DÁIL ÉIREANN

AN COMHCHOISTE UM SHLÁINTE AGUS LEANAÍ

JOINT COMMITTEE ON HEALTH AND CHILDREN

Dé Céadaoin, 9 Eanáir 2013

Wednesday, 9 January 2013

The Joint Committee met at 9.30 a.m.

MEMBERS PRESENT:

Deputy Catherine Byrne,	Senator Colm Burke,
Deputy Ciara Conway,	Senator John Crown,
Deputy Regina Doherty,	Senator Imelda Henry,
Deputy Robert Dowds,	Senator Marc MacSharry,
Deputy Peter Fitzpatrick,	Senator Jillian van Turnhout.
Deputy Seamus Healy,	
Deputy Billy Kelleher,	
Deputy Mattie McGrath,	
Deputy Eamonn Maloney,	
Deputy Mary Mitchell O'Connor,	
Deputy Denis Naughten,	
Deputy Caoimhghín Ó Caoláin,	

In attendance: Deputies Dara Calleary, Michael Conaghan, Michael Creed, Bernard J. Durkan, Damien English, Frank Feighan, Terence Flanagan, Simon Harris, Joe Higgins, Kevin Humphreys, Paul Kehoe, Finian McGrath, Tony McLoughlin, Seán Ó Fearghaíl, Aodhán Ó Ríordáin, Patrick O'Donovan, John O'Mahony, John Paul Phelan, Brendan Ryan, Billy Timmins and Peadar Tóibín, and Senators Ivana Bacik, Paul Bradford, Terry Brennan, Deirdre Clune, Paul Coghlan, Maurice Cummins, Fidelma Healy Eames, Paschal Mooney, Labhrás Ó Murchú, Marie-Louise O'Donnell, Jim Walsh and Katherine Zappone.

DEPUTY JERRY BUTTIMER IN THE CHAIR.

Implementation of Government Decision Following Expert Group Report into Matters Relating to A, B and C *v*. Ireland

Law Library, NUI Galway and University of Limerick

Chairman: You are all welcome to the meeting. Yesterday, the committee was informed by representatives of the Bar Council that they would not be attending today. Therefore, I propose to reduce the length of the session, since we have only one group in attendance, to ten minutes for opening statements, 50 minutes for questions, comprised of 35 minutes for members of the committee and 15 minutes for non-members, followed by a final five minute statement by the witnesses. This will bring the session to an end at 12.50 p.m. and we will adjourn until 2.45 p.m. Is that agreed? Agreed.

This is the fifth session in a series of hearings that the joint committee is conducting over three days to discuss the implementation of the Government decision following the recent publication of the expert group report into matters relating to A, B and C *v*. Ireland. Yesterday we began our hearing primarily on medical issues and the concerns of medical practitioners. Each of the four sessions was constructive and there was positive engagement between members and witnesses which yielded an interesting and significant debate.

At the commencement of today's session I reiterate that the purpose of the meeting is to discuss the implementation of the Government decision following the recent publication of the expert group report into matters relating to A, B and C *v*. Ireland by way of legislation and regulation within the parameters of our current constitutional provisions. The Government has stated that its aim is to ensure clarity and legal certainty in the process for determination of whether a termination of pregnancy is permissible in cases where there is a real and substantial risk to the life, as opposed to the health, of a woman as a result of a pregnancy. In doing so we must ensure that we take full account of Article 40.3.3° of the Constitution.

I welcome Ms Jennifer Schweppe from the University of Limerick, Ms Ciara Staunton from NUI Galway and Mr. Simon Mills from the Law Library.

Senator Colm Burke: With regard to the Bar Council-----

Chairman: I am not going to have any debate on it.

Senator Colm Burke: It should be clarified from the point of view of the clerk. In fairness to him, it was clarified that representatives of the Bar Council were prepared to come in and it is wrong that it is in the public domain that they never agreed to come in. In fact it was clarified to him that they intended coming in.

Chairman: I am not getting into a matter of dispute with the Bar Council.

Senator Jim Walsh: On a point of order-----

Chairman: I am not getting into it this morning.

Senator Jim Walsh: Will you allow me to raise a point of order briefly?

Chairman: No, I am not going to allow it, Senator Walsh. The matter has been agreed and we have moved on.

Senator Jim Walsh: It is not about the Bar Council but about giving the Irish Council for Civil Liberties two hours. It is a pro-abortion group.

Chairman: I made a proposal. If you had been here on time you would have heard it. We are reducing the session by one hour. We will begin our meetings on the button at the time appointed. I am a prompt chairperson and I will be respectful to all people, but we will start bang on time. We have dealt with the matter Senator Burke raised and we are clear on our situation. I am not getting into a war of words with anyone.

Before we commence I remind witnesses and members of the position regarding privilege. Witnesses are protected by absolute privilege in respect of the evidence they are to give to the committee. However, if you are directed by the committee to cease giving evidence on a particular matter and you continue to so do, you are entitled thereafter only to a qualified privilege in respect of your evidence. You are directed that only evidence connected with the subject matter of these proceedings is to be given and you are asked to respect the parliamentary practice to the effect that, where possible, you should not criticise or make charges against a person or persons or an entity by name or in such a way as to make him or her identifiable. Members are reminded of the long-standing parliamentary practice to the effect that they should not comment on, criticise or make charges against a person outside the House or an official either by name or in such a way as to make him or her identifiable.

I call on Ms Jennifer Schweppe to make her opening remarks. Each witness has a maximum of ten minutes.

Ms Jennifer Schweppe: I thank members for the invitation to present this morning. In my written submission I set out six substantive issues which I believe need to be addressed by legislation. I have also highlighted several ancillary issues, some of which relate to issues already in some way examined by the courts, such as travel and information, and some of which address issues which have not yet been before the courts. I will discuss those at the end.

I am basing my submission, as I have based all my academic writing, on the assumption that we are legislating for Article 40.3.3°. I am not here to question its presence in the Constitution; I am simply here to outline how we fulfil our obligations, which are set out in the Constitution. I base my submission on the law as it is established and the Constitution as it is interpreted. I am not here to question the findings of the Supreme Court in the X case or any other case, but I will highlight some lacunae in the law or inconsistencies in judicial pronouncements where appropriate.

There has been reference to the risk of suicide justifying a termination. On this matter I believe the X case represents the law. There is no room for debate with regard to the issue of suicide. Only the people, through a referendum, or the Supreme Court, on appeal, can change this position. Further, it is insulting to women to suggest that they will flock to doctors and assert suicide in an effort to pull the wool over their doctors' eyes simply to get an abortion. Furthermore, it is insulting to the medical profession to suggest that the wool would be pulled over its eyes.

Deputy Terence Flanagan: There is a problem with the sound. It is not coming out on the microphone.

A Deputy: We cannot hear.

Ms Jennifer Schweppe: Is my bump in the way?

(Interruptions).

Ms Jennifer Schweppe: We need to deal with the issue of suicide particularly in a country which has a clear issue with suicide, particularly in the context of teen suicide.

Senator Jim Walsh: That is an opinion.

Chairman: Senator Walsh, have a small level of decorum, please. I am not going to tolerate interruptions or bad practice in this committee meeting. Please show some courtesy and respect not only to the witnesses but to the members of the committee. I am not going to have a debate or a slagging match with you. I am not interested in that.

Senator Jim Walsh: I am not interested either.

Chairman: Please stop it.

Senator Jim Walsh: I spoke to the clerk last night about the content today, but what we are getting is opinions.

Chairman: Senator Walsh, you are out of order and you know it.

Ms Jennifer Schweppe: The second area I am not going to talk about relates to the issues which will be contained in primary or secondary legislation. There is a need for the principles and policies of the issues to be set out in the parent Act to ensure that the legislation is constitutionally robust. I will make a brief comment on the issues which I have identified and then I would be happy to answer any questions or clarify those issues later.

The first issue I raised in my written submission is key to the decision in A, B and C *v*. Ireland, namely, how it is to be established if there exists a real and substantial risk to the life of the pregnant woman. I argue that this decision should be left to medical practitioners. Where a woman disagrees with the outcome or decision of medical practitioners, I argue that she should have an automatic right of referral to an independent practitioner. This is part of best medical practice. In the context of this risk, there is no requirement of certainty that there be a real and substantial risk to the life of the woman. It only needs to be established as a matter of probability. Doctors should be satisfied as a matter of probability that there is a real and substantial risk to the life of the woman. Furthermore, termination is only permissible where it is the only way that her life can be vindicated. The X case operates in a very limited way in this regard.

The second main issue I raised relates to matters of conscience and where a doctor conscientiously objects to treating a woman. This position should be respected as it is respected in line with the Medical Council guidelines. Further, I argue for the right of a woman to refuse life-saving termination. This decision should also be respected in the context of her capacity.

The third issue which I raised in my submission relates to foetal viability. I argue that where medical professionals agree that as a matter of probability there is no prospect of life outside the womb, termination of pregnancies should be permissible. I base this opinion on the Roche *v*. Roche decision of the Supreme Court, in which case unborn life was defined as life which has the capacity to be born. Life which has the capacity to be born is that which is protected by

the Constitution. In cases of inevitable miscarriage or certain cases of lethal foetal abnormality, there is no prospect of life outside the womb and so Article 40.3.3° does not apply.

There has been some discussion on time limits. Again, where there is a real and substantial risk to the life of the woman, theoretically at the very least, termination of the pregnancy is permissible at any stage in the pregnancy. Talking about a termination of pregnancy does not mean we are talking about abortion. A pregnancy can be terminated, as in the most natural of ways, by the woman giving birth or it can be terminated by abortion. Where there is a risk to the life of the woman, best medical practice will determine whether a termination of the pregnancy by abortion or by the birth of the unborn is the best way to proceed. Best medical practice should determine how this is regulated. If we do not provide for this, both lives will be lost and I do not think that is what we are trying to do here.

The next issue to be addressed in legislation is the capacity of a young person to consent to this sort of treatment. The issue of abortion should not be treated differently from the way a young person, generally, consents to medical treatment. That said, the law relating to 16 and 17 year olds and young people under the age of 16 is woefully unclear. Thankfully, the Law Reform Commission has published a report setting out detailed recommendations and a draft Bill outlining how this issue should be dealt with. That legislation should be introduced in parallel with this legislation in order to provide a robust system of medical treatment for young people. The issue of individuals in care of the Health Service Executive and those for whom proxy consent is required also needs to be addressed.

I also urge the committee, at all stages in its proceedings, to use value-neutral and constitutionally-appropriate language. We should not talk about mothers. I am visibly pregnant. I am not a mother. I am a pregnant woman. In the same way, we do not talk about children or babies inside the womb. We talk about the constitutionally-protected unborn or the foetus. I suggest that this language be used in legislation also.

I suggest that the committee take this opportunity to consider more broadly the impact and scope of Article 40.3.3° and legislate for some ancillary issues which I have set out. Of immediate importance is the need to implement the recommendations of the Commission on Assisted Human Reproduction. I have highlighted other issues, some of which were highlighted by the expert group. For example, it is not currently a crime to kill a child in the process of being born. That is an obvious gap in the legislation which can easily be rectified.

We need to take a proactive rather than a reactive approach. We did not think a teenage, pregnant rape victim could be stopped from travelling to another jurisdiction to terminate her pregnancy, but that happened. We need to try to envisage all the possible scenarios which are not directly covered by the X case but which have emerged following the X case and will impact on the life of a woman, her ability to travel and the life of the unborn in the legislation.

These are the issues that should be addressed. I thank the members of the committee for their time and I welcome any questions they might have.

Ms Ciara Staunton: I thank you, Chairman, and Deputies and Senators for this invitation to present to the committee. Like Ms Schweppe, I work on the assumption that we are discussing legislation and, perhaps, some regulation. Guidelines are not sufficient to meet the requirements of the case of A, B and C *v*. Ireland. This has been echoed by the High Court, Supreme Court and various Government reports. The X case ruling states that if there is a real and substantial risk to the life of the mother she is entitled to a lawful abortion. That is the law.

Therefore, we have a degree of lawful abortion within Ireland.

For the rest of my presentation I will discuss the need to repeal sections 58 and 59 of the 1861 Act, the real and substantial risk test and the risk of suicide. I will also make some general comments on the procedures for determining when there is a lawful abortion.

First, we need to repeal sections 58 and 59 of the Offences Against the Person Act 1961. Nowhere in those sections are the rights of the unborn or the mother discussed, unlike Article 40.3.3° of the Constitution. We need to amend legislation to complement Article 40.3.3° and the decision of the Supreme Court.

Second, the real and substantial risk test should be put on a statutory footing. This is the only current exception to Article 40.3.3°. As Ms Schweppe said, it is likely, if facts come before the Supreme Court in the future, that we may find another exception to the general prohibition on abortion. The committee should take consideration of these future issues which may arise. The real and substantial risk to the life of the mother is a constitutional exemption and legislation must give effect to the test.

What does the test mean? A real and substantial risk does not mean an immediate and inevitable risk. Mr. Justice McCarthy addressed this in the Supreme Court decision in the X case. We can define the test in another way and say that where there is a real and substantial risk to the life of the woman at some point during the pregnancy, an abortion is lawful in Ireland. It does not have to be proved that death is inevitable and will be immediate, but simply that, as a matter of probability, a death is likely to arise at some point.

The committee must, therefore, consider the issue of time limits. The introduction of time limits is standard practice in many jurisdictions. For this very narrow exception, however, I recommend that we do not include a time limit. We must, rather, trust the medical opinion of our doctors.

Dr. Simon Mills may correct me on some of the following points. Let us consider the example of a woman who is 30 weeks pregnant and whose doctors believe there is a real and substantial risk to her life at some point. She is entitled to a termination of the pregnancy because that is what is putting her life at risk. Her doctors must, therefore, terminate her pregnancy and save her life. The doctors must then make every effort to save the life of the unborn. In that way, both the right to life of the pregnant woman and the unborn are vindicated. This does not mean death to the foetus but simply that we must first look at the right to life of the mother and then vindicate the right to life of the unborn. I recommend that rather than inserting a cut-off point in legislation, the regulations should detail that doctors should save the life of the mother and then make every effort to save the life of the unborn. These difficult cases will come before doctors and we must trust the clinical judgment of our doctors.

The third issue is the narrow suicide test. This has received much attention in the media and in other writings. The real and substantial risk includes the risk of suicide, but only if the risk of suicide arises from the pregnancy and can only be averted by the termination of the pregnancy. If a woman is pregnant due to rape or incest and is suicidal due to the rape or incest she is not entitled to an abortion. That has nothing to do with the pregnancy. However, if her doctors believe the risk of her suicide arises from the pregnancy which has arisen from the rape or incest and that risk of suicide can only be averted by a termination of pregnancy it is then, and only then, that she is entitled to an abortion. Risk of suicide cannot be excluded from the medical issues. Medical issues and suicide are to be treated as one and the same and be subject

to the exact same test.

Finally, I will consider the procedures for determining a lawful abortion. First, legislation must take account of the real and substantial risk test. I also echo comments that this is best left to our medical doctors. By putting this statutory defence into legislation we are telling our doctors we will not criminalise them if they perform an abortion when they believe there is a real and substantial risk to the life of the mother. This takes away the chilling effect which the European Court of Human Rights discussed in A, B and C *v*. Ireland.

The second issue the legislation must take into account is that of conscientious objection which was raised by the Medical Council at yesterday's hearings. This is common international practice. However, it should come with the caveat that the conscientious objection can only arise where another doctor is willing to perform the abortion. A woman's life should not be put in jeopardy because a doctor is unwilling to perform the abortion.

I reiterate that the issue of time limits should not be dealt with in the legislation. The overriding theme of the legislation should be that we respect the clinical judgment of our doctors. We respect the clinical judgment of our doctors in all other cases and the case of abortion should not be an exception.

I welcome questions from committee members on any aspect of my presentation.

Chairman: I welcome Dr. Simon Mills from the Law Library. He has ten minutes speaking time.

Dr. Simon Mills: I thank Deputies and Senators for inviting all of us to set out our views on the law relating to this matter. I have a slightly unusual background. For the purposes of a legal session, I wish to set out briefly my professional background and also the background on which my submissions are grounded. My submissions are somewhat different from those of Ms Schweppe and Ms Staunton, although I agree with almost everything both of them said. In fact, with regard to one of my views, I have been persuaded to change my mind on something, on which I suspect we may touch later. The step I have taken is somewhat unusual in that my written submissions include a proposed draft Bill for the termination of pregnancy in accordance with Article 40.3.3° and existing Supreme Court jurisprudence, including but crucially not limited to the X case.

I have been a practising barrister since 2002 and specialise in all areas of health care law. From 1997 to 2011, I was a practising doctor and for most of that time a part-time general practitioner in an urban setting. It may be helpful to the committee and the other Members present that during that time I dealt with a small but significant number of women who were seeking termination of pregnancy. I retired as a medical practitioner in 2011 and no longer practise medicine. As well as being a barrister and a doctor, I also completed an MSc in philosophical medical ethics. Presciently, my thesis was on the topic of legislating for abortion in a pluralist society.

I wish to comment briefly on the debate which has brought us here. For the purposes of the discussion which I hope is a dispassionate analysis of the law relating to the termination of pregnancy, I adopt no position, one way or another, on the question of abortion. However, I observe that, in general, public discourse on the question of termination of pregnancy - these hearings being a notable exception, judging from what I heard yesterday - very often frames the political and social debate as if it were a two-sided issue. In public discourse there is an ap-

parent assumption that the only conversation to be had - one would always prefer to avoid the divisive terminology - is between the pro-abortion-pro-choice side and the anti-abortion-pro-life side. On this account of matters, it is assumed that "pro-life" means no more and no less than being opposed to abortion in all circumstances and that "pro-choice" means no more and no less than ultimately being in favour of abortion on demand.

I have always believed this is an inaccurate model and that views on abortion are far more complex than this type of simplistic analysis tends to suggest. The constant reinvigoration of this account of abortion, debates characterised by pro-life versus pro-choice arguments, has continually frustrated the attempts to move from rhetoric to resolution on the topic. A far more realistic account is that the debate is a three-sided discussion consisting of the strong pro-life position, the strong pro-choice view and the moderate position which attracts adherents from both the pro-life and pro-choice sides. If there is a majority view on abortion in this jurisdiction - I believe there is - I suspect it is that which frames the majority view on abortion in this jurisdiction that there is a substantial overlap between moderate pro-life and moderate pro-choice views.

I hope what I have done will assist the committee. I have drafted a termination Bill which I hope steers a middle course between constitutional proprieties and the needs of women in this jurisdiction. The draft termination Bill which I have prepared arose, first, from a need to clarify in my own mind what sort of legal regime would be permissible in Ireland, having regard to the Constitution; and, second, to establish whether such a regime was amenable to being drafted in compact and comprehensible legislation. There would be some irony in a situation where we came before the committee as lawyers to say politicians had to legislate without at least having given some thought to how such legislation might work. It can be guaranteed that, were politicians to draft unworkable legislation, we lawyers would be the first to pull it apart.

I hope my draft legislation will at least provide a template for discussion. I do not presume it amounts to any more than that, save for a number of points. First, I believe it accurately reflects the state of law in this jurisdiction, with one qualification relating to viability, about which the Bill, as drafted, may need some thought. I bear in mind in that respect the comments made by Ms Schweppe and Ms Staunton, with which, ultimately, I agree and think are not accurately reflected in the way the relevant section is drafted. Second, I believe the Bill provides the clarity that the medical profession has stated it requires. Third, I believe it provides many of the safeguards required by those who are sceptical of the need for any codification of law allowing for termination of pregnancy. In particular, in my reading of it and the opinion of those to whom I have showed it, there is no scope in the Bill for any scheme of abortion on demand. Fourth, I believe it meets the recommendations of the expert group in so far as it provides for the combination of legislation and regulations. Fifth, I believe it is a Bill to which all political parties which have called for the codification of law on termination can subscribe on the basis of their public pronouncements. Sixth, I believe it provides a clear basis for legal terminations within the scope of Article 40.3.30.

The draft Bill does not include anything to do with rape or incest, that is, pregnancy occasioned by illegal circumstances, because in my view Article 40.3.3° precludes this, save in the circumstances identified by Ms Staunton where, by reason of the pregnancy occasioned by legal circumstances, there is a threat of suicide. I adopt and agree with the remarks made by both Ms Schweppe and Ms Staunton on the question of legislation for suicide.

I will set out briefly the contents of the Bill. Sections 1 and 2 deal with a number of limited preliminary matters, including certain definitions. In section 3 the legal position relating to the

1861 Act is restated in modern language, with alterations to the length of custodial sentences, in line with the last referendum on the question of abortion and the draft Bill contained therein. However, having restated the legal ban on abortion, the Bill sets out a number of clear exceptions under which a termination will not be unlawful under the restatement of the 1861 Act.

In section 4 the first exception is the scenario where termination arises as a consequence of other medical treatment. Sections 5, 6 and 7 deal with the question of the real and substantial risk to life, including the threat of suicide. Section 7 specifically deals with the threat of suicide. It applies the same test Ms Staunton called for, albeit a test executed through a slightly different two-step process, in order to give assurance to those who have certain concerns about the threat of suicide.

Section 8 deals with termination of pregnancy in cases of inevitable miscarriage of a non-viable pregnancy. This was touched on by Ms Schweppe. Again, I agree with her view that the non-viable pregnancy comes within the remit of a permissible abortion within Article 40.3.3°.

Section 9 deals with termination of pregnancy in cases of lethal foetal abnormality. I adopt and agree with the remarks of Ms Schweppe on that front.

Section 10 deals with the power of the Minister to make regulations as to the certification of medical opinions. All of the grounds I have set out would be certified on the basis of no fewer than two medical opinions, at least one of which must come from an appropriately qualified medical specialist.

Section 11 affords certain immunities to doctors acting in good faith under the Bill, consistent with the wish expressed yesterday by, among others, Dr. Mahony of Holles Street Hospital. It also imposes certain obligations on doctors to act in good faith.

Section 12 contains an express ban on the termination of a foetus that is viable, which I touched upon earlier. This section may need some modification in light of the submissions by Ms Schweppe and Ms Staunton, which I accept. Section 13, which should be read bearing in mind the comments by Dr. Mary McCaffrey before the committee yesterday, allows for conscientious objection on the part of doctors and, in certain circumstances, on the part of nurses. Section 14 provides for locations where terminations may take place, including the entitlement of the Minister to make regulations providing for such locations and for the reporting of terminations by such locations. Section 15 makes lawful the provision of any information relating to terminations which would be lawful under the Bill. Section 16 provides for certain penalties, while section 17 gives jurisdiction to the High Court to deal with disputes. Finally, section 18 repeals certain matters, most notably sections 58 and 59 of the Offences Against the Person Act 1861.

The draft Bill will not necessarily commend itself to the doctrinaire elements of either the pro-life or pro-choice groups, but it does, in my view, amount to a convincing first stab at a law built on a common ground and around a consensus. It is an attempt, made in good faith, to move the discussion on from rhetoric to resolution. I am happy to take any questions Members may have.

Chairman: Thank you, Dr. Mills. I will now invite questions from committee members, starting with Deputy Billy Kelleher.

Deputy Billy Kelleher: I welcome the witnesses and thank them for their presentations. My question relates to the ruling in the X case and the jurisprudence arising therefrom, as out-

lined by the witnesses. The issue of fatal foetal abnormalities is a very sensitive and emotive one. We have had presentations from women who had to travel to Britain to terminate a pregnancy where there was no potential viability at birth. Will Ms Schweppe clarify that it is her view that it is not necessary to have a constitutional change in order to address this particular issue, if it were deemed suitable and appropriate to do so through legislation?

Deputy Caoimhghín Ó Caoláin: I welcome the delegates and thank them for their considerable contributions. On page 16 of the document that she submitted to the committee in advance of today's meeting, Ms Schweppe talks about adults of sound mind refusing treatment, including a reference to the exception that arose where Ms Justice Laffoy sought a capacity test. Our objective arising out of these deliberations is to assist in the drafting of legislation on a very complex issue. Yesterday I tried to tease out the challenges of having precision in legislation, and my question to Ms Schweppe today relates to the scope of legislation. We will never be able to second guess or anticipate all of the situations that can and, over time, undoubtedly will present. Is Ms Schweppe of the view that the legislation to be drafted should anticipate and provide clarity for medical practitioners where there is agreed professional opinion that a woman does not have the ability or is not of sound mind and thus incapable of making a decision to refuse medical intervention? I am interested in having her elaborate on that particular point in order to inform our understanding of the extent of what she might wish the legislation to address.

Will Ms Staunton clarify her point regarding the narrow suicide test? Is she referring to the current legal position when she states that a pregnant woman who is suicidal for reasons not directly linked to the pregnancy is not entitled to an abortion but a woman whose suicidal tendencies are due to her pregnancy is so entitled? As I pointed out yesterday to the representatives of the Irish Medical Council, that seems to be what is outlined in its guidelines. However, it seems clear that not everybody is aware of that being the case, including some of the expert opinion that presented here yesterday and may yet present before these hearings later today or tomorrow. Certainly, not all legislators are aware of the fact. Will Ms Staunton clarify that issue for us?

I commend Dr. Mills on his drafting skills. I have gone through the legislation he has offered us and thank him for the effort employed. Going back to the point Deputy Kelleher raised, the Bill presented by Dr. Mills includes provision for the termination of pregnancy in the case of lethal foetal abnormality. There is an assumption, which was in evidence in the discourse last night on the Vincent Browne show on TV3, that this is something which cannot be addressed in the context of the legislation the Government intends to present. I am not convinced that is the case. This committee has made a decision not to accommodate those who wished to articulate their very disturbing experiences in this regard. However, nobody could fail to be moved by the account of the young woman who spoke on the TV3 programme last night or the accounts of what many other families have been through. Unfortunately, the Chairman has indicated that my time is up. Will Dr. Mills indicate, with the benefit of his undoubted skills, whether it is within our compass to include provision for this particular matter in the legislation shortly to be presented?

Deputy Ciara Conway: I thank the witnesses for their submissions and presentations. I look forward to hearing their feedback on the questions posed by my colleagues on the issue of fatal foetal abnormalities and how it might be addressed. Ms Schweppe made several very valid points in regard to the capacity of young people. We should not forget that the X case was about a 14 year old child and her wish for a termination of an unlawful pregnancy. Will

she comment further in this regard? I am not sure whether the public is aware of the quandary in which children in care may find themselves in terms of the status of their care order and how that might prevent them from obtaining the timely treatment they may require. Some children are moving from a chaotic family life to a chaotic environment within the care system itself. We are talking about a very vulnerable group of young people whose members may be more likely than children in other situations to face a crisis pregnancy. Ms Schweppe has made a very welcome interjection in this regard and one we have not yet heard. Of all the tests that may present under the proposed legislation, this is one of the most likely because it relates to a very high-risk group. I look forward to further clarification in this regard.

There has been some debate among the public and by commentators on the potential repeal of sections 58 and 59 of the 1861 Act, an issue to which Ms Staunton referred in her presentation. In particular, a view is beginning to emerge that it is not as simple as repealing the old law but that something must replace it. If we legislate for X, will that be enough or will it leave us in another quandary? Will we have a gaping hole in the legislation on sexual health and reproductive rights? Will there still be ambiguity if we were to repeal just those sections? I would welcome some further information on that matter.

On the question of a test to establish the probability of suicide due to pregnancy, the manner in which the submission dealt with this issue has really clarified the matter for me. The suicidal ideation is not due to an unlawful pregnancy but to the woman being suicidal as a direct result of the thought of being pregnant. That is very clear. That is a welcome insight.

I welcome some of Ms Schweppe's ideas on how we as legislators would do that. I would welcome some feedback and with the permission of the Chair I may come in again.

Deputy Seamus Healy: I thank the witnesses for their very helpful submissions, in particular Dr. Mills's draft termination of pregnancy Bill, which offers an interesting template. I am seeking clarity and I ask the witnesses to explain their understanding of the current legal position on this issue. What is their position on the expert group report? Do they support the legislation and regulation option? Have they a position in regard to medical, nursing and other personnel who have a conscientious objection to abortion? Yesterday afternoon I raised with the representatives of the Institute of Obstetricians and Gynaecologists the question of fatal foetal abnormality and whether that can be seen as part of the legislation. I would like the witnesses who have touched on this issue to expand on it. I would also like them to deal with the question of consent of children and adolescents.

Ms Jennifer Schweppe: Some of the questions overlap but I will deal with the issues as they arose. On the question of fatal foetal abnormalities, which was raised by Deputy Kelleher, my position on this, and I think I am correct in stating that in law, where the foetus has no capacity to survive outside the womb, that is not life for the purposes of Article 40.3.3°. When we refer to unborn life in the Constitution, what we are talking about, as the then Mrs. Justice Denham, now the Chief Justice, stated in the Roche *v.* Roche case, we are referring to a life which has the capacity to be born. In that case it related to embryos that were implanted in the womb. I think the logic of her reasoning on what the Constitution protects and does not protect applies to foetuses which have no capacity to be brought to term and produce a living baby. I do not think that Article 40.3.3° applies in that case. Perhaps as a matter of clarity the legislation should in a declaratory manner state that. I do not think we need a constitutional amendment where as a matter of probability doctors are of the opinion that the foetus has no capacity to be born.

I think that is the legal situation in that case, but the problem arises where doctors are of the opinion the foetus has the capacity to be born but will survive only for a short period, be it a matter of days or weeks. Tragically, in circumstances such as that, the Constitution does not permit termination of pregnancy and, unfortunately, women in that position do currently need to travel to terminate those pregnancies. I do not agree with this position. I did not see the programme "Tonight with Vincent Browne" last night but I think a constitutional amendment would be required in those cases, where there is a prospect of life outside the womb and the pregnancy is viable. In cases of inevitable miscarriage, as Dr. Mills talked about, or where the foetus has no capacity to be born alive, I do not think a constitutional amendment is needed. I think the legislation should include a declaratory statement to that effect and permit medical practitioners to terminate pregnancies in those circumstances. I hope that answers the question.

Deputy Ó Caoláin's first question related to refusal of treatment. As an academic, I like to think of all eventualities. That is something I include because the debate assumes that where there is a risk to the life of a woman, she will want to terminate her pregnancy. That is not necessarily always the case. I wanted to highlight the fact that some women will acknowledge that their life is at risk but will want to continue with the pregnancy and would like the medical practitioners involved in their case to try to see the pregnancy through to term. The only exception, as I see it, to the general position, which is a general position in law and does not just apply in the context of termination of pregnancy but arises in other cases, is in cases in which the woman does not have the capacity to refuse the treatment. The Fitzpatrick case would be a narrow exception to that. Again I suggest the Law Reform Commission's recommendations in relation to capacity for vulnerable people generally and for people altogether should be adopted in that context. That is my position and reflects common medical practice. I do not think we need to do anything new there.

On the issue of the link between suicide and pregnancy, I wholeheartedly agree with Ms Staunton's position. Just because one is suicidal in pregnancy does not justify a termination. The threat of suicide must be linked to the pregnancy and I fully adopt her position on that.

Deputy Conway raised the issue of fatal foetal abnormalities. In relation to consent of young people generally, the Law Reform Commission has published a report and I commend it to the committee. It is very detailed and sets out the legal issues exactly and recommends very robust legislation for dealing with them. Quite simply, in relation to 16 and 17 year olds, there seems to be a presumption currently in section 23 of the Non-Fatal Offences Against the Person Act 1997 that a 16 or 17 year old can consent to medical treatment in the absence of parental consent but it would appear that section 23 provides a defence to a doctor only in the case of criminal sanctions as opposed to civil sanctions. For those under the 16 years, there is a presumption against treatment in the absence of parental consent. I think this is an issue which needs to be addressed. I refer to a paper by McMahon et al where they talk about the utter confusion of GPs as to whether they can treat somebody under the age of 16 years for anything. Again this does not necessarily relate to this issue. For example, it could apply to whether a doctor can treat a 15 year old for a broken leg in the absence of parental consent. The Law Reform Commission's proposals are very clear on this issue.

When it comes to children in care, the Deputy is correct that this issue deserves more attention. These young people are, by definition, vulnerable and are treated in law very differently from children who are in the care of their parents. A child in the care of her parents can be brought to another jurisdiction to terminate an unconstitutional pregnancy. Children in the care of the HSE cannot, according to the decision of Mr. Justice Geoghegan in the C case, although

the decision of Mr. Justice McKechnie in the D case does seem to throw a little bit of confusion into that entire issue. I think that needs to be teased out. The final Deputy asked about the current legal position.

Chairman: It was Deputy McGrath.

Ms Jennifer Schweppe: Sorry.

Chairman: I beg your pardon. It was Deputy Healy.

Ms Jennifer Schweppe: I thought that was who it was.

Chairman: I offer my sincere apologies to Deputy Healy. How could I mistake him?

Ms Jennifer Schweppe: The current legal position is that termination of pregnancy is constitutionally permissible where there is a real and substantial risk to the life of the mother and where that risk can only be eliminated by termination of pregnancy. That risk has to be assessed or determined as a matter of probability. I agree with the expert group that legislation and regulation are required. I would adopt the current position with regard to conscientious objection, which is set out in the guidelines. I think that should not be made clear for declaratory purposes in this legislation. I have dealt with fatal foetal abnormalities. I think I have already answered the question on children and adolescents.

Chairman: I ask Ms Staunton to be brief as six members are waiting to speak.

Ms Ciara Staunton: Deputy Kelleher's question was not addressed to me, but I would like to make a comment in response to it. When we are drafting the Bill, we will have to give consideration to cases which have not yet been litigated. The X case is the only exception we have at the moment. It is the only case that has actually been litigated. When this committee is drafting legislation, it has to be careful to take account of the cases we have discussed. We do not want to have to come back here again if another case reaches the Supreme Court. We do not want to have to wait for another 20 years for the introduction of legislation.

Deputy Ó Caoláin asked about the narrow suicide test. The test considers whether there is a real and substantial risk to the life of the woman. I mentioned suicide on its own simply because there is a fear that the floodgates will open. That fear is completely unfounded. It suggests that there will be some sort of collusion between the pregnant woman and the doctor. That is not the case. We trust our doctors in every other clinical judgment they make. We must continue to trust our doctors when it comes to the issue of abortion. It is very clear that a lawful abortion can take place only if the risk of suicide is linked to the pregnancy.

In response to Deputy Conway, I would like to say I believe we should repeal sections 58 and 59 of the 1861 Act because they are outdated. They do not take account of Article 40.3.3° or of the subsequent High Court and Supreme Court decisions. Furthermore, they do not make any reference to the right of the mother and the right of the unborn. The Act focuses on abortion. I say we should repeal it and replace it with something else. If the House wants to provide for criminal prosecution in the case of an unlawful abortion, that is fine and such a provision should be introduced. Any comprehensive legislation dealing with lawful and unlawful abortion should reflect Article 40.3.3°, the X case and any other issues the House might wish to discuss.

Deputy Healy asked about the current legal position. If there is a real and substantial risk to

the life of a woman, she is entitled to a lawful abortion. It is irrelevant whether it is a medical risk or a suicide risk. If the risk is directly related to the pregnancy, abortion is lawful in Ireland.

I wish to echo what Ms Schweppe said about the views set out in the expert report. Legislation, accompanied by regulations, should be introduced to give effect to those views. Guidelines simply do not work. They do not have the force of law. Doctors are under no obligation to follow them. Based on the Medical Council guidelines, there is no right to a lawful abortion if a woman needs it. The Medical Council guidelines currently state that doctors can perform abortions, but there is no right for a woman to have an abortion at the moment. Legislation will ensure that gap is overlooked.

I wholeheartedly echo what Ms Schweppe said about fatal foetal abnormalities. I will not comment further on that other than to say there is no right to life to vindicate if there is no possibility of the unborn producing a live birth. I believe abortion is lawful in such circumstances. However, if that child has the possibility of being alive even for a second, unfortunately a pregnant woman cannot have an abortion in that case. It is not about time, quantity or quality - it is about whether it is capable of being born. That is where the test should lie.

The Law Reform Commission recently published a report on the issue of children and consent. Its particular focus on people aged 15, 16 and 17 is very important when dealing with this matter. I recommend that the House should read and consider the report and proceed on the basis of the recommendations in it.

Dr. Simon Mills: Perhaps Deputy Healy's final questions offer me a useful point from which to begin to reply to the totality of the questions. He asked what the current legal position is. Two aspects need to be considered when answering that question. The first aspect, which has already been addressed by Ms Schweppe and Ms Staunton, relates to what we know from the X case. That has already been set out. There is slightly more to be said about what we can reasonably infer from the text of Article 40.3.3°; from other Supreme Court decisions, particularly the Roche decision to which Ms Schweppe has already adverted; and from decisions of the European Court of Human Rights. The decision that was handed down in the case of D *v*. Ireland is one such relevant decision. In that case, the European Court of Human Rights found that the complaint was not admissible but made certain pertinent observations in relation to cases of lethal foetal abnormality.

There are things we can infer from the state of law in general. For two reasons, it is a mistake to confine our consideration of this matter to the X case, notwithstanding the terms of reference of this group. The first reason, which has already been identified by Ms Staunton, is that the X case was about X. That is all it was about. That is all the court was asked to decide. One might wonder what the courts would have decided if some recent cases in this jurisdiction had come before them. If they had, we would be talking not only about X but also about E, F and G. It is simply a fact of our proximity to the United Kingdom that more cases have not come before the courts. In my view, such cases would amply identify the number of circumstances in which terminations are permissible within the meaning of Article 40.3.3° and in a manner that is consistent with existing Supreme Court and High Court jurisprudence. That is the second limb. The first limb relates to what we know from Article 40.3.3° and from the X case. The second limb relates to what we can infer.

Among other things, we can infer from the Roche decision and, in particular, from the judgment of the current Chief Justice, Ms Justice Denham, that the meaning of life in a constitutional sense - I am sure the committee will hear more about the meaning of life from the church

leaders tomorrow - relates to the capacity to be born alive. That is the basis for my decision to include two specific provisions in the draft Bill I have prepared. The first provision would apply in the case of the inevitable miscarriage of a non-viable foetus. When I say "non-viable", I mean incapable of surviving by reason of its prematurity. The second provision would apply in the case of a lethal foetal abnormality. In this case, I refer to a foetus or embryo that is incapable of surviving outside the womb. Unfortunately, I have to agree with Ms Staunton and Ms Schweppe about the foetus - or baby, once born - that will survive for a few moments outside the womb. I have to say I think there is something disturbingly utilitarian about Article 40.3.3° in that it comports an obligation to be born, only to suffer and die where the wish of a caring, prudent and loving parent might be for a different outcome. However, I do not think that is a matter for this committee to consider.

Like Ms Schweppe and Ms Staunton, I think the best of the options outlined in the expert group report is the last of the four that were proposed and recommended; namely, a combination of legislation and regulation. That is why the draft Bill I have prepared for the assistance of the committee provides for legislation setting out a broad framework and providing for the Minister to be entitled to make certain regulations in relation to certain aspects of the operation of the Act for its smoother and better operation and to respond to any exigencies that may arise.

The question of conscientious objection is clearly set out in the Medical Council guidelines. However, I think it requires express statutory provision. This is specifically provided for in the draft Bill that I have furnished to the committee. I deal with conscientious objection in that Bill in two ways. The termination of a pregnancy under that Bill or any Bill will be a two-step process, firstly involving the provisions of opinions that are sufficient to ground a lawful termination and secondly the performance of the termination itself. With regard to the first element of that process, my Bill requires that opinions must be provided by a registered medical practitioner, who has a right of conscientious objection subject only to an obligation to refer the person in question to another registered medical practitioner who is prepared to provide an opinion. Of course the Bill does not set out an obligation with regard to what that opinion must or should contain. The second element is the performing of terminations of pregnancy. I maintain that any registered medical practitioner, nurse or midwife who has a conscientious objection to participation in the performance of a termination of pregnancy should be entitled to refuse to participate. I do not provide an obligation in the Bill to refer the person on, but I note the comments and the view of Professor Kieran Murphy of the Irish Medical Council and that of the council on the question of conscientious objection. Further, conscientious objection will not operate to allow a registered medical practitioner, nurse or midwife to refuse to participate in treatment that would be necessary to save the life of a pregnant woman.

The final area to deal with is the question of lethal foetal abnormality. It flows from what I have already said about what we can reasonably infer that I row in behind Ms Schweppe and Ms Staunton on the question of lethal foetal abnormality. Where there is no capacity to be born alive then Article 40.3.3° does not confer a constitutional right to life. It does not lessen the moral seriousness of a termination. It does not lessen the values we may hold about the question of termination. However, it does tell us what the Supreme Court has told us, that is, such foetuses or embryos do not attract protection under Article 40.3.3° and, as such, a Bill that provided for the termination of an inevitable miscarriage or non-viable pregnancy or which provided for termination in scenarios of lethal foetal abnormality would be permissible under Article 40.3.3°.

Senator Colm Burke: I thank the panel for giving a comprehensive overview. I refer to

one or two points raised yesterday from representatives of the Institute of Obstetricians and Gynaecologists. The expert group report provided several choices for who should make the decision in the area of suicide. It provided the option of two specialists and for the case to be referred on to a specialist obstetrician, and the option of an obstetrician or two specialist psychiatrists plus an obstetrician. The Institute of Obstetricians and Gynaecologists suggested that the decision should be made by two obstetricians. In deciding on the issue of suicide does the panel believe that two obstetricians can make a decision on the issue of suicide given that their expertise is in the area of obstetrics and gynaecology and not psychiatry? The delegation referred to a psychiatrist being involved as well but they were referring to a panel of three and I wonder about the legal aspects of that.

The second issue relates to section 8 of the draft Bill presented this morning. It refers to two medical practitioners having to sign off on a miscarriage. The evidence given yesterday included reference to smaller units where there is only one consultant on duty from 5 p.m. on Friday evening to 9 a.m. on Monday morning. I do not believe section 8 could be operational in that situation. Perhaps the panel will come back to me on this point because I have a concern in this regard.

With regard to the issue of foetal abnormality, there is a fine line with regard to deciding whether a foetus or baby will survive for one second or ten seconds after being born, and deciding on the issue after five months of pregnancy. I wonder whether there are legal complications in that decision being arrived at. How would the panel put a formula in place to deal with that? I am unsure whether the draft legislation here deals with that issue.

Deputy Robert Dowds: I welcome our visitors and I thank them for their input. One thing the medical experts cried out for yesterday was clarity in the law in terms of their treating a woman in cases in which they believed a termination was required. One of the points made, particularly by the master of the National Maternity Hospital, Holles Street, was that in many circumstances it is almost impossible to know exactly the extent to which a woman's life is at risk when the practitioners have to intervene. They cried out for legislation to protect them in their work. Given the constitutional constraints within which we operate at the moment is it possible to draft legislation that would deal adequately with the situation that they want rectified?

Senator Jillian van Turnhout: I thank the three witnesses. My understanding is that no one disagrees with the repeal of sections 58 and 59 of the Offences Against the Person Act but I wish to confirm that. Yesterday there was considerable discussion here, as there has been in the media, about suicide ideation or suicidal intent. Having listened yesterday and considered the matter overnight and having re-examined the Supreme Court judgment I do not see a necessity for a different procedure to determine whether a woman has a right to access an abortion where the risk to her life arises from the matter of mental rather than physical health. The substantive weight should be given to a clinical determination involving the practitioners with relevant specialisms. I seek the guidance of the witnesses because I believe we have separated an issue and having read the relevant material I wonder why it has been separated.

I was reassured by the medical opinion yesterday with regard to time limits. Having reflected on the Supreme Court interpretation of Article 40.3.3° and the wording itself, I believe the lack of a time limit is mitigated by the strictness of the test itself. That is my understanding and I would welcome any guidance the witnesses can offer. I welcome the guidance of the witnesses on foetal abnormality and therefore I will not stray into that issue. I also welcome the comments on the issue of consent. I have read the Law Reform Commission report which

is rather weighty and detailed and it provides options. There are still some issues for us with regard to children in the care of the State, because there is legal limbo with regard to unaccompanied minors. The committee will have to tease out these issues.

Deputy Denis Naughten: My first question is for Dr. Mills and I call on him to don his medical hat for a moment. He made the point that he has dealt with several cases of women who required or went for a termination. Has he come across cases of women with suicidal intent during his professional career?

Dr. Mills made a point in his last contribution relating to fatal foetal abnormalities. Such cases involve babies who are born to suffer and die, even if only for several seconds. Given the evidence we heard here yesterday, is it not the case that vast majority of terminations are terminations by induction which lead to a premature birth? In such cases is there not suffering involved? Is it not the case that if there is medical intervention then there would be suffering involved?

My final question is for Ms Ciara Staunton and relates to suicide and the suicide test. She made the point that in the case of a pregnancy due to rape or incest suicidal risk could only be averted by the termination of the pregnancy. She made the point that there should not be a termination date beyond which an intervention could take place. What would happen in the case of a woman in that particular circumstance where the child was born and was viable beyond 23 weeks? Do we not need to put some legal clarity in place with regard to the guardianship of that particular child who would be unwanted by the mother who wanted a termination? How do we deal with that legal challenge?

Senator Colm Burke raised the issue of suicide. The perinatal consultants before the committee yesterday stated that they believed that two psychiatrists should sign off on the issue of suicide. What is the opinion of the witnesses in this regard?

Senator John Crown: I thank the witnesses for coming in. These have been clear and informative presentations. There are two related issues which cannot be seen outside the context our health service, namely, the necessity for the provision of short-cutting the approval process for a termination when an emergency arises and the question of conscientious objection. Both issues appear to presuppose the notion that we have something resembling a normal health system in the country with a uniform number of large, well-staffed or comprehensively staffed units with plenty of consultants, but that is not what we have here. We have a large number of units that do not have that level of staffing. These circumstances need to be taken into account.

I was very taken by Dr. Simon Mills's presentation with respect to the moderate position, because it is one I have been espousing for some time. There is little doubt in my mind that the core reason the abortion debate paralyses public policy, jurisprudence, appointments to the United States Supreme Court, elections and so much is the failure of the medical profession to come down off the fence and make a stab at defining when personhood, as opposed to life, begins. People are quite happy to let doctors decide when life ends. They are quite happy to have a body with a beating heart and an oxygenating ventilatory system aiding artificial respiration be deemed to be dead because its brain is no longer sensate, conscious and working. We need to get to the other side of the debate at the earlier side of the argument.

I think Dr. Mills is wrong, however, with regard to lethal foetal abnormalities. The wording of the Constitution, as currently read, seems to guarantee the right to life of the existing child and not the right to a future potential life which begins at the time of birth. My guess is that we

will hear legal opinions that will be contrary to that of Dr. Mills and that there will be a necessity for a constitutional amendment if we are to legislate on the issue of inevitable fatality as a result of foetal abnormality.

I thank the witnesses for their presentations.

Ms Ciara Staunton: Deputy Naughten spoke about a viable child. A woman is entitled to a lawful abortion if there is a real and substantial risk to the life of the woman due to that pregnancy. Irrespective of whether the issue is one of mental or physical health she is entitled to a termination of her pregnancy. If there is a viable child, because the pregnancy is at an advanced stage, the doctor must first save the life of the woman by terminating the pregnancy and then do everything he or she can to save the child. The issue of guardianship has nothing to do with what we are talking about. There are structures in place to deal with a child whose mother wishes to give him or her for adoption, but they have nothing to do with what we are dealing with here.

In reply to Senator van Turnhout, I propose the repeal of sections 58 and 59 of the Offences Against the Person Act 1861 but also to replace them. One cannot simply repeal legislation. It must be replaced. With regard to suicidal intent, my only reason to separate it from other threats to life is that there has been much discussion about it and about the danger that it will open the floodgates to abortion on demand. That will not happen. The test is too narrow and applies to very few cases. All threats to the life of the pregnant woman should be dealt with together.

May I ask Deputy Dowds to repeat his question?

Deputy Robert Dowds: The medical experts who addressed the committee yesterday said they needed legislation that would give them support. They could not always be sure of the extent to which a woman's life would be at risk. Is it possible to produce legislation within the present constitutional constraints?

Ms Ciara Staunton: It is, absolutely. We are not dealing with proof beyond a reasonable doubt but where, on the balance of probability, there is a real and substantial risk at some point during the pregnancy. A woman who is, for example, two months pregnant must be, in the clinical judgment of her doctor, at a real and substantial risk. It is important that the legislation acknowledge the importance of clinical judgment. If a doctor believes a woman's life is at risk, even when eight or nine months pregnant, she is entitled to a lawful abortion. At present, doctors are not sure whether the standard of proof is on the balance of probability or beyond a reasonable doubt. There is much uncertainty. The threat of criminal prosecution under sections 58 and 59 of the 1861 Act adds to that fear and uncertainty. Once it is clearly stated that a woman is entitled to a lawful abortion if there is, on the balance of probability, a real and substantial risk to her life at some point during her pregnancy, that uncertainty will be removed. I am sure Dr. Mills will agree that doctors would feel more comfortable with a test such as that.

Deputy Robert Dowds: What would be the position if a woman died a year after the birth, for example?

Ms Ciara Staunton: Senator van Turnhout also asked about time limits. I do not agree with the insertion of time limits. They usually arise in the case of abortion on demand, which we are not dealing with here. We are dealing with a small number of cases in which a woman's life is threatened. We should not impose an arbitrary figure. A doctor will know if he or she can save the life of a woman and also vindicate the right to life of the unborn as cases arise and in

accordance with his or her clinical judgment.

Dr. Simon Mills: With regard to viability and time limits, I agree with Ms Staunton that the strict construction of Article 40.3.3° as interpreted in the X case does not include time limits. I can also see that in drafting legislation that would attract general support and still not be unconstitutional there might be certain types of termination not expressly covered by the X case judgment for which time limits might be appropriate. I do not want to put it any further than that. It is something that is almost germinating in my head as I have been sitting here having this very helpful discussion, bearing in mind the submissions of Ms Schweppe and Ms Staunton. It is something I would be happy to return to in future discussions of the draft Bill.

Senator Van Turnhout also mentioned the question of treating suicide differently. I largely agree with Ms Staunton that as a matter of broad principle there is no distinction to be drawn between a threat to the woman's life by reason of the continuation of her pregnancy as a medical or as a psychiatric matter. Two distinctions, however, need to be drawn. This is one of the reasons I treated suicide separately in the draft Bill.

First, the required specialisation of the doctors making the assessment must necessarily be different. Someone touched on this earlier. Do we want obstetricians deciding on the psychiatric well-being of women? No, we do not, any more than we want neurosurgeons deciding on the viability of pregnancy. That is how one would deal with that. One has different and appropriate experts.

The second way in which one might treat it differently, and which I offer tentatively in the draft Bill, goes to the difficulties with suicidality that have been identified across witnesses, which is that its presence or absence may be fluctuant. It may be there one day and not be there another. I tentatively suggest in the draft Bill that, as distinct from scenarios of medical emergency or crisis, it may be appropriate that assessments for suicidality be carried out on two separate dates.

Flowing from that and in reply to the question about rural hospitals where there may only be one doctor, I am reminded of what Senator Crown was saying earlier. If we assume that the opinion of two doctors is generally preferable to the opinion of one, should we put women who are in rural locations or in poorly resourced hospitals at an effective disadvantage? In drafting the issue of a serious and immediate threat to life, one may have to reflect on the question of the number of experts who would give an opinion where, for example, only one expert is available and in the view of that expert a termination, within the meaning of any available legislation, is necessary. Provision could be made, by way of regulation of the reporting or certification of any termination, for an expert to explain why a second opinion could not be obtained although it would normally be required under the Act. That is one possibility.

There was a more general question about the need for clarity and whether legislation would provide the kind of clarity doctors require for their work. I suggest that the Deputy read my draft Bill which I have provided to the committee. I hope it shows that clear, workable, sane and sensible legislation that will guide doctors in a way they can live with is not an unachievable norm. Doctors make life and death decisions every day.

The last question I was asked was an important one. Deputy Naughten asked if there was a difference between a foetus with a lethal abnormality who will suffer by reason of being born and a foetus who is delivered prematurely and must suffer as part of being delivered prematurely. There is an obvious moral and legal difference. The foetus born with a lethal foetal

abnormality is being born solely to die. The foetus who is delivered prematurely with a view to effecting its survival is being born to a wholly different purpose. This seems to me to be a logical moral distinction.

To deal with the last point raised by Senator Crown and his disagreement on the meaning of Article 40.3.30, I hope it is clear to the committee - I will reiterate for Senator Crown - that this is not the three of us forming our view of Article 40.3.30, it is the three of us articulating the view of Article 40.3.30 formed by the Chief Justice in the Roche case.

Ms Jennifer Schweppe: I wish to comment on a few issues. I agree completely with Dr. Mills regarding the link between suicide and termination in that the decisions should be made by individuals - psychiatrists - who are qualified to make these decisions. It is important to note with regard to any termination of pregnancy which is permissible under the Constitution that according to the X case, we are discussing a matter of probability.

In reply to Deputy Dowds, there does not need to be any certainty as to the risk of a medical risk, be it a psychiatric or physical risk, or on the issue of fatal foetal abnormality. I think the matter of probability test is one which should determine this. I agree with Ms Staunton on that point. I do not think there should be any different procedures aside from who determines the risk with regard to suicide. I think to do so would be to bring us back to a situation where mental health is stigmatised. I thought we had moved on from that. To treat them completely separately would bring us as a country back a step.

Senator van Turnhout asked about consent. I think the parallel legislation would probably be suitable, not just to deal with young people but also to deal with anyone for whom a proxy consent is required, such as wards of court, vulnerable persons, for example. In reply to Senator Crown, I agree with Dr. Mills's assessment of our collective opinion on the definition of life. We are just articulating the law on this issue, as opposed to a philosophical or moral position. The reason we are here is because there is no definite agreement on what the law is. Lawyers would be very poor if we all collectively and generally agreed on the law. We are articulating what Mrs Justice Susan Denham said in the Roche case. We think that applies here.

Deputy Mary Mitchell O'Connor: I thank the witnesses for their presentations. I have a question for Dr. Mills. I have studied his proposed draft Bill. I ask him to clarify for this committee and also for the audience who are listening if he can guarantee that the floodgates will not be opened by his proposed Bill. Will it allow the floodgates to open? Will it allow women to get abortions by giving the excuse that they want an abortion because of suicide? That is a significant argument among the general public. It is a view among the public that once some legislation is enacted this will open the floodgates, that women will go to the courts and abortions will be permitted two or three years down the line. That is the real worry for the public. If Dr. Mills can nail that view for me, I would be very appreciative.

Senator Colm Burke: I refer to the issue which was raised yesterday by the Institute of Obstetricians and Gynaecologists. Its view is that two obstetricians and one specialist would be needed to decide on the issue of suicide. I ask if this is a workable solution because I do not think it has been clarified. It goes outside the recommendations in the report of the expert group.

Dr. Simon Mills: I will deal with the second question first. In my view that is a matter of nuance, to some extent. The question of how the practicalities of it would work will clearly need to be worked out. Ultimately, I am wedded to the idea of two experts. If there is a signifi-

cant body of opinion that says it should be three experts, there may well be cases where three experts are appropriate. To some extent, it is an intellectual cul-de-sac which tells us nothing about whether we can formulate workable legislation. Of course it is workable; it is more workable in large teaching hospitals where there is a plethora of specialists, sub-specialists and super-specialists than it may be in rural hospitals. It may go back to my reply to an earlier question about how we manage this scenario in the context of limited resources.

In reply to Deputy Mitchell O'Connor, I too have studied this Bill in some detail. I offer it with some trepidation because one does not want to put one's head above the parapet only to have it shot at. I have discussed the Bill with a large number of professional colleagues. Not one of them has identified a loophole in the Bill that would tend to suggest that it would in any way open any floodgates. I am very grateful to the Deputy for having taken to time to read the Bill. The parameters in it should be very clear because they are very tightly drafted. In my view, I do not see any provision through which some tricky lawyer will drive a coach and horses in order to usher in abortion on demand. That is the height of the position, as I see it.

Ms Jennifer Schweppe: I agree with Dr. Mills's position about the practitioners who make this assessment. One could ask if two, why not three or if three, why not four, if four, why not a committee. Two is a workable number and the assessment can be done quickly. When it is a case of a real and substantial risk to the life of the pregnant woman, I think expediency is required.

I have read Dr. Mills's Bill. I do not think it is possible to drive anything through it, not to mention a horse or a coach. We cannot guarantee that floodgates will not be opened. Nothing is guaranteed in law. What we can guarantee is that we are not doing anything with the Constitution which obliges medical practitioners, everyone in society, politicians, to respect and vindicate the right to life of the unborn. I agree we need to give due regard to the right to life of the pregnant woman but there is nothing in any legislation which can affect that right to life of the unborn. We need to accept that. To say that medical practitioners will start terminating pregnancies in a more general way, is to diminish the profession. We need to respect the fact that medical practitioners will act in accordance with the legislation and the guidelines.

Ms Ciara Staunton: On the point raised by Deputy Mitchell O'Connor, as Ms Schweppe said we cannot guarantee that floodgates will not be opened. However, what we can guarantee is that if the legislation is drafted correctly in accordance with the X judgment, reflecting Article 40.3.30, the floodgates should not be opened. The risk of suicide which arises from the pregnancy is the only occasion when a lawful abortion is permitted. To suggest that women will be giving an excuse is insulting not only to pregnant women but also to the medical profession. It suggests that they are unable to distinguish between a person giving an excuse and a woman who is suicidal. While we cannot guarantee it, I would be very surprised. We are not dealing with abortion on demand; we are dealing with a very narrow set of facts under which abortion is lawful in this jurisdiction.

Deputy Catherine Byrne: I ask for clarification because I am a little confused. I have a question for Ms Schweppe which may seem irrelevant to this discussion. I have listened with great interest to all the expert opinions. I am not a legal professional with a legal mind nor am I a doctor. I am a housewife who became a politician. I do not know of any pregnant woman who does not say, "I am having a baby". I do not know of anybody who does not approach a pregnant woman and acknowledge that she is expecting a baby. In the opinion of the legal representatives here, when is a baby a baby? Is it before birth or after birth? I am still confused in what the witnesses have been saying about the foetus. I ask for clarification because it would

be of great assistance to me.

Ms Jennifer Schweppe: No problem. I am expecting a baby. What is inside my body is unborn; it is a foetus. It is not a baby; babies are born. One expects the baby to come out of one's body. Once it does so, then it is a baby. I am also not a mother. I do not have any other children; therefore, I am a pregnant woman.

When we use very emotive language like "mother" and "baby", it automatically colours how we think about the issue. That is why I have said we should use value-neutral language.

Chairman: As no other committee member is indicating, we will move on to the 20 minute slot for other Members, beginning with Senator Ivana Bacik.

Senator Ivana Bacik: I thank the witnesses for their excellent presentations. I agree with the legal analysis offered and Dr. Mills' characterisation of the debate as three-sided. It is useful to note that research on the experience of women in Ireland who have had abortions, for example, by Dr. Ruth Fletcher, shows they feel disengaged and alienated from a debate that is unduly polarised. It is notable that we will not hear from GPs as a body in the course of these hearings, or from women who have identified themselves as having had abortions. The voices of these women have been largely absent from much of the debate.

In terms of legislation, it is very helpful to have Dr. Mills's template, for which I thank him.

Dr. Simon Mills: I apologise for interrupting the Senator, but I am having difficulty hearing her because of background conversation.

Chairman: I ask members to respect the speaker who has the floor.

Senator Ivana Bacik: Is it Dr. Mills's view that there should be provision for emergencies? The expert group report states, on page 36, that one doctor should be enough in an emergency. Why then is it required to have three opinions in a non-emergency? Does that not render the judgment of the European Court of Human Rights ineffective? Specifically, paragraph 267 of the A, B and C *v*. Ireland decision points to the need for accessible and effective procedures to vindicate the right to legal abortion.

I agree with the delegates' analysis regarding fatal foetal abnormality, which is in accordance with the Chief Justice's statement in the Roche case. In the D *v*. Ireland case in 2005, to which the witnesses also referred, the Government argued that there was, at the very least, a strongly tenable argument that where there was no prospect of foetal life beyond the womb, there was no right to life to be vindicated. In June last year a number of Labour Party Deputies and Senators, including me, sent a legal opinion to the Minister for Health, Deputy James Reilly, asking that lethal foetal abnormality be included in any legislation dealing with the X case as it would not necessitate the holding of a constitutional referendum. I welcome the delegates' assessment in that regard.

Deputy Terence Flanagan: Yesterday we heard from the masters of the large maternity hospitals that they did not feel restricted in offering all necessary medical assistance to pregnant mothers in a medical emergency. They further stated they were personally unaware of and had not seen examples where current law and practice had restricted the provision of all necessary care for women in these circumstances. If that is the case, why do we need to change the law?

Ms Schweppe stated "mother" and "baby" were loaded terms, an issue which was raised

by a previous speaker. In fact, the European Court of Human Rights regularly uses the word "mother" and the phrase "her child" in reference to these matters. Does Ms Schweppe believe the unborn child is entitled to any right at all?

Ms Staunton states in her paper that where the health and well-being of the mother is at risk and she is not in a position voluntarily to travel abroad for an abortion, she has no option but to seek to avail of one in this jurisdiction. Ms Staunton seems to be introducing a lower test for the introduction of abortion. Will she indicate whether this is, in fact, her personal view?

Does Dr. Mills's Bill include a duty of care towards the unborn? Does he believe the unborn baby who has a foetal abnormality enjoys absolutely no constitutional protection? Will he indicate whether there has ever been a conviction in Ireland under section 59 or 60 of the Offences Against the Person Act 1861?

Senator Jim Walsh: Yesterday we had a good consensus from the medical experts that current medical practice was very good if only it could be statutorily underpinned. The contentious issue is that of suicide. Despite what the delegates opposite are saying, the clear evidence yesterday from the professionals in the field was that it was very difficult to predict the outcome for a patient who presented with suicidal ideation. On this matter we have had the views of a psychiatrist on both the pro-life and pro-choice advocacy sides during the period of all of the debates. One of the psychiatrist witnesses said in evidence yesterday that if a woman presented claiming to be suicidal, she would believe her. We also heard evidence that a survey carried out in Britain showed that 97% of suicide predictions were false positives. The architect of abortion in Britain, Lord David Steel, recently said:

> It would seem the mistake being made in Ireland is to try to define the circumstances in which each abortion may be carried out and that is a hopeless road to travel down. I never envisaged there would be so many abortions [in Britain].

In fact, there were 6.4 million abortions in Britain between 1986 and 2011, only 150 of which took place to save the life of the mother. These are British Government figures.

Ms Schweppe referred to the use of language. The fact, however, is that the European Court of Human Rights regularly uses the word "mother" as a synonym for "pregnant woman" and the term "her child" for "foetus". I ask her to reflect on this.

In regard to foetal abnormalities, we have had presentations from people who found themselves in this situation and I understand the issues that arise. However, will the delegates, particularly Dr. Mills, clarify whether they are seeking, in the case of non-viable foetuses, to have abortions permitted up to 20 to 24 weeks? Am I right or wrong in assuming that is the position?

Deputy Aodhán Ó Ríordáin: I thank the witnesses for their excellent presentations. I am particularly interested in the draft Bill presented by Dr. Mills. In regard to section 9 which deals with termination of pregnancy in cases of lethal foetal abnormality, my concern is that legislators will be asked to differentiate between an unsustainable pregnancy and a pregnancy which will lead to the birth of a baby who may survive for moments outside the womb. In the latter case is Dr. Mills of the view that a constitutional referendum would be necessary? It is important to clarify this unfortunate determination which legislators may face. In regard to the conscientious objection clause in section 13, is it normal practice to include such a clause within legal frameworks?

Deputy Billy Timmins: I thank the witnesses for their contributions. It is clear that they

put a tremendous amount of work into their consideration of the issue. Ms Schweppe mentions in her submission that the question of when life begins has never, for the purposes of the Constitution, been addressed. Is it her view that this question should be addressed and, if so, how might it best be done?

Dr. Mills is, if I may use the term, just what the doctor ordered. His draft Bill covers all spheres, including medical, legal and, in particular, medical ethics, and I commend him for his courage in publishing the proposals. I welcome his comments on the need to facilitate a clearer expression of the centrist position or middle ground in both the public space and the various political fora. That is something many of us in public life often seek but very seldom achieve. If it could be achieved in this and other matters, we would be able to resolve contentious issues much more quickly.

Section 9 of the draft Bill deals with the issue of foetal abnormality, a very clearly and scientifically defined issue. However, the issue of contention for most people in regard to this matter is that of suicide, a matter dealt with in section 7. In fact, whether one agrees or disagrees that the threat of suicide should be a ground for termination, the difficulty arises in the context of the evidence we heard yesterday, namely, that one psychiatrist will say a threat of suicide is not and never will be a ground for termination, while another will disagree. In that context, how does Dr. Mills see the provisions in this section working in practice? If the threat of suicide is permitted as a ground for abortion under legislation, will we have a situation where it will become known very quickly which psychiatrists are likely to give a positive answer and *vice versa*? How does one deal with the issue of suicide when, according to psychiatrists themselves, the question of determining suicide risk is an inexact science?

My final question is probably outside the remit of the discussion and I will not object if the Chairman does not allow it or the witnesses do not wish to respond. In the context of claims that will most likely be made later today or tomorrow by other contributors, we must consider the notion of the intention of the electorate versus the decision of the Supreme Court. Ms Staunton has mentioned that the referenda on the 12th and 25th amendments to the Constitution seem to give a definitive view from the electorate on the suicide issue. However, the argument has been and will be made again in the course of these discussions that the results of these referenda cannot be seen strictly as a decision on whether suicide should be removed as a ground for an abortion, in so far as some of those who voted "No" on those occasions were, in fact, opposed to the provision of abortion on that ground.

Deputy Peadar Tóibín: The Supreme Court has stated there must be a real and substantial threat to the life of the mother. Is there any quantification of what this comprises in order to achieve a termination? The master of the National Maternity Hospital indicated yesterday that medicine and treatment operate on the basis of probabilities. The psychiatrists who came before us yesterday also indicated that typically 3% of those who are diagnosed as being at risk of suicide actually die by suicide. Would a 3% confidence level in respect of the identification of actual suicides be sufficient to ensure that a real and substantial threat to a mother's life would be taken into account?

Chairman: There are 11 minutes remaining in the session. I will ask Ms Schweppe, Ms Staunton and Dr. Mills to reply to the points that have been raised before we conclude.

Ms Jennifer Schweppe: I thank members for their questions. Senator Bacik inquired as to whether we should have different legislation for emergency and non-emergency situations. Her argument in this regard is quite compelling. When we look to introduce legislative change,

we often look not to our nearest neighbours but to our next nearest neighbours in England and Wales. That is the sort of framework I had in mind in the context of legislating for this issue.

With regard to Deputy Terence Flanagan's point, in the same way that some doctors did not feel restricted by the current legislation, other doctors did. The fact that there is a difference needs to be addressed. Do I believe the unborn child is entitled to any rights? I respect the constitutional position that the unborn has a right to life.

Senator Walsh referred to the issue of language. I am of the view that we should use constitutional language, certainly in respect of foetal life, that is, to use the term "unborn". The term "pregnant woman" does not have any emotive, moral or ethical undertones. In the context of viability in the period between 20 and 24 weeks, foetal abnormalities are generally picked up at an early stage of the pregnancy. Foetal abnormality scans generally take place at approximately 18 weeks. I am of the opinion that any issue would be raised before that stage.

In reply to Deputy Timmins's point, I hope I state in my submission that the issue of when life begins has been addressed. The issue of when unborn life ends has not. I just wanted to clarify that.

In the context of Deputy Tóibín's point, doctors make assessments in respect of the risks and benefits of medical treatment every day. It is what they do for a living and we trust them to make those assessments as to what risks and benefits are associated with treatment. We need to simply apply what they do every day in this very narrow context of medical treatment.

Ms Ciara Staunton: I will begin with the final point. Deputy Tóibín inquired as to what constitutes a real and substantial risk. We have addressed this on numerous occasions. We must trust their opinions. On the matter of probability, there is a real and substantial risk to the life of the woman at some point during the pregnancy. That is what a real and substantial risk is. As Ms Schweppe stated, doctors make these decisions all the time. They do not really deal in percentages and they base their decisions on their clinical judgment and experience. We must trust and respect their decisions.

Deputy Timmins referred to suicide and whether it should be included. The discussion in this regard is actually relevant because that is the law. If a woman is suicidal as a result of her pregnancy, she is entitled to an abortion. Whether we include it is not debatable. We must include it.

Reference was made to the 12th and 25th amendments to the Constitution. The 12th amendment related solely to suicide and it was very clearly rejected. The other two amendments were passed. The people clearly indicated that they were happy with the amendments relating to travel and information but that they were not happy with that which related to suicide. There has been a great deal of academic commentary on why the 25th amendment was rejected. Again, the discussion in this regard is irrelevant because the amendment - which also dealt with suicide - was rejected. The people rejected it and this reinforced their position on the 12th amendment.

Senator Walsh also referred to suicide. I repeat what I stated earlier, namely, that it is already catered for and that the threat of suicide must be included. We have a very different regime from that which obtains in the UK. We are concerned here with an extremely narrow test. The UK is completely different and we should not look to what has happened there. We are referring to situations where there is a real and substantial risk to the life of a woman. That

is not abortion on demand and it should never ever be seen as such. The only time an abortion is lawful in this jurisdiction is when there is a real and substantial risk to the life of the mother. I really cannot overstate that.

Deputy Terence Flanagan referred to language relating to the mother and child. Our Constitution includes the term "unborn". I am of the view that we should follow the Constitution and opt for the terminology used in it. I did not hear the Deputy's question in respect of my submission, as there was a lot of movement. If he wishes to repeat it, however, I would be quite happy to provide an answer.

Deputy Terence Flanagan: What is Ms Staunton's personal view in respect of the current situation? She seems to be advocating a lower test in respect of abortion.

Ms Ciara Staunton: Where in my submission did I indicate that?

Deputy Terence Flanagan: I just quoted from a paper in which Ms Staunton referred to circumstances in which the health and well-being of a mother is at risk and she is not in a position to voluntarily travel abroad for an abortion, but she has no option but to do so.

Ms Ciara Staunton: Is the Deputy referring to an article I published?

Deputy Terence Flanagan: Yes.

Ms Ciara Staunton: That is completely different. I was discussing the decision in A, B and C *v*. Ireland and giving my own personal opinion. I was called before this committee to give evidence as a legal expert on the X case and the implementation of that case. I am, therefore, advocating a test in accordance with the X case and our Constitution. What I have written outside of my submissions is not actually that relevant to what I am saying here.

Dr. Simon Mills: I echo what Ms Staunton says. This is a place for, in so far as is possible, our dispassionate legal opinion to be offered. I hope we have furnished that. I will now deal with the matters raised by the various Deputies and Senators.

I find myself in agreement with both Senator Bacik's position and the contrary position that has been presented. There may well be circumstances in which a Bill such as that which I have presented to the committee envisages that a two-doctor system may require deviation in certain circumstances. It may, for example, require deviation in favour of a single-doctor opinion which - as I said in reply to Senator Crown - may involve, for example, the making of regulations and an explanation of why, in the circumstances of a case, only a single opinion was furnished. The draft Bill I provided uses language such as "no fewer than two doctors" because there may be circumstances in which, in order to obtain a properly circumspect view of the totality of an individual pregnant woman's care, more than two opinions may well be required. I certainly do not exclude that possibility in the draft Bill I prepared.

Deputy Terence Flanagan referred yesterday to doctors not feeling restricted by the current situation and asked members and us to infer that there is no requirement for legislation. He must have been listening to different hearings to those to which I was listening. I heard a doctor say "I do not want to go to jail". It is difficult to imagine any greater restriction on a doctor than a fear of losing his or her liberty. I also heard a doctor say "I need clarity on this". I think I heard another doctor say "I need clarity on this". I think I heard the Medical Council state that it needs clarity. I am pretty sure I have heard the Legislature say that we need clarity and legislation on this. There is a chance that at the inquiries Deputy Terence Flanagan attended yesterday,

what he contends was said was actually stated. However, it was not said at this inquiry and it has not been stated in public discourse.

The Deputy posed two specific questions, the first of which related to whether doctors have a duty of care towards the embryo, the foetus or the unborn child. Yes, of course they do. Any obstetrician or general practitioner involved in the care of a pregnant woman will inform one that in the generality of matters he or she has two patients in front of him or her. I do not demur from that point of view in so far as it is held by doctors. The Deputy's other question related to whether a foetus or embryo with a lethal foetal abnormality has any rights. I am of the view that the termination of a pregnancy is always a morally serious decision. However, what I know is that the Supreme Court has told lawyers and legislators everywhere in this jurisdiction that the born alive test is an essential index of the right to life as comported by the Constitution.

Ironically enough, in his opening remarks Senator Walsh referred to the need for legislation, thus suggesting that he was at the inquiries I watched yesterday as opposed to those which Deputy Terence Flanagan was watching. The Senator referred to quotes attributed to Lord Steel and the latter's concerns about the Act introduced in the UK and its consequences. With the greatest of respect, there is a very simple solution to that - namely, to refrain from introducing the 1967 UK Act here. We should introduce something different which contains safeguards and which is consistent with Article 40.3.3° and with the needs of pregnant women.

Two questions on the draft Bill were posed by Deputy Ó Ríordáin the first of which was about lethal foetal abnormality. As drafted the Bill is consistent with Article 40.3.3o as interpreted by the Supreme Court.

I was also asked about the question of conscientious objection and whether it is unusual to include conscientious objection in a Bill. It is but this is a *sui generis*, one-of-a-kind legal, social and political matter about which people have strong feelings. I would simply observe that for all the criticism of the 1967 Act and the regime it introduced, it also includes a role for conscientious objection. That is one aspect of the 1967 Act that we should import.

I agree with Ms Schweppe and Ms Staunton on the question of psychiatry. Regarding Deputy Tóibín's questions about psychiatry, I would ask him to sit down and read the testimony given yesterday by Dr. McCarthy.

Chairman: As the time allocated has elapsed-----

Deputy Terence Flanagan: Chairman, I would like to ask----

Chairman: Sorry, the time allocated is up.

Deputy Terence Flanagan: Chairman, the question-----

Chairman: I ask Ms Staunton to give a three minute final summation followed by Ms Schweppe and Dr. Mills.

Ms Ciara Staunton: I thank the committee again for inviting us here to give our independent legal opinion on the X case and any implementation of that. When this committee begins to draft the heads of the Bill, the most important thing we must do is give effect to the X case. We must ensure that the legislation states when an abortion is lawful in Ireland in accordance with the X case. However, I urge the committee to consider the other issues and situations which may arise from Article 40.3.3o. We do not want to come back here again if we can pre-

vent that.

The second issue is that the legislation must be prescriptive to a degree to ensure that doctors have as much certainty as possible as to when an abortion is lawful in Ireland. However, the legislation must give effect to the fact that doctors are making hard choices. These are a very small number of cases and decisions will be hard. We must trust the clinical decisions of our doctors in the best interests of both the pregnant woman and the unborn child, in accordance with the legislation and Article 40.3.3o.

I reiterate that there should be no floodgates. Suicide is not a catch-all for women who want abortion on demand. A woman is only entitled to an abortion if there is a real and substantive risk to her life, which includes a threat of suicide, and it is only if that suicide is directly linked to her pregnancy. If she is suicidal prior to the pregnancy or just suicidal in general, she will not be entitled to an abortion. It is only when that is very directly linked.

Ms Jennifer Schweppe: I thank the committee and the Chairman again for an opportunity to express my views on the current legal situation as I see it. I will briefly reiterate three points in my final summation. First, what we are doing at the moment is legislating for the law; we are legislating for the current legal situation. There is no question to answer in regard to whether suicide should justify the termination of a pregnancy where that suicide, as Ms Staunton said, is linked to the pregnancy. To question its justification is to both stigmatise mental health and to diminish our respect for medical practitioners who work in this incredibly difficult area every day.

The second issue is in regard to fatal foetal abnormality. I believe that the law as it currently stands is that unviable foetal life is not life for the purposes of Article 40.3.3o and that a declaratory section should be included to that effect in the legislation. Where the life is viable, a constitutional referendum would be required to allow for termination in those circumstances. There is no requirement of certainty in either the X case test or the viability issue. It needs to be established only as a matter of probability. There is not a 99%, 80% or 60% requirement. It simply needs to be established as a matter of probability in accordance with the views of the relevant medical practitioners.

I would also echo Ms Staunton's recommendation that we use this as an opportunity to be proactive rather than reactive in regard to this issue as a whole. Academics and the courts have come up with scenarios where we are still not entirely clear on what the law is and we have spent huge amounts of money commissioning reports which have simply been ignored. The Commission on Assisted Human Reproduction would be the most obvious one which requires immediate incorporation.

There are still some straggling issues regarding travel and information which must be addressed. For example, can the husband of a pregnant woman be entitled to know that his partner is seeking to travel to terminate her pregnancy or is seeking information in regard to that pregnancy? Do asylum seekers have a right to leave this jurisdiction to terminate a pregnancy in circumstances which would not be constitutional?

I have already talked about the issue regarding consent for those individuals who by reason of age or capacity require proxy consent to be made for them. In certain circumstances this will be made by a guardian; in other circumstances it will be made either by the District Court or the High Court. On the question as to whether the High Court can allow an individual to travel to terminate a pregnancy in circumstances which are unconstitutional, Mr. Justice Geoghegan said

that should not be allowed and that issue requires clarification.

The issue of third party foetal assault remains entirely open in this jurisdiction. It is not terribly complicated to legislate for that but it needs to be included in the Bill. I thank the committee once again for its attention.

Chairman: Before Dr. Mills begins, in fairness to Deputy Flanagan, he is genuine in his commitment, commentary and participation here. He was not being derogatory about anything Dr. Mills said. In his reply Dr. Mills may have been a bit sarcastic with him but in fairness he was-----

Deputy Patrick O'Donovan: He might like to apologise.

Dr. Simon Mills: To be fair, Chairman, I think I was more than a bit sarcastic but I am happy to concur with the rules of this House and if anything I said was interpreted as sarcasm or rudeness, I apologise if any offence was caused to anybody listening to those remarks.

It occurs to me also that there is one question I did not answer and I do not want to be accused of having ducked or not answered any questions. It was a question put to me by Deputy Naughten who asked if I had ever seen a suicidal pregnant woman when I worked as a general practitioner. The answer to that question is "Yes". I recall seeing women who were pregnant and suicidal but the question of whether they were suicidal within the meaning of the X case was not a matter for my clinical judgment and therefore I cannot answer the question with any more precision other than to say that I did attend at various times depressed and suicidal pregnant women during my time as a general practitioner.

It is worthwhile for the committee to observe that Ms Schweppe, Ms Staunton and I have worked entirely independently on these matters save for the fact that I took the liberty, because I had her e-mail address, of furnishing Ms Schweppe with a copy of the draft Bill yesterday. I had no idea what she intended to say. I had no idea what Ms Staunton intended to say. They had no idea what I intended to say and they had no idea what the contents of the Bill would be. It is interesting and informative that there is coherence and a coalescence of our views and that as a matter of fact the Bill I have presented for the committee articulates the vast majority of the views that have been so cogently expressed by Ms Schweppe and Ms Staunton. That is something the committee should have some account to when considering the evidence its members have heard today. It is an interesting coalescence of views.

I will make one last comment on the Bill I have commended to the committee as the basis for the starting point of talking about this issue more and about the form the final Bill will take, and I say it in the light of what I heard said yesterday. The Bill I presented to the committee deals with a number of issues that were raised. It deals with clarity, which was called for by Dr. O'Mahony from the National Maternity Hospital. It deals with the requirement for specialist doctors, which was called for by Professor Kieran Murphy of the Irish Medical Council. It deals with the question of conscientious objection, which was called for by Dr. Mary McCaffrey. It deals with the fear of floodgates, which was warned against by Professor Patricia Casey yesterday. It deals with the question of abortion on demand by precluding it in so far as that appears to me to be possible in the drafting of the Bill. It deals with late-term pregnancies, an issue raised by Deputy Flanagan yesterday in his questions. It ensures, by protecting doctors acting in good faith, that doctors will not go to jail. The Bill does not quantify risk in accordance with the X case and the call for clinical judgment to be allowed. In respect of all of these circumstances and without having known what the doctors were going to say yesterday, I

believe we have a starting point.

Chairman: That concludes this session. I thank Ms Jennifer Schweppe from the University of Limerick, Ms Ciara Staunton from the National University of Ireland, Galway, and Dr. Simon Mills from the Law Library. I wish Ms Schweppe well and every success with her pregnancy.

Senator John Crown: I request that we go into private session briefly.

Chairman: No.

Senator John Crown: I am making a request and it is in the Chairman's gift to grant it.

Chairman: I will talk to the Senator after I suspend the sitting.

Sitting suspended at 11.30 a.m. and resumed at 11.45 a.m.

Irish Council for Civil Liberties

Chairman: The time is 11.47 a.m. and we will resume in public session. I again welcome people to this public session. I remind members, witnesses and those in the Visitors Gallery to ensure their mobile telephones are switched off for the duration of the meeting, as they interfere with the broadcasting of proceedings. I acknowledge the presence in the Visitors Gallery of a former Member of the Oireachtas, Ms Geraldine Kennedy, who is very welcome to today's proceedings. I omitted to welcome her yesterday but am glad to see she is present this morning.

This is the joint committee's sixth session of hearings and for clarification, as members are aware the Bar Council of Ireland declined an invitation to participate this morning. I wish to put on record that an invitation was issued to the Bar Council before Christmas. Moreover, late last week the clerk to the committee spoke to people in the Bar Council by telephone when it was confirmed the council would be in attendance before the joint committee and that it would confirm who would be attending on Monday. The clerk made contact with the Bar Council again early yesterday morning requesting details of who would be attending, following which we received a telephone call and shortly thereafter a letter stating the Bar Council would be declining to attend. I simply wish to put this on record from our perspective and not to engage in any war of words or clash with the Bar Council.

As members are aware, this session has been condensed into one hour for this sixth session in a series of hearings the joint committee will be conducting over the next two days to discuss the implementation of the Government decision following the recent publication of the expert group report into matters relating to the cases of A, B and C *v.* Ireland. In this regard, I welcome to this session from the Irish Council for Civil Liberties, Dr. Alan D. P. Brady and Mr. Stephen O'Hare. Before we commence I remind witnesses of the position regarding privilege. Witnesses are protected by absolute privilege in respect of the evidence they are to give to the committee. However, if they are directed by the committee to cease giving evidence on a particular matter and they continue to so do, they are entitled thereafter only to a qualified privilege in respect of their evidence. They are directed that only evidence connected with the subject matter of these proceedings is to be given and are asked to respect the parliamentary practice to the effect that, where possible, they should not criticise or make charges against a person or persons or an entity by name or in such a way as to make him, her or it identifiable. Members

are reminded of the long-standing parliamentary practice or ruling of the Chair to the effect that they should not comment on, criticise or make charges against any person or persons outside the House or an official either by name or in such a way as to make him or her identifiable. The witnesses have ten minutes in which to make their opening statement. This will be followed by questions and answers with members for 35 minutes and non-members thereafter.

Dr. Alan D. P. Brady: On behalf of the Irish Council for Civil Liberties, I thank the joint committee for the opportunity to address it today. The Irish Council for Civil Liberties is Ireland's independent human rights watchdog. We have been monitoring, educating and campaigning for the protection of human rights in Ireland for 35 years. I am a member of the executive of the Irish Council for Civil Liberties Association and hold that role in a voluntary capacity. In my professional life I am both a practising barrister and an adjunct lecturer in law at Trinity College, Dublin, where my research focus is on constitutional rights and human rights. I am accompanied today by my colleague from the ICCL, Mr. Stephen O'Hare.

I wish to address two core points that are outlined in the submission from the ICCL to the committee. The first concerns matters that are settled law, matters that are really beyond dispute with regard to constitutional rights and rights under the European Convention on Human Rights. The second matter I would like to address before the committee today is the opportunity that this legislative process presents for this committee and for the Oireachtas to improve Ireland's human rights position actively, particularly with regard to lethal foetal abnormality.

As regards the first point on matters that are settled law under the Constitution, it is important to state that abortion is legal in Ireland. It is legal under the limited test within the X case, but it is legal. This committee and the Oireachtas are not engaged in an analysis of whether abortion should be legalised. That has already happened. It happened in the X case and arguably it happened at the point at which the eighth amendment to the Constitution was introduced. Certainly, the very well-publicised advice of the Attorney General at the time made it clear that the constitutional settlement countenanced the possibility of abortion in circumstances where there was a threat to the life of the mother. That legalisation of abortion is limited to the test set out by the Supreme Court in the X case. It is where there is a real and substantial risk to the life of the mother and where that risk can only be avoided by termination of pregnancy. Within that test, however, a woman whose life is at risk - a woman who meets that test - has a constitutional right to have an abortion in this jurisdiction. That is settled law. It is not a matter that is up for discussion. In relation to that test, and something that has been controversial in relation to that test, the Supreme Court was also extremely clear that that threat to life included a risk of suicide. The Irish people have had two opportunities to remove that. They have chosen not to do so on both occasions. That is settled law. The constitutional position is very clear.

With regard to the European Convention on Human Rights, the upshot of the A, B and C *v.* Ireland decision is that Ireland has been found to be in violation of Article 8 of the European Convention by the European Court of Human Rights because there is a gulf between that theoretical constitutional right and its practical implementation. The fact that there is no effective, accessible procedure in Ireland has been found to be a violation of Article 8. Therefore, that is the clear position concerning the European Convention on Human Rights.

We have had sight of the expert group report, which has been circulated widely. The ICCL would strongly endorse that analysis and certainly welcomes it. There are aspects of it that are of particular note. One is that the analysis makes it clear that the only way for Ireland to comply with its European Convention on Human Rights obligations is to legislate for X, and to do so with all due haste. As regards certain aspects in that report, we would particularly endorse

chapter 5 which sets out four principles which should guide the legislative process. We strongly endorse those. There is also an analysis of how the decision-making process should be structured, and also concerning a review process. We also endorse the analysis of the expert group on that. There are some aspects within that report that involved an either-or choice. Rather than going through them one by one and taking up the time for my submission, I would be happy to deal with subsequent questions on them.

As regards the constitutional rights of pregnant women whose lives are at risk, the constitutional right to have a termination in this jurisdiction is clear. It is settled law. As regards the European Convention on Human Rights, the obligation to provide an effective and accessible procedure for finding out whether one meets that test is a requirement under Article 8. That is also settled law. Therefore, it is clear that legislation must be forthcoming and must meet both of those standards. The ICCL wants to be extremely clear about that.

The second point I want to address is the opportunity that this presents for improving Ireland's human rights position, particularly with regard to the European Convention. In the past, Ireland has been found to be in violation of the European Convention and has had to respond to that. We would certainly not be here today if there had not been a finding of a breach of Article 8 in the A, B and C *v.* Ireland decision. Therefore, rather than Ireland waiting to be brought to the European Court of Human Rights and told that it is in violation, this legislative process presents an opportunity for Ireland to get out in front of our human rights commitments and to seek to ensure better protection under the European Convention in Ireland than is currently provided. It can be done during this legislative process. I mention that specifically in relation to fatal or lethal foetal abnormality.

Unfortunately, in a rare number of cases women are faced with the very difficult and troubling news that the foetus they are carrying is not going to survive. It is not going to be born. In those circumstances, therefore, they face a choice. Do they continue with the pregnancy or not? Some women, no doubt, continue with the pregnancy and find it very fulfilling, while others cannot face it. At the moment, the decision on whether to do that in Ireland is made for them. They do not make that decision themselves. Not only is it made for them, it is made for them by a 19th century criminal law. That is the position in Ireland concerning fatal or lethal foetal abnormality.

There is, therefore, a concern that this may give rise to a violation under Article 3 of the European Convention on Human Rights, which protects against inhuman or degrading treatment. Recent decisions from the ECHR in relation to Article 3 and abortion indicate that where a vulnerable woman is seeking access to abortion and is suffering pain and anguish as a result of delays, there has been found to be a violation of Article 3. I can refer specifically to those cases if required to do so.

The ICCL is concerned that while the ECHR has not yet made a finding that Ireland is in violation of Article 3 in relation to our stance on lethal foetal abnormality, it is strongly arguable that we are in breach. Rather than waiting to be brought to the ECHR and told we are in violation of these women's rights, we strongly urge this committee to recommend making provision for allowing a termination in the case of a fatal foetal abnormality so that Ireland can actively improve our protection of human rights.

This does give rise to a concern, and I know this is something that was addressed this morning, about Article 40.3.3° and whether that would permit a termination in the case of a lethal foetal abnormality, because obviously it provides for the right to life of the unborn, which is to

be vindicated in so far as is practicable. It is at least arguable that it would allow a termination in the case of a fatal foetal abnormality. Whether the right is engaged at all is an open question. Certainly, whether "vindicating it in so far as is practicable" requires a woman to go full term for a pregnancy that will not result in birth is also an open question.

I am not the first person to have made this argument. This precise argument was made by the Irish Government in the D *v.* Ireland case before the European Court of Human Rights. It was an admissibility decision. Ms D had gone to Europe without seeking redress in the Irish courts and it was argued by the Irish State that she should have sought redress in the Irish courts and had therefore failed to exhaust her domestic remedies. The argument made by the Irish State was that, had she gone to the High Court, it was at least tenable that she would have successfully obtained a mandatory injunction requiring her to be permitted to have an abortion. Therefore, if that argument is being made by the Irish State and being accepted as a feasible argument by the European Court of Human Rights, if legislation is passed by these Houses providing for lethal foetal abnormality, then it is at least arguable that it is constitutional. We would say there is a strong argument that it is required under Article 3.

As regards any residual concerns around constitutionality, we suggest that ultimately it is open to the President, in consultation with the Council of State, to refer any Bill from the Oireachtas to the Supreme Court under Article 26 of the Constitution. It certainly seems plausible that it might happen. Even if it does not, however, it is our view and the view of many lawyers that, ultimately, whatever legislation is passed here, it is going to find itself in the Supreme Court one way or the other. I hope that is not in any way a disrespectful comment. I do not mean it in a disrespectful manner. I think the history of this issue is that litigation has been the order of the day a great deal of the time. The House can embrace that, however. It can say: "Look, our legislation is ultimately going to be approved, or examined, by the Supreme Court and so there is no need necessarily to run away from that."

On those two core points, the ICCL takes the view that, as regards the X test and the need for legislation, that is a matter of settled law. As regards lethal foetal abnormality, there is a strong argument that Article 3 requires access to an abortion in those circumstances, although the issue has not yet been addressed by the European Court. We would argue that Article 40.3.3 ° would permit it.

In closing, I will make one brief comment in relation to the ICCL as an organisation. As I have indicated, we are an organisation engaged in monitoring, education and campaigning. We are here today particularly because we have expertise in human rights law and we are hoping to make that available to the committee. We are also a campaigning organisation. As regards our stance on abortion, we are of the view that in cases of incest, rape and a threat to health, we support access to abortion in those circumstances. That is not a matter for this committee today. Any of those three things would most probably require a constitutional amendment but I have mentioned them because I want to be transparent about our position concerning this. I do not want it to be said at any point that we were seeking to hide our position on that. We have both expertise and a campaigning angle. We are here today in relation to expertise but I want to be transparent as regards the campaigning. I am very grateful to the committee for its attention and I am happy to answer any questions members may have.

Senator Marc MacSharry: I thank Dr. Brady for his presentation. On the issue of Article 3 of the European Convention on Human Rights, will he go into a little more detail once again for those of us who are non-legal minded as to how he would reconcile that with the view of the protection afforded to the unborn child under Article 40.3.3°?

Deputy Caoimhghín Ó Caoláin: I welcome Mr. O'Hare and Dr. Brady from the Irish Council for Civil Liberties, ICCL, and commend them on the work not only in this particular instance but across a whole range of issues on which the council campaigns. It is important to note from the council's written submission and Dr. Brady's contribution that we, as legislators, are being asked to consider the need for legislation to give, as Dr. Brady said, meaningful effect to the existing constitutional rights of pregnant women whose lives are at risk. That has to be emphasised time after time. Ireland has a legal obligation and, in this instance as the expert report has indicated, we have been asked to provide for the judgment in the A, B and C case not only legally and procedurally in a sound way but constitutionally also.

I note from the submission that Dr. Brady is looking to give effect to this as an absolute bare minimum. He also outlined several additional points that need to be addressed, not least the issues arising around fatal foetal abnormalities. Will he elaborate on this? In circumstances where foetal life cannot be born alive and will not survive outside the womb, can it really be said the right to life of the unborn is constitutionally equal to the right to life of the woman? There is also the added position of the Government in the D *v.* Ireland case where it was acknowledged that this particular matter could be legislated for with the existing constitutional position in Article 40.3.3° standing and that there would not be a conflict with these two positions. Will Dr. Brady elaborate further on this?

Earlier, the committee heard from Dr. Simon Mills who presented a copy of draft legislation which points out that it is within the compass of legislators to bring forward provision to accommodate this particular matter. I would like a further confirmation of that from the ICCL and Dr. Brady with his respective legal training and knowledge.

Deputy Seamus Healy: I welcome the representatives from the ICCL. Much of the territory here has been dealt with earlier this morning and, to some extent, yesterday. I welcome the clarity on several issues and the question of the opportunity for development. Can I get clarification on the 1992 and 2002 referenda? This has been an issue and there has been a divergence of opinion as to whether the question of suicide was ruled out or in as a result of these particular referenda.

Is the council's view on the expert group report that the option of legislation and regulation would be the correct way to proceed? Has the council a view on the doctors' assessment? Has it a view on the number of doctors necessary? Would just a single specialist suffice or would more be required? I raised the issue of lethal foetal abnormality yesterday and again this morning. Will the council expand on and clarify its views on that?

Deputy Denis Naughten: I thank Dr. Brady for his evidence. Coming back to the European Court of Human Rights judgment, it made the point there needs to be reasonable or practical access to a termination in certain circumstances in Ireland and there is a responsibility on the State to put that process into place. That is why we are dealing with and debating this today. It had been inferred earlier that sign-off by three doctors would run contrary to the European Court of Human Rights judgment. We had evidence from professionals in the field and obstetricians that a sign-off would require two obstetricians plus a specialist in a particular field. In the case of suicide, it would be a specialist in psychiatry. That means there would be a minimum of three doctors to sign off in some cases. A perinatal psychiatrist gave evidence yesterday that in the case of suicide that it was their opinion that two psychiatrists should sign off. In those cases, one is talking about a minimum of three and maybe up to four specialists having to sign off. Would that run contrary to the European Court of Human Rights judgment in light of the fact that these are the professionals at the coalface making this point about signing off?

Dr. Alan D. P. Brady: On Senator MacSharry's concern with Article 3, there have been two recent cases involving Poland. Both involved women who under Polish law were entitled to an abortion. One was a 14 year old who had been raped and the other was a woman facing a very severe foetal abnormality. I am not sure whether the abnormality was fatal although Polish law provides for abortion in circumstances of severe foetal abnormality as opposed to the bare fatality. In both instances there were very substantial delays and much procrastination by doctors. In the case of the 14 year old, her details were made public. The European Court of Human Rights was very critical of the way the case was handled. The upshot was that the court took the view that Article 3, the protection against inhuman and degrading treatment, was engaged. Accordingly, if one looks at the specific person one is facing as opposed to some generic person, if the specific vulnerable woman is in circumstances whereby her treatment reaches the threshold required for Article 3, then an Article 3 violation is possible. There are very few members of the Council of Europe who do not provide for abortion in cases of lethal foetal abnormality. Ireland is one of the few that might be taken but we would suggest there is a strong argument that an Article 3 violation might be found.

On Article 40.3.3°, and to some extent this moves on to the point Deputy Ó Caoláin raised, in the Roche case the Supreme Court found that the right to life of the unborn requires the capacity to be born. In circumstances where there is clear medical evidence that the foetus will not be born, then, based on that assessment of the Supreme Court, it is strongly arguable that Article 40.3.3° does not arise. Even if it were to arise, the obligation on the State is to vindicate in so far as is practicable. A court might take the view it arises, but in circumstances where the foetus cannot survive outside the womb, it may be asked what can the State be expected to do to vindicate that right to life, given that to some extent it is a cipher.

The council would absolutely endorse the view Deputy Ó Caoláin expressed on the need for clarity. In the D *v.* Ireland case, recognition was given that sometimes novel interpretations of constitutional rights are required. This is not something that is somehow aberrant but is inherent to constitutional rights. They are, by definition, broad norms of very general application and we entrust our courts to work out the precise details of them. The European Court of Human Rights recognised that the suicide criterion in the X case was something that could not necessarily have been anticipated in advance, and certainly, were the High Court and, on appeal, the Supreme Court to address the question of fatal foetal abnormality, there is a very strong chance that they would take the view that it is permissible under Article 40.3.3°. Again, I cannot tell the committee that with any great degree of certainty because, ultimately, it is something that would have to be determined. Certainly, as a practising lawyer, when one is asked questions in relation to matters such as this, often the advice one is giving is the best guess that one can come up with and, ultimately, it is determined by a court. However, a distinction can be drawn between the circumstance in the case of D *v.* Ireland, where what was being said to the woman was, "Well, you should have gone to the High Court in circumstances where there is no legislation and asked the High Court to grant you an injunction", and a circumstance where the Oireachtas has passed legislation allowing for a termination in those circumstances. The history of the relationship between the courts and the Oireachtas is that there is strong deference paid to decisions taken by the democratically elected Legislature of the State and if the State had passed legislation in that regard, it is certainly arguable that some degree of deference might be paid to it by the courts if the question were to come before them.

In relation to the question raised by Deputy Seamus Healy on the amendments, the Constitution has been amended 31 times since it was introduced in 1937. On five occasions, roughly the same question has been put to the people twice. Those five occasions are: introducing first past

the post; divorce; the Lisbon treaty, the Nice treaty; and removing the suicide criterion from the X case. Of those five, in three of them the answer changed as between the two referenda. In the other two, first past the post and removing the suicide criterion, the answer was the same on both occasions. The idea that we need a further referendum on this is to some extent, with the greatest of respect to those who are making the argument, something of a red herring. On questions, such as the Lisbon and Nice treaties, where people are being faced with a very detailed slate of issues - the Lisbon and Nice treaties are very lengthy and involve many different and divergent matters - the idea that parsing the reasons people voted a certain way perhaps has some merit in that circumstance, but I do not see that it has merit in circumstances where a fairly simple and straightforward question is put. Both the 1992 proposal and the 2002 proposal involved removing this criterion of suicide and both of them failed. One can say there are different pressure groups and different campaigning organisations took different views, and if they had said different things, different things would have happened, and that is to do a disservice to the electorate. The Irish people understood the questions they were being asked and gave the same answer on both occasions. To some extent, bringing that out again is a little bit of a red herring.

Finally, on Deputy Naughten's question in relation to ECHR decisions, there is a positive obligation under Article 8, and that is what has been found to be breached in the A, B and C *v*. Ireland case. However, I would also mention - the citation is in my submission - the decision in Tysiąc *v*. Poland of 2007 in which the European Court of Human rights looked at situations where there was a disagreement between a woman and her doctors on whether she qualified. The court stated that there were a number of matters that would have to be provided for: there had to be an objective mechanism for resolving that disagreement; the woman had to be heard, possibly through an oral hearing; and it had to be dealt with in a timely fashion. I do not wish to second-guess medical evidence that was given yesterday. The expert report has recommended two doctors at specialist level, and certainly that is what the Irish Council for Civil Liberties would recommend. It may be an obstetrician and a psychiatrist, maybe two obstetricians, etc. If a doctor felt he or she needed additional opinion - I note there was lengthy evidence on this yesterday - we would not be seeking to second-guess that. However, the criterion made very clear in the decision in Tysiąc *v*. Poland is that it must be timely. That is a particular concern. Where we are in a situation where somebody is seeking to have an abortion and there is a threat to her life, the clock is ticking, and whatever mechanism is put together by these Houses, it has to be capable of quick resolution. The concern is that if four, five or six different doctors have to give opinions, for example, particularly if one was away from one of the main maternity hospitals in Dublin, it may take some time. That would be the particular concern the ICCL would have about that system, and the decision in Tysiąc *v*. Poland is quite clear on that.

Senator Colm Burke: I thank the Irish Council for Civil Liberties for its presentation. Returning to the foetal abnormality issue, if provision was made for that in the legislation, is Dr. Brady satisfied that Ireland then would be within Article 3 of the convention? The definition of foetal abnormality given this morning was where there is no prospect that the foetus, once born, will survive even for one second.

The second issue relates to the floodgates. We heard yesterday from Professor Casey that if legislation is enacted within the confines of Article 40.3.3°, it will open the floodgates. If legislation is put in place and it must be within Article 40.3.3°, what is the ICCL's view as regards it opening the floodgates?

The third issue the ICCL raises relates to getting the President to refer the legislation to the

Supreme Court under Article 26 of the Constitution. As Dr. Brady will be aware, the Government has no influence on that. The Council of State may advise the President but the final decision is the President's. Is that an option at which the President should look as one of bringing a conclusion to this matter?

Deputy Robert Dowds: If we were to legislate to allow for abortion in cases of rape, what would require to be done?

Senator John Crown: The Irish Council for Civil Liberties should understand that I come from this with no particular ideological baggage. My own position is that an early embryo does not have the rights of a person and that many foetuses that are legally aborted in otherwise civilised countries, and in the United Kingdom, are, in fact, humans who are being deprived of their right to personhood, a process which, I believe, occurs some place during gestation as yet undefined due to the failings of my profession to ethically grasp the nettle which it should have grasped. At what stage does the Irish Council for Civil Liberties believe that a foetus acquires some rights which would be defended by the actions of the council?

Deputy Catherine Byrne: I thank Dr. Brady and Mr. Stephen O'Hare. We listened this morning to the legal end, and yesterday to the doctors. What struck me yesterday was the submission from the master of the Rotunda and the master of Holles Street, both of whom stated clearly and loudly that they should be allowed do their job. I have a short question on sections 58 and 59 of the Offences Against the Person Act 1861. If this was replaced or repealed, how would it influence a doctor's decision? Would it be a good idea? Would it make it easier? In asking that, I do not mean they would be allowed to play God. Would we not be debating some of the issues here, such as suicide and foetal abnormalities? I wish to know their broader feelings on the matter if that was replaced.

Chairman: I call Senator van Turnhout.

Senator Jillian van Turnhout: My question has been asked.

Deputy Mary Mitchell O'Connor: In the Irish Council for Civil Liberties' submission, paragraph 8, refers to "pregnancies involving a defined set of fatal foetal abnormalities". I ask Dr. Brady to clarify what the council means by a defined set of fatal foetal abnormalities.

Chairman: Finally, I call Deputy Naughten. I ask him to be brief because he contributed already.

Deputy Denis Naughten: On the fatal foetal abnormalities, the Irish Council for Civil Liberties made the case in its presentation that protection under Article 40.3.3° of the Constitution, based on the Roche case, does not extend to fatal foetal abnormalities. There is a difference between no prospect of being born, which would be a non-implanted embryo, and no prospect of life outside the womb. For example, a stillbirth would fall under one category and not under the other. In this regard, the legal judgment relates to an embryo, and a non-implanted embryo would not have life outside the womb because it has no opportunity of being born. Is there a difference? I seek clarification on that.

Deputy Ciara Conway: I am sorry I was not present in the Chamber for Dr. Brady's presentation, but I was listening and I have read it. There is something that he has not dealt with and on which I wonder whether I could get his position. It is something about which I have asked others who have appeared, that is, consent. Reverting back to the X case and that the age of the girl was 14, we heard this morning already from some of the legal experts on the Law

Reform Commission's document on medical consent. I understand that deals with those aged between 15 and 17 years. However, the girl in the X case was 14 years of age. I ask the ICCL's position on consent.

Dr. Alan D. P. Brady: In regard to fatal foetal abnormalities and whether we would stay within Article 3 if we provided for them, I am not sure that is necessarily the case, but it is a difficult question to answer because the European Convention on Human Rights is treated as a living document and is interpreted on an ongoing basis by the European Court of Human Rights. Its analysis to date would suggest that denying abortions in cases of lethal foetal abnormality may be a violation. Now that Article 3 has been found to be part of the analysis of abortion, an argument could be made that cases of rape or incest are also covered by it. However, I do not think it would be permissible under Article 40.3.3° at present to provide for abortion in cases of rape or incest. That would require a constitutional amendment.

Phrases such as "floodgates" are possibly unhelpful in these circumstances. I am aware this was discussed in some detail yesterday. The Constitution as interpreted by the Supreme Court states that where a doctor is satisfied there is a real and substantial risk to life and termination is required to avoid that risk, the woman is entitled to an abortion. That is the test and we are going to have to trust our doctors to apply it in practice. I understand that umbrage was taken yesterday at the suggestion that doctors would not be capable of applying that test. The floodgates argument is something of a red herring.

In regard to Senator Crown's point, I am not going to take a position on a specific date. As an organisation that bases its analysis on constitutional rights and legal expertise, the position taken in the Roche case was that the rights under Article 40.3.3° enter into effect at the point of implantation. However, it is important to distinguish between the right to life of the unborn under Article 40.3.3° and the constitutional rights of a born person under the rest of the Constitution. As the Constitution draws such a distinction, it is a right specific to an unborn child. I realise I may not have answered the Senator's specific question but that is as far as I propose to go because I want to keep to the rights provided in the Constitution.

In regard to sections 58 and 59, doctors in this situation are already making decisions about life and death and are faced with difficult choices. Sections 58 and 59 provide for an additional and very unpleasant factor, namely, the possibility of going to jail for life. Penal servitude was abolished in 1997 and the punishment would now be life imprisonment. It is not helpful for a doctor who is making this kind of life-and-death decision to have that weighing in the balance. The ICCL takes the view that the Act should be repealed, but it is not sufficient to repeal it on its own because Article 8 still requires us to establish an accessible mechanism for the constitutional right to be activated. Removing that would not suffice in itself because in circumstances in which, for example, opinions differ on the existence of a threat to life between the woman and her doctor or among doctors, some mechanism is required for resolving the difference quickly.

As regards criminalising abortion outside the setting of medical treatment, there is no difficulty with replacing sections 58 and 59 to deal with what are commonly called back-street abortions, that is, any abortion not performed by an obstetrician in a hospital. The State has a legitimate interest in ensuring such practices do not occur in order to protect the right to life of the woman.

On the question of defining foetal abnormalities raised by Deputy Mitchell O'Connor, the particular cases we discussed included Edwards syndrome and anencephaly, but we are open to the views of medical practitioners in particular. The core point is that if a doctor states that

a foetus will not survive outside the womb, this is a circumstance in which we believe there would be no difficulty in providing for a termination under Article 40.3.3°. As I am not a medical person I will not provide a specific list, but I hope I have gone some way towards answering the Deputy's question. Once again, we need to trust our medical professionals in this regard.

Deputy Naughten asked about implantation. The Roche case indicates that the right under Article 40.3.3° does not arise until implantation. There must also be the possibility of being born for that right to be engaged. The Roche case deals with a frozen embryo rather than abortion, but it is all we have in terms of guidance from the Supreme Court on the meaning of the right to life.

Deputy Denis Naughten: Does it not deal with the possibility rather than the probability of being born?

Dr. Alan D. P. Brady: That is a fair assessment, but there will possibly be some leeway. The obligation on the State is to vindicate it in so far as it is practicable. There may be leeway for the Oireachtas to take a decision on precisely how it wants to define it.

In regard to Deputy Conway's question, section 23 of the Non-Fatal Offences against the Person Act provides that a person over the age of 16 can consent to medical treatment regardless of the position of his or her parents. The recommendation of the Law Reform Commission, which has been commended, takes account of the fact that in most instances consent will be exercised through the parents. It will be only in rare or exceptional circumstances that an alternative view is taken, and the best interest of the child should govern. The X case is not a good example because the parents were in favour of their child having an abortion. A better example for that purpose is the C case, because the child was in care and the parents objected to the decision being made by the HSE. Substantial psychiatric evidence was heard in the District Court in that case. After examining the transcript of evidence, the High Court stated that it failed to see how any court could have taken a different view on the need to allow that child to have a termination. I do not want to second-guess the precise legislation to be introduced on foot of a Law Reform Commission report at this early juncture but our position is that the best interests of the child should be paramount. That has recently become the case in certain litigation under the Constitution in light of the recent amendment.

Senator Colm Burke: I ask Dr. Brady to address the issue of referral to the Supreme Court by the President.

Dr. Alan D. P. Brady: I certainly do not want to second-guess the President's discretion in that regard. I mentioned the issue because it may arise, but even if it does not arise it is my view that the legislation will find itself in the Supreme Court one way or another. The Oireachtas does not need to be afraid of that, however, because a dialogue could take place between the Legislature and the Supreme Court on the precise definition of our constitutional rights. That is a process in which the Oireachtas should engage.

Senator Ivana Bacik: I thank Dr. Brady for his clear presentation. A consensus is emerging from the medical and legal experts who testified yesterday and this morning on the need for regulation and legislation, in accordance with the decision taken by the Government before Christmas. The legislation must provide for an accessible and effective procedure.

In regard to the number of doctors required, chapter six of the expert group report, which sets out a clear blueprint for the types of issue to be addressed in legislation, appears to suggest

that two would be sufficient. In the case of suicide risk, one of these may be required to be a psychiatrist. Is it Dr. Brady's view that requiring more than two doctors as a matter of routine would render the procedure inaccessible or ineffective for women, particularly outside Dublin, and can that be addressed in some way by providing for decisions to be made in emergencies based on one opinion?

Dr. Brady has helpfully taken the issue of fatal foetal abnormality somewhat further. We heard previously about the D *v*. Ireland case in 2005, in which the Government argued it was tenable that a woman would have a right to an abortion in a case of foetal abnormality because there would be no right to life for the unborn that was capable of being protected. This was taken further in the Roche case, and Dr. Brady has helpfully cited the two Polish cases of 2011 and 2012 before the European Court of Human Rights, which appear to suggest that litigation in Ireland would be likely to succeed where a woman is denied an abortion in a case of foetal abnormality and forced to travel abroad. Does Dr. Brady think such litigation would succeed in terms of establishing a breach of Article 3, and should we legislate now to provide for abortion in such limited circumstances in the interest of preventing such litigation?

Senator Paul Bradford: I commend Mr. O'Hare for making it clear from the outset that he is here as part of what he calls a campaigning organisation. If all groups of witnesses who presented themselves were as frank and honest, it would add greatly to the honesty of the debate. I thank them for telling us where they are coming from politically and where they want the legislation to travel.

On the point of Mr. O'Hare's contribution-----

Chairman: It was Dr. Brady and not Mr. O'Hare.

Senator Paul Bradford: Sorry, it was Dr. Brady. At point 5 he argues that at an absolute bare minimum - he was saying that in a legal fashion - the Government must now legislate. I do not have his legal knowledge, but I ask him to assist us to clarify the position arising from the European court judgment. My understanding is that the obligation on the State is to provide clarification. He is saying that as a bare minimum, we must legislate. Is that his opinion and obviously his preference? What is the legal impact of the judgment? My understanding - I have heard it from many people - is that the State is obliged to provide legal clarification. Dr. Brady is stating that we are obliged to legislate. I appreciate it may be his preference, but I ask him to let me know the actual legal position.

Chairman: At this juncture, I acknowledge the presence in the Gallery of a former Member of the House and former Minister, Ms Gemma Hussey. She is very welcome.

Senator Jim Walsh: I echo what was already said. I compliment Dr. Brady on making an honourable and professional contribution to us. I am well aware of his advocacy on the pro-choice side and he acknowledged that, which is an honourable thing to do. I am aware from the accounts of the Irish Council for Civil Liberties that it has received between €7 million and €8 million from Chuck Feeney, which comes with conditionality as applies to other groups that have received such funding.

Chairman: That is not relevant to our hearings today.

Senator Jim Walsh: Would that other groups that have appeared before the committee yesterday and this morning had taken the same professional approach Dr. Brady has taken - unfortunately they did not.

Dr. Brady spoke about the C case. Would he agree that the European Court of Human Rights allows a relatively broad range of discretion to countries and certainly from a time perspective it does not rush countries into taking positions that would be against the wishes of that country? Yesterday we heard from the masters of the maternity hospitals that the C case could have been adequately dealt with under normal procedures within their hospitals. If people, who are in remission from cancer, present in a pregnant condition there is a mechanism for dealing with that. Could we not answer the concerns with regard to the European court in that regard given that it has actually acknowledged in its judgment that our constitutional position is in fact fine?

Chairman: I thank the Senator.

Senator Jim Walsh: Second, with regard to the X case, on which the Irish Council for Civil Liberties is strong-----

Chairman: I thank the Senator.

Senator Jim Walsh: -----yesterday it was outlined to us that 97% of diagnoses for predicting suicides are false positives therefore if we legislate for the X case we do so knowing that in 3% of the cases, the person would probably have gone on to commit suicide and therefore it complies with the spirit and the law of the X case.

Chairman: Senator-----

Senator Jim Walsh: Equally, we now know that in 97% of those cases we are going to abort healthy babies-----

Chairman: I thank the Senator.

Senator Jim Walsh: -----who are entitled to protection under our present constitutional position simply because suicide ideation-----

Chairman: The Senator is depriving others of the opportunity to speak.

Senator Jim Walsh: -----cannot be predicted with any degree of accuracy.

Chairman: The Senator's time is up. I call Senator Healy Eames. I want to allow the other members to speak if I can.

Senator Fidelma Healy Eames: I thank Dr. Brady for his presentation. Does the Irish Council for Civil Liberties hold a different position on foetal abnormality as opposed to fatal foetal abnormality? I ask that for a specific reason. Medics deal in probabilities and can also get it wrong. I am very conscious of a recent meeting with a mother who had been living in the UK. As I recall how she described it to me, when she was pregnant with twins she was told they were the next stage to conjoined twins and she was advised to have an abortion on the basis of foetal abnormality. She returned to Ireland and decided to carry those babies to full term. They are now happy healthy six-year olds running around in a school playground. That is how she described it to me.

A changed legislative context changes how we behave and how we think. It can also bring undue influence on a pregnant woman. How would Dr. Brady say that women's rights would be infringed if we had the legislative context he is proposing in this jurisdiction? How would he respond to the evidence of healing for women who carry to full term babies who may have fatal foetal abnormalities? What about the rights of those women in that context?

Deputy Peadar Tóibín: I welcome the two individuals who have appeared before the committee today. I was very impressed by their engagement with the committee. When people have different views it is important that they are treated with respect. Senator Crown touched on one of the key points in the debate, which is the issue of when personhood begins. In other words, when does a human being achieve human rights? Dr. Brady said there was a distinction between the unborn and the born with regard to those human rights. Many people in this State would have the view that one's right to life should not be dependent on whether one has a disability or a fatal illness. In Dr. Brady's view, what area of the Constitution allows for a different treatment of those specific issues as between unborn children and born children?

Senator Labhrás Ó Murchú: I also welcome the representatives of the Irish Council for Civil Liberties and thank them for the manner in which they have engaged with the committee in order to help to inform us and, by extension, perhaps the general public also. My question also comes back to the rights of the unborn. To what extent has the council considered this in its deliberations? Does it have a specific policy in regard to the unborn in the same way as it has done such an exceptionally good job in regard to expectant mothers? Does Dr. Brady believe that the envisaged legislation, as we understand it, is too limited and perhaps might even be inoperable?

I note that Mr. Mark Kelly of the Irish Council for Civil Liberties said last month that Ireland should seize this opportunity to have a thorough overhaul of the antediluvian laws relating to abortion. Is that also the position of the council? Is it also suggesting there should be a much more liberal abortion regime and that abortion should be there as of right? Is that also the position of the council? I remind people that representatives of the medical profession yesterday stated that they could not cite one specific case of a maternal death. Therefore to what extent do we have antediluvian laws or are we actually questioning the medical profession?

Dr. Alan D. P. Brady: I will go through those questions in order. Senator Bacik asked about the decision-making process. We would endorse the expert group's proposal requiring two doctors at the specialist level. I am conscious that medical evidence was given by doctors stating that in reaching their diagnosis they often require consultation with others. I do not believe we want to impede that, but having regard to the ECHR case law on this, the key criterion is "timely". I suspect a requirement of more than two doctors in legislation may cause a risk of delay, which would fall foul of Article 8 of the ECHR. However, inevitably doctors will consult with their colleagues and we would certainly make no effort to impede that.

Regarding whether Ireland might face a challenge over denying abortions in cases of fatal foetal abnormality, we believe it is very likely that such an action would succeed and in those circumstances I would absolutely endorse the position set out by Senator Bacik that rather than waiting until that happens we should be actively seeking to improve our Article 3 compliance by providing for abortion in cases of fatal foetal abnormality now.

In response to Senator Bradford, I should first clarify that while we are very clear that we are a campaigning organisation with a position on this, we have come here today as a body that also has very substantial expertise on human rights law. That is the capacity in which we are appearing today. I hope the analysis I have given to date has been very heavily focused on the constitutional rights law and human rights law of the ECHR rather than coming from a separate political campaign organisation. I thank members for their comments in that regard.

With regard to the requirement under Article 8, Ireland is under a positive obligation to provide an effective and accessible procedure. At the moment, there is legislation from 1861

which states it is a criminal offence to perform an abortion. The difficulty is that if that legislation was not there, perhaps it could be done by guidelines or by statutory instrument. The fact there is extant legislation which makes this a criminal offence means the only thing that can remove that sword of Damocles, as it was recently described by a senior doctor, is legislation to repeal and replace that. We would also be strongly in favour of the idea that effective and accessible mechanisms should be at the statutory level to ensure consistency. We would endorse the view of a statute plus a statutory instrument plus regulations because obstetric medicine is developing all the time. At the moment, our legislation is 152 years old and obstetric medicine in 1861 was entirely unrecognisable from what it is now, so provision for flexibility would be something worth endorsing.

Senator Walsh mentioned the C case - the cancer case. I made reference to the C case but I was making reference to an Irish High Court decision which is also rather unhelpfully referred to as the C case, which involved a 13 year old rape victim. In connection with that, the concern there was not what was medical practice in Ireland or about doctors making decisions; the concern was that the woman had a constitutional right and she needed to find out whether or not that constitutional right arose. The difficulty is not with the medical practice. The difficulty is with accessing the right. Again, people do not have to justify accessing rights - that is why they call them rights. The constitutional right was very clear there. The difficulty was she had no means by which to access that.

In regard to your concern around the diagnosis of-----

Senator Jim Walsh: A bit of clarity.

Dr. Alan D. P. Brady: I will finish my answer to the Senator's question, if he does not mind. In regard to his concern around the diagnosis of suicide, the Supreme Court rejected in the X case the position that had been taken in the High Court, which is a requirement of an immediate risk. The test that is set out is real and substantial risk to life, on the balance of probability, that can only be avoided by termination.

In circumstances like this, we are dealing with life and death situations that, to some extent, involve predicting future human behaviour. We are relying on the best judgment of our medical professionals and our view is that we should trust them. Within the rubric of that test, sometimes they will get it right and sometimes they may perhaps get it wrong. Again, however, the test that is set out does not require absolute certainty; it requires probability that there is a real and substantial risk to the life of the mother that can be avoided by termination. The constitutional position under the X case is very clear and I think we should trust our doctors in that regard.

With regard to Senator Healy Eames' concern around the decision on whether or not to terminate a pregnancy, upon having medical advice that the pregnancy is not viable, I believe it is very easy to look at situations in hindsight. This comes back to what I was saying about the fact we are trusting medical professionals to make difficult decisions about future events. The key point the Irish Council for Civil Liberties would make in that circumstance is that the decision should be made by the woman. This is certainly something that is emphasised in the expert group report in the principles set out in chapter 5 in regard to the test under the X case.

At the moment, under Irish law, the woman does not make the decision; the decision is made for her by an 1861 criminal statute. We have to trust women in that situation. Some women, I have no doubt, will carry the pregnancy to term and, perhaps, even in circumstances where it

is clear the child is not going to survive, some women may decide to go to term in any event. Some women may not. I do not think that is a decision that should be made for those women. I have real concerns under Article 3 that the Irish State is seeking to make the decision for women who are faced with a clear medical diagnosis that the pregnancy is not viable, and that there is a real risk we will be found to be in breach of Article 3.

With regard to Deputy Tóibín, as I have indicated already in regard to the question from Senator Crown, the Irish Constitution distinguishes between the right to life of the unborn and the right to life of born people. That is a distinction that derives from the Constitution itself and I not really want to go beyond that.

In regard to Senator Ó Murchú's question, again, we are here today to provide the benefit of our expertise in regard to constitutional rights and human rights. In our analysis, we have, of course, been cognisant of Article 40.3 throughout. We are of the view that in cases of rape and incest, in cases where there is a substantial threat to the life of the mother, ultimately, it may be necessary to provide an abortion, and we are in favour of that as a campaigning organisation. We are not saying at the moment that the European Convention on Human Rights requires that.

In regard to the European Convention on Human Rights' position, again, this is something that is considered in detail in cases like A, B and C *v*. Ireland and Tysiac *v*. Poland, whereby the court says there is an emerging consensus among the Council of Europe member states in regard to abortion. The vast majority of Council of Europe member states provide for relatively liberal abortion regimes, certainly relative to Ireland. At the moment, the position being taken by that court is that it falls within the margin of appreciation for a state to determine how it governs its abortion regulation itself. In circumstances where Ireland has this constitutional right, however, it has failed to meet the Article 8 obligation.

I do not believe we can discount the possibility that this consensus is changing over time, however, so we need to be live to the fact that, in terms of the development of ECHR case law, if we are looking at, say, a young rape victim who is not suicidal but who is asking for an abortion, in those circumstances, it is entirely feasible that, ultimately, the ECHR may determine it is a violation of Article 3 to deny it. That has not happened yet and I want to be very clear that I am not saying it has happened yet. However, in drafting legislation which will hopefully be in place for some considerable period of time, it is extremely valuable for this committee and for these Houses to have one eye to its human rights obligations internationally.

Chairman: I thank Dr. Brady and Mr. O'Hare for attending.

Sitting suspended at 1.45 p.m. and resumed at 2.45 p.m.

Professor William Binchy and Mrs. Justice Catherine McGuinness

Chairman: I remind members, witnesses, members of the media and those in the Visitors' Gallery to please ensure that mobile phones are switched off for the duration of this meeting, because they interfere with the broadcasting equipment even when they are in silent mode.

Everyone present is very welcome to this afternoon's hearing. This is the seventh session in the series of hearings that the committee will continue for the next two days to discuss the implementation of the Government decision following the recent publication of the expert group

report on the matters raised in A, B and C *v.* Ireland. I welcome Professor William Binchy and the Honourable Mrs. Justice Catherine McGuinness and I thank them for their presence this afternoon. Before commencing, I remind witnesses that they are protected by absolute privilege in respect of the evidence they give to the committee. However, if they are directed by the committee to cease giving evidence in regard to a particular matter and they continue to do so, they are thereafter entitled only to a qualified privilege in respect of their evidence. Witnesses are directed that only evidence connected with the subject matter of these proceedings is to be given. Witnesses are further asked to respect the parliamentary practice to the effect that where possible, they should not criticise or make charges against any person, persons or entity by name or in such a way as to make him, her or it identifiable.

Members of the committee are reminded of the long-standing parliamentary practice and rulings of the Chair to the effect that they should not comment on, criticise or make charges against a person outside the House or an official by name or in such a way as to make him or her identifiable.

I call on Professor Binchy to make his opening remarks. We have circulated his prepared remarks to members. Mrs. Justice McGuinness does not have prepared remarks to circulate.

Professor William Binchy: It is an honour and a privilege to be here today. I congratulate the Chairman and members of the committee on the wonderful job they have done in distilling the complex and challenging arguments on this very humane theme. I will not speak on the points that I presented to the committee. Members can read them in their own time. I want to open on a few points which I am sure will be raised in our discussion over the next two hours. The first point I wish to mention is the obvious one that, whatever our perspective, we are dealing with a human rights issue. I have come to this issue and to the committee as one who believes in the human rights of the unborn and it goes without saying that I also believe very much in the rights of those who have been born and very specifically the mother of an unborn child.

The evidence that the committee heard yesterday and the discussion that developed were interesting because they established, broadly but definitely, that what is going on in Irish hospitals is wonderful. The doctors treat the mother and the unborn child as two patients. They do their best for both and they make sure that mothers do not die. That is wonderful news. We did not hear that doctors are holding back or are nervous about intervening, or that the law is getting in the way of what they do. On the contrary, the doctors said they do exactly what they wish to do in order to bring about that result. The net effect of that is that some unborn children regrettably do die. They are not targeted but if one carries out necessary medical treatment on the mother, the unborn child, in some circumstances, very predictably, will die. The outcome is also that Ireland is one of the safest places in the world for a woman to be pregnant. All of that we know. I suggest that most people in Ireland want legal support for the actuality on the ground. In other words, the argument I am putting forward is not a theoretical, abstract, metaphysical one but one that points to the maternity hospitals that are near us here, one of which is a stone's throw away - we could walk there in five minutes. We are asking that what they do there every day and night should have the support of the law. It is a very practical proposal that the present existing medical practice should be given legal support.

The difficulty in this area is that unfortunately, 20 years ago, with the best will in the world but without having heard any expert evidence from a psychiatrist, the Supreme Court interpreted the amendment we had been dealing with for the past 30 years as involving a different legal and medical scenario, which would involve a change in existing medical practice. I am not in any sense denigrating the judges involved. What the Supreme Court articulated in that

decision would, if implemented in legislation, very definitely involve a change in legal practice. At the most obvious level it would involve obstetricians carrying out abortions in circumstances where the woman in question and the child she is carrying are physically entirely healthy but in circumstances of suicidal ideation. This would be a change to existing medical practice. Yesterday we heard from psychiatrists, who had nuanced differences in their views but who do not regard abortion as an appropriate treatment for suicidal ideation. The evidence they gave was striking. The proposal is to implement the X decision of the Supreme Court to change medical practice, remove the approach of doctors towards treating mothers and children as two patients and transforming it by, as it were, involving what are undoubtedly abortions, and specifically in the context of suicidal ideation involving abortions in circumstances where they do not take place at present.

We then get to the legal and political dimension to this problem, which is the European Court of Human Rights decision in A, B and C *v*. Ireland. This decision is under the European Convention on Human Rights and thus far, it is a point worth making, this convention has not been interpreted as providing for a right to liberal abortion. On the contrary, the European Court of Human Rights denied this particular proposition and what it stated in this case is that Ireland must clarify its law. In other words, a woman who wants to know what the situation is in her medical circumstances, what her entitlements are and how medical practice will operate in her context must have a clear line of understanding, and if she disagrees with what a particular doctor proposes she must be able to look to another doctor. This is absolutely reasonable. One could make the argument that what was involved in the A, B and C *v*. Ireland case was not so much a lack of clarity in the existing law, which is absolutely plain, or in the existing medical practice, which, as I stated, is carried out in Irish hospitals day and night, but rather a lack of understanding of what this issue was.

What the A, B and C *v*. Ireland case is concerned about is the question of clarity in our law. It does not state we must introduce the Supreme Court judgment into our law by legislation. I stress this point very strongly and I invite the committee, not necessarily to believe me on this as its members might regard me as a partisan advocate in this area rather than simply a cold legal analyst, but to seek the advice of the Attorney General on whether the A, B and C *v*. Ireland judgment requires Ireland to implement the existing framework of law as articulated in the X decision or, on the contrary, leaves Ireland to determine its own legal policy in the area towards the protection of the unborn. Undoubtedly it is the latter of these two propositions. However, we are being told by many sources, including official sources, that Ireland must, under the A, B and C *v*. Ireland decision, implement the European judgment by implementing the Supreme Court decision. This is not a correct statement of law.

We then move very much to the political domain and I ask committee members to forgive me for treading into their territory. Prior to the election, Fine Gael made it absolutely plain it would not legislate to implement the Supreme Court decision. The Government established an expert group with terms of reference. It is an act of Executive power by the Government to establish an expert group with specific terms of reference. Included in these was the crucial term of reference that the expert group would put forward options which would be reflected upon by the Legislature having regard to constitutional, legal, ethical and medical considerations in the formulation of policy in this area. In other words, the hands of the expert group were not tied in any way, nor should they have been, simply to implementing what the Supreme Court stated. The expert group was given a broad brief to bring in proposals in the form of options based on constitutional, legal, ethical and medical considerations.

There is something very strange in the report, which is a statement at its beginning that the only brief which the Minister for Health, Deputy Reilly, gave the expert group was to bring in options consistent with the existing constitutional framework, that is to say the constitutional framework as interpreted by the Supreme Court decision. We have a Minister, contrary to the terms of reference by which his Government established the group and the promise given by Fine Gael going into the election, apparently briefing the expert group to bring in options within the scope of the X decision. The Government then stated it must act on the report of the expert group, which found its terms were narrowed by the Minister, and here we are speaking about legislation.

In these circumstances, I sincerely request committee members to probe the Minister to explain why he briefed the committee in this way contrary to the terms of reference of the Government. It raises serious political issues, but it also raises serious legal issues in terms of going against a committee established in the exercise of Executive power of the Government. This is an important point. It is absolutely crucial because it has had the effect of the Government now stating the expert group has come forward with a limited range of options which essentially sets the tone for debate. It does not set the tone for debate. It is entirely consistent. The Irish people formulate policy in this area on questions of human rights. The Irish people are perfectly entitled in the exercise of their democratic power to come forward with such protection of the unborn as they wish.

If the committee wants to know the type of regime I would like, it is not a theoretical and metaphysical regime based on lofty academic theory but rather I invite committee members to go 500 yards down the road and ask those working at the maternity hospital there what they are doing, and go across the river and ask those at the Rotunda Hospital what they are doing. The committee should ask hospitals. It has already asked them and has been told by doctors what they are doing. We need legal protection for the existing medical situation dealing with pregnant women and their unborn children, and also to address the question of suicidal ideation in the humane way rather than by terminating the lives of unborn children. I am sure there will be plenty of questions.

Chairman: I now call on Mrs. Justice Catherine McGuinness. I thank her for coming before the committee because I know she had an accident recently. If she wishes, she may sit when she addresses the committee.

Mrs. Justice Catherine McGuinness: I thank the committee for its courtesy in inviting me here. I am not quite sure why exactly I was chosen but I am happy to try to be of as much assistance to the committee as I possibly can. As committee members can see, I suffered an accident and I have been relatively ill in recent weeks, so I have not had an opportunity to prepare an opening statement but I would like to stress several points at the beginning.

I am not representing the Judiciary in any way. I retired from the Judiciary in November 2006 and I also retired from the Law Reform Commission. As some committee members know well, I was recently heavily involved in other issues leading to 10 November 2012. At lunchtime, I was described on the radio as being someone who would hold more liberal views than Professor Binchy. I do not believe my views are relevant to this. I am here as a lawyer and I want to speak about the law. I am not trying to put forward my views or those of anybody else. I wish to make my position clear as far as the law is concerned.

Professor Binchy has made many criticisms of the X judgment. I reread the entire judgment last night and I have a different opinion of it, in that I feel the court made a genuine effort to

reach the huge human dilemma put before it rather than simply approaching the matter from a theoretical point of view. It made excellent arguments with regard to the way in which the Constitution should be interpreted in a traditional way following the previous judgments of Mr. Justice Walsh, who was recognised as our most prominent constitutional judge, as it were, and bringing together the 1983 amendment to the Constitution with Article 41, which refers to the important role of the mother in the home and her position as a woman in the constitutional family.

Neither Professor Binchy's views of the judgment nor mine are relevant to what the Oireachtas must do. As the Supreme Court reached its decision in the X case, that is an authoritative interpretation of the wording of the 1983 amendment. There have been other cases since, some of them not well known because they were held *in camera*, but this interpretation stands.

Two further referendums proposed changes in the formula to exclude self-destruction; they failed. Many will claim that people voted for this or that reason, but we do not know for what reasons they voted. The ballots were secret.

The X case judgment stands and is the law of this country. It is an outline and legislation is necessary for more detail. This is what was re-emphasised in the A, B and C *v*. Ireland case. The latter case did not go into the details. It emphasised that, although the law existed, it needed clarification, as Professor Binchy stated.

The Government now proposes to take this long-delayed step. I consider that it is correct in law in so doing. I also believe that it is right in using outline legislation and regulations to achieve this end. This is my belief because I saw what happened with divorce legislation, in that all of the detail of the reasons for divorce and so on have been inserted into the Constitution, thus making it impossible to reform them in any way without a referendum. The committee's approach is right.

Implied in this is the need to change the criminal law. We are working on an Act that was passed in 1861. Reading it, one realises how odd the phraseology is and the difficulty it presents, in that it is a sword of Damocles held over the medical profession.

I will not go into the arguments about the medical evidence presented to the committee. I am not a medical expert and am not qualified to comment on that evidence.

As most members know, I am a practising member of the Church of Ireland, which does not necessarily exact from its members unquestioning obedience to statements of the House of Bishops or the standing committee of the General Synod. However, I am largely in agreement with the position taken by the Church of Ireland in its statements on this subject. The committee will hear those statements in more detail tomorrow.

I have no desire to enter into aggressive debate on this matter. Professor Binchy will not be an aggressive debater in that sense either. However, I reflect the views of a large number of men and women who are holding the middle ground and do not believe that one or other position is absolutely right and we should all run along with it.

Professor Binchy has discussed the need for legal support for the actuality on the ground. I wish to examine that actuality rather than the esoteric conditions of the maternity hospitals alone. Professor Binchy's comments regarding those hospitals were right, but he has forgotten the thousands of Irish women who travel abroad for abortions. To say that we have no abortion in Ireland is simply not true. We have abortion - we just have it elsewhere. In the 1983 amend-

ment, we considered an ideal situation and decided that we did not want abortion on the one hand and, on the other, that we also wanted an escape route. As soon as the X case concluded, we voted for the right to travel and the right to information. Why did we do so if it was not the case that we wanted an escape route from the absolute?

The grounds of suicide have been introduced because we insist on saying that it must be a risk to life only, not a risk to health. If one allowed a 14 year old who had been sexually abused and raped an abortion for that reason rather than a threat to her life, the grounds of suicide would create difficulties for legislators because they insist on having the threat to her life as the only grounds. The Oireachtas is legally bound to stick with the X case. If legislators want to remove suicide as grounds, they must hold a referendum. Even Professor Binchy acknowledged this on today's "Morning Ireland", more or less. Under the Constitution, the Supreme Court must interpret the law. It has interpreted the law and the Oireachtas is stuck with it. Perhaps I am prejudiced as a past member of the court, but I believe that I am constitutionally correct.

Chairman: As Professor Binchy knows and as per page 8 of the expert group report, the only brief that the Minister gave the group was to deal with the requirements set by the judgment of the European Court of Human Rights and to advise the Government on how to give effect to existing constitutional provisions.

Professor William Binchy: I was referring to the latter element, namely, existing constitutional provisions.

Chairman: Committee members have 60 minutes in which to contribute. Deputy Kelleher is first. He has three minutes.

Deputy Billy Kelleher: I welcome the witnesses. In 1983, the people's decision related to the life of the mother as opposed to her health. Subsequently, the X case introduced the issue of suicide. In recent days, experts with differing opinions have presented to us. Some were pro-choice, some were pro-life and, as one could contest, some were in the middle ground. They discussed the matters facing us as legislators in trying to address this sensitive issue.

There are two key points. We want clarity and it is important that we raise the issue of suicidal ideation. Yesterday, psychiatrists and expert groups told us that this came in various forms, for example, suicidal ideation, suicidal intent and the finality of suicide itself. Equally, they pointed out that it was only in the event of a woman being suicidal because of her pregnancy that a termination could lawfully be conducted.

The masters of the various hospitals presented yesterday. In particular, Dr. Rhona Mahony stated that she wanted to be guaranteed that at no stage would she or her patients be threatened with jail or criminal convictions because she carried out her duty to protect mothers' lives. This profound statement resonated with many people.

However, Professor Binchy is correct, in that many Members on all sides of the Houses and people in broader society have strong opinions on the issue of suicide. Is he claiming that we do not need any new legislation and that the current structure is sufficient or is he asserting that a referendum is essential for addressing the issue of suicide? The deletion of the constitutional provision may be suitable in his view, but could the issue be addressed by legislation that exempted suicide?

Deputy Caoimhghín Ó Caoláin: I join with the Chairman in welcoming Professor Binchy and Mrs. Justice McGuinness. I would like, if possible, to first put some questions to Mrs.

Justice McGuinness.

Chairman: I propose to take questions from speakers in blocks of four.

Deputy Caoimhghín Ó Caoláin: Mindful of the fact that Mrs. Justice McGuinness is retired from practice, I would nevertheless like if she could advise us if it is her understanding that the existing law provides for interventions in the circumstance, as described by my colleague, where there is a risk to the life of the expectant woman as a result of suicide allied to her pregnancy. It is the view of some who have come before us, and is provided for in the guidelines of the Medical Council, that this is the current understanding. Can Mrs. Justice McGuinness shed any further light in terms of her understanding of it?

I would like to focus on two particular points which arise from Professor Binchy's submission and were alluded to by him in his oral presentation this afternoon. Professor Binchy states on page 2 of his submission that if the Oireachtas proceeds as it now proposes to do, then, as has been the case in most other countries, the law on abortion will change, with further extensions being demanded. Surely, as it is only the Irish people who could make such a change, the constitutional protections remain in place. No change that is in conflict with any article or subsections of the Constitution can occur without the expressed consent of the electorate in a referendum. Professor Binchy rightly reflected on the high standards in our maternity hospitals. Yesterday, we heard excellent contributions from the Master of the National Maternity Hospital, the Master of the Rotunda Hospital and Dr. Mary McCaffrey from Kerry General Hospital. Why does Professor Binchy suggest - it is a suggestion because it is not a bald statement - that the situation would change on the introduction of the proposed legislation? Those who appeared before us yesterday came across as exceptionally caring, compassionate and dedicated professionals. I would have every confidence that this is exactly how they would continue to perform.

Deputy Seamus Healy: I welcome the witnesses and thank them for their submissions. As I have done in respect of previous witnesses, I will commence by asking the witnesses to set out for us their understanding of the current legal situation in this area. Professor Binchy said that people set the policy. There have been three referendums on this issue, one in 1983 and two others in 1992 and 2002. I take it that is the people setting policy on this topic. As that is the case, and in view of the fact that the vast majority, if not all, the medical people, including the obstetricians, who have appeared before us have sought legal clarity in this area, what is Professor Binchy indicating or suggesting the Oireachtas should do on this issue?

Deputy Ciara Conway: I thank the witnesses for their presentations. I have a number of questions for them. Throughout his statement Professor Binchy referred to the Supreme Court decision as discredited. I would like to know on what basis he uses that type of language. As I understand it, the Supreme Court is the supreme court of the land and its decision is the law. I admit, as a legislator, that there has been a failure to legislate in this regard for the past 20 years. I would like to know why Professor Binchy refers to that Supreme Court decision as discredited. With all due respect, Professor Binchy is here as a constitutional expert rather than to give political or personal conjecture on this issue.

I have spoken previously about the issue of consent. The children's rights referendum was recently passed. The X case involved a 14 year old child. We have all heard of the plight of children in care. As legislators, we need to ensure the rights of children to appropriate medical treatment, if so required, are vindicated. I would welcome some feedback from the witnesses on that issue.

Chairman: I should point out that Professor Binchy is here also as an eminent academic.

Professor William Binchy: Perhaps I will respond by coalescing a couple of points rather than reiterating what I said previously.

Chairman: Five other speakers have also indicated.

Professor William Binchy: I will respond first to Deputy Conway's concern in regard to the political character of what I said. That is important because it links very strongly into the legal dimension. The Irish people and politicians need to understand that it is not necessary under the A, B and C judgment to implement the Supreme Court decision. That is a crucially important legal point. Sadly, the terms of reference of the expert group, which were broad, were narrowed by the Minister. This is crucially impacting on the legal solutions that are now before the committee. I would definitely regard that as a legal issue.

Questions were asked about how we proceed in this area and how the Supreme Court decision is discredited. It was discredited by a number of commentators who wrote about it. I would be hard pressed to name one commentator who unambiguously welcomed its analysis and said that it was right in every respect. Commentators whose viewpoints would not be the same as mine but who would be neutral on the issue of the whole question of abortion or on pro-choice expressed a critique of the Supreme Court adjudication process at the time. To give substance to that, I am happy to name one or two of them if the committee so desires. It is true also to say that the facts are fairly obvious. The Supreme Court in the 1992 decision heard no evidence from any psychiatrist. In circumstances where it is proposed to introduce into our law a ground for abortion based on suicidal ideation, without having heard the evidence of any psychiatrist, it is not unfair to describe that decision as worthy of criticism.

As regards how we proceed, reference was made to the children's referendum. With the exception of the important value of treating everybody fairly and equally, which is a distinctive legal value, law has no values within its system. Hearing both sides of a case is also a distinct legal process value, which is important. Beyond that, law is a scaffolding around which one constructs a building. The building constructed by society is based on the values which it wishes to see incorporated in law. Law does not dictate to society what that building should look like. The values infused into law are the product of social choice rather than of the legal system. That is a crucially important point. In that context, the children's referendum, which was passed a couple of months ago, states that the State recognises the natural and imprescriptible rights of all children. I would like to raise a point, which would not necessarily succeed before the existing Supreme Court but which raises a question of constitutional interpretation. Who are "all" children? Does this include only children who have been born after 14 weeks of gestation or does the constitutional referendum embrace what the language on the face of it appears to do, namely, respect and acknowledge the inalienable, inherent and natural rights of all children? The short answer that many lawyers will give is that the Supreme Court refers to the pro-life amendment which defines "children" in terms of the unborn rather than children. I recently reviewed the Supreme Court decision in the X case. There are 40 references to unborn children in that decision. The Supreme Court had no difficulty referring to unborn children as children, even while interpreting the amendment in question. That raises a question for constitutional interpretation now. The most recent time the Irish people have spoken was in the children's referendum, in which they have given respect to all children. Do I suspect that this argument would be successful in convincing the Supreme Court that this impacts on unborn children? Frankly, I would not make that confident prediction. However, it is interesting from a legal point of view. One must look at text and interpret it. The Supreme Court has that task at

all stages, and we have a new constitutional textual situation applying to all children at present.

It is fair to say that the Supreme Court has arrived at some surprising decisions, and not just the X decision. There is the manner of analysis that the Supreme Court came up with in the question dealing with a not entirely unrelated area, that is, embryos. That is not before the committee now and I will not bring the committee down that path in my remarks. However, it is important that the Supreme Court found that there was no constitutional protection whatsoever for embryos outside the womb. It is a surprising decision, and not necessarily consistent with the wider democratic views on this matter. When one is asked if one accepts the Supreme Court because it is the authoritative voice of interpretation, one of course accepts the legitimacy of the Supreme Court to interpret the Constitution. Mrs. Justice McGuinness was on the Supreme Court and my personal view of her is that she contributed wonderfully to Irish jurisprudence. However, I give her that compliment not just because she was a Supreme Court judge, but because of the quality of her analyses and judgments. We are perfectly free to respond to a Supreme Court decision and, in certain cases, to say that the Supreme Court got it wrong. That can lead, and in many cases does lead, to a constitutional change. There is nothing unusual about that. It is part of what a democracy is.

Mrs. Justice Catherine McGuinness: There are four questions and I will try to reply to them as quickly as possible. To be honest, I could not comment, as if it were handed down on tablets of stone, on the talk about a risk to life as a result of suicide related to her pregnancy as opposed to suicide unrelated to her pregnancy. That question has not been put before the courts and has not yet been decided. This is a difficulty people often have. They say the courts ought to have said this or that, but the courts decide precisely on what is put before them. The Supreme Court did not decide that one could have an abortion up to nine months. It was not asked to decide on a time limit. A time limit would be a matter for legislation. The people who attack the court about that are completely wrong. There can be things that are not decided. The committee will have heard from other lawyers who perhaps would be more prepared to guess about this, as it were, but I am not prepared to guess about it.

When one talks about looking at the current legal situation in this area, one must look at the entire legal position and the position set up by the various referenda. The referenda in 1992 and 2002 rejected a very clear attempt to get rid of the suicidal or self-destruction ground. It was specifically put to the people and, for whatever reason, they voted against it. If one says that the referendum is the ultimate democracy, that was the ultimate democracy. Again, the people voted for a right to travel and a right to information. We would be naive if we thought that was not a recognition that people go abroad for abortions.

When committee members are looking at the views of the Irish people on this issue, they should look to all the people who do not write to them and who do not carry out the robot telephone calls bothering them in their offices but who say: "I do not really want abortion but what if it was my 14 year old daughter who was raped?" If the human dilemma is put before them, they are out on the streets. They were out on the streets about the X case and about Savita. People are more subtle than simply saying: "This is our ideal and come hell or high water we will stick to it."

As regards the discredited decision, it is a matter of opinion whether one discredits it. With regard to the psychiatrists, it would have been preferable, perhaps, to have a psychiatrist but there was a very well known psychologist. In fact, another well known psychologist was at a meeting of the Children's Rights Alliance that I attended this morning. She said to me that she considered it a great pity that only psychiatrists and no psychologist appeared before the com-

mittee to give evidence, because psychologists have a great deal to say on this as well.

It is to be hoped that the situation of children in care will be taken into account in the more detailed guidelines and regulations to be made. This would be in accordance with the children's referendum. I agree with Professor Binchy about the importance of the children's referendum. "I would, wouldn't I?", as the saying goes. However, it is interesting that among the people who most strongly opposed the children's referendum were the same people who are extremely, and much more violently than Professor Binchy, opposed to any possible move on introducing abortion. That was a little strange. They are terribly in favour of the rights of the unborn but they are not so enthusiastic when it comes to the rights of the born.

I believe the committee must look at the middle ground and to the middle people of Ireland who do not keep going after the members all the time.

Chairman: Seven members wish to speak and there is half an hour remaining, so I ask members to be precise and concise.

Senator Colm Burke: The preface of the expert group report was written by Mr. Justice Seán Ryan. In it he stated that the European Court of Human Rights concluded that there is an existing constitutional right which was identified by the Supreme Court in the X case decision, that it was logical and rational that the right should be available and enforceable, that there should be a formal, accessible and transparent procedure and that Article 47 of the convention requires implementation of the Strasbourg judgment. Is Professor Binchy suggesting that Mr. Justice Ryan was wrong in saying that? He appears to say that in his submission. The second question also relates to Professor Binchy's submission in which he asks, if the Oireachtas proceeds on the basis that it is permissible intentionally to terminate the lives of unborn human beings, what principled barrier there is to extending the circumstances in which lives may be terminated. Is not Article 40.3.3° that protection in the sense that the lives of the unborn are written into the Constitution and protected? That same protection is not in the constitutions of other countries, so it is wrong to make a comparison with other countries as regards broadening the right.

Deputy Denis Naughten: I thank both speakers. They are very articulate and impressive. I have a couple of questions for Professor Binchy. He said in his presentation that he wishes to give legal protection to the existing medical practice, and he outlined the evidence given to the committee yesterday. The Medical Council made it quite clear in its presentation that suicidal ideation is already part of its guidelines. The perinatal psychiatrists who appeared before the committee yesterday believe they are competent to deal with any such case that might present, although no case has yet come before them. Is Professor Binchy saying that the existing situation with regard to suicidal ideation as practised under the Medical Council guidelines by the perinatal psychiatrists is adequate or that it should be changed?

My understanding of the Medical Council guidelines - Professor Binchy can correct me if I am wrong because I could not get an answer from the Medical Council yesterday - is that from the fifth edition to the current seventh edition the circumstances have been extended regarding what would be acceptable under the ethical guidelines for a termination to take place. Is that the case? There was a long discussion this morning on fatal foetal abnormalities. The case was made by witnesses this morning that under Article 40.3.3° of the Constitution, based on the Roche decision of the Supreme Court, that there is provision within the current legal interpretation to make provision for that without an amendment to the Constitution. What is the witnesses' view on that?

Deputy Robert Dowds: Mrs. Justice McGuinness remarked that the X case judgment arose directly as a result of the 1983 referendum, which restricted the judgment that could be made. What judgment might have been made if that constitutional change had not taken place?

To what extent is legislation needed to protect doctors in hospitals? In their contributions yesterday, the medics strongly emphasised that they need protection when it comes to treating women and they pointed out that they could not be absolutely sure in many cases if a woman's life was in danger but they must still make these decisions. Do we need to produce legislation to protect the medics, the women and the unborn children involved? What would we do without our old enemy across the water, England?

Senator Jillian van Turnhout: I have two questions that relate to the testimony we heard yesterday from the medical professionals, who clearly asked for legal clarity. Professor Fionnuala McAuliffe went further to say that without our proximity to Britain, the questions we would face here would be very different.

We have had considerable discussion on the threat to life, suicide ideation and intent. Do we need to distinguish in legislation if a threat to life is physical or mental? Must we make that distinction? Surely the substantive weight should be given to clinical determination involving practitioners with relevant specialism where appropriate, such as oncology and other areas, as well as psychology.

Deputy Conway asked about children and I would also raise the issue for vulnerable adults. Do we need to provide for them via parallel legislation or guidelines? How would we deal with that question? Several of the legal witnesses this morning mentioned the report of the Law Reform Commission on consent, and Mrs. Justice McGuinness was president of the LRC at the time. I would welcome any guidance she could offer on dealing with the issue of consent, both for children and vulnerable adults.

Deputy Mattie McGrath: I also welcome the guests and thank them for their contributions. Is the basic proposition not that there is a separation of powers in the Constitution that does not allow the Supreme Court to direct the Oireachtas to legislate on any topic in a given manner and, thus, the Oireachtas can consider new medical evidence, and current medical thinking and disagree with the X case judgment? Does Mrs. Justice McGuinness think that in a pregnancy with medical complications that there are two patients, considering the strong protection for the unborn child in Article 40.3.3° of the Constitution?

Senator John Crown: I am delighted to have the honour of sharing this Chamber today with two such distinguished people whose very sincerely beliefs I respect. I have a few questions for Professor Binchy. The five minute walk he referred to with respect to the National Maternity Hospital was taken yesterday in the opposite direction by people who came here and told us what they wanted at the end of that walk: legislation. I am glad Professor Binchy is in agreement because he also suggested, if I understand his opening statement correctly, that there is a need for legislation to clarify the issue with respect to life saving abortions where the mother's life is in danger. It appears from what he is saying that we should somehow specifically exclude suicidality from this. As a lawyer, could he put this in the context of the Supreme Court judgment and two referenda? I am sorry if we sound like a broken record but that is as high as it goes in civil authority in civil society, the ultimate court of appeal. Unless I seriously misunderstand Professor Binchy, and I mean him no disrespect when I say that perhaps I do, is he suggesting that we, as legislators, should ignore what has been said in our Constitution, confirmed in two referenda and interpreted by our Supreme Court? If so, who is the authority

we should be answering to, if it is not we, the people, *vox populi*? It seems to me the professor is suggesting a constitutional coup.

I would also ask that a portion of Professor Binchy's written submission not be included in the Official Report. It refers to speculation about the cause of death of someone whose death certificate has not yet been issued and whose inquest is still pending and which should not, because it contains suggestions about possible causality, be on the record of this committee.

Deputy Peter Fitzpatrick: I welcome the expert witnesses. The evidence I have heard in the past two days has confirmed the mother and the unborn child get the best of care in Ireland. Doctors are doing their best to protect the mother and the unborn child and the mother and child are seen as two patients. It was also confirmed yesterday that women who have abortions increase their risk of mental health problems such as depression and substance abuse. Women who have abortions are more likely to commit suicide, while motherhood protects against suicide. What are the opinions of the expert witnesses on those matters?

Deputy Regina Doherty: I thank both the expert witnesses for their informative submissions. The medics yesterday mentioned emergency situations where it is easy for them to react when there is a substantial risk to the life of a woman but in situations where the risk is not immediate, such as for cancer or cardiac patients, it is not clear and some of the medics suggested they are still sending those women to England, or those women are choosing to go to England, prior to their treatment. Can the witnesses offer any advice on how we could legally clear that up, allowing us to recognise that substantial does not necessarily mean immediate? It could be a substantial threat to the life of the woman in three or six months.

Deputy Mary Mitchell O'Connor: I thank the witnesses for their presentations. One of them said that the law has no values, that it is a scaffolding. Given what the masters of the hospitals said yesterday, is it right that we would repeal the 1861 law? Could we have a specific response that advises legislators that if we are going to put legislation in place, what should we put in that legislation to curb any floodgates? For me and the constituents contacting me, that is the main worry, that it will open the floodgates. Rather than rubbishing the idea and saying we should not do this, can we have some advice on what we should do?

Professor William Binchy: There was a number of questions so I hope the committee will forgive me if I elide a few of them.

There is a notion that doctors need some degree of security regarding the legal standpoint for what they do. The concern that doctors will be arrested, prosecuted and imprisoned, as mentioned yesterday, is not a real concern in the sense that the law operates on the basis of the bona fides of the doctor's approach in this area. Any lawyer - that is, non-campaigning lawyer - will tell a doctor who has a concern that there is no prospect of prosecution for a bona fide judgment in terms of compliance with the existing law, which has already been stated, with regard to life-threatening conditions, complying with the law, he or she would not be in danger of prosecution and imprisonment. That is an unreal concern.

Let me mention a piece of information that might be of interest to all people, which is that we live with judgments made against a legal principle that is not incorporated in any legislation that I am aware of, a very general principle of civil law - that is, the law of negligence. My first point is with regard to the need to take reasonable care. We must take reasonable care driving a car, we must take reasonable care minding children and, specifically, doctors must take reasonable care of their patients. Obviously they must take reasonable care of their patients during

pregnancy but also they must take reasonable care of their patients in all situations. That very general standard, which has no specificity other than the two words "reasonable care", is applied every day to every single medical decision that a doctor takes. If a doctor fails to exercise reasonable care, the doctor will be sued and a judgment will be made against him or her - and if the doctor is working for a hospital, against the hospital in question. Such lack of specificity, lack of legislation and lack of nailing everything down is part of medical practice not just in the area of obstetrics but throughout all disciplines. It is incidentally part of our lives in terms of every decision that we take which involves care for other people. One can say in regard to law that one can have a certain concern that one wants everything nailed down, but we are living in a legal environment, entirely outside the context of pregnancy, in which a generalised standard of taking reasonable care applies to doctors. One can read on the Internet all the judgments in which doctors got it wrong and did not take reasonable care and patients suffered or died as a result.

Second, let us reflect on the approaches that can be taken. What we need is clarity in the law, rather than legislation necessarily. In debates, perhaps not surprisingly, words become key words and carry messages. The word "legislation" at this stage equals the X case and the Supreme Court decision in the X case. One may say we must have legislation, which means we must have legislation that incorporates the X decision. That is a shorthand, as it were, for implementing the X case decision. However, that is not necessarily the case. One could have clarification, for example, through protocols and standards of practice with the greatest of specificity. One could have books of standards for clarification if one so desired. One could also have legislation clarifying existing medical practice in this area. It is not a question of having a fetish about legislation but rather a well-based, reasonable concern that the word "legislation" is actually a shorthand for implementation of the decision in the X case. That is a crucial point that must be made in that context.

It would be quite possible for the Oireachtas to introduce legislation if it so desires, or, as I suggest, to implement other methods such as protocols and standards of practice in this area which will cover the entire panoply of medical practice to treat a medical condition. One could do that over the next few months and produce some excellent material which would be useful and would allay any theoretical concerns that doctors might have. I stress again that the evidence the joint committee has received from doctors is that they are not actually holding back and failing to administer treatments to mothers out of concern for the law. They are going ahead and doing what they should do in the circumstances to save mothers' lives. The actuality on the ground is fine.

Deputy Robert Dowds: On a point of information, one of the doctors said they encouraged people to go outside the country for certain treatments.

Professor William Binchy: Undoubtedly - and it is fair to say I am referring to the general thrust of the evidence presented to the joint committee - the position mentioned by the Deputy does not represent by any means the majority view that the Deputy heard expressed yesterday.

Senator Crown said, in an interesting rhetorical way, that what we are talking about was a constitutional coup. I believe he put some effort into thinking of that word. With respect to Senator Crown, it is not a very fair word.

Senator John Crown: To put the record straight, it was 30 seconds of effort.

Chairman: Could we demur from engaging in insults? I wish to clarify for Senator Crown

that Professor Binchy's quotation was from an article in *The Irish Times*, which is covered in full in the presentation.

Senator John Crown: It has been submitted. The death certificate has not been issued in this case yet.

Chairman: I accept that. To be fair to Professor Binchy, he has referenced an article from *The Irish Times*.

Professor William Binchy: I ask Senator Crown to forgive me for concentrating on him. It is absolutely nothing personal, although I did sense a certain tinge in his presentation. Senator Crown mentioned that we have had two referendums already and asked how many more times we need to hear what the people have said. With respect, that is a serious reduction of the history of Irish constitutional referendums over the past 20 years, and I am surprised. I do not particularly like the term "pro-life", as opposed to "pro-choice", or any of these terms. The debate will not be won on the label, as members will appreciate. However, of those who describe themselves as pro-life, many - indeed, the majority - actually opposed the referendum that proposed the type of change the Senator mentioned in 1992. In 2002, a certain segment of that pro-life constituency also opposed the referendum in question. That is an important point, and if we are to give a nuanced history, it would be an injustice not to mention those facts. I also point out that one referendum took place 20 years ago and the other ten years ago, but we are now discussing a situation that has been precipitated by the European decision which asks for clarification in the law. It does not ask or insist - I say this again - that Ireland implement the decision in the X case. That is an absolutely crucial point.

Senator Colm Burke asked whether I am suggesting that the judge got it wrong or that, in his introduction to the expert group report, he said something that was not true. I am saying something different, which is that the judge, in the statement the Senator read out, gave the truth but it was a partial truth, because he quoted some of the decision and invited the reader to draw a conclusion. I think it is fair to say the reader would be likely to draw the conclusion that therefore we must implement the X case decision. That is the manner in which that quotation was used. If that is the effect of reading that particular text, it is a mistaken effect. I am simply pointing out the mistaken effect in question.

Finally, a point was made about principle. I made the argument, and I stand over it, that if we change the practice in Irish hospitals so that obstetricians are carrying out abortions on women who have no physical illness whatsoever and on unborn children who have no physical difficulty whatsoever on the basis of suicidal ideation, we very definitely will have changed the principles on which medical practice operates in this country. That shift in principle may not happen overnight but if, in those circumstances, it is possible to take an innocent unborn child's life, that constitutes a shift. As Mrs. Justice Catherine McGuinness mentioned - I hope I am not misrepresenting her by giving a summary of her summary - the X decision was packing in certain other grounds under the life ground because it was the only ground that was available in the circumstances. I hope I am not doing Mrs. Justice McGuinness an injustice in saying that. Already we can see the principle: if we can do it in one particular context, why not do it in other contexts? We are dealing with tragic human conditions. Any person of a humane disposition feels tremendously for the circumstances of the pregnant woman, and if one feels tremendously for a particular pregnant woman and agrees that one can take an innocent life in circumstances in which there is no medical condition, then I would respectfully say the principles have been changed and the culture will have been changed for the future.

Mrs. Justice Catherine McGuinness: There have been a number of questions and I will try to deal as quickly as I can with as many as I can. With regard to the Medical Council, I simply do not know whether the council extended its circumstances. I do not have the expertise to answer that question.

I was also asked what the judgment in the X case would have been if Article 40.3.3° had not been included in the Constitution arising from the 1983 referendum. Obviously, I do not know what it would have been. It may not have been all that different. It is obvious that I cannot answer that question.

It is important to answer the question about the protection of doctors and Deputy Mitchell O'Connor's question about repealing the 1861 Act. I think we should repeal it. There needs to be a protection of some kind to deal, for example, with the question of someone who is running an illegal abortion factory. Some area of the criminal law would have to deal with that. We do not need it to have been framed in 1861. We do not necessarily need penalties of the level provided for in the Act in question. I think doctors are worried about it. They probably know that the Director of Public Prosecutions is not watching every doctor and waiting to prosecute, but there is a worry in the back of their minds. It is possible that the kind of negligence regime mentioned by Professor Binchy, which already exists in civil cases, is a reasonable approach. I would go along with that to a large extent. At the same time, some level of criminal sanction for someone who deliberately engineers illegal abortions needs to be maintained as well. Perhaps that is what we would have, to a much greater extent, if we were not beside what one Deputy referred to as the "old enemy".

Senator van Turnhout also mentioned our proximity to the United Kingdom. Perhaps she was right when she suggested that we do not necessarily need to specify the nature of the threat to life. It is interesting that in his judgment in the X case, the Chief Justice specifically said that he felt:

> The Court must, amongst the matters to be so regarded, concern itself with the position of the mother within a family group, with persons on whom she is dependent, with .... persons who are dependent upon her and her interaction with other citizens and members of society .... Having regard to that conclusion, I am satisfied that the test proposed on behalf of the Attorney General that the life of the unborn could only be terminated if it were established that an inevitable or immediate risk to the life of the mother existed, for the avoidance of which a termination of the pregnancy was necessary, insufficiently vindicates the mother's right to life.

That is a general statement. It is not about suicide. I think it deals with the question of cancer and other serious illnesses that was raised here. If the risk to the life of the mother has to be immediate, it "insufficiently vindicates the mother's right to life". Many of these questions are discussed in the judgment, discredited and all as it may be.

Deputy Mattie McGrath asked about the separation of powers. Of course we have the separation of powers. While the Judiciary does not "direct the Oireachtas" on the legislation it should enact, it can point out that legislation is needed in a certain area. This does not just apply to the abortion area. It applies to lots of other areas as well. The courts have often said that clarity of legislation is required in a certain area having been asked to make decisions with regard to that area. The job of making such decisions should, under the separation of powers, be done by the Oireachtas rather than by the Judiciary. That is precisely why Mr. Justice McCarthy said in 1992 that the failure to legislate over the previous eight years was inexcusable.

Reference was made to the need for clarity and we were asked who we are answerable to. I think I have more or less dealt with the various referendums. If we are to have any more referendums, we should put various options before the public rather than simply asking the people whether they want X or Y. That is important. There are other views that could be reflected in the way the public votes.

I would like to respond to the floodgates question that was asked by Deputy Mitchell O'Connor. It is in the hands of members to act on the way things are at the moment. It does not look to me that the very limited kind of legislation that will be introduced if the judgment in the X case is followed could possibly open any floodgates. If members are worried that the inclusion of the suicide ground will lead to a move in that direction, they should try to ensure the Oireachtas sets up a strong and difficult gateway, which would need convincing medical evidence, in the outline legislation and the regulations thereunder. It is really up to the Oireachtas. Protocols and standards are all very fine, but they are not enough when it comes to the crunch in front of the courts if the law is needed. Professor Binchy said that everyone feels for the circumstances of the pregnant woman. Of course we all feel for the circumstances of the pregnant woman, but we also need to do something about them. I think I have covered the list of questions, by and large.

Chairman: I ask those who would like to ask supplementary questions to be brief.

Deputy Billy Kelleher: My questions are aimed primarily at Professor Binchy. The medical professionals and obstetricians said yesterday that they have sometimes had to refer women to England for terminations so that life-saving treatments could be continued upon their return. They were quite clear on that. They referred them to England because they were unsure of the position here. While there was no immediate risk to the life of the mother, in all probability there was a risk to the life of the mother at some stage in the future. I would like to get some clarity on that issue. Professor Binchy said that we could clarify the grounds on which a termination could take place without legislation. It might be possible to do so by means of protocols or other guidelines. Is Professor Binchy saying that when we as legislators are considering the issue of suicide, we can ignore two referendums and the X case interpretation and choose instead to legislate on medical grounds while excluding suicide? Would a referendum be required in such circumstances?

Deputy Caoimhghín Ó Caoláin: I would like to repeat some of the questions I asked Professor Binchy already. I thank Mrs. Justice McGuinness for her replies. Professor Binchy suggested that further extensions have followed when most other countries have changed their abortion laws. I made the point that the Irish people would surely be the bulwark in such circumstances. No constitutional change whatsoever is proposed. No such change can occur unless the Irish people give their express consent to it. I have to say that no evidence has come before these hearings in support of the suggestion that we will see a very different situation in the shape of a deterioration in the acknowledged high standards within our maternity units. There is nothing to suggest that we cannot look forward to being able to continue to trust in all circumstances those who are responsible for overseeing and directly providing services to pregnant women.

Chairman: I apologise for missing Deputy Catherine Byrne in the beginning.

Deputy Catherine Byrne: I will be brief. Mrs. Justice McGuinness started by saying she did not know why she was invited to address this forum. It is clear to everyone who is sitting here why the invitation was extended to her. She was invited because of her honesty and

wisdom. That is what the hearing is about. It is about us listening to the honesty and wisdom of everyone who has spoken in the last two days and who will speak tomorrow. Mrs. Justice McGuinness hit the nail on the head when she said it is not we who are sitting in this Chamber who are important, but the people who are looking on. We should not be concerned with legal and medical minds so much as with women who face the difficulty, when their child tells them she has been abused or raped, of where they go from there. Mrs. Justice McGuinness has hit the nail on the head.

Professor Binchy spoke about human rights. I am a mother and I believe in human rights. When someone comes to my office and says she has a difficulty because her child is pregnant and asks what she should do with her, I believe that child has human rights. I did not see that answered in anything Professor Binchy said.

Senator Colm Burke: We have discussed the issue of doctors seeking clarity. From my own contact with doctors in hospitals throughout the country, I can say they are looking for that clarity. They feel they are walking on eggshells at present with regard to the decisions they are taking. They are afraid, not only of criminal prosecution but of being reported to the Medical Council because someone's view might be that they are stepping out of line. That is why they are looking for clarity and it is important that clarity be given.

Deputy Denis Naughten: Could Professor Binchy comment on two questions I asked earlier about fatal foetal abnormalities and the regulation creep within the Medical Council ethical guidelines?

Professor William Binchy: I will take the last point about fatal abnormalities first. I think the view was expressed this morning that existing Irish law would be interpreted as providing for abortion in those circumstances. The short answer I would give is that I do not agree that is how the law would be interpreted. Nothing is certain in this world but that is my view. I take the point about the D case, but my view is that a speculative argument was made which succeeded in that case but that the law would not be so interpreted in Ireland.

I pick up on what Deputy Ó Caoláin said a second time, and it is a fair point. I thought I had answered the first time but perhaps I did not answer the question clearly enough. It is said, "Well, are we not locked into the X decision here and, therefore, there is no problem in terms of a rolling development of the law into further areas". The answer I gave, and which I would give again, is that the change of culture involved in transforming Irish medical practice to allow for the provision of abortion, for the actuality of abortion, for no requirement of due care to the child and for the requirement that suicidal ideation would be a ground for abortion, would have an effect. Let us not exaggerate these things. Not tomorrow or the next day but over a period of time that would have an effect on medical practice in this area such that the attitude towards abortion would be transformed. It is reasonable to project that the net effect would be that the actual interpretations of the grounds would change over time.

We have experience not only in England, although the experience in England is striking on this point, but in many countries that when a change is made in the law, for the best of reasons, to allow for the intentional destruction of the life of the unborn child, a cultural change is made and it is very difficult to stop. We heard of the tragic example mentioned by Deputy Catherine Byrne of a young girl who may have been raped or subject to sexual abuse. Should we not have an abortion in those circumstances? I believe Deputy Byrne was saying it would be appropriate to do so. Already, we would be discussing these matters and extensions for these hard cases. It would be very difficult to have a principled basis for opposing them. That is the point I am

making about the cultural change in this area. This is a human rights question. Sometimes human rights are difficult and the actual experience of protecting human rights is difficult.

The final point links into that very difficulty. If, as legislators and society, we are going to say unborn children are to be protected, making absolutely sure the lives of mothers during pregnancy are equally protected and that no mother dies, there is a solemn, real and tangible economic and social obligation on our society to provide the support for women who find themselves in crisis pregnancies, not just lip service but actual social and economic support. That is a practical question and not one, perhaps, to be addressed in detail today, but when we talk about changes in the law that is an area where legislators can introduce changes to provide the social and economic support for women who find pregnancy a challenge.

On the human rights issue, let us not change our culture whereby we recognise that to be a human being, at all stages from the very beginning to the very end of life, is to be part of an important, crucial, valuable enterprise, the human experience of life. Our culture is built on the notion that every person has equal dignity and entitlement to equal respect and equal rights. Let us not throw away that very important principle, for the best of reasons and motivations, but rather do what I mentioned in my first remarks to the committee and look down the road 500 yards, see what they are doing in those hospitals and give legal protection to that. Do not change the law so as to bring in an abortion regime.

Mrs. Justice Catherine McGuinness: I thank Deputy Catherine Byrne for her kind remarks. I appreciate her understanding feeling for the women in her constituency, which I know she has felt for many years.

I would not be quite as certain as Professor Binchy regarding foetal abnormality. I would not be certain that a doctor would be protected in the case of foetal abnormality. I do not think foetal abnormality would come under the X case judgment. It is highly doubtful that a doctor would be protected in such a situation. Doctors need to have that clarified, at least.

What doctors are looking at is extreme abnormality where the child is incapable of being born alive. They are not asking to be allowed to abort children who are suffering from Down's syndrome, for example. It is not about that. It is about cases where the child is already destined to die in the womb and that situation must be dealt with. It is highly doubtful what the law would be.

Professor Binchy said that if we are going to do this we will have no requirement of due care for the child. I do not believe legislators are going to approach the passing of legislation in such an uncaring manner. If legislators are approaching the issue as they suggest, by having an outline law and regulation, they have the opportunity to look at the question of due care for the child and balance that, as is required, against the life of the mother, and they should do so. That can be dealt with in the regulations.

When we look at the values of Irish society and whether we are going to change them - members of the committee will understand what I am saying - our values are considerably more subtle than one might think. What do we really do about life, as opposed to the ideal we set before us? When we come to the human dilemma what do we really do about it?

I plead with Members of the Oireachtas not to be too affected by a bullying approach either from the ultra liberal people who are looking for the introduction of abortion on demand or from the extremists who describe themselves as pro-life and who are trying to get them to

narrow the law. I ask them to think about where the middle ground is and what the majority of their constituents may feel.

Chairman: We now have a 20 minutes session for non-members of the committee to ask questions. Eleven non-members have indicated a wish to speak and ask a question. It will not be possible to hear all 11 in 20 minutes. I ask Deputies and Senators to be brief and to ask a question rather than make a speech.

Deputy Terence Flanagan: I thank both expert witnesses for attending. I ask the following question of both of them. Should a court evolve, in relation to its judgments, in light of developing scientific knowledge, even if that is the Supreme Court? The X case happened 20 years ago and there has been extensive evidence from psychiatrists consistent with the view that abortion may be associated with an increased risk of mental disorder. If that is the case and abortion is not a treatment for suicide, as we heard yesterday, why should the Oireachtas then make a law that ignores that reality? I have some questions for Mrs. Justice McGuinness. As the X case has no time limits, should the Government legislate for the direct abortion up to birth where the woman's life is at real and substantial risk, including the risk of suicide? If not at birth, at what point would she consider it is acceptable? Does she believe that in circumstances where psychiatric judgment shows a threat to the life of the mother, someone should be appointed to appeal and speak out on behalf of the unborn child?

Deputy Billy Timmins: I thank Professor Binchy and Mrs. Justice McGuinness. Would they agree that the difficulties, particularly with regard to suicide, have paralysed any positive development over the past 20 or 30 years? I refer to this morning's presentation by the representative of the Irish Council for Civil Liberties. He stated that irrespective of what proposal comes forward, it may end up in the Supreme Court. Based on the experience of the issue over the past 20 years, is there merit in splitting the decision? There is almost unanimous agreement that the 1861 Act should be repealed and replaced, and that legislation on the guidelines for medical procedures should be introduced. I suggest these issues should be dealt with. The issue of suicide and any related issues, as well as the need for a constitutional amendment, could then be considered separately. The Government has already decided to bring forward legislation. It is hoped that the legislation for dealing with the medical procedures could be enacted without an appeal to the Supreme Court, although the other issue will almost certainly end up in the Supreme Court. However, legislation on the medical guidelines would provide protection for the likes of the master of the National Maternity Hospital who is looking for protection in the practice of her profession.

Senator Fidelma Healy Eames: I thank the two witnesses for their wisdom. It is clear from Professor Binchy's response to the judgment of the European Court of Human Rights that he believes Irish law can be clarified without legislation. If so, how would we make this an adequately safe context for medical practitioners to carry out their practices and also for pregnant women in difficulty, bearing in mind that the medical professionals made very clear to us yesterday their real concerns about the lack of legal clarity? I refer in particular to Professor McAuliffe's admission yesterday that we send cases with medical complications to the UK in order to save the life of the woman because it is unsafe for doctors to carry out those procedures in this country. Professor McAuliffe is a member of the executive of the Institute of Obstetricians and Gynaecologists. She is a representative voice.

I have a question for Mrs. Justice McGuinness. In the A, B and C case, applicant C did not argue suicidal ideation and therefore her legal position is different to that of the woman in the X case. The European Court of Human Rights judgment made no reference to legislation. Why,

therefore, is Mrs. Justice McGuinness of the view that legislation is required on the basis of the X case arising out of the A, B and C decision?

Senator Paul Bradford: I welcome both witnesses. I ask Professor Binchy to expand in so far as possible on his view that the range of options being presented by the expert group is not as inclusive or as broad as it could be. I welcome Mrs. Justice McGuinness back to her previous place of employment. On two occasions she used that lovely phrase, "the human dilemma". It is very difficult for any of us to be dismissive of the issue of the human dilemma. Will she agree that in our attempt to genuinely respond to the human dilemma, we must also be cognisant of the fact that in countries such as the United States and Britain, there was an attempt at a genuine response to the human dilemma of abortion in the late 1960s and early 1970s which went horrifically wrong? Does this not teach us a lesson that we must proceed with extreme caution and care when responding to what she rightly calls the human dilemma? Sometimes the initial response to that human dilemma can result in a solution that is neither humane nor a solution.

Senator Jim Walsh: I compliment both contributors for their honesty. The session is enhanced by their differing perspectives, something we did not have at this morning's session. The notion was canvassed this morning that we could legislate for foetal abnormalities without the need for a referendum. I concede this is a very difficult area and a situation with which most of us have a great deal of sympathy. Mention was made of the failure to legislate. In fact, it was a decision made by successive Governments not to legislate for the very good reason that suicide was very problematic from the point of view of how it might be exploited.

Given the separation of powers between the Judiciary and the Oireachtas, is the Oireachtas obliged to legislate in respect of specific Supreme Court decisions?

Chairman: I advise Senator Walsh he has asked that question previously.

Senator Jim Walsh: Sorry, I did not realise that. In other words, could it be left to case law? I ask for the views of the witnesses. Deputy Timmins put his finger on it. I do not think there will be a great deal of difficulty in Members and the general public subscribing to dealing with the real medical issues but suicide is definitely going to be a major controversial issue because of the experience in other countries where it has opened the floodgates. As Dr. Anthony Clare said many years ago, it is used as a wedge in many restrictive areas to bring in abortion. Should the laws we enact be just? Is there an obligation on us as legislators to be just? I ask this question purely in the context that we now know from evidence that suicide cannot be predicted with any great degree of accuracy. Therefore, given the constitutional equal right to life, we know that that law will create an injustice for many vulnerable unborn children.

Chairman: I remind members to be brief, please, in order to be fair to their colleagues.

Deputy Aodhán Ó Ríordáin: I thank both witnesses for their presentations. I have been an admirer of Mrs. Justice McGuinness for a long time. I particularly admire Professor Binchy's stance in the 2004 citizenship referendum. Article 34.4.6° of the Constitution states, "The decision of the Supreme Court shall in all cases be final and conclusive." How does this relate to the legal certainty of how we operate here? Is it not the fact that abortion is legal in this country under the ground of the risk to the mother in terms of her mental health and suicide? I ask the witnesses to comment on the draft Bill submitted by a previous witness, Dr. Simon Mills, on the point of lethal foetal abnormality. He contends that a foetus without any prospect of life was not protected under the Constitution.

Senator Paschal Mooney: I echo all the justified compliments paid to both witnesses. I thank them for the clarity they have provided in response to our questions. I have a question for Mrs. Justice McGuinness. It is not unconstitutional for the Supreme Court to revisit its own decisions. It has happened infrequently. I ask Mrs. Justice McGuinness to outline under what circumstances the Supreme Court would revisit the X case, in light of developments in the areas of psychiatry and psychology. Professor Binchy is a proponent of a referendum. At this remove and in the absence of any specific legislation, can he outline what question would be put to the people, considering that two questions of a similar nature have been asked over a ten-year period? I have no difficulty with recurring referenda. It happens regularly in other countries which have that option. One assumes the Government will propose legislation. Should the vote be on the proposed legislation or on a different question? In other words, what would be the question to be put to the people?

Senator Katherine Zappone: I thank the esteemed lawyers. It is a great and necessary exchange between them and us as lawmakers. Do we have an obligation to implement the recommendations and judgments of the European Court of Human Rights as outlined in Article 46 of the European Convention on Human Rights? What was the judgment? Professor Binchy made the point that the judgment of the European Court of Human Rights was that we have not legislated for Article 40.3.3°. However, my reading of the judgment - perhaps Mrs. Justice McGuinness will comment on this - is that we have not legislated for that article as interpreted by the Supreme Court in the X case. In other words, the issue is that we have not legislated for the X judgment, as distinct from Professor Binchy's argument that the judgment was seeking clarification rather than legislative implementation. I refer to paragraphs 254 and 264 of the judgment, which include a couple of references to the lack of legislative implementation.

Deputy Bernard J. Durkan: I apologise for not being in the Chamber for the entirety of the discussion, but I was following proceedings on screen. I compliment the legal experts on the clarity with which they have addressed the issues. What is the position when there is a legal challenge to a particular practice, either administrative or in medicine, for example, which has become, in the absence of legislation, customary practice over a period of time? Is the lack of legislation a weakness in such cases and, by the same token, is the existence of legislation a strength? I am asking this apropos of the question raised by doctors.

Deputy Peadar Tóibín: I too am honoured to have witnessed the fascinating exchange here today. The Supreme Court decision in the X case stated that there must be a real and substantial threat to the mother's life before an abortion would be permitted. Is there any quantification of what that threat comprises? We heard evidence yesterday, for instance, that out of 100 predicted suicides, typically three will actually occur. Would that level of prediction equate to a real and substantial threat in the circumstances we are discussing?

Professor Binchy mentioned that there may be gaps in the Supreme Court judgment. Does this make it more likely that if the issue comes before the court again in the future, whatever legislation is introduced might be deemed unconstitutional? How were the gaps in the ruling allowed to happen? Was it the case that the Attorney General did not request the necessary psychiatric evidence at the time?

Deputy Michael Creed: I compliment both witnesses on their thoughtful presentations. Professor Binchy referred repeatedly to a 500-yard walk or a five-minute walk that would allow us to witness current medical practice, which is informed by the Irish Medical Council guidelines. As I understand those guidelines, there is a clear and bald reference therein to suicide as grounds for a termination as a consequence of the ruling in the X case. Is Professor Binchy

therefore implicitly suggesting that the *status quo* that is informed by those guidelines should be left to operate without any direction from the Legislature as to how medical practitioners should interpret that bald provision in the guidelines?

Will our two eminent guests give us the benefit of their reflections on the State papers recently released under the 30-year rule which include the advice from successive Attorneys General to the Governments of the early 1980s in respect of the referendum which inserted Article 40.3.3° into the Constitution? I refer in particular to the predictions that apparently were made at the time and which subsequently came to pass as to the consequences of that amendment.

Chairman: I apologise to the witnesses for the avalanche of questions, but it is important that members who have been in the Chamber all day be allowed to contribute. I invite Professor Binchy to respond.

Professor William Binchy: Thank you, Chairman. It has been a long session and I will be brief. On the last point from Deputy Michael Creed, when I read in *The Irish Times* on 1 or 2 January about the State papers from 30 years ago I made a resolution to read them myself. They sound fascinating. If I am reading the newspaper reports correctly, the State papers seem to say that Mr. Sutherland, whose public response to the Fianna Fáil proposal in early 1983 is in the public domain, was opposed to the whole idea of a constitutional referendum on several grounds before Fianna Fáil brought forward its actual wording. The reasons he gave against the very idea of a constitutional referendum bore a striking resemblance to his critique of what emerged under the Fianna Fáil wording in 1983. This is a novelty to me - certainly, as far as I remember, not one word was said in 1981 or 1982 to show that Mr. Sutherland was opposed in principle to the very idea of a referendum. I hope my memory is not fallible on that. I intend to read the material when the dust settles on these Oireachtas hearings.

Chairman: It might be more appropriate for Professor Binchy to return to the modern age now.

Professor William Binchy: Yes, let us go the modern age and indeed to the future. Several speakers asked whether we are bound by the constitutional provision that says that a Supreme Court judgment is final. Senator Katherine Zappone spoke about the references in the judgment of the European Court of Human Rights in A, B and C *v*. Ireland to the need to implement in accordance with the existing constitutional provisions. Forgive me, but I think I have dealt with these points before. I will, however, make them again. The Supreme Court judgment in the X case, like any Supreme Court judgment, is of course the law of the land. There is no dispute about that; we are not challenging the legitimacy of the decision at a fundamental constitutional level. There are no constitutional coups here, to use the expression of Senator John Crown. That does not deprive us, however, as part of the democratic process, from critiquing a decision. I will return to history for a moment, if I may, because it is enlightening. There was a case, some 35 years ago, in which the Supreme Court interpreted the Adoption Act in a particular way. We had a referendum and everything was fine thereafter. It is absolutely reasonable for the democracy to respond to a Supreme Court decision. I beg members not to proceed on the basis that they have to implement the Supreme Court decision. They emphatically do not. With respect to Senator Zappone, who has read the judgment from the European Court of Human Rights, nor does that court require us to implement the X decision. On the contrary, it requires us to have clarity in our law. Moreover, it specifically says that it is up to states to develop their law in this particular area.

There is no right under the convention to abortion and we are perfectly free in this area to

bring in a legal system which, going back to what I mentioned again and again, corresponds to the existing practice in medical hospitals. Our side of the argument is emphatically empirical, emphatically on the basis of what is happening already in Irish hospitals. Those who are proposing that the law be changed are proposing a change of culture in this area. That change of culture will involve the intentional taking or termination of the life of an innocent human being. It is a radical change in Irish society. Since independence, no such proposal has come before the Oireachtas; nor, indeed, has it come from the wider community that there should be such a proposal. I strongly repeat that what we are looking for here is something emphatically simple to provide, namely, that existing medical practice be given legal support and there be no change to the system and culture in this country.

Chairman: Thank you, Professor Binchy. I now invite Mrs. Justice McGuinness to respond.

Mrs. Justice Catherine McGuinness: A great many questions were asked, some of which are relevant to what I can say and others which I simply cannot answer. Looking at the evolution of Supreme Court judgments, which a number of speakers asked about, no court will suddenly start issuing statements about this and that. Courts deal with cases that come before them. Therefore, it would require a further case to come before the court before it could be expected to change its point of view. On the other hand, it does very occasionally happen that the Supreme Court changes its approach. In general, however, it follows a rule known as *stare decisis*, which means that what is decided stays decided in the vast majority of cases, because it would involve introducing a huge uncertainty into the law if it were to change daily from time to time. I expect even Professor Binchy would accept that. One cannot really expect the whole thing to change ever so conveniently in such a way as to make it easier for legislators. One cannot expect the Supreme Court suddenly to up and say that it knows this is creating a problem and it will issue a statement about it. That is not about to happen. I come back to the fact, which is accepted, that what the Supreme Court decides is the law. Unfortunately for the committee, that included suicide ideation or the ground of suicide. This can of course be changed if a referendum takes place. I think a referendum would be needed.

Senator Walsh asked if the Oireachtas is obliged to legislate and inquired as to whether it should be left to case law. That is precisely what the Oireachtas has been doing for the past 20 years. Again and again the courts have asked it to legislate because they would much prefer for the law to be set down - as it should be under the separation of powers - by the Legislature and the Executive. The Legislative, as well as the Executive, should play an important part in it. However, that to which I refer has not happened and, therefore, it has been left to the courts to make these decisions.

As the Senator said, one would have to be concerned with regard to what is termed "opening the floodgates". Is this a practical reality, however, given the medical culture to which Professor Binchy refers and also the culture of the country? If the Senator is afraid that this is going to open the floodgates, I think he is afraid that Irish people are - for themselves - going to open the floodgates. We ought to have a bit more trust in them and in Irish doctors rather than suggesting that the moment this is introduced into law, everyone will be galloping to do something that they do not do already. Again, I return to the problem that we do it already to a certain extent. However, compared to other countries such as England, our rate of abortion is low and I think it would stay that way. I hate the way that we always compare ourselves to England. Why do we not consider the position in some of the continental countries which have other laws? Why are we stuck with this sort of symbiotic relationship with England in respect of divorce, abor-

tion and everything else? I suggest that we should consider what happens in other countries.

On a practice that is there over time, if it is an illegal practice it will remain as such. If it is challenged in court, it will be in difficulty. I do not believe one can just establish law by continually doing something. On the other hand, if it has been established practice, it can be argued that the law should be changed in order to allow it to be there.

Deputy Tóibín referred to the quantification of a real and substantial threat. That is not in the judgment and I find it difficult to see how it could be done by a judgment. It could perhaps be done by detailed regulations. It is very interesting to consider the opinions of the Attorneys General at the time. Perhaps the Government of the day should have paid a bit more attention to the legal advice it received when introducing the 1983 amendment.

Chairman: I thank our guests. We have reached the end of the session. Do Professor Binchy or Mrs. Justice McGuinness wish to make any closing remarks or are they prepared to leave matters as they stand?

Professor William Binchy: I wonder whether I should inflict anything more on the committee. I think I will not do so and will leave the matter at that point.

Chairman: I thank Professor Binchy.

Mrs. Justice Catherine McGuinness: I think the same thing. The committee has heard quite enough from us. I thank members for the courtesy they displayed when posing questions. No members attacked us or said anything cruel, even when it was clear that they disagreed with us.

Chairman: I thank Professor Binchy and Mrs. Justice McGuinness for coming before the committee, for imparting their wisdom to us and for their patience. I also thank members and non-members of the committee for their forbearance.

I remind everyone that we will recommence proceedings at 9.30 a.m. tomorrow and that witnesses from six churches and one non-church will be present for the opening session. I will, therefore, be asking members to be brief in the context of the questions they wish to pose and the comments they wish to make.

The joint committee adjourned at 4.35 p.m. until 9.30 a.m. on Thursday, 10 January 2013.