A Critical Analysis of the Heads of Bill and the Legal Necessity of Legislating for *X.*

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This article addresses two questions: what restrictions on abortion on the grounds of risk of suicide are and are not contained in Head 4 of the *Protection of Life During Pregnancy Bill 2013*? What, if any, is the legal requirement to legislate for such abortions? In answer to the first question, the following claims are advanced: Head 4 creates a new and unprecedented statutory basis in Irish law for the direct and intentional termination of an unborn child's life, *i.e.* for procured abortion, even after the point of viability outside the womb. Unsettlingly, and one hopes inadvertently, the Bill permits in principle, by reason of its definition of the "unborn", the carrying out of a procured abortion upon a partially delivered baby. Further, there is no requirement that an abortion be certified under Head 4 only as a last resort after alternative treatments have been offered or tried. Finally, the requirement that three medical practitioners be involved in certification under Head 4 is not a robust safeguard due to the silence of the Bill on the mechanics of referral process. In answer to the second question it is argued that there is no legal obligation upon the Oireachtas, arising from the jurisprudence of either the European Court of Human Rights or the Irish Supreme Court, to enact primary legislation providing for abortion on the grounds of risk of suicide.

I - Introduction

The public discussion of the Heads of the *Protection of Life During Pregnancy Bill 2013*[1] suggests there may be some confusion[2] as to what is permissible under the

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[1] Heads of *Protection of Life During Pregnancy Bill 2013* [hereinafter Heads of Bill] <http://www.dohc.ie/press/releases/pdfs/plp_2013.pdf?direct=1> (last accessed: 16 July 2013). Please note that this article is a revised version of the written submission prepared by the author on 16 May 2013, in response to an invitation of the Joint Committee on Health and Children to address the Committee in relation to the Heads of Bill on 21 May 2013. In the author's opinion none of the textual differences between the Heads of Bill and the *Protection of Human Life During Pregnancy Bill 2013* as passed by Dáil Éireann on 12 July 2013 and Seanad Éireann on 23 July 2013 <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2013/6613/b66b13d.pdf> (last accessed: 16 July 2013), affect the substance of the arguments in what follows and the analysis is equally applicable the Bill as passed.

[2] Consider, for example, the following exchange between the Minister for Health, Dr. James Reilly T.D., and R.T.E.'s Pat Kenny on 1 May 2013, the day the Heads of Bill were published:

> Pat Kenny: But you know take a 22 week gestation for example on the cusp of viability I mean what's suppose [*sic*] to happen in that situation?
> Minister: Well it wouldn't be for me to say what's suppose [*sic*] to happen it would be for the doctors themselves to look at this situation and assess it.

proposed legislation with respect to abortion on the grounds of risk of suicide. If an informed and reasoned debate on the merits of this aspect of the Heads of Bill is to be possible in the coming weeks or months, a necessary first step is to achieve some level of clarity as regards:

(a) what restrictions on abortion on the grounds of risk of suicide are and are not contained in Head 4 of the Bill; and
(b) what, if any, is the legal requirement to legislate for such abortions.

This article considers (albeit in a condensed manner) these two questions. Part II explores the terminology that is relied upon in the discussion that follows. Part III then considers six features of Head 4 which I believe are significant but perhaps not yet sufficiently well understood. In light of the points raised, Part IV goes on to discuss to what extent the Oireachtas is under an obligation to legislate for abortion on the

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Pat Kenny: I know we have people on the so called pro-life side of this argument who say look if its 30 weeks at that point you get an early delivery rather than a termination then you wonder whose responsibility is the child that is so born particularly when premature birth can lead to certain ongoing health effects who is responsible for taking care of those. The doctors who make the decision have they a responsibility in law and perhaps a financial responsibility that might come to play on their insurance, the conditional on the decisions they make I mean these are questions which are ignored in this bill?
Minister: No they are not we've thought these things through but can I also say thanks to the excellent work of Jerry Buttimer, we'd a very calm debate at the Oireachtas Health Committee leading up to the drafting of the heads as we look forward to a similar tone and debate over the number of weeks as their debate informs us on the drafting of the bill. Can I just say specifically in relation to the issues you've raised I mean its [*sic*] not for me to tell doctors what to do but I could imagine that the obstetrician in particular who has a duty of care to both his patients as do the psychiatrists by the way but the obstetrician who'd be more familiar with this whole issue would more than likely insisting that if they waited a week or two you know that this baby would have a chance to live. Now I can't say that that will be the case I must leave it up to the judgement of the professionals involved.
Pat Kenny: By the way … have obligations to both their patients they surely do not have any obligations to an unborn child or a foetus because …
Minister: No but they have under the constitution …
Pat Kenny: No but they are not patients, the foetus is not a patient of the psychiatrist if you know what I mean…
Minister: Well we could get into the you know the specifics of you know I don't want to be on …[answer ends].

Extract taken from document entitled "Transcript of Interview with Minister James Reilly, Pat Kenny Show~Wednesday 1st May 2013" prepared and circulated on 1 May 2013 by Sarah Meade of the Fine Gael Press Office (on file with author).

grounds of risk of suicide on foot of the *Attorney General v. X* case[3] and the *A., B. & C. v. Ireland*[4] case.

II - Terminology

Throughout this article, the following terms will be used in the following ways, and for the reasons stated:

> **"unborn child"** – Embryo and foetus are specialised medical terms for the unborn which are appropriate in certain contexts, particularly where it is important to be precise about the gestational or anatomical features of the developing human life. Neonate or pre-pubescent are similar specialised terms that may be used to distinguish different stages in physiological development after birth. Legally speaking, however, "unborn child" is a recognised term in Irish statute[5] and case law,[6] as well as European case law,[7] and there is no basis for not using this term in formal legal discourse.
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> **"procured abortion"** – This term is used to mean the direct and intentional killing of the unborn child. It is used to avoid the ambiguity in the phrase "termination of pregnancy" and to distinguish the procedure from other uses of the term "abortion" in medical discourse, for example spontaneous abortion. It is consonant with the following definition of abortion offered by the Supreme Court in the *Attorney General (S.P.U.C.) v. Open Door Counselling Ltd:* "[t]he performing of an abortion on a pregnant woman *terminates the unborn life* which

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[3] *A.G. v. X.* [1992] 1 I.R. 1 [hereinafter *X.*].
[4] *A., B. & C. v. Ireland*, no. 25579/05 [2010] E.C.H.R. 2032 (16 December 2010) [hereinafter *A., B. & C.*].
[5] Section 58 of the *Civil Liability Act 1961* states: "[f]or the avoidance of doubt it is hereby declared that the law relating to wrongs shall apply to an unborn child for his protection in like manner as if the child were born, provided the child is subsequently born alive."
[6] See, *e.g.*, *G. v. An Bord Uchtála* [1980] 1 I.R. 32; *The Attorney General (S.P.U.C.) v. Open Door Counselling Ltd.* [1988] I.R. 593; *X.*, *supra* note 3.
[7] See, *e.g.*, *H. v. Norway*, no. 17004/90, Decision (Admissibility), 19 May 1992 (Eur. Comm. H.R.); *Boso v. Italy*, no. 50490/99, Decision (Admissibility), 5 September 2002 (E.Ct.H.R.); *Vo v. France*, no. 53924/00, Judgment (Grand Chamber), 8 July 2004 (E.Ct.H.R.); *A., B. & C.*, *supra* note 4; *R.R. v. Poland*, no. 27617/04, Judgment (Fourth Section), 26 May 2011 (E.Ct.H.R.).

she is carrying. Within the terms of Article 40, s. 3, sub-s. 3 it is *a direct destruction* of the constitutionally guaranteed right to life of that unborn child."[8]

"the *X.* case test" – This phrase will be used as a short-hand for the binding interpretation of Article 40.3.3 authoritatively decided by the Supreme Court in the *X.* case[9], which was summarised by Hamilton J. in *In re. Article 26 and the Information (Termination of Pregnancies) Bill 1995*[10] as follows:

> *[t]he Attorney General v. X.* … established that having regard to the true interpretation of the Eighth Amendment, *termination of the life of the unborn* is permissible if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother and that that risk can only be avoided by the termination of her pregnancy.

III - What Head 4 permits as currently drafted and how it may operate in practice

Head 4 of the Heads of Bill is entitled "Risk of loss of life from self-destruction".[11] It provides as follows:

> (1) It is not an offence to carry out a medical procedure, in accordance with this head, in the course of which or as a result of which unborn human life is ended, where–
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> (a) that procedure is carried out by a registered medical practitioner at an appropriate location,
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> (b) one obstetrician/gynaecologist, who must be employed at that location, and two psychiatrists, both of whom shall be employed at a centre which is registered by the Mental Health Commission, and one of whom shall be attached to an institution where such a procedure is carried out, in accordance with this head, jointly certified in good faith that –
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> (i) there is a real and substantial risk of loss of the pregnant woman's life by way of self-destruction, and
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> (ii) in their reasonable opinion this risk can be averted only by that medical procedure.

[8] [1988] I.R. 593 per Finlay CJ at 625 [emphasis added].

[9] *X.*, *supra* note 3.

[10] [1995] 1 I.R. 1 [emphasis added].

[11] Abortion on grounds of risk of suicide is now dealt with in s. 9 of the *Protection of Human Life During Pregnancy Bill 2013*, *supra* note 1.

> (2) (a) At least one of the three medical practitioners referred to in paragraph (b) of subhead (1) shall consult with the pregnant woman's general practitioner where practicable.
> (b) In forming the aforesaid opinion, the medical practitioners should examine the woman.
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> (3) Where three medical practitioners referred to in this head have jointly certified an opinion referred to in paragraph (b) of subhead (1), the certifying obstetrician/gynaecologist referred to in paragraph (b) shall forward the certificate to a location referred to in paragraph (a) of subhead (1) and shall make arrangements for the carrying out of the procedure at that location.
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> (4) It will always be a matter for the patient to decide if she wishes to proceed with a termination following a decision that it is permissible under this Act.[12]

The following does not purport to be an exhaustive discussion of the issues raised by Head 4. Rather it is an attempt to explain some of the most significant features of Head 4 and to dispel some of the misunderstanding that surrounds them.

A. Head 4 permits the direct and intentional killing of the unborn child.

First, we must be clear that Head 4 creates a new and unprecedented statutory basis in Irish law for the direct and intentional termination of an unborn child's life, *i.e.* for procured abortion. For the first time in Irish law there will be a formal legislative framework for a medical procedure the defining object (or success condition) of which is not merely the relocation but the death of the unborn child. This would appear to represent a significant change in existing medical practice. This existing practice was well articulated by Dr. Rhona Mahony (Master of the National Maternity Hospital) at the Joint Committee on Health and Children's hearings in January 2013 when she stated:

> [i]n my hospital last year we had three cases in which we had to intervene prior to foetal viability because of our concern that a woman would die. There is a tiny number of cases, 30 or 40 is an overestimate. The figure nationally is more likely to be between ten and 20. *We never kill a foetus. That is not our aim.* Occasionally it is required that we deliver a pregnancy before the baby is viable or capable of surviving in our neonatal intensive care unit. When there is any possibility at all that we can preserve the life of the baby we will do so. We are

[12] Heads of Bill, *supra* note 1 at 10.

> able to do so from very low gestations, from 23 weeks on and in those cases Members can be very certain that we will make every effort to preserve life.
>
> In other cases, we are required to terminate a pregnancy as part of a treatment of a medical condition because we feel a woman will die. That is not killing the baby. That is simply delivering the baby before it is viable. There is a difference. *It is always our wish to preserve life* and society should be very reassured about that.[13]

Consider the emphasised words. It is clear that they could not be applicable to a "medical procedure" carried out under Head 4, *i.e.* a procedure which is carried out with the guiding goal of killing an unborn child in order to give effect to a decision that a real and substantial risk to the pregnant woman's life from suicide can only be averted by a procured abortion.

B. Head 4 permits late-term procured abortion (*i.e.* after viability).

Second, we must be clear that under Head 4, and depending on the circumstances of the individual case, a procured abortion could lawfully be carried out at any stage in pregnancy. The claims made by some that it would always be illegal to intentionally kill an unborn child after viability are simply not supported by anything in the Heads of Bill as it is drafted. The point is easily illustrated: if a woman presents to a psychiatrist late in her pregnancy, perhaps as a result of a traumatic experience of some sort, and states that the very thought of having a baby makes her want to kill herself or that she would rather die than have this baby and give it away, on what basis under the Heads of Bill would a psychiatrist necessarily be in breach of the law in certifying a late-term procured abortion? After all the psychiatrist is quite free (legally speaking) to form an opinion in good faith that it is the very prospect of the child's future existence which is driving the woman's suicidality. On this analysis, and notwithstanding the need to preserve unborn human life as far as practicable, the psychiatrist might conclude in good faith that the risk of suicide in such a case cannot be averted by an early inducement of labour but can only be averted by a procured abortion, *i.e.* by a medical

[13] Joint Committee on Health and Children Hearings (8 January 2013) at 34 [emphasis added] <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/HEJ2013010800034> (last accessed: 16 July 2013).

procedure "as a result of which unborn human life is ended" (to use the language of subhead (1) of Head 4). If she and a colleague of her choice[14] formed such an opinion, and the obstetrician was content to defer to their expertise in the area of suicidality, the terms of Head 4 would permit a late-term abortion to be certified and carried out in such circumstances.

It is quite understandable that some people's initial reaction might be to criticise this analysis as extreme or alarmist. This is quite natural as the scenario is indeed an alarming one and legislates for an extreme position on abortion that most would find morally objectionable whatever their views on early-term abortion. However, the proposed legislation is clear: the *bona fide* assessment of the practitioners involved can render legal a procedure at any stage of pregnancy, the result of which is to end the life of the unborn child, rather than merely to deliver the child and end the *pregnancy* early.

To be clear, it is not suggested here that the fact that Head 4 allows for the possibility of a procured abortion at any stage of pregnancy is the result of any malice or carelessness on the part of the proposers or drafters of the Heads of Bill. On the contrary it is submitted that the possibility of late-term abortion is a necessary consequence of the faithful application of what is defined above as the *X.* case test to a risk other than one caused by the physiological effects of the pregnancy on the woman. In other words, it is not the test of "real and substantial risk to the life" *per se* that creates the possibility of lawful late-term abortion. This is because in applying that test to risks to the mother's life arising from obstetrical or other physical conditions there is never a situation where the *death* of the unborn child is the intended and desired outcome of whatever medical treatment is required to avert the risk in question. The death of the unborn child may be an inevitable consequence of the treatment but it will not be the death *per se* that averts the threat, as distinct, say, from the fact that the child is no longer in the woman's womb. By contrast, if one allows the test of "real and substantial risk" to be applied to situations where it is claimed that the very fact of the present or future existence of the child (or, indeed, the thought of being refused an abortion) is itself the cause of a risk to the pregnant woman's life from suicide, then it is

[14] See Part III. F. of this article *infra*.

clear that the test could in such cases permit (and so require) a medical procedure the intended and desired outcome of which is the killing of the unborn child.

If this analysis is correct then an obvious question arises: is the Oireachtas really required to apply the *X.* case test to the risk of death from suicide and to legislate for procured abortion on grounds of such risk? This will be considered in Part IV below.

C. Head 4 does not require a procured abortion to be offered only as a "treatment" for a medically recognised psychiatric condition.
D. Head 4 does not require a procured abortion to be an option of last or ultimate resort.

These points can be taken together. Whatever one's views on the merits or morality of abortion on grounds of risk of suicide there is a duty to be honest and clear about how Head 4 will actually operate. For example, though many may be under the impression that abortion can only be offered as a last resort or when all other "treatments" for suicidality have been exhausted, there is in fact nothing in the Heads of Bill that requires anything like this. The test under Head 4 with respect to the permissibility of certifying a procured abortion for a woman at risk from suicide is whether the risk of self-destruction "can be averted only by that medical procedure".[15]

Non-medics (such as lawyers and legislators) may not appreciate that from the perspective of psychiatry not every instance of suicidal ideation, intention or even behaviour necessarily constitutes or manifests a "mental illness" which can be "treated" by professional psychiatric interventions. A threat of suicide, including a very forceful and credible threat, by a person is, on its own, not a sufficient ground to admit that person as an involuntary psychiatric patient under Irish law.[16] This means that psychiatrists would be free to operate under the Bill as follows: in a case where for example; (a) a pregnant woman says that she will kill herself if she is refused an abortion, and (b) she is deemed not to be suffering from a recognised mental illness (or indeed from any medical condition), a psychiatrist may form an opinion in good faith

[15] Heads of Bill, *supra* note 1, subparagraph (ii) of paragraph (b) of subhead (1).
[16] For the necessary and sufficient conditions see s. 3 of the *Mental Health Act 2001*.

that; (a) one should not seek to test the truth of what the woman says,[17] and (b) there are no psychiatric treatment options which can first be tried for the simple reason that the woman does not have a recognised psychiatric condition. To be clear: psychiatrists will be lawfully entitled in such a case to consider the certification of a procured abortion as the first and only option, not as an ultimate option of only last resort once other "treatments" have been tried and found ineffective.

E. Head 4 permits a procured abortion to be carried out upon a partially delivered baby.

That the terms of Head 1 when read with Head 4 may, no doubt inadvertently, permit partial-birth abortion is a shocking prospect. While this is an aspect of my analysis in which I hope that I am mistaken, it seems to follow necessarily from the definition given of "unborn" in the Heads of Bill. Head 1 defines "unborn" in a somewhat curious manner as follows: "'unborn' as it relates to human life means following implantation *until such time as it has completely proceeded* in a living state from the body of the woman."[18]

From the explanatory notes it appears that this definition was at least partly inspired by the suggestion of the Expert Group that there is a lacunae in the provisions of sections 58 and 59 of the *Offences Against the Person Act 1861* such that there is no express criminal prohibition on the killing of a baby during delivery.[19] In other words, it appears that this definition was formulated so that a baby in the course of being delivered would, by being deemed an "unborn" for the purposes of the Heads of Bill, have the benefit of the criminal offence created by Head 19(1) which states: "[i]t shall be an offence for a person to do any act with the intent to destroy unborn human life." Unfortunately it does not appear to have occurred to the drafter(s)[20] that, by being

[17] See, at the end of this report, the comments attributed to Dr. Anthony McCarthy, President of The College of Psychiatry in Ireland <http://www.rte.ie/news/2013/0424/385417-psychiatrists-will-not-take-part-in-abortion-panel/> (last accessed: 16 July 2013).
[18] Heads of Bill, *supra* note 1, subhead (1) [emphasis added].
[19] See S. Ryan *et al*, *Report of the Expert Group on the Judgment in* A, B and C v Ireland (Department of Health, November 2012) at 51 <http://www.dohc.ie/publications/pdf/Judgment_ABC.pdf?direct=1> (last accessed: 16 July 2013).
[20] I am not asserting for a moment that there is at present any medical practitioner in Ireland who would contemplate performing a partial-birth abortion. Ultimately, that is beside the point. At this stage of

deemed an "unborn", a baby in the course of being delivered does not just gain the benefit of protection under Head 19 but is simultaneously exposed to the risk of being lawfully terminated under Head 4 (for the reasons set out at (a) and (b) above).

F. The requirement under Head 4 that an abortion can only be certified with the approval of three medical practitioners is not necessarily a robust safeguard in practice.

In practice obstetricians will not be deciding whether there is a real and substantial risk to the life of a pregnant woman from suicide or whether an abortion is the only way to avert that risk. This will fall to the two psychiatrists. In reality, however, the critical decision-maker under Head 4 will be the first psychiatrist who sees a pregnant woman presenting with suicidality of some form. If that psychiatrist is satisfied that the test set out in Head 4 has not been met then there is no point in him even contacting a second psychiatrist in order to examine the woman. Alternatively if the first psychiatrist does believe the woman should be certified for an abortion then he is free to contact a colleague of his own choosing to conduct the second examination. The explanatory memo says the Heads of Bill is deliberately silent on this referral process to allow flexibility.[21] However this allows the first psychiatrist to choose only like-minded colleagues. Indeed he may have a colleague whom he virtually always asks in this regard. Again, nothing said here is intended to cast aspersions on any current practitioners. One of the purposes of a critical legal analysis of a Heads of Bill at this stage is to identify what unintended or unforeseen consequences it may have. That is not the same as saying that these consequences will occur or even that they are likely to occur.

IV - Is the Oireachtas required to legislate for abortion on grounds of risk of suicide because of the *X.* case?

The Heads of Bill have been proposed on the basis that they legislate in a manner required by the *X.* case. However, this move to legislate for the *X.* case was

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legislative drafting one should aim to identify all of the unforeseen and undesirable effects which may in principle follow from a proposal (however unlikely in practice) with a view to revising the drafting and avoiding as many such effects as possible.

[21] Heads of Bill, *supra* note 1 at 11.

itself motivated by the decision in 2010 of the European Court of Human Rights (E.Ct.H.R.) in the *A., B. & C.* case.[22] The kernel of Court's ruling in favour of the third applicant, C, is expressed in its conclusion that:

> the authorities failed to comply with their positive obligation to secure to the third applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3 of the Constitution.[23]

Regrettably the Expert Group set up by the Government to advise on the implementation of the judgment gave no consideration in its report to the jurisprudence of the E.Ct.H.R. or to the documents of the Committee of Ministers with respect to the implementation of judgments by Contracting States.[24] The starting point of any consideration as to the options available to Ireland in its execution of the *A., B. & C.* case judgment should have regard to the following four principles:

(a) it is primarily for the Contracting State to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention;[25]

(b) this "discretion"[26] or freedom[27] with respect to the choice of means is subject to the condition that such means are compatible with the conclusions set out in the Court's judgment;

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[22] *A., B. & C., supra* note 4.

[23] *Ibid.* at 267. See further paras. 263, 264, 274, 277 and 279.

[24] See *Report of the Expert Group, supra* note 19 at 55 for the Group's full terms of reference "as approved by the Government on 29th November 2011". It appears, however, that the Group was subsequently instructed by "the Minister" to limit itself to advising "the Government on how to give effect to existing constitutional provisions." *Ibid.* at 8.

[25] *Scozzari and Giunta v. Italy*, no. 39221/98 and no. 41963/98, Judgment, 13 July 2000 at para. 249 (E.Ct.H.R.). See also, most recently, *Kurić and Others v. Slovenia*, no. 26828/06, Judgment (Grand Chamber), 26 June 2012 at para. 406 (E.Ct.H.R.). See also *Draon v France* 1513/03, Judgment, 6 October 2005 at paras. 106-108 (E.Ct.H.R.).

[26] *Papamichalopoulos and Others v. Greece (Article 50)*, no. 14556/89, Judgment, 31 October 1995 at para. 34 (E.Ct.H.R.).

[27] *Ibid.*

(c) a central aspect of the obligation under Article 46 is the adoption of general measures that may be deemed *effective for preventing the recurrence* of a breach of the Convention *similar* to that found in the Court's judgment;[28] and

(d) in addition to the discretion and freedom noted above and with particular reference to the adoption of general measures in respect of *positive obligations*, a Contracting State enjoys a "wide margin of appreciation"[29] and it is not for the Court to indicate the most appropriate means for a State to adopt.[30]

Practically speaking, the principal test for assessing compliance with a judgment of the E.Ct.H.R. is whether the measures proposed by a State will be effective in preventing a recurrence of the original breach. Contrary to the relative cursory analysis given by the Expert Group to the matter in Chapter 7 of its report, it would be possible for the State to properly comply with what is required under *A., B. & C.* case by means of any of the four options identified by the report. Legislation with associated regulations is not the only practically and legally viable option. However, since that is the Government's preferred option and Heads of Bill have been produced the more pressing question is now this: is the Oireachtas constitutionally required to legislate for abortion on grounds of risk of suicide because of the *X.* case? It is submitted here that a careful reading of the *X.* case establishes that it is a binding authority for no more than what is defined above as the *X.* case test. As a matter of Irish law, therefore, the Oireachtas is not under any legal obligation to legislate for abortion on grounds of risk of suicide.

To understand why one must begin by considering what the Supreme Court did and did not *decide* in the *X.* case. And before doing that it is necessary to recall that not everything which is said by a Court in the course of a judgment constitutes a binding

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[28] See "Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements" (Adopted by the Committee of Ministers on 10 May 2006), Rule 6.2. See also Committee of Ministers Annual Report 2011 (April 2012) at 16. See also Interim resolution DH (99) 434 "Action of the security forces in Turkey: measures of a general character" (adopted by the Committee of Ministers on 9 June 1999 at the 672nd meeting of the Ministers' Deputies), all available at <http://www.coe.int/t/cm/home_en.asp> (last accessed: 16 July 2013).

[29] See, for example, *A., B. & C., supra* note 4 at paras. 233, 240 and 249.

[30] *Ibid.* at para. 260.

precedent. One of the basic rules in this regard was stated by Mr. Chief Justice O'Dalaigh in the *State (Quinn) v. Ryan* as follows: "[i]t requires to be said that *a point not argued is a point not decided*; and *this doctrine goes for constitutional cases* (other than Bills referred under Article 26 of the Constitution and then by reason only of a specific provision) as well as for non-constitutional cases."[31]

The same point was made by a Divisional High Court in *Maguire v. Ardagh* as follows:

> [t]he respondents contend that the argument made concerning the lack of an inherent jurisdiction to conduct an inquiry of the type in suit runs counter to the decision of In re Haughey [1971] I.R. 217. Despite the extensive nature of the argument made in that case, it does appear that this point was never argued. *A point not argued is a point not decided. It may not have been raised for any number of reasons.* One perhaps was that the particular inquiry in that case was being carried out with specific statutory powers pertinent to that inquiry. For whatever reason, the point was not argued or decided and therefore *we do not think that the decision* In re Haughey *can be relied upon as providing judicial authority* for the notion of an inherent power to conduct an inquiry of the type involved in this case.[32]

This dictum of the Divisional Court was approved by the Supreme Court.[33]

Thus leaving aside the issues of E.U. law and the question of the direct enforceability of constitutional rights via the Courts, there were actually only two issues which were in dispute and argued before the Supreme Court in the *X.* case regarding the interpretation of 40.3.3° itself. To understand the first issue, however, one must first recognise what was conceded and thus was not argued. Counsel for the Attorney General formally conceded two points during the hearing of the appeal in the Supreme Court. The first was that "abortion" is lawful under 40.3.3° in certain circumstances.[34] That concession had the regrettable effect of excluding from the formal consideration of the Court the

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[31] [1965] I.R. 70 at 120 (Morris P., Carroll and Kelly JJ.) [emphasis added].
[32] [2002] 1 I.R. 385 at 445 [emphasis added].
[33] *Ibid.*, *per* Murray J. at 598 and *per* Geoghegan J. at 722. Note also Keane C.J. (dissenting) at 517 who did not disagree with the principle as stated by the High Court but did dispute its interpretation of *In Re. Haughey* [1971] I.R. 217 referenced in the decision.
[34] *X.*, *supra* note 3 at 32.

distinction between (procured) abortion and necessary life-saving treatment for the mother that animates current obstetrical practice in Ireland (as articulated by Dr. Mahony in the passage quoted above).[35] The second concession was that in certain circumstances an abortion could be the only way to avert the death of a woman from suicide and that such an abortion would be lawful under 40.3.3°.[36] This concession had the equally regrettable effect of excluding from the formal consideration of the Court the evidentiary basis for the contention that abortion is an occasionally necessary means for protecting women from suicide. It also left unargued a range of important issues about the nature of and appropriate therapeutic responses to suicidality, and the ethical, political and broader social policy implications of permitting a risk or a threat of suicide by one person to change the legal rights of another.

An example of one of the more egregious factual inaccuracies contained in the judgments as a consequence of how the appeal was heard can be identified by comparing the assumptions about the nature of and proper treatments for suicidality in pregnancy underlying the judgments of the majority in the Supreme Court in the *X.* case with the expert psychiatric testimony given to the Joint Committee on Health and Children on 8 January 2013. The following two passages, in particular, illustrate well the discrepancies between the position taken by the Supreme Court in that case and the medical evidence submitted by the psychiatrists:

> [i]f a physical condition emanating from a pregnancy occurs in a mother, it may be that a decision to terminate the pregnancy in order to save her life can be postponed for a significant period in order to monitor the progress of the physical condition, and that there are diagnostic warning signs which can readily be relied upon during such postponement.
>
> *In my view, it is common sense that* a threat of self-destruction such as is outlined in the evidence in this case, which the psychologist clearly believes to be a very real threat, *cannot be monitored in that sense* and that it is almost impossible to prevent self-destruction in a young girl in the situation in which this defendant is if she were to decide to carry out her threat of suicide.

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[35] See text accompanying note 13 *supra.*
[36] *X.*, *supra* note 3 at 36.

> I am, therefore, satisfied that on the evidence before the learned trial judge, *which was in no way contested*, and on the findings which he has made, that the defendants have satisfied the test which I have laid down as being appropriate and have established, as a matter of probability, that there is a real and substantial risk to the life of the mother by self-destruction which can only be avoided by termination of her pregnancy.[37]

> Another aspect that really has not been brought out pertains to when the expert group considered the emergency situation in a medical context. In such a situation as when, for example, a woman has had an epileptic fit and the baby must be delivered very quickly, speed is of the essence. *In psychiatry, precisely the opposite is the case.* Someone who is intensely suicidal often needs admission to hospital. *It is exactly the opposite to the medical intervention* and, consequently, even the notion of carrying out an emergency termination is completely obsolete in respect of a person who is extremely suicidal. I reiterate that in our practice, we see people who are profoundly depressed, who feel hopeless, worthless or utterly helpless to deal with situations. *In such situations, one can see clearly the intervention usually is to admit such people into hospital, day hospital or home care but the intention is to support and help them through the crisis they are in.* It is not to make a decision that is permanent and irrevocable.[38]

These concessions were extremely significant and fundamentally shaped the resulting arguments and judgments.[39] Indeed taken together they represent what many commentators and legislators today appear to assume was authoritatively *decided* by the Supreme Court in the *X.* case.[40] On the contrary the two issues of interpretation of

[37] *Ibid.* at 55, *per* Finlay C.J. [emphasis added].
[38] Dr. John Sheehan, Perinatal psychiatrist, oral testimony to Joint Committee on Health and Children Hearings (8 January 2013) at 50 [emphasis added]. <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/HEJ2013010800050?opendocument> (last accessed: 16 July 2013).
[39] The political context cannot be overlooked. The Government of the day encouraged Ms. X. and her parents to appeal against the High Court decision and offered to pay their legal costs.
[40] See, for example: *Report of the Expert Group*, *supra* note 19 at 29: "[t]he Supreme Court in the X case specifically recognised risk of suicide as a legitimate basis for permitting termination of pregnancy where the other criteria were satisfied"; Dr. Jennifer Schweppe, Written Submission to the Joint Committee on Health and Children Hearings (9 January 2013) at 9, <http://www.oireachtas.ie/parliament/media/committees/healthandchildren/Jennifer-Schweppe.pdf> (last accessed: 16 July 2013) where she writes: "[f]urther, in order to comply with the current constitutional position as set out in the *X case*, the test must include self-destruction as a ground for terminating pregnancy" [reference omitted]. See also the Dáil speeches of An Taoiseach, Enda Kenny T.D., and the Minister for Justice, Equality and Defence, Alan Shatter T.D., at the second stage of the *Protection of Human Life During Pregnancy Bill 2013* speaking in the Dáil on 1 July 2013 <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013070100033?opendocument> (last accessed: 16 July 2013) and <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013070100036?opendocument> (last accessed: 16 July 2013).

40.3.3° that were actually argued by counsel for Ms. X, in light of the concessions made by counsel for the Attorney General, were:

(1) That Ms. X was entitled to a lawful abortion under 40.3.3°because there was a real and substantial risk to her life;

(2) That even if Ms. X was not entitled to an abortion under Article 40.3.3° that her right to travel took precedence over the right to life of the unborn such that it would not be appropriate to injunct her from travelling to England.

As against this counsel for the Attorney General argued:

(1) That the correct test was whether there was an inevitable and imminent risk to the life of the mother;

(2) That a right to travel did not take precedence over the right to life of the unborn.

On point (1) Ms. X won by a majority of 4 to 1. Strictly speaking that rendered point (2) *obiter*. On point (2) the Attorney General won by a majority of 3 to 2. What was never argued however (and therefore never formally decided) was the appropriateness of allowing the test of "real and substantial risk" to be invoked in order to justify a procured abortion on the grounds of a risk of suicide. It appears this aspect was noted a few months after the decision in the *X.* case in a paper delivered by one of Ireland's most eminent constitutional jurists, Mr. Justice Brian Walsh, speaking extra-judicially at University College Galway.[41] He stated that the Eight Amendment (which inserted Article 40.3.3°):

> confers no immunity for taking life and its stated objective is the preservation of and respect for life. It is perfectly consonant with the idea of the safeguarding of the mother's life without intentional and direct intervention to terminate the life of the foetus. The claim that it admits of direct termination has never been fully argued. In the X case it was conceded. There was no legitimus contradictor to argue against such a construction and therefore the

[41] Walsh J., "Justice and the Constitution" (University College Galway, 11 November 1992).

> court's decision can only bind the particular case as it was based on a conceded and unargued construction. It is well established that neither a constitutional provision nor even a statutory provision can be construed on the basis of a concession if it were to be binding *in rem*.[42]

V - Conclusion

Head 4 creates a new and unprecedented statutory basis in Irish law for the direct and intentional termination of an unborn child's life, *i.e.* for procured abortion, even after the point of viability outside the womb. Unsettlingly, and one hopes inadvertently, the Heads of Bill permits in principle, by reason of its definition of the "unborn", the carrying out of a procured abortion upon a partially delivered baby. Further, there is no requirement that an abortion be certified under Head 4 only as a last resort after alternative treatments have been offered or tried. Finally, the requirement that three medical practitioners be involved in certification under Head 4 is not a robust safeguard due to the silence of the Bill on the mechanics of referral process.

It might be contended that, imperfect though this legislative effort may be for the reasons just outlined, there is an obligation on Ireland to introduce *some* legislative measure providing for abortion on grounds of risk of suicide. However, there is a strong case to be made that in legislating for the practical implementation of Article 40.3.3° the Oireachtas is bound by the *X.* case test (as defined in section II above) but is *not* bound by the application of that test by the majority of the Supreme Court to the circumstances of Ms. X. A point not argued is a point not decided. The Court's application of the test to a risk arising from the threat of self-destruction was premised on concessions made by the parties to the case, which had the practical effect of precluding any airing or consideration of either argument or evidence in respect of the complex and weighty issues which legalising abortion on the grounds of risk of suicide necessarily raises. That these concessions should have determined the fate of such an important court case is perhaps regrettable. That 21 years later they should be

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[42] Quoted in R. Byrne & W. Binchy, *Annual Review of Irish Law 1992* (Dublin: Round Hall Press, 1994) at 175.

determining the fate of our legislature's deliberations is no longer just unfortunate, it is inexcusable.[43]

[43] With apologies to the late McCarthy J. (*X.*, *supra* note 3 at 82).