

Parliamentary briefing

Abortion amendment to Northern Ireland (Executive Formation Bill)

Key points

- On Tuesday (10 July) an abortion amendment (NC10) brought forward to the Northern Ireland (Executive Formation) Bill was passed. The full text of the amendment (now clause 9 of the Bill) is available [here](#).
- If the amendment is successful in forcing the UK Government to remove sections 58 and 59 of the Offences Against The Person Act, this would introduce **abortion on demand, for any reason, up to 28 weeks¹ to Northern Ireland**. This could also have repercussions for the operation of sections 58 and 59 in England and Wales, possibly resulting in **widespread changes to abortion legislation in England and Wales**, removing almost all legal safeguards around abortion.
- This would leave Northern Ireland, England, and Wales with one of the most extreme abortion laws in the world and they would be out of line with legislation in the Republic of Ireland and Scotland.
- The change would **potentially lead to significant numbers coming across the border for abortions from the Republic of Ireland** where, post-referendum, abortion is restricted in most cases to 12 weeks gestation. It is also possible that there would be traffic from a number of other countries in Europe as the median gestational time limit for most abortion among EU countries is 12 weeks².
- Polling from ComRes shows that **66% of women** and **70% of 18-34 year olds** in Northern Ireland do not want abortion law imposed on Northern Ireland from Westminster.³
- It is totally constitutionally inappropriate to bring forward abortion amendment to a Bill which has nothing to do with abortion in any way, to legislate on such a sensitive matter. No consultation on this amendment will be possible. The people of Northern Ireland will have next to no opportunity to voice their opinions.
- Westminster must respect the principle and spirit of devolution and ensure the people of Northern Ireland through their elected representatives get to decide on what law and policy should apply in that jurisdiction.

What would be the effect of removing sections 58 and 59 of the Offences Against The Person Act in Northern Ireland?

- There would be **no law regulating abortion** up to 28-weeks in Northern Ireland:
 - This would allow for abortion on demand, for any reason.
- An abortion could **be performed legally on any grounds**:
 - In England and Wales, the Abortion Act provides that abortion can only be performed under specific grounds. Without this legal safeguard, it could allow for:

¹ BMA - Update on the decriminalisation of abortion (March 2017) - <http://bit.ly/bmaupdate>. Please note we have received the following legal advice regarding this point: The statutory presumption provided by the Infant Life Preservation Act/Criminal Justice (Northern Ireland) Act is that the point at which a child is 'capable of being born alive' is 28-weeks. Before 28-weeks, it would be left to the health professionals involved with the abortion to decide on a case-by-case basis whether that particular child was 'capable of being born alive' at an earlier stage. In practice, it would be unlikely that the doctors involved in individual cases would have any interest in challenging the presumption in the Acts - so this would likely in practice usher in a 28-week limit.

² <http://news.bbc.co.uk/1/hi/world/europe/6235557.stm>

³ <https://bothlivesmatter.org/66-of-women-in-northern-ireland-do-not-want-abortion-laws-imposed-by-westminster>

- Sex-selective abortions (this has been a problem in Canada⁴), abortions purely for social reasons etc; abortion to take place in situations of coercion - there would be no legal mechanism to check whether a woman has been coerced or not.
- Abortion for disabilities **including Down's syndrome, club foot and cleft palate would be introduced** to Northern Ireland:
 - In England and Wales, the latest available figures show that 90% of children diagnosed with Down's syndrome are aborted⁵. Northern Ireland has a very different approach. Disability-selective abortion for Down's syndrome is not permitted and there is a culture of welcoming and supporting people with this disability rather than eliminating them.
 - This is reflected directly in the latest figures (2016) from the Department of Health in Northern Ireland showing that there were **52 children with Down's syndrome born⁶**, in the same year **only 1 child from Northern Ireland with Down's syndrome was aborted⁷** in England and Wales.
- There would be **no legal restrictions on places where abortions could be performed**:
 - In England and Wales, the Abortion Act currently restricts abortion to hospitals or places approved by the Secretary of State (section 1(3)). Without this legal safeguard there would be no legislation governing:
 - Mail-order abortions; Abortion pills to be given out in schools; Abortions performed in school nurse clinics; A proliferation of private abortion clinics; Telemed abortions; Pharmacists providing abortion pills over the counter.
- There would be **no legal requirement that two doctors must certify an abortion**:
 - In England and Wales, the Abortion Act prescribes that an abortion can only be carried out if two doctors are of the opinion in good faith that the abortion is medically necessary for the mother. Without this legal safeguard, it could allow for:
 - Healthcare assistants, nurses and pharmacists carrying out abortions, with no trained doctor present in the case of a complication.
- There would be no legal provision protecting **medical professionals' freedom of conscience with regard to abortion**.
 - In England and Wales, the Abortion Act prescribes conscientious objection rights for medical professionals (see section 4 of Abortion Act).
 - Doctors, nurses, other healthcare professionals could be forced to perform abortions or leave their profession; they could also be forced to be complicit in the abortion process by having to refer to another doctor who will do a termination (eg Victoria, Australia a doctor was investigated for not referring for a sex-selective abortion; Pharmacists being forced to give out abortifacient drugs).
- It would be **more difficult to secure convictions against third parties that have forced a woman to terminate a pregnancy**.
 - Cases of non-consensual abortions (for example surreptitiously slipping abortion pills in a woman's drink) are currently prosecuted under sections 58 and 59. For example, in a recent case, a man was convicted for putting abortion pills in his wife's sandwich; he was convicted under s. 58.⁸ In another case a man had ordered abortion pills which he was about to deceive his wife into taking; he was convicted under s. 59.⁹ Without sections 58 and 59 such prosecutions would be very difficult, if not impossible, to bring.

⁴ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3281173/>

⁵ http://www.binocar.org/content/annrep2013_FINAL.pdf

⁶ http://www.publichealth.hscni.net/sites/default/files/Core%20Tables%202016%20-%20final%20-%208%20Dec%202017_0.pdf

⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714541/2017_Tables_-_Abortion_Statistics ods

⁸ R v Magira [2008] EWCA Crim 1939, [2009] 1 Cr App R (S) 68; <https://www.telegraph.co.uk/news/1580407/Jail-for-man-who-tried-to-kill-unborn-child.html>

⁹ R v Fletcher [2014] EWCA Crim 1876; <https://www.mirror.co.uk/news/uk-news/soldier-who-planned-kill-unborn-3948834>

- Even if they could be prosecuted under the poisoning offences (sections 23 and 24 of the OAPA) the maximum sentence, 5 years, would be lower than what is available under sections 58 and 59. In any event, such alternative prosecutions would only vindicate the injuries that the woman suffered and would not vindicate the fact her unborn child was a victim.
- The situation would **likely allow for far greater abuses** than those which have already occurred under the current law in England and Wales:
 - Already within our current legal framework in England and Wales we have seen doctors pre-signing abortion forms¹⁰, gender-selective abortions being offered¹¹, live babies being left to die following abortions that have gone wrong¹² and children with minor disabilities, such as cleft palate¹³, being aborted. In this context, where the current law is supposed to be preventing such appalling practices, the thought of allowing abortion, on demand, through to 28-weeks, is seriously concerning.

Where do women sit on this issue

- Contrary to the rhetoric from abortion campaigners behind this move, the position is radically out of step with the opinions of women in Northern Ireland on this matter:
 - Polling from ComRes shows that **66% of women** and **70% of 18-34 year olds** in Northern Ireland do not want abortion law imposed on Northern Ireland from Westminster.¹⁴

Where does the rest of the world's legislation sit on this issue?

- As the UK prepares to leave the EU, we need to decide where we position ourselves globally.
 - The introduction of abortion on demand through to 28 weeks in Northern Ireland would position the region drastically away from Europe where the median gestational time limit for abortion is **12 weeks**.¹⁵

Why devolution must be respected

- Westminster must respect the principle and spirit of devolution and ensure that the people of Northern Ireland through their elected representatives get to decide on what law and policy should apply in that jurisdiction.
- The Northern Ireland Assembly has considered the issue of abortion much more recently than any other parliament in the United Kingdom. In 2016, a clear majority of the Northern Ireland Assembly, including both Unionists and Nationalists, upheld the law on abortion as it currently stands.¹⁶
- If the British Parliament intervenes in this matter it would be undermining the devolution settlement. The Government should not bluntly step into a sensitive issue at a difficult time for Northern Ireland's politics. Northern Ireland has a difficult and unique history within the British Isles. Calls for Westminster to impose its will upon Stormont should be treated with extreme caution, particularly on an issue as sensitive as abortion.
- Rather than seeking to impose a legislative framework in Northern Ireland, the British Parliament should re-double its efforts to see the Northern Ireland Assembly return so that the Assembly can deliberate on this matter and decide what the best way forward is for that part of the United Kingdom.
- Some argue that Westminster should intervene on this particular matter because being able to access abortion is a human right.
 - This, however, is plainly not true. The lack of a right to abortion in any international treaty was noted by the United Kingdom Supreme Court in *R (A and B) v Secretary of State for Health* [2017] 1 WLR 2492 per Lord Wilson at [35], with whom Lord Reed and Lord Hughes agreed: *'The conventions and the covenant to which the UK is a party carefully stop short of calling upon national authorities to make abortion services*

¹⁰ <http://www.telegraph.co.uk/news/uknews/law-and-order/10807990/Pre-signing-abortion-forms-is-illegal-General-Medical-Council-admits.html>

¹¹ <http://www.telegraph.co.uk/news/health/news/9099511/Abortion-investigation-doctors-filmed-agreeing-illegal-abortions-no-questions-asked.html>

¹² <http://www.dailymail.co.uk/health/article-512129/66-babies-year-left-die-NHS-abortions-wrong.html>

¹³ <http://www.dailymail.co.uk/news/article-3761905/Fury-number-abortions-cleft-lip-babies-rises-new-womb-tests-offered.html>

¹⁴ <https://bothlivesmatter.org/66-of-women-in-northern-ireland-do-not-want-abortion-laws-imposed-by-westminster>

¹⁵ <http://news.bbc.co.uk/1/hi/world/europe/6235557.stm>

¹⁶ <http://www.bbc.co.uk/news/uk-northern-ireland-35546399>

generally available. Some of the committees go further down that path. But, as a matter of international law, the authority of their recommendations is slight:’ see Jones v Ministry of Interior of the Kingdom of Saudi Arabia [2006] UKHL 26, [2007] 1 AC 270, para 23, Lord Bingham of Cornhill.

- Some are suggesting that a report produced by the Committee on the Elimination of Discrimination Against Women, in February, which suggests that the Northern Ireland law abortion is not human rights complaint, means that the UK Government should intervene.
 - The truth, however, as a legal opinion by Prof Mark Hill QC makes plain, is that the Committee in question is not judicial and has no competence to make formal determinations on the UN CEDAW Convention. Indeed, the CEDAW Convention does not even mention abortion. Hill makes it plain that the idea that abortion law in Northern Ireland is not acceptable simply represents the views of the activist membership of the Committee.

Current Northern Ireland situation on abortion

- The Abortion Act has not been extended to Northern Ireland. Instead, the law in Northern Ireland strikes a difficult and delicate balance between the protection of both mother and unborn child.
- Abortion is illegal unless the mother’s life is in danger in which case it is legal. The exact language is ‘where continuation of the pregnancy would threaten the life of the mother’ and is interpreted as “a threat which has a real and serious, permanent or long term, adverse effect on physical or mental health”. This unique law holds the tension, as far as humanly possible, between women and unborn children, freedom and societal responsibility, ensuring the preservation of the value of life across society.
- **100,000 report** - As a result of Northern Ireland’s unique law and culture, it is estimated, using robust statistical methods, that over 100,000 people are alive today in Northern Ireland because it did not enact the 1967 Abortion Act.¹⁷
 - This is equal to 5% of the total population of Northern Ireland. One in ten people under 50 are alive because of Northern Ireland’s distinctive laws. This equates to 100 classrooms every year (based on an average classroom of 25 children)
 - This claim has been robustly investigated over a 5 month period by the Advertising Standard Authority (ASA) and upheld.¹⁸
 - The ASA found: *“on balance we concluded that the evidence indicated that there was a reasonable probability that around 100,000 people were alive in Northern Ireland today who would have otherwise been aborted had it been legal to do so.”*¹⁹

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¹⁷ <https://bothlivesmatter.org/wp-content/uploads/2017/01/Both-Lives-Matter-report-January-2017-Web.pdf>

¹⁸ <https://bothlivesmatter.org/wp-content/uploads/2018/01/BLM-STEP-BY-STEP-EXPLANATION-002.pdf>

¹⁹ <https://bothlivesmatter.org/wp-content/uploads/2018/01/BLM-STEP-BY-STEP-EXPLANATION-002.pdf>