

DRAFT

FROM: TONY WORTHINGTON

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cc: PS/SoS(B&L)
PS/Mr Worthington (B&L)
PS/ Mr Murphy (B&L)
Mr Gowdy
Mr Simpson
CMO
CNO
CI(SSl)
Dr Smith
Mr Watkins (Cen Sec)
Ms Goldring (OLR)
Mr Maccabe (NIO)
Mr Beeton (NIO)
Mr Hill (NIO)

Secretary of State

ABORTION LAW IN NORTHERN IRELAND

Issue

1. How to respond to the pressure for change on the law on abortion in Northern Ireland and the expected opposition to any proposal for change.

Recommendation

2. I propose that an expert committee be commissioned to inquire into the legal, medical and social issues raised by the current abortion law and practice in Northern Ireland and recommend changes. The proposed composition of the committee is outlined at Annex A.

Background

3. The Abortion Act 1967 does not extend to Northern Ireland, and the grounds on which abortions may be carried out here are more restricted than in Great Britain. Abortions are illegal in Northern Ireland except where necessary to save the life of the mother, or where continuance of the pregnancy would involve risk of serious injury to her physical or mental health. In Great Britain, under the Abortion Act 1967, abortions may be carried out on much wider grounds, for example, in cases of serious foetal abnormality and where there is a risk to the health of existing children in the family. A summary of the current law is at Annex B.
4. The provisions of the Abortion Act 1967 were not introduced in Northern Ireland because the Government considered the reform of social law here to be a matter for a devolved administration.

Statistics on abortion in NI and GB

5. Abortions recorded as performed on Northern Ireland women in England and Wales represent 5% of total recorded conceptions in Northern Ireland, although it is likely that this figure is an underestimate as some women use a convenience address in England and Wales. Figures for abortions on Northern Ireland women in Scotland are very small. Miscarriages and abortions carried out in Northern Ireland hospitals, the classification of which is suspect due to the lack of clarity in the law, account for a further 6% of all conceptions. During 1994 (the last year for which statistics are available in GB) 20% of recorded conceptions to women resident in England and Wales led to an abortion.

Pressures for Change

6. In recent years, four developments have increased pressure for clarification of and changes to the law in Northern Ireland:
 - High Court Judges have commented adversely on the state of the present law on abortion in 2 notable cases.
 - In June 1993 the Standing Advisory Commission on Human Rights (SACHR) published a consultation paper on abortion law in Northern Ireland which argued that the law is uncertain and falls short of the standards of international human rights law. SACHR's 19th Annual Report, published in June 1994,

reaffirmed its position that it does not have a particular view on what the law should be, but recommended that the Government should bring forward options for clearer law.

- A survey of Northern Ireland's consultant gynaecologists conducted by Middlesex University has found that two-thirds of those who participated in the survey supported a change in the law.
- Opinion polls have appeared to show a majority amongst both sections of the community in favour of liberalising the existing law. A 1994 poll found that 72% of those questioned thought that abortion should be legal in cases of rape or incest, and 59% where a child would be seriously handicapped.

7. Criticisms of the current law are:

- the statute law simply prohibits illegal abortions - it does not specify the grounds on which abortions can be legally performed
- the status of the Bourne Judgement case law is uncertain
- uncertainty about the law gives rise to widespread inconsistency in practice
- the law as it stands may constitute an infringement of human rights because of its lack of clarity
- since those who can afford to can use abortion services in Great Britain, it disadvantages women who are less well off.

Opposition to Change

8. The churches, local politicians and the overwhelming majority of the representations received by Ministers have consistently expressed opposition to the extension of the Abortion Act 1967 to Northern Ireland. The main reasons given by those opposed to any relaxation in the abortion law are that it deprives the unborn child of the right to life, that it is against their moral and religious beliefs and that it very often has harmful physical and psychological effects on the woman.

9. Those opposed to change have argued that in Great Britain legislation on abortion has usually been at the initiative of an individual MP rather than the Government, with MPs voting according to their own consciences. To date no Northern Ireland MP has expressed any interest in introducing legislation on abortion. They have also argued that opposition to abortion is one issue on which Catholics and Protestants in Northern Ireland are united.

Options for Action

- 10 Any Government action to clarify or change the law will inevitably be highly controversial. Four broad options are set out below:

- A - do nothing
- B - proceed directly to legislation
- C - public consultation
- D - an expert inquiry.

Option A - Do Nothing

11. The Government might continue to defend a "do nothing" policy on the grounds that legislation on such a sensitive, local issue would best be left to a devolved administration at Stormont.
12. This might signal Government confidence that the goal of a devolved administration will be achieved. However, it would expose Ministers to the criticism that they are ignoring the welfare of the women who have to travel to Britain for abortions, the difficulties created for doctors, the recommendation of SACHR, and the comments of High Court judges. If a test case were taken to the European Court of Human Rights, it is SACHR's opinion that the Court would find that the current NI legislation failed its test of legal integrity. It is also the case that other sensitive social measures have been introduced at Westminster which probably did not have the support of a majority in Northern Ireland (e.g. homosexual law reform).

Option B - Proceed Directly to Legislation

13. The Government might proceed directly to introduce legislation to clarify and/or extend the existing provisions under which abortions may be performed. Ministerial decisions on the content of proposed legislation would be informed by the views expressed in the SACHR consultation, as well as advice from Departments and

political advisers. The various interests in Northern Ireland would have the opportunity to offer comment in due course on the draft legislation.

14. Under Option B the Government would be taking direct and immediate action to remedy the present unsatisfactory position. However, there would be strong and vocal opposition from:
 - those who are opposed to the practice of abortion, and who believe that any action to change the law will result in its "liberalisation" (anti-abortion campaigners, the churches, Northern Ireland MPs and the main political parties); and
 - those who would consider it irregular for social legislation to be "imposed" on Northern Ireland.
15. Successive Governments have undertaken that any new legislation on abortion would be considered only after full consultation with the people of Northern Ireland. The normal processes of consultation on draft legislation are unlikely to be accepted as fulfilling this undertaking.

Option C - Public Consultation

16. The Government might issue a consultative paper setting out the case for clarifying the law and seeking views on the options for change and the issues to be addressed.
17. Under Option C, the Government would be seen to be responding to an unsatisfactory situation drawn to its attention by SACHR and others. This option would provide for a more comprehensive input of external perspectives on the various options for change. It would however be subject to strong opposition from the same sources as Option B.

Option D - Expert Inquiry

18. The Government might establish an ad-hoc expert committee with a membership drawn mainly from well respected and recognised leaders in the legal, health and social services professions and lay members from women's and consumer interests. The committee would be charged with inquiring into the legal, medical and social issues raised by the current abortion law and practice in Northern Ireland and recommending changes. By reporting comprehensively on a wide range of issues, including abortion

counselling, pregnancy testing, contraception, who should decide on and perform abortions and where the operations should be carried out, an expert committee could open up and better inform public debate and policy formulation.

19. Given the obvious political difficulties, Option D would allow the Government to maintain a position of neutrality while providing for a full and independent review of the law. This would be perceived as a less aggressive strategy than Options B and C. It would be presented as a responsible and sensitive response to the various problems which have been drawn to its attention in a difficult area where strong views are passionately held and expressed.
20. The committee would be unlikely to be able to report in less than 12 months, by which time the prospects for achieving a devolved administration should be clearer. In the meantime, the Government could take the line that they would prefer the matter to be dealt with by a devolved administration but are not prepared simply to do nothing where the law is clearly unsatisfactory.

Conclusion

21. The uncertainty in the abortion law in Northern Ireland constitutes a significant deficiency which has adverse effects on the lives and rights of women and on medical practice and leaving the law unclarified is not defensible. However, opposition to any initiative is likely to be formidable, and there seems little prospect of overt support from any of the Northern Ireland MPs. Any action must anticipate a general negative response across the political spectrum. Taking all these considerations into account, option D, an Expert Inquiry, appears to be the best way ahead. This allows Government to be seen as acting responsibly and sensitively in a difficult area, is less contentious than more direct Government action and enables expert advice to provide a comprehensive view of wider issues which should open up and better inform public debate and future policy formulation.
22. I would welcome your agreement to proceed on this basis.

TONY WORTHINGTON

ANNEX A

COMPOSITION OF EXPERT COMMITTEE

1. It is proposed that the committee would have 10-12 members, mostly women, who are well respected in their field. The committee would be chaired by a High Court Judge, possibly one of the two involved in the recent cases. Other members would be:

Legal	one place
Medical	three places
Nursing	one place
Women's interests	one place
Social services	one place
Consumer interests	one place
Journalist	one place
Lay members	two places

2. The committee's remit would be
to inquire into the legal, medical and social issues raised by the current abortion law and practice in Northern Ireland and recommend changes.
3. The time scale envisaged to consider and report to Government would be one year. The Committee would be able to choose how it would seek views, but this could, for example, include inviting evidence from interested parties and commissioning public opinion polls.

“THE ABORTION LAW IN NORTHERN IRELAND” - EXTRACT

Abortion in Northern Ireland is regulated by the 1861 Offences Against the Person Act, the 1929 Infant Life (Preservation) Act and, in case law, by the *Bourne Judgement* of 1938.

The 1861 Offences Against the Person Act

The Offences Against the Person Act became law on 1 November 1861. It contains 79 paragraphs and covers a wide range of possible offences, including:

- Administering poison
- Sending letters threatening to murder
- Placing wood on a railway with intent to endanger passengers
- Assaulting a magistrate
- Rape
- Child stealing
- Bigamy
- Concealing the birth of a child

In the midst of this are two paragraphs on abortion. They read, in full, as follows:

“(58) Every Woman, being with Child, who, with Intent to procure her own Miscarriage, shall unlawfully administer to herself any Poison or other noxious Thing, or shall unlawfully use an Instrument or other Means whatsoever with the like Intent, and whosoever, with intent to procure the Miscarriage of any Women, whether she be or be not with Child, shall unlawfully administer to her or cause to be taken by her any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life, or any Term, not less than Three Years - or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour, and with or without Solitary Confinement.”

“(59) Whosoever shall unlawfully supply or procure any Poison or other noxious Thing, or any instrument or Thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the Miscarriage of any Woman, whether she be or be not with Child, shall be guilty of a Misdemeanour, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for the Term of Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.”

The 1861 Offences Against the Persons Act still remains operative throughout the whole of the UK. It is widely accepted by legal experts that the use of the term “unlawful” in respect of abortions implies that some abortions could be lawful.

The 1929 Infant Life (Preservation) Act

Northern Ireland was originally excluded from the provisions of this Act until 1945 when it was subsequently enacted for Northern Ireland as the Criminal Justice (Northern Ireland) Act. This piece of legislation prohibits the destruction of a child capable of being alive unless the act is carried out in good faith to preserve the life of the mother.

The 1929 Infant Life (Preservation) Act, article 1.1 states:

“Subject as hereinafter in this subsection provided, any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof to indictment to penal servitude for life:”

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

Criminal Justice Act (Northern Ireland) 1945

(s.25) “(1) Subject as hereafter in this sub-section provided, any person who,

with intent to destroy the life of a child then capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life:

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

"(2) For the purposes of this and the next succeeding section, evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be prima facie proof that she was at that time pregnant of a child then capable of being born alive. (s.26 relates to the possibility of a jury convicting of this felony of child destruction whilst acquitting under, e.g. s.58 Offences Against the Persons Act 1861).

Judge McNaghton's statement from the Bourne case 1938

In England, in 1938, Dr Alex Bourne deliberately challenged the law in order to clarify what constituted legal practice in relation to abortion when the abortion was not directly necessary to save the woman from death. He carried out an abortion on a 14-year-old rape victim, and at the subsequent trial brought evidence that if the young woman had been forced to continue with the pregnancy she would have become a mental and physical wreck. Dr Bourne was acquitted. At the trial Judge McNaghton restated that the law allows termination of a pregnancy for preserving the life of the mother and continued:

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

This case was of major significance in that it extended the grounds for a lawful abortion to include the mental and physical well-being of the woman.

The 1967 Abortion Act

The 1967 Abortion Act clarified the law for doctors in England, Scotland and Wales, but the law was not extended to Northern Ireland.

Sections 1.1 and 5.1 of the 1967 Abortion Act read as follows:

"(1.1) 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,

(a) that the continuance of the pregnancy would involve risk to the life of the pregnant women, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or

(b) 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.

(5.1) Nothing in this Act shall affect the provisions of the Infant Life (Preservation Act) 1929 (protecting the life of the viable fetus)."

The Human Fertilisation and Embryology Act 1990

(s. 37) of the Human Fertilisation and Embryology Act amended (a) and (b) of the original text of the Abortion Act to read:

"(a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, or injury to the physical and mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or

(b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or

(c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or

(d) that there is substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped."