Written submission from the Reproductive Health Law and Policy Advisory Group' (ANI0006)

Introduction

This submission has been prepared by the Reproductive Health Law and Policy Advisory Group. Established in 2015, the Advisory Group is a collaborative academic knowledge exchange initiative led by Dr Fiona Bloomer (Ulster University), Dr Kathryn McNeilly (Queen’s University Belfast) and Dr Claire Pierson (University of Liverpool).

Since 2015, the Advisory Group has undertaken research with healthcare professionals, law and policy makers and wider stakeholders on abortion law reform in Northern Ireland. A number of briefing papers have been published from this work outlining key findings and recommendations. In this submission we summarise our work’s findings in relation to the Committee’s questions.

Question One:

What are the views of public, women, medical and legal professionals and how have these views changed over time?

A. Views of the Public

Repeated public opinion polls over the last three decades have provided insight into the views of the public on access to abortion in Northern Ireland. As detailed in appendix 1, polls carried out from 1992 onwards indicate that support for legal reform has consistently exceeded 60% in a range of circumstances including: in relation to cases of sexual offences; if a woman’s life was at risk; if a woman’s physical and mental health were at risk; and on grounds of foetal abnormality. On the role of Westminster of note is the most recent poll which determined that 66% of respondents supported the view that “In the absence of a devolved government, Westminster should reform the law”.

In the last two years two surveys, led by academic teams, have provided a robust evidence base on the views of the public. In 2016 data from the Northern Ireland Life and Times Survey indicated broad support for reform of the law. In 2017 a survey of over 2000 trade union members mirrored this support for reform: “a woman’s life being at risk” was the most common option (77%); just under half (47%) stated abortion should be provided “when a woman asks”; a small minority of respondents replied “none of these” (11%).

B. Views of Medical Professionals

In 2016 the Advisory Group undertook a number of private and roundtable discussions with professionals working in the area of abortion in Northern Ireland. These included representatives from RCOG, RCM, RCN and a number of specialist practitioners working across the Health Care Trusts in Northern Ireland and Great Britain. We were specifically concerned to obtain views on provision of care in relation to fatal foetal abnormality (FFA) and pregnancy following sexual crime, and to consider ways of moving forward which would be of benefit both to women and professionals working in the area.
A number of recurrent issues arose during these discussions:

**Lack of clarity within the current legislative and policy framework** –
Difficulties emerged surrounding clarity on the law, communication amongst professionals, and the impact and effects of the current legal framework on healthcare professionals. For example, one issue raised was the perception that in order to be deemed a ‘mental or physical wreck’, and thereby fall within the Bourne exception, a psychiatrist’s diagnosis of a mental health condition was required (this is not required under the law). On the issue of mental health assessment, it was also noted that a divide exists amongst Obstetricians. Some feel very capable to assessing mental health and making an assessment as per Bourne, while others, usually those more junior in their practice, feel ill equipped to make such an assessment without specific training on the issue.

Healthcare guidance policy published in 2013 which was framed in a punitive manner was cited as creating a ‘chill factor’ or a ‘climate of fear’. Whilst guidelines published in 2016 were an improvement, it is clear that the legacy of the 2013 guidelines still exists.

An additional issue raised pertained to abortion medication. There is increased awareness that abortion medication which may be purchased online. The prosecution of two women in Northern Ireland for purchasing and/or using such medication in 2016, and the one conviction which has followed to date, has moved debate on substantially. The legal framework and guidelines for healthcare professionals must reflect this and deal with the related issues comprehensively. Such changes should be introduced as soon as possible in order to assist healthcare professionals with this difficult issue which has received much publicity and provoked much concern.

**Pathways for Abortion Provision and Care** –
Where a woman is seeking an abortion which cannot be provided in Northern Ireland, healthcare professionals expressed concern surrounding lack of standardised pathways, in particular relating to FFA. Such a lack of pathways has the consequence of heightening practical and emotional difficulties for women. To a significant extent pathways are colloquial – dependant on who the healthcare professional in question can put the woman in contact with and, in turn, what healthcare professional and Health and Social Care Trust the woman is receiving care from. While participants suggested the situation has improved in recent years, it is still not possible to make a direct referral for a woman to seek abortion provision in Great Britain. Standardised NHS pathways on this issue are required. It is noteworthy that the Department of Health in Northern Ireland has refused to issue revised guidance to health professionals advising them of the centralised booking system for those wishing to travel to England.

Related to the lack of standardised pathways for abortion provision, participants identified a lack of aftercare support for women who choose to seek a termination outside Northern Ireland. Because women in Northern Ireland generally seek abortion at a later stage – given the legal and practical obstacles that must be surmounted – the need for an aftercare pathway is even more important. Pathways which are integrated into NHS care would allow a woman to return home and seek aftercare from her local Health and Social Care Trust.

In relation to women who travel to seek abortion on grounds of FFA specifically, healthcare professionals raised concern regarding the lack of pathways for returning foetal remains home for burial or autopsy. Case were cited of women and/or couples required to transport...
remains themselves in harrowing circumstances such as via picnic coolers, in hand luggage, or via private courier. The absence of pathways raises significant ethical concerns, causes additional trauma and difficulty at an already harrowing time and leaves women and their families without a significant practical support provision. Pathways for return of foetal remains could also be created within a standardised NHS frame. Participants expressed awareness that work to create such a pathway, accompanied by counselling, is currently under consideration. Whilst such pathways were recommended in a report issued by a Department of Health and Department of Justice FFA Working Group in 2016, the extent to which these have been implemented remains unknown.

Difficulties were also highlighted in relation to the legal aspects of foetal remains and information regarding disposal which is causing considerable distress. Women and families appear to be receiving inaccurate and/or incomplete information regarding possibilities to take tissue home for burial in Northern Ireland and there is a general lack of awareness of disposal options and arrangements which appears to stem from a lack of understanding regarding the legal position of foetal remains.

C. Views of Legal Professionals

Legal professionals in Northern Ireland have been required to grapple with a legal framework for abortion which is unsatisfactory. The views of legal professionals on the difficulties of this framework, and how it can be assessed in light of international and domestic human rights commitments, can be gathered from a range of case law in Northern Ireland.

Clarity of the Law –
In 2001, the Family Planning Association for Northern Ireland brought judicial review proceedings seeking to, amongst other things, gain clarity on what the law is regarding lawful provision of abortion in Northern Ireland. Heard by the Court of Appeal in 2004, all judges felt that clarity could be provided in this area. Campbell LJ, for example, stated in his judgment that ‘over the years the judiciary, ministers with departmental responsibility in this area and the Standing Advisory Commission on Human Rights have all acknowledged that the law on abortion in Northern Ireland is in an unsatisfactory and uncertain state’.

Criminal Prosecution –
In 2016, a woman was prosecuted in Northern Ireland regarding use of abortion medication. Hearing the case, Justice MacFarland noted that if the woman had been in any other part of the UK she would ‘not have found herself before the courts’. The woman received a suspended sentence (the maximum sentence for the office under sections 58 and 59 of the Offences Against the Person Act 1861 being life imprisonment).

Human Rights Compatibility –
In 2015, the Northern Ireland Human Rights Commission brought judicial review proceedings challenging the human rights compatibility of prohibition of abortion in Northern Ireland in the cases of fatal foetal abnormality, sexual crime and severe foetal malformation. In 2018, the UK Supreme Court heard this case and determined by a majority that prohibition in the first two situations is incompatible with the Article 8 right to private life. Despite finding that the Commission ultimately did not have legal standing to bring the case, the Supreme Court judges made a clear assessment of the law in human rights terms.
Delivering the leading judgment, President of the Supreme Court, Lady Hale stated that ‘I am in short satisfied that the present legislative position in Northern Ireland is untenable and intrinsically disproportionate in excluding from any possibility of abortion pregnancies involving fatal foetal abnormality or due to rape or incest’. In her judgment, Lady Hale also stressed that the role of the judiciary in the debate on reform should not be marginalised. She commented that, ‘this is not a matter on which the democratic legislature enjoys a unique competence. It is a matter of fundamental human rights on which, difficult though it is, the courts are as well qualified to judge as is the legislature.’

**Question Two:**

**What are the experiences of women of the current law?**

In 2017, a unique study sought to identify if abortion was a workplace issue in Northern Ireland and the Republic of Ireland. This study, the first of its kind in the world, identified that of over 2000 respondents in Northern Ireland, 19% stated they had direct experience of a range of scenarios including issues related to disclosure, advice and support, time off and sick pay:

“I personally had an abortion just last year and struggled to afford it. I couldn't get any time off after either as I work as an agency nurse and do full time hours and could not afford to take the time off afterwards.”

“I did not disclose to anyone in the workplace. This was not through any shame over my decision. It was because my case was very complicated due to fatal foetal abnormality and I was very low and could not face the several questions disclosing the information would entail. I also understood there would be judgement so I wasn't in a strong enough position to have to explain my actions nor did I feel I should justify them as it wasn't anyone's business. I feel it may have been handled differently because I just told senior management I lost my baby when I was put under a lot of pressure to return to work after a short spell off. Their response was what I expected. They told me they would get help and support for me but nobody to this day ever contacted [me]. I definitely think unions need to have discussions with employers to put policies in place to keep them safe as well as employees.”

“I have had both miscarriage and an abortion while an employee and the difference was striking – I could tell my employer about the miscarriage and got sick leave and support but felt there was no way I could tell my employer about the abortion. The stigma is still very strong.”

Consultation sessions with the activist organisation, Alliance for Choice, identified a series of case studies which provide insight into the stresses experienced by those who self-abort at home. In each case the woman sought information on accessing abortion medication, discussed the fear of criminalisation and, as outlined below, detailed the circumstances which prevented them accessing abortion elsewhere:

“We had a few calls, secretly, from someone who had to hang up and call back a number of times as she was so afraid. It turned out her ex had destroyed all of her documents, she was in the process of leaving him because he was so abusive but she was pregnant. She had nothing to say who she was, she was far away from him which
meant being far away from her support network and had no-one to be with her, no-one to look after her young children for days. There was just no way for her to travel. We reassured her about the safety of the pills but told her she had to not tell anyone at hospital if she needed to go. We had to reassure her that though it was illegal very few people had been arrested. We were asking her to add more secrets and trauma to the awful experience she was going through. She was frightened if he ever found out what she was going to do that she would lose her children to her violent ex-partner.”

“A very worried young woman called to ask all about the abortion pills. She had a lot of questions; ‘How do you take them? Are they safe? Will it show on my medical records? Can they trace the pills to me? What is the name of the medication? What are the side effects? Where’s the best site to get them?’ I told her as much as I could but made sure I told her about the funding and travel help from the UK. She was adamant it wasn’t possible. It was exam time, turned out she was a medical student and there was no way she could miss the exams, what possible reason could she give? She was already having to hide her morning sickness in classes. She wondered aloud if she were ever to be caught would it mean she was struck off from her potential career.”

Since the centralised booking system (CBS) was introduced in mid 2018 for those travelling to England, there are early indications that the system is working well for most cases. However, three key issues are of note:

- Problems are experienced by those with underlying health condition.
- Problems occur when the estimated gestation is inaccurate (this may require re-booking and return trips/ visits to the clinic).
- Knowledge of the CBS is low amongst those seeking abortions.

**Question Three:**

**What are the UK Government's international responsibilities and how can these be reconciled with devolution?**

**A. International Human Rights Law**

The UK is a signatory to all major human rights treaties created by the United Nations. In the past twenty years international human rights law has evolved to recognise the denial of safe abortion services as a human rights violation. The United Nations Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee Against Torture and the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) have stressed that states must guarantee accessible legal abortion services.\(^{11}\) In particular, they have noted that criminal frameworks and punishments for abortion are not human rights compliant.\(^{12}\)

In 2018, the United Nations Human Rights Committee’s General Comment on the right to life stated that ‘restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering… discriminate against them or arbitrarily interfere with their privacy’.\(^{13}\) The Committee also advised that states should not apply criminal sanctions for women or girls undergoing abortion or against medical providers.
In 2016, CEDAW carried out an investigation into Northern Ireland’s abortion law. The Committee carried out interviews with politicians and law-makers, health professionals, NGOs, academics and women affected by the law. In 2018 it published its report. This report determined that the current law in Northern Ireland results in grave and systematic violation of human rights under CEDAW. The Committee made recommendations in two areas to remedy the violation:

1. Change of Legal Framework to repeal sections 58 and 59 of the Offences Against the Person Act 1861 and create new legislation providing expanded grounds for access to abortion. Interim cease on application of criminal law while these developments are occurring.

2. Improvement to local sexual and reproductive health services to ensure access to contraception and high quality abortion and post-abortion care; rights-based counselling and information on sexual and reproductive health and services; reform of sex education; awareness-raising campaigns on reproductive and sexual health; combatting of gender stereotypes; protection of clinic staff and service users from harassment by anti-abortion protestors.

B. Devolution

The UK is a signatory to international human rights law commitments at state-level. However, devolved governments in Scotland, Wales and Northern Ireland do have responsibility to ensure human rights compliance. If the Northern Ireland Assembly (presently non-functioning) does not act to fulfil human rights obligations, the legal framework for devolved powers does provide a number of options.

Section 5(6) of the Northern Ireland Act 1998 provides that devolution does “not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland.” However, this is subject to the Sewel Convention by which the Westminster Parliament will not normally legislate in areas of devolved competence without the consent of the Northern Ireland Assembly.

The Sewel Convention, as applies in Northern Ireland, has not been written into law, but it has been written into a Memorandum of Understanding on intergovernmental relations in terms that make it clear that, ‘The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power’. However, the Memorandum of Understanding also acknowledges that ‘Parliament’s decision to devolve certain matters [means] that Parliament itself will in future be more restricted in its field of operation’ (The Convention, as applies in Scotland and Wales, has been written into statute law).

Alternatively, section 4 of the Northern Ireland Act allows the Secretary of State for Northern Ireland to take back an element of devolved powers so that it becomes reserved to Parliament at Westminster.

Amendment NC57 passed in October 2018 made a change to law requiring the Secretary of State and senior officers of Northern Ireland Departments to address incompatibilities between legislation applied in Northern Ireland and human rights obligations. This includes legislation on abortion, and requires the Secretary of State to provide guidance on this issue.
The CEDAW Committee has stressed that devolution cannot be used in order to excuse inaction on international human rights violations. It is possible that Westminster can act to remedy such violations in the present context where the devolved Assembly at Stormont is not functioning.

November 2018
### Appendix 1 Public Opinion Polls and Survey Data

| Event                                                                 | 1992
|-----------------------------------------------------------------------|-----
| Abortion should be permitted                                          | 76  |
| on grounds of rape and incest                                         | 76  |
| on grounds of rape                                                    | 72  |
| on grounds of rape and incest                                         | 71  |
| on grounds of rape and incest                                         | 62  |
| on grounds of rape and incest                                         | 69  |
| on grounds of rape and incest                                         | 84  |
| on grounds of rape and incest                                         | 65  |
| Abortion should not be a crime                                        | 79  |
| Abortion should not be a crime                                        | 82  |
| Abortion should not be a crime                                        | 79  |
| Abortion should not be a crime                                        | 62  |
| Abortion should not be a crime                                        | 76  |
| Abortion should not be a crime                                        | 60  |
| Abortion should not be a crime                                        | 80  |
| Abortion should not be a crime                                        | 57  |
| Abortion should not be a crime                                        | 60  |
| Abortion should not be a crime                                        | 59  |
| Abortion should not be a crime                                        | 81  |
| Abortion should not be a crime                                        | 57  |
| Abortion should not be a crime                                        | 73  |
| Abortion should not be a crime                                        | 84  |
| Abortion should not be a crime                                        | 83  |
| Abortion should not be a crime                                        | 77  |
| Abortion should not be a crime                                        | 86  |
| Abortion should not be a crime                                        | 65  |
| Abortion should not be a crime                                        | 66  |

3. BBC RTÉ opinion poll data: http://downloads.bbc.co.uk/ni/NewShow/Supa/Survey_218_PDF.pdf
5. Trust union survey - Bloemer, F., Devitt, Trew, J., Farrant, C., MacNamara, N. and Mackie, D. (2017) Abortion as a workplace issue. Trade union survey – North and South of Ireland, Dublin: UNITE the Union, Unions, Mandate Trade Union, the CWU Ireland, the GMB, Alliance for Choice, Trade Union Campaign to Repeal the 8th, Abortion, Car and Bloemer, F. (2018) Briefing Paper: Northern Ireland data, abortion as a workplace issue: Trade union survey, Dublin: UNITE the Union, Unions, Mandate Trade Union, the CWU Ireland, the GMB, Alliance for Choice, Trade Union Campaign to Repeal the 8th.