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The Speaker

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To: All Assembly Members

10 May 2021

Dear Member,

On 8 March 2021, the Assembly passed the following motion:

“That the Northern Ireland Human Rights Commission be asked to advise whether the Severe Fetal Impairment Abortion (Amendment) Bill is compatible with human rights.”

I have now received the advice requested and, in accordance with Standing Order 34 (6), I attach it for the information of all Members.

I will also deposit this advice in the Assembly Library and it will be available on the Assembly website.

Yours sincerely,



ALEX MASKEY MLA



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Submission to Northern Ireland Assembly
on the Severe Fetal Impairment Abortion
(Amendment) Bill**

April 2021

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Summary of recommendations

3.9 The Commission 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.

3.10 The Commission further advises that in order to ensure that women's decisions on this ground do not perpetuate stereotypes towards people with disabilities, the government should provide appropriate information and support to women and girls – both to those who choose to carry their pregnancies to term and those considering a termination on this ground.

3.14 The Commission advises that the UNCRPD recommendation must be read in conjunction with the joint statement by the CEDAW and CRPD Committee, in respect of the recognition of the bodily autonomy of women.

3.32 The Commission recommends that guidance is produced for Northern Ireland by the Department of Health, in conjunction with regulatory and professional bodies, in order to clarify what is meant by 'severe fetal impairment' and support the informed decisions made by women and their clinicians.

3.46 The Commission advises that in order for human rights protections to be practical and not illusory, women in NI should have access to the same services locally as they are entitled to access in other parts of the UK. The removal of access to abortion in situations of severe fetal impairment as proposed by the Bill, coupled with the limited diagnostic testing arrangements in NI, may result in violations of Articles 3 and 8 ECHR.

3.47 The Commission recommends that testing, such as Non Invasive Prenatal Testing (NIPT) is offered alongside information, timely specialist referrals and counselling where necessary to ensure that women in NI are afforded as much information, support and time as possible to make an informed decision about the continuation of their pregnancy.

3.56 The Commission advises that precluding abortions in Northern Ireland in cases of severe fetal impairment, as this bill proposes may leave women having to travel in order to have an abortion or continue with a pregnancy against her wishes, both of which may result in violations of Articles 8 and 14 ECHR.

1. Introduction

- 1.1. The Northern Ireland Human Rights Commission (NIHRC), pursuant to Section 69(4) the Northern Ireland Act 1998, advises the Assembly whether a bill is compliant with compatible with human rights. In accordance with this function, the following response is submitted to the Assembly on the Severe Fetal Impairment Abortion (Amendment) Bill.
- 1.2. The NIHRC is the National Human Rights Institution (NHRI) for Northern Ireland and one of three NHRIs in the United Kingdom (UK). It is accredited with A status before the United Nations and is in full compliance with the United Nations Principles relating to the Status of National Institutions.¹
- 1.3. The NIHRC bases its advice on the full range of internationally accepted human rights standards signed and ratified by the UK government, including the European Convention on Human Rights (ECHR), as incorporated by the Human Rights Act 1998 (HRA), and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. The relevant regional and international treaties in this content include:
 - European Convention on Human Rights (ECHR);²
 - UN International Covenant on Civil and Political Rights (UN ICCPR);³
 - UN International Covenant on Economic, Social and Cultural Rights (UN ICESCR);⁴
 - UN Convention on Elimination of Discrimination against Women (UN CEDAW);⁵
 - UN Convention against Torture (UN CAT);⁶
 - UN Convention on the Rights of the Child (UN CRC);⁷
 - UN Convention on the Rights of Persons with Disabilities (UN CRPD).⁸
- 1.4. In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN.

¹ Principles relating to the Status of National Institutions, Adopted by General Assembly Resolution 48/134 (20 December 1993)

² Ratified by the UK in 1951.

³ Ratified by the UK in 1966.

⁴ Ratified by the UK in 1966.

⁵ Ratified by the UK in 1969.

⁶ Ratified by the UK in 1988.

⁷ Ratified by the UK in 1989.

⁸ Ratified by the UK in 1998.

These declarations and principles are non-binding, but provide further guidance in respect of specific areas. The relevant standards in this context include:

- UN CEDAW Committee Concluding Observations 2019;⁹
- UN CEDAW, General Comment 35 on Gender-based Violence¹⁰

1.5. The NIHRC welcomes the opportunity to provide advice to the Committee on the Severe Fetal Impairment Abortion (Amendment) Bill. The language in this submission is reflective of that used by the UN CEDAW Committee and various medical bodies and direct quotes are used in reference to the rights of women and girls, and terminology surrounding disability.

2. Current legal framework on abortion in Northern Ireland

The Northern Ireland (Executive Formation Act) 2019

2.1. Reform to abortion law in NI occurred at Westminster, during the period in which the NI Assembly was not functioning. The NI (Executive Formation etc.) Act 2019 (NIEFA) repealed ss.58 and 59 of the Offences against the Person Act 1861 and placed the Secretary of State for Northern Ireland under a legal duty to ensure that the recommendations in paragraphs 85 and 86 of the CEDAW report are implemented in respect of Northern Ireland.¹¹

The CEDAW Inquiry

2.2. 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.

⁹ CEDAW C/GBR/CO/8 'Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', adopted by the Committee at its seventy-second session, 18 February- 8 March 2019

¹⁰ CEDAW/C/G/35 "General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 1

¹¹ S.9(1) Northern Ireland (Executive Formation etc) Act 2019

- 2.3 The Committee for the Elimination of All Forms of Discrimination against Women (CEDAW Committee) carried out a confidential inquiry into the law on abortion in Northern Ireland¹² which included a country visit to Northern Ireland in September 2016. The Committee published its report of the Inquiry (CEDAW Inquiry report) in March 2018.
- 2.4 The CEDAW Committee found that the UK violated the rights of women in Northern Ireland by unduly restricting their access to abortion. They concluded that women and girls have been subjected to grave and systemic violations of rights through being compelled to either travel outside of Northern Ireland to procure a legal abortion or carry a pregnancy to term. The situation constitutes violence against women that may amount to torture or cruel, degrading treatment. Further, the conclusions are that because abortion is a service that only women need, to refuse it amounts to discrimination against women.¹³
- 2.5 Key recommendations in respect of abortion are found at paragraph 85 of the CEDAW report:

“85. The Committee recommends that the State party urgently:

(a) Repeal sections 58 and 59 of the Offences against the Person Act, 1861 so that no criminal charges can be brought against women and girls who undergo abortion or against qualified health care professionals and all others who provide and assist in the abortion;

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

(i) Threat to the pregnant woman’s physical or mental health without conditionality of “long-term or permanent” effects;

(ii) Rape and incest; and

(iii) 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;

(c) Introduce, as an interim measure, a moratorium on the application of criminal laws concerning abortion, and cease all related arrests, investigations and criminal prosecutions, including of women seeking post-abortion care and healthcare professionals;

...”¹⁴

¹² A confidential inquiry was held under Article 8 of the Optional Protocol to the UN Convention on the Elimination of Discrimination against Women, signed and ratified by the UK Government in 2004.

¹³ CEDAW/C/OP.8/GBR/1, ‘UN CEDAW Committee Inquiry Concerning the UK of Great Britain and NI under Article 8 of the Optional Protocol to the UN CEDAW’, 6 March 2018, at para 83(a) and (b).

The Abortion (Northern Ireland) (No. 2) Regulations 2020

2.6. The current legal framework for abortion in NI is laid out in the Abortion (Northern Ireland) (No.2) Regulations 2020 (the Abortion Regulations)¹⁵, which provide grounds for termination subject to a gestational limit:

- on request up to 12 weeks (Regulation 3); and
- if the pregnancy would involve risk of injury to the physical or mental health of the pregnant woman which is greater than if the pregnancy were terminated up to 24 weeks (Regulation 4)

2.7. Part 3 of the Abortion Regulations provide grounds for termination with no gestational limit if:

- Immediate necessity: it is immediately necessary to save the life or prevent grave permanent injury to the physical or mental health of the pregnant woman (Regulation 5);
- Risk to life or grave permanent injury to physical or mental health of pregnant woman: there is a risk to the life of the pregnant woman which is greater than if the pregnancy were terminated (Regulation 6);
- Fatal fetal abnormality: the death of the fetus is likely before, during or shortly after birth (Regulation 7(1)(a)), and;
- Severe fetal impairment: if the child were born, it would suffer from such physical or mental impairment as to be seriously disabled (Regulation 7(1)(b)).

2.8. The rationale for Regulation 7(1)(b) (abortion for severe fetal impairment without a gestational limit) was explained by HM Government in its consultation response:

“This decision has also been made on the basis that it mirrors provision of services in England, Scotland and Wales, where abortion for SFI and FFA is available without time limit. We considered that if we created a different time limit for SFI in Northern Ireland, women and girls would effectively be left with no choice but to travel to other parts of the UK for a termination. It also ensures that women and girls have access to abortion until a late stage in pregnancy where

¹⁴ CEDAW/C/OP.8/GBR/1, ‘UN CEDAW Committee Inquiry Concerning the UK of Great Britain and NI under Article 8 of the Optional Protocol to the UN CEDAW’, 6 March 2018, at para 85.

¹⁵ These regulations replaced The Abortion (Northern Ireland) Regulations 2020, which are substantively the same.

invasive test results or screening may be delayed or there has been late presentation of an impairment.”¹⁶

- 2.9. Further explanation of the rationale for the severe fetal impairment provision was given by Viscount Younger of Leckie in the House of Lords:

“... in cases of severe foetal impairment and fatal foetal abnormalities, with no gestational time limit. This is where there is a substantial risk that the condition of the foetus is such that the death of the foetus is likely before, during or shortly after birth; or, if the child were born, it would suffer from such physical or mental impairment as to be seriously disabled. We recognise these are very distressing circumstances, usually arising in cases of wanted pregnancies, and appropriate support and provision of information are key so that women can make informed decisions, based on what is right for their health and wider circumstances, including if they want to carry the pregnancy to term and have proper support going forward. ... In such cases, the regulations require that two medical professionals certify in good faith that the ground for the abortion has been met. While CEDAW’s report is silent on the question of gestational limit in such circumstances, we consider the aforementioned grounds an appropriate way of delivering on our statutory duty and implementing the recommendations of the CEDAW report in a way that will work effectively in practice.”¹⁷

Commissioning of abortion services

- 2.10. Since these regulations came in to force, there has not been a regulated, centralised service in NI for abortions, albeit that the Secretary of State has recently laid new regulations to take powers to ensure relevant authorities in NI enable full implementation of the CEDAW recommendations.¹⁸ The failure to commission and fund services by the Department of Health has meant the provision is not in line with the Abortion Regulations, leading to many women and girls being unable to access abortion services locally and having to travel.

¹⁶ NIO, ‘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, p.21.

¹⁷ Abortion (Northern Ireland) (No. 2) Regulations 2020, HL deb 15 June 2020 c1975. Available at [https://hansard.parliament.uk/Lords/2020-06-15/debates/C3A41D37-B021-4DDC-8FBB-6371E8E8F83C/Abortion\(NorthernIreland\)\(No2\)Regulations2020](https://hansard.parliament.uk/Lords/2020-06-15/debates/C3A41D37-B021-4DDC-8FBB-6371E8E8F83C/Abortion(NorthernIreland)(No2)Regulations2020)

¹⁸ Abortion (Northern Ireland) Regulations 2021

2.11. At the time of writing, this matter is currently subject to an ongoing legal challenge brought by the Commission and the situation may therefore be subject to change as the case develops.

3. Severe Fetal Impairment Abortion (Amendment) Bill

3.1 Clause 1(4) of the Bill omits Regulation 1(1)(b) of the Abortion Regulations. The provision for abortion with no gestational limit in cases of severe fetal impairment is thereby removed.

3.2 The rest of the Abortion Regulations are unaffected. If the Bill becomes an Act, abortion will remain lawful on other grounds as defined in the Regulations and as set out in the section above.

UN CEDAW

3.3 The provision of abortion falls within the scope of reproductive healthcare, protected by a number of human rights provisions. Specifically, CEDAW Article 12 which requires State parties to eliminate discrimination against women in health care, including in relation to family planning, Article 2 (discriminatory laws), Article 12), Article 16 (family planning and information).

3.4 General Recommendation 35 of the CEDAW Committee confirms the position that the “denial or delay of safe abortion and post-abortion care, forced continuation of pregnancy, abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment”.¹⁹

3.5 The CEDAW Committee inquiry was the most recent examination of the law in NI from a human rights perspective. The outcome of the Inquiry held that the UK Government was responsible for grave and systemic violations under UN CEDAW in respect of the criminal law, which compelled women to carry pregnancies to full term or to travel outside NI to access legal abortion.²⁰ The ensuing recommendations from the CEDAW Committee were intended to ensure that the law in NI could become compliant with the Convention.

¹⁹ CEDAW/C/GC/35, ‘General recommendation No.35 on gender-based violence against women’, 14 July 2017, at para 18.

²⁰ CEDAW/C/OP.8/GBR/1, ‘UN CEDAW Committee Inquiry Concerning the UK of Great Britain and NI under Article 8 of the Optional Protocol to the UN CEDAW’, 6 March 2018, at para 83(a) and (b).

3.6 The inquiry report stated:

“The Committee assesses the gravity of the violations in Northern Ireland in the light of the suffering experienced by women and girls who carry pregnancies to full term against their will owing to the current restrictive legal regime on abortion. It notes the great harm and suffering resulting from the physical and mental anguish of carrying an unwanted pregnancy to full term, especially in cases of rape, incest and severe fetal impairment, in particular fatal fetal abnormality. The situation gives women in Northern Ireland three deplorable options: (a) undergo a torturous experience of being compelled to carry a pregnancy to full term; (b) engage in illegal abortion and risk imprisonment and stigmatization; or (c) undertake a highly stressful journey outside Northern Ireland to gain access to a legal abortion. Women are thus torn between complying with discriminatory laws that unduly restrict abortion or risking prosecution and imprisonment.”

3.7 The CEDAW Committee also states as follows:

“In cases of severe fetal impairment, the 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.”²¹

3.8 Therefore, in order to achieve compliance with UN CEDAW, abortion must be available in cases of ‘severe foetal impairment’ in NI.

3.9 **The Commission 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.**

²¹ CEDAW/C/OP.8/GBR/1, ‘UN CEDAW Committee Inquiry Concerning the UK of Great Britain and NI under Article 8 of the Optional Protocol to the UN CEDAW’, 6 March 2018, at para 62.

- 3.10 **The Commission further advises that in order to ensure that women’s decisions on this ground do not perpetuate stereotypes towards people with 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.**

UNCRPD

- 3.11 Under the UN Convention on the Rights of Persons with Disabilities (UNCRPD), people with disabilities are protected by rights to equality and non-discrimination²², and it is recognised that women with disabilities are subject to multiple discrimination and should enjoy all human rights and fundamental freedoms.²³ The CRPD Committee, in its recent concluding observations on the UK, highlighted that it has 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”. It further 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”²⁴.

- 3.12. 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 the respect for autonomous decision- making by women, including women with disabilities... A human rights based approach to sexual and reproductive health acknowledges that womens 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.”²⁵

²² Article 5 UNCRPD

²³ Article 6 UNCRPD

²⁴ CRPD/C/GBR/CO/1, ‘UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI’, 3 October 2017, at para 13.

²⁵ UN CRPD Committee and UN CEDAW Committee, ‘Guaranteeing Sexual and Reproductive Health and Rights for All women, in particular Women with Disabilities: Joint statement by the UN CRPD Committee and UN CEDAW Committee’, 29 August 2018.

- 3.13. 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.
- 3.14. **The Commission advises that the UNCRPD recommendation must be read in conjunction with the joint statement by the CEDAW and CRPD Committee, in respect of the recognition of the bodily autonomy of women.**

UK Supreme Court

- 3.15 The UK Supreme Court (UKSC) considered the domestic legal position of access to abortion in NI in the case of *Re NIHRC*.²⁶ The Court, by a majority of 4 to 3, held that the NIHRC did not have the required legal standing to bring the case.²⁷ However, despite this finding, the Justices still proceeded to give their views on the substantive issue, which while persuasive, are not legally binding.
- 3.16 The UKSC highlighted that, “the starting point to any discussion on abortion has to be the right of all human beings, male and female, to decide what should be done with their own bodies...”, identifying the right under both the common law and the ECHR.²⁸ The Court further confirmed that the prohibition of abortion fell “within the scope of, or engaging, Article 8 in the case of persons affected by that prohibition”²⁹ and identifying that “for those women who become pregnant, or who are obliged to carry a pregnancy to full term, against their will there can be fewer greater invasions of their autonomy and bodily integrity”.³⁰
- 3.17 In respect of the substantive issues, the Court, by a majority, gave an indicative view that to refuse an abortion in cases of rape, incest and fatal foetal abnormality was in breach of Article 8 ECHR. The

²⁶ *In the matter of an Application by the NI Human Rights Commission for Judicial Review (NI) Reference by the Court of Appeal in NI pursuant to Paragraph 33 of Schedule 10 to the NI Act 1998 (Abortion)* [2018] UKSC 27.

²⁷ *In the matter of an Application by the NI Human Rights Commission for Judicial Review (NI) Reference by the Court of Appeal in NI pursuant to Paragraph 33 of Schedule 10 to the NI Act 1998 (Abortion)* [2018] UKSC 27, at para 3.

²⁸ *In the matter of an Application by the NI Human Rights Commission for Judicial Review (NI) Reference by the Court of Appeal in NI pursuant to Paragraph 33 of Schedule 10 to the NI Act 1998 (Abortion)* [2018] UKSC 27, at para 6.

²⁹ *In the matter of an Application by the NI Human Rights Commission for Judicial Review (NI) Reference by the Court of Appeal in NI pursuant to Paragraph 33 of Schedule 10 to the NI Act 1998 (Abortion)* [2018] UKSC 27, at para 104.

³⁰ *In the matter of an Application by the NI Human Rights Commission for Judicial Review (NI) Reference by the Court of Appeal in NI pursuant to Paragraph 33 of Schedule 10 to the NI Act 1998 (Abortion)* [2018] UKSC 27, at para 6.

UKSC did not provide a similar indicative view in relation to severe foetal impairment. It must be noted that the evidence presented to the UKSC in support of the Commission's case did not provide a specific set of facts related to a diagnosis of a serious foetal impairment.

Article 3 ECHR

3.18. Article 3 provides "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". Article 15(2) ECHR, clarifies that this is a non-derogable right and should not be interfered with under any circumstances. The ECt.HR has established that a minimum level of severity must exist for Article 3 to be engaged and this will depend on the particular circumstances of the case. Factors that will be considered include treatment's duration, the physical and mental effects of the treatment on an individual, and the victim's sex, age and state of health.³¹ Once the minimum threshold is achieved, the level of severity will determine whether the treatment is torture, inhuman or degrading treatment.³²

3.19. It has been recognised by the UKSC that there may be particular circumstances where the preclusion of abortion does represent a violation of Article 3.³³

3.20. The Commission has identified a number of areas of concern raised by the Bill as introduced to the NI Assembly where this bill may lead to a particular set of facts that will reach the threshold for incompatibility with Article 3 ECHR.

Article 8 ECHR

3.21 Prior to the UKSC judgment in *re NIHRC*, the issue of access to abortion has been considered on a number of occasions by the European Court of Human Rights (ECt.HR). The ECt.HR has been prepared to accept that the issue of abortion access falls within the scope of Article 8 ECHR, which protects the right to private and family life. For example, in *P & S v. Poland*³⁴, it was confirmed that prohibition of abortion when sought for reasons of health and/ or

³¹ Ireland v. UK (1980) 2 EHRR 25, at para 162.

³² Ireland v. UK (1980) 2 EHRR 25, at point 4 of reasoning.

³³ *In the matter of an Application by the NI Human Rights Commission for Judicial Review (NI) Reference by the Court of Appeal in NI pursuant to Paragraph 33 of Schedule 10 to the NI Act 1998 (Abortion)* [2018] UKSC 27, at para 103.

³⁴ *P. and S. v. Poland*, Application No. 57375/08 (20 January 2013)

well-being falls within the scope of Article 8.³⁵ In *A,B,C v Ireland*³⁶, the ECt.HR held that in some circumstances lack of access to an abortion is a breach of Article 8 while in other circumstances it is not. The specific issue of disability has also been considered by the ECt.HR, in the case of *RR v. Poland*. It was held to be in breach of Article 8 & 3 ECHR to preclude an abortion in the circumstances of a fetal impairment, where genetic testing was not available to enable the woman to make a decision until the time limit for an abortion had passed³⁷.

3.22 The UKSC, in respect of its consideration of the law on abortion in NI, has recognised the “guarantees stated in the ECHR should be interpreted in light of other relevant international human rights instruments.”³⁸

3.23 The Commission has identified a number of areas of concern raised by the Bill as introduced to the NI Assembly that may be incompatible with Article 8 ECHR. These are set out below.

Definition – ‘severe fetal impairment’

3.24 The present Bill does not define ‘severe fetal impairment’ nor is it defined in law under the current legal framework for abortion. The service therefore operate on the basis of a clinical not a legal definition. While human rights standards have used the terminology of ‘serious’ and ‘fatal foetal abnormality’ or ‘impairment’, the Commission has consistently advised that the decisions on the definition of these terms are necessarily one for the clinicians, and the decision should be made by individual women and girls in consultation with their consultants and healthcare team.

3.25 The Commission notes concerns³⁹ raised about the use of abortion in situations of downs syndrome⁴⁰ and cleft palate and the ongoing litigation in England and Wales, which is discussed in the following section.

³⁵ *P. and S. v. Poland*, Application No.57375/08 (20 January 2013) at para 96.

³⁶ *A, B and C v Ireland*, Application No. 25579/05 (16 December 2010).

³⁷ *RR v Poland*, ECHR Application No. 27617/04 (28 November 2011) at para’s 162 & 214.

³⁸ *In the matter of an Application by the NI Human Rights Commission for Judicial Review (NI) Reference by the Court of Appeal in NI pursuant to Paragraph 33 of Schedule 10 to the NI Act 1998 (Abortion)* [2018] UKSC 27, at para 31.

³⁹ Presbyterian Church in Ireland, ‘Press statement: PCI support for Givan Bill’, 16 February 2021. Available at: <https://www.presbyterianireland.org/News/February-2021/PCI-support-for-Givan-bill.aspx>

⁴⁰ Right to life News, ‘Down’s syndrome advocates speak out against pressure from health bodies that will introduce abortion for the condition to Northern Ireland’, 8 February 2020. Available at: <https://righttolife.org.uk/news/downs-syndrome-advocates-speak-out-against-pressure-from-health-bodies-that-will-introduce-abortion-for-the-condition-to-northern-ireland>

3.26 The Commission continues to advise that decisions as to whether a diagnosis is considered 'severe' should be made by clinicians, with appropriate guidance provided by the Department of Health, regulatory and professional bodies. Any guidance should take steps, as required by CEDAW, not to perpetuate stereotypes towards people with disabilities.

3.27 In England, Scotland and Wales, the Royal College of Obstetricians and Gynaecologists has published guidance on termination of pregnancy for fetal abnormality⁴¹, which is available up to term "if there is a substantial risk that the child if born would have a serious handicap"⁴². The guidance states that abortions on this ground have accounted for 1% of abortions in England and Wales.⁴³

3.28 The guidance confirms:

"The law does not define serious handicap. The view has been expressed that provided the condition is not trivial, or readily correctable, or will merely lead to the child being disadvantaged, the law will allow doctors scope for determining the seriousness of the condition. At a minimum, it is suggested a "serious handicap" would require the child to have physical or mental disability which would cause significant suffering or long term impairment of their ability to function in society. The most serious genetic or other conditions which manifest themselves at birth or almost immediately thereafter are likely to fall within the scope of Section 1(1)(d)".⁴⁴

3.29 This guidance provides further clarity on the scaling of severity, noting that both the size of risk and the gravity of the abnormality are important. Their advice is that doctors should continue to weigh up the following factors when reaching a decision:

- "the potential for effective treatment, either in utero or after birth
- on the part of the child, the probable degree of self-awareness and of ability to communicate with others
- the suffering that would be experienced

⁴¹ Royal College of Obstetricians and Gynaecologists, 'Termination of Pregnancy for Fetal Abnormality in England, Scotland and Wales', 25 June 2010. Available at: <https://www.rcog.org.uk/en/guidelines-research-services/guidelines/termination-of-pregnancy-for-fetal-abnormality-in-england-scotland-and-wales/>

⁴² Section 1(1)(d), Abortion Act 1967

⁴³ Royal College of Obstetricians and Gynaecologists, 'Termination of Pregnancy for Fetal Abnormality in England, Scotland and Wales', 25 June 2010, at p.1. available at: <https://www.rcog.org.uk/en/guidelines-research-services/guidelines/termination-of-pregnancy-for-fetal-abnormality-in-england-scotland-and-wales/>

⁴⁴ Royal College of Obstetricians and Gynaecologists, 'Termination of Pregnancy for Fetal Abnormality in England, Scotland and Wales', 25 June 2010, at p.8.

- the probability of being able to live alone and to be self-supportive as an adult
- on the part of society, the extent to which actions performed by individuals without disability that are essential for health would have to be provided by others. Doctors will be better able to demonstrate that their opinions were formed in good faith if they have sought advice from appropriate specialists. These may not be obstetricians but may be specialists in the management of the particular condition.”

3.30 The RCOG Guidance also provides clarity for clinicians for circumstances where an abortion is requested but clinicians do not feel that grounds for a termination are met under the law.⁴⁵

3.31 Updated guidance from the British Medical Association is also available for practitioners on the factors to be considered for a fetal impairment⁴⁶

3.32 **The Commission recommends that guidance is produced for Northern Ireland by the Department of Health, in conjunction with regulatory and professional bodies, in order to clarify what is meant by ‘severe fetal impairment’ and support the informed decisions made by women and their clinicians.**

Diagnosis and timing

3.33 The issue of diagnosis, and the timing of such, is central to the ability of a woman to make an informed choice about her options. The issue of timing will also come into play if a woman wishes to access an abortion in NI, rather than travelling to another country or accessing medication online from an unregulated provider. Women may feel rushed to make the decision to have a termination before having received appropriate and specialist medical advice, emotional support and counselling, if this bill is passed. Given the lack of availability of diagnostic testing in NI, this issue is compounded. Women in other regions of the UK are not subject to these time constraints as abortion is available to term in cases of serious disabilities, albeit that there is a current legal challenge underway on the equivalent legislation in England, where it has been argued that the provisions in the Abortion Act 1967 are contrary to Articles 2,3,8 and 14 ECHR.⁴⁷

⁴⁵ Royal College of Obstetricians and Gynaecologists, ‘Termination of Pregnancy for Fetal Abnormality in England, Scotland and Wales’, 25 June 2010, at p25.

⁴⁶ British Medical Association, ‘The Law and Ethics of Abortion’, September 2020.

⁴⁷ Heidi Crowter and others v. Secretary of State for Health and Europe for Trisomy 21

3.34 The Commission notes that the NI Contraception and Abortion Taskforce (NIACT) has reported as follows:

“First trimester screening and Non Invasive Prenatal Testing (NIPT) are not routinely offered in Northern Ireland. Therefore most fetal anomalies are diagnosed following the anomaly scan between 19 and 20 weeks, which in many cases is later compared to the rest of the UK. It is clear that the lack of provision of prenatal testing, which is available in the rest of the UK, makes it unlikely that an abnormality will be diagnosed at an early stage in NI.”⁴⁸

3.35 The British Medical Association has produced guidance on this issue as follows:

“Doctors faced with a potential late abortion for serious fetal abnormality should be aware that women should be given information and time to understand the nature and severity of fetal abnormality, and should be offered specialised counselling where appropriate, in order to assist them in reaching an informed decision about how to proceed. The purpose of prenatal screening is to expand the choices available to the pregnant woman and to allow her to make an informed decision about whether to continue with a pregnancy or seek a termination. Women should not be rushed into making a decision, but if a decision is made to terminate the pregnancy, this should proceed without undue delay. Appropriate support should be provided before and after the termination.”⁴⁹

3.36 Therefore, the effect of the Bill will be that women who are not able to utilise any of the other grounds for accessing an abortion, will be precluded from an abortion in NI, and will be required to travel.

3.37 NIACT further comments that the consequence of later diagnosis,

“results in abortions occurring at a later gestational age, which can carry a greater risk of complications and can be even more distressing for the woman and her family. Many cases of fetal abnormality or suspected fetal abnormality are referred to the Regional Centre for Fetal Medicine. Once referred, there should be timely access to investigations and counselling, and to treatment

⁴⁸ The Northern Ireland Abortion and Contraception Taskgroup, ‘Report on Sexual and Reproductive Health in Northern Ireland’ (March 2021) para 5.7.4.

⁴⁹ British Medical Association, *The Law and Ethics of Abortion*, September 2020.

options in accordance with RCOG Guidance (RCOG, 2010).”⁵⁰

- 3.38 The Commission notes that a consensus statement, produced by the RCOG, with support from the Royal College of Midwives and the Society of Radiographers makes specific recommendations on prenatal screening for Down's Syndrome, Edwards Syndrome and Patau's Syndrome. It also indicates that counselling both before and after screening is recommended, as well as highlighting the importance of presenting information and support in a non-directive way.⁵¹
- 3.39 The Commission is aware that further RCOG guidance is underway to support healthcare professionals deliver neutral and unbiased information to women and families who receive a 'high chance' result after antenatal screening for Down's syndrome. The RCOG has recognised the need for high quality guidance to ensure women are supported to make the choices that are right for them and their families. A "Green-top" guideline on NIPT is in development, as well as a Good Practice Paper that will outline the care and support to be provided to women who choose to continue with a pregnancy following a diagnosis of Down's syndrome, Edwards' syndrome and Patau's syndrome. This guidance is being produced jointly with British Maternal and Fetal Medicine Society and the estimated publication is 2021 ⁵²
- 3.40 The issue of access to testing and time limits for abortions involving foetal abnormality was considered by the ECt.HR in the case of *RR v Poland*.⁵³ In this case, the applicant had a child born with Turner's Syndrome. She argued that she had sought further information on the health of the foetus through prenatal genetic testing which would have enabled her to make an informed decision, based on medical evidence, as to whether to carry out her pregnancy. She argued that she was refused these tests until the legal limit for abortion, which was then 22 weeks, had expired. She argued that this refusal was a result of systemic problems in the health system in Poland and the State's failure to implement existing laws on abortion.

⁵⁰ The Northern Ireland Abortion and Contraception Taskgroup, 'Report on Sexual and Reproductive Health in Northern Ireland' (March 2021) at page 8

⁵¹ Royal College of Obstetricians and Gynaecologists, Supporting Women and their partners through prenatal screening for Down's Syndrome, Edwards' Syndrome and Patau's Syndrome, published 2 December 2020 available at: <https://www.rcog.org.uk/en/guidelines-research-services/guidelines/consensusstatement-prenatal-screening/>.

⁵². <https://www.rcog.org.uk/en/guidelines-research-services/guidelines/consensusstatement-prenatal-screening/>

⁵³ *RR v Poland*, ECHR Application No. 2617/04 (28 November 2011)

3.41 The ECt.HR found that lack of availability of testing in this case was a breach of Articles 3 and 8 ECHR, stating:

“The Court observes that the nature of the issues involved in a woman’s decision to terminate a pregnancy is such that the time factor is of critical importance. The procedures in place should therefore ensure that such decisions are taken in good time.”⁵⁴

3.42 It further noted that,

“the applicant was in a position of great vulnerability. Like any other pregnant woman in her situation, she was deeply distressed ... she had to endure weeks of painful uncertainty concerning the health of the foetus, her own and her family’s future and the prospect of raising a child suffering from an incurable ailment. She suffered acute anguish through having to think about how she and her family would be able to ensure the child’s welfare, happiness and appropriate long term care.”⁵⁵

3.43 It is clear that the lack of provision of prenatal diagnostic testing, which is in many cases available in the rest of the UK, makes it unlikely that an abnormality will be diagnosed at an early stage in NI.⁵⁶ The Commission recognises the evidence that the healthcare risks are heightened at a later stage of pregnancy. The ECt.HR has already found violations of the ECHR where failure to provide genetic testing in time for an informed decision to be made, within the legal framework.⁵⁷

3.44 Women in NI are potentially at a disadvantage vis-a-vis their counterparts in other parts of the UK, in that they do not have autonomy on this issue unlike in other regions, where testing may be more widely available and diagnosis at an earlier stage is therefore more likely. By removing access to abortion on the grounds of severe fetal impairment, women will in the majority of cases be effectively prevented from accessing in NI one of the options available elsewhere in the UK.

3.45 This disparity in provision of services also raises the potential for socio-economic discrimination in that diagnostic testing is usually not available in NI on the NHS whereas it may be available privately, to

⁵⁴ RR v Poland, ECHR Application No. 2617/04 (28 November 2011) para 203.

⁵⁵ RR v Poland, ECHR Application No. 2617/04 (28 November 2011) para 59.

⁵⁶ The Northern Ireland Abortion and Contraception Taskgroup, ‘Report on Sexual and Reproductive Health in Northern Ireland’ (March 2021) page 8

⁵⁷ RR v Poland, ECHR Application No. 2617/04 (28 November 2011)

those women who are able to afford it. The effect of the Bill, in an attempt to prevent abortion on the grounds of severe fetal impairment, may disproportionately impact the most vulnerable women and girls from accessing services.

- 3.46 **The Commission advises that in order for human rights protections to be practical and not illusory, women in NI should have access to the same services locally as they are entitled to access in other parts of the UK. The removal of access to abortion in situations of severe fetal impairment as proposed by the Bill, coupled with the limited diagnostic testing arrangements in NI, may result in violations of Articles 3 and 8 ECHR.**
- 3.47 **The Commission recommends that testing, such as Non Invasive Prenatal Testing (NIPT) is offered alongside information, timely specialist referrals and counselling where necessary to ensure that women in NI are afforded as much information, support and time as possible to make an informed decision about the continuation of their pregnancy.**
- 3.48 Further, the Commission recognises that women and girls may present late for antenatal care. This may be due to a number of reasons, including late identification of a pregnancy, coming to terms with the pregnancy, a lack of experience, social and economic barriers or other reasons. It is therefore important that women and girls are not precluded from accessing an abortion and that a late prenatal diagnosis should not result in a woman or girl being pressured to decide quickly either to continue with or to terminate her pregnancy.
- 3.49 The Commission notes that an ongoing legal challenge in England is currently dealing with the issue of fetal impairment. The Commission recognises that the case could have important implications for this issue going forwards and therefore it may be prudent to await the outcome and review in light of same.

Travel

- 3.50 For a majority of women and girls, who wish to access an abortion, where there is a diagnosis of a severe fetal impairment, the Bill would result in it being necessary to travel outside of NI. At present, it is possible to travel to Great Britain, under the Central Booking pathway funded by the UK Government⁵⁸, where there is a charge for such

⁵⁸ UK Government, Central Booking system for NI women seeking an abortion in England. Available at: [Central booking system for NI women seeking an abortion in England - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/central-booking-system-for-ni-women-seeking-an-abortion-in-england)

services. If travel is not possible, for reasons such as disability, caring or employment responsibilities or other reasons and therefore the only other options are to self-administer abortion pills from an unregulated provider or she must carry the pregnancy to full term.

- 3.51 Forcing women to travel outside of NI in order to access a healthcare service raises a number of significant human rights concerns. Whilst funded travel for women from NI has been available⁵⁹, it creates an emotional burden to women and girls to travel to an unfamiliar place without the support of family and friends. The UKSC has acknowledged the difficulties associated with travelling for an abortion⁶⁰ and noted the “stress, indignity and expense of arranging for a mechanical process of abortion away from their familiar home surroundings and sources of local support, while meaning that a minority of women, less well informed, funded or organised, miss out on abortion altogether... Even for the majority who do travel abroad, the potential stress and trauma is clearly substantial and long term.”⁶¹
- 3.52 It has also been highlighted that the repatriation of fetal remains is a “significant source of stress” when women are required to travel for an abortion.⁶² The CEDAW Inquiry noted that transportation of fetal remains to NI may be necessary for reasons including emotional (bereavement), religious (burial), medical (DNA testing for recurrence risk of genetic abnormalities), and as prosecutorial evidence in rape cases.⁶³ The CEDAW Inquiry further noted:

“NI residents face difficulties in obtaining DNA analyses in England to establish genetic abnormalities in cases of FFA. Thus, they are forced to return with foetal remains to conduct thorough tissue testing to determine risk factors for future pregnancies. Testimonies revealed that the absence of any established protocols regarding the transfer of foetal remains has resulted in women resorting to undignified transporting practices, including in cooler boxes or hand luggage, at the mercy of airline personnel. Furthermore, no protocol on the reception of foetal remains

⁵⁹ British Pregnancy Advisory Service, ‘Funded abortion treatment for women from Northern Ireland’ at <https://www.bpas.org/abortion-care/considering-abortion/northern-ireland-funded-abortion-treatment/>

⁶⁰ *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (NI) Reference by the Court of Appeal in NI pursuant to Paragraph 33 of Schedule 10 to the NI Act 1998 (Abortion)* [2018] UKSC 27 at para 28.

⁶¹ *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (NI) Reference by the Court of Appeal in NI pursuant to Paragraph 33 of Schedule 10 to the NI Act 1998 (Abortion)* [2018] UKSC 27 at para 126.

⁶² CEDAW/C/OP.8/GBR/1, ‘UN CEDAW Committee Inquiry Concerning the UK of Great Britain and NI under Article 8 of the Optional Protocol to the UN CEDAW’, 6 March 2018, at para 32.

⁶³ CEDAW/C/OP.8/GBR/1, ‘UN CEDAW Committee Inquiry Concerning the UK of Great Britain and NI under Article 8 of the Optional Protocol to the UN CEDAW’, 6 March 2018, at para 32.

by NI mortuaries exists. This situation recently led to the resignation of one of the only two NI paediatric pathologists.”⁶⁴

- 3.53 Many women and girls also experience barriers to travel such as cost of travel, time off work and child care issues, whilst there will be some who cannot travel on grounds of health or disability or may not have a passport or other necessary travel document.⁶⁵
- 3.54 These barriers will be disproportionately faced by women and girls from rural areas, lower socio-economic groups, lone parents, those with disabilities, those in abusive relationships, minority ethnic groups and immigrants.⁶⁶ There is therefore a significant risk that Article 14, the prohibition of discrimination, will also be engaged in conjunction with Article 8 ECHR.
- 3.55 The Commission recognises that the diagnosis of a severe impairment is often a complex medical, fact specific, difficult and sensitive matter. Decisions of this nature are best made by women and girls together with multi-disciplinary medical teams and appropriate support networks in a time frame that is appropriate in all of the circumstances. Requiring a decision quickly, in order to facilitate travel, is likely to cause additional stress and trauma, to an already difficult situation.
- 3.56 **The Commission advises that precluding abortions in NI in cases of severe fetal impairment, as this bill proposes, will leave women having to travel in order to have an abortion or continue with a pregnancy against their wishes, both of which may result in violations of Articles 8 and 14 ECHR.**

4. Constitutional issues

- 4.1. While abortion is a devolved matter, and therefore falls within the competence of the NI Assembly, there are further considerations regarding the Bill that are of concern to the Commission.
- 4.2. Aside from the issues of human rights compliance, as set out in the previous section, the Committee may wish to reflect on the role of

⁶⁴ CEDAW/C/OP.8/GBR/1, 'UN CEDAW Committee Inquiry Concerning the UK of Great Britain and NI under Article 8 of the Optional Protocol to the UN CEDAW', 6 March 2018, at para 32.

⁶⁵ CEDAW/C/OP.8/GBR/1, 'UN CEDAW Committee Inquiry Concerning the UK of Great Britain and NI under Article 8 of the Optional Protocol to the UN CEDAW', 6 March 2018, at para 27.

⁶⁶ CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the UK Eighth Periodic Report', 8 March 2019, at para 49 and 50; E/C.12/GBR/CO/6, 'UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 14 July 2016, at para 61.

the Secretary of State for NI (SoS). The Commission notes that section 9(1) of the Northern Ireland (Executive Formation etc) Act 2019 (NIEFA 2019) imposes a mandatory duty on the SoS to ensure that the recommendations in paragraphs 85 and 86 of the CEDAW report are implemented in respect of NI. This represents an ongoing duty, which the SoS must continue to discharge, including with respect to any proposed legislative changes at the NI Assembly.

- 4.3. The Commission also notes that, under the s.9 duty, further steps have been taken by the SoS in respect of ensuring that abortion services are formally commissioned and funded in NI. This can be evidenced through the introduction of the Abortion (NI) Regulations 2021, which will empower the SoS to direct a relevant person to act for the purpose of the implementation of the CEDAW recommendations.
- 4.4. In addition to these powers, the Commission recognises the legal position and role of the SoS in respect of the legislative process in NI. The SoS is responsible for submitting Bills from the NI Assembly for Royal Assent. Under s.14(5) of the Northern Ireland Act 1998,
- 4.5. "The Secretary of State may decide not to submit for Royal Assent a Bill which contains a provision which he considers-
(a) would be incompatible with any international obligations..."
- 4.6. 'International obligations' are defined by s. 98(1) NIA as meaning "any international obligations of the United Kingdom other than obligations to observe and implement the Convention Rights". The UK Government ratified the Optional Protocol to UNCEDAW in 2004. By its signature and ratification, the UK Government committed to recognising "the competence of the Committee on the Elimination of Discrimination against Women ("the Committee") to receive and consider communications submitted in accordance with article 2."⁶⁷ Therefore, the Commission understands that this would form part of the UK's international obligations, including UN CEDAW, its inquiries and reports of individual or group communications. It is also of note that the recommendations of the CEDAW Inquiry Report were indeed implemented in full in the Northern Ireland (Executive Formation etc) Act 2019.
- 4.7 The Commission notes that it has been asserted that the CEDAW Regulations are not binding and do not constitute international obligations⁶⁸.

⁶⁷ Optional Protocol to the Convention on the Elimination of Discrimination against Women, Article 1.

⁶⁸ The Abortion (Northern Ireland) Regulations 2021 Explanatory Memorandum at para 7.7

- 4.8 The Commission does not share this view in the particular and specific circumstances of the implementation of the reform of abortion law in Northern Ireland. Under Article 8 of the Optional Protocol to UN CEDAW, "If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned." Furthermore, Under Article 9, "The Committee may invite the State Party concerned to include in its report under Article 18 of the Convention details of any measures taken in response to an inquiry conducted under article 8 of the present Protocol". It then continues; "The Committee may, if necessary, after the end of the period of six months referred to in article 8.4, invite the State Party concerned to inform it of the measures taken in response to such an inquiry."
- 4.9 The Commission understands that the action of parliament, as the sovereign legislature is, in effect, the UK response to the CEDAW Inquiry as required by Article 9. The inquiry found grave and systemic violation in accordance with Article 8 and the Northern Ireland (Executive Formation etc) Act 2019 provisions give those findings domestic force by placing a duty on the Secretary of State. In particular, Section 9 of the 2019 Act requires the Secretary of State to ensure that the recommendations in paragraphs 85 and 86 of the Report of the Inquiry under Article 8 of the optional protocol to CEDAW (6 March 2018) are fully implemented in respect of Northern Ireland. This, the Commission considers, is the means by which the recommendations of the UN treaty body was addressed in this case. As a result, under the UK dualist legal system the obligations have been made legally binding.
- 4.10 The Commission notes the legal position that the Secretary of State for Northern Ireland has to submit this Bill for Royal Assent. Should he consider that in doing so he would be in breach of his obligations under Northern Ireland (Executive Formation etc) Act 2019 and the Northern Ireland Act 1998, he may take the decision not to submit for Royal Assent.

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