



**Black and Minority Ethnic
Women's Network**

**Black and Minority Ethnic Women's Network
SUBMISSION**

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

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Introduction

- 1.1 The Black and Minority Ethnic Women's Network (BMEWN) is a women-led organisation that advocates for change on issues affecting black and minority ethnic (BME) women in Northern Ireland (NI). The aim of the network is to develop the capacity of ethnic minority women so that they can support and assist their communities in accessing services, furthering their human rights and developing sustainable community-based leadership.
- 1.2 Access to procedures to end pregnancies is a particularly important issue for BME women in NI; BME women are more likely to be victims of sex trafficking¹ and domestic abuse² than other groups. Additionally, BME women seeking asylum have often been the victims of sexual crime in their country of origin³, with one particularly high profile case of an asylum seeking woman being denied an abortion in the Republic of Ireland – which has similar restrictions to NI - causing controversy in the media.⁴
- 1.3 Therefore, the BMEWN welcomes the opportunity from the Department of Justice (DoJ) to comment on a potential change in the criminal law on abortion, with a view to effecting change on the issues of termination in cases of fatal foetal abnormality and sexual crime.

Sexual Crime and Ending a Pregnancy

Victims of Sex Trafficking

- 2.1 As noted above, BME women are disproportionately represented as victims of sex trafficking. Pregnancy as a consequence of sex trafficking is not uncommon, with National Crime Agency best practice informing its front line practitioners that they may encounter women who are pregnant.⁵ Indeed, research has highlighted many individual examples of trafficked women who have suffered after becoming pregnant due to sexual exploitation.⁶

¹ Constituting 96.9% of potential sex trafficking victims referred to the National Referral Mechanism in 2013: National Crime Agency, 'United Kingdom Human Trafficking Centre: National Referral Mechanism Statistics 2013' (2014) Available at:

<<http://www.nationalcrimeagency.gov.uk/publications/139-national-referral-mechanism-statistics-2013/file>> [Accessed 06/01/15] p.2

² BME individuals and women are overrepresented as victims of domestic abuse: 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/index/updates/domestic_abuse_incidents_and_crimes_in_northern_ireland_2004-05_to_2013-14.pdf> [Accessed 06/01/15] pp.26-27

³ Refugee Council, 'The Vulnerable Women's Project: Refugee and Asylum Seeking Women Affected by Rape or Sexual Violence' (2009) Available at:

<http://www.refugeecouncil.org.uk/assets/0001/7039/RC_VWP-report-web.pdf> [Accessed 06/01/15] p.24

⁴ BBC News, 'Woman Denied Abortion in the Republic of Ireland Speaks Out' (2014) Available at: <<http://www.bbc.co.uk/news/world-europe-28849058>> [Accessed 06/01/15] (Not paginated)

⁵ See: <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/best-practice-guide>

⁶ Centre for Social Justice, 'It Happens Here: Equipping the United Kingdom to Fight Modern Slavery' (2013) Available at:

- 2.2 It is important, therefore, for BME women who have endured these traumas to have the option to end a pregnancy that may only cause further pain and difficulty; psychologically, the process of birthing a child resultant from rape can be extremely traumatising for the pregnant woman, who may feel they are experiencing a repetition of the trauma of the rape.⁷

Refugees and Women Seeking Asylum

- 3.1 Women who are refugees or are seeking asylum have an increased chance of having experienced sexual crime at some point in their lives. Around a third of individuals applying for asylum in the United Kingdom (UK) are women and research illustrates that women seeking asylum are vulnerable to sexual crime throughout their experience – this is the case even while they are seeking asylum in another state, as they are vulnerable to sexual exploitation due to destitution.⁸
- 3.2 Naturally, women who have been subjected to such offences are at risk of pregnancy. Indeed, depending on the individual's country of origin, an unwanted pregnancy may be inherent to their status as an asylum seeker – in some states, such as Eritrea, women may be murdered if they become pregnant outside marriage, even where this is a consequence of rape, in order to preserve the family's "honour".⁹
- 3.3 Again, this illustrates that the ability to obtain a medical procedure to end a pregnancy resultant from sexual crime is of particular importance to the BMEWN, as some BME women are particularly vulnerable to this type of crime.

Women Subjected to Domestic Abuse

- 4.1 It has been noted above that BME women are disproportionately likely to be victims of domestic abuse – a fact that has been acknowledged by the Committee on the Elimination of Discrimination Against Women (CoEDAW).¹⁰ Domestic abuse may involve sexual crime, including rape; indeed, UK statistics illustrate that the victim's partner is the perpetrator in the majority of the most serious instances of sexual crime.¹¹

<http://www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20reports/CSJ_Slavery_Full_Report_WEB%285%29.pdf> [Accessed 06/01/15] pp.17, 49 and 175

⁷ Baradon, T., *Relational Trauma in Infancy: Psychoanalytic, Attachment and Neuropsychological Contribution to Parent-Infant Psychotherapy* (2009, Routledge: London) p.206

⁸ op cit n 3 p.14

⁹ ibid p.20

¹⁰ 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: 05/01/15] para.34

¹¹ 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 05/11/15] p.16

- 4.2 However, it is also notable that the reported instances of domestic abuse are likely only a fraction of the true scale of offences. A number of factors increase the likelihood that some BME women will not report the abuse they experience. Women may rely on their partner for their residency status, or may be financially dependent upon them due to their own ineligibility for financial assistance.¹² Indeed, women who have no recourse to public funds as a condition on their visa are not even able to gain access to refuges, as they are ineligible for subsidies to finance their accommodation.¹³
- 4.3 Ultimately, these factors render many BME women particularly vulnerable to domestic abuse, as leaving their partner and reporting their experiences may result in them losing their residency status or having to live in destitution. Consequently, it is important that women who are victims of domestic sexual crime are able to access procedures to end pregnancies. This is particularly important, as pregnancy may be used to maintain the control that abusers have over victims.¹⁴
- 4.4 The BMEWN also notes that the consultation focuses on the issue of ‘sexual crime’. While the network agrees with this focus, it should be noted that not all offences that result in pregnancy are prohibited under sexual criminal law. For example, coercive pregnancy and contraceptive sabotage are not explicit sexual offences under the Sexual Offences Order 2010, but are experienced by up to 35% of women who experience partner violence.¹⁵
- 4.5 While these offences are not expressly covered by sexual criminal law, the Network feels that they constitute ‘sexual crime’ in the sense that they are potentially criminal offences – such as assault – and are of a sexual nature. Consequently, instances of reproductive coercion should be considered as justification for obtaining a procedure to end a pregnancy due to sexual crime.

¹² 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 06/01/15] p.9

¹³ *ibid* p.20

¹⁴ Chamberlain, L. and Levenson, R., ‘Addressing Intimate Partner Violence, Reproductive and Sexual Coercion: A Guide for Obstetric, Gynecologic and Reproductive Health Care Settings’ (2012) Available at: <http://www.futureswithoutviolence.org/userfiles/file/HealthCare/reproguidelines_low_res_FINAL.pdf> [Accessed 06/01/15] p.6

¹⁵ Against Violence and Abuse, ‘Independent Domestic Violence Advisors: Information Briefing August 2010 – Sexual Violence as Part of Domestic Violence’ (2010) Available at: <<http://www.avaproject.org.uk/media/62309/idva%20policy%20briefing%20aug%20st.pdf>> [Accessed 06/01/15] p.1

Duty to Report Sexual Crime to Police

- 5.1 The BMEWN finds it concerning that the consultation suggests that a duty to report sexual crime to the police could become a prerequisite to obtaining a termination if the criminal law is adjusted. Sexual crime is significantly underreported in the UK¹⁶ for a multitude of reasons and it makes little sense to place a burden upon the victim to take particular actions in order to access a medical procedure to mitigate criminal harm committed against them.
- 5.2 Numerous factors may influence a woman's decision on whether or not to report a sexual offence, such as fear of being disbelieved, embarrassment or shame regarding the event, a lack of confidence in the police and a reluctance to be subjected to the rigours of the criminal justice process.¹⁷
- 5.3 Furthermore, as has been emphasised above, some BME women are particularly vulnerable to domestic abuse due to a number of particular factors, such as a dependency on the abuser for residency status and financial assistance. These same factors make it less likely that these offences will be reported; consequently, any duty to report offences to police would discriminate against BME women in this situation.
- 5.4 The BMEWN recommends, therefore, that the criminal law on abortion be adjusted to allow for procedures to be conducted where the pregnancy is a consequence of sexual crime. 'Sexual crime' should be taken to refer to any act prohibited under the Sexual Offences Order (NI) 2008 that can or does result in pregnancy.**
- 5.5 Provision should also be made to allow terminations to occur where criminal activity not explicitly covered by this act, but which may be indirectly prosecuted under other provisions, results in pregnancy. This includes practices known as reproductive coercion.**

¹⁶ 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

¹⁷ Wainer, L. and Summers, L., 'Understanding the Extent and Nature of Serious Sexual Violence in the London Borough of Hackney' (2011) Available at: <<https://www.ucl.ac.uk/scs/publications/downloads/hackney-march2011.pdf>> [Accessed 06/01/15] p.7

Ending a Pregnancy in the Case of Fatal Foetal Abnormality

Psychological Distress

- 6.1 Pregnancy may be a greatly bonding experience between the woman and her unborn child; a pregnant woman may have a sense of the forthcoming baby before it is even born.¹⁸ However, in the case of the foetus developing a fatal abnormality, this experience is distorted; the pregnant woman is aware that the foetus growing inside her cannot live. The fact that a woman in NI does not have the choice to end a pregnancy in this situation has the potential to cause a great deal of trauma, as the experience of birthing a stillborn child has a profound psychological impact.¹⁹
- 6.2 Delivering a baby with a fatal abnormality may cause additional distress within certain minority cultures. For example, under Islamic tradition, a baby must draw breath in order to receive the azān and be acknowledged as a Muslim. Without this acknowledgement, the baby is unlikely to be buried in a Muslim cemetery.²⁰ Consequently, continuing a pregnancy and developing a bond with a baby, knowing that it may go unacknowledged in death by the family and wider community can be a source of great distress to the pregnant woman.
- 6.3 While it is acknowledged that some women may draw comfort from the process of completing the pregnancy and saying farewell to their child, others are left traumatised by this experience.²¹ Consequently, it is important that women be given a choice in this situation, so that they may decide what is best for them.

Defining 'Lethal'/'Fatal' Foetal Abnormality

- 7.1 As noted in the consultation document, defining a 'lethal' or 'fatal' foetal abnormality is a difficult task. It may not be realistic to list all potentially fatal conditions in legislation or to base the definition strictly upon how long the baby may survive after birth.

¹⁸ op cit n 7 p.206

¹⁹ Royal College of Obstetricians and Gynaecologists, 'Late Intrauterine Fetal Death and Stillbirth' (2010) Available at: <https://www.oaa-anaes.ac.uk/assets/_managed/editor/File/Guidelines/Intra-Uterine%20Foetal%20Demise/GTG%2055%20Late%20Intrauterine%20fetal%20death%20and%20stillbirth%2010%2011%2010.pdf> [Accessed 07/01/15] p.2

²⁰ Shaw, A., 'They Say Islam has a Solution for Everything, So Why are there No Guidelines for This? Ethical Dilemmas Associated with the Births and Deaths of Infants With Fatal Abnormalities from a Small Sample of Pakistani Muslim Couples in Britain' (2012) Available at: <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3500506/pdf/bioe0026-0485.pdf>> [Accessed 08/01/15] pp.489-490

²¹ 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

- 7.2 Considering the complexity and variegation of cases where a fatal abnormality may be involved, it would seem appropriate for there be some element of medical expertise in the legislative framework for decision-making on this matter. Providing a legislative framework for medical practitioners to assess whether or not the foetus is compatible with life could offer the necessary responsiveness required to adequately deal with sensitive or difficult cases.
- 7.3 This seems a particularly appealing system, as it is also utilised in other European states, such as Norway and Poland.²² It should be noted that these states require that decisions be made by a panel of two physicians, rather than one.²³ This could be a useful structure to emulate, as it avoids the impunity of a single decision-maker without requiring the excessively high threshold of a positive decision from a large group of physicians.
- 7.4 However, it is notable that if medical practitioners are to make determinations on this issue, then initial decisions should not be immutable. The legislative framework establishing this system should also provide for the ability to appeal decisions, so that particularly difficult cases are given adequate attention. Again, this is the established practice in other European states, such as Denmark, Portugal and the Slovak Republic.²⁴
- 7.5 In both the case of an initial decision and any further decisions that the legislative framework may allow for, it should be ensured that determinations are made promptly and well in advance of the expiry of any gestational term limit imposed upon the performance of a procedure to end a pregnancy.
- 7.6 The BMEWN recommends that the criminal law on abortion be adapted to allow procedures to be carried out where the foetus is determined to have a fatal abnormality.**
- 7.7 It is also recommended that a legislative framework be developed to allow the question of whether or not the foetus has a fatal abnormality be determined by a panel of two medical practitioners on an individual basis.**
- 7.8 It is further recommended that this framework allow for initial decisions to be appealed. Both initial and appealed decisions should be delivered well in advance of any gestational term limit on performing a termination.**

²² See: www.un.org/esa/population/publications/abortion/doc/norway.doc; International Planned Parenthood Federation, 'Abortion Legislation in Europe' (2009) Available at: http://www.ifpa.ie/sites/default/files/documents/resources/ippf_abortion_legislation_in_europe_feb_2009.pdf [Accessed 12/01/15] p.63

²³ *ibid*

²⁴ pp.14, 20 and 71

Requirement of Parental Consent

- 8.1 Where someone is seeking a procedure to end a pregnancy, the issue of whether they should require parental consent to obtain this procedure if they are under a certain age is relevant.
- 8.2 While the BMEWN does not support a strict requirement that girls under the age of 18 be required to obtain parental consent for a procedure, it may be reasonable to take steps to persuade girls under the age of 16 to inform their parents of their intentions.
- 8.3 This would align with the current approach in England and Wales, derived from *Gillick v West Norfolk and Wisbech Area Health Authority* (1985), which allows physicians to approve procedures only where they cannot persuade the child to inform their parents and it is determined that the girl will understand the physician's advice.²⁵
- 8.4 This approach would also align more readily with that adopted in other jurisdictions, such as Norway, where the opinion of the parents or guardians of a girl is taken into consideration where the pregnant girl is under 16, but is not required to let procedures take place in particular circumstances.²⁶
- 8.5 The BMEWN recommends that parental consent not be a strict prerequisite to non-adults receiving a procedure under any new laws. However, steps should be taken to ensure that girls under the age of 16 are capable of making a consensual decision to undergo the procedure, in line with the Gillick criteria utilised in England and Wales.**

²⁵ *Gillick v West Norfolk & Wisbech Area Health Authority* [1985] UKHL 7; [1986] 1 FLR 229

²⁶ *ibid* p.62

Gestational limit

- 9.1 Perhaps one significant oversight of the current consultation is its failure to discuss the issue of gestational limits upon procedures available under any new law. While States that limit the availability of abortions to scenarios where the mother's life is at risk need not consider gestational limits - as to fail to intervene would likely constitute manslaughter - states offering elective procedures generally define temporal limitations to their availability.²⁷
- 9.2 Gestational limits vary greatly depending on the State, with limits across Europe generally ranging from 12 to 22 weeks.²⁸ Under the Abortion Act 1967, as amended by Section 37 of the Fertilisation and Embryology Act 1990, the gestational limit for terminations in Great Britain is 24 weeks. However, as the law is structured radically differently in this jurisdiction as compared to the framework that may be established in NI, it may not be useful to draw upon this system to inform NI's.
- 9.3 European jurisdictions that do have similar systems to the one proposed in NI, where there are separate legal justifications for abortion, tend to have differing gestational limits depending on the reason for the termination. Amongst these States, it is usually the case that the gestational limit for malformed fetuses is higher than that for pregnancies arising from sexual crime. For example, this is the case in Portugal, Spain and Finland.²⁹
- 9.4 As regards the termination of pregnancies arising from sexual crime, many European States set a gestational limit of 12 weeks.³⁰ However, in the case of foetal abnormality, this tends to extend to around 24 weeks.³¹ It is important to ensure in both cases that adequate time is given for physicians to come to a determination on the availability of a procedure and for any appeals of this decision to be made.
- 9.5 The BMEWN recommends that a gestational limit for termination arising from sexual crime be set at 12 weeks. A limit of no more than 24 weeks should be implemented in the case of fatal foetal abnormality.**
- 9.6 In both cases, adequate time should be allowed for decision-making processes to occur to their fullest extent. If the process of determining whether a woman is eligible for a procedure does exceed the gestational limit in either case, then consideration should be given to whether it would be appropriate to deliver the procedure regardless.**

²⁷ For example, terminations for pregnancies resultant from sexual crime in Germany are permitted up until 12 weeks of pregnancy: 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 13/01/15] p.12

²⁸ op cit n 22

³⁰ For example, Germany, Finland, Czech Republic and Spain: op cit n 22 pp.18, 26, 32 and 73

³¹ ibid pp.18, 26, 65 and 73

Provision of Counselling Services

- 10.1 In some jurisdictions, such as Germany, the receipt of counselling is a prerequisite to obtaining an elective procedure to end a pregnancy. Although it is not strictly required in cases of medical justification and sexual crime, it may still be utilised.³²
- 10.2 While this approach may be useful in ensuring that women make a full and informed decision on whether to end their pregnancy, it is notable that such a requirement leaves room for a woman's decision to be unduly influenced; it is relevant that the express purpose of the counselling in the German jurisdiction is to persuade the woman not to end the pregnancy.³³
- 10.3 Furthermore, requiring an individual to participate in counselling is not likely to produce positive results – involuntary counselling clients are more likely to manifest resistant behaviours³⁴ and a specific approach must be taken to counselling involuntary clients, or else poorer outcomes may result.³⁵
- 10.4 Consequently, it would be inappropriate to establish the receipt of counselling as a prerequisite to obtaining terminations due to fatal foetal abnormality or sexual crime.
- 10.5 However, counselling services must still be made available, as a matter of choice, to women seeking terminations on the basis of fatal foetal abnormality or sexual crime. An emphasis should be placed on signposting women to services that are independent, neutral and non-judgemental.
- 10.6 The BMEWN recommends that undergoing counselling should not be a prerequisite for receiving a termination in the cases of fatal foetal abnormality and sexual crime, in line with practice both in the UK and the rest of the EU.**
- 10.7 It is further recommended that physicians ensure that women seeking terminations for these reasons are signposted to independent counselling services and made aware of their existence.**

³² Körper und Sexualität, 'Abortion: What You Should Know – What You Should Keep in Mind' (2010) Available at: <http://www.profamilia.de/fileadmin/publikationen/Reihe_Koerper_und_Sexualitaet/Schwangerschaft_sabbruch_englisch_2010.pdf> [Accessed 13/01/15] p.5

³³ *ibid* p.6

³⁴ Watson, J.C., 'Addressing Client Resistance: Recognizing and Processing In-Session Occurrences' (2006) Available at: <<http://counselingoutfitters.com/Watson.htm>> [Accessed 13/01/15] (Not paginated)

³⁵ Trotter, C., *Working with Involuntary Clients: A Guide to Practice* (2009: SAGE) p.20

For further information on this consultation response, please contact:

Claire Choulavong
BMEWN Development Worker
claire.nicem@gmail.com

or

Luke Kelly
Legal Policy Officer
lukek.nicem@gmail.com

or

Patrick Yu
Executive Director
patrick@nicem.org.uk