

# **ABORTION (FATAL FOETAL ABNORMALITY) BILL**

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## **EXPLANATORY AND FINANCIAL MEMORANDUM**

### **INTRODUCTION**

1. This Explanatory and Financial Memorandum has been prepared in order to assist the reader of the Bill and to help inform the debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.
2. The Memorandum should be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill, and where a clause or part of a clause does not seem to require any explanation or comment, none is given.

### **BACKGROUND AND POLICY OBJECTIVES**

3. Legislation relating to abortion in Northern Ireland largely stems from the Offences against the Person Act 1861. Abortions are currently only lawful in those circumstances where the life or long-term physical or mental health of the mother are at risk.
4. The current law does not allow for an abortion in those cases where there is a fatal foetal abnormality; that is where death will occur before or during birth or, if a live birth should occur, there is no medical treatment which could be offered to alter the fatal nature of the condition or improve the chances of survival.
5. As a result, women in this situation are forced to travel to elsewhere in the UK to if they feel that they need to obtain an abortion. This creates unnecessary stress, makes clinical assessments about the viability of any future pregnancy more difficult and has a financial cost.
6. Additionally, women who may be affected by long-term mental ill-health following a birth in these circumstances are forced to seek an abortion on these grounds. This has the result of requiring them to declare their mental ill-health, as no other legal option is available. Sadly, there are still legal ramifications to this.

7. Some women in these circumstances would wish to continue with their pregnancy to full-term. Others may wish to terminate the pregnancy early. This Bill would allow them to make an informed choice.

## **CONSULTATION**

8. The Department of Justice has previously carried out a consultation on this issue and brought proposals to the Northern Ireland Executive. This consultation received a major response, including 712 individually written responses and 65 responses from representative organisations and interested groups.

## **OPTIONS CONSIDERED**

9. Two options have been considered in relation to the current situation: no legislative change and legislating to allow abortion in the cases of where a foetus has a fatal abnormality.
10. The first option (no legislative change) would be inadequate. Failure to legislate would not allow women who wish to access an abortion in cases of fatal foetal abnormality to do so. There has been some discussion about producing guidelines to doctors in regard to abortions. However, there is currently no basis in law for women to obtain an abortion in cases of fatal foetal abnormality and it would not be possible for a change to the guidelines to alter this fact. A change to primary legislation is required.
11. The second option (legislation for abortion in the cases of a fatal foetal abnormality) would provide clarity in the law for women and doctors.
12. The Department of Justice consultation on this issue informed proposals for legislation, but they were not taken forward by the Northern Ireland Executive. The consultation examined three approaches to defining ‘lethal foetal abnormality’ in law: listing specific lethal conditions; assessing sustainability of life; and providing no statutory definition of ‘lethal’, and allowing a clinical judgment of incompatibility with life. It concluded that the final option was preferable and stated that “[this] option provides a clear statutory framework within which the medical professionals can be sure that the choice of a termination is within the law.”
13. This option therefore also allows the development of a procedure which is robust and operable. The Department of Justice consultation examined a range of options for defining fatal foetal abnormality and produced a clear recommendation. Legislation can be drawn up which tightly defines the circumstances in which an abortion is legal.

14. David Ford has concluded that the first option would not resolve the current criminalisation of women who decide on an abortion if their foetus has a fatal abnormality and therefore second option is the preferred option.

## **OVERVIEW**

15. This Bill would create a defence for people involved in carrying out a termination when two suitably qualified medical practitioners make a diagnosis of a fatal foetal abnormality for which no treatment could be offered, other than palliative care, if the pregnancy proceeded to full term.

## **COMMENTARY ON CLAUSES**

The bill consists of four clauses.

### **Clause 1: Conditions for medical termination of pregnancy**

The first clause creates a defence against criminal prosecution for abortion if two doctors agree that a foetus has an abnormality which is likely to prove fatal. It further provides that the doctors may only reach this assessment if the foetus is likely to die either before birth or during birth or, in the case of a live birth, there is no medical treatment which could be offered to alter the fatal nature of the condition or improve the chances of survival. This clause also outlines the qualifications that the doctors must have in order to make such a diagnosis.

Such an assessment may only be made if it is considered, in the best opinion of two doctors to occur. The clause allows for variations within conditions, such as conditions which may prove fatal in some occurrences but not others, and changes in medical technology. It also requires the ‘balance of probabilities’ evidential basis.

If these criteria are met, then no prosecution of the woman or the doctor may take place.

### **Clause 2: Procedure for medical termination of pregnancy**

The second clause outlines the procedure which should be followed if the conditions outlined in the first clause are met. It provides that a woman must be provided with information on the options available to her: an abortion or to continue to live birth. She should also be offered the opportunity to make an informed choice between the two. Regardless of which of the two options she decides, the bill provides that appropriate medical care must be afforded to her.

### **Clause 3: Conscientious objection**

The third clause provides for a conscientious opt-out for medical professionals. They are able to opt-out from direct involvement in a procedure. There is already legal precedent that this does not include preparatory or ancillary work. This position was upheld by the

UK Supreme Court in *Greater Glasgow Health Board v Doogan & Anor* [2014] UKSC 68.

#### **Clause 4: Commencement and short title**

The fourth clause outlines the short title of the Bill and provides for it to come into force on the day after the day on which it receives Royal Assent.

No part of this bill affects the current legal situation in relation to abortions carried out in order to save the life or protect the long-term mental or physical health of the woman.

#### **FINANCIAL EFFECTS OF THE BILL**

16. There are unlikely to be significant costs from this legislation. However, it is likely there will be a small increase in the number of abortions carried out in Northern Ireland and this will lead to small cost increase on the health service.

#### **HUMAN RIGHTS ISSUES**

17. The High Court has ruled that the current provisions in the Offences Against the Person Act 1861 breached Article 8 of the European Convention on Human Rights, which requires respect for a person's family life and personal autonomy. This decision is currently under appeal.

#### **EQUALITY IMPACT**

18. In accordance with section 75 of the Northern Ireland Act 1998 and the requirement to have due regard to the need to promote equality of opportunity, David Ford MLA has concluded that this Bill does not have significant implications for equality of opportunity and that an equality impact assessment was therefore not necessary.

#### **SUMMARY OF THE REGULATORY IMPACT ASSESSMENT**

19. David Ford MLA has concluded that no Regulatory Impact Assessment is required.

#### **LEGISLATIVE COMPETENCE**

20. David Ford MLA had made the following statement under Standing Order 30:

*“In my view the Abortion (Fatal Foetal Abnormality) Bill would be within the legislative competence of the Northern Ireland Assembly.”*