

## EQUALITY COMMISSION FOR NORTHERN IRELAND

### Response to DOJ consultation on the Criminal Law on Abortion: lethal foetal abnormality and sexual crime

January 2015

#### **1 Executive Summary**

- 1.1 The Equality Commission for Northern Ireland welcomes the opportunity to respond to the Department of Justice's (DOJ) consultation on *The Criminal Law on Abortion: lethal foetal abnormality and sexual crime*.
- 1.2 We are disappointed that a full consultation on abortion has not been issued.
- 1.3 We agree that there is a pressing need to consider a change to the criminal law on abortion to provide for lawful termination of pregnancy as an option for women in certain limited and clearly defined circumstances, including on the ground of lethal foetal abnormality.
- 1.4 However, we stress that our support for any changes to the criminal law on abortion is subject to such changes being considered compatible with human rights law.
- 1.5 We agree, in the event the law is widened to permit abortion on the ground of lethal foetal abnormality, that it is essential that there is a clear and unambiguous definition of "lethal foetal abnormality"<sup>1</sup> so as to provide legal certainty and clarity for both women and medical professionals.
- 1.6 We support the DOJ's proposal to consider whether or not to make provision for abortion in the case of pregnancy

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<sup>1</sup> Or, if applicable, such standards deemed to be consistent with human rights law as determined by the High Court following its consideration of the NIHRC application for judicial review.

resulting from sexual crime and, if so, how this would be defined and safeguarded.

- 1.7 We will consider further our position on the issues raised in the event of a further consultation on the same.
- 1.8 We recommend that the DOJ, when considering its proposal to change the law to enable women to choose to terminate their pregnancy where a lethal foetal abnormality has been assessed, or in the event of any further proposals relating to the provision for abortion in the case of pregnancy resulting from sexual crime, ensures that its approach is in compliance with the UK Government's obligations under the UNCRPD, as well as obligations under the disability equality legislation.
- 1.9 We support the DOJ's proposal to consider how, in the event of changes in the criminal law relating to abortion, a right of conscientious objection might be included.
- 1.10 Whilst we will consider our position in more detail in the event of a further consultation on this issue, we recognise that the inclusion of such a right in criminal law relating to abortion, provided it is narrowly and clearly defined, can have a number of beneficial outcomes.

## **2 Introduction**

- 2.1 The Equality Commission for Northern Ireland welcomes the opportunity to respond to the Department of Justice's (DOJ) consultation on *The Criminal Law on Abortion: lethal foetal abnormality and sexual crime*. Further details on the scope of the Commission's remit is contained in Annex 2.
- 2.2 We recognise that the issues raised in the consultation document are both complex and sensitive in nature. It is also clear that some of the proposals touch on a range of important equality issues; for example, issues relating to women's ability to access reproductive health care services; the rights of disabled people under equality law and under the UN Convention on the Rights of Persons with Disabilities (UNCRPD); as well as the religious rights of employees in the workplace. The Commission is responding to those

issues raised in the consultation that are within its remit and expertise.

2.3 The Commission has already made it clear, as set out in its CEDAW Shadow Report (2013), that there should be a consultation carried out on abortion law in Northern Ireland.<sup>2</sup>

2.4 The Commission is of the view that such a consultation should consider, among other things, the issue of women in Northern Ireland having the same access to reproductive health care as women in the rest of the United Kingdom. It should also consider amending the abortion law to remove the punitive provisions imposed on women who undergo abortion.

2.5 We are disappointed that a full consultation on abortion that considers the above matters has not been issued.

2.6 The DOJ will be aware that the CEDAW Committee in its Concluding Observations on the UK in 2013 recommended specifically in relation to Northern Ireland, that:

*“the State party should expedite the amendment of the anti-abortion law in Northern Ireland with a view to decriminalise abortion. The State party should also ensure that legal abortion not only covers cases of threats to the life of a pregnant woman, but also other circumstances such as threats to her health and in cases of rape, incest and serious malformation of the foetus.”*<sup>3</sup>

2.7 It is essential that the DOJ ensures that all proposed changes to the law are compatible with human rights law. We are aware of the application for judicial review brought by the NIHRC in this regard, and await the outcome of the same.<sup>4</sup>

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<sup>2</sup> [ECNI CEDAW Shadow Report, 2013](#)

<sup>3</sup> [CEDAW Concluding Observations on UK 2013](#)

<sup>4</sup> The NIHRC has indicated that “a woman does have a human right to access this service in certain circumstances including where her life is at risk, where there is a serious malformation of the foetus or in circumstance of rape or incest. The law in Northern Ireland does not provide access to a termination of pregnancy in all of these circumstances and is therefore in the Commission’s view in violation of human rights.” The first stage in the NIHRC’s application for judicial review is listed for hearing by the High Court on 2 February 2015. See NIHRC *Fact sheet on the Termination of Pregnancy*, Dec 2014. <http://www.nihrc.org/news/fact-sheet-on-termination-of-pregnancy>

## **Termination on ground of lethal foetal abnormality**

- 2.8 We agree that there is a pressing need to consider a change to the criminal law on abortion to provide for lawful termination of pregnancy as an option for women in certain limited and clearly defined circumstances, including on the ground of lethal foetal abnormality.
- 2.9 However, we stress that our support for any changes to the criminal law on abortion is subject to such changes being considered compatible with human rights law. We therefore note and await the outcome of the application for judicial review brought by the NIHRC in this regard, which could prove fruitful in clarifying this important issue.
- 2.10 We agree, in the event the law is widened to permit abortion on the ground of lethal foetal abnormality, that is essential that there is a clear and unambiguous definition of “lethal foetal abnormality”<sup>5</sup> so as to provide legal certainty and clarity for both women and medical professionals.
- 2.11 In terms of the possible options as regards a definition explored in the consultation paper, the Commission does not support option one (i.e. listing specific lethal conditions) on the basis that would not be possible to compile a definitive list that covers all conditions and which takes account of future conditions and/or medical advances.
- 2.12 We do not, however, consider that it is within our expertise to comment on feasibility of the remaining options discussed in the consultation paper.
- 2.13 We consider that there are cogent reasons in favour of such a change to the law. For example, we believe that it will improve women’s ability to access reproductive health care services. It will allow women greater choice in circumstances where a lethal foetal abnormality has been assessed. It will also mean that women will not be required to carry to full term a foetus that is unlikely to survive following birth, or

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<sup>5</sup> Or, if applicable, such standards deemed to be consistent with human rights law as determined by the High Court following its consideration of the NIHRC application for judicial review.

have to experience the emotional and other impact of carrying a foetus with a lethal foetal abnormality.

- 2.14 We stress that although such a change to the law would permit greater choice for women in those difficult circumstances, clearly women may equally decide, and should be free to decide, not to have an abortion where the foetus is assessed as having a lethal foetal abnormality.
- 2.15 This change will also mean that women in Northern Ireland will not have to travel to Great Britain and pay the associated costs, and experience the additional stress, of having an abortion on this ground carried out privately outside Northern Ireland. Statistics reveal that approximately 803 abortions were carried out in the England and Wales in 2013 in relation to women from Northern Ireland; though we note that the vast majority of abortions carried out in England and Wales during that period were in circumstances where the pregnancy had not exceeded its 24<sup>th</sup> week, with a considerably smaller proportion being carried out in circumstances relating to the health of the foetus.<sup>6</sup>
- 2.16 In terms of having to pay the costs associated with having an abortion on this ground carried out privately outside Northern Ireland, this may have a particular impact on women with low incomes or from disadvantaged communities who may face difficulties in meeting those costs .
- 2.17 Also, the additional stress of having to travel outside Northern Ireland for a private abortion may place further barriers on women who are particularly vulnerable, including young women, and who need additional emotional or other support at that time.
- 2.18 Extending the law in this area also reduces the risk of women resorting to 'back street' abortions which are often unsafe and carry the risk of prosecution. Clarifying the law in

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<sup>6</sup> 5,469 abortions were carried out in the England and Wales to non-residents; 67.3% were from women in the Republic of Ireland and 14.7% (approximately 803 women) from Northern Ireland. 97% of abortions in England and Wales (94.5% in Scotland) in 2013 were in circumstances where the pregnancy had not exceeded its 24<sup>th</sup> week and the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman. 1% of abortions (England and Wales) were in circumstances that there was a "risk that the child would be born handicapped". There were 190,800 abortions notified as taking place in England and Wales and 11,777 abortions performed in Scotland in 2013. [abortion-statistics.ukparliament.06102014](http://abortion-statistics.ukparliament.06102014)

this area will also assist health professionals and others in that they will have certainty that their actions will not leave them open to the risk of prosecution.

- 2.19 Further, it will clarify the position for health professionals in terms of the treatment/care they are expected to provide in circumstances where complications have arisen for women who have had private abortions in other jurisdictions; for example, where the abortion procedure was not fully completed in the other jurisdiction.
- 2.20 In addition, whilst outside the matters considered in the consultation document, we would stress the need to develop clear guidance and information for both women, health professionals and others so that they understand their rights and responsibilities under abortion law. We are aware that the Department of Health, Social Services and Public Safety (DHSSPS) consulted (2013) on *'Guidance on the Termination of Pregnancy: The Law and Clinical Practice in Northern Ireland'*<sup>7</sup> but that to date revised final guidance has not been issued.
- 2.21 Whilst we recognise that due to their religious and/or moral views, some people, both men and women, are opposed to the proposed change, we also note there is evidence of clear public support in Northern Ireland for changes to the criminal law on abortion in these circumstances.<sup>8</sup>

### **Pregnancy resulting from sexual crime**

- 2.22 We support the DOJ's proposal to consider whether or not to make provision for abortion in the case of pregnancy resulting from sexual crime, and, if so, how this would be defined and safeguarded.
- 2.23 We will consider further our position on the issues raised in the event of a further consultation on the same.

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<sup>7</sup> <http://www.dhsspsni.gov.uk/guidance-limited-circumstances-termination-pregnancy-april-2013.pdf>

<sup>8</sup> Research published in October 2014 has found that the majority of people in Northern Ireland support changes to the legislation providing access to abortion in certain circumstances, including rape, incest and where the foetus has a fatal abnormality<sup>8</sup>. 60% of people thought the law in Northern Ireland should make access to abortion available where the foetus has a fatal abnormality.  
[http://www.amnesty.org.uk/sites/default/files/milward\\_brown\\_poll\\_results\\_october\\_2014\\_final\\_0.pdf](http://www.amnesty.org.uk/sites/default/files/milward_brown_poll_results_october_2014_final_0.pdf)

## Disability issues

- 2.24 As highlighted above, the Commission is of the view that a number of issues raised in the consultation are relevant to the rights of disabled people, including under the UN Convention on the Rights of Persons with Disabilities (UNCRPD); in particular, the proposal relating to lethal foetal abnormality and the proposal to consider whether or not to make provision for the termination of pregnancy due to sexual crime are relevant to the UNCRPD<sup>9</sup>.
- 2.25 The DOJ will be aware that the Commission, jointly with the NIHRC, is responsible for promoting, protecting and monitoring implementation of the UNCRPD in Northern Ireland.
- 2.26 Whilst the UNCRPD does not explicitly refer to abortion in its text, there are a number of Articles (Articles 5, 6, 7, 10, 17, 23 and 25) in the UNCRPD which are particularly relevant to this issue. We have set out the full text of these relevant Articles in Annex 1 hereof.
- 2.27 Whilst we recognise that abortion law in GB permits abortion in a much wider range of circumstances than those discussed in the consultation document, we draw to the DOJ's attention the fact that the UK Government in its first report to the UNCRPD Committee in 2011 has recognised that "concerns were expressed around the approach to abortion in the UK, where disabled people have suggested a bias towards termination of pregnancies if a child is likely to be disabled."<sup>10</sup>
- 2.28 Further, we ask the DOJ to note that *A Parliamentary Inquiry into Abortion on the Grounds of Disability* in 2013 also

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<sup>9</sup> Specifically the DOJ has asked should the law allow for abortion for victims of other sexual crime, such as sexual activity with a person under the age of 16, abuse of a position of trust, unlawful sexual activity with a vulnerable adult. See paras 6.12 -6.13 of consultation document.

<sup>10</sup> *UK Initial Report on the UN Convention on the Rights of Persons with Disabilities*, May 2011, HM Government See page 112

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/345120/uk-initial-report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/345120/uk-initial-report.pdf)

considered whether or not the Abortion Act 1967 was contrary to the Equality Act 2010.<sup>11</sup>

- 2.29 We recommend that the DOJ, when considering its proposal to change the law to enable women to choose to terminate their pregnancy where a lethal foetal abnormality has been assessed, or in the event of any further proposals relating to the provision for abortion in the case of pregnancy resulting from sexual crime, ensures that its approach is in compliance with the UK Government's obligations under the UNCRPD, as well as obligations under the disability equality legislation.

### **Right of conscientious objection**

- 2.30 We support the DOJ's proposal to consider how, in the event of changes in the criminal law relating to abortion, a right of conscientious objection might be included.

- 2.31 Whilst we will consider our position in more detail in the event of a further consultation on this issue, we recognise that the inclusion of such a right in criminal law relating to abortion, provided it is narrowly and clearly defined, can have a number of beneficial outcomes.

- 2.32 For example, it can:

- provide legal certainty and clarity to both employees and employers so that they are clear when they can or cannot refuse to participate in the treatment;
- recognise and give automatic legal protection to those people who, due to their strongly held moral and/or religious convictions, object to participating in terminations of pregnancies in certain circumstances.

- 2.33 However, the Commission is clear that that any exception to the law must be narrowly defined and objectively justifiable.

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<sup>11</sup>It will be noted that the *Inquiry* recommended that Parliament reviews the question of allowing abortion on the grounds of disability and, in particular, how the law applies to a fetus beyond the age of viability (currently 24 weeks). It also recommend that if the time limit for abortions on the grounds of disability remains to birth, there should be additional written justification for abortions on the grounds of disability after 24 weeks, which should be subject to audit.

<http://www.abortionanddisability.org/resources/Abortion-and-Disability-Report-17-7-13.pdf>



We do not support exceptions to either equality law or other law that do that meet these essential requirements.

- 2.34 In the interests of legal certainty, any right needs to be clearly defined so that the extent and limits to this right are clear. For example, it needs to be clear who can avail of the right; in relation to what services/treatment the right applies to; and how will a ‘conscientious objection’ be established. The need for such clarity is apparent in light of the recent Supreme Court decision in the case in Great Britain of *Doogan & Anor vs NHS Greater Glasgow and Clyde Health Board* (*‘Glasgow mid-wives cases’*).<sup>12</sup>
- 2.35 There is also a need to ensure that the exercise of a conscientious objection does not prevent women from accessing services to which they are legally entitled. It should be made clear that the conscientious objector be under an obligation to refer the case to a professional who does not share that objection, and that this is a necessary corollary of the professional’s duty of care towards the patient, as highlighted in the above mentioned Supreme Court decision.<sup>13</sup>
- 2.36 It is also important to note that the Supreme Court in the *Glasgow mid-wives cases* made it clear that the petitioners in that case, even if not protected by the conscience clause, “may still claim that, either under the Human Rights Act or under the Equality Act, their employers should have made reasonable adjustments to the requirements of the job in order to cater for the religious beliefs.”<sup>14</sup>
- 2.37 Finally, it is essential that any exception within the criminal law relating to abortion is in compliance with human rights law.

## Equality Commission

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<sup>12</sup> *Doogan & Anor vs NHS Greater Glasgow and Clyde Health Board*, Decision of the Supreme Court, 17 Dec 2014 [2013] UKSC 68, <http://ukscblog.com/new-judgment-greater-glasgow-health-board-v-doogan-anor-scotland-2014-uksc-68/>

<sup>13</sup> Ditto, see paragraph 40 thereof.

<sup>14</sup> Ditto see para 24 thereof. It will be noted that the Equality Act 2010 applies only in Great Britain

## **Annex 1**

### **Relevant UNCRPD Articles**

#### **Article 5: Equality before the Law**

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

#### **Article 6 Women with disabilities**

1. State Parties recognise that women and girls with disabilities are subject to multiple discrimination and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.
2. State Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental rights set out in the Convention.

The Committee has published an outline document<sup>15</sup> for the preparation of a General Comment on Article 6 Women, which will outline the duties of state parties with regard to, inter alia, reviewing family policy if it discriminates against women with disabilities.

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<sup>15</sup> Available at: <http://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx>

### **Article 7 Children with disabilities**

1. State Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.
2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

### **Article 10 Right to Life**

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

### **Article 17 Integrity of the person**

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

### **Article 23 Respect for home and family**

1. State Parties shall take effective and appropriate measures to eliminate discrimination against all persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:
  - (b) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognised and the means necessary to enable them to exercise these rights are provided.

### **Article 25 Health**

State Parties recognise that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. State Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health related rehabilitation. In particular, State Parties shall:

- (a) Provide persons with disabilities with the same range, quality and standard of free or affordable healthcare and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;

- (d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;
- (f) Prevent discriminatory denial of health care or health services or food or fluids on the basis of disability.

## **Annex 2: The Equality Commission for Northern Ireland**

1. The Equality Commission for Northern Ireland (the Commission) is an independent public body established under the Northern Ireland Act 1998. The Commission is responsible for implementing the legislation on fair employment, sex discrimination and equal pay, race relations, sexual orientation, disability and age.
2. The Equality Commission's remit also includes overseeing the statutory duties on public bodies under Section 75 of the Northern Ireland Act 1998 (Section 75) and under the Disability Discrimination Act 1995.
3. In addition, the Equality Commission, together with the Northern Ireland Human Rights Commission, has been designated under the United Nations Convention on the rights of Persons with Disabilities (UNCPRD) as the independent mechanism tasked with promoting, protecting and monitoring implementation of the Convention in Northern Ireland.