

Submission to the Northern Ireland Assembly Health Committee consultation on the Severe Fetal Impairment Abortion (Amendment) Bill

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Background to the organisation making this submission

The British Society of Abortion Care Providers (BSACP) is the principal, authoritative Society for health professionals working in abortion care in the UK, its Crown Dependencies and its Overseas Territories. It aims to provide a supportive community to promote best practice in abortion care. It was formed in October 2015 and is a specialist Society of the Royal College of Obstetricians and Gynaecologists (RCOG). It is separate from the RCOG but works closely with it and with its Faculty of Sexual and Reproductive Healthcare (FSRH). Representatives of all devolved nations sit on its Council. Its membership comprises mainly doctors, nurses and midwives who deliver abortion care for the National Health Service (NHS) – whether from NHS settings or the independent sector. The three main independent sector providers (ISPs) are: the British Pregnancy Advisory Service (BPAS), MSI Reproductive Choices (MSUK) and the National Unplanned Pregnancy Advisory Service (NUPAS).

Introduction

BSACP made clear in its submission to the 2019 Westminster consultation on ‘A new legal framework for abortion services in Northern Ireland’ that abortion without time limit should be available for fetal abnormality (<https://bsacp.org.uk/resources/bsacp-submissions-to-formal-consultations/>). BSACP believes that Mr Paul Givan’s Private Members’ Bill and his arguments in favour of it selectively presents points of view of certain disabled people (who we have nothing but respect for) but fails to represent the voices of women themselves and the health professionals who care for them. This kind of restriction smacks of what is happening in the USA with ‘reason bans’ – four US States have put forward bans on the grounds of fetal abnormality (<https://www.gutmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly>).

Content and effects of the Bill

Mr Givan’s Severe Fetal Impairment Abortion (Amendment) Bill amends the Abortion (Northern Ireland) (No. 2) Regulations 2020 to remove the grounds for an abortion in cases of severe fetal impairment (‘if the child were born, it would suffer from such physical or mental impairment as to be seriously disabled’) from Regulation 7. The Bill leaves subsection (1)(a) intact: ‘the death of the fetus is likely before, during or shortly after birth’. BSACP does not intend to attempt to analyse the motivations behind the sponsorship of this Bill. We would, however, point out that in the debate during the Second Stage of the Bill that MLAs including Ms Paula Bradshaw stressed that the Bill sets

out to pit disability rights against women's^a rights rather than to recognise that they are parts of the same human rights standards. We also emphasise a point that Ms Sinead McLaughlin made that it is important that women are allowed their bodily autonomy. Mr Gerry Carroll stressed that the passage of a Bill such as this would in effect be reproductive coercion by the state. Ms Clare Bailey made a very pertinent point about the adverse impact that this Bill would have in interfering with the delicate and distressing decisions that women, in consultation with their obstetrician, have to make.

Personhood

The basis of the SFIAA Bill is that the fetus is a person. This is not the case in English case law. Although a fetus has a potential human life, it is not a person. The interests of the fetus are subordinated to those of full legal subjects – i.e. those already born.¹ It is legally invalid to apply disability arguments to the fetus.

Compatibility with existing statute law

This Bill is not compatible with the Northern Ireland (Executive Formation etc) Act 2019. The 2019 Act lays down that recommendations in paragraphs 85 and 86 of the CEDAW report are implemented. Section 85(b)(iii) of the CEDAW report states that grounds for abortion should include severe fetal impairment (SFI) as well as cases in which the death of the fetus is likely before, during or shortly after birth. Section 86 of the CEDAW report states that women must have their sexual and reproductive rights respected and that all necessary services relating to these must be provided. In short, the SFIAA Bill is not human rights compliant.

Antenatal tests

In England, pregnant women are offered first-trimester screening in the form of combined testing at 11 - 14 weeks' gestation for specific major fetal anomalies and fetal trisomy. This involves a blood test and a nuchal translucency ultrasound scan. This then gives risk scores for Down syndrome (trisomy 21), Edward's syndrome (trisomy 18) and Patau's syndrome (trisomy 13). Those shown to be at higher risk are then offered further testing of the liquor by amniocentesis.

^a Within this submission we use the term woman. However, it is important to acknowledge that it is not only people who identify as women for whom it is necessary to access women's health and reproductive services in order to maintain their health and wellbeing. Abortion services and delivery of care must therefore be appropriate, inclusive and sensitive to the needs of those individuals whose gender identity does not align with the sex they were assigned at birth.

In Wales and Scotland, pregnant women are offered Non-Invasive Prenatal Testing (NIPT), which looks at cell-free DNA,² from 10 weeks onwards and screens for the same three chromosomal abnormalities. NIPT is due to be adopted in England from June 2021.

Second-trimester ultrasound screening takes place at 19 – 22 weeks' gestation and looks for a much wider range of anomalies by detailed visual examination of all organs and other parts of the body.

The fact that first-trimester antenatal screening is not offered to the women of Northern Ireland is one of several health inequalities that disadvantages them. This lack of extension of the UK NHS Fetal Anomaly Screening Programme to NI means a diagnosis of SFI is mostly made following the second-trimester anomaly scan, with a further time-lag in establishing a prenatal diagnosis due to the investigative pathway required for confirmation.

Even when all the investigations are complete, there may still be clinical uncertainty about the prognosis for the fetus – it may be difficult to say if the fetus will die around the estimated date of delivery, whether a newborn baby will have an untreatable disorder which will result in a protracted period of suffering or whether the newborn baby will have a serious impairment that is not immediately life-threatening.

Termination for medical reasons

More than 4,000 abortions for medical reasons/fetal abnormality take place in the UK each year.³ The number of such cases is rising, mainly due to technological improvements in screening and diagnosis and to increased maternal age at delivery. One-third of abortions for fetal anomaly take place at 20 weeks' gestation or over.³ Referral to a tertiary fetal medicine centre usually takes 7 – 10 days. Advanced tests followed by consultations with geneticists, the multidisciplinary team and time for decision-making take the gestation beyond 24 weeks in many cases. Some of these tragic cases come over to GB from NI. For a woman or couple to be in such a situation when their pregnancy was wanted is extremely distressing. We admire the work of Antenatal Results and Choices, the national charity that provides information and support for those facing this situation or who have experienced it (<https://www.arc-uk.org/about-arc>).

The voices of people in Northern Ireland

The 2016 Northern Ireland Life and Times survey found that 75% of the population were in favour of abortion being legal if someone in their family was faced with serious fetal anomaly

(<https://www.ark.ac.uk/nilt/2016/Abortion/FAMABN.html>). Numerous testimonies from the public gathered by Alliance for Choice and submitted to the House of Commons Women and Equalities Committee (Written submission ANI0370) provide clear evidence of the need for an approach to the issue of SFI which centres the voices of families directly impacted by it.⁴ A recent survey of healthcare professionals in NI found that a half or more would be willing to actively participate in abortion procedures in certain circumstances.^{5 6}

Serious clinical impact in the event of the Bill being passed

Input into this section is primarily from our members practising in Northern Ireland and our members who are fetal medicine specialists . The cases that the SFIAA Bill would affect are cases involving significant fetal structural abnormalities such as abnormalities of the nervous system or cardiovascular system or serious genetic conditions.⁷ As mentioned above, diagnoses of SFI tend to be made at a more advanced gestation than in the rest of the UK. As in GB, final diagnoses of SFI may well be made beyond 24 weeks' gestation and some time needs to be allowed for the parents to assimilate the implications and made a fully informed decision.⁷ It is estimated that in NI there are currently six women per year with a diagnosis of SFI made at beyond 24 weeks' gestation.

If this Bill were to be enacted, SFI cases that could be decided upon before 24 weeks could legitimately be dealt with on mental health grounds under Clause 4(1)(b) of the Regulations. However, SFI diagnosed later, or needing more time to be decided upon, would need to travel outside the country. An unfortunate effect of the Bill is likely to be that parents feel pressurised into making decisions before the investigations are complete. BSACP feels that forcing women to continue a pregnancy when there is SFI because of inability to travel or forcing women to travel is cruel and inhuman treatment. Denying women treatment in their own country also creates shame and stigma.

It is known that decision-making by patients and clinicians around fetal anomaly is distressing, emotionally-challenging, complex and made even more difficult if the law is in any way unclear.⁸ Also, if the law mentions the term fatal fetal abnormality, without allowing SFI as a ground, clinicians can often react in a conservative manner because of the chilling effect of the criminal law. For instance, this is the situation currently in the Republic of Ireland (ROI) (<https://www.oireachtas.ie/en/bills/bill/2018/105/>). Unlike the law in NI, section 11(1) of the Health (Regulation of Termination of Pregnancy) Act 2018 allows abortion for fetal anomaly only if the condition is likely to lead to the death of the fetus within 28 days of birth. But, it has been shown

that the majority (58%) of cases of fetal anomaly in the ROI cannot be classified as fulfilling the grounds of the 2018 Act.⁹ Consequently, a majority of cases of fetal anomaly in the ROI must travel to another jurisdiction: 81 such women travelled to England in 2019.³ Our members would not like to see a return to times such as obtained between 2013 and 2019, when a very conservative interpretation by the NI Attorney General of the previous legal situation led to many women travelling to GB for abortion on the ground of fetal anomaly or being refused abortion.

Conclusion

BSACP recommends that the SFIAA Bill is rejected by the Health Committee as being incompatible with existing law, contrary to the wishes of a majority of the citizens of NI and because, if enacted, it would have severe deleterious effects on pregnant women in highly distressing situations.

References

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