



**NICEM
SUBMISSION**

**The Criminal Law on Abortion: Lethal Foetal
Abnormality and Sexual Crime**

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Introduction

- 1.1 The Northern Ireland Council for Ethnic Minorities (NICEM) is an independent non-governmental organisation. As an umbrella organisation¹ we represent the views and interests of black and minority ethnic (BME) communities.² Our mission is to work to bring about social change through partnership and alliance building, and to achieve equality of outcome and full participation in society. Our vision is of a society in which equality and diversity are respected, valued and embraced, that is free from all forms of racism, sectarianism, discrimination and social exclusion, and where human rights are guaranteed.
- 1.2 Abortion law is an area where the legal system in Northern Ireland (NI) lags significantly behind not only the rest of the United Kingdom (UK), but most of Europe. Current provisions in NI are drawn from the Offences Against the Person Act 1861 and the Criminal Justice Act 1945; these provisions have been defunct in the rest of the UK since 1967.
- 1.3 Supporters of the current model frequently assert that the NI population is broadly in favour of this system; however, research evidences the fact that this is not the case. Indeed, it has been illustrated that almost 70% of the population is in support of allowing the ending of a pregnancy in additional situations to those currently permitted.³
- 1.4 It is notable that, on the issue of the availability of medical procedures to end a pregnancy, BME communities may be particularly adversely affected by the excessive restrictions that currently exist. Therefore, NICEM welcomes the release of this consultation and the opportunity to comment on these proposals to change the law.

¹ Currently we have 27 affiliated BME groups as full members. This composition is representative of the majority of BME communities in Northern Ireland. Many of these organisations operate on an entirely voluntary basis.

² In this document “Black and Minority Ethnic Communities” or “Minority Ethnic Groups” or “Ethnic Minority” has an inclusive meaning to unite all minority communities. It is a political term that refers to settled ethnic minorities (including Travellers, Roma and Gypsy), settled religious minorities, migrants (EU and non-EU), asylum seekers and refugees and people of other immigration status united together against racism.

³ Millward Brown, ‘Attitudes to Abortion’ (2014) Available at:

<http://www.amnesty.org.uk/sites/default/files/milward_brown_poll_results_october_2014_final_0.pdf
> [Accessed 31/10/14] p.4

Sexual Crime and Ending a Pregnancy

Duty to Report Crime to the Police

- 2.1 The question of whether or not an individual should have to make a police complaint in order to access a procedure for ending a pregnancy resultant from sexual crime is important. In this context, it is notable that victims of sexual crime face extreme difficulty in approaching the police, with sexual crime in the UK being acutely underreported.⁴
- 2.2 There are many reasons why a woman may not want to report to police that she has been raped, including not wanting others to know that she has been raped and not wanting to acknowledge the rape herself. Fears regarding the criminal justice process may also inhibit the desire to report an offence.⁵
- 2.3 Arguably, this reticence would only increase amongst women who have become pregnant as a consequence of sexual crime. Any desire to avoid being judged by others would likely be exacerbated in the scenario where a woman is querying whether she is capable of carrying the foetus to term.
- 2.4 It is also notable that there is no requirement in the rest of the UK for a woman to make a complaint to the police in order to undergo a procedure to end a pregnancy resultant from sexual crime.
- 2.5 Additionally, a woman may not know that she is pregnant until weeks after the sexual offence has occurred, thus she would have to make a complaint long before knowing that she is pregnant and long before deciding whether or not she feels that the pregnancy should be ended.
- 2.6 Ultimately, it would be unreasonable to establish a requirement that a woman should have made a complaint to the police as a prerequisite to qualifying for a legal procedure to end a pregnancy resultant from sexual crime. Sexual crime is one of the most underreported types of offence in the UK and, for various reasons, it is far from guaranteed that a woman who finds herself pregnant as a result of sexual crime will have reported the offence.
- 2.7 NICEM recommends that any change to the criminal law to allow for procedures to end pregnancies that result from sexual crime not be constructed in such a manner as to make a complaint to the police a prerequisite to obtaining such a procedure.**

⁴ Office for National Statistics, 'Focus On: Violent Crime and Sexual Offences, 2011/12' (2013) Available at: < www.ons.gov.uk/ons/dcp171778_298904.pdf > [Accessed 13/11/14] p.3

⁵ Acton, A.(ed), *Issues in Criminal and Forensic Psychology and Psychiatry: 2013 Edition* (ScholarlyEditions, Atlanta, 2013) p.76

Refugees and Asylum Seekers

- 3.1 It is a well-established fact that individuals who are seeking asylum are disproportionately likely to have been victims of sexual crime, particularly women. The Refugee Council observed that 44% of the refugee women it worked with between 2010 and 2011 had been raped.⁶ Additionally, the United Nations High Commissioner for Refugees (UNHCR) has published guidelines illustrating the increased risk of experiencing sexual violence generated by a number of factors associated with being a refugee or an asylum seeker.⁷
- 3.2 Indeed, a recent high-profile incident in the Republic of Ireland involved a young asylum seeker discovering that she was pregnant after being raped outside of Ireland. She was denied the option to end her pregnancy, even when she became suicidal and refused to eat.⁸ While this incident did not arise in NI, it is notable that the Northern Irish legal model also does not permit the ending of a pregnancy on the basis of rape.
- 3.3 It is further notable that rape can constitute a crime against humanity for the purposes of the Rome Statute of the International Criminal Court 1998, under Article 7(g). While this does not directly relate to the ending of pregnancies consequent from rape and sexual crime, it is notable that asylum seekers and refugees who are pregnant as a consequence of such crimes may be victims of a serious international offence. Forcing a woman who has been the victim of such an offence to continue the resultant pregnancy only compounds the wrong that has been done.

⁶ Refugee Council, 'The Experiences of Refugee Women in the UK' (2012) Available at: <https://www.google.com/url?q=http://www.refugeecouncil.org.uk/assets/0001/5837/Briefing_-_experiences_of_refugee_women_in_the_UK.pdf&sa=U&ei=QqlTVMjoD-L1iQL1zYCoBw&ved=0CAUQFjAA&client=internal-uds-cse&usg=AFQjCNHR5c1lQT0yM3DMEBd6Jb2nTwr8Sw> [Accessed 31/10/14] p.2

⁷ United Nations High Commissioner for Refugees, 'Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response' (2003) Available at: <www.unicef.org/emerg/files/gl_sgbv03.pdf> [Accessed 31/10/14] p.22

⁸ McDonald, H., 'Woman Denied Abortion in Ireland "Became Pregnant After Rape"' (2014) Available at: <<http://www.theguardian.com/world/2014/aug/18/ireland-woman-forced-caesarean-pregnant-rape-friend>> [Accessed 05/11/14] (Not Paginated)

Victims of Trafficking

- 4.1 BME vulnerability to sex crime is also increased by the perpetuation of trafficking within NI; sexual exploitation remains the main reason for individuals being trafficked into the UK.⁹ Indeed, the first prosecution for trafficking in NI concerned a case of trafficking for the purposes of sexual exploitation.¹⁰ Consequently, many victims of trafficking will have been coerced into sexual relations as an express result of their situation.
- 4.2 Trafficking victims generally may also be vulnerable to sex crime, with handlers sometimes utilising rape as a form of control and to secure compliance from their victim.¹¹
- 4.3 Consequently, it is of extreme importance that such victims have the opportunity to avoid undergoing further trauma through the continuation of pregnancy resultant from sexual exploitation.
- 4.4 NICEM notes that the current consultation questions whether the option to end a pregnancy should be available in all circumstances of sexual crime, or whether it should be strictly limited to pregnancies resulting from the crime of rape. The consultation particularly highlights the issue of consent and proving rape where the victim is less than 16 years of age, but above 13 years of age.
- 4.5 In this context, NICEM would like to highlight the fact that the most prevalent reason for minors to be trafficked into the UK is for the purpose of sexual exploitation; in 2013, 88% of minors identified as victims of trafficking in the UK were sexually exploited. This is an accelerating problem, with this figure representing a 250% rise since 2012.¹²
- 4.6 Therefore, any attempt to strictly limit the ability of women who have become pregnant as a consequence of sexual crime could disproportionately impact those myriad individuals – many of whom are minors - that are trafficked into the UK, largely for the express purpose of sexual exploitation.

⁹ National Crime Agency, 'United Kingdom Human Trafficking Centre: National Referral Mechanism Statistics 2013' (2014) Available at: <<http://www.nationalcrimeagency.gov.uk/publications/national-referral-mechanism-statistics/139-national-referral-mechanism-statistics-2013/file>> [Accessed 03/11/14] p.2

¹⁰ *R v Matyas Pis* [2012] NICC 14

¹¹ The Anti-Trafficking Monitoring Group, 'In the Dock: Examining the UK's Criminal Justice Response to Trafficking' (2013) Available at: <http://www.antislavery.org/includes/documents/cm_docs/2013/i/in_the_dock_final.pdf> [Accessed 03/11/14] p.23

¹² National Crime Agency, 'National Crime Agency Strategic Assessment: The Nature and Scale of Trafficking in the United Kingdom 2013' (2014) Available at: <<http://www.nationalcrimeagency.gov.uk/publications/399-nca-strategic-assessment-the-nature-and-scale-of-human-trafficking-in-2013>> [Accessed 05/11/14] p.1

Victims of Domestic Abuse

- 5.1 Further relevant is the issue of sexual crime in the context of marriage. It is an established fact that sexual offenders are frequently known to the victim, and UK Government statistics illustrate that the perpetrator in the majority of instances of the most serious sexual crimes is the victim's partner.¹³
- 5.2 It is notable, therefore, that BME women are disproportionately represented as victims of domestic abuse, constituting 5% of victims in 2013.¹⁴ This reality has been reinforced by international commentary, with the Committee on the Elimination of Discrimination Against Women (CoEDAW) noting that domestic violence particularly affects BME women.¹⁵ Indeed, the fact that this overrepresentation is statistically evident despite the reality that the vast majority of domestic abuse likely goes unreported is indicative of the scale of this problem.
- 5.3 The vulnerability of BME victims of domestic abuse is exacerbated by the difficulties they may face in seeking assistance, due to various reasons, such as financial dependence on their abuser, the potential for their immigration status to be challenged if they leave their partner and language difficulties that may obstruct their ability to communicate with local authorities.¹⁶
- 5.4 While there are no available statistics for the number of BME women subjected to sexual abuse by their partners within NI, it is undeniable that these factors put women with a BME background at an increased risk of such offences. Consequently, the option to end a pregnancy that has arisen from a domestic sexual crime is of particular relevance to BME communities.

¹³ Ministry of Justice, Home Office and Office for National Statistics, 'An Overview of Sexual Offending in England and Wales' (2013) Available at:

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214970/sexual-offending-overview-jan-2013.pdf> [Accessed 05/11/14] p.16

¹⁴ Police Service of Northern Ireland, 'Trends in Domestic Abuse Incidents and Crimes Recorded by the Police in Northern Ireland 2004/05 to 2013/14' (2014) Available at:

<http://www.psni.police.uk/domestic_abuse_incidents_and_crimes_in_northern_ireland_2004-05_to_2013-14.pdf> [Accessed 05/11/14] p.27

¹⁵ Committee on the Elimination of Discrimination Against Women, 'Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland' (2013) Available at:

<<http://www.scottishhumanrights.com/application/resources/documents/ConcObsCEDAW.doc>> [Accessed: 05/11/14] para.34

¹⁶ McWilliams, M. and Yarnell, P., 'The Protection and Rights of Black and Minority Ethnic Women Experiencing Domestic Violence in Northern Ireland' (2013) Available at: <<http://nicem.org.uk/wp-content/uploads/2014/03/PRBMEWEDVNI-1.pdf>> [Accessed 05/11/14] p.9

5.5 It is also notable that sexually abusive behaviour that results in pregnancy may exist outside explicitly prohibited sexual crime. For example, there is no express legal prohibition on sabotaging birth control or coercing a partner into pregnancy, yet research shows that 35% of women who report partner violence have also been subjected to these experiences.¹⁷

International Law and Ending Pregnancies Resultant from Sexual Crime

6.1 In the context of these above points, it is notable that there is international legal support for an adaptation of NI's law to allow pregnancies to be ended where they arise from rape or incest. CoEDAW has urged a change in the law in NI to this effect¹⁸, in accordance with its General Recommendation No. 24 on Women and Health, which states that laws that criminalise abortion within Member States should be amended.¹⁹

6.2 The UN Committee on Economic, Social and Cultural Rights has also sought an adaptation of the law on abortion in NI, with the Council stating that the provisions of the Abortion Act 1967 should be expanded to apply in NI, in order to avoid clandestine and unsafe abortions being sought in a number of circumstances, including where the pregnancy has arisen as a consequence of rape.²⁰

6.3 Furthermore, both the UN Special Rapporteur on Torture and the UN Special Rapporteur on Health have proven critical of extreme restrictions on the availability of medical procedures for ending pregnancies, with the latter stating that criminalisation of abortion is 'a very clear expression of State interference with a woman's sexual and reproductive health'.^{21 22} The Human Rights Committee has also urged Member States to allow women to choose to end pregnancies that are resultant from rape.²³

¹⁷ Against Violence and Abuse, 'Independent Domestic Violence Advisors: Information Briefing August 2010 – Sexual Violence as Part of Domestic Violence' (2010) p.1

¹⁸ Op cit n 15 para.51

¹⁹ Committee on the Elimination of Discrimination Against Women, General Recommendation No. 24: Article 12 of the Convention (Women and Health) A/54/38/Rev.1, Ch.1, para.31(c)

²⁰ Committee on Economic, Social and Cultural Rights, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories' (2009) Available at: <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW3XRinAE8KCBFqOHnz%2fVuDNYrNRpYh4%2fXwi5mGxO4uVHSp5NkoJ82qvuCoRYrFwZPTcDMxjOFb22xm9hq%2boJq1GI%2bVhCMIVEBIplzFCHxoP>> [Accessed 05/11/14] para.25

²¹ Mendez, J.E., 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez' (2013) A/HRC/22/53, paras. 46 and 50

²² Grover, A., 'Interim Report of the Special Rapporteur on the Rights of Everyone to the Highest Attainable Standard of Physical and Mental Health' (2011) A/66/254, para.27

²³ Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Argentina' (2000) CCPR/CO.70/ARG, para.14

6.4 It is also notable that case law has exhibited that denying an individual the option to end a pregnancy resulting from rape can be contrary to human rights law under the European Convention of Human Rights (ECHR). In the *P and S v Poland* case, the European Court of Human Rights determined that the State's mistreatment of a girl seeking to end a pregnancy consequent from rape amounted to a breach of the Article 3 ECHR prohibition on inhuman or degrading treatment.²⁴

6.5 Ultimately, NICEM welcomes the fact that the current consultation seeks to adapt the law, in compliance with international law and standards, to allow the ending of a pregnancy where it has arisen as a consequence of sexual crime.

6.6 NICEM recommends that legislation be introduced or amended to allow pregnancies to be ended where they arise as a consequence of sexual crime. Sexual crime should be defined as any act that is prohibited under the Sexual Offences (Northern Ireland) Order 2008 that is capable of causing or does cause the victim of the act to become pregnant.

6.7 It is also recommended that provision be made to allow the ending of pregnancies resultant from coercive and deceptive sexual practices outside the remit of this Order – which could still be prosecutable as a criminal offence - including contraceptive sabotage and pregnancy coercion.

Fatal Foetal Abnormality and Ending a Pregnancy

International Law and Ending Pregnancies in the Case of Fatal Foetal Abnormality

7.1 The fact that the current legal arrangement in NI does not allow pregnancies to be ended where the foetus is afflicted with a fatal abnormality affects all women in NI, including those with a BME background. It is important to highlight at this point that there is a significant distinction between foetuses that will develop into a child with disabilities and foetuses that have a fatal abnormality, which are 'incompatible with life' and thus will live only for a matter of hours or days.²⁵

7.2 It is well-established under international law that forcing a woman to carry a foetus to term that is afflicted with a fatal abnormality can constitute a violation of human rights law.

²⁴ *P and S v Poland* [2013] No. 57375/08, para.169

²⁵ Schweppe, J. and Spain, E., 'When is a Foetus Not an Unborn? Fatal Foetal Abnormalities and Article 40.3.3' [2013] 3(3) IJLS 92, 95

- 7.3 In the case of *KNLH v Peru* (2007), the Human Rights Committee found that there had been breaches of Articles 7 and 24 of the International Covenant on Civil and Political Rights 1966 (ICCPR) when a 17 year old girl was denied an abortion when the foetus she was carrying was afflicted with anencephaly, a fatal foetal abnormality.²⁶
- 7.4 This case is of particular interest, as the legal structures regarding abortion in Peru were essentially the same as the current system in NI; that is, pregnancies could only be ended to save the life of the mother or to avoid serious and permanent damage to her health.
- 7.5 It was determined that the failure to provide the girl concerned with the ability to end her pregnancy amounted to cruel, inhuman or degrading punishment in contravention of Article 7 ICCPR, as the experience caused her extreme distress and resulted in her developing severe depression.²⁷
- 7.6 It was also determined that this failure constituted a violation of the girl's Article 24 right to protection by the State, in her capacity as a minor. The Committee emphasised that, in omitting to provide a medical procedure to end the pregnancy, the state had failed to provide the complainant with 'the medical...support necessary in the specific circumstances of her case'.²⁸
- 7.7 The Parliamentary Assembly of the Council of Europe has also passed a resolution that opposes the excessive restriction of medical procedures to end pregnancies, stating that, rather than limiting the number of such procedures carried out, these restrictions only result in more clandestine and unsafe procedures being performed.²⁹
- 7.8 Furthermore, both the UN Council on Economic, Social and Cultural Rights and the CoEDAW have criticised the current legal arrangement governing abortion in NI in the context of the prohibition on ending a pregnancy where the foetus is seriously malformed. Both bodies have encouraged a change of the law in NI to allow women to choose to end pregnancies where the foetus is lethally malformed.³⁰

²⁶ *KNLH v Peru* [2003] 1153/2003, CCPR/C/85/D/1153/2003/Rev.1, paras.6.3 and 6.5

²⁷ *ibid* para.6.3

²⁸ *ibid* para.6.5

²⁹ Parliamentary Assembly of the Council of Europe Resolution No.1607 (2008), recital 4

³⁰ *op cit* nos. 19 and 20

Psychological Impact of Carrying a Foetus with a Fatal Abnormality to Term

- 8.1 Also relevant is the serious psychological impact that can be had upon a woman who is forced to continue a pregnancy to term where the foetus has a fatal abnormality. Women in this position will need to perform the same steps as other pregnant women, including antenatal classes and ultrasound scans, in order to maximise their health outcomes for the duration of the pregnancy. This means that these women will be grouped with expectant mothers, which can be a traumatising experience for those who know that their foetus will develop to be incapable of living.³¹
- 8.2 Research has illustrated that these experiences can have an indirect negative impact upon a woman's health, with one participant skipping meals in order to avoid spending time on the antenatal ward with expectant mothers.³²
- 8.3 Further research, conducted in Brazil, illuminates the need to allow women carrying fatally malformed foetuses that want to end their pregnancies the option to do so. In Brazil, medical procedures to end pregnancies are generally prohibited, but may be permitted by a judicial authorisation.³³ It is notable that in Brazilian research conducted between 1998 and 2008, only 17% of individuals who were informed of a fatal foetal abnormality did not apply judicially for permission to end the pregnancy.³⁴ Of those who did apply for permission to end the pregnancy, 100% did so on the basis of minimising their pain.³⁵
- 8.4 Ultimately, it is evident not only that there is a strong international human rights case for changing the law to allow pregnancies to be ended where the foetus is inflicted with a fatal abnormality, but also that the current system of denying women the opportunity to end such pregnancies has the potential to inflict significant psychological trauma on those who must carry such pregnancies to term.
- 8.5 NICEM recommends that legislation be introduced or amended to allow pregnancies where the foetus is afflicted with a fatal abnormality to be ended, if the pregnant woman so elects.**

³¹ Chitty, L. et al, 'Continuing With Pregnancy After a Diagnosis of Lethal Abnormality: Experience of Five Couples and Recommendations for Management' [1996] 313 BMJ 478, 479

³² *ibid*

³³ Benute, G.R.G et al, 'Feelings of Women Regarding End-of-Life Decision Making After Ultrasound Diagnosis of a Lethal Fetal Malformation' [2012] 28 Midwifery 472, 473

³⁴ *ibid* p.475

³⁵ *ibid* p.473

Factors Related to Ethnicity and the Current System

- 9.1 A number of factors related to the issue of ethnicity mean that the current system for criminalising abortion in NI disproportionately affects individuals with an ethnic minority background.
- 9.2 Research suggests that some ethnic minority groups in the UK have an increased chance of carrying a foetus with a neural tube defect, a collection of defects that include fatal abnormalities such as anencephaly, hydranencephaly and iniencephaly. This is linked in part to the fact that BME individuals in the UK disproportionately suffer from Type-2 Diabetes, which in turn is a risk factor for carrying a foetus with a neural tube defect.³⁶
- 9.3 It is also the case that the monetary aspect of current legal arrangements for criminalising medical procedures for ending pregnancy disproportionately affects some BME individuals.
- 9.4 In practice, some individuals travel to other parts of the UK to end pregnancies that they feel unable to continue. However, as such procedures cannot be obtained on the National Health Service, such individuals must self-fund. As BME individuals are more likely to come from a deprived background³⁷ and individuals with little or no disposable income, such as asylum seekers, have a BME background, the current system is de facto discriminatory.
- 9.5 In light of these factors, NICEM re-emphasises the above recommendations and recommends that any consideration given to changing the criminal law on abortion be mindful of the current system's discrimination against those with a BME background.**

Criminalisation of Ending Pregnancies and Unsafe Procedures

- 10.1 A further factor for consideration when addressing the criminalisation of procedures for ending pregnancy in NI is the reality of unsafe abortions. These procedures are often sought by women who are in desperate need and find themselves with no other choice in a state that unduly restricts the availability of legal procedures. Undergoing such procedures puts women at significant risk, with 13% of maternal deaths across the world in 2008 being a consequence of such unsafe, unregulated practices.³⁸

³⁶ Macintosh, M.C.M et al, 'Perinatal Mortality and Congenital Anomalies in Babies of Women With Type 1 or Type 2 Diabetes in England, Wales, and Northern Ireland: Population Based Study' (2006) Available at:

<<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1513435/>> [Accessed 10/11/14] pp. 1 and 2

³⁷ Northern Ireland Council for Ethnic Minorities, 'The Annual Human Rights and Racial Equality Benchmarking Report 2013/14' (2014) Available at: <<http://nicem.org.uk/wp-content/uploads/2014/06/Final-Benchmarking-Full-Report-NICEM-web.pdf>> [Accessed 10/11/14] p.5

³⁸ World Health Organisation, 'Unsafe Abortion Incidence and Mortality: Global and Regional Levels

10.2 Thus, it is notable that there is evidence to suggest that, rather than reducing the number of procedures to end pregnancies, criminalising these procedures simply increases the number of unsafe abortions that occur. World Health Organisation research has illustrated that the number of unsafe abortions conducted in states with restrictive laws on ending pregnancies is far higher than in those with less restrictive laws.³⁹

10.3 As has been illustrated above, this fact has been emphasised on an international legal platform, with the UN Committee on Economic, Social and Cultural Rights and the Parliamentary Assembly of the Council of Europe emphasising that the criminalisation of procedures to end pregnancy simply increases the number of unsafe procedures performed.⁴⁰ This presents a serious health risk to women who could benefit from a less restrictive system.

10.4 NICEM emphasises the danger that laws criminalising procedures for ending pregnancy can present to the health of women, including BME women, in Northern Ireland. It is again recommended that the law be adapted to allow pregnancies consequent from sexual crime and pregnancies where the foetus has a lethal abnormality to be ended, in order to combat the practice of dangerous and potentially fatal unregulated abortion.

Conscientious Objection

11.1 The consultation has also raised the issue of conscientious objection, which is not currently permitted in cases of lawful ending of pregnancy, as the current legal framework only allows pregnancies to be ended in scenarios where it would be extremely ethically questionable for a medical professional to refuse to perform the procedure. This reasoning was alluded to in the case of *R v Bourne*, wherein it was stated that:

*‘[if] the life of the woman could be saved by performing the operation and the doctor refused to perform it because of some religious opinion, and the woman died, he would be in grave peril of being brought before this court on a charge of man-slaughter by negligence’.*⁴¹

in 2008 and Trends During 1990-2008’ (2012) Available at:

<http://www.who.int/entity/reproductivehealth/publications/unsafe_abortion/rhr_12_01/en/index.html> [Accessed 11/11/14] p.4

³⁹ World Health Organisation, ‘Safe and Unsafe Induced Abortion: Global and Levels in 2008 and Trends During 1990-2008’ (2012) Available at:

<http://apps.who.int/iris/bitstream/10665/75174/1/WHO_RHR_12.02_eng.pdf?ua=1> [Accessed 11/11/14] p.2

⁴⁰ op cit n 20 and 29

⁴¹ *R v Bourne* [1939] 1KB 687

- 11.2 However, if the occasions whereupon a woman could obtain a procedure to end a pregnancy were to be expanded, it is feasible to consider whether conscientious objection could be countenanced in these additional circumstances.
- 11.3 This is reinforced by the fact that Section 4 of the Abortion Act 1967 – the legislation governing the provision of procedures for ending pregnancies in England, Scotland and Wales – allows for medical practitioners to avoid participation in relevant procedures in circumstances other than where the life of the woman is at risk, or where there is a need to act to prevent grave, permanent injury to her physical or mental health.
- 11.4 International human rights law acknowledges the entitlement of States to draft legislation that allows medical practitioners to conscientiously object to performing procedures for the ending of pregnancies. This was highlighted in the ECHR case of *Z v Poland*, wherein it was emphasised that the Court’s previous finding against a system of conscientious objection in *Tysiac v Poland* was a consequence of the application of the domestic law in that specific case, rather than a criticism of conscientious objection provisions per se.⁴²
- 11.5 Nevertheless, it is of great importance that if conscientious objection is to become integrated into the law, then such practice is well regulated. The case of *Tysiac v Poland* has illustrated that a failure to properly regulate the refusal to perform medical procedures for ending pregnancy on the basis of conscientious objection can contribute to a breach of Article 8 of the ECHR.⁴³
- 11.6 Furthermore, the World Health Organisation considers that conscientious objection should not be allowed to prevent a procedure from taking place entirely; if a provider conscientiously objects to performing a procedure, then the pregnant woman should be referred to another, easily accessible provider who is willing. Failing this as a possibility, the conscientiously objecting provider should perform the procedure.⁴⁴
- 11.7 NICEM recommends that any future legislative change to the criminal law on procedures for ending pregnancies allow for medical personnel to conscientiously object to direct involvement in a procedure that is taking place for purposes additional to those allowed under the current law.**
- 11.8 However, it is also recommended that legislative provisions be explicit in preventing conscientious objection from interfering with a woman’s ability to obtain a legal procedure in a timely and convenient manner, in line with international law and guidance.**

⁴² *Z v Poland* [2013] No.46132/08, para.111

⁴³ *Tysiac v Poland* [2007] No.5410/03, para.107

⁴⁴ Johnson Jr., B.R. et al, ‘Conscientious Objection to Provision of Legal Abortion Care’ [2013] 123 International Journal of Gynaecology and Obstetrics 560, 560

Gestational Term Limitation

12.1 It is usually the case in states that permit pregnancies in scenarios other than to save the life of the mother, that a term limit applies as regards how developed the pregnancy is in order to inhibit the number of terminations available in the very late stages of pregnancy.

12.2 In the rest of the UK, there is a limitation on attaining an elective medical procedure to end a pregnancy that has proceeded beyond 24 weeks, as under Section 37(1)(a) of the Human Fertilisation and Embryology Act 1990. The limitation is placed at this point, as this is the time of development at which it is considered that the foetus could survive outside the womb.

12.3 However, it is notable that in many other European jurisdictions, such as Germany, there is a limitation of 12 weeks.⁴⁵ Other such states have higher term limits – Spain and Romania both place the limit at 14 weeks – but few European states have a term limit for elective procedures as high as that of the UK.⁴⁶

12.4 Council of Europe Resolution 1607 Article 7.1 encourages Member States to decriminalise abortion ‘within reasonable gestational limits’. While the Council of Europe does not provide any further information on what constitutes ‘reasonable’ limits, it would seem appropriate to derive this information from the limitations currently utilised within European States.

12.5 There are a wide range of gestational limits adhered to within European jurisdictions – some states adhere to limits as low as 10 weeks, whereas others, such as France, have no limitation at all in the case of fatal foetal abnormality.⁴⁷ Gestational limits tend to fall between 12 and 22 weeks for elective procedures.⁴⁸

12.6 NICEM recommends that any gestational term limit introduced alongside a change in the criminal law on abortion be in line with those adopted in other European states, ranging between 12 and 22 weeks. Any limitation should not be lower than that offered in the most restrictive European state, as this could be construed as an unreasonable limitation.

⁴⁵ Bundesministerium für Familie, Senioren, Frauen und Jugend, ‘Schwangerschafts-beratung § 218: Informationen über das Schwangerschaftskonfliktgesetz und gesetzliche Regelungen im Kontext des § 217 Strafgesetzbuch’ (2014) Available at:

<<http://www.bmfsfj.de/blaetterkatalog/760/blaetterkatalog/index.html>> [Accessed 17/12/14] p.10

⁴⁶ Rowlands, S., ‘Abortion Law of Jurisdictions Around the World’ (2014) Available at:

<http://fiapac.org/static/media/docs/Abortion_laws_around_the_world_Sam_Rowlands_rev_2014_2.pdf> [Accessed 17/12/14] pp.12 and 14

⁴⁷ International Planned Parenthood Federation, ‘Abortion Legislation in Europe’ (2009) Available at: <www.ifpa.ie/sites/default/files/documents/resources/ippf_abortion_legislation_in_europe_feb_2009.pdf> [Accessed 17/12/14] pp.12 and 18

⁴⁸ *ibid*

Counselling and Advice Services

- 13.1 Prior to receiving an elective procedure to end a pregnancy, some jurisdictions require women to receive information and counselling in order to prepare them for the procedure and ensure that they wish to proceed with it; for example, this is the case in Germany⁴⁹ and the Republika Srpska within the Federation of Bosnia and Herzegovina.⁵⁰
- 13.2 In the German jurisdiction, this counselling constitutes an opportunity for a woman to discuss her reasons for wanting to end the pregnancy. It is also used to inform the woman of financial entitlements, childcare arrangements, and support available to help her continue any studies/training and so forth, if the woman were to elect to continue the pregnancy.⁵¹
- 13.3 However, it is notable that the express purpose of this counselling is to motivate the woman to continue the pregnancy⁵²; thus, such counselling may pressure women, particularly some vulnerable women, into continuing a pregnancy that they are not prepared or willing to continue.
- 13.4 In the UK jurisdiction, counselling services are available, through organisations such as the Family Planning Association, but are not a prerequisite to obtaining a procedure to end a pregnancy. These services place an emphasis on being non-directive, thus preserving the autonomy of the pregnant woman insofar as is possible.
- 13.5 This seems to align more fully with international commentary on reproductive health – for example Article 16.1(e) of the Convention on the Elimination of All Forms of Discrimination Against Women, which emphasises the freedom of women to decide freely and responsibly on reproductive issues, with access to information to enable them to make such decisions.
- 13.6 NICEM recommends that any future changes to the criminal law on abortion ensure that counselling is not made an obligatory aspect of obtaining such a procedure. It should be ensured, however, that individuals seeking a procedure are signposted to relevant services.**

⁴⁹ op cit n 45 pp.14-15

⁵⁰ op cit n 47 p.12

⁵¹ Pro Familia, 'Körper und Sexualität: Abortion, What You Should Know – What You Should Keep in Mind' (2011) Available at:

<http://www.profamilia.de/fileadmin/publikationen/Reihe_Koerper_und_Sexualitaet/Schwangerschaft_sabbruch_englisch_2010.pdf> [Accessed 23/12/14] p.6

⁵² ibid

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