Severe Fetal Impairment Abortion (Amendment) Bill

BPAS response to the NI Assembly Committee for Health

Background

The British Pregnancy Advisory Service (BPAS) is a British reproductive healthcare charity that offers pregnancy counselling, abortion care, miscarriage management, contraception and STI testing to more than 100,000 women each year. We have long provided care to women travelling to England from Northern Ireland to access abortion care, and spent three years running the Central Booking Service which provides appointments, travel, and accommodation to Northern Irish women travelling for care.

We also advocate for women's reproductive choice – providing them with accurate and balanced information, and ensuring the right to make their own choices about their bodies and treatments including during pregnancy and birth. To this end, we ran the Now for NI campaign in 2018-19 to decriminalise abortion in Northern Ireland.

Position

BPAS opposes this bill, which removes an essential aspect of reproductive choice and would re-establish a system where Northern Irish women are forced to travel to England for care. It is a cynical attempt by anti-abortion politicians to damage the human rights-compliant law that is now in place across the Province.

BPAS believes that in all instances, women, in conjunction with their families and their medical team, are the people to make the decision about whether or not to continue their pregnancy.

Abortion in Northern Ireland

Historic position

Prior to October 2019, abortion was illegal in Northern Ireland in almost all circumstances. The Offences Against the Person Act 1861 carried a life sentence for anybody (including a woman or a healthcare professional) who attempted to end a pregnancy except where continuation of the pregnancy would leave the woman a 'physical or mental wreck' (R v Bourne [1938]).

This legal provision, advice given by the Attorney General of Northern Ireland's office, and repeated police action against those suspected of seeking to end a pregnancy resulted in only 8 legal abortions taking place in Northern Ireland is 2018-19. Fetal anomaly, including fatal fetal anomaly, were not provided for in this arrangement.

The Northern Ireland Human Rights Commission brought legal proceedings to challenge the law. In June 2018, the UK Supreme Court found that the law on abortion in Northern Ireland was *'untenable and intrinsically disproportionate'* and *'clearly needs radical reconsideration'*. The Court stated that the law was incompatible with Article 8 (right to a private and family life) of the European Convention on Human Rights.

Existing law

Abortion in Northern Ireland is now governed by the Northern Ireland (Abortion) Regulations (No. 2) passed in 2020 and amended in 2021. These regulations are underpinned by s9 of the Northern Ireland (Executive Formation) Act 2019 which was passed in Westminster during the time there was no Northern Ireland Executive in place.

In brief, the regulations provide a framework for abortion provision in Northern Ireland. Under these regulations, abortion is allowed in the following circumstances:

- Prior to 12 weeks on a woman's request and with the certification of a healthcare professional such as a doctors, nurse, or midwife, in line with the Republic of Ireland.
- Between 12 weeks and 24 weeks on the same grounds as in the rest of the UK - that continuing with the pregnancy would involve a risk of injury to the physical or mental health of the woman greater than if the pregnancy was terminated. This must be certified by two healthcare professionals.
- Beyond 24 weeks along the same lines as the rest of the UK- if the life or health of the woman is in serious danger, or if there has been a diagnosis of severe or fatal foetal abnormality. This must be certified by two healthcare professionals.

The availability of abortion on the grounds of serious or fatal fetal anomaly are provided for in Regulation 7, which enables abortions to take place both before and after 24 weeks. This bill would remove this provision for abortions on the grounds of serious fetal anomaly at all gestations.

Current arrangements

Routine abortion services have been neither funded nor commissioned by the Northern Ireland Department of Health – a situation which has recently resulted in the granting of powers to the Secretary of State for Northern Ireland to direct commissioning of services. This appears to be the only route by which commissioning of services would occur.

We understand that termination on the grounds of serious or fatal fetal anomaly is available to some degree in Northern Ireland under the current law, preventing all women from having to travel. However, women from all health boards continue to travel to England to obtain legal abortions.

Fetal Anomaly

Fetal anomaly is the name given to a diagnosis received during pregnancy where testing reveals there to be abnormalities with the fetus. Serious and fatal fetal anomalies are a subset of a wider array of diagnoses.

In England, roughly 2% of pregnancies have some form of fetal anomaly (latest NCARDRS figures), with 73.5% of these being diagnosed antenatally. The most common types of anomaly to be diagnosed antenatally are abdominal wall (91%) and nervous system (87%) anomalies.

The vast majority of fetal anomaly diagnoses result in a live birth (73.4%), and Termination of Pregnancy for Fetal Anomaly (TOPFA) occurs in 23.8% of cases (a further 2.8% result in stillbirth or late miscarriage).

Method and timing of diagnoses

Fetal anomaly diagnoses generally occur as a result of either the first or second ultrasound scan, or associated screening. Screening provides information about the likelihood of the presence of a fetal anomaly and is not a mandatory part of maternity care. If the probability of anomalies is high, a woman may choose to proceed with diagnostic tests to determine the presence, extent, and impact of any anomalies.

Given the nature of fetal anomalies, diagnosis tend to take place later in pregnancy. In England and Wales in 2019, only 10% of Ground E (fetal anomaly) abortions occurred prior to 13 weeks' gestation – reflecting the stage at which most anomalies are detected.

Once an anomaly is suspected or diagnosed, women are typically referred to other specialist providers such as fetal medicine centres, where they undergo further diagnostic tests. These tests are required to formulate an accurate diagnosis and to determine the prognosis for the fetus. These investigations often take several days or weeks to conduct, evaluate, and discuss with Multi-Disciplinary Teams, all after the 20-week ultrasound. As a result, full investigation and assessment often brings women close to or over the 24-week time limit for abortions on other grounds.

Accuracy of Fatal Fetal Anomaly diagnoses

A significant barrier to the operation of a 'Fatal Fetal Anomaly' provision as provided for by this Bill is the limited ability of doctors to determine the likelihood of a fatal outcome for particular diagnoses. The decision that must be made in a legal context is one of good faith that there is a substantial risk that the fetus is likely to die either before, during, or 'shortly after' birth. In Northern Ireland where political and legal opposition to abortion has been deeply ingrained, healthcare professionals are likely to be understandably nervous about making such a certain determination.

With regards to the operation of a Fatal Fetal Anomaly provision (and its shortcomings in the context of the current law in Ireland), a 2020 paper (Power S, Meaney S, O'Donoghue K. The incidence of fatal fetal anomalies associated with perinatal mortality in Ireland. Prenat Diagn. 2020 Apr;40(5):549-556. doi: 10.1002/pd.5642. Epub 2020 Feb 7. PMID: 31913532) examining the findings of coronial inquests into stillbirths and neonatal deaths as a result of congenital abnormality found that *"less than half of the congenital anomalies could be classified as an FFA [under the Irish abortion law]; however, all were fatal. This acknowledges the complexity of these cases. In isolation, the congenital anomaly may not be fatal, but combined as multiorgan system anomalies, it is."*. In fact, the study found that only 42% of deceased or stillborn infants would have been eligible for termination on the grounds of fatal fetal anomaly.

In short – any law which purports to protect the availability of fatal fetal anomaly abortions while prohibiting terminations on the grounds of serious fetal anomaly is not grounded in clinical evidence.

The law in the rest of the UK

Abortion on the grounds of serious and fatal fetal anomaly is available without time limit across the rest of the UK. Depending on gestation, women may attend standalone clinics such as those run by BPAS – where we have a dedicated TOPFA pathway – or receive care in hospital or a fetal medicine unit.

CEDAW requirements

Legal obligations under CEDAW

Section 9 of the Northern Ireland (Executive Formation) Act 2019 places obligations on the Secretary of State for Northern Ireland to 'ensure that the recommendations in paragraphs 85 and 86 of the CEDAW report are implemented in respect of Northern Ireland.'

Paragraph 85(b)(iii) of the CEDAW report recommends that the State Party (the UK) adopt legislation to legalise abortion on the grounds of *'severe foetal impairment, including FFA...'*

Many of the criticisms which have been rehearsed at political levels concern the power of CEDAW and the findings of its 2018 report into abortion in Northern Ireland. However, this is not a question with political relevance at either a Northern Ireland or Westminster level. The original applicability of the CEDAW report to domestic law is irrelevant, as the NI(EF) Act brought it into domestic law. It is not in question that legally, the Secretary of State for

Northern Ireland is now obliged to ensure that abortion law and availability in Northern Ireland is compliant with CEDAW paragraphs 85 and 86. Although this is not directly relevant to the Assembly, it would be worth noting that if a decision is made at Assembly level that contravenes these provisions, the Secretary of State will be legally obliged to overturn it.

The framing of the CEDAW report is unambiguous – the law on abortion in Northern Ireland must provide for legal access to abortion on the grounds of severe foetal impairment. The proposed Bill would contravene this provision at all gestations.

Impact on provision

The proposed bill has a dual reliance in terms of availability of abortion that is compliant with the CEDAW recommendations, neither of which BPAS believes are justified.

1) That abortions on the grounds of serious fetal anomaly would be available in law prior to 24 weeks.

2) That a time limit of 24 weeks for abortion on the grounds of serious fetal anomaly is sufficient to realise women's rights

Availability prior to 24 weeks

Even without the provision for abortion on the grounds of serious fetal anomaly, there is a tacit acceptance by politicians that abortion would be available for those women who wanted it on the grounds of this diagnosis, simply within the same gestational limits as other abortions and effectively 'masked' by use of another Regulation.

However, the failure of the Northern Ireland Executive to commission abortion services means that there has been no legal or clinical test of the interpretation or operation of Regulation 4 (and the nature of fetal anomaly means that Regulation 3 would not account for the vast majority of TOPFA cases).

In practice, the same ground in the rest of the UK is used to approve the vast majority of abortions, with widely-drawn boundaries that recognise the relative risks of continuing a pregnancy to term versus accessing an abortion. However, there is no guarantee that this would also occur in Northern Ireland.

If doctors sought to further enforce a political anti-abortion approach on the grounds of serious fetal anomaly, the ultimate impact could be that women were unable to access abortion on the grounds of serious fetal anomaly at any gestation, even if they would otherwise be able to access abortion care on widely-drawn 'social' grounds. This would be in clear contravention of the requirements of CEDAW.

Sufficiency of a 24-week time limit

As detailed above, the clinical framework for diagnosing, assessing, and evaluating a fetal anomaly can be lengthy. The purpose of this evaluation is to ensure that women have all the information they feel they need to make the best choice for them and their family. The decision-making process may also take additional time, as may booking a procedure, arranging aspects such as childcare or travel, and finding a hospital or healthcare provider who will be willing and able to provide a mid-trimester abortion procedure. For these reasons, it is not unusual for women who receive a late diagnosis of fetal anomaly to be pushed close to or over the 24-week time limit.

The placing of a hard 24-week limit will ultimately result in women who are diagnosed with a serious fetal anomaly having to turn down additional diagnostic and evaluative tests, and removing from her the ability to consider continuing her pregnancy, for fear that she may miss her ability to access a termination.

Unintended consequences

If we are to read this Bill as presented, its goal is to prevent the provision of abortions on the grounds of serious (non-fatal) fetal anomaly. However, the proposals are likely to carry with them a number of unintended consequences likely to frustrate the purported purpose.

Funded travel to England

Northern Irish women are entitled to access abortion care in England (and also Scotland and Wales) through a funded scheme first established prior to the change in law. This scheme enables women to access abortion care in line with abortion law in Great Britain – which provides for termination on the grounds of serious fetal anomaly.

The result of a change in the law in Northern Ireland would simply be to re-establish the systematic marginalisation of women who need abortion care by forcing them to travel to England (if they are able to afford time of work, childcare etc) to end their pregnancy in a legal way.

As shown by previous English and Welsh abortion statistics, the criminalisation of abortion in Northern Ireland does nothing to prevent access for women – it simply makes the process of accessing abortion as complicated, expensive, and cruel as possible.

Terminations at other gestations

It is legal to terminate a pregnancy up to 24 weeks on 'social' grounds in Northern Ireland – an option which would presumably be expected to be available to women with a serious fetal anomaly diagnosis.

Given the likelihood of some women with serious fetal anomaly diagnoses foregoing further testing and evaluation, we would expect an increase in the number of 20-24 week abortions (once the service is established) which may well outnumber those who would have eventually opted to terminate beyond 24 weeks under the current law.

Notifications

National figures on fetal anomalies take into account those pregnancies that end with a termination on the grounds of fetal anomaly. In 2014, the Department of Health (as then) issued a report aiming to better match abortion statistics with figures related to fetal anomaly in order to monitor outcomes (https://www.gov.uk/government/publications/under-reporting-of-abortions-for-fetal-abnormalities).

A system whereby serious fetal anomaly is removed from the law is unlikely to prevent these abortions happening locally prior to 24 weeks – but it will ensure that either doctors provide a different reason, or women are forced to lie to their medical team as to their reasons for seeking an abortion. As a result, there will be no records regarding the proportion of fetal anomaly diagnoses that result in TOPFA, and the records for Northern Ireland regarding rare diseases will fall below the standards of those elsewhere in the UK.

Conclusion

BPAS supports the regulations as currently framed and believes that this Bill would:

1) Contravene the obligations conferred by the CEDAW report on abortion in Northern Ireland;
2) Result in a lack of availability of abortions on the grounds of fatal fetal anomaly; and
3) Re-establish the system of travelling of Northern Irish women in need of abortion care.