DÁIL ÉIREANN

AN COMHCHOISTE UM AN OCHTÚ LEASÚ AR AN MBUNREACHT

JOINT COMMITTEE ON THE EIGHTH AMENDMENT OF THE CONSTITUTION

Dé Céadaoin, 27 Meán Fómhair 2017

Wednesday, 27 September 2017

Tháinig an Comhchoiste le chéile ag 1.30 p.m.

The Joint Committee met at 1.30 p.m.

Comhaltaí a bhí i láthair / Members present:

Teachtaí Dála / Deputies	Seanadóirí / Senators
James Browne,	Jerry Buttimer,
Ruth Coppinger,	Paul Gavan,
Clare Daly,	Rónán Mullen,
Bernard J. Durkan,	Ned O'Sullivan,
Peter Fitzpatrick,	Lynn Ruane.
Billy Kelleher,	
Mattie McGrath,	
Catherine Murphy,	
Kate O'Connell,	
Louise O'Reilly,	
Jan O'Sullivan,	
Anne Rabbitte.	

Seanadóir / Senator Catherine Noone sa Chathaoir / in the Chair.

Business of Joint Committee

Chairman: Apologies have been received from Deputies Lisa Chambers, Hildegarde Naughton and Jonathan O'Brien.

The joint committee went into private session at 1.31 p.m. and resumed in public session at 2.15 p.m.

Eighth Amendment of the Constitution: Constitutional Issues Arising from the Citizens Assembly Recommendations

Chairman: I welcome members once again and also viewers who may be watching our proceedings on Oireachtas TV. This is our second public session of the Joint Committee on the Eighth Amendment of the Constitution. Under the terms of reference of the joint committee, it is obliged to report to the Dáil and the Seanad within three months of its first public meeting.

Before I introduce our witnesses today, at the request of the broadcasting and recording services, members and visitors in the Public Gallery are requested to ensure that for the duration of the meeting their mobile phones are turned off completely or switched to airplane mode.

I now extend, on behalf of the committee, a warm welcome to Dr. David Kenny, Assistant Professor of Law, Trinity College Dublin; Professor Fiona de Londras, chair of the Global Legal Studies and Deputy Head of School, Birmingham Law School; and Ms Mary O'Toole, senior counsel. All three witnesses are here to assist the committee in its consideration of the constitutional implications of the Citizens' Assembly's recommendation arising from ballots and we would be grateful for as much evidence and information, without moving into the realm of opinion, in so far as is possible. The witnesses are all very welcome to this afternoon's meeting.

Before we commence formal proceedings I must deal with some matters of housekeeping. I wish to advise the witnesses that by virtue of section 17(2)(*l*) of the Defamation Act 2009, witnesses are protected by absolute privilege in respect of the evidence they are to give to the joint committee. If, however, they are directed by it to cease giving evidence on a particular matter and continue to so do, they are entitled thereafter only to 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 any person 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 ruling of the Chair to the effect that they should not comment on, criticise or make charges against a person outside the Houses or an official, either by name or in such a way as to make him or her identifiable. I invite Dr. David Kenny to make his presentation.

Dr. David Kenny: I thank the Chairman. I have been asked to address the committee on enumerated and unenumerated rights in the Constitution as they relate to the committee's work, and on the effect of either repealing or replacing Article 40.3.3°. I will address each of these matters in turn.

The Irish Constitution protects a variety of personal rights. Some are expressly set out or enumerated in the Constitution, mainly in Articles 40 to 44, including the right to life, good name, freedom of expression, etc. The courts have also recognised certain unenumerated or implied rights, which are protected, notwithstanding that they are not specifically listed in the Constitution, for example, the right to bodily integrity, the right to travel, and the right to marital privacy. Though not listed specifically in the text, if recognised by the courts as being implied by the provisions and values of the Constitution, they are protected just as if they were enumerated in the text.

The Constitution empowers judges of the superior courts to judicially review laws, and invalidate them if they violate the provisions of the Constitution, which includes violation of express or unenumerated constitutional rights. It is permissible for laws to restrict rights, but this must be done in an proportionate manner, that is, rights should not be restricted more than necessary to achieve some other important objective and, overall, the harm done by the restriction should not outweigh the benefit. The courts also defer to some degree to the Legislature's determination about the need to restrict rights, and offer particular deference in instances where the Legislature is balancing two rights against one another, but courts can and do invalidate laws when it is shown that the Legislature restricted rights irrationally or disproportionately.

Before the insertion of Article 40.3.3°, the Constitution did not contain any express reference to the right to life of the unborn or to the regulation of abortion. The courts also never handed down judgments that directly addressed the constitutionality of any particular legal regulation of abortion. However, the courts did recognise several rights that might have had some significance for the constitutionality of abortion laws, and made some comments to this effect. The courts suggested on several occasions in the 1970s and 1980s that there was an unenumerated right to life of the unborn. In 1995, reflecting on these comments, the Supreme Court suggested that the courts, before the insertion of Article 40.3.3°, had recognised the right to life of the unborn as an unenumerated personal right. On the other hand, the courts had also recognised a right to bodily integrity, and a right to marital privacy that had encompassed a right to have some access to contraception. This might have grounded an argument that restrictive abortion laws could have been unconstitutional as a violation of these rights. However, the courts had given significant indications in the 1970s and 1980s that this was not their view, and that the implied rights recognised by the courts could not be used to challenge a prohibition on abortion.

Although we cannot know for sure – since no case was ever brought to test this – these comments suggest that, before 1983, a liberalised abortion regime, had it been enacted, might have been deemed unconstitutional as a violation of the unenumerated rights of the unborn child, whereas a strict limitation on abortion would probably not have been unconstitutional by reason of the privacy or autonomy rights of women. With the insertion of Article 40.3.3° in 1983, the right to life of the unborn was given express textual recognition, and given equal weight to that of the mother, and the consequences of this are well known.

I have been asked to comment on the difference between repealing and replacing Article 40.3.3°, and what the consequence might be for relevant constitutional rights. I am taking replacement to mean, in this context, the replacement suggested by the Citizens' Assembly, that is, replacing Article 40.3.3° with a provision empowering the Oireachtas to have some exclusive competence in this area. I am happy to discuss other versions of replacement if the committee wishes. The question is what rights might exist if Article 40.3.3° was simply removed, and what might this mean for laws passed in this area and in light of this, should something be

inserted in the Constitution to replace the Article.

First, it is crucial to stress that neither of these proposed changes to the Constitution would have an immediate or automatic effect on the legal position on abortion. The legal position will remain whatever is contained in law – currently the Protection of Life During Pregnancy Act 2013 – unless and until the law is changed by the Legislature or is invalidated by the courts. However, as will be discussed, if the Judiciary held a legislative solution was not compatible with the Constitution as amended, this could have the effect of altering the legal position.

The first option is simply to remove the text of Article 40.3.3° and not put anything in its place. This seems straightforward, because if the Constitution says nothing explicit, it might be inferred that it will have no role to play, and we might assume that the matter will be regulated by law. However, it is not so simple. This outcome is certainly one possible consequence of repealing the Article 40.3.3° without replacement, but there are other possible consequences as well.

The other possibility is that the repeal of Article 40.3.3° without replacement does not remove the issue from the bailiwick of constitutional rights, but rather leaves it to the courts to determine how constitutional rights should affect the regulation of abortion. The courts could hold that the right to life of the unborn continues to enjoy constitutional protection as an unenumerated right, as it did before the advent of Article 40.3.3°, or as a facet of the rights of children under Article 42A or the right to life generally under Article 40.3. On the other hand, the courts could hold that the right of autonomy, bodily integrity or privacy of women extends to the question of abortion; or they could hold that both of these things are so.

All of this turns on complex questions of constitutional interpretation of the meaning of repeal. In the event of repeal, it would be open for a well-situated person to challenge the law on abortion as a violation of one of these sets of rights and ask the courts to find the law unconstitutional, and it is very hard to say with certainty what the courts would do. There are several possibilities. First, the courts could hold that one or both of these sets of rights exist, but decide that they will defer to the legislative determination of how to balance these rights. Second, the courts could hold that neither set of rights exists, and the Constitution does not speak to the question of abortion. Third, the courts could hold that the right to life of the unborn, even when no longer expressly mentioned in the Constitution, was protected and strong enough to render a liberal abortion law unconstitutional. Fourth, the courts could hold that the autonomy, privacy or bodily integrity rights of women were strong enough to render a restrictive abortion law unconstitutional. In these latter two cases, the courts could rule that the rights were disproportionately infringed by the law, and this would limit the Legislature in making a new law regulating the area, changing the scope and content of the regulation of abortion.

It is very difficult to say with certainty which of these options would prevail in the long run. Any assertion to the contrary offers a certainty that is not available. For my part, in the short term, the first or second option seems most likely, based on the current viewpoints of courts and their attitude of respect for legislative determination of complex social issues. However, in constitutional law, viewpoints change and shift, the composition of the courts is altered and what seemed previously unlikely becomes plausible. Even if a court seems unlikely to intervene at the moment, we generally do not write constitutions for the here and now, but for the long run. The option of repealing Article 40.3.3° without replacement leaves the question of judicial intervention open in the future, with the possibility of courts invalidating a law regulating abortion, requiring either a more liberal or a more conservative regime. If this were unpopular, it could only be changed by a referendum to change the Constitution to overturn the judicial

decision. This creates uncertainty about what laws the Legislature can pass, and whether the Legislature alone will formulate the law in this area. It will be for this committee to consider if the best course is to leave open this risk of judicial intervention or to try to reduce it.

A way to limit this uncertainty is to remove Article 40.3.3º and replace it with a provision conferring upon the Oireachtas exclusive power to regulate this area and balance the competing rights involved, to foreclose or limit the possibility of judicial intervention. I take this to be the suggestion made by the Citizens' Assembly. Rather than allow judicial intervention in this controversial area, this approach prefers that the legal position on abortion would be set by a democratically accountable legislature, that this legal position would be certain and not open to invalidation or restriction by the courts and that the legal position could be changed using the ordinary process for amending laws if views and outlooks shifted. Again, it will be for the committee to decide if these benefits would warrant adopting this approach.

It should also be noted that there is nothing, *per se,* improper about denying the Judiciary power to intervene in certain areas. The Constitution excludes judicial consideration of several major matters, including emergency legislation, various matters related to the operation of the Houses of the Oireachtas such as parliamentary privilege and the directive principles of social policy set out in Article 45 of the Constitution. There are several means by which this could be done, to different effect. First, to state that the Oireachtas is specifically empowered to legislate on this issue. Second, to state this and further state that it should be for the Oireachtas to balance the relevant rights involved and third, to state that the Oireachtas should be empowered to legislate on the issue and that judges cannot invalidate such a law on the basis of constitutional rights.

It is not clear that the first of these options would have the desired effect. Specific empowerment to legislate for an issue does not immunise such legislation from judicial review. One would probably have to go further and suggest some exclusivity in respect of the power of the Legislature. The second option, by expressly giving the Oireachtas the job of balancing relevant rights, would strongly indicate to the Judiciary that courts should not intervene to invalidate the solution made by the Legislature. The third option might go further still, clearly excluding any judicial intervention. There are also various other options along this spectrum. There are different forms of words that could be used to achieve these outcomes. Examples from our own Constitution, past amendment proposals, and the constitutions of other countries all provide possibilities.

In considering the removal of Article 40.3.3º and its constitutional regulation of abortion, a most important consideration is the role of constitutional rights and the Judiciary in the aftermath of this change. Ultimately, this question requires careful consideration of democratic accountability, certainty and predictability, and the desirability of judicial intervention in the regulation of abortion. The question put to the people should be formulated with these matters in mind, so that the people can have a clear understanding of the possible consequences of their vote.

Professor Fiona de Londras: I have been asked specifically to address the question of legal certainty. While it is quite appropriate for this committee to be concerned with legal certainty, we must accept that absolute legal certainty is not achievable. Rather the aim might be to create a reasonable level of legal certainty. This is one that makes clear the scope of the legislative power of the Oireachtas, although it may still require the exercise of judgment in determining whether a proposed legal enactment is within that power. It may also be subject to a finding by a court that this judgment was inaccurate, resulting in some or all of a piece of law being struck

down. In my view, both simple repeal and repeal and replace allow for a reasonable level of legal certainty, although in the case of replace, much depends on the wording that is proposed.

Furthermore, legal certainty is only one interest to be pursued in respect of the reform of Article 40.3.3°. Any change proposed should be such as to ensure that it does not tie the hands of the Oireachtas completely. Constitutions should enable the organs of state to govern effectively, that is, to respond to the real governance needs in society which shift and change over time, within constitutionally articulated limitations. They should also enable a state to meet its international human rights law obligations of which it is currently in breach. In other words, constitutions should stand the test of time. They should enable government to meet the needs of those it governs and, arguably, that is not currently the case..

Article 15.2.1° of the Constitution provides that the Oireachtas has the power to legislate for all matters and Article 15.4 requires the Oireachtas to legislate in a manner consistent with the Constitution. Thus there is no uncertainty about the power to legislate for abortion as a general matter. At present, the scope of the power of the Oireachtas to legislate is also clear as it is outlined in Article 40.3.3°. This limits the power to such an extent that the Oireachtas cannot legislate for reforms as proposed by the Citizens' Assembly without constitutional change. In my view the assembly's proposal as to constitutional law reform should be read in its context and as per its intended effect, which I read to be as a proposal designed to make explicit the power to legislate for abortion to the extent recommended in the legislative proposals made by the assembly. The question of legal uncertainty really relates to how to ensure that the Oireachtas has the power to legislate to the extent recommended by the assembly, although whether it would pass a law of that kind would be a matter for the Oireachtas itself. In this respect, the constitutional and legislative questions should be considered separately. The constitutional question relates to how to ensure the Oireachtas has sufficient power, while the legislative question relates to the exercise of that power. I am dealing here with the former.

In its session last week, this committee expressed concern about how to ensure the constitutionality of legislation that might follow a referendum. I take this as being related to uncertainty about what rights either the foetus or the pregnant woman would have following simple repeal. There are three potential outcomes. First, repeal would remove the express right to life of the foetus. Women's right to access abortion care would most likely be seen as part of already protected rights such as to bodily integrity and privacy. These rights are qualified and may be limited, provided the limitation is proportionate. If this is the outcome, then the Oireachtas could legislate for abortion according to the same rules and principles as it does in all other areas of governance that have implications for rights. A second potential outcome is that repeal would remove the express right to life of the foetus but other un-enumerated or implicit constitutional rights of the foetus would be unaffected. The extent of those rights is currently unknown. This might substantially constrain the scope for the Oireachtas to legislate to make abortion care more widely available than is currently the case. The third potential outcome is that repeal would remove the express right to life of the foetus and mean that women had a right to access abortion care in Ireland, which right might be unlimited. That might substantially constrain the scope for the Oireachtas to legislate for limitations to abortion care.

While all three outcomes are possible, my view is that the first option is the most likely. Under that approach, the constitutional rights of pregnant persons which are undisturbed by repeal of Article 40.3.3°, that is, all ordinary constitutional rights that women would have on a day-to-day basis anyway, would continue to apply, as would the obligation only to legislate in conformity with the Constitution. Repeal would most likely be interpreted as empowering the

Oireachtas to legislate for abortion unconstrained by foetal constitutional rights but it would be open to the Oireachtas to pursue the legitimate aim of preserving foetal life by imposing time limits or limiting access to certain grounds. In doing so, however, only proportionate limitations on the rights of pregnant persons could be imposed. While the courts would ultimately determine the meaning of the Constitution, in the first instance the Oireachtas would be advised as to its likely meaning by the Attorney General and would legislate accordingly. In other words, the Oireachtas would need to approach making law about abortion in the same way as it approaches the rest of its law-making functions.

As to the options for reform, the first option is a simple repeal of Article 40.3.3°. The power of the Oireachtas to legislate would continue to be guaranteed under Article 15 but the scope of the power might not be fully clear. This is because the foetus may have some continuing constitutional rights and of course, the pregnant person would have her full constitutional rights. She may also have a constitutional right to choose. The exact scope of these rights may need to be determined, probably by a court. It is reasonable to expect that courts would take into account the assumed intentions of the electorate in voting to repeal. Legislation for abortion introduced after repeal would need to ensure that any limitations on the rights of pregnant people are proportionate. A court could strike the legislation down if it were an unconstitutional interference with rights. A simple repeal would thus produce a reasonable level of certainty similar to that within which the Oireachtas ordinarily operates.

A second option is to remove Article 40.3.3° and replace it with a provision that permits abortion in limited circumstances, for example, rape, incest, risk to life or fatal foetal abnormality. Such a provision would produce some legal certainty as it would make it clear that legislation for abortion is permitted in respect of the specified grounds, subject to those grounds being defined with sufficient specificity to allow for legislative action. A change of this kind would greatly limit the power of the Oireachtas to legislate and would not address the most prevalent reasons for women in Ireland accessing abortion care. It would produce an unduly complex and detailed constitutional provision. It would constrain the power of the Oireachtas to react to medical, scientific or political developments in the future. It would be cumbersome and impractical, unlikely to stand the test of time and it would be inconsistent with the recommendations of the Citizens' Assembly.

A third option is to repeal Article 40.3.3° and replace it with a negative provision, such as "Nothing in this Constitution shall prohibit abortion as regulated by law". This would make explicit the power to legislate and allow future change through the legislative process. It would likely be interpreted as resolving uncertainties about the impact on the power to legislate of any residual and un-enumerated rights of the foetus. It would also leave open the potential for the Protection of Life During Pregnancy Act 2013 to remain in place, although it would be vulnerable to constitutional challenge. It would leave the extent of a pregnant person's rights in respect of reproductive autonomy to be determined. It would be open to the Oireachtas to pursue the legitimate aim of preserving foetal life by imposing proportionate limitations on the rights of pregnant persons. It would enable the Oireachtas to legislate to meet the needs of the electorate and would produce a reasonable level of certainty similar to that within which the Oireachtas operates in other contexts.

A fourth option is to remove Article 40.3.3° and replace it with express rights to bodily integrity and self-determination in medical decision making. This would not tie the hands of the Oireachtas, although it would effectively compel legislation on abortion as the Protection of Life During Pregnancy Act 2013 would almost certainly violate such an explicitly guaranteed

right. It would address in a broad sense the need for autonomy in reproductive life and thus go beyond abortion. It may have further unanticipated or undesired impacts around, for example, end-of-life decision making, although limiting it to bodily integrity during pregnancy might address that concern. It should be noted that the latter point is not made in the written submission to the committee. The courts would determine the exact parameters of the right.

A fifth option is to remove Article 40.3.3º but to regulate abortion through legislation prepared and published in advance of the referendum and entrenched in the Constitution. This would echo the approach proposed in 2002. Inasmuch as it would create legal certainty it would do so by calcifying abortion law and making it immune from the normal processes of politics, law and governance. The meaning and operation of the legislation would be subject to judicial determination, potentially making it highly complex and difficult to use. The legislation could never be amended without a further referendum, even for minor technical changes. It would not be changeable without referendum, even if it resulted in violations of international human rights law and would thus likely fail to stand the test of time.

Of the options I have outlined above, the first - simple repeal - and the third - repeal and replace with a negative provision - seem most fully to ensure a reasonable level of legal certainty, the ability to govern effectively and stand the test of time and the ability to ensure compliance with international legal obligations.

I am happy to take questions from the committee.

Chairman: I thank Professor de Londras. We will now hear from Ms Mary O'Toole, senior counsel. Ms O'Toole will give a practical outline of how the courts approach constitutional issues. She can work off the base proposals already outlined by the previous speakers if she so wishes.

Ms Mary O'Toole: Good afternoon to the members of the committee. I do not have a paper prepared, unlike my co-speakers. I will speak to the committee on the subject that I was asked to address. I hope this is helpful and if it is not, please stop me. I gather I have ten minutes. I am not known for my brevity but we will do our best.

I have practised in the area of the application of the eighth amendment and I understand that the committee would like an idea of the practicalities and how the courts balance rights in cases concerning the eighth amendment. The long and the short of this is, on the substantive issue of the life of the mother versus the life of the foetus, if I could put it in those extremely crude terms, that balance has already been struck by the Supreme Court in the X case and that test, decided by the Supreme Court in 1992, is still the test that is applicable in any case where the right to life of the unborn is in any way in conflict with the right to life of the mother. The important point to note about that provision is that all one is doing is balancing a life with a life. One is not balancing a life with health, welfare or any of those matters. One is balancing a life with a life.

The amendment specifically states these are equal rights. It is the equal right to life of the mother. If one has two beings with equal rights to life, how does one balance that? That is exactly what happened in the X case. In the X case, the argument before the court was, first, the unborn has a right to life, the mother has a right to life and one can only intervene to save the life of the mother if the mother is facing certain or inevitable death. Therefore, if she suffers from a condition that will result inevitably in death or imminent death then one can intervene but anything short of that did not permit an intervention. That was the argument made by the State.

In the High Court in X, the High Court judge stated there was a threat to the life of the young Ms X, who was 14 at the time, but the threat to her life is nothing compared to the threat to the life of the foetus if the judge does not grant the order - the High Court judge was asked to grant an order preventing Ms X from travelling out of the jurisdiction to avail of an abortion. If the injunction was not granted, then there is a certainty that the foetus will die whereas it may or may not be the case that the mother would die - there is not absolute certainty about her death.

The Supreme Court looked at that test and decided that it, in fact, did not vindicate sufficiently the right to life of the mother. In deciding how it would do that it was, in the first instance, urged by counsel on behalf of the young woman that the real test was if there was a real and substantive threat to her life and not if there was an imminent certainty of her death, and it did not matter how that threat arose. Whether it arose from some kind of physical illness or whether it arose from a threat of self-destruction, if that was a real and substantive threat, that was sufficient. That was ultimately the test that the Supreme Court adopted, while making it clear that it was a threat to the life, as distinct from the health, of the mother.

How did the court do that? How did it decide that the threat to the life of the mother was sufficient? What it did was to look at the Constitution as a whole. It looked at the social function of women and girls and the sort of constitutional rights that pertained, and it stated it was important. It is interesting, when one looks at the judgments, most of the judges regard themselves as harmonising constitutional rights and not deciding on a priority of rights. They looked at girls and women and their interaction with other parties. This was a young woman who was there with her parents. She had a relationship with her parents. They had a relationship with her. She had certain social functions. They took that into account.

It is most clearly explained in the McCarthy judgment where he says the woman is the "life in being", the unborn is the "contingent" life and everything depends on the life of the woman in being, and one looks at her role and one looks at her function within society. It is acknowledged in the McCarthy judgment that it is always going to be the case that the foetus would face certain death because the choice is abortion or not abortion, and that is not the basis on which one approaches the test. One looks at the substantive threat to the life of the mother, one evaluates that, and if there is a real and substantive threat to her life then she is entitled to avail of abortion. That is the only case that actually determines the test where one has that kind of situation.

Since then there has been a remarkable paucity of judgments concerning it. It has not arisen that anybody has brought a case before the court to look at that test again because, of course, the Supreme Court was saying no constitutional interpretation is ever immutable for all time. It simply has not arisen. What one has is the application of that test and-or a consideration of the right to travel because, one should remember, when X was decided there was no right to travel. In fact, one of the discussions in X is not only whether one is entitled to an injunction preventing this young woman from travelling, but whether one is entitled to an injunction at all on the basis of whether she has a constitutional right and should her life be vindicated, and in those circumstances whether there is a right to an injunction preventing her from availing of abortion services. That was the first question.

The second question was can one grant an injunction against a person in these circumstances if the person is simply going to travel to another jurisdiction to avail of a service that is lawful in the other jurisdiction. The Supreme Court did not come to a binding determination on that point but the majority indicated that their view would be that one could grant an injunction. Two of the judges took the view that one could not and the other three stated that one could

grant an injunction in those circumstances.

After the X case, there was a further referendum which introduced the right to travel as an independent right in the Constitution. Subsequent cases, after X, also looked at the right to travel aspect of it. Am I over my ten minutes?

Chairman: There were some technical difficulties at the outset and I will let Ms O'Toole have the benefit of the doubt. Ms O'Toole has three minutes.

Ms Mary O'Toole: The other point the committee has to bear in mind about the case law is that the vast preponderance of the cases involve children. The case law is about children ranging in age from approximately 13 and a half years to 17 years. The young woman in X was 14 years of age. The person in the C case was a young woman in care aged 13 and a half years who was suicidal. The High Court determined that she satisfied the test in X that there was a real and substantive threat to her life as a result of her reaction to the pregnancy. She had been, as is described in the report, brutally raped and as a result, had become pregnant. She was considered to have satisfied the X test, but Mr. Justice Geoghegan, in his judgment in the High Court, said that if one is dealing with an Irish teenager who wants to travel abroad, the travel amendment did not give an independent right to travel. It was to prevent one from being injuncted from going abroad for an abortion, but effectively what he stated was that it did not allow an Irish court to sanction one going abroad for an abortion that one could not have got in Ireland.

That case was not appealed to the Supreme Court because he found on the test the young woman in question satisfied the dicta in the X case and there was no appeal by either party. That was a case which had effectively been brought by the HSE to ask the court what its rights and duties were in relation to this child.

The last case in that series is the Ms D case in which Ms D claimed that she was not suicidal. She was a young woman in care, aged 17 years, and was in circumstances where her child was suffering from a fatal foetal abnormality and had a condition that was incompatible with life. She wanted to travel to avail of an abortion. She was very clear that she was not suicidal. She was distraught at the diagnosis but she was clear she was not suicidal. Mr. Justice McKechnie in a largely extempore decision in the High Court decided that she had a right to travel, she did not have to apply to the District Court for liberty to go and there was nothing in the statutes or Constitution that prevented her from travelling. Once again, this is a case with a child in care.

Most of the case law that has arisen involves children or other women who do not have legal autonomy because they may be refugees or are in the immigration or asylum system. Those cases have not actually come before the court as cases where there is a dispute about whether or not the mother is entitled to avail of services; they have come before the court in other ways and the court has not had to make a decision on the substantive issues involved in the eighth amendment.

I do not know if that was helpful but I will answer any questions members might have.

Chairman: I thank all three witnesses for their presentations. Members will be aware we have strict speaking times and I hope they will stick to those times and ask questions that are succinct, precise and brief. I do not want to sound like a school teacher but if we spend more time listening to the witnesses who appear before us, we will benefit from getting more information and evidence.

I will call the first of the four speakers on the rotation system this week, which is Senator

Ruane.

Senator Lynn Ruane: I thank the witnesses for their contributions. Ms O'Toole's contribution was very useful. I hope my questions do not touch on some of what she spoke about. I did not have the submission beforehand, so I will try to reword them so that they are more appropriate.

I am going to focus on constitutional certainty and on the merits of repeal versus replace, especially since I note that in her presentation Professor de Londras suggested the option of a negative provision in the Constitution. It is an interesting point and I am eager to know what the others think of this.

To save time, I will indicate which witnesses my particular questions are for. My first question is for Professor de Londras and Dr. Kenny and relates to Mr. John O'Dowd's presentation to the Citizens' Assembly. He asserts that the judicial statements made before the insertion of the eighth amendment to the Constitution relating to any rights of the foetus may not be binding as they were not necessary for the decision in any of the relevant cases. Do Professor de Londras and Dr. Kenny agree with this assessment and do they think it could be the case in any post-repeal judicial decisions on the right to life of the foetus?

Professor de Londras and perhaps the other witnesses could comment on the next two questions. Is trying to achieve legal certainty the most important value to consider when amending the Constitution? The eighth amendment, particularly the X case, has prevented the courts from considering all of the pregnant woman's rights in abortion cases. Is it fair to say that if the eighth amendment is removed those rights are reinvigorated and cannot be suspended?

My next question is to Dr. Kenny and Ms O'Toole because Professor de Londras outlined this matter in her presentation. Does she think a referendum on wording which repeals Article 40.3.3º instead of replacing it to include explicit exceptions-based grounds for abortion such as in cases of fatal foetal abnormality, rape, incest, or risk to health in the Constitution is a strong legal construct in the overall framework of constitutional, judicial and legislative laws.

This question is directed to Dr. Kenny who in his opening statement said it was not improper to exclude certain areas in the Constitution from judicial consideration and listed emergency legislation, among other legislation, as an example of such an area. Does he think that abortion legislation should be treated in the same way, constitutionally, as laws passed when the State is under threat or at war? It seems unusual to me that it would. I would like to hear his justification for continuing to treat abortion as an exceptional constitutional case.

My next question is for Ms O'Toole. There have been many high profile cases and ones in which she has been involved directly. Can she tell us more about the cases which make it to the court and maybe where legal advice is sought and where the treatment during pregnancy is not in relation to abortion but the wider issue on how the wording of eighth amendment has had an impact? We have heard her evidence today on the likelihood of various post-repeal judicial review scenarios. Given that she has direct experience in legal practice of how the Judiciary has previously balanced those rights between a pregnant woman and foetal life in the Constitution, what is her professional opinion on the status of a constitutional right to life of a foetus following a potential deletion of Article 40.3.3º and how would it be balanced against the rights of a pregnant woman?

Chairman: I thank the Senator. The witnesses will be doing well to get in on all that in six

and a half minutes.

Dr. David Kenny: I will answer as much as I can and if I forget anything the Senator should feel free to remind me. I agree entirely with Mr. John O'Dowd's statement that anything before 1983 would not be binding. I referred to it in the paper as obiter comments in so far as the court was commenting in passing on something not directly necessary to decide. Moreover, in the event that they were being considered after some sort of change, one would have to consider what would repeal have done in any event. Even if they were binding, they could not have been binding in exactly the same way, given that the Constitution had been changed and changed again in the meantime. One would have to consider what those changes would actually do which is where the uncertainty comes from. It is created by that doubt.

On whether certainty is the most important value, it is largely for this committee to decide where the values fall. The committee has to consider what a level of certainty is in the context of the issue which it is considering. Is there anything in particular about this issue that warrants a particular level of certainty and, as the Citizens' Assembly apparently felt, warrants a level of certainty that protects it from judicial intervention. It is for the committee to decide if there is something specific about this context which would suggest that.

In terms of a general view, it is obviously an issue where judicial intervention has caused a great deal of public controversy and major political controversy in various places around the world. That could be something that the committee considers relevant but that is entirely a matter for its consideration.

Professor de Londras discussed the repeal with specific grounds, and I agree with her on that. She described it as cumbersome and impractical and that is exactly right. It would require a level of detail that is incredibly difficult to do in constitutional text or some other constitutional mechanism. It would lock in something that would require substantial elaboration and leave no room to adapt it on the ground or change it if a problem arose. It is very hard to do from a constitutional law perspective.

On judicial exclusion, I was merely listing examples and was not giving an equivalence when I spoke about emergency powers. I was just noting several instances where it happens, so I do not want to suggest an equivalence. For a softer example, Article 45 excludes a variety of socio and economic rights and entitlements from judicial consideration. It is not merely the most extraordinary considerations where the Constitution allows for certain things to be removed from judicial competence, for whatever reasons seem right to the politicians proposing an amendment and the people voting on it. It is for the legislators and, ultimately, for the people to decide if something should be included in the scope of judicial intervention.

Professor Fiona de Londras: I share Dr. Kenny's view that Mr. John O'Dowd was precisely right in his argument that the statements preceding 1983 were *obiter*. For the sake of fairness and completeness, we should also note that we have two conflicting High Court judgments. I mentioned them on page 10 of the longer submission the committee has received from me - IRM *v.* Minister for Justice and Equality and Ugbelase and Ors *v.* Minister for Justice, Equality and Law Reform in 2009 - where there are conflicting *dicta* about whether or not the right to life is the only constitutional right that the unborn, as the constitutional term goes, currently holds in Ireland, so there is a persistent uncertainty and I believe that it is under appeal to the Supreme Court.

On the question of whether legal certainty is the most important value, I think it is for this

committee and eventually the electorate to decide on that but it is certainly not the exclusive value. That would be the first point I would make. Second, when thinking about legal certainty, it is important to consider what legal certainty might mean. In the context of the regulation of any form of health care, but let us say abortion for these purposes, there are various actors who need varying kinds of certainty. The Oireachtas needs some degree of certainty to know what it can do to the same extent as one knows in any case what one can do. The courts at least need some degree of clarity around what they think it is that the electorate might have meant. Medical practitioners need certainty about what they are permitted to do. As Ms O'Toole mentioned, public authorities with people in their care who may have pregnancies that they cannot or do not want to continue with need certainty about what they do. People who seek abortion care need certainty about what they can do. I am not sure any constitutional provision could secure certainty across all of those levels. It is a mixture of constitutional provisions, legislation, principles, working principles, protocols and so on that goes across a wide range of agencies.

Regarding the last point about whether repeal of Article 40.3.3º would mean that the other rights which women hold under the Constitution would simply be reinvigorated, I agree entirely. I made that point in my submission that any idea that the right to life or competing right to life might have a form of primacy over those other rights not relating to life allows those rights to come back into the fold in a fuller sense and that is where proportionality analysis would come in, as it does in other rights-related situations.

Ms Mary O'Toole: I propose to address the questions that were specifically addressed to me. Regarding the repeal, amend or delete front, my colleagues have outlined pretty extensively to the committee what the implications of each of those courses are. The difficulty is the uncertainty created by simple deletion. One will simply never get certainty. There is no single legal provision anywhere where one could say with certainty what it means but there are degrees of uncertainty. This is an area where, primarily, women at the centre of the difficulties need to understand in a very time-sensitive way what their rights are and how they can be accessed, they need to be able to take advice and it needs to be clear. That kind of certainty is very valuable. Having said all that, it seems that trying to put complex provisions into the Constitution is simply impossible and makes it very difficult. One is trying to get very complex ideas into a couple of sentences and it is very difficult to do this. The eighth amendment is a very good example of that because at the time it was passed, there were opinions about what it meant and what its effects were which were not borne out over time. It ended up meaning something different to what a lot of the people who voted on the issue thought it meant. It is that kind of thing that causes difficulties on a practical level. There is merit in having a degree of clarity so that it is clear that any pre-existing rights are governable by the Oireachtas and everybody knows where they stand but that is a matter for the committee as what exactly it wants to achieve and how it achieves it.

In terms of the amendment and other cases that have arisen that have nothing to do with abortion rights as such, it is true to say that the existence of the amendment has meant that other aspects of care for women have been captured within the remit of the amendment. In particular, we saw the PP *v.* HSE case where a woman who was deceased and was pregnant was in circumstances where her body was being kept alive in order to keep the foetus alive. In that case, the High Court held that this situation did engage the eighth amendment and that there was a right to life of the unborn in those circumstances - not one that had to be balanced against the right to life of the mother because the mother was deceased but a right to life. The medical evidence in that case was unanimous to the effect that there was a high probability that the child would not survive until term; the fact that the mother had died at the point in the pregnancy, which

was about 15 weeks at the date of her death, meant that the prospects for getting the foetus to a stage where it was viable was probably nil; and the mother's system was collapsing. In other words, the clinicians who were involved could not apply ordinary principles of clinical practice to the circumstances in which they found themselves because they were very concerned that if they did so, they would be in breach of constitutional rights and possibly behaving unlawfully because their circumstances were unclear.

This is an aspect of the amendment that is not covered by the recent legislation, which simply covers how one balances the test in the X case or provides a mechanism for accessing an answer about whether or not somebody is entitled to an abortion in this jurisdiction. It does not deal with the other issues that might arise. Of course, the eighth amendment has also been used in other circumstances to suggest an unborn child has certain immigration rights that must be taken into account by the courts and that a frozen embryo has a right to life. The Supreme Court held that a frozen embryo does not fall within the provisions of the amendment - least in the circumstances that pertained in the Roche case. The eighth amendment was mentioned in the arguments in the MR & Anor *v.* An tArd Chláraitheoir & Ors case concerning surrogacy where the issue was whether the woman who bore the child was to be considered the legal mother of the child. The terms of the eighth amendment were relied on to suggest that this is what that provision requires - again, not the basis upon which the court made its decision in MR & Anor *v.* An tArd Chláraitheoir & Ors. The wording of the eighth amendment has had a lot of unexpected consequences and that is one of the difficulties about amending and replacing wording. One must bear in mind that it can have consequences that may not have been intended.

Deputy James Browne: I thank all our experts for coming before us today. Their contributions have been most helpful to me. It is critical that this committee carries out its deliberations in an open and informed manner. The witnesses' contributions will be helpful in that regard. I have a number of questions and will nominate somebody to answer them but I have no difficulty with anybody else taking them or adding to the answers. While some of my questions may seem obvious, my role is not just to ask questions to inform myself but to ask questions that people might like answers to. I will use a question-and-answer format as opposed to posing a lot of questions in one go.

My first question is addressed to Dr. Kenny. In his presentation, he mentioned unenumerated personal rights and how the courts have suggested at times that the unborn had unenumerated rights. Will he elaborate on how he would see such rights impacting on a situation where there was a repeal *simpliciter* or a repeal that replaced the provision with more specific or nuanced situations for allowing abortion?

Dr. David Kenny: I can certainly try. The problem that I was attempting to get across was the difficulty of fully understanding the answer to that question. As I mentioned in my response to Senator Ruane's question, the reality is that all those statements would have to be reconsidered in light of whatever change was proposed. It is certainly one possibility that those rights could essentially be recognised again or recognised to have continued in the aftermath of a simple repeal. That means they could come into play and could be asserted by an interested citizen to challenge a law on abortion, if it was felt that those rights were not being respected by that law. It is possible but I do not know how likely it is.

The same is true if specific situations were listed in the Constitution. If that right persisted alongside, unless the new provision specifically excluded that right while listing certain situations, it is also possible that right could persist in that context and, again, a stricter regime could be required. It probably could not countermand the constitutional text if it said certain

situations should not be allowed but it might have some role in interpreting that. Again, unfortunately, it is difficult to say without some specific proposal in front of us and without knowing the minds of the courts at the relevant time.

Deputy James Browne: I understand it requires an element of speculation and it is quite difficult to address.

From a case law perspective and legal certainty, what difficulties does Ms Mary O'Toole foresee in terms of a repeal and replace where the constitutional provision was replaced but with additional circumstances to allow for abortion or additional wording? Ms O'Toole addressed that when dealing with Senator Ruane's question. Will she expand on that?

Ms Mary O'Toole: It depends on the format it takes but once one puts in specific wording, then that wording is likely to be interpreted. That is if we go on past experience to inform our thinking. The eighth amendment was interpreted by the Supreme Court and that test has been in place since 1991. It means a certain thing and it applies across the board in cases where it arises as meaning a particular thing. If we put a provision into the Constitution, one runs the risk that it will be interpreted in a particular way and will be difficult to change that interpretation. Once the Supreme Court decides on the meaning of a particular provision, then that binds all the lower courts. It is applied in a particular way.

Putting a long list or elaborate provisions into the Constitution runs the risk that it will end up meaning something a little bit different to what it was intended to mean. In any event, once it is interpreted, then that interpretation is likely to pertain for a long period. One does not have the flexibility one would have in legislation where one could amend or repeal if there was public disquiet about it. One would need another referendum to the change it.

Deputy James Browne: Rape and incest are the most horrific of crimes. Does Professor Fiona de Londras see any challenges around a specific legislative attempt to address that situation, as opposed to allowing for it under a different category?

Professor Fiona de Londras: There are a couple of potential challenges that probably would be the case if one was trying to specify rape or incest in a constitutional or legislative sense. The first is around the process use of proof and qualification. How would somebody actually establish that they are legally permitted to access abortion on the basis of those grounds? Would it require engagement with criminal justice systems? Would it require verification by a medic? In either case, it is likely to be quite damaging and also difficult to work.

Second, it would empower actors such as medics to make a decision and further disempower people who have already experienced either rape or incest. That is a disempowering disregard for their consent. It reinforces that.

While I understand entirely the concern to make sure people in those situations might be able to access abortion care, if they should wish to do so, that can be achieved under different means such as health grounds or grounds on request up to a certain limit.

Deputy James Browne: I thank Professor Fiona de Londras. That was most helpful.

The discourse around this issue can be on either extreme. From my experience of talking to people, most people are somewhere between the two extremes and on different points, however. The possibility of a preferendum has been mentioned where a series of options would be offered in the referendum. Will the witnesses outline the difficulties with that?

Dr. David Kenny: It is very tricky to execute. The courts have not been strict in proposing limits on the kind of changes that one can make to the Constitution. There would have to be some mechanism to ensure that a clear question can be put. Obviously, it has to come in the form of a Bill enacted through the Oireachtas and result in a ballot paper which is then voted on. The problem is that if one has some multiple-choice system, it is unclear one can pass a referendum like that, unless the majority of people vote for one preference. If it is possible - that is something of an open question - one creates a difficulty whereby one would have to pass that preferendum with one option happening to get a majority of votes on the day. Perhaps the most likely case, particularly if there are multiple options on the ballot, would be an inability to pass any one option. As a matter of the logistics of changing the Constitution, it is very difficult.

It might also create difficulties debating constitutional change, which is a complex matter at the best of times. It is difficult to convey complex matters of constitutional law and potential effects. These may be compounded if one has multiple competing visions on the same ballot paper.

Deputy James Browne: The Citizens' Assembly recommended that Article 40.3.3º would be replaced and authorising the Oireachtas to legislate on the issue. Would it be fair to say that, in doing that, the Citizens' Assembly was saying to legislate for the categories it had supported, as opposed to saying this is where it felt abortion should be allowed, and, having said all that, the Legislature should make its own decision?

One of the challenges in how we form governments is that we tend to have coalitions. Whatever comes out of this process, there should be certainty. The difficulty is that one can have a particular group holding the balance of power. One could potentially have many swings from one election to the next in terms of where the circumstances where abortion is allowed. Have the witnesses any idea how we address this? I understand that is stepping into the political arena but it is a challenge that will come down the line.

Professor Fiona de Londras: On the preferendum point, to the best of my recollection in 1996, the constitutional review group formed the conclusion that it was not constitutionally permissible. That is my recollection, but it might be worth checking.

I understand the Citizens' Assembly recommendation to be, as the Deputy put it, namely to ensure the Oireachtas had the power to legislate to the extent it recommended but to leave it to the Oireachtas to decide whether to do that.

As for the latter question, that is the realm of politics which I cannot really address.

Dr. David Kenny: I am going to take the same plea on the second question.

On the first, I take a slightly different view of the Citizens' Assembly recommendation. When Ms Justice Mary Laffoy explained the ballot put to them, she spoke about full control being given to the Legislature. That is on page 894 of the report, in appendix E. Related to that, there is a question and answer section where, on page 899 leading into page 900, one of the citizens asks if the assembly were to vote for this option, would it mean that the Oireachtas could maintain the *status quo* and not legislate. The response given by Professor Madden, the legal representative on the advisory group, was "Yes". She argued that this option would give the Oireachtas the power to either retain the *status quo* or to do something. That was my view of what the citizens were told they were voting for and obviously that is open to interpretation.

Deputy James Browne: Thank you.

Chairman: Senator Mullen has ten minutes.

Senator Rónán Mullen: I just want to recall what the Chairman said at the outset about seeking evidence and information without moving into the realm of opinion as much as possible. In that context, I cannot fault a word of what Dr. Kenny had to say. It was a very accurate survey of the issues. However, I would suggest that instead of talking about the "risk" of judicial intervention, one might talk about the "possibility" of such intervention. Judicial intervention is very often what preserves us from chaos.

I am sorry to have to put it to Professor de Londras that she really ought to consider whether she has served the request of the Chairman well, in terms of seeking evidence and information without moving into the realm of opinion. She appears to be constitutionally - if she will pardon the pun - incapable of using the correct term, which is "unborn". I know that foetus, which is Latin, means "little one" but very often it gets used in these debates so as to exclude consideration of one party, at least in terms of their humanity. She spoke in various places about "unduly complex and detailed" constitutional provisions and about things being "cumbersome" and "impractical". She also spoke about "abortion care" but there is very little care for the unborn in the process. There is very little talk about pain killers and the late-term abortions that go on in places like Britain and Canada.

Professor de Londras also spoke about reproductive autonomy and even warned about the dangers of violations of international human rights law. It always amazes me - all of the witnesses here are lawyers - how bodies such as the European Court of Human Rights, ECHR, can tell us that we have a margin of appreciation in these areas, which in lay persons' terms means that where there is not a moral consensus, so to speak, countries can legislate according to their values and yet when I encountered the Commissioner for Human Rights at the Council of Europe, the hemicycle was told that we do not speak about human rights before birth. I am wondering if that is the position of any of the people here. Perhaps it is the position of Professor de Londras, seeing as she evoked the notion of violations of international human rights. I am concerned and would ask her to consider whether she had not been very tendentious in circumstances where we were not to have advocacy here today; we were supposed to be getting informed opinion.

I thank Ms O'Toole for her comments, much of which explained well the legal history in this area. However, I note that she spoke about "surprising outcomes" in terms which seem to me to evoke a degree of criticism of the eighth amendment. I would put it to her that there are other surprising outcomes. She mentioned the C case and the terrible circumstances around that but I understand that is one of those areas where the person involved is on the record as saying that she did not come to believe that she was well served by the operation of the X case legislation. Ms O'Toole also mentioned the D case, with which she was involved herself. She would agree with me that Mr. Justice Nicholas Kearns put it to her in that case that the issue had nothing to do with the abortion debate and as far as I recall, she agreed with him. Is it not the case that no matter whether one had the eighth amendment or not, in any jurisdiction where there is a question about withdrawing life support, such a question could have arisen? In talking about the surprising outcomes of law, could anything be as surprising as what the 1967 legislation in Britain turned into? It was supposed to provide for abortion not being prosecuted in exceptional cases but it led to an abortion-on-demand situation. Would it not be wrong to talk about this issue as though the only uncertainties could flow from constitutional delineation of matters when, in fact, legislation of any kind is equally prone to potentially surprising outcomes? In terms of suggesting that any particular approach has merit, it is true that there were different views of

what the eighth amendment might lead to but aside from the X case, it seems to have succeeded in its substantial aim, which was to reserve decisions about life and death in these matters to the Irish people and to exclude judicial and political elites from changing matters as they had often done, without public consultation, in many countries. I would be interested to know if Ms O'Toole would accept the analysis that the eighth amendment was substantially successful in meeting the aim of its proponents and the 63% of people who voted for it.

Chairman: Thank you Senator Mullen. I invite Dr. Kenny to respond first.

Dr. David Kenny: Thank you very much. Very briefly and with the greatest respect to our Judiciary, I meant "risk" in a non-pejorative sense. I meant risk to certainty and would leave it to the committee to decide if it is a risk or a possibility in a grander sense than that. In terms of the final comment about the substantial success of the article, I would say that in any event one of the things it did was to create a need for substantial judicial intervention to determine its meaning. Again, if one of our conversation topics today is the effect on certainty of requiring substantial judicial elaboration of a constitutional provision, I think that is worth bearing in mind. I will leave it at that.

Chairman: Thank you Dr. Kenny. Professor de Londras is next.

Professor Fiona de Londras: I thank Senator Mullen. I am afraid my Latin is not as good as his. However, I am agnostic about what term is used - foetal life, unborn life, prenatal life - I am happy to use any of those terms. I happen to have used foetal life here but I do not have any problem with using a different word. In terms of care for the unborn, to use the term that I take it the Senator would prefer, the point that I made repeatedly throughout my written and oral submissions - and I take it that the Senator has seen the longer submission - is that it would be open to the Oireachtas to pursue the legitimate aim of preserving unborn or foetal life and within that, to then determine how the Oireachtas considered this question of care ought best to be engaged and pursued. However, there would be limitation on that and the limitation would be the rights of pregnant persons. This is, as the Senator will appreciate, the distinction between treating preservation of foetal life as a constitutional value and giving a right to life to the unborn. It is more than, as the Senator knows, a technical distinction in terms of how the law would play out.

In respect of potential violations of international human rights law, I do not think I ever necessarily confined myself to saying that international human rights law might be developed only in order extend situations in which it might be seen that human rights protect a right to access abortion. If we were to have a limited provision in the Constitution specifying grounds or an entrenched provision, let us say, and if international human rights law were to find that, in fact, unborn life did have human rights, we would once again find ourselves, I should think, in violation of international human rights law. My point is simply that to put such provision into the Constitution prevents adaptation and, for the sake of a better word, legislative nimbleness or responsiveness when international legal obligations might change. As the Senator will know, after Vo *v*. France and A, B and C *v*. Ireland, there is not yet a clear position in Strasbourg as to whether foetal life does enjoy convention rights but there is a clear view that where a national legal system provides for access to abortion, it must have in place a system that makes it truly accessible and makes the right operational. Of course, as the Senator knows, I have a particular view on this relating to legal regulation that bears no relation to my personal, ethical view on abortion but I have been at pains in my submission to try to simply present the comparative legal position and the arguments, as asked.

Chairman: I thank Professor de Londras. Ms O'Toole is next.

Ms Mary O'Toole: First of all, what I attempted to do for the committee was to outline the cases that have arisen so that members can see, on a practical level, how the thing works. That is my only intention. I can comment only on what is on the public record. If individual litigants have different views after cases, that is a matter for them. What we are concerned with is how the courts actually deal with the rights in question and, when asked to make a judgment, what they take into account. That is what I was dealing with in terms of both the C case and the P case.

When I refer to "surprising outcomes of law," what I am talking about in that context is that during the course of the amendment campaign in 1983 a great number of people believed they would be voting to ensure there would be no abortion in Ireland. A great many people would also have said during that debate that the amendment would not have had implications in any area other than in dealing with the issue of abortion. When I talk about surprising outcomes, I mean it in that context. I mean that one puts words in the Constitution and they have an impact in other areas with which one is not actually dealing in the context of the debate at the time of the referendum. Nobody was talking about what would happen if the mother died or what would happen in respect of the unborn in the case of a pregnant woman in the asylum system. Nobody addressed any of these issues; that was not what was at stake. What was at stake was abortion law in Ireland. We framed the amendment and the people voted on it in that way.

If I am asked whether the provision has been substantially successful, I imagine it depends entirely on one's view. Suffice it to say members are all here to discuss whether the provision should be changed. Presumably because there has been a sense that there is a view among the public that the wording should perhaps be changed, the extent to which it should be changed is a matter for members, as politicians, to discuss. It is the politician's role to put it before the people as that is their function. I hope that answers Senator Rónán Mullen's question.

Deputy Kate O'Connell: I am standing in for Deputy Hildegarde Naughton.

I thank all of the delegates for their contributions. To some extent, many of my questions have been answered. When one is the fourth questioner, things can get a bit messy; therefore, I ask for forgiveness if they do.

My first question is for Professor Fiona de Londras. Will she make us aware of whether any European constitutional court has dealt with similar issues concerning the unborn and access to abortion services? If so, will she tell us how it has dealt with and resolved these issues? I am considering the matter in the wider European context, considering that we are where I imagine others have been.

To return to the issue of repealing or replacing and bearing in mind the amount of documentation we have received, the main issue on my mind coming here today was that of the evidence of the Citizens' Assembly and the views of delegates, the experts, on repealing or replacing. As I do not want to misquote anyone or condense some of the delegates' statements, making them open to misinterpretation, they should correct me if I am wrong. What I am really taking from what is being said is that laying out explicitly the grounds on which somebody could access abortion services is pretty much unworkable. To follow on from Deputy James Browne, it is very important that they hear the answers to these questions, including on the issue of rape which is a criminal act. If we were to produce a list of reasons somebody might be deserving of the right to an abortion, or where we would deem her to be so deserving, what would be the position? If somebody was raped, be it violent or otherwise, would it be pretty much impossible for a decision to be made? Who would decide?

One of the delegates spoke about time sensitivity. Serious issues arise about empowering people and taking power from people and putting it in the hands of somebody else. All of the delegates have nearly answered that replacing the wording with a list of who was deserving would really not be workable. Perhaps they might clarify the matter to ensure I am not misinterpreting them.

I was going to ask about the constitutional issue of exceptional circumstances, but I believe that question has been answered by Dr. Kenny. Is there any country in Europe that has a list of reasons one can access an abortion service? Who authorises abortions in these circumstances?

My next question is for Dr. Kenny and it is about the idea of having legislation on abortion that would not be subject to constitutional challenge. Am I correct in saying nearly any outcome could be subject to a constitutional challenge? Are we saying that, no matter what the outcome of a referendum, someone could technically challenge it in court? Am I misinterpreting the position?

Would anyone have concerns if we were to constitutionally preclude constitutional challenges to future legislation on abortion, or if we were to write in that no one could challenge a provision in the future?

Dr. David Kenny: The first issue was about laying out specific grounds. I have expressed my view that it would be unworkable. As I do not claim to have knowledge of every legal regime in the world, I state very tentatively my belief about countries that do lay out grounds. I am aware of only a few. Swaziland and Kenya are two. They allow the Legislature to legislate on the matter; therefore, they have specific constitutional grounds, but there is the possibility for the Legislature to set out others. I shall make my next comment very tentatively as I do not claim to be an expert on the constitutional law of the places in question. I believe Somalia has limited grounds, without an exclusion. It is a necessity provision, but I do not know how it has worked in practice. To my knowledge, I do not believe there is any European country that sets out specific grounds for access, but, again, I plead only partial knowledge on that question. I am very happy to be corrected and Ms de Londras may know more than me.

The second question was about whether nearly any outcome would allow a constitutional challenge. One of the points we have all been making is that we should perhaps never say never in this circumstance. As my two colleagues said, certainty is unachievable. One could get close to excluding the possibility of a challenge to legislation if one almost expressly stated the Judiciary shall not invalidate a Bill passed for this purpose by reason of constitutional rights. That might exclude a great many possible challenges on the grounds that the regime was too liberal or too conservative. Again, there is always a possibility that someone could find a way. I never want to say "never", but that is the option that comes closest. I do not believe it is quite as unachievable as the Deputy's comments suggested, but lots of options leave open the possibility.

On whether I am concerned about the prospect, it is ultimately for the people to decide in a referendum and their politicians in offering the referendum to them whether it is worthwhile. One has to decide whether one believes the Judiciary should be intervening in this particular area and whether it would be better, for any reason, to have it decided with finality by the Legislature. I do not have a concern about the idea that the people and politicians should get to decide. That is the way our system works and the check on judicial power is ultimately that we can change the Constitution and, if we want, exclude things from the hands of judges. As the check is with the politicians and the people, I do not have a reservation in that regard. As to whether it would be appropriate in this case, I will leave it to other minds to decide.

Professor Fiona de Londras: To pick up on the matter of other constitutions that specify grounds, my understanding is that Dr. Kenny is right; there are just the three countries he mentioned - Kenya, Somalia and Swaziland. Somalia's is very limited. It is a case of necessity, especially to save the life of the pregnant person, whereas in Kenya it is an emergency risk to life and a risk to health. In Swaziland there is a longer list of serious risks to physical and mental health, including a serious risk that the child would - please accept this language as it is a quote - "be irreparably seriously handicapped". In all cases one doctor certifies and, as far as I understand, no medical certification is required, but I do not know whose certification is required in cases involving rape, incest or unlawful sex with - again this is a direct quote - "a mentally retarded woman". The Kenyan and Swaziland provisions, to the best of my knowledge, are relatively recent – within the last decade – and in neither case has legislation been passed to give effect to them; therefore, in both states, in fact, abortion services are largely inaccessible. My understanding is the UN Population Fund and other organisations document extremely high levels of illegal abortions in these jurisdictions.

As regards other European states and constitutional courts, there are some courts that have dealt with similar issues. It is perhaps particularly interesting to talk a little about the Slovak Republic because in that jurisdiction there is a recognition that prenatal life is worthy of protection, but there is no right to life. The way the court has dealt with that issue is to state regulation of abortion is permissible but that one cannot disturb the essence of the rights women hold under the constitution. That is not wholly dissimilar to something like the approach taken by the US Supreme Court that one cannot place undue burdens on women in accessing abortion services or proportionality. There will be degrees of whether an essence is less or more than a proportionality approach, but that approach is relatively common. It might be worth noting that the German constitutional court relatively early on in its jurisprudence on abortion did recognise a prenatal right to life, but it has progressively accepted that it does not preclude making abortion services available within certain schemata or certain limitations. The constitutional courts of Austria, France, the Netherlands, the Slovak Republic and Portugal – the list may be longer, but that is my understanding of it - have all refused to recognise a prenatal right to life.

Have I answered all of the questions asked?

Deputy Kate O'Connell: I believe so.

Chairman: We will move on as we are over time.

Ms Mary O'Toole: My fellow speakers have outlined all of the various options in the context of repeal, replace and amend. The point I am making is that putting in a long amendment may actually not be helpful because once it is interpreted, it is inclined to be fixed in a way that is very difficult to unfix if it causes any disquiet. The benefit of legislation is that it can be amended much more easily than the Constitution, a change to which would require a referendum.

As to whether this should be an issue in respect of which the courts would have no input and no power to determine constitutional rights, as a lawyer I am somewhat uncomfortable with that, but that is just a personal view. The main aim is to ensure everybody is clear, given the complications of the pre-1983 position and given the possible complications of deletion of the amendment *simpliciter* that one would arrive at a situation where one would make it clear that we were starting on a new page, as it were, and that rights would be defined in a particular way in legislation and that one was giving the Legislature the entitlement to do this. Obviously, the Legislature would probably have to make it clear in advance of any referendum what legisla-

tion it had in mind. Even that would not be completely simple, but what one would be trying to do is avoid the pitfalls because of the pre-1983 provisions. Professor de Londras said in her paper that it might well be that if there was to be a deletion of the right to life of the unborn, one would arrive at a situation where although there was no right to life of the unborn, the right of the woman as a citizen to bodily integrity and so on would then come back to the fore again, but that would not necessarily preclude the possibility that the Legislature could limit that right in accordance with the common good, as has happened in other jurisdictions where there is no recognition. The problem is that nobody can say for certain what is going to happen; therefore, what one needs to do is try to arrive at a position where one could be as certain as one could be of the result one wanted to achieve; the extent to which one wished to change the current situation and how one wanted to change it and what the pre-1983 provisions might do to that intention.

Chairman: I thank Ms O'Toole. What I propose is that questioners be given up to three minutes in which to ask questions and that each of the responders have approximately one minute each in which to reply. I know that it sounds very tight, but it is the best we can do in the circumstances as we have so many members who want to ask questions.

Deputy Louise O'Reilly: I had a list of questions, but most of them have been asked and answered comprehensively. I thank the delegates for the information they have provided for us and coming to see us. One of the issues we are discussing is the need for legal certainty. We have discussed it over and over again and there has been much talk about the need for legal certainty. In the opinion of the delegates, do we have legal certainty? Much of our discussion will focus on the need to have certainty on this issue. Could we have it merely by repealing an amendment to the Constitution and inserting another? In what way could we arrive at that position?

In the case of a straightforward repeal of Article 40.3.3°, would it then be open to the legislators to legislate as they saw fit, or are there other constitutional impediments that might prevent us from debating freely and legislating for the regulation of abortion?

Professor Fiona de Londras: On the question of whether we have legal certainty, as I outlined in paragraphs 1.1 and 1.2, I think we do. It is clear that the Oireachtas has the power to legislate and that that power is limited by the eight amendment. My understanding was that we were discussing whether or how we could achieve legal certainty if the recommendations of the assembly were to be pursued. As I said, I think it would require a combination of Constitutional, legislative and other provisions. On the other impediments referred to, I think the question is really what are they and what is their extent. What are the other rights that might impede the freedom of the Oireachtas?

Dr. David Kenny: I, too, was focusing on the issue of certainty in the event of change. In so far as we have certainty – I agree with Professor de Londras that we do - it was won during decades of uncertainty in litigation about various parts and a failure to legislate in the light of certain judicial decisions made. It is not as if certainty was provided immediately with the insertion of Article 40.3.3°. In terms of other possible impediments, that is obviously the scope of the discussion.

In the event that there is repeal without a replacement, again, I can say it is possible there are impediments, but I am not sure what they are. The issue may not come up in practice, but I could not come anywhere close to guaranteeing it.

Ms Mary O'Toole: I do not have anything much further to add. My colleagues comprehensively addressed the issue.

Deputy Jan O'Sullivan: I, too, will not repeat questions that have been asked and answered comprehensively, for which I thank the delegates.

I wish to tease out with Ms O'Toole her response to Senator Lynn Ruane on cases of which she is aware.

Ms O'Toole described one case in particular, but she referred to the fact that most of the cases related to children and the issue of travel was significant in many of them. She also said that the cases are obviously time sensitive so I wanted to pursue the question of delay. Late terminations are not desirable, earlier terminations are much more preferable for all sorts of reasons. Can Ms O'Toole speak of her experience and any other cases she is aware of where court proceedings lead to delay? She said that women seeking asylum and other similar situations come to the court in other ways, is I think how she put it. Can she tell us more about this? There is the issue of women in the asylum process in particular, who are curtailed in where they can travel. It would be helpful if we could get a better sense of what kind of cases are there and about the area of delay.

Ms Mary O'Toole: I think I have a minute in which to answer that.

Chairman: No, if someone is the only person responding to a question they have three minutes.

Ms Mary O'Toole: Three minutes is perfect. First, in fairness to the court system, the court tends to pull out all the stops and these cases tend to be heard very quickly. I do not think that can be laid at the door of the courts system. Once the case comes to the court's attention and the nature of the issues is identified, generally everything is done very quickly.

On women in the asylum system, for instance in the D. *v.* Ireland case, the State cited a Ukrainian asylum seeker who was able to get legal representation, access a court, go to a judge over the weekend and have a full hearing by the following Monday and had a decision on Monday evening. There are some instances where asylum seekers are able to access services quickly. Then if one looks at the Y case, it only came to the court's attention because the HSE made an application in relation to a woman who was at that time detained in a mental hospital who was pregnant and they wanted to be able to sedate and hydrate her because she was effectively going to be delivered of her child in circumstances where, I think it was August then, and she had been seeking an abortion since the previous April. It seemed to fall between all the cracks and she was not able to travel because she was unable to get a document, she was unable to fund the procedure and she because extremely depressed and suicidal. If one looks at the HSE report of the timeline for the Y case, it would appear that she was subsequently delivered of the child by caesarian section in hospital because that was the only way of vindicating her right to life at that time because she was suicidal and was refusing food and fluid. She did not come before the court on the question of the right to travel or on suicidal grounds, arguing that her rights needed to be vindicated in a particular way, she came before the court because the HSE wanted to hydrate her because she was not eating or drinking.

Deputy Jan O'Sullivan: On the question of delay Ms. O'Toole has said that the courts deal with these things as expeditiously as possible, but is she aware of delays before the cases get to court?

Ms Mary O'Toole: Yes, because obviously one has a woman who may be quite vulnerable who does not know what to do or who to approach and has not got legal representation and cannot fund legal representation and does not know who to talk to about her circumstances. It usually depends on the individual and whether she can access advice which outlines her rights to her. It should be borne in mind that this not an area of practice that is particularly common so the number of lawyers with the specialist knowledge required is quite small. All those kinds of difficulties stand in the way, and that goes for children as well as people who cannot move because they are in the asylum or immigration system in some way which curtails the right to travel.

Deputy Jan O'Sullivan: Would their parents come to court or how would they be represented?

Ms Mary O'Toole: Usually the children who come to court are in care. Parents will usually make a decision for their minor and will travel with them out of the jurisdiction to avail of services or else, now, will invoke the provisions of the Act to see if they qualify for an abortion in this jurisdiction. It is really children who are in care and adults who are vulnerable either because they do not have capacity to make decisions or they simply do not have the freedom to move out of the jurisdiction.

Chairman: The Deputy is happy with that response so we will move to Deputy Catherine Murphy who has less than three minutes.

Deputy Catherine Murphy: We are told the people are sovereign. If a constitutional referendum was passed on a straightforward question of repeal, how would that be interpreted? Would that change how the Judiciary would look at the issue with respect to prior case law? Would the Judiciary look at the discussions and debate that led up to the decision that people made? Does that have an impact? How do they interpret the people's decision?

The witnesses have told us that the balance has already been struck in the X case. The only people who do not have a right to health are pregnant people. The witnesses say that mostly affects children. On certainty among the medical profession, is it something that would be interpreted in the context of a change that people can make given that the Citizens' Assembly has been very explicit with regard to the health aspect across a range of different levels?

Ms Mary O'Toole: Yes, if there was repeal, the court would, as part of its deliberations try to decide what the meaning and effect of the repeal was. This has happened in other cases where the court had to look at the effect of a provision that had been changed by referendum. The court would try to see what the objective was in repealing. The issue is the uncertainty about the conclusions it would come to. It would obviously conclude that the eighth amendment was to be taken out of the Constitution so that the right to life of the unborn was not going to be an explicit constitutional right, and then there is the balancing right to life of the woman, except that the woman's rights to life and probably to bodily integrity would be part of the ordinary constitutional values. What is unknown in that scenario is whether, notwithstanding that repeal, the court might take the view that there were still some residual unenumerated rights in regard to the unborn. There are commentators who believe that is an unlikely outcome and those who believe it is impossible to call. As Dr. Kenny has said, it is very difficult to say with certainty but yes, the courts would discuss what the amendment meant, what it was intended to achieve and be guided by that.

It is very difficult to know. For instance, in the C case, Mr. Justice Geoghegan decided that

the right to travel amendment did not create an independent right to travel for an abortion. It depends on how clear what was intended is and how one can bring before the court, in the midst of the competing views that happen at the time of a referendum, what it was intended to achieve.

Deputy Catherine Murphy: Does the fact we have had a process with the Citizens' Assembly and in this committee following from which we would then ask people to amend the Constitution together form part of that discussion?

Dr. David Kenny: It is such an interesting question. I would largely echo Ms O'Toole's comments. Obviously, the courts will have to look for the intent of the electorate in making their votes. Because the people are sovereign, it would be the people's intention rather than the intention of any one body that is privileged because, obviously, there are many relevant comments made in this building and elsewhere that might lead up to it but it is the people's choice that has this sort of constitutional effect. The problem is, of course, it is very hard to figure out the intent of the people at the best of times because the intent is often highly diffuse. It is often not a single reason. It is often many reasons. Therefore, the courts have to look to all sorts of sources. Sometimes, in cases where this becomes relevant, the court will say, "Of course, the people did not mean", and follow it with something. It is difficult sometimes to know exactly where that comes from because there is no one privileged place where one can find the people's intention. Even though that is all relevant and the other processes are taken into account as well in forming the context of the people's choice, there is no one privileged way one can say this is what the people intended. The courts get to make the determination finally.

Chairman: Did Professor de Londras have any comment to make?

Professor Fiona de Londras: No.

Chairman: Is Deputy Catherine Murphy satisfied with the response?

Deputy Catherine Murphy: Yes, thanks.

Deputy Clare Daly: All of the witnesses' papers contributed well to the types of information we were seeking here. Ms O'Toole's contribution, in particular, gave us a good insight into how the courts interpret these issues at present, which is critical for this because the repeal-replace discussion that we are having now really came in against the backdrop of the idea, introduced at the Citizens' Assembly by Mr. Brian Murray in his paper, that the courts might restrict the ability of the Oireachtas to legislate. If you like, that was where the fear of the courts came from. All of this uncertainty now is to do with how can we ensure the courts do not do that. My first question is, are we in danger of over complicating matters here and taking it a little too far? The courts have fairly well interpreted the provisions that have been there already. I merely wish to hear the witnesses' opinion. Dr. Kenny, in his paper, stated he did not think they would so interpret it. In fact, Mr. Brian Murray himself stated he did not think it either. Why are we spending so much time on it? That is my first question. The level of certainty we are seeking here is a Holy Grail. It is not to be found. We have a separation of powers in the State for a reason.

Is it not the case that prior to the eighth amendment, a sizable lobby in the State felt that the unborn did not have any rights even though abortion was outlawed under the Offences against the Person Act 1861 with the penalty of penal servitude for life? Even though that legislated existed, to be sure to be sure there would never be abortion, this was inserted because it was believed the courts could have a Roe *v*. Wade situation. Presumably, they did not think in 1983

that the unborn had a right. I wonder are we overstating those implicit rights?

My other question was to Dr. Kenny, in terms of his point that the Judiciary now might interpret it but the courts in the future may interpret it differently. I would put it to Dr. Kenny that a future Oireachtas could legislate, differently and in any way it likes. If the Constitution states the Oireachtas has exclusive powers, then the Oireachtas can do whatever the hell it likes, basically, and that can be against the wishes of the people either way.

Chairman: Does Professor de Londras want to come in?

Professor Fiona de Londras: I will address the first question. First of all, Mr. Brian Murray is not the only person who noted that these possibilities are present. I myself noted them in my written submission to the assembly. The question is not necessarily whether we are over-complicating matters but rather what is the extent of what one might call the risk, likelihood, possibility or certainty we are willing to take on. As I said, and we have all said, absolute certainty is not possible. Ms Justice Laffoy said that last week as well. The question for this committee, for the Cabinet and then for the people is how much we consider to be a reasonable level of certainty and that then goes to what ultimately one puts to the people, if anything. It may seem overly technical and overly complicated but it is nevertheless not unimportant. No matter what route we take, we will not be able to answer all the questions that we are mooting here today.

Dr. David Kenny: My view is that Mr. Brian Murray was just attempting to inform the citizens of what he believed, and I would agree, was a possible consequence of their action and trying to get across the idea that the courts could either liberalise or restrict access in a judicial determination in future. I agree, as I stated in the paper, that is unlikely as I see it now. The reason it may not be over-complicating but worth dwelling on is simply that judicial intervention in this area has caused such political consternation in, for example, the United States and to a lesser extent in Canada. Judicial intervention in this area has caused significant political controversy and while we are on the topic of debating its future, it is worth bearing that in mind because the choice is open as to trying to control for judicial intervention or not, as the committee sees fit.

On the second question, Deputy Clare Daly is absolutely right. Just as the future Judiciary can change, so too can the future Legislature. I suppose the question is the extent to which we want to place the uncertainty with the courts or with the Legislature and its future composition. Ultimately, almost any regime will require legislative action and will require a responsible Legislature to represent the people and act in a manner that is responsible in light of that. Courts can only do so much and, ultimately, they cannot legislate. There is not a way of avoiding relying on a responsible Legislature in future but, obviously, the choice lies with the committee as to where to place the uncertainty and the doubt.

Ms Mary O'Toole: I would agree with the contributions made by my fellow speakers. In previous referendum campaigns, for example, the marriage equality referendum, the Legislature published the 2015 Child and Family Relationships Act which made it clear to the populace what it intended to do without actually having to make that legislation part of the Constitution and solidify it for ever more, as it were, until a further referendum. Similarly, at the time of the divorce referendum the wording was put to the people, then the divorce legislation was published and everybody understood what that would involve. It is, perhaps, that sort of process, and subject to the difficulties of the questions as to whether existing constitutional rights, which may or may not continue to exist, since 1983 are going to be there. At least if people know what

they are voting for, that would assist.

Deputy Clare Daly: Would Ms O'Toole agree that this process here and the Citizens' Assembly is the equivalent, we are informing the people as to why we want to go in that direction and it is really the same kind of guidance?

Ms Mary O'Toole: There would be no replacement for legislation. One can make recommendations as to what should happen but, until it is clear to the people that that is what will be adopted, one may run into difficulties because one is still open to the issue that the populace will not know whether, if they vote in a particular way, a particular result would be achieved. This is a matter for the committee, but it is a question of whether the populace will be happy that the politicians will enact something that they would like to see happen, whether it should be a matter for the Judiciary to decide where the rights lie or whether it should be some kind of compromise between the two and one just takes a leap of faith. It is a question of the committee looking at the advice and deciding which of the options it thinks is the best in the circumstances, and then what the committee will do as a result of that - whether the committee wants a change, the extent to which it wants a change etc.

Chairman: I thank Ms O'Toole. I will move on to the next questioner, who is Deputy Coppinger.

Deputy Ruth Coppinger: I thank all the speakers for their presentations and contributions.

In reference to an earlier point, the speakers were asked here for their legal opinions. They were asked to give a range of opinions and people giving opinions is not banned in the committee. In fact, we all had the option of recommending and suggesting people to give their opinions.

My questions relate to what was the intent of the Citizens' Assembly because that is why we are here. Obviously, the committee is to deal with the recommendations of the Citizens' Assembly and the general issue of the reality of abortion. It was mentioned earlier that the option is repeal or replace, but there is a third option which arises from the Citizens' Assembly, which is repeal and replace. To make it clear the Citizens' Assembly was proposing that the eighth amendment should be repealed and taken out of the Constitution and replaced in order to try to copperfasten the right of Oireachtas to legislate. That is what the Citizens' Assembly decided. In doing so it was trying to close off any potential legal challenge and uncertainty as the witnesses have outlined because of the perceived pre-1983 rights. It was being done from the point of view of an anti-abortion challenge. That is clearly the case because it coincides with what it recommended, which was abortion on socioeconomic grounds, abortion up to 12 weeks on request of the pregnant person, for health reasons and so on.

I want to ask the witnesses about a specific wording. The Citizens' Assembly did not come up with a wording, but it was mooted that specific powers might be given to the Oireachtas. I believe that would be problematic because no legislation should be immune from challenge by a concerned person, whose civil rights, for example, might be being impaired. Any wording would need to take cognisance of that.

While there is merit, as Ms O'Toole said, in dealing with this question of a danger of pre-existing rights, we do not want it to be the case that any legislation would be just impervious to any woman, pregnant person or anybody challenging it. I think there would be a problem with that wording and I have no doubt that any referendum proposing that politicians would have

exclusive power in anything would be roundly rejected by the electorate. It shows the problems with inserting a wording. Professor de Londras has suggested a wording, which does not give the Oireachtas exclusive powers, it just stipulates that the Oireachtas must legislate. If nothing is inserted, as she suggested, how big a deal is the threat other speakers have mentioned? The only threat I could envisage is a legal challenge. However, if legislation was published as has been suggested so that everybody knew what they were voting for, would that not make it clear what the people's intent was? I have heard people saying that there could be a chilling effect on the Oireachtas or that the Oireachtas might, if there was a legal challenge by an individual, try to use the vacuum of not having a replacement wording as a chilling effect and not actually legislate.

I want to ask about putting additional abortion grounds into the Constitution. I am glad there has been some discussion of who our allies and friends are here. Countries that are basically dictatorships or arise from dictatorships, such as Kenya, Swaziland, Chile and the Philippines, are the countries Ireland is in conjunction with on this issue. While it may not be specifically for today, I believe Deputy Browne last week asked about a balance of power. There might be a balance of power and a group of Deputies who put it up to the Dáil to get the legislation changed or otherwise they would refuse to form a government. There seemed to be a suggestion that some kind of special case or exemption from democracy would be made for abortion legislation - maybe a higher proof that the Dáil would vote by, say, 72 to 25. I am raising it because it is the second time I have heard it raised at this committee. For the Dáil not to be allowed to change legislation would be a break with our democratic rights.

Chairman: We need to allow the questions to be answered because the Deputy has taken up a lot of the time.

Professor Fiona de Londras: The negative provision that I propose would mean that the Oireachtas may legislate. It would not necessarily mean that the Oireachtas must legislate. It would leave that decision to the Oireachtas, I think. If legislation or draft legislation were published in advance of a referendum, even if it were not entrenched, there is a possibility that the Oireachtas would consider itself bound not to go beyond what it considers the people understood to be the likely legislative position. Whether it would do that or for how long that would pertain is a matter for these Houses and for politics.

There are two points on the balance of power and supermajorities which are related. Even if, as Deputy Browne has suggested, there were some kind of coalition discussion where a red line on abortion legislation were proposed, the basic democratic safeguard of removability would always exist. Therefore, if the people did not like it, they would not return those people in the following election. Applying a supermajority would depend on whether the Members of these Houses consider this to be a topic that is in some ways so exceptional that it cannot be dealt with through the ordinary legislative process and that it is somehow different from other decisions that have implications for life and death that are taken every day on budgets, for example, in the Houses.

Dr. David Kenny: I would be slow to parse the intent of the Citizens' Assembly in detail, but I will give my general sense of what it intended. It seems to have been a dual intent, basing it on the transcript of the questions asked and the responses given. It first wanted to take this issue out of the Constitution and then separately recommend particular legislative outcomes. In the exchange I referred to earlier, the citizens were told that the Oireachtas when making decisions may be guided by the recommendations they subsequently make, but they would be giving it the power to decide for itself. Obviously, there is the hope and anticipation the Oireachtas

will follow the citizens' recommendations, but they did not make this choice in the expectation that the Oireachtas would absolutely be bound by them. That is my reading of the assembly, but obviously it is open to interpretation.

On the politics or wisdom of immunisation to challenge, I will leave it to the members of the committee. It is obviously a balance. On the one hand the cost of exclusion is that it rules out a challenge by a concerned citizen affected in some way. The benefits are that there is potentially less doubt, and less of a chill on the Oireachtas in that sense. There would also be less risk in terms of a final settlement of the issue.

I agree with Ms O'Toole that it might be extremely helpful to have a published Act, as a kind of way of settling the intention with the people. However, it is important to stress that it would not be absolutely definitive because the Act will not actually be part of the referendum. It would be a promise or a pledge that might influence voters. We cannot say that is what all voters intended or that it would be necessarily absolutely part of the decision. By the same token, should the courts decide that that Act was relevant in informing the intent of people, it could end up limiting the power that was given by the referendum as well. If it was taken that this was the intention of the people, it might form a limitation on future Oireachtas action itself.

I feel that we are just lawyers sitting here saying things are uncertain which, to a certain extent, is true but unfortunately that is the refrain I will continue to come back to. There is an element of uncertainty here.

Ms Mary O'Toole: I echo what Dr. Kenny said there. We are really just outlining to the committee all the things could happen. Members must understand that, as lawyers, we are inclined to go immediately to the worst-case scenarios as that is just our nature. Given that we cannot predict anything with any great certainty, everything is surrounded by caveats. It is just a question of this committee deciding which of those it believes is the best option in the circumstances before it.

Deputy Peter Fitzpatrick: I thank Dr. David Kenny, Ms Mary O'Toole and Professor Fiona de Londras for their presentations. Article 40.3.3º states, "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right." If we propose removing such a statement of equal rights from our Constitution, especially after so recently adding to the Constitution a new statement of equal rights on marriage equality, it would display confusion on the question of human rights in our laws.

Dr. David Kenny stated that if Article 40.3.3º were removed, it would have no immediate or automatic effect on the legal position on abortion. He stated that the legal position will remain whatever is contained in law under the Protection of Life During Pregnancy Act 2013, and that unless and until the law is changed by the Legislature or validated by the courts, this will not change.

Removing the eighth amendment would inevitably lead to abortion on demand. It is not hard to imagine, then, where abortion in Ireland will be in a few decades. In the United States alone, over 55 million lives have been terminated by abortion since its introduction. This amounts to nearly one fifth of the entire population, or indeed the entire population of a country the size of South Africa. A baby's heart beats 21 days after conception. Facial features start to form by the fourth week. Internal organs begin to form by the sixth week. The nervous system is responsive by the eighth week, and the baby can swallow, yawn and suck by the ninth week.

By week 11 the baby can stretch and jump. There are 100,000 people alive in Ireland today as a direct result of the eighth amendment. Removing it would lead to abortion on demand. I ask the witnesses to give me their legal opinion on this.

Chairman: I call Ms O'Toole this time as I do not want to always leave her until last.

Ms Mary O'Toole: This exemplifies the juxtaposition of opinion. The belief is that simply repealing the eighth amendment and not replacing it with anything will lead to abortion on demand because women will have their right to bodily integrity reinstated, that is, their right to health and their right to life, and that there will be no right to life for the unborn. One side of the debate believes that would be the consequence of repealing the amendment without replacing it with any other provision. The other side of the debate believes that repealing will leave the right to life of the unborn as an inherent right in the Constitution and will lead to a circumstance where a woman's right to bodily integrity would be trumped by that right to life. Those are the two controversies.

We have had a lot of discussion over whether the pre-1983 position is correct or not. My conclusion is that it is very difficult to say whether the pre-1983 position will re-emerge, certainly in so far as the rights of the unborn are concerned. Professor de Londras said in her paper that if a woman's right to life and to bodily integrity were to come back to the fore, that there is no reason why the Legislature cannot modify those rights in the common good, just as they do with regard to other rights. This, however, is not regarded by the other side of the debate as sufficiently secure for their purposes. Again, there is a degree of uncertainty about exactly what would happen. To my way of thinking, the Citizens' Assembly wanted to start with a clean slate and to ask how do we do this. There are, of course, risks and benefits to each of those approaches. How one sees those risks and benefits would also hugely depend on where one is standing. It is the difficult task of this committee to look at that.

I think it very unlikely that abortion on demand would be the result of the repeal of the eighth amendment *simpliciter*. The whole ethos of the manner in which we deal with these issues in Ireland makes that an unlikely outcome. Certainly at present, however, an enormous deference is paid by the courts, as Dr. Kenny has said, to the views of the Legislature on how these rights should be balanced. That is the present reality and the Supreme Court has reiterated as recently as the MR & Anor *v.* An tArd Chláraitheoir & Ors decision on the surrogacy issue that it is a matter for the Legislature to balance these precarious rights. In the course of the X case Mr. Justice McCarthy complained that the Legislature has not introduced legislation as to how these rights are to be balanced and left it to the court. No, then, I do not think that a repeal would lead to abortion on demand. One is dealing, however, with the two views on each side as to what the consequences of repeal without replacement might be. One is trying to balance all of that.

Chairman: Do the other two witnesses want to make a brief comment?

Professor Fiona de Londras: Very briefly. The likelihood depends on the answer to two questions. The first question is whether it would be constitutionally permissible. Would repeal, in other words, create an unlimited right to access abortion? I think it very unlikely. The second question is whether it would be politically likely, because even if it were constitutionally possible it would need to be politically enacted. This, I think, is also highly unlikely. I do not consider it inevitable at all.

Chairman: I will now call on Senator Paul Gavan.

Senator Paul Gavan: I thank the three witnesses. It has been a very helpful day in terms of the advice that has been given. I was particularly struck by Ms O'Toole's reference to the 1983 amendment which I am unfortunately old enough to remember. It was in fact the first campaign in which I was involved. The eighth amendment was presented at the time as a very simple amendment that would not have consequences. Those of us who campaigned against it at the time, and I am glad to say that I was one of them, made the argument that the Constitution it was not the right place to insert something specific of that nature. To bring this back a stage, this leads to the question as to how a constitution should operate. Should it operate on the basis of broad principals or the basis of specifics? I would welcome a legal perspective on that. Going back to that time, is it the view of the witnesses that the eighth amendment was necessitated from a legal, constitutional perspective?

My final question might seem a little obvious. We keep talking about repeal. For the sake of clarity, could the witnesses give us a legal definition of what repeal means?

Chairman: Perhaps Dr. Kenny would like to go first this time.

Dr. David Kenny: Generally speaking, constitutions work best when they state broad principals. At the same time, when those principals are fleshed out, particularly by court judgments, it is sometimes also necessary to include matters of detail. It is also the case that detail sometimes has to be inserted for governance reasons. The choice needs to be made in this House as to what the appropriate level of detail would be and if certain regulatory changes need to be made. The people then ultimately get to decide if those changes are well advised or not.

The second question concerned whether or not the insertion of Article 40.3.3º was necessitated. One of the things cited at the time was a fear of a Roe *v.* Wade type of judgment. This was specifically cited in the Dáil with the introduction of the wording, as well as in many public debates. Studying the judgments of the courts now with hindsight, it seems in my view that was a very unlikely possibility at that point. I certainly would not say that it was foreseeable. Again, there is a never-say-never aspect to this and one can never know how the courts are going to develop. As to whether or not there was an imminent risk at the time, however, I would say that it seems unlikely and it was probably not an immediate concern.

The simplest legal definition of repeal would be that the language is excised and no longer there. It would not simply be a case of repealing the eighth amendment, of course, but also the 13th and 14th amendments that have added to it. The repeal of Article 40.3.3º would mean that the language is gone and what follows after that, and what is the actual meaning of that, are the big questions.

Ms Mary O'Toole: I would agree with all of that. If somebody had brought an application at the time to protect the rights of the unborn he or she would probably have succeeded. One has to bear all of the social and cultural factors of the time in mind, and how people thought about things. What exactly would have happened would also would have hugely depended on the individual circumstances of the case before the court. I certainly think that it was very unlikely that the Irish courts at that time would have or indeed would even today sanction an abortion on demand scenario, in the sense of abortion in any circumstances at any time for any reason. That is my personal view. As a practitioner that just does not resonate me and I do not see that happening. That is, however, only a personal view.

I agree with Dr. Kenny's definition of repeal. One just takes it out and then deals with the consequences of having taken it out.

Professor Fiona de Londras: I agree.

Chairman: Good. I will move on to the next questioner, who is Deputy Billy Kelleher.

Deputy Billy Kelleher: At the risk of being repetitive, it is nice to have lawyers give us advice for free from time to time. We will keep asking the same questions.

Last week, Ms Justice Laffoy said that whatever we do, we must try to bring legal certainty to the issue. She was very clear on that. Of course, the difficulty is what legal certainty is and when would one arrive at it. The Constitution only states that the Oireachtas legislates and the courts interpret the intention of the Legislature. Of course, in the this context the reason we have had interpretations is because we have had no legislation. It was the X case which led to the interpretation of the Constitution and why we are in a particular bind in this context.

We may be complicating the issue in terms of the legal and constitutional aspects, such as, for example, publishing legislation with a repeal or amend provision and asking the people to adjudicate on the Constitution while at the same time assuming that legislation is published in tandem which ensures they can feel comfortable amending or repealing the amendment. It may be the case that legislation would be published and run in tandem with a constitutional referendum and the people would decide to change the Constitution because they are comfortable with the legislation. If the legislation is subsequently interpreted by the courts and deemed to be ineffective or not to interpret the original constitutional change, would the Legislature be very slow to change that legislation given that it ran in tandem with a constitutional amendment? I ask for more clarity on that issue.

Deputy Daly referred to the fact we might be complicating matters. We complicated this issue because we had an insertion, Article 40.3.3º, in 1983 but the Oireachtas never legislated subsequently. We had a vacuum for many years. It was not until the Supreme Court ruling in the X case that Mr. Justice McCarthy pointed that out. We failed to legislate thereafter. We have had a lacuna in the law while the courts were, I imagine, based on what they said, begging for the Oireachtas to legislate. The Oireachtas has not had a great record in this particular area.

From that point of view, if we are to ask the people to amend, replace or repeal on the basis that the Oireachtas may legislate, we need to bear in mind that our record to date has not been great. Is it necessary for us to say that the Oireachtas must legislate but that can be interpreted by the courts?

Professor Fiona de Londras: On whether the Legislature would be slow to depart from legislation published in tandem with a referendum proposal but not entrenched in the Constitution, the answer is likely to be "yes" because there would likely be a sense that this is what people understood themselves to be voting for. The distinction between the constitutional referendum and the law is not always at the forefront of one's mind when voting in the ballot box. Nevertheless, the ordinary processes of politics, such as protest, representation, changes in scientific knowledge, hard cases or whatever, would be processed by the Oireachtas in the ordinary way. It would then be for the Houses to determine how comfortable they were with departing from the proposed legislative provision.

As to whether we should say that the Oireachtas may legislate or that it must or shall legislate, again that is a matter for the committee. If a referendum were held and passed with a clear, democratic and political expectation of legislation, I imagine the Members of these Houses would feel politically obliged to proceed with legislating.

Deputy Billy Kelleher: Even if legislation was not published in tandem with the referendum.

Professor Fiona de Londras: Yes. I would imagine that some impression of likely legislation, perhaps the heads of a Bill or a sense of what it is likely to be, would be required. If I remember correctly, that is what happened around the referendum on information and we have the abortion information Act, which has a longer Title, resulting from that. I believe the heads of a Bill were then put into full legislation, but I am open to correction. Dr. Kenny or Ms O'Toole may know.

Dr. David Kenny: There is a risk that the Oireachtas might be slow to change legislation in those circumstances. I very much agree with Professor de Londras. Perhaps in that situation it would be worth stressing that the Legislature was being empowered, which was the point of the change, and this was what was being proposed for the moment but was not meant to create a political expectation for all time. Rather, it was a promise that nothing further would be done without the representatives of the people going through the ordinary process of making a law, which is the usual guarantee one has against breakneck changes in any legal regime.

The second question concerned whether the Oireachtas must legislate. Again, it is something the committee should consider. Ultimately, the committee will end up relying on the same enforcement mechanism, that is, political pressure, because the courts will be loath to issue an order mandating, for example, the Houses to legislate. It is difficult to foresee that happening. Whether the provision includes the term "shall", "will", "must" or "may", it seems that ultimately it relies on political will in the Houses.

Chairman: I thank Dr. Kenny.

Ms Mary O'Toole: It would seem that if it was decided to hold a referendum and a Bill was published advising the people of what the Government had in mind, it would be political suicide not to go along with that if it were passed. That is not a legal view. We can have a provision in the Constitution which requires legislation and so on. Obviously, the courts would not like to impinge on any separation of power and so on. I would have thought there would be enormous political pressure. This is a political, rather than legal, question because it seems to me that politically it would simply not be acceptable to leave a vacuum.

There would not be a total vacuum. If there was repeal and an enabling provision allowing the Oireachtas to-----

Deputy Billy Kelleher: There has been a vacuum since 1983.

Ms Mary O'Toole: We would still have the current legislation, the Protection of Life During Pregnancy Act, in place. That legislation might be subject to challenge because it only deals with the question of the right to life of the mother. If there was a basis for abortion on grounds other than the right to life, such as something to do with bodily integrity, then the Act may well be challenged on the basis that it does not vindicate a woman's right to bodily integrity. We would be in a vacuum and only dealing with the 2013 Act. It would seem to me that legislation would have to be put in place pretty quickly because it is likely that there would be some kind of application by someone in respect of the existing legislation in the event of repeal.

Chairman: I thank Ms O'Toole.

Deputy Bernard J. Durkan: I should state at the outset that I am not in favour of abortion

and never have been, but I have spoken at many gatherings since 1983 where it was obvious to me that there were certain requirements that needed to be dealt with such as, for example, rape and incest, which I do not propose to go into now. I am not sure that what we are doing will deal with those issues in their entirety because they still exist.

Deputy Daly, correctly, referred to the 1861 Act. As one of the people who was in the House in 1983 and went through that debate, I can assure the Deputy that it was not a simple debate. It was a very animated and bitter debate on both sides. This is not a simple thing. People who believe that what we are discussing is simple are naive. The people on the Citizens' Assembly had the advantage of not having to address their constituents or the various groups which are likely to come to the fore in the course of what we are now undergoing.

It is worth saying at this stage that the 1861 Act did not protect women to any great extent. Several women lost their lives unnecessarily at that time. Some of us dealt with those cases up close and personal over the years, something which continues. We need to remind ourselves that there was very little protection for women. The 1861 Offences against the Person Act was deemed to be the Act that prevented abortion at that time. There was a fear that there would be a constitutional challenge to it. That is where it came from. As a result a lobby started for an amendment to the Constitution.

It is not possible to exclude a particular item of legislation from the Constitution and the courts without challenge. That is my opinion but I am neither a legal nor a medical practitioner. I have, however, read the wise words of both over the years. There would be a fear on both sides of something like that happening. Reference has already been made to the various situations that could emerge.

Reference is made in the report of the Citizens' Assembly to the system in the United Kingdom and the possibility of a similar system in this country. Given the existence of the Magna Carta in the UK and our written Constitution, how do the witnesses as legal professionals make the comparison and conclude that it is as simple to bring in legislation that would not be challenged here as it was in the UK?

Chairman: Is the Deputy directing those questions to anybody in particular?

Deputy Bernard J. Durkan: Anybody can answer. It is a dropping ball that anyone can reach for.

Ms Mary O'Toole: There is no written constitution in the UK. The nearest thing it has to one is the European Convention on Human Rights which was enacted in law in 1998. That gave it a charter against which to measure rights. Until then legislation could not be challenged in the way that we are used to doing. The courts in England could not say that legislation was unconstitutional. They have unwritten constitutional principles, which is somewhat different. Invalidating legislation is a different day's work. We recently saw the challenge to the constitutionality of the manner in which the Brexit legislation was brought before the British Parliament because it has unwritten parliamentary rules allowing it to ask whether there is the power to do this, that and the other but invalidating legislation is not one of those things.

In the Bourne case in England in, I think, 1937, a doctor was prosecuted under the Offences against the Person legislation that the Deputy speaks of for having performed an abortion on a 14 year old. He said he was performing it to preserve the life of the mother. The jury was directed to acquit him of the offence of abortion on the basis that if the mother's pregnancy

had proceeded she would have been a mental and physical wreck. That test imports health, as opposed to life, qualifications. Following that case legislation regulating the abortion regime was introduced in England. It is purely legislative and is amended by Parliament from time to time as required. It is not subject to a constitutional analysis in that way. It might be subject to some kind of challenge under the European Convention on Human Rights but it has not, in so far as I am aware, been so challenged to date because I do not think there is any provision of the convention that would obviously be breached by anything in the English legislation.

Professor Fiona de Londras: In terms of constitutional analogies the UK does not work very well as Ms O'Toole has said. After five years of teaching public law in the UK, I now have the trope. There is a constitution but it is not codified in one document. The courts do not have any strike down power. Every piece of legislation can be challenged under the Human Rights Act and courts will exercise varying levels of deference depending on the topic. It is not a good analogy for us because it is such a different way of thinking about the relationship between legislative and judicial power.

In response to the Deputy's first question on the possibility of excluding an item from the Constitution, I agree with Dr. Kenny that it is legally possible to exclude an item from scrutiny of the courts. Whether it is politically possible, which is what I take the Deputy to have been talking about, is an entirely different matter.

Deputy Bernard J. Durkan: I should mention that I was a member of the convention that drew up the charter of fundamental human rights all those years ago as well. Some other time I will go back to it.

Deputy Mattie McGrath: I welcome our guests here today and thank them for their time.

What are their views of the preamble to the UN Convention on the Rights of the Child which states: ". . . the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth"? This clearly states that a child is to be considered a child before birth and that any prenatal child is entitled to legal protection. According to Fiona Broughton of the faculty of law at University College Cork, UCC:

> At the nub of this research lies a very basic question – who is the subject of human rights? This is a vital question and not one which should be left up to each state to decide the answer for itself through arbitrary court judgments, piecemeal legislation, or as Angela Shanahan has put it "accidents of precedent".

My concern is that by removing the constitutional rights that are there at the moment we will end up granting and withdrawing the right to life depending on the whim of parliament at any time. Is that not an absurd situation?

Language is also very important. I was interested to hear Professor de Londras use the term fatal foetal abnormality despite the fact that the Health Service Executive, HSE, quite recently issued a guidance document on this issue advising against use of the term. Should the professor not also be guided by this opinion as it is not based on medical reality? If we do not use the proper terminology how can we develop an appropriate law in this area? When Senator Mullen asked this question the professor said she was agnostic and did not mind what term she used but when she replied she used the same terminology when she had an opportunity to use another term. I believe that is inappropriate.

Is Ms O'Toole saying that a woman's right to bodily integrity means a right to abortion because that is what she appears to be saying? Who defined bodily integrity as meaning a right to abortion?

I wish to also state in public session, as I did in private session today, that I was disappointed that the committee did not choose to view the short DVD by Dr. Levatino. I was asked to raise it and to ask the committee to view it. The Chairman said she had seen it. It is an animation and the Chairman said it was not unreasonable. I would have thought the committee would at least look at it in public and give its responses.

Chairman: I thank the Deputy. We will stick to the questions.

Deputy Mattie McGrath: This man has performed many hundreds of abortions and changed his mind and saw fit to produce that video.

Chairman: With respect, we have covered that matter in the private meeting.

Deputy Mattie McGrath: I wanted to put it on the public record here. I do not think I am over my time.

Chairman: Actually the Deputy is.

Deputy Mattie McGrath: I wanted to put on public record that I want that video to be seen here.

Chairman: I think the Deputy has done that. I thank the Deputy.

Professor Fiona de Londras: On who is the subject of human rights, international human rights law, as I am sure the Deputy is aware, has effectively fudged this matter. There is no clear answer one way or another as to whether the foetus or unborn or prenatal life is a rights bearer in terms of international human rights law. I know the committee has a session coming up on that subject where I am sure that can be further pursued.

I understand the concern about the withdrawal of a right. It goes back to something I said to Senator Mullen about the possibility of the distinction between a constitutional right which is legally enforceable in a particular way and a constitutional value which can legitimately guide the work of the Oireachtas. There could be a value for the protection of the unborn, as one sees in a couple of European states like, from memory, Croatia, the Czech Republic, Hungary and the Slovak Republic. I might be wrong, but that is my memory. It makes it clear that Parliament can be guided by the pursuit of that aim subject to a requirement not to impinge on the essence of, or disproportionately to limit, the constitutional rights of pregnant persons. While that seems like a very technical distinction, it empowers Parliament while protecting the rights of pregnant persons. As to the terminology "fatal foetal abnormality", I took this as an opportunity to engage in a public debate. It is a vernacular usage and were it to be in any way put into either legislation or the Constitution, I would expect it to be subject to more precise definition and terminological notation.

Ms Mary O'Toole: I will address first the question Deputy McGrath put to me on a woman's right to bodily integrity as a right to abortion. I do not think I said that. At the moment, the right to an abortion in Ireland is predicated on the life of the pregnant woman being subject to substantive risk or threat. If one removes that, the pregnant woman would still have a right to life in general terms, as all citizens do, albeit it is not an absolute one. She would also, as all

citizens do, have a right to bodily integrity. A right to bodily integrity is usually associated with a right to the preservation of one's health so that if one was in a position where a pregnancy was causing a difficulty with or a threat to one's health, one could conceivably bring an application before the court to say that one was entitled to an abortion because of whatever health difficulty was concerned. That is all I meant to convey by mentioning the right to bodily integrity.

Chairman: I thank Dr. Kenny, Professor de Londras and Ms O'Toole for their very helpful contributions this afternoon on a very complex matter. It has been a very interesting conversation. As there is no other business, the meeting is adjourned until Wednesday, 4 October, when we will address in public session the human rights issues arising from the Citizens Assembly recommendations. I wish everyone a good evening.

The joint committee adjourned at 4.55 p.m. until 1.30 p.m. on Wednesday, 4 October 2017.