

## UPDATE on the decriminalisation of abortion (March 2017):

*The impact of repealing the Offences Against the Person Act 1861 and retaining the Infant Life (Preservation) Act 1929 (England and Wales) and Criminal Justice (Northern Ireland) Act 1945*

Publication of the BMA's discussion paper *Decriminalisation of abortion: a discussion paper from the BMA* (February 2017), has stimulated some interesting and helpful discussion about what 'decriminalisation' of abortion might look like, an issue which is rarely addressed in the medical or academic literature. In particular, there has been debate around the statutory presumption of viability, in the 1929 and 1945 Act, at 28 weeks' gestation, which is referred to on page 24 of the discussion paper. In the light of the discussion that has ensued, we believe more detailed explanation of the BMA's interpretation of this may be helpful to inform the debate. We accept that others may have different views and we welcome further debate on this and other aspects of our paper.

In the light of legal advice we have received, the BMA suggests that, if the abortion offences in the Offences Against the Person Act 1861 were repealed and only the 1929 Act and 1945 Act remained:

- The statutory presumption of viability would remain at 28 weeks' gestation under the 1929 Act and 1945 Act.
- This is a rebuttable presumption i.e. it is presumed to be the case unless there is evidence contrary to this in the individual circumstances.
- In most cases this presumption will be easily rebutted due to developments in clinical understanding and treatment of premature babies.
- Currently, the standard medical threshold of viability is understood to be around 24 weeks' gestation.<sup>a</sup> It is possible, however, that future advances in perinatal and neonatal care may drive this threshold downwards.
- The medical threshold does not, however, change the statutory presumption of 28 weeks under the 1929 Act and 1945 Act.
- The statutory presumption of 28 weeks would need to be rebutted on the individual facts of each case.
- As noted in the BMA decriminalisation discussion paper:

"Viability is difficult to define. It can mean that the fetus is capable of being born alive but may die shortly afterwards, or it can mean that an infant is capable of surviving into childhood with no, or minimal, disabilities. Even if a fetus reaches a gestational age, which is considered the minimum for viability, many other individual factors come into play – for example, birth weight, any underlying medical conditions, whether it is a multiple pregnancy and the gender of the fetus. Another factor when considering viability is whether fetal viability relates to the minimum stage possible for any fetus to survive, whether it refers to the viability of a particular individual fetus, or whether it refers to the stage at which the majority survive. For a more detailed discussion on viability see the BMA discussion paper *Abortion time limits: a briefing paper from the BMA (2005)*." (footnote n, page 26)

- For example, one fetus of 25 weeks' gestation may be capable of being born alive, but another may not due to factors such as restricted fetal growth. Therefore, to administer an abortion in the first case could remain a crime under the 1929 Act and 1945 Act, whereas in the second case, the same act would not.

### Clarity in future law reform

The different views that have been expressed on this point highlight the need for clarity in any law reform, so that individuals are clear about what is and what is not lawfully permitted, including where the statutory presumption of viability lies in relation to whether a crime has been committed.

a See, for example: British Association of Perinatal Medicine. The Management of Babies born Extremely Preterm at less than 26 weeks of gestation, A Framework for Clinical Practice at the time of Birth, Report of a Working Group. *Arch Dis Child – FNN Online First*: Published on October 6, 2008 as 10.1136/adc.2008.143321. Available at [www.bapm.org/publications/documents/guidelines/Approved\\_manuscript\\_preterm\\_final.pdf](http://www.bapm.org/publications/documents/guidelines/Approved_manuscript_preterm_final.pdf) (Accessed 7 March 2017); and Nuffield Council on Bioethics. *Critical care decisions in fetal and neonatal medicine: ethical issues*. London: Nuffield Council on Bioethics, 2006. Available at [www.nuffieldbioethics.org/neonatal-medicine](http://www.nuffieldbioethics.org/neonatal-medicine) (Accessed 7 March 2017).

