

Committee for Health
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21 June 2021

Dear Mr McBride,

SEVERE FETAL IMPAIRMENT ABORTION (AMENDMENT) BILL

Thank you for your letter of 21 May 2021, your ref C141/21. I am grateful for the opportunity to review and respond to the evidence submitted to the Committee regarding my Severe Fetal Impairment Abortion (Amendment) Bill. In what follows I am going to briefly restate the main reasons for the Bill before moving to respond to the submissions, which is the main focus of this document.

1. Introductory Comments

- 1.1. My Bill seeks to ensure that the law on abortion is in line with other provisions in Northern Ireland that uphold the rights of those with a disability. It seeks to address the message that people with a disability are less valuable than those without so that there is less discrimination against and stereotyping of those with disabilities. I hope to shift attitudes towards disability, which will in turn have a significant impact on the quality and length of life of people with disabilities and their families.
- 1.2. In the Supreme Court in 2018, Lord Kerr said, “*UNCRPD is based on the premise that if abortion is permissible, there should be no discrimination on the basis that the foetus, because of a defect, will result in a child being born with a physical or mental disability.*”¹ Having a disability clause in the abortion regulations proliferates stigma and leads to discrimination. A congenital anomaly report published in Scotland in 2020 states: “*Termination of pregnancy for fetal anomaly accounted for almost all of the non-live born babies, showing the impact of antenatal screening on the outcome of babies with these specific types of anomalies.*”² This is not a positive outcome for this minority.
- 1.3. The Assembly’s responsibility is to shape the laws in Northern Ireland to create a society where all people are valued equally. We cannot refrain from creating laws which uphold the equal value of persons with disability on the basis that neighbouring countries do not subscribe to such laws. Moreover, the equivalent law in GB was introduced thirty years ago when attitudes towards disability were markedly different, and it is currently facing a legal challenge in the High Court. This Bill would bring us into line with the more recently introduced law in the ROI; a policy supported by Sinn Féin, which recognises that the law has a role in setting grounds for abortion.

¹ See [Press Summary](#) and [\[2018\] UKSC 27](#), Lord Kerr at paragraphs 331-332

² Congenital anomalies in Scotland, (2000 to 2018), 6 October 2020, page 9
<https://beta.isdscotland.org/media/5981/2020-10-06-congenital-anomalies-in-scotland-2018-main-report.pdf>

- 1.4. I want my Bill to be part of changing the story on how we think about disability across the board. I want my Bill to be part of changing the economics of raising a child with a disability so that there is proper support and care for families. I note that the Alliance for Choice says, "*The harmful perceived "burden" of parenting children with disabilities is not the effect of the disability, but rather the effect of disability-related stigma and discrimination, lack of inclusion and participation of persons with disabilities in society, and the lack of affordable and locally available supports and services for people with disabilities and their families.*"³ It is exactly these concerns which need to be addressed with policies to improve the circumstances of families with disabilities. I am aware of a survey conducted by the Down's Syndrome Association which reveals that many carers were not satisfied with the support they are receiving.⁴ And that a recent survey of people with disabilities and their families and carers by Disability Action NI found that 39% of respondents had their care impacted by the pandemic and just under 10% had their support stopped entirely.⁵ This must be improved. I am very pleased to see that a new Bill in Westminster is dedicated to the needs of those with Down Syndrome.⁶
- 1.5. My Bill does not dismiss the challenges of raising a child with a disability.⁷ In 2011, the American Journal of Medical Genetics published a series of articles about Down's syndrome. One of these covered a study of people with Down's syndrome who were older than 12 on information that could be shared with new and expectant parents of children with Down's syndrome. "*Among those surveyed, nearly 99% of people with DS indicated that they were happy with their lives, 97% liked who they are, and 96% liked how they look. Nearly 99% people with DS expressed love for their families, and 97% liked their brothers and sisters.*"⁸ Another article surveyed the views of siblings: "*96% of brothers/sisters that responded to the survey indicated that they had affection toward their sibling with Down's Syndrome; and 94% of older siblings expressed feelings of pride.*"⁹ 79% of parents said "*their outlook on life was more positive*" because of their child.¹⁰
- 1.6. Individuals like Heidi Crowter have inspired me to take this action. She finds legislation which treats unborn babies with disabilities differently to all other babies, 'deeply

³ <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/alliance-for-choice.pdf>, page 11, para 42

⁴ "We found that care and support offered is often poor in quality and quantity and seriously lacks attention to health conditions (sadly some people have died). Support is often inadequately funded and can be cut at review with no justification. Families are expected to continue to provide care and support which many do willingly; others because they feel there is no choice. Family carers and people with Down's syndrome report long delays in accessing a service, inadequate services and increasing costs not being met, which are all contributing to a significant decline in the well-being of our members." Down's Syndrome Association, [It's My Life](#), 2018, page 2.

⁵ [The Impact of Covid-19 on disabled people in Northern Ireland](#), Executive Summary, Disability Action Northern Ireland, pages 3–4

⁶ A Bill to make provision about meeting the needs of persons with Down syndrome; to place a duty on local authorities to assess the likely social care needs of persons with Down syndrome and plan provision accordingly; and for connected purposes. [Down Syndrome Bill - Parliamentary Bills - UK Parliament](#)

⁷ Royal College of Midwives, pages 1-2
<http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/royal-college-of-midwives.pdf>

⁸ Skotko BG et al, Self-perceptions From People With Down Syndrome, *Am J Med Genet A*, 2011 Oct;155A(10):2360-9. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3740159/>

⁹ Skotko BG et al, Having a Brother or Sister With Down Syndrome: Perspectives From Siblings, *Am J Med Genet A*, 2011 Oct;155A(10):2348-59. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3348944/>

¹⁰ Skotko BG et al, Having a Brother or Sister With Down Syndrome: Perspectives From Mothers and Fathers, *Am J Med Genet A*, 2011 Oct;155A(10):2335-47. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3353148/>

offensive'. She says the law makes her feel like she should not exist. Lord Shinkwin said about the 2021 Regulations, *"I am a severely disabled parliamentarian who believes that I have as much right to exist as anyone else. The regulations may not apply to me directly, but they still threaten me because they challenge that right by devaluing my existence. The narrative of the regulations is that I should not really exist. Indeed, I would be better off dead. The Minister cites CEDAW, but I wonder how that narrative does not perpetuate a negative stereotype against disabled people, which CEDAW expressly prohibits. If we pass the regulations today, not only are we endorsing lethal disability discrimination right up to birth but we are in practice saying to anyone who is born with a disability that they somehow escaped the net."*¹¹ It is these voices, and the voices of many other families, that I have responded to with my Bill.

- 1.7. This Bill will also ensure that no woman is given the impression that she is thought selfish for availing of healthcare resources as she carries a child with a severe fetal impairment to term, potentially requiring high-intensity neonatal care, or indeed perinatal palliative care. I note the 'Strategy for Children's Palliative and End-of-Life Care 2016-26' which is already in place to ensure NI continues to develop its provision for palliative care including perinatal hospice care.¹²
- 1.8. It is well-known that academic and public-figure Richard Dawkins has stated recently that it is "immoral to bring a Down's child into the world if you have a choice"¹³, and women in England and Wales, where it is has been legal for some time to abort on the basis of a "severe fetal impairment" (or in the terms of the Abortion Act 1967, a "serious handicap") have recounted their experiences of doctors communicating that a decision to continue a pregnancy with a positive screening result for Down's syndrome would be selfish.¹⁴ This is not an attitude I wish to see develop in Northern Ireland and that is why I believe it is important to have laws in place which do not offer lesser protections to babies on the basis of prospective disability.
- 1.9. I note that some submissions have expressed concern about *"anti-choice spokespeople using the lives of people with disabilities as political footballs"*.¹⁵ Firstly, I am aware that some pro-life groups have condemned the Bill because they do not regard it as pro-life. Secondly, I would draw the Committee's attention to the open letter signed by 1,553 people with Down's syndrome and their families who urged politicians to vote in favour of my Bill at its second reading,¹⁶ and two national Down's syndrome charities who have also expressed support for this Bill.¹⁷ One of these charities was founded in 1996 by a father of a child with Down's syndrome to address the paucity of research into

¹¹ Speaking on 28 April 2021, [https://hansard.parliament.uk/Lords/2021-04-28/debates/6CB1E549-E7DB-4FFE-8734-06D7536F06A3/Abortion\(NorthernIreland\)Regulations2021#](https://hansard.parliament.uk/Lords/2021-04-28/debates/6CB1E549-E7DB-4FFE-8734-06D7536F06A3/Abortion(NorthernIreland)Regulations2021#)

¹² [A Strategy for Children's Palliative and End-of-Life Care 2016-26 | Department of Health \(health-ni.gov.uk\)](https://www.health-ni.gov.uk/publications/a-strategy-for-childrens-palliative-and-end-of-life-care-2016-26)

¹³ [Is discrimination against people with Down's syndrome not just another form of prejudice? – Brian Wilson | The Scotsman](https://www.scotsman.com/news/health/is-discrimination-against-people-with-downs-syndrome-not-just-another-form-of-prejudice-1.5000000)

¹⁴ [PADS: Sharing the news \(downsyndromeuk.co.uk\)](https://www.downsyndromeuk.co.uk/news/pads-sharing-the-news), page 18.

¹⁵ [http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/alliance-for-choice.pdf](https://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/alliance-for-choice.pdf), paragraph 130

¹⁶ <https://donscreenusout.org/press-release-pressure-mounts-on-ni-political-leaders-as-over-1500-people-with-downas-syndrome-and-their-families-call-for-law-change/>

¹⁷ [http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/downs-syndrome-research-foundation-uk.pdf](https://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/downs-syndrome-research-foundation-uk.pdf)

[http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/dont-screen-us-out.pdf](https://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/dont-screen-us-out.pdf)

interventions to support people with Down’s syndrome,¹⁸ and the second is “*a grass-roots initiative supported by a collection of people with Down’s syndrome, families and Down Syndrome advocate groups*” who say “[w]e have come together to highlight the serious concerns around the introduction of second-line cfDNA screening.”¹⁹ These charities have been advocating on the issue of prenatal treatment in cases of suspected disability long before my Bill was conceived of. Whilst the perspectives of disabled people, like any other grouping, are not monolithic on this issue, this Bill is clearly supported by a significant number of people with disabilities and their families and I consider it disrespectful to imply they are being used. I hope the Committee will ensure that the expressed views of all those with disabilities, regardless of their views on this Bill, will be treated with respect.

- 1.10. My Bill does not seek to restrict access to abortion for pregnant women on the grounds that the mother has a disability.²⁰ On the contrary, it is about equality for a minority group negatively impacted by a clause in law which is outdated. In fact, removing this regulation is likely to ameliorate unconscious bias towards disabled, pregnant women and their pregnancies and put healthcare firmly at the centre of their healthcare encounters.
- 1.11. The question of what legal grounds for abortion should exist in Northern Ireland – the subject of my Bill - is a separate matter to the question of what services should be commissioned, which is a matter for the Department for Health.²¹ My Bill does not impact the implementation of either the 2020 or 2021 Regulations,²² nor is it my intention to recriminalize women as suggested by the Alliance for Choice, since Regulation 11(2)(a) specifically excludes women committing an offence if they obtain an abortion outside of the ground of the Regulations.²³
- 1.12. It has been suggested that late terminations for some non-fatal conditions do not take place.²⁴ The key issue is not at what stage of pregnancy such terminations take place, but rather that such conditions may be considered in law to be sufficient grounds for a termination in cases where they are not life-threatening. Where this is the case, it risks perpetuating stereotypes that adversely impact children and adults who have been impacted by these conditions.
- 1.13. The abortion statistics suggest that abortions on grounds of non-fatal disabilities do take place after 24 weeks.
 - The national abortion statistics for England and Wales in 2018 document 15 cases where there was a termination on the *principal* ground that the fetus had a cleft lip or palate, and 1 of these was above 24 weeks’ gestation. In 2017 there were 13 and 1 cases respectively (though in 2017 it is unclear whether the case above 24 weeks’

¹⁸ <https://www.dsrf-uk.org/about-us/>

¹⁹ <https://dontscreenusout.org>

²⁰ <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/abortion-rights-campaign.pdf>, page 1

²¹ <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/amnesty-international-uk-and-informing-choices-ni.pdf>, page 5

²² <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/ni-womens-european-platform.pdf>, page 1

²³ <https://www.legislation.gov.uk/uksi/2020/503/regulation/11/made>

²⁴ RCOG evidence, paras 19 and 20, <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/royal-college-of-obstetricians-and-gynaecologists.pdf>

gestation was a “principal mention”).²⁵ Cases where a condition is noted as the ‘principal mention’ form a distinct category in those statistical bulletins as compared with those cases where these conditions were mentioned but were not the principal condition for the purposes of grounds to terminate. The 2019 and 2020 statistical bulletins do not report “principal mentions”.²⁶

- In 2018 more than 618 babies were terminated for the principal reason that there was an antenatal diagnosis of (or high chance screening result for) Down’s syndrome, and 18 of these terminations occurred beyond 24 weeks’ gestation. In 2017 there were 655 terminations where Down’s syndrome was the principal condition mentioned and 11 terminations were in cases where the baby was above 24 weeks’ gestation (though unlike the 2018 statistics, the 2017 statistics do not specify whether these were the “principal” condition mentioned).²⁷ Furthermore, it is quite possible that these figures represent an underestimate.²⁸

- 1.14. It is also important to be clear about the 2018 data from the National Congenital Anomaly and Rare Disease Registration Service, which publishes data on England and is cited by the RCOG in their submission.²⁹ The RCOG say that 73.5% of congenital abnormalities were diagnosed antenatally and that 73.4% of all fetuses and babies diagnosed with such an anomaly, whether that be antenatally or postnatally, resulted in a live birth. However, their submission did not mention that of those cases where an antenatal diagnosis is made, 37.7% led to an abortion.³⁰ Nor did they mention that of those pregnancies with an antenatal diagnosis of Down’s Syndrome, 85.2% led to an abortion.³¹ In 2018 of 877 antenatal diagnoses, only 114 led to a live birth; 747 led to an abortion.³² I repeat the statement from the equivalent Scottish report that “*Termination of pregnancy for fetal anomaly accounted for almost all of the non-live born babies, showing the impact of antenatal screening on the outcome of babies with these specific types of anomalies.*”³³
- 1.15. Regardless of whether abortions on the grounds of a disability are occurring in significant numbers after 24 weeks’ gestation, my Bill is focussed on removing the principle in law that a prospective disability is undesirable and grounds to terminate the developing child. If abortion is expressly allowed for at any stage of pregnancy on the grounds that the developing child may have a disability once born, this risks perpetuating stereotypes about the value and quality of life of those living with these disabilities.

²⁵ [Abortion Statistics for England & Wales](#), 2017 & 2018, Department of Health & Social Care, Data Tables, Table 9a.

²⁶ Abortion Statistics, England and Wales: [2019 & 2020](#), para 2.17.

²⁷ [Abortion Statistics for England & Wales](#), 2017 & 2018, Department of Health & Social Care, Data Tables, Table 9a.

²⁸ Compare with the Congenital Anomaly Statistics for 2018 provided as part of the [National Congenital Anomaly and Rare Disease Registration Service](#), Table 10.

²⁹ RCOG evidence, paras 53 and 54, <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/royal-college-of-obstetricians-and-gynaecologists.pdf>

³⁰ National Congenital Anomaly and Rare Disease Registration Service Congenital anomaly statistics 2018, August 2020, page 21

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/909405/NCARDR_S_Congenital_anomaly_statistics_report_2018.pdf

³¹ *Ibid*, page 33

³² NCARDRS 2018 Data, Table 10

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907642/Congenital_anomaly_statistics_2018-tables.ods

³³ Congenital anomalies in Scotland, (2000 to 2018), 6 October 2020, page 9

<https://beta.isdscotland.org/media/5981/2020-10-06-congenital-anomalies-in-scotland-2018-main-report.pdf>

ETHICAL ISSUES

2. *This Bill will force women to carry pregnancies to term in cases of ‘severe fetal impairment’ which is inhuman and degrading and subjects these women to an unacceptable level of trauma*³⁴

- 2.1. I am concerned that the British Society of Abortion Care Providers and Doctors for Choice Northern Ireland suggest that making a woman carry a baby with a fetal anomaly is “degrading” and “inhuman”. The stories of many parents and those living with congenital conditions is exactly the opposite.
- 2.2. I was also disappointed to see a prominent organisation who make the case that continuing a pregnancy in cases of ‘severe fetal impairment’ is “inhumane” cite a report from 1987 which calls these fetuses “seriously abnormal”.³⁵ Bearing in mind that undoubtedly children and adults are alive today with conditions that would have been classed as ‘severe fetal impairments’, I am surprised that this language is being cited.
- 2.3. An unexpected diagnosis with a prognosis that is uncertain, as may be anticipated in a number of pregnancies where there is a diagnosis ‘severe fetal impairment’, will be a significant source of anxiety and trauma. Women should be given full medical and other support during and after their pregnancy.
- 2.4. I acknowledge that clinicians cannot always accurately predict the outcome of a pregnancy where there is a ‘fetal impairment’, just as it is not possible for clinicians to predict the outcome of *any* pregnancy with complete certainty — sadly there are a number of cases where a child is stillborn where there were no prior indicators of fetal ill-health or distress. Nevertheless, prematurely ending a pregnancy does not preclude the tragedy of this loss. I note that Alliance for Choice say, “[a] *second-trimester abortion is both emotionally and physically painful, and many women who terminate the pregnancy because of a fetal anomaly suffer of significant long-term psychological morbidity.*”³⁶ Indeed, studies have shown that continuing a pregnancy to its natural endpoint and providing the opportunity for parents, family and significant others to meet the child and

³⁴ <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/convention-on-the-elimination-of-all-forms-of-discrimination-against-women.pdf>, section 1c). <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/alliance-for-choice.pdf>, para 20.

<http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/british-pregnancy-advisory-service.pdf>, see section titled ‘Funded travel to England’. <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/doctors-for-choice-ni.pdf>, pages 2, 6 and 8. <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/british-society-of-abortion-care-providers.pdf>, page 5.

³⁵ <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/alliance-for-choice.pdf>, para 20.

³⁶ <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/alliance-for-choice.pdf>, para 45.

spend time with them, in cases where this time may be short, can have a significant protective benefit for parental wellbeing.³⁷

- 2.5. In the report of the Department of Health Working Group on Fatal Fetal Abnormality, it states, *“The group was also informed that there is a different group of abnormalities detected by ultrasound where, antenatally, it is difficult to predict the outcome. In these cases, even with joint discussion by health professionals in fetal medicine, medical genetics and neonatology, it can be difficult to accurately counsel parents and sometimes they are given a prognosis which covers a spectrum from mild to severe disability.”*³⁸ They went on to recommend that where there was uncertainty about whether a diagnosis fell within their definition of a fatal fetal abnormality (FFA), those conditions would fall outside of the grounds for an abortion on the basis of FFA.³⁹
- 2.6. Where a child is diagnosed with a ‘severe fetal impairment’ which would not be considered a ‘fatal fetal anomaly’ but nevertheless may result in death in childhood, high quality palliative care can support families to realise the best possible quality of life in very difficult circumstances. Children’s charity “Together for Short Lives” say *“Palliative care for children and young people is an active and total approach to care, from the point of diagnosis, throughout the child’s life, death and beyond. It embraces physical, emotional, social and spiritual elements and focuses on the enhancement of quality of life for the child or young person and support for the whole family.”*⁴⁰
- 2.7. In 2016 Northern Ireland launched its strategy for children’s palliative and end-of-life care and it is very important that this continues to be prioritised and, crucially, that it is sufficiently funded so that children and their parents are given the best possible care, including an individual care plan developed in consultation with a multidisciplinary team, which focusses on the child’s best interests and their quality of life.
3. **Retaining the possibility of termination in cases of ‘severe fetal impairment’ should be available because of the prolonged suffering that a child may experience if born following a diagnosis of SFI**⁴¹
- 3.1. It is important to emphasise that children born with severe disabilities should not experience profound pain and suffering if they receive high-quality supportive medical care. Lord Shinkwin, who himself has a condition that would be classified as a ‘severe fetal impairment’, has spoken about the harmful message sent by the current abortion law in Northern Ireland, that he would be *“better off dead”*.⁴² Lord Kerr (with whom Lord Wilson agreed), has also said in the UKSC that, *“many children born with disabilities, even grave disabilities, lead happy, fulfilled lives. In many instances they enrich and bring joy to their families and those who come into contact with them.”*⁴³ I would also

³⁷ Cope H, Garrett ME, Gregory S, Ashley-Koch A. Pregnancy continuation and organizational religious activity following prenatal diagnosis of a lethal fetal defect are associated with improved psychological outcome. *Prenat Diagn.* 2015 Aug;35(8):761-768. doi: [10.1002/pd.4603](https://doi.org/10.1002/pd.4603). Epub 2015 May 26.

³⁸ Report of the Working Group on Fatal Fetal Abnormality, Department of Health, [April 2016](#), para 4.26

³⁹ *Ibid*, para 4.27

⁴⁰ <https://www.togetherforshortlives.org.uk/changing-lives/supporting-care-professionals/introduction-childrens-palliative-care/>

⁴¹ [doctors-for-choice-ni.pdf \(niassembly.gov.uk\)](#), page 6. [royal-college-of-obstetricians-and-gynaecologists.pdf \(niassembly.gov.uk\)](#), paragraph 51.

⁴² HL Deb [28 April 2021](#) vol 811 c2271

⁴³ [\[2018\] UKSC 27](#), para 332.

draw attention to the non-binding recommendation of the UN Committee on the Rights of Persons with Disabilities who recommended the GB and NI adopt and action plan aimed at, “*eliminating perceptions towards persons with disabilities as not having “a good and decent life.”*”⁴⁴

HUMAN RIGHTS ISSUES

4. **This Bill fails to meet the requirements set out in the CEDAW report, and it therefore breaches the Northern Ireland (Executive Formation etc.) Act 2019 and is not human rights compliant**

4.1. These claims have been made by a number of submissions⁴⁵ and primarily by the Northern Ireland Human Rights Commission, which “*advises that the Bill’s proposal to remove access to abortion in circumstances of serious foetal impairment is incompatible with the UK’s obligations under the UN CEDAW.*” This conclusion does not stand up to scrutiny for three main reasons.

The Scope of CEDAW

4.2. Firstly, **the conclusion conflates the Convention with the reflections of the CEDAW Committee.** The Commission accurately states, “*The Convention on the Elimination of All forms of Discrimination against Women (UN CEDAW) is a UN treaty on women’s rights. The UN CEDAW, and the Optional Protocol to the treaty, are binding on the UK as a matter of international law, following its ratification in 1986.*” However, it does not follow from this that my Bill is “*incompatible with the UK’s obligations under the UN CEDAW.*” In order to reach this conclusion, the Commission moves from its consideration of the Convention itself to a report produced by the CEDAW Committee, an unelected and non-judicial committee whose views do not constitute international law and are not binding as a result of our obligations under the Convention, which does not mention abortion at all. The CEDAW Committee does not have any legal standing by which to read the right to abortion into the Convention, and as an unelected body its authority in relation to Northern Ireland’s law is slight.⁴⁶ The only body with standing to read in an additional right is the UN Court of Justice and it has not done so. Indeed, the Westminster Government has recently acknowledged that the recommendations “***are not binding and do not constitute international obligations.***”⁴⁷ I include in the Annex to my letter, detailed evidence from Prof Mark Hill QC on the on the constitutional standing of the CEDAW Committee report on Northern Ireland.

CEDAW’s applicability in NI: Section 9 of the NIEFA 2019

4.3. Secondly, while, I acknowledge that paragraphs 85 and 86 have been made binding on the UK Government by virtue of Section 9 of the Northern Ireland (Executive Formation

⁴⁴ CRPD/C/GBR/CO/1, [29 August 2017](#)

⁴⁵ Including RCOG evidence, para 10 and para 14, <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/royal-college-of-obstetricians-and-gynaecologists.pdf>

⁴⁶ [2017] 1 WLR 2492 [35]

⁴⁷ Explanatory Memorandum to the Abortion (Northern Ireland) Regulations 2021, Paragraph 7.7 https://www.legislation.gov.uk/uksi/2021/365/pdfs/uksem_20210365_en.pdf

etc) Act 2019 (NIEFA 2019), this is not because they are – as the Commission suggests – binding international human rights law. However, while some argue that my Bill is inconsistent with section 9, that does not stand up to scrutiny for reasons set out by the former Attorney General John Larkin QC. In his advice to me Mr Larkin writes: “[*Abortion law*] has not ceased to be a transferred matter. The Assembly is entirely free to amend the Regulations in the manner proposed by the Bill”.⁴⁸

- 4.4. Moreover, he says, “*It is, perhaps, important to make the distinction between (1) the force that paragraphs 85 and 86 of CDEAW have by themselves in the law of Northern Ireland, (2) the force that paragraphs 85 and 86 have by virtue of section 9 (1) of the 2019 Act on the Secretary of State for Northern Ireland, and (3) the force that paragraphs 85 and 86 have by virtue of section 9 (1) of the 2019 Act on the legislative competence of the Assembly. ... there can be no debate about (1) and (3). Paragraphs 85 and 86 have no free-standing legal force in our law, and section 9(1) is addressed to the Secretary of State and, in no way, binds the Assembly ...*”⁴⁹ (emphasis added).
- 4.5. Mindful of this, Mr Larkin goes on to say, “*It does not matter as a matter of domestic law (including the limits on the legislative competence of the Assembly) if the Bill goes diametrically against any or all of the CEDAW recommendation.*”⁵⁰
- 4.6. Therefore, I would argue that there is no contradiction between my Bill and section 9.

The Contradictions within paragraph 85

- 4.7. Thirdly, paragraph 85 is not statute and has not been stress tested by the provision of proper scrutiny. It says:

‘The Committee recommends that the State party urgently:

b) Adopt legislation to provide for expanded grounds to legalise abortion at least in the following cases: ...

(iii) Severe foetal impairment, including FFA, without perpetuating stereotypes towards persons with disabilities and ensuring appropriate and ongoing support, social and financial, for women who decide to carry such pregnancies to term;’

- 4.8. As Mr Larkin points out the provisions of (iii) ‘are internally contradictory.’⁵¹ The meaning of the provision of the qualification ‘without perpetuating stereotypes’ renders (iii) meaningless. It is plainly completely impossible to remove protections from unborn disabled babies on account of their disability to allow abortion specifically on this basis, without the act of doing so telling people with those disabilities that people with their condition are worthy of less protection, because at one stage of their life having that disability would be grounds for their being aborted when being non-disabled would not be a ground for abortion.

CEDAW’s strategy to mitigate against discrimination: provision of information and support

- 4.9. The Northern Ireland Human Rights Commission further “*advises that in order to ensure that women’s decisions on this ground do not perpetuate stereotypes towards people with*

⁴⁸ Legal Opinion of John Larkin QC, 4 March 2021

⁴⁹ *Ibid*

⁵⁰ *Ibid*

⁵¹ *Ibid*

disabilities, the government should provide appropriate information and support to women and girls – both those who choose to carry their pregnancies to term and those who are considering a termination on this ground.” The authority upon which this statement rests appears to come from the CEDAW Committee. The Commission note that *“In cases of severe fetal impairment, the Committee [the CEDAW Committee] aligns itself with the Committee on the Rights of Persons with Disabilities in the condemnation of sex selective and disability selective abortions, both stemming from the need to combat negative stereotypes and prejudices towards women and persons with disabilities. While the Committee consistently recommends that abortion be available to facilitate reproductive choice and autonomy, State parties are obligated to ensure that women’s decisions on this ground do not perpetuate stereotypes towards people with disabilities. Such measures should include the provision of appropriate social and financial support for women who choose to carry pregnancies to term.”*

- 4.10. However, logically the discriminatory implication of a law that allows the unborn to be aborted up to birth because of disability, while not permitting this for the non-disabled, is not addressed by the provision of advice and support for the mother in the presenting context when a decision is made to terminate on the basis of disability. Second, there is no legal basis for suggesting that the discriminatory implication of a law that allows the unborn to be aborted up to birth because of disability, while not permitting this for the non-disabled, is addressed by the provision of advice and support for the mother. The NIHRC seems to rest their suggested solution not on the text of the UNCRPD, which is international law, but simply on the reflections of the unelected and non-judicial CEDAW Committee and its understanding of reflections of the unelected and non-judicial UNCRPD Committee. Moreover, the relevant CEDAW Committee text only seems to engage with the provision of advice and support for a mother who does not elect to terminate on the basis of disability, leaving the central question of how the provision of advice and support can prevent the discriminatory effect of a law that allows abortion up to birth on the basis of disability, while not allowing it for the non-disabled.

UNCRPD

- 4.11. The Commission then turns to consider the **UN Convention on the Rights of Persons with Disabilities** (UNCRPD) directly, noting that under the UNCRPD *“people with disabilities are protected by rights to equality and non-discrimination.”* They further note that the UNCRPD Committee expressed direct concerns about the discriminatory nature of the Abortion Act 1967 in Great Britain in this regard, before Northern Ireland embraced the same discriminatory framework. Specifically, they express concerns *“about perceptions in society that stigmatise persons with disabilities as living a life of less value than of others and about the termination of pregnancy at any stage on the basis of foetal impairment”*; and recommended, *“the State Party amend its abortion law accordingly. Women’s rights to reproductive and sexual autonomy should be respected without legalising selective abortion on the ground of foetal deficiency”*.⁵²
- 4.12. My view is that it would be wholly wrong to create a law that not only discriminates against the unborn disabled by affording them less protection in law than those who are

⁵² CRPD/C/GBR/CO/1, October 2017, paragraphs 12 and 13

able bodied, but which also says that the lives of the disabled can be ended precisely because they are disabled. Yet that is what the law in Northern Ireland does, as the UK Government has explicitly stated it wanted to keep the 2020 Regulations in step with the Abortion Act 1967.⁵³

4.13. The NIHRC seeks to respond to this difficulty in terms that are deeply problematic. It states:

“The UNCRPD and CEDAW Committees issued a joint statement, in August 2018, to address the issue of ambiguity between their positions. The statement concluded:

“States parties should ensure non-interference... with respect for autonomous decision-making by women, including women with disabilities... A human rights based approach to sexual and reproductive health acknowledges that women’s decisions on their own bodies are personal and private, and places the autonomy of the woman at the centre of policy and law making related to sexual and reproductive health services including abortion care.”

The Commission considers that the joint statement confirms the position of both committees with regard to women’s autonomy in making decisions about their pregnancy. Nonetheless, we recognise that it has not provided complete clarity on the issue of access to abortion in circumstances of a severe fetal impairment.”

4.14. The first major problem with the approach of the NIHRC is that they once again confuse the status of the UN Conventions with that of the unelected and non-judicial Committees, a point I have already made above. The views of Committees do not constitute international law. In this case, the two Committees have sought to arrogate to themselves a competence that they simply do not have in not only reflecting on a matter that the binding law of the Conventions does not address, but in doing so to reflect on rights that cross Conventions. It is extraordinary that the NIHRC should mention this joint statement without acknowledging that: (1) the statements of the CEDAW Committee and the UNCRPD Committee do not constitute international law and (2) the two Committees do not have the power to introduce a new Convention right to abortion on any basis, including up to birth for any reason.

4.15. The second major problem is that the statement amounts to the prioritising of women’s autonomy above concerns about the sending out of messages that endorse discrimination and without any legal foundation for doing so. It is not at all clear how, given the text of the UNCRPD, one can reach the conclusion in the joint committee statement. It is interesting that in their final paragraph the NIHRC effectively recognises that this is far from satisfactory and yet it still associates with it, saying *“Nonetheless, we recognise that it has not provided complete clarity on the issue of access to abortion in circumstances of a severe fetal impairment.”* (para 3.13)

4.16. It is important in this context to note that in 2019, the Special Rapporteur on the rights of persons with disabilities said about the UN Convention on the Rights of Persons with Disabilities that *“Article 10 recognizes and protects the right to life of persons with*

⁵³ Explanatory Memorandum to Abortion (Northern Ireland) Regulations (No 2) 2020, para 7.15, page 8 https://www.legislation.gov.uk/ukxi/2020/503/pdfs/ukxiem_20200503_en.pdf

*disabilities on an equal basis with others, which is critical for contesting legislation, policies and practices whereby the lives of persons with disabilities have been put at risk because of perceived low quality of life...The right to life includes the right to survive and develop on equal basis with others. Disability cannot be a justification for termination of life.*⁵⁴ (emphasis added)

The Supreme Court Judgment

4.17. Finally, while the NIHRC pays great heed to the reflections of unelected, non-judicial bodies that do not constitute international law, it does not properly engage with the **relevant jurisprudence, including that from the Supreme Court.** For example the Supreme Court makes it clear in the case of *In The Matter of an Application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC27 on appeal from the decision of the Northern Ireland Court of Appeal [2017] NICA 42, that there is a clear distinction between abortion on the basis of ‘severe fetal abnormality’ and ‘fatal fetal abnormality’, deeming that abortion is a human right in relation only to ‘fatal’ and not ‘severe fetal abnormality’. It makes most sense to respond to the lack of engagement with relevant jurisprudence in responding to paras 3.14 – 3.32 by citing directly from the response of the eminent QC, Brett Lockhart whose advice I have sought on the NIHRC submission. Mr Lockhart said:

- (7) “What is of particular relevance to the current Bill before the Northern Ireland Assembly is that the Supreme Court in the context of a consideration of Convention rights regarding fatal foetal abnormality rape and incest also discussed, whether serious malformation of the foetus, was in any way incompatible with Convention rights of women.
- (8) By way of context it should be noted that in the NIHRC case at first instance⁵⁵, Horner J at [69] highlighted...:-

69. There is also surely an illogicality in calling for no discrimination against those children who are born suffering from disabilities such as Down's Syndrome or spina bifida on the basis that they should be entitled to enjoy a full life but then, permitting selective abortion so as to prevent those children with such disabilities being born in the first place. This smacks of eugenics.

70. It is always difficult to draw the line and it comes as no surprise that the phrase serious malformation of the foetus remains undefined. It can mean different things to different people. The position is very different with conditions such as anencephaly. In those cases the foetus is physically incapable of enjoying a separate existence outside the mother's womb. Those conditions are medically diagnosable. Ms Lieven QC on behalf of the Commission quite frankly admitted that SMF and FFA could be distinguished both morally and legally.

- (9) This anomaly was picked up by Lord Kerr who had already held that the law that then applied in Northern Ireland prior to the 2020 Regulations was, in cases of sexual crime and fatal foetal abnormality, incompatible with both Article 3 and Article 8 of the Convention. His position on serious malformation of the foetus

⁵⁴ Report of the Special Rapporteur on the rights of persons with disabilities, [December 2019](#), A/HRC/43/41, para 48, page 12

⁵⁵ The Northern Ireland Human Rights Commission's Application [2015] NIQB 96

was however in line with the reasoning of Horner J. At paragraphs [331] and [332] of his judgment, Lord Kerr stated:-

331. In para 64 et seq of his judgment, Horner J gave a number of reasons for refusing to hold that the unavailability in Northern Ireland of abortion in cases of serious malformation of a foetus was not incompatible with the Convention rights of women in that country. I agree with his reasoning and conclusions. The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is one of the treaties specified as an EU treaty under the EC (Definition of Treaties) (UNCRPD) Order 2009. Section 6(2)(d) of the NIA forbids the Northern Ireland Assembly from making laws contrary to UNCRPD. That circumstance alone would not, of course, preclude a finding of incompatibility but, as Horner J pointed out, UNCRPD is based on the premise that if abortion is permissible, there should be no discrimination on the basis that the foetus, because of a defect, will result in a child being born with a physical or mental disability. That is a weighty factor to place in the balance, and one which is not present in cases of fatal foetal abnormality or rape and incest. This is particularly so in the light of UNCRPD Committee's consistent criticism of any measure which provides for abortion in a way which distinguishes between the unborn on the basis of a physical or mental disability, relying on "general principles and obligations (articles 1-4)" and "equality and non- discrimination (article 5)" - see Horner J at para 65.

332. As Horner J pointed out, many children born with disabilities, even grave disabilities, lead happy, fulfilled lives. In many instances they enrich and bring joy to their families and those who come into contact with them. Finally, the difficulty in devising a confident and reliable definition of serious malformation is a potent factor against the finding of incompatibility. For these and the other reasons given by the judge, I would refuse to make a declaration of incompatibility in the case of serious malformation of the foetus.

(10) What is notable about Lord Kerr's decision is that he specifically addresses The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)⁵⁶ which he notes is based on the premise "that if abortion is permissible, there should be no discrimination on the basis that the foetus, because of a defect, will result in a child being born with a physical or mental disability."

(11) This observation is consistent with Article 10 of the UNCRPD which states:-

Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others"

(12) The same point is also addressed by Lord Mance who stated at [133]:-

... But in principle a disabled child should be treated as having exactly the same worth in human terms as a non-disabled child, save to the extent that additional costs due to the disability may be identified and recovered in damages from someone negligently responsible for causing the disability: Parkinson, para 90. This is also the consistent theme of the United Nations Committee on the Rights of Persons with Disabilities, expressing concerns about the stigmatising of persons with disabilities as living a life of less value than that of others, and about the termination of pregnancy at any stage on the basis of foetal abnormality, and recommending States to amend their abortion laws accordingly (CRPD/C/GBR/CO/1). If this embraces fatal foetal abnormality, I cannot go so far. But, in relation to disability, I consider that the Committee has a powerful

⁵⁶ The United Kingdom has ratified the UN Convention on the Rights of Persons with Disabilities in 2009. The preamble at paragraph (g) recognises that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person. Article 10 of the Convention reaffirms that every human being has the inherent right to life and "shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others". Article 12 reaffirms that persons with disabilities have the right to recognition everywhere as persons before the law

point. Further, although the Abortion Act 1967 itself distinguishes children who would be “seriously handicapped” from others, this is in the context of a law which entrusts that judgment to the opinion of “two registered medical practitioners ... formed in good faith”: section 1. In the result, I share Horner J’s view that it is not possible to impugn, as disproportionate and so incompatible with article 8, legislation which prohibits abortion of a foetus diagnosed as likely to be seriously disabled.

- (13) Further support in international law for the rights of children with a disability is found in the UN Convention on the Rights to 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.”* Emphasis added
- (14) There is a useful summary of the current legal framework on abortion in Northern Ireland at paragraphs 2.1 to 2.10 of the Submission prepared by NIHRC in April 2021 to the Northern Ireland Assembly. Paragraph 2.5 of the NIHRC paper sets out paragraph 85 of the recommendations in respect of abortion in the CEDAW Report. Paragraph (b) recommends that legislation be adopted, which would provide for expanded grounds to legalise abortion in cases of severe foetal impairment (including fatal foetal abnormality without perpetuating stereotypes towards persons with disabilities and ensuring appropriate and ongoing support, social and financial, for women who decide to carry such pregnancies to term). When the Secretary of State introduced the 2020 Regulations, the legislative language had changed somewhat from “severe foetal abnormality” to “seriously disabled”. The language used is, therefore, closer to the equivalent provision referred to above in the law in England and Wales where one is dealing with “serious handicap”⁵⁷.
- (15) I note the arguments of the NIHRC at paragraphs 3.18-3.20 regarding Article 3. The NIHRC refer to paragraph 103 of the judgment of Lady Hale. While it is correct to say that Lady Hale did not feel it necessary to consider in detail Article 3, given her views on Article 8, it should be remembered that a majority of the Court (Lord Mance, Lord Reed, Lady Black and Lord Lloyd-Jones) refused to make a declaration that the previous law of Northern Ireland was incompatible with Article 3. Further, the paragraph relied upon (which is set out below) refers to a foetus with a fatal abnormality or a case of rape or incest. I have great difficulty in accepting the proposition that under current law, any set of facts as suggested by the Commission could reach the threshold for incompatibility, pursuant to Article 3 in relation to serious malformation of the foetus. I note that they do not seek to suggest, even on a theoretical basis, any such set of facts.

103. For these reasons, therefore, I would reject the Commission’s general case that the 1861 and 1945 Acts are of themselves incompatible with article 3 of the Human Rights Convention. That does not mean that the Northern Ireland authorities’ treatment of a pregnant woman, with a foetus with a fatal abnormality or the result of rape or incest (or, indeed, in other cases) may not on particular facts achieve that level of severity that justifies a conclusion of breach of article 3. It means only that the legislation by itself cannot axiomatically be regarded as involving such a breach.

⁵⁷ The expression used in Section 37 of the Human Fertilisation and Embryology Act 1990

- (16) The NIHRC paper then addresses the question of Article 8 and the specific issue of disability. No attempt is made to highlight the most relevant decision of the UK Supreme Court, where, as illustrated above, a number of the judgments considered the question of disability. Reliance is instead placed on a much earlier decision of *RR v Poland* ECHR Application No. 27617/04 (28th November 2011) at paragraphs 162 and 214.
- (17) The decision in *RR v Poland* is based on an entirely different factual matrix. In that case the State had already adopted statutory regulations allowing abortion in some situations. If that is the case, the court held that it must not structure its legal framework in a way, which would limit the possibility of obtaining a legal abortion. In that case, the Polish national had been informed, following an ultrasound in the eighteenth week of her pregnancy that the foetus may be affected with some malformation. There was then a delay and a failure to refer, which effectively prevented the mother from obtaining a lawful abortion. This is entirely different from the proposed legislative amendment in the current Bill, which seeks to bring equality of treatment between the law relating to disabled children in the womb and to those unborn children who do not have such a disability.
- (18) The treatment of this issue has been carefully considered by the Supreme Court in the Human Rights Commission case in 2018 and the jurisprudence that is relied upon in no way dislodges the force of the observations made by the Justices of the Supreme Court. The fact is that there is an obvious anomaly and this Bill represents a fairly modest change to the current law, which would, if enacted, reinforce the view that children with a disability should not be discriminated against in the womb.
- (19) In summary, there are a number of observations that can be made in relation to the 2020 Regulations and the proposed amendment, which is currently before the Northern Ireland Assembly:-
- (i) There is no gestational limit in paragraph 85 of CEDAW;
 - (ii) The UK Government in enacting the 2020 Regulations, essentially chose to incorporate the language of Section 37 of the Human Fertilisation and Embryology Act, which adopts the term “serious handicap” Such a legislative approach was taken despite the criticism of discriminating against disabled children in the womb by the Supreme Court in 2018;
 - (iii) One of the distinct benefits in the current context of the Supreme Court decision in 2018 is that the specific question of “serious malformation of the foetus” was considered. Even in those judgments from Justices, such as Lord Kerr, who had held that there was an incompatibility in earlier Northern Ireland law in cases of fatal foetal abnormality and rape and incest, the situation was markedly different with regard to serious malformation of the foetus;
 - (iv) The current jurisprudence, therefore, strongly rejects the idea that abortion on grounds of serious malformation of the foetus, which

permits a higher gestational limit, on that basis, is in some way incompatible with the European Convention;

- (v) The failure to address the Supreme Court decision in 2018 and, in particular, its analysis of foetal malformation is, in my view, a glaring omission in the NIHRC paper. To argue that the current 2020 Regulations are incompatible with both Article 3 and Article 8 in relation to the very narrow and modest change that is being proposed, one must address the judgments in the Supreme Court. This has not been done.”

4.18. My main conclusion from this advice is twofold.

- First, the NIHRC have gone out on a limb in attributing weight to the Joint Statement between the unelected and non-judicial CEDAW Committee and UNCPRD Committees because it does not constitute international law and because it is contrary to the weight of relevant human rights jurisprudence, including that of the Supreme Court.
- Second, the NIHRC has engaged with the relevant jurisprudence in a manner that fails to take it seriously for all the reasons that Mr Lockhart has very eloquently set out. Indeed, the Supreme Court press release said, “*Serious foetal abnormality: By contrast, it is not possible to impugn as disproportionate and incompatible with Art 8 legislation that prohibits abortion of a foetus diagnosed as likely to be seriously disabled. A disabled child should be treated as having equal worth in human terms as a non-disabled child.*”⁵⁸

4.19. I note that the law in Great Britain which permits abortions up to term in cases of “severe fetal impairment” (in the language of the ’67 Act, “*that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped*”) is currently facing a challenge in the UK High Court to be heard on 6 and 7 July 2021.

4.20. I now turn to paras 3.33 to 3.56 of the NIHRC submission. These paragraphs are predicated on the assumption that there should be a **right to abort in all cases of disability**. The whole point of my Bill is to argue for the creation of a society where abortion on the basis of disability up until birth is not legal because in Northern Ireland, we do not only acknowledge the rights of the pregnant woman but the rights of the pregnant woman, the unborn and the born disabled who are distressed by the knowledge that they are part of a society where others like them regularly have their lives ended because of their disability. Therefore, I disagree with the NIHRC on the fundamental point of principle and would point out (see below) that the Supreme Court jurisprudence on this issue, supports my position. Although confronted directly with the question about whether there is a human right to abortion in case of “severe fetal impairment”, with all that this meant for women’s choice, and notwithstanding the fact that abortion on the basis of “severe fetal impairment” was legal in the vast majority of the United Kingdom at the time, the Supreme Court was clear that there is no Convention right to abortion at any stage in relation to this form of disability.

Status of the Unborn

4.21. I also want to address questions around the **status of the unborn and associated legal rights**.

4.22. My Bill is in line with the Preamble to the UN Convention on the Rights of the Child, which states that a child “*needs special safeguards and care, including appropriate legal protection, before as well as after birth*”.⁵⁹

4.23. Justice Horner said, “*The position in Northern Ireland law can reasonably be summed up by concluding that the unborn child does not enjoy a full “right to life” under Article 2. However pre-natal life does have some statutory protection ...*”⁶⁰ In particular, as noted by the BMA, “*The concept of viability underpins much of the debate, and the current 24-week time limit in the Abortion Act*”.⁶¹ Indeed, a specific offence of child destruction, section 25 of the Criminal Justice Act (Northern Ireland) 1945, at the point of viability exists, so this point of a child’s development is clearly an important legal marker. It was this offence that was quoted in the 2013 case on the stillbirth of Alex Drummond, “*In Rance v Mid-Downs Health Authority [1991] 1 QB 587 it was held that the words “a child then capable of being born alive” in the 1945 Act meant capable of existing as a live child, breathing and living by reason of its breathing through its own lungs alone, without deriving any of its living, or power of living, by or through any connection with its mother.*”⁶² The judgement agreed that the definition of “deceased person” in the Coroners Act 1959 Act “*include a [dead] foetus in utero then capable of being born alive.*”⁶³ This implies a recognition of personhood before birth.

4.24. Brett Lockhart QC says:

(22) “...The gravamen of the NIHRC argument is focused on the rights of women and the critical importance of bodily autonomy. There is little attempt to consider the evolving rights of the unborn child. The implication of the arguments advanced is that human rights are not relevant until the birth of the child. That presupposes, however, an answer to the more difficult question of when life begins. The courts, both in Europe and in the UK, continue to struggle with the concept of preborn life, as highlighted by the European Court of Human Rights in the landmark decision of *Vo v France* :-

“84. At European level, the Court observes that there is no consensus on the nature and status of the embryo and/or foetus ... although they are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation. At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts, and also in the United Kingdom ... – require protection in the name of human dignity without making it a “person” with the “right to life” for the purposes of Article 2 ...

⁵⁹ Preamble to the 1989 UN Convention on the Rights of the Child, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

⁶⁰ [2015] NIQB 96, paragraphs 64 and 65

⁶¹ *Decriminalisation of abortion: a discussion paper from the BMA*, February 2017, page 26

⁶² See para 34 [2013] NICA 68, Attorney General and Siobhan Desmond vs The Senior Coroner For Northern Ireland. Judgement delivered by Morgan LCJ

⁶³ *Ibid*

(23) Recognition that the issue in question has profound moral and ethical connotations is entirely apposite. Michael Sandel, Professor of Government at Harvard University, considers in his seminal work, “Justice – What’s The Right Thing To Do” the question of how an understanding of philosophy can help to make sense of politics, morality and our own convictions. He argues persuasively that the biggest questions in our civil life can be illuminated through reasoned debate. On the question of abortion, he states as follows:-

... Those who would defend the right of women to decide for themselves whether to terminate a pregnancy should engage with the argument that the developing foetus is equivalent to a person, and try to show why it is wrong. It is not enough to say that the law should be neutral on moral and religious questions. The case for permitting abortion is no more neutral than the case for banning it. Both positions presuppose some answer to the underlying moral and religious controversy.

(24) The relevant jurisprudence continues to struggle with the question of abortion. In this case, however, the change proposed is modest. As Lord Mance points out, the stigmatising of persons with disabilities as living a life of less value than that of others is the consistent theme of the United Nations Committee on the Rights of Persons with Disabilities.”

MEDICAL ISSUES

5. **The Bill will distract medical professionals from providing care to considering how to interpret the law**⁶⁴

- 5.1. In every area of medicine, clinicians must practice within legal and regulatory frameworks and they do so under the guidance of public bodies such as the General Medical Council, and with the support of their trade unions and professional bodies (such as the British Medical Association). Clinicians undertake rigorous training before they are licensed to practice, and they are required to undertake continuing professional development to ensure their skills and competencies remain up-to-date with best medical practice and new legislation.
- 5.2. Out of this strong foundation of learning, regulation and guidance clinicians across disciplines make difficult decisions, some on a daily basis, about what course action is most appropriate in a life-threatening situation. I am confident in the ability of Northern Ireland’s clinicians to make these same judgements in the context of pregnancy, and with the protections afforded by the legal structures that ensure clinicians are not prosecuted for ‘good faith’ decisions.
- 5.3. I recognize that the BMA have raised concerns about “*uncertainty for doctors*” that “*could hinder patient care*” — they say “[t]his, combined with the threat of criminal conviction and professional sanctions, could have a chilling effect on the ability of doctors to make clinically indicated decisions in conjunction with their patients.”⁶⁵
- 5.4. I am keen to work with clinicians to ensure protocols are in place so that they are fully supported and assured that they will not face unwarranted legal challenges when they are practicing in good faith and according to best practice guidelines. The British Association

⁶⁴ [royal-college-of-obstetricians-and-gynaecologists.pdf \(niassembly.gov.uk\)](#), para 61. [british-medical-association.pdf \(niassembly.gov.uk\)](#), [alliance-for-choice.pdf \(niassembly.gov.uk\)](#), page 30.

⁶⁵ [british-medical-association.pdf \(niassembly.gov.uk\)](#)

of Perinatal Medicine 2019 Framework for Practice “*Perinatal Management of Extreme Preterm Birth Before 27 weeks of Gestation*” provides an example of guidance in current use which supports clinicians to make decisions when outcomes are, by nature, uncertain – and where there is a complex interaction between the wishes of parents, the legal and professional duty of doctors to act in the best interests of their patients, as well as touching on potential conflicts between maternal and fetal health.⁶⁶

- 5.5. The NI working group on Fatal Fetal Abnormality found that in many cases clinicians *are* able to provide clear indications of whether a fetal condition is likely to be fatal. The Working Group also identified that there will be some cases where the outcome is uncertain– and the professionals advising the working group stressed that in these cases “*there should be no option for a termination of pregnancy under any proposal for legislative change arising from this review.*”⁶⁷
- 5.6. In all cases clinicians must make a good faith judgement to the best of their ability and within the context of the appropriate multidisciplinary team, as is already best practice.
- 5.7. Following *Montgomery v Lanarkshire Health Board* [2015] UKSC 11,⁶⁸ clinicians must also advise women of all risks, however small, with particular sensitivity to the risks which hold particular importance to the individual woman in question, including the potential risk of incorrectly assessing the severity of the condition of the fetus.
- 5.8. As in any medical situation, clinicians are not infallible, and a baby may, in some cases, have a fatal condition that is not picked up through scans or a screening process, or at birth it may become apparent that the child has a far more serious condition than anticipated which is subsequently fatal. These cases are devastating for the families involved and every support must be offered to these families including perinatal palliative care and bereavement care. I would welcome discussion on how we can ensure that parents experience excellence of care and support in the brief time they have with a child who dies shortly-before, during or shortly-after birth as well as in the longer-term.
- 5.9. Where the pregnant woman’s life is a risk or there is risk of “*grave permanent injury*” to her physical or mental health she will continue to be eligible for a termination in Northern Ireland under Regulation 6 — this is unaffected by my Bill, and any woman facing such challenging circumstances must be provided with timely, compassionate care both during and after her pregnancy.⁶⁹
6. ***The 24-week limit will force parents to make a rushed decision as conditions may not be detected until the 20-week scan, and further testing and consultation with the relevant professionals takes time***⁷⁰
- 6.1. The purpose of my Bill is to ensure that babies with disabilities are afforded the same care and protections as all other babies, and to shift the discussion so that pregnant women are not being advised to consider whether to terminate a pregnancy at any gestation based

⁶⁶ [Perinatal Management of Extreme Preterm Birth Before 27 weeks of Gestation \(2019\) | British Association of Perinatal Medicine \(bapm.org\)](https://www.bapm.org/perinatal-management-of-extreme-preterm-birth-before-27-weeks-of-gestation-2019/)

⁶⁷ Report of the Working Group on Fatal Fetal Abnormality, Department of Health, [April 2016](#), Pages 30–31.

⁶⁸ <https://www.supremecourt.uk/cases/docs/uksc-2013-0136-judgment.pdf>

⁶⁹ [The Abortion \(Northern Ireland\) \(No. 2\) Regulations 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukui/2020/2/regulations/2020-02-20/1)

⁷⁰ See e.g. [british-society-of-abortion-care-providers.pdf \(niassembly.gov.uk\)](#), page 5. [fetal-medicines-submission-03062021.pdf \(niassembly.gov.uk\)](#), page 4.

on information about the likelihood their child would have a non-fatal disability, once born.

- 6.2. In GB research has shown that 69% of pregnant women who received a positive diagnostic test result for Down's syndrome were offered a termination in the same conversation, and 50% of pregnant women who received a high chance screening result were offered a termination again *after expressing their desire to continue the pregnancy* — some of these women were offered terminations repeatedly throughout their pregnancy.⁷¹
- 6.3. More than 1,500 people with Down's syndrome and families of those with Down's syndrome have written to NI political leaders to express their concern about the new law in NI which permits abortion on the basis of disability, saying “[t]his is discrimination and will likely have a devastating impact on the community of people with Down's syndrome.”⁷²
- 6.4. Regardless of gestation, laws which provide for termination of pregnancy on the basis that the baby would have a disability covered by my Bill shape perceptions about the value and quality of life of persons with disabilities.
- 6.5. The Down's Syndrome Association (DSA) conducted two surveys (in 2009 and repeated in 2014) to identify the antenatal and neonatal experiences of parents of a child with Down's syndrome. Both surveys revealed that women did not recall being provided with enough information about Down's syndrome during their pregnancy.⁷³
- 6.6. As recently as 2019, women in England have received information about antenatal screening which discusses the ‘risk’ the baby will have a ‘handicap’ as opposed to being ‘normal’.⁷⁴ Such discriminatory language and attitudes have no place in modern healthcare, and my Bill seeks to ensure we do not perpetuate the same attitudes in NI.
- 6.7. Specialized care pathways should be introduced for women who have received a diagnosis of ‘fetal impairment’, such as the newly published pathway for women expecting a child a diagnosis of Down's syndrome, produced jointly with disability charities, Down's Syndrome Research Foundation and Positive About Down's Syndrome, and St. George's University Hospitals.⁷⁵ Pathways such as these will ensure that women and children are provided with up-to-date information, that has been informed by the lived experience of people with similar disabilities, and high-quality support and care. It should be noted that in England and Wales until January this year, the only formal pathway for women carrying a child diagnosed Down's syndrome during pregnancy has been termination of pregnancy. The Down's Syndrome Research Foundation have highlighted the quite astonishing fact that “*just £16 per person with Down's syndrome is designated for research (compared to over £200 per person with cancer). Of that paltry figure, £11 is spent on screening.*”⁷⁶ It is deeply concerning, then,

⁷¹ <https://www.dsrf-uk.org/pads-new-report/>

⁷² [Press release – Pressure mounts on NI political leaders as over 1500 people with Down's syndrome and their families call for law change - Don't Screen Us Out , Open letter to Northern Ireland politicians - Equally Valued \(dontscreenusout.org\)](#)

⁷³ Down's Syndrome Association, A Guide for Healthcare Professionals, Antenatal, Neonatal and Postnatal Care, 2019, Pages 9-10 <https://www.downs-syndrome.org.uk/?wpdmdl=6543&ind=0>

⁷⁴ <https://twitter.com/sallyephillips/status/1359771579627020288/photo/1>

⁷⁵ <https://www.dsrf-uk.org/pregnancypathway/>

⁷⁶ <https://www.dsrf-uk.org/holdsmeback5/>

that significantly more money is being spent trying to prevent children with Down's syndrome from born than is spent on research into improving their quality of life.

- 6.8. Where screening tests and results are delayed, efforts should be made to ensure this process is streamlined so that women can be provided with the best possible care in a timely manner during their pregnancy.
- 6.9. There are certain (rare) physical conditions which may not be detected until the 20 weeks' scan (for example lethal skeletal dysplasia which is thought to affect around 0.9 in 10,000 pregnancies), which is 4 weeks before the cut-off limit for abortion. However, where these are conditions are considered so serious that the baby will either not survive in the womb or die during or shortly after birth, women will still be eligible for a termination in Northern Ireland or support to continue the pregnancy until its natural end. Terminations will also still be legal in cases where the pregnant woman's life is a risk or there is risk of "grave permanent injury" to her physical or mental health.⁷⁷
- 6.10. However, to suggest that women would be rushed into terminating in cases where the fetus has a condition which is not considered fatal misses the point, that this Bill is about shaping a culture where having a disability is not considered to be incompatible with having a rich and valuable life.

7. *This Bill would force women to travel to access a termination and may create very distressing circumstances where a woman struggles to access a post-mortem and to bury her baby, and this may hinder access to appropriate follow-up care and support*⁷⁸

- 7.1. In the first instance, it is important to stress that my Bill does not compel anyone to have an abortion. While it does not seek to prevent someone travelling to another jurisdiction to access an abortion, my objective is that the absence of abortion in Northern Ireland for non-fatal disability should be part of a very disability supportive culture in Northern Ireland where parents with disabled children feel sufficiently supported, where excellent healthcare is available, and harmful stereotypes such as the belief that people with a disability will be unable to live a good life are thoroughly repudiated, such that a woman's discovery that she is carrying a baby with a non-fatal disability will not result in an automatic consideration of termination.
- 7.2. It is important to note that terminations in cases of a 'fatal fetal anomaly' are not covered by my Bill and will continued to be provided for under the Abortion (Northern Ireland) (No. 2) Regulations 2020. In these cases, and all cases where women lose a baby during or shortly after pregnancy in Northern Ireland, I hope that we can work to ensure we can provide high-quality perinatal palliative and bereavement care.
- 7.3. Where women access terminations in other jurisdictions because they are not eligible under NI law, it is for those providing terminations in these circumstances to advise women about their options for returning the baby to Northern Ireland and to ensure that women are aware of these issues from the outset. The immediate aftercare and safety of a patient following a termination procedure in another jurisdiction is the responsibility of the service provider in that jurisdiction. It is incumbent upon them to ensure there is

⁷⁷ [The Abortion \(Northern Ireland\) \(No. 2\) Regulations 2020 \(legislation.gov.uk\)](#)
⁷⁸ [fetal-medicines-submission-03062021.pdf \(niassembly.gov.uk\)](#), page 2. [doctors-for-choice-ni.pdf \(niassembly.gov.uk\)](#), page 8.

ongoing care, to ensure that the woman is fit to travel and to make her aware prior to undertaking treatment of the potential need to prolong her stay should complications arise and of indications that she should seek urgent care should she develop symptoms during her return journey. They should also ensure that she is informed of the relative risks of travelling to access a late-term termination in line with *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.⁷⁹ If the UK Government continues to fund terminations in these cases I hope they will address the need for appropriate funded options to return the baby to Northern Ireland.

- 7.4. Every woman who accesses healthcare in Northern Ireland following a pregnancy loss should be offered high-quality, timely care & support including bereavement care – regardless of the place or circumstances of her loss. There should be clear referral pathways, which are adequately resourced and sufficiently flexible to provide rapid entryways for these women into follow-up care. Best practice guidance for bereavement care is set out in the Department of Health, Social Services and Public Safety publication, *‘Regional Bereavement Guidance on evidence-based, holistic care of parents and their families after the experience of miscarriage, stillbirth or neonatal death’*, updated in 2015.⁸⁰
- 7.5. We need to work to ensure there are robust support systems for women expecting a child with a suspected or diagnosed disability, as well as lifelong provision and care to ensure these children and their families are provided with everything they need to flourish. Receiving unexpected news in pregnancy is understandably extremely challenging, and as some have said there may be some women and families “who cannot see their way to raising a child with a severe disability” – it is my hope that despite what may be a scary start and at times a very challenging journey, we will work together to ensure that what seems unmanageable is made manageable.
- 7.6. The NIHRC suggests that the travel implications for any woman who wants to abort a baby on the basis of disability, potentially up until birth, are such that their Article 8 and Article 14 rights are engaged. The engagement of these rights, however, is pursuant to having first established a right to abort on the basis of non-fatal disability up until birth. I do not believe that there is basis for asserting such a right for the reasons I have set out above and thus the concerns about the engagement of Article 8 and 14 rights in relation to that ‘right’ do not obtain.

OTHER LEGAL ISSUES

8. *This Bill places Northern Ireland behind Great Britain*

- 8.1. The law on abortion in Great Britain which allows abortion without gestation limit in cases of “serious handicap” was introduced thirty years ago and is currently facing a legal challenge in the High Court regarding its impact on people with disabilities.⁸¹ In Northern Ireland, we have the opportunity to ensure that our laws do not inadvertently perpetuate

⁷⁹ <https://www.supremecourt.uk/cases/docs/uksc-2013-0136-judgment.pdf>

⁸⁰ [Bereavement guidance after a miscarriage, stillbirth or neonatal death | Department of Health \(health-ni.gov.uk\)](#)

⁸¹ [Down's Syndrome campaigners gear up for High Court fight to change abortion law | Daily Mail Online](#)

stereotypes towards persons with disabilities (and indeed this was one of the requirements of the CEDAW report).

- 8.2. The purpose of devolution is to allow different jurisdictions to shape their own laws in a manner that accords with the values of their respective electorates. When the UK Government consulted on changing the law on abortion in NI, 79% of respondents did not support the Government's proposals,⁸² and in June 2020 75 MLAs voted in favour of a motion or an amended motion which rejected allowing abortion up to term on the basis of non-fatal disabilities.⁸³ This demonstrates the Northern Ireland electorate's views regarding abortion diverge from the Regulations as made by the UK Government.
- 8.3. The changes proposed by my Bill will bring Northern Ireland's law into line with the more recently developed law in the Republic of Ireland, and I hope that we can learn from the experiences in that jurisdiction to ensure that changes introduced by my Bill are workable and embedded in appropriate clinical guidance.⁸⁴

9. *The Secretary of State cannot approve this Bill*

- 9.1. The NIHRC argues at para 4.10 of their submission that Secretary of State may take the decision not to submit my Bill for Royal Assent because he would be in breach of his obligations under the NIFEA 2019 and the Northern Ireland Act 1998. I have dealt with the issues around the NIFEA earlier. The Northern Ireland Act 1998 allows the Secretary of State to refuse to submit a Bill for Royal Assent under section 14(5) if he believes that the Bill does not meet international obligations. Since the UK Government has recently said that that the CEDAW recommendations "*are not binding and do not constitute international obligations*",⁸⁵ the Secretary of State could not use this as an argument as a reason not to submit my Bill for Royal Assent.

OTHER ISSUES

10. *Fetal sentience*

- 10.1. It is concerning that claims about the status of the fetus not being awake in utero have been made in the context of my Bill.⁸⁶ These claims were made by the Royal College of

⁸² A new legal framework for abortion services in Northern Ireland, Implementation of the legal duty under section 9 of the Northern Ireland (Executive Formation etc) Act 2019, UK Government consultation response, [March 2020](#), page 9.

⁸³ Northern Ireland Assembly Official Report, [2 June 2020](#). 46 MLAs voted in favour of the motion I tabled which stated "That this Assembly welcomes the important intervention of disability campaigner Heidi Crowter and rejects the imposition of abortion legislation which extends to all non-fatal disabilities, including Down's syndrome." A further 32 MLAs voted in favour of an amendment in the name of Emma Sheerin MLA which would have led to a motion stating: 'That this Assembly welcomes the important intervention of disability campaigner Heidi Crowter and reject the specific legislative provision in the abortion legislation which goes beyond fatal foetal abnormalities to include non-fatal disabilities, including Down's syndrome.' Three MLAs voted in favour of both the original motion which passed and the amendment. Consequently, 75 MLAs voted to reject allowing abortion up to term on the basis of non-fatal disabilities.

⁸⁴ Section 11(5) [Health \(Regulation of Termination of Pregnancy\) Act 2018](#)

⁸⁵ Explanatory Memorandum to the Abortion (Northern Ireland) Regulations 2021, Paragraph 7.7 https://www.legislation.gov.uk/uksi/2021/365/pdfs/uksiem_20210365_en.pdf

⁸⁶ Royal College of Midwives, page 2 <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/health/primary-legislation/sfia-bill/written-submissions/royal-college-of-midwives.pdf>

Obstetricians and Gynaecologists in 2010 in their paper entitled *Fetal Awareness Review of Research and Recommendations for Practice*.⁸⁷ One of the authors of the 2010 RCOG report has since significantly revised his position on the subject of fetal pain. In an article published in the British Medical Journal in January 2020, entitled, *Reconsidering Fetal Pain*, Dr Stuart Derbyshire and co-author John C Bockmann, set out how the latest developments in neuroscience present a different picture. They argue that “*neuroscience cannot definitely rule out fetal pain before 24 weeks*,” and that the latest neuroscientific evidence suggests a fetus may in fact have “*an immediate and unreflective pain experience mediated by the developing function of the nervous system from as early as 12 weeks*.” Both authors conclude that “*the major practical outcome*” of their review is that “*it is reasonable to consider some form of fetal analgesia during later abortions*.” Dr Derbyshire now suggests a case-by-case approach in which the “*clinical team and the pregnant woman can consider whether fetal analgesia makes sense based on the clinical requirements for the abortion, the age of the fetus and the conscience of the parties involved*”⁸⁸ His co-author goes further, saying, “[f]etal analgesia and anaesthesia should thus be standard for abortions in the second trimester, especially after 18 weeks...”⁸⁹

10.2. I note that the BMA “*suggests that even if there is no incontrovertible evidence that the fetus feels pain, the use of fetal analgesia when carrying out any procedure (whether an abortion or a therapeutic intervention) on the fetus in utero may go some way in relieving the anxiety of the woman and health professionals*.”⁹⁰ This advice seems more in keeping the Derbyshire/Bockmann position than the RCOG position of 2010.

Yours sincerely

Paul Givan MLA

⁸⁷ RCOG, *Fetal Awareness Review of Research and Recommendations for Practice*, Report of a Working Party, March 2010

⁸⁸ *Ibid.*

⁸⁹ Stuart W.G. Derbyshire and John C. Bockmann, “Reconsidering Fetal Pain,” *Journal of Medical Ethics* 46, no. 1 (January 2020): 3–6, <https://10.1136/medethics-2019-105701>.

⁹⁰ The law and ethics of abortion, BMA views, September 2020, page 8
<https://www.bma.org.uk/media/3307/bma-view-on-the-law-and-ethics-of-abortion-sept-2020.pdf>

ANNEX: LEGAL OPINION OF PROF MARK HILL QC ON THE STATUS OF THE CEDAW COMMITTEE REPORT

Prof Mark Hill QC states:

- ‘3. ...The report is based upon a misapprehension as to the status of the Committee and its competence to make declaratory determinations, still less juridical rulings regarding CEDAW which States parties are obliged to follow.
4. The Committee does not have the capacity or standing to give a binding adjudication on the United Kingdom’s obligations under CEDAW or on the proper interpretation of CEDAW. The interpretative function under the CEDAW is reserved, not to Committee, but to the International Court of Justice. See Article 29.

Article 29

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.
3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.
5. Under the Optional Protocol to CEDAW, the United Kingdom has agreed to co-operate with the Committee if the Committee initiates an inquiry after having received reliable information indicating grave or systematic violations of the rights in CEDAW in the United Kingdom. In considering whether the foregoing threshold has been met, the Committee is entitled to take a view as to what constitutes a violation of CEDAW obligations. But it must do so in accordance with the ordinary rules of interpretation set out in the Vienna Convention on the Law of Treaties. The Committee’s views are not binding interpretations of the law, nor do they contribute to customary international law when approaching the interpretation of these rights.
6. In initiating the present inquiry, and in coming to its conclusions and recommendations, the Committee has instead chosen to rely on its own interpretation of CEDAW. In consequence it initiated an inquiry (and published a report) when it was not properly open to the Committee to do so under its own terms of reference. Further it purported to make an interpretation which, at best, can amount to nothing more than an opinion, but at worst, for the reasons appearing below, is demonstrably wrong.
7. The text of international treaties such as CEDAW are carefully crafted expressions of intent and belief. There is no reference to abortion in the text of CEDAW. There is nothing in the text of CEDAW which requires a state party to allow abortion on specified grounds and/or decriminalise abortion generally. The absence of such a provision in the formal text gives a clear indication that no such obligation exists. The International Court of Justice has not interpreted CEDAW in a manner which departs from the plain wording of the text so as to require a right to abortion or the decriminalisation of abortion to be “read in”.

8. The lack of a right to abortion in any international treaty was noted by the United Kingdom Supreme Court in *R (A and B) v Secretary of State for Health* [2017] 1 WLR 2492 per Lord Wilson at [35], with whom Lord Reed and Lord Hughes agreed:

The conventions and the covenant to which the UK is a party carefully stop short of calling upon national authorities to make abortion services generally available. Some of the committees go further down that path. But, as a matter of international law, the authority of their recommendations is slight: see *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270, para 23, Lord Bingham of Cornhill.

9. Nevertheless, the Committee, “based on its expertise in interpreting [the Convention]”, recommends that abortion be decriminalised in all cases and asserts that “States parties are obligated not to penalise women resorting to, or those providing such services [abortion]”. The Committee is not a judicial body, no source is given for its claimed ‘expertise in interpreting’ in CEDAW, and even if it were to possess some expertise or experience in this regard, it lacks the jurisdiction to interpret CEDAW, this being a matter expressly reserved to the International Court of Justice. That it may in the past have arrogated to itself an interpretative function beyond that granted to it cannot create such a power.
10. The Committee purports to interpret the CEDAW as requiring ‘States parties to legalise abortion, at least in cases of rape, incest, threats to the life and/or health (physical and mental) of the woman, or severe foetal impairment’. This is derived from the Committee’s own General Recommendations and from its views on individual communications under the Optional Protocol. In none of these source documents is there an analysis of how these “obligations” have come about given the text of the Convention and, in particular, within articles 2, 5, 12 and 16, on which the Committee principally relies. The Committee might well wish such “obligations” to be present, but the States who agreed CEDAW and are signatories to it chose not to insert such terms.

Flawed interpretation

11. Article 12 of CEDAW (read with Articles 1, 2, 5, 14 and 16) is said by the Committee to constitute the “legal underpinnings of the Committee’s jurisprudence in this area”. It reads:

Article 12

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

12. The Committee seems to treat “health care” as necessarily including all forms of termination of pregnancy whatever the motivation. It makes no differentiation in cases, for example, when the abortion may be for family planning purposes or on account of any other form of subjective selectivity. Whilst “family planning” is expressly brought within the definition of “health care” for the purposes of Article 12, it is instructive to note that abortion is not.
13. The seemingly expansive interpretation taken by the Committee is not supported by an analysis of State action in other international agreements. When the Programme of Action

of the International Conference on Population and Development referred to family planning, a significant number of reservations were made which noted that the concept of family planning did not include abortion. The Programme of Action declared that:

Governments should take appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning. [7.24]

Any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process. In circumstances where abortion is not against the law, such abortion should be safe [8.25].

14. This makes it clear, first and foremost, that the international consensus is that States can legitimately outlaw abortion. Secondly, it was agreed that abortion cannot be promoted as a method of family planning. Therefore the suggestion in the Report that these same States would have considered abortion to be ‘related to family planning’ for the purposes of Article 12 of CEDAW is misplaced.
15. In the absence of a specific reference to abortion in the definition of “healthcare” in Article 12, given the specific inclusion of family planning, it must be concluded that the State parties did not intend abortion to be treated as healthcare for the purposes of Article 12. That it had to be made explicit that healthcare included family planning tells against any presumption or assumption that healthcare implicitly included access to abortion. The absence of reservations to Article 12 of CEDAW by States which restrict abortion further emphasises this.
16. The same analysis applies to the references to health and family planning in Articles 10 and 14 of CEDAW. There is therefore no basis for the Committee’s findings that a restriction on access to abortion can constitute a violation of these articles, which relate to the arrangements made for relationships and sexuality education or for rural women’s access to abortion.
17. General Recommendation No. 24 constitutes the Committee’s formal elaboration of its understanding of Article 12 of CEDAW. It comments, albeit obliquely, on abortion, at two points. First, when it suggests that it is discriminatory for a State to refuse to provide legally for the performance of ‘certain reproductive health services for women’; and secondly, when it is said that ‘other barriers to women’s access to appropriate health care include laws that criminalize medical procedures only needed by women [? or] punish women who undergo those procedures’ [sic]. It is only at the end, when recommendations are made for government action, that laws on abortion are specifically highlighted. The recommendation is that, ‘when possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion’ (emphasis added).
18. This recommendation cannot have its roots in Article 12 for the reasons set out in paras 12 to 17 above. It is not for the Committee to read in words which are not in the carefully agreed text of the international commitment entered into by States. However even if this recommendation were validly made, what General Recommendation No. 24 commends falls far short of the supposed obligations to which the United Kingdom seems to be held in the inquiry report. Since abortion does not constitute a form of “healthcare” under a proper reading of the CEDAW, a prohibition or criminalisation of abortion cannot amount to a barrier to women’s access to appropriate healthcare.

19. The inquiry report also references General Recommendation No. 28 on the core obligations under Article 2 of the Convention. This general recommendation calls on States to promote equality of opportunity for women through implementation of plans and programmes ‘in line with the Beijing Declaration and Platform for Action’. In this context, the Beijing Platform asks States to, ‘consider reviewing laws containing punitive measures against women who have undergone illegal abortions’ [106-k] (emphasis added). What was agreed by States in Beijing is far more respectful of the extent to which States might wish to protect unborn life than the position adopted by this inquiry report. In light of this, General Recommendation No. 28, purporting as it does to be ‘in line with the Beijing Declaration’ cannot serve as a basis for the inquiry findings. The Beijing Platform correctly identified that the extent and manner in which States protect unborn life are matters over which they have a considerable and legitimate degree of sovereign discretion. The more doctrinaire approach of the Committee failed to recognise and acknowledge this.
20. The inquiry report also gives some free-standing weight to Article 16 (rather as simply a context for interpreting Article 12) in reaching its conclusion in [60] of the report. It appears to rely on the following particular provision of article 16:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.
21. Again, there is no specific mention of a right to abortion, the textual focus very much being on equality in decision-making, as opposed to an undefined right vested solely in the mother. However, Monaco and Malta entered reservations on abortion to the extent that this commitment might be interpreted as requiring the decriminalising of abortion. Such an interpretation (however strained) could, of course, only come about as a result of a decision of the International Court of Justice and none has been forthcoming.
22. Nothing in General Recommendation No’s. 19 or 35, the latter of which suggests that criminalisation of abortion is a form of gender based violence, reveals any sound basis for the inquiry’s findings.
23. Similarly, the report’s reliance on Article 5 (and what it sees as stereotyping of women) does not empower it to recommend decriminalisation of abortion and/or positive rights to abortion in certain specific cases. At most, a legitimate comment from the Committee on a perceived failure to meet the Article 5 obligation would be a call for state action to combat a form of stereotyping that views women primarily as mothers.
24. Nothing in any of the other General Recommendations cited by the Committee (for example, on rural women, migrant workers and refugees) casts any light on how the obligations to provide for and decriminalise abortion can be derived from CEDAW.
25. In summary, the Committee’s suggestion that the Northern Irish criminal law on abortion is discriminatory against women cannot withstand scrutiny. Discrimination under Article 1 of CEDAW involves differential treatment or impact. It is meaningful to compare the treatment of pregnant women with the treatment of others in the context of, for example, employment or benefits. Where the prohibition under challenge deals in terms with the circumstances in which termination of pregnancy is permitted there can be no meaningful comparison. Any law dealing with that subject matter must necessarily apply to pregnant

women and not others (setting aside the doctors who perform abortions). In the context of such a law, it makes no sense to talk of discrimination against pregnant women. That is why there is no authority suggesting that laws governing termination of pregnancy fall to be justified as discriminatory against pregnant women or women generally, in the jurisprudence of the European Court of Human Rights in Strasbourg, the Court of Justice of the European Union in Luxembourg, or in the domestic courts of the United Kingdom.’