

Information note on legal advice received on options for a Referendum on Article 40.3.3 of the Constitution

1. The Department of Health has prepared this information note in order to explain the legal reasons that have informed the approach to the amendment of the Constitution that has been adopted. We hope that this helps to inform discussion on these issues.
2. The Report of the Citizens' Assembly recommended, *inter alia*, that Article 40.3.3 of the Constitution should be repealed and replaced with an Article which explicitly authorises the Oireachtas to legislate to address termination of pregnancy.
3. The Report of the Joint Committee on the Eighth Amendment of the Constitution recommended, *inter alia*, that Article 40.3.3 of the Constitution "be repealed simpliciter".
4. Against this background the Minister for Health sought the advice of the Attorney General on the potential legal and constitutional implications of a repeal simpliciter of Article 40.3.3 of the Constitution.
5. The Attorney General advised that there is no absolute certainty about the post-repeal landscape of rights. If Article 40.3.3 were repealed simpliciter, it might subsequently be argued before the Courts that the unborn have residual rights arising under other Articles of the Constitution that could continue to restrict the power of the Oireachtas to legislate on the issue.
6. To mitigate the uncertainty that might arise in such circumstances, it was advised that consideration should be given to inserting wording into the Constitution that expressly affirms the right of the Oireachtas to legislate for the regulation of termination of pregnancy.
7. While Article 15.2 of the Constitution provides generally that the Oireachtas has the power to make laws for the State, the legal advice is to the effect that the above approach would have the advantage of making it clear, through express words, that the Oireachtas has power to legislate on the subject of the termination of pregnancy.
8. If the amendment is adopted by the People, the Oireachtas would have an express power to legislate to regulate termination of pregnancy as it considers appropriate, in the same way as it legislates in every other area of policy. The insertion of the additional wording would bring greater constitutional certainty to the primary authority of the Oireachtas to make laws in this area, dealing with controversial social and medical matters.
9. Such an amendment would make it clear that it will be primarily a legislative function for the Oireachtas to determine how best to guarantee and balance proportionately the rights, interests and values that are engaged, in the interests of the common good.
10. Any such amendment would be fully consistent with, and maintain, the separation of powers provided for in the Constitution. It would not oust the judicial review jurisdiction of the courts as to the validity of any law, or restrict rights of access to the

courts. Legislation enacted post-amendment would remain subject to review by the courts like any other legislation.

11. While no approach can be completely free from the risk of legal challenge, the Attorney General advises that the approach recommended above is likely to be a legally safer option than a simple repeal.
12. Such an enabling provision is not without precedent. The Constitution, in a number of places, expressly restates that the Oireachtas has power to make certain laws in particular contexts. Examples include:
 - Article 42A on children's rights – see, for example, Article 42A.4.2 which provides that provision shall be made by law for ascertaining the views of children and giving them due weight in the context of certain legal proceedings
 - Article 40.6.1, which, *inter alia*, provides that provision may be made by law to prevent or control certain kinds of public meetings
 - Article 10.3, which provides that provision may be made by law for the management of certain property belonging to the State.
13. The above advice of the Attorney General informed the approach of the Minister for Health to recommend to the Cabinet that a referendum on Article 40.3.3 of the Constitution should be held, asking the People to:
 - (a) Repeal Article 40.3.3 of the Constitution in full, as recommended by both the Joint Oireachtas Committee and the Citizens' Assembly; and
 - (b) Insert a new Article into the Constitution to expressly affirm that laws may be enacted by the Oireachtas providing for the regulation of termination of pregnancy.
14. The decision of Government on 29 January was to approve the above recommendations of the Minister for Health on the approach to be taken to the Referendum.

Department of Health, 30 January 2018