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Guidance on the Termination of Pregnancy: The Law and Clinical Practice in Northern Ireland

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Guidance on the Termination of Pregnancy: The Law and Clinical Practice in Northern Ireland

1. Current Law on the Termination of Pregnancy

- 1.1 In Northern Ireland, the law relating to the termination of pregnancy is contained in sections 58 and 59 of the Offences Against the Person Act 1861, and in section 25 of the Criminal Justice Act (Northern Ireland) 1945 as those provisions have been interpreted to date by the courts. The legislation has been interpreted and explained by the Northern Ireland Courts in a series of cases decided in the High Court in the 1990s and, more recently, in a decision of the Court of Appeal in 2004. Similar legislation applied in England, Wales and Scotland before 1967 and was interpreted in the leading English case of R-v- Bourne (1939). The Bourne decision, although an English case, remains highly relevant to Northern Ireland, and has been consistently applied in Northern Ireland cases. Further detail and relevant extracts from the law relating to abortion in Northern Ireland are provided at Annex A.
- 1.2 The law relating to termination of pregnancy in Northern Ireland is different from that in England, Wales and Scotland. The Abortion Act 1967, as amended by the Human Fertilisation and Embryology Act 1990, does not extend to Northern Ireland and the grounds on which abortion may be carried out here are more restrictive than those in England, Wales and Scotland.

Northern Ireland Legal principles

- 1.3 The law governing the termination of pregnancy in Northern Ireland at present and in the cases where that legislation has been interpreted by the court can be summarised in the following principles:

- (i) operations in Northern Ireland for the termination of pregnancies are unlawful unless performed in good faith only for the purpose of preserving the life of the woman;
- (ii) the 'life' of the woman in this context has been interpreted by the courts as including her physical and mental health;
- (iii) a termination will therefore be lawful where the continuance of the pregnancy threatens the life of the woman, or would adversely affect her physical or mental health. The adverse effect on her physical or mental health must be a 'real and serious' one, and must also be 'permanent or long term'. In most cases the risk of the adverse effect occurring would need to be more likely than not. However, in certain circumstances the possibility of an adverse effect may be sufficient if, for example, the imminent death of the woman was the potential adverse effect.
- (iv) it will always be a question of fact and degree whether the perceived effect of non-termination is sufficiently grave to warrant terminating the pregnancy in a particular case.

1.4 In summary, it is lawful to perform an operation in Northern Ireland for the termination of a pregnancy, where:

- it is necessary to preserve the life of the woman, or
- there is a risk of real and serious adverse effect on her physical or mental health, which is either long term or permanent.

In any other circumstance it would be unlawful to perform such an operation.

- 1.5 Fetal abnormality is not recognised as a ground, in itself, for termination of pregnancy in Northern Ireland. It will only be lawful to terminate a pregnancy in the case of actual or possible fetal abnormality if the continuance of the pregnancy threatens the life of the woman, or would adversely affect her physical or mental health. As in other cases, the adverse effect on the woman's physical or mental health must be a real and serious one, and must also be permanent or long term.
- 1.6 In keeping with the law in Northern Ireland, it will always be for the medical practitioner responsible for the care of the woman to decide, as a matter of professional clinical judgment, whether the perceived effect of non-termination is sufficiently grave to warrant terminating the pregnancy. As with any exercise of clinical judgment, there will be occasions where this will be a difficult decision. Each case requires careful and sensitive assessment within the law as outlined in this guidance. Where termination of pregnancy is advised, the standard procedures for obtaining consent should be adhered to. (See para 5.2)
- 1.7 Termination of pregnancy beyond the time at which a child is 'capable of being born alive' is governed by the Criminal Justice Act (NI) 1945, which provides a statutory defence against the offence of child destruction where the act which caused the death of the child was done "*in good faith only for the purpose of preserving the life of the mother*". The principles set out in paragraph 1.3 apply in such a case. This follows from the *Bourne* decision and its application to the Northern Ireland legislation. Section 25(2) of the Act states that a fetus with a gestational age of 28 weeks is prima facie capable of being born alive. Whether a child is 'capable of being born alive' would be a matter of evidence in the event of a prosecution in Northern Ireland.
- 1.8 It is important for practitioners to appreciate that anyone who unlawfully performs a termination of pregnancy is liable to criminal prosecution with a maximum penalty of life imprisonment. A person who is a

secondary party to the commission of such an offence is liable on conviction to the same penalty. For this reason (unless in circumstances of an emergency) an assessment by two doctors (although not itself a legal requirement) is recommended. (See section 3)

2 Purpose of Guidance

- 2.1 The purpose of this guidance is to explain the existing law relating to the termination of pregnancy in Northern Ireland and how it relates to good clinical practice. It also provides guidance on the giving of informed consent and the provision of aftercare services.
- 2.2 It is important to emphasise that this guidance cannot, and does not make any change to the law of Northern Ireland. In the event of any conflict between this guidance and decisions of the courts, the latter will always prevail.
- 2.3 Within the scope of this Guidance and the law in Northern Ireland, each Health & Social Care Trust must ensure that its patients have access to termination of pregnancy services.

3 Clinical Assessment

- 3.1 Although not required by law in Northern Ireland two doctors, where practicable, who share prior knowledge of the woman and her clinical circumstances, should undertake the clinical assessment. However, in exceptional circumstances, such as an emergency, it may be sufficient for a single doctor to assess whether a termination of pregnancy is indicated. All clinical assessments should be completed in a timely manner and without undue delay and reasons for termination must be clearly recorded in the woman's notes. See Section 5 for guidance.
- 3.2 In circumstances where the pregnancy is likely to cause an adverse effect on the woman's mental health that is real and serious, and long term or permanent, those medical practitioners who are competent in making a clinical assessment in these situations will be best placed to determine the long term likely impact on the woman's mental health. It is rare for pregnancy to cause an adverse effect on mental health which is real and serious, long-term or permanent. To make this determination will require particular competence and experience. A psychiatrist should be involved where there is a current history of severe mental illness or previous history of severe mental illness or a known history of severe learning disability. This might include current or past psychotic illness, severe affective disorder or other severe mental disorders.
- 3.3 There may be situations when the mental health of a woman with no prior history of mental illness needs to be assessed. For those under 18 a Child and Adolescent Psychiatrist is appropriate. For those with a learning disability or where there is any doubt of mental competence a Consultant Psychiatrist specialising in Learning Disability is appropriate.
- 3.4 For women aged 18 years or over, assessment would most appropriately be carried out by a Consultant General Adult Psychiatrist.

A GP or Consultant Obstetrician, who has prior knowledge of the woman and her clinical circumstances, and who is both experienced and competent in making a mental health assessment in these situations would also be appropriate to carry out the assessment.

4 Conscientious Objection

This section has been temporarily withdrawn and will be reissued as soon as possible.

5 Good practice issues

- 5.1 All healthcare professionals, especially those working in maternity and gynaecology units, should be familiar with the legal framework relating to termination of pregnancy in Northern Ireland and be aware of when termination of pregnancy can legally be provided. They must also comply with the guidance from their respective regulatory body.

Consent

- 5.2 It is a general legal and ethical principle that valid consent must be obtained before commencing an examination, starting treatment or physical investigation, or providing personal care. This principle reflects the right of individuals to determine what happens to their own bodies, and is a fundamental part of good practice. A health professional who does not respect this may be liable both to legal action by the person and action by their regulatory body. See GMC guidance on *Consent: patients and doctors making decisions together* (June 2008). Employing bodies may also be liable for the actions of their staff. While there is no statute here setting out the general principles of consent, in common law, touching an individual without valid consent constitutes the civil wrong and the criminal offence of battery. Further, if health or social care professionals fail to obtain consent and the individual subsequently suffers harm as a result, this may be a factor in a claim for damages against the health or social care professionals and staff involved. Poor handling of the consent process may also result in complaints from individuals through the HPSS complaints procedure or to regulatory bodies.

- 5.3 With consent to termination of pregnancy, as with consent for other medical procedures, there are certain criteria which must be met in order for the consent to be valid. The woman must have sufficient competence to understand the procedure and its alternatives in broad terms and to make a decision. It is also important that consent must be

voluntary and the decision must be made on the basis of sufficient, accurate information. In those cases, where a termination is advised and taking account of the urgency of the procedure, where possible, the woman should be afforded the time to consider the decision to have a termination.

- 5.4 When a minor meets the grounds to have a termination within Northern Ireland the requirements relating to consent are the same as for any other medical procedure. The GMC publication *0-18 years – Guidance for All Doctors* gives guidance on assessing whether a minor is competent to provide consent.
- 5.5 The Department has produced *A Reference Guide to Consent for Examination, Treatment or Care* (March 2003). It provides guidance on the law relating to consent. This document is publicly available on the DHSSPS website - www.dhsspsni.gov.uk/. All Health and Social Care staff are strongly advised to read this guidance before carrying out any termination procedure. Particular attention is drawn to the chapters on adults without capacity ('incapable adults') and on children and young people. These chapters also explain the circumstances in which a referral should be made to the court for a ruling before a medical procedure or treatment is undertaken.

Child Protection

- 5.6 It is a criminal offence to fail to report to the police any sexual offence against a child under the age of 13 without reasonable excuse¹. Where a young person under the age of consent presents for a termination, staff should be aware of and comply with the reporting requirements relating to minors as set out in the relevant child protection guidance. The law relating to sexual offences is found in the Sexual Offences (Northern Ireland) Order 2008; it is complex so, Health Care

¹ Section 5 Criminal Law Act (NI) 1967.

Professionals should always ensure that they continue to adhere to the current, relevant Area Child Protection Committee guidance and Departmental guidance about protecting sexually active children from abuse.

Counselling

This section has been temporarily withdrawn and will be reissued as soon as possible.

Aftercare

5.12 Aftercare services should be available to any woman who presents with symptoms or complications following a termination of pregnancy, regardless of where it was carried out, so that she has access to appropriate treatment where required.

Confidentiality

5.13 Patients have a right to expect that health professionals will not disclose any personal health information to a third party without consent. Women seeking termination of pregnancy are likely to be particularly concerned about the confidentiality of this information and staff should be sensitive to this.

5.14 Health professionals should refer to guidance on confidentiality available from their regulatory body including the GMC's *Good Medical Practice* (Nov 2006). The NMC also provides guidance on confidentiality in *The Code: standards of conduct performance and ethics*.

Recording of clinical decisions

- 5.15 There should be consistency in the recording of clinical decisions. The record should show a full and clear rationale behind the decision to carry out a termination including any consultation with other medical professionals. The record should show that the decision is supported by appropriate information about the options available and implications of continuing with the pregnancy and that the woman has understood and given her informed consent to the termination.

6 Service arrangements

- 6.1 Information should be available for both women and healthcare professionals on the choices available within the service and on routes of access to the service. Relevant Health and Social Care bodies should ensure that there are clear referral and care pathways in place.
- 6.2 Access to services should be ensured for women with special needs as appropriate. For example, special arrangements should be made for non-English-speaking women and those with speech or hearing impairment, physical or learning disability.
- 6.3 Any woman considering induced termination of pregnancy should have timely access to clinical assessment.
- 6.4 Appropriate information and support should be available for those who consider but do not proceed to termination of pregnancy.
- 6.5 The timeframe between the decision being taken and the termination of pregnancy being carried out will be dictated by clinical needs.
- 6.6 Where clinical circumstances permit the women should be afforded sufficient time to reflect on the treatment choices available.
- 6.7 Service arrangements should be such that:
 - Women admitted for termination of pregnancy should be cared for with great sensitivity in the most appropriate ward/location.
 - Women having second-trimester terminations by medical means should be cared for by appropriately experienced staff. Ideally, they should have the privacy of a single room.
- 6.8 Aftercare services should be available to any woman who presents with symptoms or complications following a termination of pregnancy. (See section 5, para 5.12)
- 6.9 Clinical management guidance is available at: www.rcog.org.uk.

However, where a legal issue arises, the guidance in this document should be followed.

7 Providing Information to Women

- 7.1 Any woman seeking a termination who does not meet the criteria in full in Northern Ireland should be treated sensitively and in a non-judgmental way. The GMC's Good Medical Practice (Nov 2006) paragraph 7 states:

'The investigations or treatment you provide or arrange must be based on the assessment you and the patient make of their needs and priorities, and on your clinical judgement about the likely effectiveness of the treatment options. You must not refuse or delay treatment because you believe that a patient's actions have contributed to their condition. You must treat your patients with respect whatever their life choices and beliefs. You must not unfairly discriminate against them by allowing your personal views to affect adversely your professional relationship with them or the treatment you provide or arrange. You should challenge colleagues if their behaviour does not comply with this guidance.'

- 7.2 Health professionals should explore the woman's concerns and expectations to establish what kind of support she is getting or may expect to receive from her partner, family, social services, work colleagues or school/college authorities. It is important to discuss any difficulties she foresees if she continues with the pregnancy as well as any concrete measures that can be taken to help her particular situation. A woman should be offered information about alternatives to termination such as continuing with the pregnancy, adoption, etc. She should also be offered information on organisations which can offer support and advice.
- 7.3 Verbal advice should be supported by accurate, impartial printed information that the woman can understand and may take away to consider further.

- 7.4 Information for women and professionals should emphasise the duty of confidentiality by which, as for any form of health care, all concerned with the provision of induced termination are bound.
- 7.5 Clinicians involved with termination of pregnancy should be aware of the risk of possible complications and sequelae of termination and should discuss these with the woman so that she can give informed consent, recording discussions on a proforma similar to those used in *Consent of Examination, Care and Treatment*. The GMC's *Consent: Patients and Doctors making decisions together*, paragraphs 28 – 36 also gives guidance on discussing side effects, complications and other risks involved in a procedure.

Annex A

RELEVANT EXTRACTS FROM THE LAW ON ABORTION IN NORTHERN IRELAND

Offences Against the Person Act 1861

1. The grounding statute in Northern Ireland is the Offences Against the Person Act 1861 which contains in sections 58 and 59 the criminal offence of unlawfully procuring a miscarriage:

“58. Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or not be with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable...”

“59. Whosoever shall unlawfully supply or procure any poison or noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to procure the miscarriage of any woman, whether she be or not be with child, shall be guilty of as misdemeanour, and being convicted thereof shall be liable...”

Criminal Justice Act (Northern Ireland) 1945

2. Section 25 of the Criminal Justice Act (Northern Ireland) 1945 also provides:

(1) Subject as hereafter in this sub-section provided, any person who, with intent to destroy the life of a child then capable of being born alive,

by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to life imprisonment:

Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.

(2)For the purposes of this and the next succeeding section, evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be prima facie proof that she was at that time pregnant of a child then capable of being born alive.

Case Law

In each case the court came to its decision after detailed consideration of medical reports by consultant psychiatrists and obstetricians.

The Bourne case 1939

3. The Bourne case, *R v Bourne* [1939] KB 687, centred on an obstetrician who was charged with having procured the miscarriage of a fourteen-year old girl contrary to section 58 of the 1861 Act. The girl was pregnant as the result of a rape. The obstetrician had attested that, having made an examination of the girl, he had concluded that the continuance of the pregnancy would severely affect her mental health.
4. In his charge to the jury, Mr Justice Macnaghten referred to section 1 (1) of the Infant Life (Preservation) Act, 1929 and pointed out that the proviso (that a person shall not be guilty of an offence if he acted in

good faith to preserve the mother's life) did not appear in section 58. However, he went on to say:

"...but the words of that section (i.e. section 58 of the 1861 Act) are that any person who "unlawfully" uses an instrument with intent to procure miscarriage shall be guilty of felony. In my opinion the word "unlawfully" is not, in that section, a meaningless word. I think it imports the meaning expressed by the proviso in section 1 sub-section 1, of the Infant Life (Preservation) Act, 1929, and that section 58 of the Offences against the Person Act, 1861, must be read as if the words making it an offence to use an instrument with intent to procure a miscarriage were qualified by a similar proviso."

5. What this means is that a person who procures an abortion in good faith for the purpose of preserving the life of the woman shall not be guilty of an offence.
6. In terms of what is meant by "preserving the life of the mother", Mr Justice Macnaghten said this:

"...those words ought to be construed in a reasonable sense, and, if the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who, under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother."

Cases in the Courts in Northern Ireland since 1993

In each case the court came to its decision after detailed consideration of medical reports by consultant psychiatrists and obstetricians.

7. In 1993, the Northern Ireland High Court heard the first of a series of cases which began to circumscribe the nature of lawful terminations. All of the cases involved individuals who were unable to consent for themselves by reason of diminished mental competence or age.
8. The 1993 case of *Re K* concerned a fourteen year old minor who was a ward of court. The Northern Health and Social Services Board sought an order permitting a termination of the pregnancy on the basis of the minor's statements that she would commit suicide if the pregnancy was not terminated. Having heard medical evidence that "...to allow the pregnancy to continue to full term would result in her being a physical and mental wreck", the judge found that a termination in such circumstances would be lawful.
9. In the 1994 case of *Re A.M.N.H.*, the pregnant woman was severely mentally handicapped and a ward of court. There was medical evidence that the continuation of the pregnancy would adversely affect the woman's mental health. The judge held that abortion is lawful where the continuation of the pregnancy would adversely affect the mental or physical health of the woman. However, he said that the adverse effects must be real and serious. He found in the case that the termination of the woman's pregnancy would be lawful.
10. The 1995 case of *Re S.J.B.* involved a seventeen-year-old severely handicapped girl who was made a ward of court. On the basis of medical evidence presented to the court, the judge held that a termination of the pregnancy would be lawful.
11. The case of *Re C.H.*, also decided in 1995, concerned a sixteen-year-old girl who was a ward of court. She stated that she wished to have her pregnancy terminated and threatened to commit suicide if she was forced to continue with her pregnancy. On the basis of medical

evidence, the judge held that it would be lawful for the pregnancy to be terminated.

12. In the case of *R v MacDonald* in 1999, in a decision during a criminal trial, the Crown Court considered the meaning of 'capable of being born alive' in s.25 of the Criminal Justice Act (NI) 1945. It ruled that it meant the foetus has a real chance of being born and existing as a live child, breathing through its own lungs, whether unaided or with the assistance of a ventilator and whether for a short time or a longer period.
13. In 2004 the Northern Ireland Court of Appeal, on a judicial review application brought by the *Family Planning Association for Northern Ireland*, considered the law relating to termination of pregnancy in Northern Ireland and ordered that the Department should issue legal guidance on the termination of pregnancy.