



Northern Ireland  
Assembly

## Research and Information Service Bill Paper

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5<sup>th</sup> March 2021

**RaISe**

# Severe Fetal Impairment Abortion (Amendment) Bill

**NIAR 54-21**

This paper aims to support MLAs' consideration of the Severe Fetal Impairment Abortion (Amendment) Bill. It discusses relevant legislative and policy background in this area, before considering the content of the Bill as introduced; the Assembly's consideration of the Bill so far; and key issues arising from the Bill as introduced.

**Paper No. 16/21**

**5<sup>th</sup> March 2021**

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## Key Points

- On 16<sup>th</sup> February 2021, the Severe Fetal Impairment Abortion (Amendment) Bill ('the SFIAA Bill') was introduced to the Assembly. The SFIAA Bill seeks to amend current abortion law in Northern Ireland. In particular, it concerns abortions in cases of 'severe fetal impairment' in Northern Ireland. This paper aims to support consideration of the SFIAA Bill, as introduced.
- 'Severe fetal impairment abortion' is one of multiple terms referred to in this paper. Others include: 'serious fetal abnormality abortion'; 'serious fetal malformation abortion'; and 'Ground E abortion', which is the term used across Great Britain. In substance, each of these terms refer to the same procedure across the UK.
- Abortion law in Northern Ireland is historically based on the Offences Against the Person Act 1861. In recent years, due to a combination of judicial findings, reporting of the UN Committee on the Elimination of Discrimination Against Women and consequent legislative change, lawful grounds for abortion in Northern Ireland have been clarified and significantly expanded. Current grounds for lawful termination are specified in the Abortion Regulations (Northern Ireland) (No. 2) 2020 ('2020 Regulations as amended').
- At present, these Regulations include a protected ground in which a pregnancy termination is lawful in Northern Ireland without time restrictions. This is where two registered medical professionals are of the opinion – formed in good faith – that: there would be a 'substantial risk' if the pregnancy went to term; and, the birth would result in a 'seriously disabled' child. The proposed SFIAA Bill describes 'seriously disabled' child in those circumstances using the term 'severe fetal impairment'.
- There is no current clinical or statutory guidance on how precisely to define 'substantial risk' of pregnancy resulting in the birth of a 'seriously disabled' child. This is also the case for 'Ground E abortion' in Great Britain, which addresses abortions in the same circumstances. In practice, the Royal College of Obstetricians and Gynaecologists state that the determining factor on whether a 'severe fetal impairment abortion' is permissible is the two opinions of registered medical practitioners, as required under the prevailing legislation in both Great Britain and Northern Ireland.
- It is notable that in its 2018 decision 'In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review', the UK Supreme Court addressed several complex human rights issues arising from a pregnancy termination in Northern Ireland. The Court did not find any human rights incompatibilities when there is an absence of lawful abortion in Northern Ireland in cases of severe fetal impairment.

- Also in 2018, a report from the UN Committee on the Elimination of Discrimination Against Women (UN-CEDAW) called for multiple changes to abortion law in Northern Ireland, including the legalisation of severe fetal impairment abortion. That report stated it was for the UK Government to ensure that any such abortions did not perpetuate any disability stereotypes. To this end, it also stated the UK Government should provide sufficient social and financial support for women who carry such pregnancies to term.
- Subsequent to the 2018 judgement and the UN-CEDAW report, the UK Parliament passed the Northern Ireland (Executive Formation etc) Act 2019. Its enactment aimed to ensure the UK's compliance with the UN-CEDAW recommendations via Regulations to be brought forward in Westminster by the Secretary of State for Northern Ireland. Public consultation subsequently followed on what later was enacted in Westminster – i.e. the 2020 Regulations as amended.
- A number of respondents to that consultation argued that allowing such abortions without time limit would perpetuate stereotypes of disability. However, prior to this, the UN Committee on the Rights of Persons with Disabilities reported on the situation in UK. This was at a time when severe fetal impairment (Ground E) abortions were permitted across Great Britain. In that context, the UN Committee found that in the UK, disabled people have the same right to life from birth as non-disabled people, and are not subject to arbitrary deprivation of life. Later, the Committee further recommended abortion law be amended to ensure women's rights to reproductive and sexual autonomy were respected, without legalising abortion on the ground of fetal deficiency.
- It is within this context that the MLA introduced the SFIAA Bill. If enacted as introduced, the legislation would remove the 'substantial risk-seriously disabled' abortion ground specified in the 2020 Regulations as amended, via the insertion of an amendment. The new regulatory provision would prevent termination at any stage of pregnancy on the ground of severe fetal impairment, making it unlawful in Northern Ireland. All other lawful termination grounds specified under the 2020 Regulations as amended would remain.
- If so, Northern Ireland would then no longer be in line with current GB regulations – i.e. Ground E severe fetal impairment abortions, as explained above. In Northern Ireland, a woman or a girl then would face more limited treatment options if facing a pregnancy involving severe fetal impairment. The choice for the woman or girl concerned would be to carry the pregnancy to term or to travel to Great Britain (GB) to secure treatment.
- Since its introduction, the SFIAA Bill has been considered and debated in Assembly plenary, during the Bill's First Stage. In addition, the Assembly's Health Committee has had preliminary discussions about the Bill. In those contexts, a number of issues have arisen, including the Assembly's legislative competence, human rights

considerations arising from the Bill's contents, and timetabling of briefings to be provided by the MLA sponsoring the Bill to the Health Committee.

- Finally, it should be noted that Assembly Standing Order 42(1) requires a minimum of five working days between a Bill's First and Second Stages. However, in the context of a Private Member's Bill (PMB), a soft convention may be applied, allowing one month between those Stages. The convention aims to provide time for the Assembly to familiarise themselves with Bill provisions.

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# 1 Introduction

This Bill Paper aims to support MLAs when considering the Severe Fetal Impairment Abortion (Amendment) Bill (“the SFIAA Bill”), which was introduced in the Assembly on 16th February 2021. The SFIAA Bill seeks to make severe fetal impairment abortion unlawful in Northern Ireland. If enacted as introduced, it would do this by amending the Abortion Regulations (Northern Ireland) (No. 2) 2020 (‘2020 Regulations as amended’).

For context, this paper first sets out definitions and literature frequently used in addressing abortion provision within Northern Ireland, including links to relevant literature (section 2). The paper then details legislative and policy background concerning the SFIAA Bill as introduced, including historical abortion law in Northern Ireland and recent developments in this area (section 3). The content and effect of the Bill as introduced is then detailed, followed by discussion of Assembly procedural considerations (sections 4 and 5).

Key issues arising from the Bill as introduced are then discussed, including interpretations of severe fetal impairment in legislation and medical practice, and human rights considerations arising in the context of abortion in such cases (section 6).

## 2 Definitions and literature

### 2.1 Severe fetal impairment and related terms

The SFIAA Bill as introduced concerns abortion in specified circumstances – specifically, pregnancy termination in cases of ‘severe fetal impairment’. Other terms used in the UK for such circumstances include: ‘serious fetal abnormality abortion’; ‘serious fetal malformation abortion’; and, ‘Ground E abortion’. Each term is used to describe pregnancy termination in a specific set of circumstances that are substantively similar. These terms are found in legislation, policy and clinical guidance across the UK.

Abortion is currently lawful across the UK<sup>1</sup> where two registered medical practitioners form an opinion in good faith that there would be a ‘substantial risk’<sup>2</sup> to carry a pregnancy to term, because it would result in the birth of a ‘seriously disabled’ child<sup>3</sup> or a ‘seriously handicapped’ child.<sup>4</sup>

### 2.2 Relevant literature

There is a significant body of literature on the issue of abortion in the event of severe fetal impairment, and abortion more generally. Hence, the following documents provide a valuable introduction to the relevant literature:

Year	Document
1950	<a href="#">European Convention on Human Rights</a> (in particular Article 3 & Article 8)
2010	<a href="#">Termination of Pregnancy for Fetal Abnormality in England, Scotland and Wales</a> (report of Royal College of Obstetricians and Gynaecologists)
2016	Report of the DoH & DoJ <a href="#">working group on fatal fetal abnormality</a>
2018	<a href="#">The Supreme Court’s decision on NI’s abortion law - what now?</a> (LSE Blog)
2018	<a href="#">Timeline: NIHRC challenge to law on Termination of Pregnancy in Northern Ireland</a>
2018	UN-CEDAW <a href="#">Report on abortion provision in Northern Ireland</a>
2019	<a href="#">Abortion and same-sex marriage in Northern Ireland: Do Westminster votes undermine devolution?</a> (House of Commons Library article)
2019	<a href="#">Northern Ireland (Executive Formation etc.) Act 2019</a> and accompanying <a href="#">explanatory notes</a>
2020	<a href="#">Abortion Regulations (Northern Ireland) (No. 2) 2020</a> and accompanying <a href="#">explanatory memorandum</a>
2021	<a href="#">Fact Sheet on the Human Rights Commission of Northern Ireland’s legal action</a> on the lack of abortion services in Northern Ireland
2021	<a href="#">Abortion in NI: Timeline of key events</a> (BBC News article)
2021	<a href="#">Funded abortion treatment for women from Northern Ireland</a> (British Pregnancy Advisory Service)
2021	<a href="#">Severe Fetal Impairment Abortion (Amendment) Bill</a> as introduced, and accompanying <a href="#">explanatory &amp; financial memorandum</a>

<sup>1</sup> British Medical Association, *The law and ethics of abortion: BMA views* (2020)

<sup>2</sup> *Abortion Act 1967* Art. 1(d) and *The Abortion (Northern Ireland) (No. 2) Regulations 2020* Reg. 7(1)

<sup>3</sup> *The Abortion (Northern Ireland) (No. 2) Regulations 2020* Reg. 7(1)

<sup>4</sup> *Abortion Act 1967* Art. 1(d)

### 3 Background to Bill

This section details: historical abortion law in Northern Ireland; recent developments leading to the passage of the Abortion (Northern Ireland) (No. 2) Regulations 2020 ('2020 Regulations as amended'); and, contemporary delivery of abortion services in Northern Ireland. It is presented as follows:

- 3.1 Historical abortion law in the UK
- 3.2 Department of Health & Department of Justice Working Group on Fatal Fetal Abnormality and the Abortion (Fatal Foetal Abnormality) Bill
- 3.3 UN Committee on the Elimination of Discrimination Against Women report
- 3.4 Legal actions of NI Human Rights Commission & Mrs. Sarah Ewart
- 3.5 The Northern Ireland (Executive Formation, etc.) Act 2019
- 3.6 Abortion Regulations (Northern Ireland) 2020 and subsequent amending legislation
- 3.7 Delivery of abortion services in Northern Ireland

#### 3.1 Historical abortion law in the UK

Abortion law in Northern Ireland is historically based on the Offences Against the Person Act 1861. That legislation applied in England, Wales and Northern Ireland. It made it an offence to intentionally procure a miscarriage, either by self-administering or providing another person with 'any poison or noxious thing' or using 'any instrument or other means whatsoever'.<sup>5</sup>

The further offence of child destruction was created in Northern Ireland by the Criminal Justice Act (Northern Ireland) 1945. That 1945 Act states that any person who intentionally destroys the life of a child capable of being born alive shall be 'guilty of felony . . . and shall be liable on conviction . . . to penal servitude for life'.<sup>6</sup>

In England and Wales, the offence of child destruction was introduced by the Infant Life (Preservation) Act 1929. This 1929 Act, however, also created a defence to terminate a pregnancy 'in good faith for the purpose [. . .] of preserving the life of the mother'.<sup>7</sup>

Access to abortion across GB was expanded by the Abortion Act 1967. The 1967 Act did not de-criminalise abortion. Instead, it created a series of defences for doctors, allowing termination to be performed where two registered medical practitioners are of the opinion that any of several grounds are met.<sup>8</sup>

As the Abortion Act never applied in Northern Ireland, primary law on abortion remained the 1861 Offences Against the Person Act and the 1945 Criminal Justice Act detailed above.

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<sup>5</sup> *Offences against the Person Act 1861* Art. 59

<sup>6</sup> *Criminal Justice Act (Northern Ireland) 1945* Art. 25

<sup>7</sup> *Infant Life (Preservation) Act* Art 1(1)

<sup>8</sup> *Abortion Act 1967*; see also Jane Campbell et al., *RaISe Briefing Note: Current legal framework for the medical termination of pregnancy* (2012) p8

Some abortions were lawfully performed in Northern Ireland. The 1939 Bourne judgment gave protection from prosecution, if a termination was carried out in good faith 'for the purpose only of preserving the life of the mother'.<sup>9</sup> In the judgment, the judge further stated that:

*The Doctor's act is lawful where the continuance of the pregnancy would adversely affect the mental or physical health of the mother... The adverse effect must, however, be a real and serious one and it will always be a fact and degree whether the perceived effect of non-termination is sufficiently grave to warrant terminating the unborn child.*<sup>10</sup>

These grounds were expanded by further case law in 2003, when the courts decreed that abortion was legal in Northern Ireland in the following circumstances:

- *The continuation of the pregnancy threatens the life of the mother or would adversely affect her mental or physical health.*
- *The adverse effect on her mental or physical health must be permanent or long term.*
- *In most cases, risk of the adverse effect occurring would need to be a probability, but the possibility might be regarded as sufficient if the imminent death of the mother was the potential adverse effect.*<sup>11</sup>

Following direction from the courts, in 2004 the Department of Health produced guidance – based on the legislation detailed above – specifying circumstances in which abortion was possible. This stated the following:

*In Northern Ireland it is lawful to perform a termination of pregnancy only if:*

- *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.*

*It is for a medical practitioner to assess, on a case by case basis, using their professional judgement as to whether the individual woman's clinical circumstances meet the grounds for a termination of pregnancy in Northern Ireland.*<sup>12</sup>

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<sup>9</sup> *R v Bourne* (1939) 1 KB 687; see also Jane Campbell et al., *RaISe Briefing Note: Current legal framework for the medical termination of pregnancy* (2012) p3

<sup>10</sup> *R v Bourne* (1939) 1 KB 687

<sup>11</sup> Jane Campbell et al., *RaISe Briefing Note: Current legal framework for the medical termination of pregnancy* (2012) pp3-4

<sup>12</sup> Department of Health, Social Services and Public Safety, *GUIDANCE FOR HEALTH AND SOCIAL CARE PROFESSIONALS ON TERMINATION OF PREGNANCY IN NORTHERN IRELAND* (2016) p5

### 3.2 Department of Health (DoH) & Department of Justice (DoJ) Working Group on Fatal Fetal Abnormality and the Abortion (Fatal Foetal Abnormality) Bill

In 2015, the DoJ recommended changing the law to permit terminations where fatal fetal abnormality has been diagnosed.<sup>13</sup> Following this, in February 2016 the Ministers for Health and Justice agreed to establish an inter-departmental working group on the issue. That group considered only healthcare and law in cases of fatal fetal abnormality, ‘including consideration of the need for legislative change to the law on abortion.’<sup>14</sup>

Health professionals participating in the group’s work indicated: the contemporary situation was ‘professionally untenable’;<sup>15</sup> they were unable to fully meet their duty of care to women in these circumstances;<sup>16</sup> and, existing legal constraints ‘place an unacceptable burden on women’s health and wellbeing’.<sup>17</sup>

The group ultimately recommended that:

*a change is made to abortion law to provide for termination of pregnancy where the abnormality is of such a nature as to be likely to cause death either before birth, during birth or in the early period after birth.*<sup>18</sup>

In the context of the SFIAA Bill as introduced, it is important to note the distinction which health professionals drew between fatal fetal abnormalities and other abnormalities which are severe, but not necessarily fatal:

*[. . .] The group was also informed that there is a different group of abnormalities detected by ultrasound where, antenatally, it is difficult to predict the outcome. In these cases, even with joint discussion by health professionals in fetal medicine, medical genetics and neonatology, it can be difficult to accurately counsel parents and sometimes they are given a prognosis which covers a spectrum from mild to severe disability. In some of these situations, the baby may die at birth or in the early neonatal period, however, the diagnosis antenatally is not sufficiently sound to categorise these fetuses as falling into the fatal fetal abnormality group.*

***It was the unanimous view of all health professionals that such abnormalities were sufficiently distinct as to be viewed as separate to those with a diagnosed fatal fetal abnormality. In those cases where there is uncertainty about the diagnosis of fatal fetal abnormality, the group stressed that there should be no option for a termination of pregnancy under any proposal for legislative change arising from this review*** (emphasis added).<sup>19</sup>

<sup>13</sup> See <https://www.bbc.co.uk/news/uk-northern-ireland-32338793>, retrieved on 23<sup>rd</sup> February 2021

<sup>14</sup> DoH & DoJ Working Group on Fatal Fetal Abnormality, *Healthcare and the law on termination of pregnancy for fatal fetal abnormality: Proposals to the Minister of Health and the Minister of Justice* (2016) p4

<sup>15</sup> As cited immediately above, p5

<sup>16</sup> As cited in footnote 14, p5

<sup>17</sup> As cited in footnote 14, p5

<sup>18</sup> As cited in footnote 14, pp6-7

<sup>19</sup> As cited in footnote 14, pp30-31

The Abortion (Fatal Foetal Abnormality) Bill was subsequently introduced to the Assembly in December 2016. This Bill provided that abortion would not be an offence where two qualified practitioners held the opinion – formed in good faith – that the fetus was likely to die before, during or shortly after birth.<sup>20</sup> Following the collapse of the Assembly in January 2017, this Bill fell.<sup>21</sup>

### **3.3 UN Committee on the Elimination of Discrimination Against Women report**

In 2018, the UN-CEDAW Committee published a report on abortion law in Northern Ireland, under the Convention on the Elimination of All Forms of Discrimination against Women, to which the UK is a signatory.<sup>22</sup>

The Committee received information from several organisations,<sup>23</sup> which alleged that the UK had committed ‘grave and systematic violations of rights under the Convention due to restrictive access to abortion for women and girls in Northern Ireland’.<sup>24</sup> The report noted that ‘procuring, aiding and abetting abortions in cases of rape, incest, and severe foetal impairment, including fatal foetal abnormality, remain criminal and carry a maximum penalty of life imprisonment’.<sup>25</sup> The report further noted that while Northern Irish women were entitled to free abortion services in England since June 2017; this was not guaranteed by law.<sup>26</sup>

The Committee ultimately found that the UK had violated multiple Convention articles through: failings in the criminalisation of abortion; impeding access to sexual and reproductive health services; failing to address gender stereotypes; and, inadequate sexual health education.<sup>27</sup> The report therefore made the following recommendations for the UK:

#### **Recommendations**

[. . .]

##### **A. Legal and institutional framework**

*The Committee recommends that the State party urgently:*

*(a) Repeal sections 58 and 59 of the Offences against the Person Act, 1861 so that no criminal charges can be brought against women and girls who undergo abortion or against qualified health care professionals and all others who provide and assist in the abortion;*

<sup>20</sup> *Abortion (Fatal Foetal Abnormality) Bill [AS INTRODUCED]*, Art. 1

<sup>21</sup> See <http://www.niassembly.gov.uk/assembly-business/legislation/2016-2017-mandate/non-executive-bill-proposals/abortion-ffa/>, retrieved on 23<sup>rd</sup> February 2021

<sup>22</sup> See <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>, retrieved on 4<sup>th</sup> March 2021

<sup>23</sup> The Family Planning Association, Northern Ireland Women’s European Platform and Alliance for Choice

<sup>24</sup> United Nations Committee on the Elimination of Discrimination against Women, *Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*(2018) p1

<sup>25</sup> As cited immediately above, p2

<sup>26</sup> As cited in footnote 24, p7

<sup>27</sup> As cited in footnote 24, pp14-17

*(b) Adopt legislation to provide for expanded grounds to legalise abortion at least in the following cases:*

*(i) Threat to the pregnant woman's physical or mental health without conditionality of 'long-term or permanent' effects;*

*(ii) Rape and incest; and*

***(iii) Severe foetal impairment, including FFA, without perpetuating stereotypes towards persons with disabilities and ensuring appropriate and ongoing support, social and financial, for women who decide to carry such pregnancies to term*** (emphasis added).

*(c) Introduce, as an interim measure, a moratorium on the application of criminal laws concerning abortion, and cease all related arrests, investigations and criminal prosecutions, including of women seeking post-abortion care and healthcare professionals;*

*(d) Adopt evidence-based protocols for healthcare professionals on providing legal abortions particularly on the grounds of physical and mental health; and ensure continuous training on these protocols;*

*(e) Establish a mechanism to advance women's rights, including through monitoring authorities' compliance with international standards concerning access to sexual and reproductive health including access to safe abortions; and ensure enhanced coordination between this mechanism with the Department of Health, Social Services and Public Safety (DHSSPS) and the Northern Ireland Human Rights Commission; and*

*(f) Strengthen existing data collection and sharing systems between the DHSSPS and the PSNI to address the phenomenon of self-induced abortions.*

[. . .]

## **B. Sexual and reproductive health rights and services**

*The Committee recommends that the State party:*

*(a) Provide non-biased, scientifically sound and rights-based counselling and information on sexual and reproductive health services, including on all methods of contraception and access to abortion;*

*(b) Ensure accessibility and affordability of sexual and reproductive health services and products, including on safe and modern contraception, including oral and emergency, long term or permanent and adopt a protocol to facilitate access at pharmacies, clinics and hospitals;*

*(c) Provide women with access to high quality abortion and post-abortion care in all public health facilities, and adopt guidance on doctor-patient confidentiality in this area;*

*(d) Make age-appropriate, comprehensive and scientifically accurate education on sexual and reproductive health and rights a compulsory*

*curriculum component for adolescents, covering early pregnancy prevention and access to abortion, and monitor its implementation;*

*(e) Intensify awareness-raising campaigns on sexual and reproductive health rights and services, including on access to modern contraception;*

*(f) Adopt a strategy to combat gender-based stereotypes regarding women's primary role as mothers; and*

*(g) Protect women from harassment by anti-abortion protestors by investigating complaints, prosecuting and punishing perpetrators.<sup>28</sup>*

### **3.4 Legal actions of NI Human Rights Commission & Mrs. Sarah Ewart**

Between 2013 and 2019, the Northern Ireland Human Rights Commission (NIHRC) and Mrs. Sarah Ewart brought legal actions challenging the compatibility of Northern Ireland's abortion law with the UK's human rights obligations.

#### **3.4.1 NIHRC legal actions**

In 2013, the NIHRC brought judicial review proceedings on NI abortion law to the High Court of Justice in Northern Ireland. It argued that the criminalisation of abortion violated women's human rights in three circumstances: sexual crime (rape or incest); fatal fetal abnormality; and, serious malformation of the fetus.<sup>29</sup>

In such circumstances, the NIHRC contended that prohibiting abortion under Northern Ireland law is incompatible with the European Convention on Human Rights (ECHR) – specifically, Article 8 rights to a private and family life<sup>30</sup> and Article 3 rights to be free from torture, inhuman or degrading treatment.<sup>31</sup> The High Court subsequently found that an incompatibility did exist, between the Article 8 right to a private and family life and prohibition of abortions in the event of sexual crime or fatal fetal abnormality.<sup>32</sup>

The High Court's ruling was overturned by the Northern Ireland Court of Appeal (NICA) in June 2016.<sup>33</sup> The NICA found that the issue was 'primarily a matter for legislation' and that as the matter would receive further consideration in the Assembly, it was 'not appropriate to intervene at this stage.'<sup>34</sup> The Commission then appealed to the UK Supreme Court, which delivered its judgment in 2018.

Similar to the High Court, a majority of Supreme Court justices found Northern Irish abortion law to be incompatible with Article 8 in cases of sexual crime and fatal fetal

<sup>28</sup> United Nations Committee on the Elimination of Discrimination against Women, *Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*(2018) pp18-19

<sup>29</sup> Kathryn McNeilly et al., *The Supreme Court's decision on abortion law – what now?* (2018) – see (<https://blogs.lse.ac.uk/politicsandpolicy/supreme-court-on-ni-abortion-law/>), retrieved 4<sup>th</sup> March 2021

<sup>30</sup> *European Convention on Human Rights* Art. 8

<sup>31</sup> *European Convention on Human Rights* Art. 3

<sup>32</sup> High Court of Justice in Northern Ireland (2015) NIQB 96

<sup>33</sup> Court of Appeal in Northern Ireland (2017) NICA 42

<sup>34</sup> As cited immediately above, p50

abnormality. In addition this, a minority of justices found the law incompatible with Article 3 rights in these circumstances.<sup>35</sup>

For purposes of considering the SFIAA Bill as introduced, it should be noted that the Supreme Court did not make a finding on the compatibility of Northern Ireland abortion law with either the ECHR's Article 8 or Article 3, in the event of serious fetal malformation. Rather, Justice Lady Hale acknowledged the range of views on how best to balance the various rights involved:

*[. . .] the CEDAW Committee recommended to the UK that it adopt legislation legalising abortion 'at least' where there is a threat to the pregnant woman's physical or mental health; rape or incest; and severe foetal impairment, including fatal foetal abnormality 'without perpetuating stereotypes towards persons with disabilities and ensuring appropriate and ongoing support, social and financial, for women who decide to carry such pregnancies to term' (para 85). As already stated, the guarantees contained in the ECHR should be interpreted in the light of other relevant international human rights instruments. Some may think that the CEDAW Committee's recommendations strike the right balance, but I recognise and understand that others may think that they do not give sufficient weight to the valuable and rewarding lives led by many people with serious disabilities.*<sup>36</sup>

Ultimately after discussing the substantive human rights issues, the Supreme Court held that the NIHRC did not have legal standing to bring the case.<sup>37</sup>

### 3.4.2 Mrs. Sarah Ewart's legal action

In 2019, Sarah Ewart sought judicial review from the High Court of Justice in Northern Ireland. Mrs. Ewart was diagnosed with a fatal fetal abnormality nearly 20 weeks into her pregnancy, and travelled to England for a termination, as her doctor advised that 'she could not have a termination in Northern Ireland'.<sup>38</sup>

Mrs. Ewart sought multiple declarations of incompatibility with Northern Ireland abortion law and her Article 8 rights to a private and family life.<sup>39</sup> Following the Supreme Court's 2018 opinion detailed above, the High Court ruled in Mrs. Ewart's favour. However, the Court declined to provide any formal relief as at the time of its judgment, Westminster's enactment of the Northern Ireland (Executive Formation etc.) Act 2019 offered Mrs. Ewart a legislative solution.<sup>40</sup>

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<sup>35</sup> The Supreme Court of the United Kingdom (2018) UKSC 27, p14

<sup>36</sup> As cited immediately above, p13

<sup>37</sup> As cited immediately above

<sup>38</sup> High Court of Justice in Northern Ireland (2019) NIQB 88, p8

<sup>39</sup> As cited immediately above, p7

<sup>40</sup> As cited immediately in footnote 38, p32; see also High Court of Justice in Northern Ireland (2020) NIQB 33

### 3.5 The Northern Ireland (Executive Formation etc.) Act 2019

In a separate case in June 2017, the UK Supreme Court ruled against a mother and a daughter in Northern Ireland, who sought a legal right to receive free abortions in England.<sup>41</sup> Shortly after this, Stella Creasy MP tabled an amendment to the 2017 Queen's Speech, which gained substantial cross-party support and required the UK Government to fund free abortion services for women and girls from Northern Ireland. That amendment was withdrawn when the Government announced it would provide this funding.<sup>42</sup>

In this context and during the lack of fully functioning devolved government in Northern Ireland from January 2017 - January 2020, the Northern Ireland (Executive Formation etc.) Bill was introduced in Westminster. In 2019, the Bill was introduced by the UK Government to both: extend the period for a Northern Ireland Executive to form; and, to require the Secretary of State for Northern Ireland to provide progress reports on the matter.<sup>43</sup> However, during the Bill's passage it was amended to include measures in several other areas, including those relating to abortion law in Northern Ireland.

Before the Bill's enactment, it received approximately 13 hours' consideration in the House of Commons, and just under 19 hours' consideration in the House of Lords.<sup>44</sup> The Bill became law on 24<sup>th</sup> July 2019. Sections 8-12 were to come into force on the 22<sup>nd</sup> October 2019, if an Executive was not appointed by 21<sup>st</sup> October 2019.<sup>45</sup>

Amongst those sections was Section 9. It required regulations to be made to transpose and implement the UN-CEDAW recommendations detailed above.<sup>46</sup> That included: repeal of Sections 58 and 59 of the Offences Against the Person Act 1861;<sup>47</sup> and, bar retrospective investigations or criminal proceedings under that law. These regulations were to come into force by 31<sup>st</sup> March 2020.<sup>48</sup>

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<sup>41</sup> See <https://www.bbc.co.uk/news/uk-northern-ireland-40271763>, retrieved 24<sup>th</sup> February 2021

<sup>42</sup> HC Deb 29 June 2017 vol. 626 c851; see also

[www.whatdotheyknow.com/request/abortion\\_on\\_the\\_nhs\\_for\\_women\\_fr](http://www.whatdotheyknow.com/request/abortion_on_the_nhs_for_women_fr), retrieved 4<sup>th</sup> March 2021

<sup>43</sup> *Northern Ireland (Executive Formation etc. Act*, Introductory Text

<sup>44</sup> See <https://bills.parliament.uk/bills/2437/stages> retrieved 4<sup>th</sup> March 2021, and associated Official Reports

<sup>45</sup> *Northern Ireland (Executive Formation etc. Act*, Art. 13

<sup>46</sup> See pages 10 to 11 above

<sup>47</sup> See pages 7 and 8 above for description of these measures

<sup>48</sup> *Northern Ireland (Executive Formation etc. Act*, Art. 9

### 3.6 Abortion Regulations (Northern Ireland) 2020 and subsequent amending legislation

The Abortion Regulations (Northern Ireland) 2020 ('the 2020 Regulations') came into effect on 30<sup>th</sup> March 2020. In Parts 2 and 3, they permit registered medical professionals to carry out abortions in Northern Ireland under the following circumstances:

- Where a registered medical professional is of the opinion that the pregnancy is not beyond the 12<sup>th</sup> week.
- Where two registered medical professionals are of the opinion that continuing the pregnancy would risk the physical or mental health of the woman, and the pregnancy is not beyond the 24<sup>th</sup> week.
- Where a registered medical professional believes termination is immediately necessary to save the life, or to prevent grave permanent injury to the physical or mental health of the woman (no time limit).
- Where two registered medical professionals believe that the termination is necessary to prevent grave permanent injury to physical or mental health; or that continuing the pregnancy would involve risk to the woman's life greater than if the pregnancy was terminated (no time limit).
- Where two registered medical professionals believe that there is substantial risk that the death of the fetus is likely before, during or shortly after birth; **or if the child were born, it would suffer from such physical or mental impairment as to be seriously disabled** (emphasis added) (no time limit).<sup>49</sup>

When made, the 2020 Regulations<sup>50</sup> were required to be approved by Parliament by 17<sup>th</sup> May 2020 under the 'made affirmative' procedure. However, the impact of COVID-19 on parliamentary proceedings prevented this from happening. To remedy this situation, on 12<sup>th</sup> May 2020 the UK Government revoked the 2020 Regulations, and replaced them by making the Abortion (Northern Ireland) (No. 2) Regulations 2020 ('2020 Regulations as amended').<sup>51</sup> The amended Regulations were then considered by Parliament under the made affirmative procedure, which consisted of:

- The Government laying the Regulations before the House of Commons and House of Lords;
- Consideration by the Commons' Delegated Legislation Committee, the Lords' Secondary Legislation Scrutiny Committee and the Joint Committee on Statutory Instruments; and
- Consideration of the instrument in plenary sittings of the Commons and Lords.<sup>52</sup>

This action enabled the UK Parliament to have sufficient time to consider and vote on the proposed amending Regulations (2020 Regulations as amended), without causing any disruption to the legal position in Northern Ireland.<sup>53</sup>

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<sup>49</sup> *Abortion Regulations (Northern Ireland) 2020*, Regs 3-7

<sup>50</sup> These Regulations predated the '2020 Regulations as amended' which are now in effect in Northern Ireland, and are explained later in this paragraph.

<sup>51</sup> See *Abortion (Northern Ireland) (No. 2) Regulations 2020*

<sup>52</sup> See <https://statutoryinstruments.parliament.uk/timeline/TOWjTwoH/SI-2020503/>, retrieved on 4<sup>th</sup> March 2021, and associated Official Reports

<sup>53</sup> Northern Ireland Office, *Explanatory Memorandum to Abortion (NI) (No. 2) Regulations 2020*, pp1-2

### 3.7 Delivery of abortion services in Northern Ireland

Since the 2020 Regulations as amended came into effect, abortion can be lawfully provided in specified circumstances in Northern Ireland.

This provision currently occurs in the absence of any centrally and publicly commissioned service for Northern Ireland. The Minister for Health maintains that the 2020 Regulations as amended do not require the state to provide abortion services.<sup>54</sup>

Rather, the Minister asserts that the Regulations make it lawful to provide abortion in the specified circumstances. Due to pressures arising from COVID-19, the Minister paused initial consideration of abortion service commissioning.<sup>55</sup> In light of information available to RaSe at the time of writing this briefing, it is currently unclear as to what the future position will be in this regard.

In the interim context of COVID-19, the Minister has since brought proposals to the Executive for an 'emergency early medical abortion service'. At the time of writing, those proposals have not been agreed by the Executive.<sup>56</sup>

In the absence of a centrally commissioned service or a positive and specific legal duty on any public body to provide termination services, the Department of Health has received 1,091 notifications of termination between 31 March 2020 and 2 February 2021. This compares to seven notifications received in the first three months of 2020.<sup>57</sup> However, the Northern and South Eastern Health and Social Care Trusts have both recently had to suspend pregnancy termination provision due to staff and resource pressures due to COVID-19.<sup>58</sup>

In January 2021, the NIHRC announced it was taking legal action against the Secretary of State for Northern Ireland, the Executive and the Department of Health for 'failing to commission and fund abortion services in Northern Ireland'.<sup>59</sup> The NIHRC have the following 'key concerns':

- The lack of a Department supported approach has created a disparity in accessing termination services within Northern Ireland.
- It has also meant that many, depending on their circumstances and where they live in Northern Ireland, continue to have to travel to other parts of the UK and the Republic of Ireland, or to use unregulated services.
- There are occasions when travel restrictions and threat to health created by COVID-19 rule out travelling for women.<sup>60</sup>

Given this, the NIHRC contends that the current situation results in a 'disproportionate interference' in the Article 8 rights of women and girls in Northern Ireland.<sup>61</sup>

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<sup>54</sup> AQW 4218/17-22

<sup>55</sup> AQW 10646/17-22

<sup>56</sup> AQW 10646/17-22 & AQW 10647/17-22

<sup>57</sup> AQW 13231/17-22

<sup>58</sup> NIHRC, *FactSheet: Human Rights Commission Legal Action on Lack of Abortion Services in NI* (2021) p2

<sup>59</sup> As cited immediately above

<sup>60</sup> As cited in footnote 58, p3

<sup>61</sup> As cited immediately above

## 4 Content and effect of the Bill as introduced

This section explains the SFIAA Bill as introduced, drawing on its individual clauses and its accompanying Explanatory and Financial Memorandum (EFM).

The SFIAA Bill has only two clauses, one of which provides a short title and specifies that it would come into effect on receiving Royal Assent. Substantively, it proposes to make one change to Regulation 7 contained in the 2020 Regulations as amended. Regulation 7 currently states as follows:

### ***Severe fetal impairment or fatal fetal abnormality***

*7.—(1) A registered medical professional may terminate a pregnancy where two registered medical professionals are of the opinion, formed in good faith, that there is a substantial risk that the condition of the fetus is such that—*

*(a) the death of the fetus is likely before, during or shortly after birth; or  
(b) if the child were born, it would suffer from such physical or mental impairment as to be seriously disabled.*

*(2) In the case of a woman carrying more than one fetus, anything done to terminate the pregnancy as regards a particular fetus is authorised by paragraph (1) only if that paragraph applies in relation to that fetus.<sup>62</sup>*

The Bill as introduced proposes to remove reference to ‘severe fetal impairment’ from this Regulation. It would do so by both removing the phrase from the Regulation title and removing Section 7(1)(b) altogether. The amended Regulation 7 would read as follows:

### ***Fatal fetal abnormality***

*7.—(1) A registered medical professional may terminate a pregnancy where two registered medical professionals are of the opinion, formed in good faith, that there is a substantial risk that the condition of the fetus is such that—*

*(a) the death of the fetus is likely before, during or shortly after birth;*

*(2) In the case of a woman carrying more than one fetus, anything done to terminate the pregnancy as regards a particular fetus is authorised by paragraph (1) only if that paragraph applies in relation to that fetus.<sup>63</sup>*

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<sup>62</sup> *Abortion (Northern Ireland) (No. 2) Regulations 2020, Reg 7*

<sup>63</sup> *Severe Fetal Impairment Abortion (Amendment) Bill (as introduced) (2021) Art. 1*

### **Explanatory & Financial Memorandum**

In the EFM, the Bill sponsor notes that the 2020 Regulations as amended were 'introduced without consultation with the Assembly'.<sup>64</sup> The sponsor further highlights the Assembly motion passed on 2 June 2020, when the Assembly 'rejected the imposition of abortion legislation that extends to all non-fatal disabilities, including Down's Syndrome'.<sup>65</sup> The MLA sponsoring the SFIAA Bill states that he introduced it to reflect that debate and its outcome.<sup>66</sup>

The EFM also states that 'this Bill would have minimal financial implications'.<sup>67</sup> In this context, it is worth considering the Bill's potential financial implications for the public purse.

If the Bill as introduced is passed, abortion without time limit in cases of severe fetal impairment will be made unlawful in Northern Ireland. (This obviously will not impact the legislative position in GB, where abortions in these circumstances will remain lawful.) This could result in GB governments, which fund free abortion services for women and girls from Northern Ireland, incurring increased cost.<sup>68</sup>

Finally, the EFM states that 'the Member is satisfied that the Bill is human rights compliant'.<sup>69</sup> However as detailed in the following section, clarity on the human rights compliance of the Bill as introduced is currently being sought by other Members and the Health Committee. At the time of writing, a motion is to be considered by the Assembly on Monday 8<sup>th</sup> March. That motion seeks the NIHRC's advice on whether the SFIAA Bill, as introduced, is compatible with human rights law in Northern Ireland.<sup>70</sup>

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<sup>64</sup> Paul Givan, *Severe Fetal Impairment Abortion (Amendment) Bill: Explanatory and Financial Memorandum* (2021) p1

<sup>65</sup> See NIA OR 2 June 2020

<sup>66</sup> As cited in footnote 64

<sup>67</sup> As cited in footnote 64, p2

<sup>68</sup> See [www.bpas.org/abortion-care/considering-abortion/northern-ireland-funded-abortion-treatment/](http://www.bpas.org/abortion-care/considering-abortion/northern-ireland-funded-abortion-treatment/), retrieved 4<sup>th</sup> March 2021

<sup>69</sup> As cited in footnote 63, p2

<sup>70</sup> Northern Ireland Assembly, *Order Paper: Monday 8 March* (2021) p1

## 5 Assembly procedures & competence

This section considers the procedural and competence queries raised by MLAs when the Assembly has considered the SFIAA Bill in plenary and Committee considerations.

### 5.1 First Stage

At the Bill's First Stage, Paula Bradshaw MLA raised a point of order and requested that written evidence be provided from the NIHRC, before the SFIAA Bill proceeded to Scrutiny Stage.<sup>71</sup> This request was made with reference to Assembly Standing Orders (SOs) 30(5-6) and 34.

SOs 30(5-6) and 34 require the Assembly Speaker to provide a copy of any new bill to the NIHRC<sup>72</sup>, and allow the Assembly to seek NIHRC advice on a bill's human rights compatibility, if a qualifying motion is made.<sup>73</sup>

In his response to MLA Bradshaw, the Speaker confirmed that:

*The Bill will be printed, and, through the Business Committee, it will go through the normal, ongoing process by which legislation always proceeds. In my role as Speaker, I will ensure that the legislation will be governed, processed and managed properly.*<sup>74</sup>

As MLA Bradshaw made her request for NIHRC advice under a point of order, and a motion under SO 34 was not made, NIHRC advice was not sought at this stage. At the time of writing, the Assembly is scheduled to consider a further motion from MLA Bradshaw under SO 34 on Monday 8<sup>th</sup> March 2021.

### 5.2 Health Committee consideration

At the Assembly Health Committee's meeting on 18<sup>th</sup> February 2021, multiple issues arose relating to Assembly competence, human rights compliance and legislative scheduling. The Committee ultimately agreed the following:

- To request a briefing from the Bill sponsor on the general principles of the Bill.
- To seek the views of the NIHRC on whether the Bill is human rights compliant.
- To seek further information on the process undertaken to assess legislative competence.
- To discuss the scheduling of its consideration of matters relating to the Bill at its next meeting.<sup>75</sup>

The Committee further considered the Bill at its subsequent meeting on 4<sup>th</sup> March 2021, in closed session.<sup>76</sup>

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<sup>71</sup> NIA OR 16 Feb 2021, p3

<sup>72</sup> Northern Ireland Assembly, *Standing Orders* (2021) pp20-21

<sup>73</sup> As cited immediately above, p21

<sup>74</sup> As cited in footnote 70

<sup>75</sup> Northern Ireland Assembly Committee for Health, *Minutes of Proceedings 18<sup>th</sup> February 2021* (2021) p10

<sup>76</sup> See Assembly Business Diary week commencing 27<sup>th</sup> February,

<http://aims.niassembly.gov.uk/assemblybusiness/businessdiary.aspx>, retrieved 6<sup>th</sup> March 2021

### 5.3 Assembly Procedure for Public Legislation – Standing Orders

The procedure governing the passage of all public legislation in the Assembly is detailed in SOs 30 to 43.

Under SO 42(1), there must be a minimum of five working days between First and Second Stages, unless a bill is subject to accelerated passage.<sup>77</sup> In practice, there is a soft convention outside of SOs to allow one month between the First and Second Stages, particularly in the context of a PMB. This convention aims to permit MLAs, relevant Committees and Ministers sufficient time to familiarise themselves with the proposed bill and associated materials.<sup>78</sup>

Of the thirteen PMBs to have reached at least Second Stage in the 2017-22 and 2011-16 Assembly mandates, seven had a gap of one month or greater between their First and Second Stages,<sup>79</sup> and six had a gap of less than one month.<sup>80</sup> The shortest gap of these was 13 days between the First and Second Stages of the 2015 Licensing Bill.<sup>81</sup> The longest was three months, in the case of the 2015 Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill.<sup>82</sup>

At the time of writing, provisional Assembly plenary Order Papers indicate that the SFIAA Bill will receive its Second Stage consideration on 15<sup>th</sup> March 2021.<sup>83</sup> This is just under four weeks since the Bill's First Stage.

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<sup>77</sup> Northern Ireland Assembly, *Standing Orders* (2021) p25

<sup>78</sup> Email correspondence with Assembly Business Office, 17<sup>th</sup>-18<sup>th</sup> February 2021

<sup>79</sup> *Functioning of Government (Miscellaneous Provisions) Bill, Civil Service (Special Advisers) Bill, Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill, Children's Services Co-operation Bill, Road Traffic (Speed Limits) Bill, Local Government (Numbers and Addresses of Buildings in Townlands) Bill and Human Transplantation Bill.*

<sup>80</sup> *Public Services Ombudsman Bill, Ombudsman and Commissioner for Complaints (Amendment) Bill, Assembly and Executive Reform (Assembly Opposition) Bill, Licensing Bill, Civil Service (Special Advisers) (Amendment) Bill and Scrap Metal Dealers Bill.*

<sup>81</sup> See <http://www.niassembly.gov.uk/assembly-business/legislation/2011-2016-mandate/current-non-executive-bill-proposals/licensing-bill/>, retrieved 26<sup>th</sup> February 2021

<sup>82</sup> See <http://www.niassembly.gov.uk/assembly-business/legislation/2011-2016-mandate/current-non-executive-bill-proposals/human-trafficking-and-exploitation-further-provisions-and-support-for-victims-bill-/>, retrieved 26<sup>th</sup> February 2015

<sup>83</sup> Northern Ireland Assembly, *Provisional Order Papers: Monday 15<sup>th</sup> March 2021*

## 6 Issues arising from the Bill as introduced

This section details several issues and considerations arising from the Bill as introduced, with a particular focus on: interpretations of severe fetal impairment in medical and clinical practice; and, human rights considerations of abortions in such cases.

### 6.1 Interpretations of ‘severe impairment’ in medical practice

As detailed above, the provision which the Bill as introduced would remove is as follows:

***Severe fetal impairment or fatal fetal abnormality***

*7.—(1) A registered medical professional may terminate a pregnancy where two registered medical professionals are of the opinion, formed in good faith, that there is a **substantial risk** that the condition of the fetus is such that—*

*[. . .]*

*(b) if the child were born, it would **suffer from such physical or mental impairment as to be seriously disabled** (emphasis added).<sup>84</sup>*

There is currently no clinical or statutory guidance as to what the highlighted phrases, in particular ‘substantial risk’ or ‘seriously disabled’, means in clinical or medical practice in Northern Ireland.

The closest comparator to the above Northern Ireland regulation is the provision for what are commonly known as ‘Ground E abortions’ in GB. These abortions are permitted under the Abortion Act 1967, as amended:

***Medical termination of pregnancy.***

*(1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—*

*[. . .]*

*(d) that there is a **substantial risk** that if the child were born it would suffer from such physical or mental abnormalities as to be **seriously handicapped** (emphasis added).<sup>85</sup>*

As with Northern Ireland law, in GB there is no precise meaning of the highlighted terms of this Article. The current guidance of the Royal College of Obstetricians & Gynaecologists states that there is no precise legislative definition of what constitutes a ‘substantial risk’, or a ‘serious handicap’:

***Substantial risk***

*There is no legal definition of what comprises a ‘substantial’ risk. Whether a risk is substantial depends upon factors such as the nature and severity of*

<sup>84</sup> *Abortion Regulations (Northern Ireland) (No. 2) 2020, Reg 7*

<sup>85</sup> *Abortion Regulations (Northern Ireland) (No. 2) 2020, Reg 7, as amended by Bill as introduced*

*the condition and the timing of diagnosis, as well as the likelihood of the event occurring.*

*It has been argued that, since neither substantial risk nor serious handicap is defined, each can be interpreted on a largely subjective basis. As a result, it would be difficult if not impossible to demonstrate that a decision to terminate the pregnancy was not taken in good faith.<sup>86</sup>*

[. . .]

### **Serious handicap**

*The law does not define serious handicap. The view has been expressed that 'provided the condition is not trivial, or readily correctable, or will merely lead to the child being disadvantaged, the law will allow doctors scope for determining the seriousness of a condition. At a minimum it is suggested a 'serious handicap' would require the child to have physical or mental disability which would cause significant suffering or long-term impairment of their ability to function in society. The most serious genetic or other conditions which manifest themselves at birth or almost immediately thereafter are by and large likely to fall within the scope of Section 1(1)(d)'.<sup>87</sup>*

In the absence of precise legislative definitions for these phrases, or statutory guidance on their interpretation, a decision on whether a Ground E abortion can be provided is in practice a matter of 'clinical judgment and accepted practice'.<sup>88</sup> As per the legislation, this includes a heavy emphasis on the opinions which registered medical professionals provide in good faith.

In consideration of potential late abortions for severe fetal impairments, both the British Medical Association (BMA) and Marie Stopes UK emphasise the need for women to be given as much information and time as possible to inform their decisions.

In a 2020 paper on abortion law and ethics, the British Medical Association advise that:

*Doctors faced with a potential late abortion for serious fetal abnormality should be aware that women should be given information and time to understand the nature and severity of fetal abnormality, and should be offered specialised counselling where appropriate, in order to assist them in reaching an informed decision about how to proceed. The purpose of prenatal screening is to expand the choices available to the pregnant woman and to allow her to make an informed decision about whether to continue with a pregnancy or seek a termination. Women should not be rushed into making a decision, but if a decision is made to terminate the*

<sup>86</sup> Royal College of Obstetrician and Gynaecologists, *Termination of Pregnancy for Fetal Abnormality in England, Scotland and Wales* (2010) p8. The guidance at this point cites JK Mason & GT Laurie, *Mason & McCall Smith's Law and Medical Ethics* (7<sup>th</sup> edition) 2006, p146

<sup>87</sup> As cited immediately above. The guidance at this point cites A Grubb (ed.) *Principles of Medical Law* (2<sup>nd</sup> edition) 2004, p760

<sup>88</sup> British Medical Association, *The law and ethics of abortion: BMA views* (2020) pp7-8

*pregnancy, this should proceed without undue delay. Appropriate support should be provided before and after the termination.*<sup>89</sup>

In a 2020 position paper, Marie Stopes UK argued that a time limit is inappropriate. It maintained that such a limit could result in decisions made at an earlier stage, without the opportunity to avail of further tests, medical prognoses and advice. It stated:

*Abortion care should remain available without gestation limit for when a pregnancy is diagnosed with a severe fetal impairment. Such diagnoses are often made at the 20-week scan, or at later scans, and represent difficult and complex cases. It would not be appropriate to have a gestation limit for those that wish to consider abortion care in these circumstances, as families should not feel under pressure when considering all information and options while experiencing a difficult and emotional time.*

[. . .]

*Restricting Ground E post-24 weeks would not allow women, couples or families the opportunity to engage with their doctor and third sector specialist organisations for further tests and enhanced evaluation in order to fully understand the implications of a diagnosis.*

*In addition, such restrictions could have the effect of more pregnancies being ended at 23 weeks because women feel unable to cope mentally or physically with continuing the pregnancy following a diagnosis of a severe fetal impairment, and would have no other option available to them at a later gestation. It would create a situation which would not allow women and their families to wait for further tests, forcing them to base their decision on incomplete information.*<sup>90</sup>

In 2019 in England and Wales, there were 3,183 abortions under Ground E, or 2% of all abortions.<sup>91</sup> Of these: 53% were for congenital malformations, including cardiovascular and musculoskeletal malformations, and anencephaly; 29% were for chromosomal abnormalities including Down's, Edwards' and Patau's syndrome; and, 18% were for other conditions.<sup>92</sup> In Scotland, there were 211 Ground E abortions in 2019, or 1.6% of all abortions. The primary conditions in these terminations were chromosomal abnormalities, and nervous system conditions (including anencephaly).<sup>93</sup>

Statistics on terminations carried out in Northern Ireland, under the severe fetal impairment regulation, have not yet been published. However, these statistics are available for women and girls from Northern Ireland receiving abortions in England and Wales.

<sup>89</sup> British Medical Association, *The law and ethics of abortion: BMA views* (2020) pp7-8

<sup>90</sup> Marie Stopes UK, *Position Paper: Disability Equality and Abortion in the UK* (2020) p1 & p3

<sup>91</sup> Department for Health and Social Care, *Abortion Statistics, England and Wales: 2019* (2020) p11

<sup>92</sup> Department for Health and Social Care, *Abortion Statistics, England and Wales: 2019 – Data Tables*

<sup>93</sup> Public Health Scotland, *Termination of pregnancy: year ending December 2019* (2020) p22-23

In 2019 a total of 1,014 abortions were provided in England and Wales, to residents of Northern Ireland. 18 of these abortions were provided under Ground E.<sup>94</sup> In these 18 cases, 20 severe fetal impairments were identified (meaning one or two fetuses had multiple impairments.)<sup>95</sup> Nine of these were congenital malformations; six were chromosomal abnormalities including Down's, Edwards' and Patau's syndrome; and, five were other conditions.<sup>96</sup>

It must be noted that Figures on Ground E terminations in England and Wales must be treated with caution. This is due to potential under-reporting arising from a data matching issue within the Department for Health & Social Care.<sup>97</sup>

In light of the key available literature and legislation examined earlier in this paper, it seems that multiple factors inform judgments made by medical professionals in Northern Ireland about 'substantial risk' of a 'serious disability'; and their judgments are made in 'good faith'. Those factors appear to include:

- The language of the 2020 Regulations as amended;
- The experience of practical medical interpretations informing Ground E abortion provision in GB; and,
- The current absence of more detailed legal definitions or statutory guidance on the meanings of 'substantial risk' and 'serious disability' in Northern Ireland abortion law.

Within this context, it is noteworthy that the Explanatory Note which accompanied the 2020 Regulations, as amended, states:

*It is recognised that determinations that there is a 'substantial risk' of a child being 'seriously disabled' under regulation 7 are subjective and it is the Government's intention that the Regulations will protect medical professionals who make these difficult and often finely balanced decisions in good faith, based on their honest belief. Therefore, it is not intended that a medical professional should be prosecuted where a medical professional forms an opinion in good faith as to risk but makes a factual error. Similarly, in determining 'serious disability', any prosecution would require proof beyond reasonable doubt that the medical professional did not act in good faith in determining that there is substantial risk of an abnormality that would amount to the child being seriously disabled.*<sup>98</sup>

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<sup>94</sup> Department for Health and Social Care, *Abortion Statistics, England and Wales: 2019 – Data Table 12g*

<sup>95</sup> Footnote 1 of Table 12g (as cited immediately above) states that in two of these 18 cases of Ground E abortion, no specific condition was stated.

<sup>96</sup> As cited in footnote 92, Table 12h

<sup>97</sup> Department for Health and Social Care, *Guide to Abortion Statistics, England and Wales: 2019 (2020)* p9

<sup>98</sup> Northern Ireland Office, *Explanatory Memorandum to the Abortion (Northern Ireland) (No. 2) Regulations (2020)* p12

## 6.2 Human rights aspects of access to abortion services

As detailed above, the primary rights engaged in recent case law on abortion law in Northern Ireland are Articles 3 and 8 of the ECHR, which state:

### **ARTICLE 3**

#### Prohibition of torture

*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

[. . .]

### **ARTICLE 8**

#### Right to respect for private and family life

*1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

*2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>99</sup>*

Beyond these ECHR rights, the UN Office of the High Commissioner of Human Rights (OHCHR) also states that:

*Women's sexual and reproductive health is related to multiple human rights, including the right to life, the right to be free from torture, the right to health, the right to privacy, the right to education, and the prohibition of discrimination.<sup>100</sup>*

### 6.2.1 General issues with access to abortion services

In general, actual ability to access sexual and reproductive health services, including abortion, are closely linked to socioeconomic status and educational attainment: women with greater status or attainment can more easily exert control over their sexual and reproductive lives.<sup>101</sup>

Access to abortion services in Northern Ireland is a multi-faceted issue. 2017 survey research by the Irish Congress of Trade Unions found that 20% of respondents 'had direct experience of abortion as a workplace issue'. That included those accessing abortion themselves, as well as partners, colleagues, managers or relevant professionals involved.<sup>102</sup> Of these people: 73% did not disclose their abortion to colleagues; 42% struggled to pay for the service; and, 28% used annual leave.<sup>103</sup>

<sup>99</sup> European Convention on Human Rights Art. 3 & Art. 8

<sup>100</sup> See <https://www.ohchr.org/en/issues/women/wrgs/pages/healthrights.aspx>, retrieved 4<sup>th</sup> March 2021

<sup>101</sup> Ann Nolan, *Sexual and Reproductive Health and Rights: A framework for the introduction of abortion services in Ireland* (2018) p24

<sup>102</sup> Fiona Bloomer et al., *Abortion as a workplace issue: a Trade Union survey North & South of Ireland* (2017) pp35-36

<sup>103</sup> As cited immediately above, p36

Finally, as detailed above, the NIHRC has ongoing legal action against the Secretary of State for Northern Ireland, the Northern Ireland Executive and the Department of Health on the lack of a centralised and Executive-supported approach to abortion services. The Commission argues this has resulted in disparities in access across Northern Ireland, and has necessitated travel or the use of unregulated services in some instances.<sup>104</sup>

## 6.2.2 Abortion in cases of severe fetal impairment

### ○ UK Supreme Court judgment

When considering the permissibility of abortion specifically in the case of severe fetal impairment, the most recent case law from the UK Supreme Court is instructive.

As detailed above, the Supreme Court in 2018 did not find that the absence of legal abortion in cases of severe fetal impairment was incompatible with Article 3 or Article 8 rights. This was only found to be the case in circumstances of fatal fetal impairment and rape or incest.<sup>105</sup> In her opinion on the case, Justice Lady Hale acknowledged the need for and difficulty of striking a correct balance between the rights of women and the rights of persons with disabilities.<sup>106</sup>

### ○ UN Convention on Rights of Persons with Disabilities

The UN Convention on the Rights of Persons with Disabilities was adopted by the UN in 2006 and came into force in 2008.<sup>107</sup> The UK signed the Convention in 2007 and ratified it in 2009. Simply stated, the UK therefore should adhere to its provisions as a signatory country.

In 2011, the UN Committee for the Rights of Persons with Disabilities reported on the UK. This was at a time when abortion in cases of severe fetal impairment was permitted across GB, but not in Northern Ireland. At that time, the Committee noted that:

*disabled people have suggested a bias towards termination of pregnancies if a child is likely to be disabled. Disabled people believe that clear consistency is needed in the approach to resuscitation of disabled people and non-disabled people, when seriously ill.*<sup>108</sup>

However, ultimately at that stage, the UN Committee concluded that:

*In the UK, disabled people have the same right to life from birth as non-disabled people, and are not subject to arbitrary deprivation of life.*<sup>109</sup>

<sup>104</sup> Northern Ireland Human Rights Commission, *FactSheet: Human Rights Commission Legal Action on Lack of Abortion Services in NI* (2021) p3

<sup>105</sup> Kathryn McNeilly et al., *The Supreme Court's decision on abortion law – what now?* (2018) – see (<https://blogs.lse.ac.uk/politicsandpolicy/supreme-court-on-ni-abortion-law/>), retrieved 4<sup>th</sup> March 2021

<sup>106</sup> The Supreme Court of the United Kingdom (2018) UKSC 27, pp12-13, as discussed on p14 above

<sup>107</sup> Michael Potter, *The UN Convention on the Rights of Persons with Disabilities: A Brief Summary* (2016) p3

<sup>108</sup> United Nations Committee on the Rights of Persons with Disabilities, *Initial reports of State parties due in 2011: United Kingdom of Great Britain and Northern Ireland* (2011) pp63-64

<sup>109</sup> As cited immediately above, p19

The UN Committee later published its ‘Concluding observations’ on the UK’s initial report in 2017. In these observations, it expressed concern with existing abortion law and made the following recommendation:

***Equality and non-discrimination (art. 5)***

*12. The Committee is concerned about perceptions in society that stigmatize persons with disabilities as living a life of less value than that of others and about the termination of pregnancy at any stage on the basis of fetal impairment.*

*13. The Committee recommends that the State party amend its abortion law accordingly. Women’s rights to reproductive and sexual autonomy should be respected without legalizing selective abortion on the ground of fetal deficiency.<sup>110</sup>*

○ Consultation on abortions in cases of severe fetal impairment

When the UK Government consulted on the 2020 Regulations as amended in 2020, several respondents were:

*...opposed to allowing terminations under [severe fetal impairment] without time limit, particularly in relation to severe impairment where the fetus may be capable of being born alive, arguing that allowing abortions in such cases risks perpetuating stereotypes of disability by implying that such conditions are incompatible with a good quality of life.<sup>111</sup>*

The UK Government ultimately rejected this objection, in order to implement the UN-CEDAW recommendations as required by the Northern Ireland (Executive Formation etc.) Act 2019.<sup>112</sup> The Government also pointed out that at that time, the large majority of terminations for fatal abnormalities or severe fetal impairments had taken place before 24 weeks (91.3% in England & Wales in 2018). However, a small number had occurred later, for reasons including late detection of abnormality, scan delays or extended medical investigation. For that reason, the UK Government considered a time limit inappropriate.<sup>113</sup>

○ UN-CEDAW considerations

In its 2018 report on abortion law in Northern Ireland, the UN Committee on the Elimination of Discrimination Against Women considered how best to balance women’s reproductive rights and the rights of persons with disabilities, along with the need to avoid discrimination on that basis.

Ultimately, the UN Committee concluded that women should have the right to abortion, without time limit, in cases of severe fetal impairment. However, it further noted that

<sup>110</sup> United Nations Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of the United Kingdom of Great Britain and Northern Ireland* (2017) p19

<sup>111</sup> UK Government, *A new legal framework for abortion services in Northern Ireland: UK Government consultation response* (2020) p21

<sup>112</sup> See pages 14 and 15 above

<sup>113</sup> As cited in footnote 108, p20

the UK Government (and the Northern Ireland Executive) must ensure that any such decision does not perpetuate stereotypes towards persons with disabilities, stating:

***In cases of severe foetal impairment, the Committee aligns itself with the Committee on the Rights of Persons with Disabilities in the condemnation of sex-selective and disability-selective abortions, both stemming from the need to combat negative stereotypes and prejudices towards women and persons with disabilities. While the Committee consistently recommends that abortion on the ground of severe foetal impairment be available to facilitate reproductive choice and autonomy, States parties are obligated to ensure that women's decisions to terminate pregnancies on this ground do not perpetuate stereotypes towards persons with disabilities. Such measures should include the provision of appropriate social and financial support for women who choose to carry such pregnancies to term (emphasis added).***<sup>114</sup>

○ Legal differences within the UK and travel for abortion services

Beyond the human rights considerations detailed above, there is a more practical element to consider in the context of the SFIAA Bill, as introduced.

If the Bill is enacted as introduced, abortion in the case of severe fetal impairment will become unlawful in Northern Ireland. However, such abortions would remain lawful in GB. In that circumstance, it is very probable – as is currently the case<sup>115</sup> – that women and girls from Northern Ireland would be forced to travel to GB for abortions. Such a scenario would be a return to ‘exporting the problem’<sup>116</sup> of abortions, which are unlawful in Northern Ireland, to other jurisdictions.

Finally, this could also cause inequalities of access. If the Bill is enacted as introduced, women and girls would need to be aware that free and lawful abortion provision in GB could be accessed in the case of severe fetal impairment. As detailed above<sup>117</sup>, ability to access reproductive health services is closely linked to socioeconomic status and educational attainment – enactment of the Bill as introduced could therefore cause inequalities in these areas.

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<sup>114</sup> United Nations Committee on the Elimination of Discrimination against Women, *Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (2018) p14

<sup>115</sup> See <https://blogs.bmj.com/bmj/rh/2021/01/13/current-abortion-provision-in-northern-ireland/>, retrieved on 8<sup>th</sup> March 2021

<sup>116</sup> DoH & DoJ Working Group on Fatal Fetal Abnormality, *Healthcare and the law on termination of pregnancy for fatal fetal abnormality: Proposals to the Minister of Health and the Minister of Justice* (2016) p4; see also [www.ulster.ac.uk/news/2017/june/ulster-university-research-reveals-attitudes-to-abortion-in-northern-ireland](http://www.ulster.ac.uk/news/2017/june/ulster-university-research-reveals-attitudes-to-abortion-in-northern-ireland), retrieved 4<sup>th</sup> March 2021

<sup>117</sup> See page 25 above