The **Regulation** and **Quality Improvement** **Authority**

GH/KF/dep

15 September 2014

Ms Christine Darrah
Clerk to the Committee for Justice
The Committee Clerk
Room 242
Parliament Buildings
Ballymiscaw
Stormont
BELFAST
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Dear Ms Darrah

In response to your letter of 8 July 2014, please find attached a written submission of evidence to inform the next stage of development of The Justice Bill.

The submission from the Regulation and Quality Improvement Authority focusses on the proposed amendment of a new clause 11a ending the life of an unborn child, provides some general comment on the proposed new clause and the implications for the regulator in the exercise of its statutory functions.

Yours sincerely

for **Glenn Houston**
Chief Executive

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Established under The Health and Personal Social Services (Quality, Improvement and Regulation) (NI) Order 2003

RESPONSE BY THE REGULATION AND QUALITY IMPROVEMENT AUTHORITY TO CLAUSE 11A OF THE JUSTICE BILL.

The clause as presently drafted reads as follows:

"**Ending the life of an unborn Child**

11A – (1) Without prejudice to section 58 and section 59 of the Offences Against the Person Act 1861 and section 25 of the Criminal Justice Act (Northern Ireland) 1945 and subject to subsection (2) any person who ends the life of an unborn child at any stage of that child's development shall be guilty of an offence and liable on conviction on indictment to a period of not more than ten years' imprisonment and a fine.

(2) It shall be a defence for any person charged with an offence under this section to show-

(a) that the act or acts ending the life of an unborn child were lawfully performed at premises operated by a Health and Social Care Trust, or

(b) that the act or acts ending the life of the unborn child were lawfully performed without fee or reward in circumstances of urgency when access to premises operated by a Health and Social Care Trust was not possible.

(3) For the purposes of this section a person ends the life of an unborn child if that person does any act, or causes or permits any act, with the intention of bringing about the end of the life of an unborn child, and, by reason of any such act, the life of that unborn child is ended.

(4) For the purposes of this section 'lawfully' in subsection (2) means in accordance with any defence or exception under section 58 and section 59 of the Offences Against the Person Act 1861 and section 25 of the Criminal Justice Act (Northern Ireland) 1945."

The whole subject of abortion in Northern Ireland and the "legal criteria" within which it can be performed are controversial subjects but the reported case law establishes that a clinician who procures an abortion in good faith for the purpose of preserving the life of the mother would be acting within the law. In order to be guilty of an offence under the Offences against the Person Act 1861 or the Criminal Justice (Northern Ireland) Act 1945, the prosecution would have to establish that the person who procured the abortion did not believe that there was a risk that the mother might die if the pregnancy was continued. Further, if a clinician held the honest opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy would have a significant adverse effect upon the mother's physical or mental health, the procurement of an abortion in such circumstances would be lawful.

It is important to note that the law envisages that serious long-term psychological harm can be precipitated by reason of giving birth to a child suffering from an abnormality. Again, in order to be guilty of an offence, it would be necessary for the prosecution to prove that the person who procured the abortion did not believe that the mother would probably suffer serious long-term harm to her physical or mental health, including harm caused by her giving birth to a child suffering from an abnormality. The adverse effect on the health of the mother would have to be a real and serious one and one which was permanent or long-term. In most cases the adverse effect would need to be a probable risk but a possible risk of death might well be sufficient if the imminent death of the mother was the risk in question. It is a question of fact and degree whether the perceived effect of a non-termination is sufficiently grave to warrant terminating the pregnancy in any particular case. It can be seen from the above summary of the law that the case law as it has developed has allowed the law to be stated with a tolerable degree of certainty. The first issue to be considered is whether this provision irrespective of its intended purpose detracts from this tolerable degree of certainty and introduces an element of uncertainty and confusion.

Sub-paragraph (1) of Clause 11A, read in isolation, makes it an offence to end the life of an unborn child at any stage of that child's development. It is clear from the decision of Mumby J in *Smeaton v Secretary of State for Health* [2002] EWHC 610

(Admin) (18th April, 2002) that the Courts are likely to interpret the phrase "at any stage of that child's development" as meaning at any time after implantation of the embryo in the uterine wall has been established. Therefore, any treatment that has the effect of preventing successful implantation of the fertilised embryo such as the morning after pill will not fall within the scope of the proposed provision.

One issue which will have to be addressed is whether an ectopic pregnancy would be included within the ambit of this provision. In such a case the embryo is implanted but not in the uterine wall. Rather it is implanted in the falopian tube. Could the removal of a six week embryo from its site of implantation in a fallopian tube be considered to be the ending of the life of an unborn child at a stage of that child's development? Should the law as it presently stands be amended to include a provision which may be interpreted to so as to possibly criminalise the ending of an ectopic pregnancy?

The blanket prohibition on the ending of the life of an unborn child at any stage of that child's development is qualified to some extent by the defences set out in sub-paragraph (2), (3) and (4) of Clause 11A. These provisions seem to mean that the defences which are available to a charge levelled under the Offences against the Person Act 1861 or the Criminal Justice (Northern Ireland) Act 1945 would be available to a charge levelled under Clause 11A but only if the act complained of was lawfully performed at premises operated by a Trust or if the act complained of was lawfully performed without fee or reward in circumstances of urgency when access to premises operated by a Health and Social Care Trust was not possible.

In instances where a hospital clinician considers that the prescription and administration of oral abortifacient pharmaceutical drugs such as mifepristone followed by prostaglandin would be warranted, the manner in which the Clause is drafted would criminalise the practice of the actual taking of progesterone at home, as the act ending the life of the unborn child would have occurred outside premises operated by a Health and Social Care Trust. This would be so even though the medication was prescribed by an NHS doctor on Trust premises. The provision would also appear to prevent Consultant Gynaecologists in their private practice or even General Practitioners in their NHS practice lawfully prescribing oral

abortifacient pharmaceutical drugs. Is it intended that the provision of otherwise lawful treatment to women be restricted in such a manner? It might be regarded as highly anomalous that the decision by a doctor in a Trust run clinic to allow a patient in early pregnancy to ingest the second stage oral abortifacient pharmaceutical drug in the privacy of her own home might give rise to the commission of a criminal offence under this Clause whereas no offence would be committed under this proposed provision in the case of a driver who negligently knocked down a heavily pregnant pedestrian who suffered a miscarriage as a result.

If it is the intention of the promoters of this Clause to impose a blanket ban on private healthcare entities providing pharmaceutical early pregnancy termination services to women in Northern Ireland then it would seem from the above analysis of the law that the manner in which the Clause is drafted is such that, if enacted, a wider range of otherwise lawful activities may be criminalised.

In addition to the above matters, even a cursory consideration of the issue of enforcement reveals significant potential difficulties which are of such a magnitude as to have the potential to bring the law into disrepute. Who is going to police this law? How is it going to be enforced? Would its implementation simply have the effect of forcing women to purchase the two stage oral abortifacient pharmaceutical drugs on the internet and to take them at home without medical supervision? Is such a foreseeable consequence so potentially significant as to make it difficult to ignore when considering the overall impact of this draft Clause?

The potential role of the Regulation and Quality Improvement Authority (RQIA) in relation to the possible enforcement of this novel piece of criminal law must also be considered. The statutory role of the RQIA is outlined in the Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003. The RQIA is Northern Ireland's independent health and social care regulator. In its work, the RQIA encourages continuous improvement in the quality of health and social care services through a programme of inspections and reviews.

It is not the role and function of the RQIA to operate as an enforcer of criminal law provisions outside of its present regulatory framework. To do so would change the

whole ethos of the RQIA from quality and improvement to policing and enforcement and would require significant changes to the legislative framework under which this body was established. If the RQIA were to be required to take on the role of enforcer of the criminal law provisions of Clause 11A, then consideration would have to be given to the following matters:

- A thorough and detailed equality impact assessment would have to be performed in order to ensure that all regulated services currently inspected by RQIA are treated in a fair and equitable manner.
- Detailed cost analysis would have to be performed on the basis that this novel role would necessitate the employment of additional inspectors and administrators and would mandate the provision of additional specialist training to enable inspection staff to effectively undertake this role and gather evidence which would be admissible in the Crown Court.
- It would be necessary to take into account the effect on the relationship between the RQIA and the registered providers of services which the change in the role and function of the RQIA would bring about. It is highly probable that a negative dynamic would be established which could hinder quality and improvement.
- Finally, in view of the forensic complexities associated with the investigation of potential offences of this nature, it may well be the case that RQIA inspectors would have to be accompanied by specially trained PSNI officers during inspections.

In essence, it is the submission of the RQIA that this draft Clause is ill thought out both in terms of its scope and in terms of the potential unintended and deleterious effects upon the provision of healthcare in Northern Ireland and the proper and effective discharge of its functions by the RQIA.