THE CRIMINAL LAW ON ABORTION

LETHAL FOETAL ABNORMALITY AND SEXUAL CRIME

A CONSULTATION ON AMENDING THE LAW BY THE DEPARTMENT OF JUSTICE

RESPONSE BY LIFE NI

INTRODUCTION

1. Life NI welcomes the opportunity to comment on this consultation document. Our organisation has existed in Northern Ireland for over 30 years. Our main objective is to provide care and support for those facing unexpected pregnancy or needing help during pregnancy or after having a baby. We believe in the sanctity of life from conception, which leads to respect and care being afforded at every stage in life. We also offer counselling after abortion for those women or family members who need assistance or counselling following an abortion.

2. Given what we say in our introductory paragraph 1 above about ourselves, we note with some concern the imposed curtailment on the methodology of response on the part of the Department of Justice. In particular paragraph 10.3 relating to "wider issues of abortion law" which states:

   "There is no part of this document which seeks to open up this conversation, and no response which addresses such issues will be taken into account…"

3. We trust that by outlining our position in paragraph 1 and other incidental general references, we are not thereby disentitling ourselves from consideration in this consultation process. In light of this, we seek an assurance from the Department of Justice in writing, that our views will nonetheless be taken into account. We also express concern that members of the public who may not be used to responding to public consultations, but who nonetheless wish to give a view will not have those views unfairly disregarded if they inadvertently stray into areas deemed 'unacceptable' by the Department of Justice.

GLOSSARY OF TERMS

4. This document is proposing to make changes to the criminal law, yet the actual terminology used in the document is neither consistent nor clear. The first matter which causes us concern in this area is the definition of "lethal foetal abnormality." This is described as "terminal or fatal abnormality/condition." We submit that 'terminal' and 'fatal' are two distinct steps in a continuum, with 'fatal' being instantaneous and 'terminal' taking some time. Furthermore, neither condition necessarily precedes birth and this is not made clear. The Department of Justice will no doubt be aware of many instances of children diagnosed with fatal foetal abnormality living for hours and days after birth. On 24th November 2011 a number of women from the 'Every Life Counts' campaign gave poignant testimony to Assembly members at Stormont of their experiences in this regard.

5. It is noted in the glossary that the document makes interchangeable use of the words "abortion" and "termination of pregnancy." However when dealing with one set of statistical information which accompanies the consultation in Annex C (pages 59-60) the words are not interchangeable. This section sets out the relevant figures falling within the definition of "medical abortion"[1] and "termination of pregnancy."[2] It would appear that the figures under the heading of "termination of pregnancy" are a subset of "medical abortion" and relate to lawfully procured abortion and are most relevant to the matters covered in the consultation document. However as a general rule this response will use the generic word abortion unless quoting from another document.

CHAPTER 1 BACKGROUND

6. Paragraph 1.1 uses the term "incompatible with life." It is submitted that this is an inappropriate and loaded term to use. Parents who have been given such a diagnosis describe how they have found this description insulting and hurtful to their still-living child, who for them is only compatible with love. Indeed the 'Every Life Counts' campaign has given evidence on some children so labelled who have not only survived birth, but lived well beyond birth and in some cases led a much loved and relatively normal life too. As has already been said, terminology is very important in this discussion. The debate can be so

[1] Medical abortion: This "equates to (i) the interruption of a live pregnancy for legally acceptable , medically approved conditions; (ii) re-admissions with retained products of conception following a previous termination of pregnancy , missed miscarriage or a spontaneous abortion that had been treated in the first admission with an evacuation of the products of conception and (iii) a patient who had a termination of pregnancy and had retained products of conception in the same episode that required surgical treatment."

[2] "Termination of Pregnancy: For the purposes of the audit and any future issuing of statistical information "termination of pregnancy" will define any patient who has a live pregnancy terminated for Northern Ireland legally acceptable, medically approved conditions. This is a subset of the term 'medical abortion.'

easily skewed by words which write off a family's child thoughtlessly, leading to irreparable decisions being taken, which can later be regretted. By using such a throwaway term the medical profession itself becomes hardened and succumbs to a conclusion that some babies *in utero* are just not worth saving. This in turn has societal consequences to the detriment of everyone.

7. At paragraph 1. 2 the consultation document discusses anencephaly. The paragraph ends with the words: "Babies born with this condition do not survive." This is an ambiguous statement. Not all babies born with this condition die in the birth process. Some do survive for minutes, hours and occasionally longer.[3] Not all anencephaly cases are identical in severity. This is not acknowledged in the consultation document.

8. The subsequent paragraphs go on to outline the tragic circumstances of Sarah Ewart and another family who were given a diagnosis of anencephaly which led to this consultation process. Life NI sympathises entirely with these families faced with such devastating news. However, it does not believe that a solution is to be found or justified in amending the law on the basis of such hard cases.

9. Rather it proposes an alternative approach, which is to change the mindset of the medical profession when faced with such dilemmas. Instead of approaching the situation from an entirely hopeless viewpoint captured by the epithet "incompatible with life" a caring and empathetic approach to the parents, especially the mother, to value whatever time is left to her with her baby and to offer her every medical care available during that time. This is the model offered by peri-natal hospice care and is one which puts mother and baby at the forefront, rather than seeing disposal of the baby as the optimum solution. It is a solution which values the mental health of the mother by allowing nature to take its course and ensures that no regrets are stored up for the future.

10. Life NI believes that many women who are faced with a diagnosis that their baby has a brief life expectancy, are too quickly pointed in the direction of prematurely terminating that life without being offered either counselling or alternatives. It is our belief that if such alternatives were offered at the outset, many more families would opt for a life-affirming choice. We in Life NI have

[3] See the story of Nickolas Cole who survived for three years: Daily Mail 2nd November 2012- He taught us how to be a family.

expert qualified counsellors who would be willing to assist in this task if required.

11. Further, Life NI is dismayed that the Department of Justice finds itself forced into action to change the law by a media-driven campaign. Much of the coverage at the time appeared to pay little heed to the long-term effects of media exposure on the families at a time of trauma in their lives and left no room for reasoned debate. Life NI believes that a rush to change the law in such circumstances risks creating unforeseen and detrimental consequences, not only obviously, for babies *in utero* but for their families and the medical profession as well as for children with life limiting conditions who are already born.

12. The consultation document repeatedly refers to a supposed "pressing need" for action in the light of the cases which have recently come to media attention. This has to be placed in context. Diagnosis of a poor or non-existent survival expectation after birth is actually relatively rare. Furthermore such diagnosis is usually made at the 20 week scan. The statistics for 'abortions' (term used at Annex c Table 5) of Northern Ireland residents in England and Wales indicates that between 1% and 3% of all abortions take place at 20 weeks and over. In numeric terms this accounts for 15, 16, 12 and 26 between 2010 and 2013. The reasons for each of these 'abortions' is not supplied, so not all may relate to an adverse diagnosis. In any case, it is submitted that the numbers do not lead to a conclusion of "a pressing need" contrary to what the consultation document suggests.

13. In addition to the option of peri-natal hospice care, Life NI suggests that there may be merit in further researching whether there is any connection between some life-limiting conditions and remedial health care of mothers-to-be, e.g. in regard to folic acid and conditions affecting the neural tubes.

CHAPTER 2 THE CURRENT LAW ON ABORTION

14. In spite of the requirement not to widen the debate on abortion beyond the issues of lethal foetal abnormality; sexual crime and conscientious objection in these contexts, the consultation document itself provides information more generally on the law on abortion in Northern Ireland and elsewhere, including some detail on the law of the Irish Republic, which has not legislated on the two main issues covered by this consultation document.

15. Life NI is also a little surprised at the content of this chapter in relation to the law of Northern Ireland, given the exhaustive coverage of R v Bourne [1939] 1 KB 687, compared to a distinct paucity of coverage of the High Court in

Northern Ireland which has considered a number of cases on abortion over the years[4] since Bourne and more importantly, the Northern Ireland Court of Appeal which has considered the provision on abortion in Northern Ireland In re Family Planning Association v The Minister for Health, Social Services and Public Safety NICA[2004] 37.

16. Further we note the reference to the extent of the Abortion Act 1967 as amended by The Human Fertilisation and Embryology Act 1990. This remains the prevailing law on abortion in Great Britain and notably makes no specific provision for permitting abortion in circumstances of rape; incest or any other sexual crime.

17. In addition to the above there is an extremely brief summary of the law on abortion in other European jurisdictions which really does not further the debate on the issues in question to any great extent. Indeed, the inclusion of this information seems somewhat at odds with the request to respondents to steer away from more general issues connected with abortion.

CHAPTER 3 HUMAN RIGHTS CONCERNS

18. As with the previous chapter this one also appears to stray to more general issues connected with abortion beyond the specified remit for respondents and on that basis we will refrain from significant comment thereon.

19. However, some comment is required on paragraph 3.14. This rather oddly jumps from an assertion in the previous paragraph (on the flimsiest of evidence, it has to be said), that the NIHRC "indicate[s] that there may be grounds for challenge… " on human rights grounds, to an order from the NIHRC that "the consultation document must make it clear that legislation will be introduced providing for termination of pregnancy on grounds of rape, sexual abuse(incest) and in cases of serious malformation of the foetus."

20. Life NI finds the willingness of the Department to accede to this and even more strikingly the requirement by the NIHRC of the Department to give an:

> "…undertaking that the consultation will affirm the intention to amend the law to provide for termination in those specific circumstances and that the Department will progress the matter in a timely manner."

[4] See for example Northern Health and Social Services Board v F and G [1993] NI 268; Northern Health and Social Services Board v A and ors [1994] NIJB 1; and two unreported cases from the NI High Court Western Health and Social Services Board v CMB and the Official Solicitor (1995) and Re CH (a Minor) (1995).

to be a gross extension of the NIHRC's remit. Surely, it is submitted, it is a matter for the legislature alone to determine what laws to pass after it has properly consulted with the public. Any role for the NIHRC must be advisory, especially in circumstances where it is merely surmising that there "may be ongoing breaches and potential for individual violations to occur."

21. We are aware of recent litigation on this matter which commenced after the publication of this consultation document and await the outcome with interest in due course.

CHAPTER 4 PROPOSALS TO CHANGE THE LAW.

22. Once more Life NI takes issue with the repetition of the phrase "pressing need" which is evidenced largely by a tragic set of circumstances which has received widespread media coverage.

23. Life NI is opposed to any change in the law which would enable a life to be ended on the basis of any of the four options i.e. (i) falling within a list of specific lethal conditions; (ii) sustainability of life based on prediction that there will be no survival to term or sustainability after birth; (iii) "lethal foetal abnormality" with no statutory definition of 'lethal' and leaving it to medical judgement; or (iv) allowing an assessment reached by the medical practitioners that the "foetal condition" is incompatible with life.

24. Life NI has considered the immense difficulty the Department faces in even defining the circumstances in which it proposes to change the law and concludes that each of the proposals is defective even within the Department's own terms. The first three are defective on the grounds of their vagueness and arbitrariness and susceptibility to error. There is also the danger that some of these options will widen the intended scope of the proposed legislation.

25. The fourth one, preferred and recommended by the Department, is problematic on a number of grounds:

- (i) clinical judgement even when backed up by a second opinion is subjective and may not be accurate;

- (ii) the experience of Great Britain, where two opinions are necessary to secure an abortion under the 1967 Act, is that the two opinions are merely an exercise in box ticking. In some instances there has even been fraudulent pre-signing of permission forms;

- (iii) the term “incompatibility with life” is insulting and hurtful. It devalues the unborn child who at the time of assessment still has a beating heart and is still growing;

- (iv) the term “incompatibility with life” is so broad as to be capable of referring to children with such disabilities who actually survive the birth process; how are they then to be regarded?

- (v) the term “incompatibility with life” will lead to a discriminatory attitude towards children who have such disabilities;

- (vi) once a medical practitioner categorises any living being for whom s/he has a duty of care as being “incompatible with life” then the level of clinical care declines;

- (vii) the experience of other legislatures, including Great Britain, on making any change to the law on abortion is that the original intended scope of the legislation widens with the passage of time to an ever increasing number of situations, albeit not envisaged at the time of passing the legislation;

- (viii) those choosing to defy the medical determination effectively will be abandoned by their clinical practitioners or made to feel a burden.

26. Expanding on (viii), Life NI notes that it would be very concerned, should the Department succeed in legislating as it proposes by way of Option 4, for the care (or more accurately the lack of care) that would be provided to those parents who decide to continue with the pregnancy until its natural end. What exactly does no medical intervention mean? What if the predicted outcome is much less serious than originally anticipated? Can the first medical opinion be overridden? In trying to “fix” one problem many additional problems may arise. Worryingly the Department clearly has not anticipated any such problems in this consultation document and apparently has gone along with recommending

a *fait accompli* which leaves no room for a changing situation. This is an appalling vista for anyone facing an already traumatic situation.

27. In response to the questions set out at Annex A relating to lethal foetal abnormality Life NI does not believe that the law should allow for abortion in cases of lethal foetal abnormality. Given that, the second question is inapplicable. The difficulty in defining the word "lethal" demonstrates the fruitless task the Department is setting itself. Finally Life NI is totally opposed to Option 4 which would allow clinical judgement to decide when a foetus is "not compatible with life" which Life NI regards as a repugnant term.

PART TWO – CHAPTER 6 - SEXUAL CRIME

28. Life NI notes that the Department makes no recommendation in respect of this aspect of the consultation document, but considers the issues simply because "interest" has been expressed, and more probably in our view, because of pressure from the NIHRC and others. This area is under scrutiny in Northern Ireland in spite of the fact that there is no specific provision for abortion following a sexual crime under the liberal regime of the 1967 Act, rather there is reliance on the Bourne principles or other health provisions of the 1967 Act – i.e. that the pregnancy involves a greater risk to the health of the mother than if the pregnancy were terminated.

29. Frequently politicians, including the Minister of Justice, have tried to reassure the public that they have no intention of introducing the Abortion Act 1967. Now that reassurance rings hollow, when potentially an even more liberal situation is under consideration in this consultation document.

30. Life NI's response to the question "What circumstances should be exempted from the criminal law on abortion?" is that no sexual crime resulting in pregnancy can justify the taking of an innocent life.

31. Recently a number of people who were born as a consequence of rape have spoken out at public meetings[5] relating to this consultation, about their feelings on proposals to specifically allow abortion where the pregnancy arose from rape or other sexual crime. Understandably they are deeply distressed that their life and similar lives are to be regarded as valueless, simply because of their background. Why should the innocent be sacrificed to punish a criminal father?

[5] Strandtown Baptist Church Belfast 29th November 2014 Conference- Love Them Both- Talk by Gary Moore- Conceived in Rape- Life,Love and Legacy

32. The second question is “Do we need safeguards to ensure that the law works as is intended and there is legal certainty?” Life NI recognises a number of immediate difficulties surrounding this question. (i) The issue of proof will be a particularly difficult one to achieve, since few if any criminal convictions for sexual offences of this type are likely to arise before the end of the pregnancy, never mind at an earlier date. Therefore there will be no certainty that a crime has actually taken place. (ii) Thus, any change in the law will not be based on the certainty that a crime has taken place but on an assertion on the part of the mother that a sexual crime may have /has taken place. Even if this is done by affidavit as well as mandatory reporting of the alleged crime to the police, the standard of proof for such a serious issue as destruction of an innocent life seems very low to us. (iii) What will the intention of the law be? Yet again to make an exception to the criminal law on the basis of misplaced compassion. Once there is an exemption for rape, there must logically be an exemption for all other types of sexual crime. Unlike the authors of the consultation document, Life NI does not regard the position in the Isle of Man as restrictive since the woman need only report the matter to the police and swear that the pregnancy “*could have* been caused by rape, incest or indecent assault.” (See paragraph 5.6). (iv)Inevitably, if the law is to change in this way, Life NI believes it will only become a matter of time before further changes are proposed to permit abortion on demand in the first trimester.

CHAPTER 7 – ADJUSTING THE LAW

32 As the Department recognises itself, permitting abortion on the grounds of alleged sexual crime is complex. In keeping with Life NI’s view on the sanctity of life from conception, it believes that a change in the law would be a retrograde step. Instead the Department and other government departments should take steps to encourage women and young girls to report any sexual crime at the earliest possible opportunity when the best possible evidence is available. Organisations such as Life NI are available to assist any woman or girl who is worried about possible pregnancy as a result of rape or a sexual crime.

33. In response to the questions in Annex A relating to sexual crime, LifeNI does not believe that the law should provide for abortion to be a choice in the event of rape, or any other sexual crime. The other questions arising in Annex A therefore are therefore inapplicable.

CHAPTER 8 – CONSCIENTIOUS OBJECTION

34. Since this consultation document was issued, the law on conscientious objection in England and Wales has been considered and adjudicated upon by the Supreme Court in Doogan and Anor v NHS Greater Glasgow and Clyde Health Board [2014] UK SC 68.

35. Unfortunately, as far as Life NI is concerned, the ruling of the Scottish Court of Session in favour of the midwives, whereby the word "participation" had been widely interpreted, was overturned. Instead a narrow interpretation of the word was approved by Baroness Hale and the other members of the Supreme Court. This emphasises how important it would be for any legislation in Northern Ireland to be carefully drafted to ensure that anyone with a conscientious objection to participation in abortion or involvement in the procedures securing or surrounding an abortion would have the right to opt out. Further provision should be made to ensure that anyone with a conscientious objection to abortion should not be required to authorise or assist in making arrangements for someone else to be so involved or to supervise the procurement of an abortion.

36. There has been some disquiet among some commentators[6] over the approach taken by Baroness Hale in the Supreme Court. Two primary concerns arise- (i) her failure to refer to Pepper v Hart [1993] AC 593 which seeks to look behind the statute and consider the original Parliamentary intent. In the case of the conscience clause in section 4 of the Abortion Act 1967, many MPs only acquiesced in its passing on the basis that those with a conscientious objection would not be required to participate and a fortiori lose their job or position. (ii) her decision to go beyond what was originally under discussion and to stray into areas which had not been the subject of evidence or representations - ie her decision to interpret Janaway v Salford AHA [1989] 1 AC 537 as requiring a doctor with a conscientious objection to sign an authorisation form for abortion even if s/he had a conscientious objection. (paragraph 36 of the judgement). This is an affront to the conscience of anyone who is opposed to abortion and to allow a similar version of conscience clause in Northern Ireland would be totally unacceptable and completely inadequate protection to medical professionals. Furthermore Baroness Hale suggested that there was a referral requirement (see paragraph 40 of the judgement). Again many doctors would see this as a participatory step which they were uneasy to take on the grounds of conscience.

37. Life NI takes the view that a conscience clause must be robust, otherwise it will not serve its intended purpose - to protect those who have a reasonable objection to the taking of life whether it be on the grounds of lethal foetal abnormality or following sexual crime or indeed any other arbitrary reason. Without a robust conscience clause, the Department risks chilling out those most suited to working in the medical

[6] Neil Addison BL Religion Law Blog Call the Midwife. I want an abortion 3 17th December 2014.

and caring professions, and accepting only those who are ambivalent to such sensitive issues.

38. This consultation process has curtailed discussion on the more general question of abortion, in spite of the fact that it discusses in some detail the question of restricting the conscience clause only to any new proposed exemptions and not attaching it to the existing law. However if there is to be a conscientious objection clause for abortions performed for lethal foetal abnormality and following sexual crime there needs at least to be some discussion somewhere, on whether it should apply more widely to the pre-existing law in Northern Ireland as was suggested in the Consultation document: The limited circumstances for a lawful termination of pregnancy in Northern Ireland -A guidance document for health and social care professionals on law and clinical practice issued for consultation in the summer of 2013.

39. Life NI reiterates its views at that time as follows:

> "Conscientious objection
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> 21. Life NI believes that the revised guidelines on conscientious objection are an improvement on earlier versions of the guidelines. Life NI notes that the guidelines suggest that life threatening situation where no conscientious objection can apply will "occur very infrequently". Once again Life NI highlights that between 1967 and 1990, 151 (a figure amounting to 0.004% of all legal UK abortions) were categorised as done to save the life of the mother. (see Dr Michael Jarmulowicz, cited in The Physical and Psycho-Social effects of Abortion on Women: A Report by the Commission of Inquiry into the Operation and Consequences of The Abortion Act, June 1994 p. 5) This means that if 70 abortions are legally carried out in Northern Ireland that would suggest less than 1 such situation arising every three years here.
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> 22.Life NI has two queries over paragraph 4.2. What happens if there is a dispute as to whether there is a life threatening situation or not? Secondly what happens if the unborn baby in the life threatening case is likely to be capable of being born alive- should or indeed will efforts be made to save its life? In our view it is essential that every effort should be made to save the life of the child in this situation."

40. Given the recent decision of the Supreme Court, Life NI believes it to be of paramount importance that if the law is to be amended in any way suggested in this consultation document, any conscience clause must be drafted specifically to suit the circumstances in Northern Ireland, to ensure that adequate protection is provided to all medical staff and indeed others who may encounter ethical dilemmas as a result of participation or being involved with a patient who is to have an abortion in Northern Ireland. However it is to be hoped by Life NI, that the Department of Justice will take

on board the genuine concerns of organisations such as Life NI and decide not to legislate as proposed or contemplated in this consultation document.

41. In response to the questions posed in Annex A on conscientious objection, Life NI believes that there should be no attempt to legislate in the way suggested. However in the event our advice is ignored, we believe that there should be a right to conscientious objection for those who participate in or are involved in the procedures securing or surrounding an abortion to have the right to opt out. Further anyone with a conscientious objection to abortion should not be required to authorise or assist in making arrangements for someone else to be so involved or to supervise the procurement of an abortion.

The right should be extensive to ensure that the unforeseen interpretation by the Supreme Court of section 4 of the Abortion Act 1967 should not be repeated. The right should also specifically cover situations relating to authorisation and referral.

The right should cover participation in all treatment related to the abortion including pre- and post-procedure nursing care.

The right should also cover all associated but not direct duties such as supervising and supporting other staff and delegating tasks to staff involved in the provision of care to patients undergoing abortion at any stage of the process.[7]

42. Nothing further occurs at this time and we await your written confirmation that our submission is to be taken into account.

Mary J Lewis BL

15th January 2015

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[7] Life NI is puzzled at the sudden use of "*medical* termination" in paragraph 20 (pg 55) when the immediately preceding paragraphs have mostly used the word abortion and on one occasion simply "termination."