

Termination of Pregnancy (Medical Defences) Act 1995: Feasibility of an Amendment Bill during the 2017/18 legislative session

1. Introduction

The current legislation on termination of pregnancy was enacted in 1995. There was an attempt at review (undertaken by a DHSC Termination of Pregnancy Policy Sub-committee) in 2005 but this was far from comprehensive, did not deliver any choate proposals and did not progress, as far as can be judged from the available documentation.¹

The Isle of Man legislation is now over 20 years old. Considering the legal position elsewhere in the British Isles, the Isle of Man legislation is more restrictive than some jurisdictions but less restrictive than others. Termination of pregnancy is an emotive issue which elicits strong responses both for and against. Views of the public (and, indeed professionals) fall along a spectrum from (to simplify) 'a woman's right to choose' through to 'the right to life of the unborn'. There is no 'right' or 'wrong' position that can be determined solely on objective evidence of, for example, physical or mental harms resulting from termination versus continuation of pregnancy.

This paper summarises: the current position and that of other jurisdictions in the British Isles and Gibraltar; the evidence for clinical impact of termination of pregnancy on physical and mental health; the position of groups with a particular interest in abortion on the Isle of Man; the current review of the legal position in Ireland and the legal challenge to that in Northern Ireland; and indicators of demand for termination of pregnancy from Isle of Man women.

The Department is asked to take a view on whether, in the light of this paper, it feels able to make a policy recommendation to the Council of Ministers with a view to progressing an Amendment Bill or whether it considers that further work is required, including, for example, some form of public engagement/consultation.

2. Overview of Isle of Man Legislation and Legislation elsewhere in the British Isles and Gibraltar

2.1. Termination of Pregnancy (Medical Defences) Act 1995, Isle of Man

The 1995 legislation provides a defence against prosecution under the Criminal Code 1872 for medical practitioners who terminate pregnancies in the circumstances set out in the Act. In effect, the 1995 Act, makes termination of pregnancy legal where the

¹ Minutes of the meeting of the Termination of Pregnancy Policy Sub-Committee, 23 May, 2005.

surgeon who will terminate the pregnancy and an independent medical practitioner (who must be a consultant psychiatrist where there is a risk to mental health) agree that:

- Continuance of the pregnancy involves substantial risk to the woman's life (greater than would termination);
- The termination is necessary to prevent grave permanent injury to the physical or mental health of the woman;
- The termination is necessary to preserve the life of the woman;

Terminations under these grounds can be carried out without time limit. However, if the pregnancy has exceeded 24 weeks, the surgeon is required to undertake the procedure in the manner most likely to preserve the life of the child.

Termination is also legal where the medical practitioners consider there is substantial risk that the child will either not survive birth, will die shortly afterwards or will be seriously handicapped. There is no legal definition of substantial risk or serious handicap and this has not been tested in court (here or elsewhere). Termination on these grounds must be undertaken before 24 completed weeks of pregnancy.

Pregnancies resulting from rape, incest or sexual assault may also be terminated within the first 12 weeks. In addition to assessment by two medical practitioners, the woman must also provide an affidavit attesting to the cause of the pregnancy and must have made a complaint to the police. The Isle of Man is unique (among those jurisdictions in the British Isles and Gibraltar where termination is legal) in making pregnancy resulting from sexual crime a separate category requiring additional action on the part of the woman to substantiate.

Terminations on social grounds are not allowable under the 1995 Act. However, it is not illegal for women to travel abroad for terminations in jurisdictions where it would be legal, or for information about the availability of terminations abroad to be provided to women on the Isle of Man.

2.2. Comparison of the 1995 Act with legislation elsewhere in the British Isles and Gibraltar

Across the British Isles and Gibraltar: Ireland; Northern Ireland; England, Scotland and Wales; Guernsey; Jersey; and Gibraltar have their own legislation for termination of pregnancy.

Induced abortion is currently illegal in Ireland and Gibraltar (unless necessary to preserve the life of the mother). In Ireland, the right to life of the unborn, with due regard to the right to life of the mother, is enshrined in the Constitution (8th Amendment, 1983). In Gibraltar, termination of pregnancy is illegal under the Crimes Act 2011.

Northern Ireland still follows the Offences Against the Person Act 1861 in respect of procuring abortion. However, as a result of a subsequent legal judgement (R v. Bourne

[1939] KB 687, per Macnaghten J at 694) termination is legal if the doctor considers that continuation of the pregnancy will make the woman 'a physical or mental wreck'.

In England, Scotland and Wales, termination is legal, up to 24 weeks, on the grounds of risk to the physical or mental health of the woman or any existing children – effectively enabling termination on social grounds. In addition, termination is permitted to prevent grave physical or mental injury to the woman, or where there is risk to life of the mother or substantial risk of serious handicap in the child (physical or mental). There is no time limit to termination on these grounds. There is no specific provision for pregnancy resulting from sexual crime although this would be covered under the other provisions. (Abortion Act 1967)

Jersey permits termination up to 12 weeks where the pregnancy is causing distress to the woman and she has been counselled as specified in the Termination of Pregnancy Law 1997. Termination is also legal to save the life of the woman (at any point in pregnancy); or to prevent grave or permanent injury to her physical or mental health or where there is risk of serious handicap in the child (up to 24 weeks of pregnancy). (Termination of Pregnancy (Jersey) Law 1997)

Guernsey law (The Abortion (Guernsey) Law 1997) provides for termination up to 12 weeks where continuance of the pregnancy would involve risk to the physical or mental health of the woman or any existing children of her family. Termination is also legal without time limit to preserve the life of the mother or to prevent grave permanent injury to the physical or mental health of the woman. Termination for serious handicap is legal up to 24 weeks.

Comparing the current position in the Isle of Man with the other jurisdictions, the Isle of Man has a less restrictive legal framework than Ireland, Northern Ireland or Gibraltar but is more restrictive than Jersey, Guernsey or England, Scotland and Wales (where termination on social grounds is permitted). The position of the different jurisdictions is summarised in table 1.

Table 1. Legal basis for termination of pregnancy across the British Isles and Gibraltar – summary table.

Jurisdiction (Law)	Grounds for termination				
	Immediate need to preserve life of mother	Prevention of grave permanent injury to physical or mental health of woman (Time limit)	Risk to physical or mental health of the woman or existing children greater than from continuance of pregnancy (social grounds) (Time limit)	Significant risk of serious handicap in child	Pregnancy resulting from sexual crimes
Isle of Man (Termination of Pregnancy (Medical Defences) Act 1995)	Yes*	Yes*	No	Yes (24 weeks)	Yes (12 weeks)
England, Scotland, Wales (Abortion Act 1967)	Yes	Yes (no time limit)	Yes (24 weeks)	Yes (no time limit)	Would be covered by other grounds
Jersey (Termination of Pregnancy (Jersey) Law 1997)	Yes	Yes (no time limit)	Yes (distress –12 weeks)	Yes (24 weeks)	"
Guernsey (The Abortion (Guernsey) Law, 1997)	Yes	Yes (no time limit)	Yes (12 weeks)	Yes (24 weeks)	"
Northern Ireland (Offences Against the Person Act 1861)	Yes	Yes – as a result R v. Bourne [1939]	No	No	No
Gibraltar (Crimes Act 2011)	Yes	No	No	No	No
Ireland (Constitution 8 th Amendment, 1983)	Yes	No	No	No	No

*Grounds without time limit but if carried out after 24 weeks, surgeon must take appropriate actions to preserve life of child

3. Evidence of physical or mental harms resulting from termination of pregnancy

There is a lack of high quality, prospective studies to enable robust conclusions about the impacts of termination of pregnancy on long term physical (including reproductive) or mental health.

A systematic review by the Academy of Medical Royal Colleges concluded that, subject to the limitations of the available evidence:

- The rates of mental health problems for women with an unwanted pregnancy were the same whether they had an abortion or gave birth.
- An unwanted pregnancy was associated with an increased risk of mental health problems.
- The most reliable predictor of post-abortion mental health problems was having a history of mental health problems before the abortion.
- The factors associated with increased rates of mental health problems for women in the general population following birth and following abortion were similar.
- There were some additional factors associated with an increased risk of mental health problems specifically related to abortion, such as pressure from a partner to have an abortion and negative attitudes towards abortions in general and towards a woman's personal experience of the abortion.²

A retrospective cohort study of reproductive outcomes (in subsequent pregnancies) in women who had previously undergone a termination of pregnancy between 1981 and 2007 was carried out in Scotland.³ The study compared the outcomes in the subsequent pregnancy for 120,033 women who had had a termination of pregnancy; 457,477 women whose previous pregnancy resulted in a live birth; and 47,355 women who had had a miscarriage. The study found that risk of preterm birth after termination is lower than that after miscarriage but higher than after a previous live birth. This risk is not increased further in women who have had two or more terminations. Surgical but not medical termination may be associated with increased risk of spontaneous preterm birth compared to first pregnancies.

A literature review did not find evidence of any effect on subsequent fertility or risk of ectopic pregnancy unless the termination was complicated by infection.⁴

The evidence of harm from termination of pregnancy compared to continuance of an unwanted pregnancy is, therefore, inadequate to drive clinical evidence based legislation.

4. Calls for review of the current legislation

Two interest groups on the Isle of Man have recently been pressing for change to the Island's Termination of Pregnancy laws.

The Campaign for Abortion Law Modernisation (CALM) states that it is aiming to achieve parity with the UK's 1967 Abortion Act by achieving easier access to abortions for Manx

² Induced Abortion and Mental Health, A systematic review of the mental health outcomes of induced abortion, including their prevalence and associated factors, Academy of Medical Royal Colleges and the National Collaborating Centre for Mental Health, London, 2011.

³ Bhattacharya S, Lowit A, Bhattacharya S, et al, Reproductive outcomes following induced abortion: a national register-based cohort study in Scotland, *BMJ Open* 2012;2:e000911

⁴ Atrash HK, Hoque CJ, The Effect of Pregnancy Termination on Future Reproduction, *Ballieres Clinical Obstetrics and Gynaecology*, 1990 (2): 3910405

women. (<https://www.theguardian.com/uk-news/2016/jun/20/isle-of-man-campaign-abortion-law-modernisation>)

The Humanity and Equality in Abortion Reform (HEAR) campaign seek reform of the Island's abortion laws to reflect the principles of humanity and equality by increasing the right-to-life protections for unborn children and providing compassionate support for their parents.

(<http://hearcampaign.im/>)

A third group, LIFE, has a long-established pro-life stance. They state that they prefer to see solutions to the crisis some pregnant women face, by providing compassionate care and support instead of sending them the message that their only option is the termination of their unborn child. (<http://lifecharity.org.uk/wp-content/uploads/2014/07/LIFE-Isle-of-Man-Press-Release-on-Abortion-Law.pdf>)

5. Reviews/Challenges to Legislation Elsewhere

5.1 Ireland

The Irish Government has convened a Citizens' Assembly as part of the Programme for Government. The Assembly was established in July 2016 with a remit to report to the Oireachtas on five topics within a year. The first of these topics is the Eighth Amendment to the Constitution (under which termination of pregnancy is currently illegal). The Assembly consists of 99 persons randomly selected to be representative of Irish society plus a chairperson (Justice Mary Laffoy). The assembly's report on the Eighth Amendment will be submitted to a committee of both Houses of the Oireachtas which will bring its conclusions back to the Houses for debate.⁵

There is evidence that societal attitudes towards termination of pregnancy have changed in Ireland over recent years. This is reflected in the decision to make it the priority topic for consideration by the Citizens' Assembly. A recent *Irish Times*/Ipsos MRBI poll indicated support for change from the current position. Fifty five percent of those polled favoured repeal of the Eighth Amendment to allow for access to abortion in cases of rape and fatal foetal abnormality; 19 percent favoured a move to the position of the Abortion Law 1967; 18 per cent favoured maintaining the current position, while 8 per cent had no opinion.⁶

5.2 Northern Ireland

The Northern Ireland Human Rights Commission has asked the United Kingdom Court of Appeal to declare that the current law, relating to access to termination of pregnancy services for women in cases of serious malformation of the foetus or pregnancy as a result of rape or incest, is incompatible with human rights law and results in a breach of the rights of women and girls seeking a termination of pregnancy in these circumstances. This follows a Declaration of Incompatibility under the Human Rights Act from the High Court in Belfast (16 December 2015). The High Court found that prohibiting termination of pregnancy in cases of fatal foetal abnormalities and sexual crime was a violation of women's rights to

⁵ Taoiseach's speech to Seanad Éireann, 29 September 2016 [available on line at: www.Taoiseach.gov.ie , accessed 16 December 2016]

⁶ 'Irish Times' poll: Majority want repeal of Eighth Amendment, *Irish Times*, 7 October 2016

personal autonomy under Article 8 of the European Convention on Human Rights.⁷ This judgement is being appealed by the Northern Ireland Department of Justice and Attorney General.

The Northern Ireland Human Rights Commission is not seeking to introduce the Abortion Act 1967 in Northern Ireland.⁸

The Court of Appeal heard the case in June 2016 and judgement is still awaited.

5.3 United Nations Perspective

In February 2016, a woman, who had bought drugs on the internet to induce a miscarriage, was given a suspended prison sentence by the Northern Ireland courts. It was reported that she had been unable to raise funds to travel to England for a termination of pregnancy. This case raised issues beyond those already being progressed by the NIHRC (i.e. the case concerned grounds for abortion beyond serious foetal abnormality or following rape). The case was followed by a review of termination of pregnancy legislation in the UK by two United Nations' committees. On 12 July 2016, the UN Committee on the Rights of the Child published its observations on the UK. The Committee recommended that abortion be decriminalised in all circumstances and that legislation in Northern Ireland be reviewed to ensure girls' access to safe abortion and post-abortion care services.⁹

On 14 July 2016, the UN Committee on Economic, Social and Cultural Rights published its concluding observations on the UK. The Committee recorded its concern that abortion was still criminalised in all circumstances in Northern Ireland, save for where the life of the mother was in danger. The Committee noted that this could lead to unsafe abortions and discriminated against women from low income families who could not afford to travel to access termination services. The Committee recommended that Northern Ireland legislation on abortion be amended to make it compatible with women's rights to health, life and dignity.¹⁰

Note that the findings of the two UN committees are recommendations only. They do not have formal legal status.

⁷ Justice Horner ruled on the 30 November 2015 that the law in NI breached the European Convention on Human Rights, Article 8 the right to private life and a women's right to personal autonomy, by the absence of exceptions to the general prohibition on abortions in the cases of: (a) fatal foetal abnormalities at any time; and (b) pregnancies which are a consequence of sexual crime up to the date when the foetus becomes capable of existing independently of the mother. Quoted in The 2016 Annual Statement, Northern Ireland Human Rights Commission, pp.79-80.

⁸ Fact Sheet on Human Rights Commission's Termination of Pregnancy Case [available on line at: www.nihrc.org/news/detail/appeal-date-set-for-termination-of-pregnancy-case]

⁹ UN Committee on the Rights of the Child, concluding observations of the fifth periodic report on the United Kingdom of Great Britain and Ireland, CRC/C/GBR/CO/5, UN CRC, 12 July 2016.

¹⁰ UN Committee on Economic, Social and Cultural Rights, concluding observations of the sixth periodic report on the United Kingdom of Great Britain and Ireland, EC.12/GBR/CO/6, UN Economic and Social Council, 14 July 2016.

6. Demand for Termination of Pregnancy on the Isle of Man

Fewer than 10 terminations of pregnancy are carried out on island per year under the 1995 Act. Precise numbers and breakdown by ground for the procedure are not published in order to protect confidentiality.¹¹

The Post Office has recently notified DHSC of the interception of a small number of shipments of drugs to induce medical abortion sent to individuals in the Isle of Man from online pharmaceutical suppliers in Europe or India. Women taking these drugs with intent to procure a miscarriage could be guilty of a criminal offence under Section 71(i) of the Criminal Code 1872.

Quite apart from the legal considerations, use of drugs in this way raises safety concerns. In September 2016, The British Pregnancy Advisory Service launched a telephone helpline to provide reassurance and advice to women who have taken pills in countries where abortion is 'severely restricted'. The service is being advertised in Ireland, Northern Ireland and the Isle of Man.¹²

The Office of National Statistics publishes data on terminations of pregnancy carried out in England and Wales. The data includes information on women having a termination who gave a resident address outside England and Wales. In 2015, 105 women giving an Isle of Man address had a termination in England or Wales. This compares to 3,451 women from Ireland, 833 women from Northern Ireland, 174 women from Scotland, 9 women from Jersey and 8 women from Guernsey.¹³ It is of note that a small number of women from Scotland, Jersey and Guernsey (where termination on social grounds is legal and, in the case of Scotland, on exactly the same legal basis as in England and Wales) still choose to travel to England or Wales for the procedure. There may be a number of reasons for this, although a desire for anonymity, by seeking treatment away from home, may be a major factor.¹⁴

7. Conclusions

Under the 1995 legislation, termination is legal on the Isle of Man to preserve the life of the woman, to prevent grave or permanent injury to her physical or mental health, where there is substantial risk of serious handicap in the child or when the pregnancy results from a

¹¹ Terminations carried out on island under the 1995 legislation are notified to the Director of Public Health using a standard proforma. Suppression of small number data is a standard data protection convention in order to protect anonymity.

¹² The British Pregnancy Advisory Service is a UK registered charity which believes that contraception and legal abortion are an essential part of health care and should be freely available to all women through a publicly funded health service. Information on BPAS, including the helpline for Manx and Irish women can be found online at: <https://www.bpas.org/about-our-charity/press-office/press-releases/helpline-launched-for-illegal-abortion-pills/>

¹³ Abortion Statistics: England and Wales 2015, Office of National Statistics, Table 12 a: Legal abortions, non-residents of England and Wales by country of residence, 2015 [available online at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/570040/Updated_Abortion_Statistics_2015.pdf

¹⁴ Scotland publishes statistics on abortions carried out in Scotland but does not provide any breakdown of procedures on non-residents. We do not know whether Isle of Man women are travelling to Scotland for terminations.

sexual crime. Where termination is to preserve the life of the woman or prevent permanent injury there is no time limit but if carried out after 24 weeks the surgeon must take steps to preserve the life of the child. Termination resulting from a sex crime requires the woman to have made an affidavit and a police complaint in addition to satisfying the medical assessments. Termination for social reasons is not permissible under the legislation.

There is inadequate evidence of physical (including reproductive) or mental harms resulting from termination compared to continuance of an unwanted pregnancy to make clinical evidence the major driver of legislation.

Compared to legislation elsewhere in the British Isles and Gibraltar, the Isle of Man is less restrictive than Ireland, Northern Ireland and Gibraltar and more restrictive than Jersey, Guernsey, England, Scotland and Wales. There is, therefore, no single correct legal framework for termination of pregnancy. From a human rights perspective, lack of access to termination of pregnancy in cases of rape, incest or serious foetal abnormality is the main ground for challenge under human rights law. Access to termination on these grounds is already permitted under current Isle of Man legislation, although the requirement for victims of sexual crime to provide an affidavit and file a police complaint could be said to constitute an additional burden at a time of stress. The current time limits for termination on grounds of serious abnormality and sexual crime vary between jurisdictions and could be reviewed in the light of the Northern Ireland Court judgement (no time limit for fatal foetal abnormality and up to time at which foetus is capable of life independent of its mother in pregnancies resulting from sexual crime).

The United Nations Committee on the Rights of the Child recommends that abortion be decriminalised in all circumstances and that girls should have access to safe abortion care services. The Committee on Economic, Social and Cultural Rights raises concerns that Northern Ireland abortion legislation could lead to unsafe abortions and discriminates against women from low income families who cannot afford to travel to access termination services. Whilst UN recommendations have no legal status, they do raise issues regarding potentially unsafe abortion practices (e.g. purchasing drugs on the internet) and discrimination against those who cannot afford to travel to the UK for termination of pregnancy. These issues may have resonance for the Isle of Man.

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