Opening Statement to the Health Committee on the General Scheme of the Protection of Life during Pregnancy Bill, 2013
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The proposed legislation is welcome for its recognition of a public obligation to implement an existing constitutional right to life-saving abortion. But the proposed legislation does not do enough to meet the ethical obligation to value women’s lives. I will focus this statement on 4 key points in relation to the definition of the unborn, the significance of risks justifying a termination of pregnancy, the limits on the right to conscientious objection, and the inappropriateness of criminalization.

Unborn – Head 1
Head 1 suggests that the unborn shall be defined to mean “following implantation”, drawing on Roche v Roche concerning frozen embryos as precedent. With respect, the legal and ethical arguments for choosing the point of implantation as the significant moment for legal protection of unborn life have not been adequately addressed. Given past failures to interrogate the assumed wrongness of abortion and given the particular factual context of Roche v Roche, it is open to the Legislature to consider more fully the criteria by which the ‘unborn’ should be defined in this legislation.

The best ethical argument for legal recognition of the ‘unborn’ from its earliest stages is that it will, subject to assistance from the pregnant woman, become a person in the future. The future personhood argument does not apply to fetuses with lethal abnormalities. They are going to die after birth and therefore do not have a future as persons. They should be excluded from the legal definition of ‘unborn’ in the legislation. Moreover, the state itself argued in D v Ireland that it was possible that fetuses with lethal abnormalities were excluded from the legal definition of the unborn. The state has a moral obligation to deliver on that legal opinion in D v Ireland through this Bill’s definition of the ‘unborn’. In this way the
Legislature can act to alleviate the suffering of women and couples who are carrying pregnancies with lethal abnormalities.

A second important aspect of the argument for protection from implantation is that it rests on the potential to become a person, not on actual personhood. Potential personhood is best regarded as giving the unborn some moral value because of what it will become in the future. This potentiality may be ethically significant, but it is not as significant as the moral status that comes from sentience, that is the actual ability to feel pain or pleasure. Nor is it the same as the higher moral status which comes with personhood and the capacities for reason, will and communication. A person's interest in her own bodily and moral integrity may justify limitations on her duties to sentient beings. This is because part of what makes life valuable is the person's ability to reflect on her life over time, in particular factual circumstances, and make her own moral choices.

Conclusion: The following categories provide a better ethical rationale for the protection of unborn human life than the assumed significance of implantation.

- Pre-sentient foetal life has moral value rather than moral status. It should be taken into account in moral decision-making, but it does not impose harm-reducing duties on others.
- Sentient foetal life has moral status and may impose a duty not to be harmed on others.
- Self-aware personhood is a higher moral status than sentient life and may limit the duties owed to sentient life in important ways.

Recommendation 1: The unborn should be defined so as to exclude those foetuses which have lethal abnormalities and will not have a future independent life.

Recommendation 2: The unborn should be defined to mean “the foetus following the earliest moment at which sentience is possible”
Risk of loss of life justifying a termination of pregnancy - Heads 2-4
Heads 2-4 provide for the kinds of risk to a woman’s life which will legally justify a termination of pregnancy. Others have commented more eloquently than I can on the need to remove obstacles to life-saving abortion care and on the troubling mistrust of women with suicidal ideation. Here I would like to focus on the narrowness of the ‘risk to life’ ground for abortion. This ground has been drawn very narrowly in part because it has been assumed that Article 40.3.3 requires the life of the pregnant woman to be treated the same as the life of the embryo or foetus.

Equality scholars, including those who work at the Equality Studies Centre at UCD, have long argued that equality does not mean sameness. Rather equal treatment requires the accommodation of actual differences between beings. Vindicating the life of the unborn with due regard to the equal right to life of the mother should entail a full evaluation of the pregnant woman’s interests as well as those of the unborn. To state the issue concisely, women are conscious, sentient beings with moral views and responsibilities to others, when foetuses are not. Foetuses are the bearers of biological life and future persons, but this is not the same kind of life as that of breathing, feeling, thinking women. The current legal test treats women and fetuses as if they are the same, and in doing so, it devalues the significance of each form of life.

Recommendation 3:
The legal test should be: “It is not an offence to carry out a medical procedure, in the course of which or as a result of which unborn human life is ended, where there is a real and substantial threat to the life of the woman, including to her life interests in mental and bodily integrity.”

Conscientious objection – Head 12
In principle the inclusion of a conscientious objection clause is defensible, subject to 2 conditions. It must be applied to individuals rather than
organisations and only in circumstances where alternative provision is readily available. If respecting human life includes respecting the personal choices which give life meaning (Dworkin, 1992), then healthcare practitioners may avoid performing healthcare which infringes their moral values. As the Explanatory Notes acknowledge, conscientious objection is not an absolute interest. It is limited by the need to prevent harm to others, pregnant women in this instance. In circumstances where a healthcare practitioner cannot arrange alternative provision without undue delay, their right to conscientious objection may be limited by the duty to prevent harm to their patients.

Further, I would ask the Committee to note that this recognition of healthcare practitioners' consciences is inconsistent with the lack of legal recognition to date of pregnant women's consciences. If conscientious objection to the provision of abortion is legally acceptable then so is a 'conscientious objection' to the sustenance of an embryo/foetus within one's body. If a woman's conscience tells her that terminating a pregnancy is the best moral resolution of the various issues which may arise in a given pregnancy, then that conscience also deserves respect and legal accommodation.

Offence - Head 19
The criminalisation of women's decisions to end their pregnancies is a disproportionate and unfair response to the constitutional direction to vindicate the life of the unborn as far as practicable. Criminalisation does not achieve the objective of protecting foetal life. We know that 100,000s of Irish women have had abortions and that they will continue to seek out ways to control their fertility. Criminalisation makes the mental and physical experience of unwanted pregnancy worse by stigmatizing those with unwanted pregnancies and by inhibiting their healthcare providers. The Legislature has other options under Article 40 3 3. It does not, as the Explanatory Notes suggest, have to criminalise those abortions which fall outside the tests in Heads 2-4. The Legislature could regulate the terms under which women access abortion in the Irish health service without punishing those women who fall outside those terms. It
could vindicate unborn life by investing in pregnancy-related care and research into miscarriage. In choosing to punish women rather than to adopt more neutral or positive measures for the support of foetal life in pregnancy, the Legislature would act unfairly. Head 19 is unfair because it asks women, rather than the state, to bear the weight of the public duty to vindicate foetal life.

Recommendation 4(a):
Repeal sections 58 and 59 of the Offences Against the Person Act 1861, without providing for a new offence.

Recommendation 4(b) (as an alternative to 4(a)):
If the Legislature is not willing to take the route of decriminalisation, it should at minimum define the offence so that it excludes attempts to end a pregnancy. The phrase “[A]ny act with the intent to destroy unborn human life” is too broad and may include those acts which are ultimately unsuccessful in destroying unborn human life. Secondly, the maximum penalty for the offence should be reduced significantly from 14 years. This penalty is disproportionate in punishing a decision which implements the defensible moral choices of women and their healthcare providers.