NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Response to the Women and Equalities Committee Inquiry into Abortion Law in Northern Ireland

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Executive Summary

The Northern Ireland Human Rights Commission contends that the current criminal law in NI is incompatible with the human rights of women and girls. This position is based solely on the international human rights standards, which have been signed and ratified by the UK Government, and the recommendations of the expert UN treaty bodies.

The right to the highest attainable standard of health, protected by a number of core UN treaties, encompasses the right to sexual and reproductive health. This requires governments to remove any barriers interfering with access to sexual and reproductive healthcare. There is also a clear relationship between the right to health and other fundamental rights such as the prohibition on torture, inhuman and degrading treatment, the right to private life, including a woman's right to personal autonomy, and non-discrimination.

The Committee on the Elimination of all forms of Discrimination against Women ('CEDAW') conducted its first confidential inquiry in respect of the UK in 2016, following allegations relating to restrictive nature of termination of pregnancy in NI.

In its report of the Inquiry, the CEDAW Committee identified grave and systemic violations in relation to the law relating to termination of pregnancy in NI. It held that the UK Government is responsible for grave violations resulting from the criminal law, which compels women to carry pregnancies to full term, subjecting them to severe physical and mental anguish. It further found systematic violations through the deliberate criminalisation and highly restrictive policy on accessing terminations of pregnancy.

The responsibility for the grave and systemic violations was attributed to the UK Government, as the State Party to the Convention on the Elimination of All Forms of Discrimination against Women. The CEDAW Committee did not consider the devolution of powers to NI as absolving the UK from responsibility. The UK Government did not agree with the findings though it recognised its response was made in the absence of the (then) pending judgment of the UK Supreme Court and the publication of the recently completed review of the Departments of Health and Justice in treatment of fatal foetal abnormality. The UK Government has promised a further response when the NI Assembly returns.

The other UN Treaty bodies have also made specific recommendations regarding the law in NI. Most recently in 2016, Committee on the Rights of the Child recommended that the State decriminalise termination of pregnancy. The Committee on Economic, Social and Cultural Rights took a

similar position regarding decriminalisation, building on previous recommendations to bring the law into line with the rest of the UK, in respect of cases of rape, incest and foetal abnormality. The Human Rights Committee, in 2015, recommended that the State Party amend its legislation to provide for lawful termination in the circumstances of rape, incest and fatal foetal abnormality. Notably, the UK will also be examined by CEDAW and the Committee against Torture in the first half of 2019.

The judgment of the UK Supreme Court, in June 2018, also added its views on the incompatibility of NI law with the UK's human rights obligations. Notwithstanding its findings on standing, a majority of the Court held that the criminal law was in breach of a woman's Article 8 right to private and family life, insofar as it prohibits termination of pregnancy on the grounds of rape, incest and fatal foetal abnormality.

While only a minority of the Supreme Court would have found a violation of the right to freedom from torture, inhuman and degrading treatment, a number of the other judges recognised that the threshold for Article 3 ECHR could be reached on the facts of a particular case.

The importance of the judicial comment in the case is of particular significance and the Court did not have to express a view given its conclusion on the Commission's standing. The fact that lengthy judgments were given only serves to highlight the extent of the inadequacy of the present law and, in the words of Lord Mance "*present legislative position in Northern Ireland is untenable and intrinsically disproportionate in excluding from any possibility of abortion pregnancies involving fatal foetal abnormality or due to rape or incest*."

The report of the Departments for Health and Justice on fatal foetal abnormality found that "*health professional were unable to fully meet their duty of care to their patients*" and "*health professionals considered the current situation to be professionally untenable*".

The criminalisation of women continues in Northern Ireland with recent examples of prosecutions, both completed and under challenge.

The Commission's recommendations are as follows:

The Commission recommends that the UK government, in the absence of a NI Assembly, remedies the incompatibility with Article 8 ECHR identified by the UK Supreme Court. [para 19]

The Commission recommends that, in the absence of the NI Assembly, that the UK Government introduces legislation to end the criminalisation of women and girls in NI if they seek a termination of pregnancy. [paras 57 and 102]

The Commission recommends that, following a change in the criminal law and in line with international human rights standards, the Department of Health (NI) ensure that women and girls have access to termination of pregnancy in at least circumstances of a threat to physical or mental health, serious (including fatal) foetal abnormality, rape or incest. The Commission also recommends that women and girls have access to appropriate aftercare services. [paras 69, 81 and 103]

The Commission recommends that the current guidance from the Department of Health (NI) is reviewed to ensure that it provides sufficient direction for healthcare professionals to provide termination of pregnancy within the present legal framework. [para 93]

The Commission recommends that appropriate information is provided to women and girls in respect of their options relating to sexual and reproductive health. This includes the current pathway available in Great Britain to access a lawful termination of pregnancy. [para 94]

Introduction

1. The Northern Ireland Human Rights Commission (the 'Commission'), pursuant to Section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. In accordance with this function, the following statutory advice is submitted to the Women and Equalities Committee (the 'Committee') in response to its call to submissions for its inquiry into abortion law in Northern Ireland ('NI').

2. The Commission is the National Human Rights Institution ('NHRI') for Northern Ireland and one of three NHRIs in the United Kingdom ('UK'). It is accredited with A status before the United Nations and is in full compliance with the United Nations Principles relating to the Status of National Institutions[1].

3. The Commission bases its advice on the full range of internationally accepted human rights standards signed and ratified by the UK government, including the European Convention on Human Rights ('ECHR'), as incorporated by the Human Rights Act 1998 ('HRA'), and the treaty obligations of the Council of Europe ('CoE') and United Nations ('UN') systems.

4. The Commission will focus on the third question posed by the Committee setting out the UK Governments international human rights obligations in respect of reproductive rights: "*What are the responsibilities of the UK Government under its international obligations for taking action to reform abortion law in Northern Ireland? How should these be reconciled to the UK's devolution settlement?*"

NI Legal Framework

5. Termination of pregnancy in Northern Ireland is governed by ss.58 and 59 of the Offences against the Person Act 1861 ('OAPA') and section 25 of the Criminal Justice Act (NI) 1945 ('CJA').

6. Section 58 OAPA provides that:

> "*Every women, 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 any instrument or other means whatsoever, with intent to procure the miscarriage*

[1] Principles relating to the Status of National Institutions, Adopted by General Assembly Resolution 48/134 (20 December 1993)

of any woman, whether she be or not be with child, shall unlawfully administer to her 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 to be kept in penal servitude for life."

7. Section 25 CJA states that:

> "(1)*Subject as hereafter in this sub-section provided, any person who, with intent to destroy the life of a child capable of being born alive, by any willful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, or child destruction and shall be liable on conviction thereof on 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 with caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother."*

8. It is unlawful to perform a termination of pregnancy unless it is necessary to preserve the life of the pregnant woman. This includes the position where there is a risk of serious and adverse effects on her physical or mental health, which is either long term or permanent. The doctor must be of the opinion that the continuation of the pregnancy will have the consequence of making the woman a "*physical or mental wreck*".[2]

9. The NI Court of Appeal considered the legal position and Nicholson J confirmed that law should be stated as follows:

> "*Procurement of a miscarriage (or abortion) is a criminal offence punishable by a maximum sentence of life imprisonment if the prosecution proves beyond any reasonable doubt to the satisfaction of a jury:-*
>
> *1) That the person who procured the miscarriage did not believe that there was a risk that the mother might die if the pregnancy was continued; or*
>
> *2) Did not believe that the mother would probably suffer serious long-term harm to her physical or mental health; or*
>
> *3) Did not believe that the mother would probably suffer serious long-term harm to her physical or mental health if she gave birth to an abnormal child. But I consider that the jury needs assistance with the meaning of long-term.*

[2] R v. Bourne [1939] KB 687, at 694.

4) A person who is a secondary party to the commission of the criminal offence referred to above is liable on conviction to the same penalty as the principal.
5) It follows that an abortion will be lawful if a jury considers that the continuance of the pregnancy would have created a risk to the life of the mother or would have caused serious and long-term harm to her physical or mental health."[3]

The Commission's case

10. The most recent judicial consideration of termination of pregnancy law in NI was by the UK Supreme Court ('UKSC') in a legal challenge initiated by the Commission.[4] The Commission argued that the law in NI was incompatible with obligations under Articles 3, 8 and 14 ECHR, in respect of pregnancies arising from rape or incest and where it involves a serious malformation of the foetus.

11. Notwithstanding the findings of the UKSC in respect of the Commission's standing to bring the case, the Court's commentary on the substantive issues are significant and the Commission would recommend this to the Committee in its entirety. In particular, the President of the Court, Lady Hale noted that "*if the court has reached a firm conclusion that the law is incompatible there is little reason not to say so, particularly where, as here, the UK has already been advised that the law is in breach of its international human rights obligations under another treaty*."[5]

12. A majority of the UKSC identified that the law in NI is incompatible with the right to private and family life (Article 8 ECHR) in respect of the prohibition of termination in situations of rape, incest and fatal foetal abnormality. Lady Hale observed, "*for women who become pregnant, or who are obliged to carry a pregnancy to term, against their will, there can be few greater invasions of their autonomy and bodily integrity*."[6] Lord Mance highlighted, "*the present law treats the pregnant woman as a vehicle who must (as far as Northern Ireland is concerned) be expected to carry a foetus to birth, whatever the other circumstances, and whatever her wishes, as long as this experience does not end her life or ruin her health…and as I would accept, that approach fails to attach any weight whatsoever to personal autonomy*

[3] Family Planning Association of NI v. Minister for Health, Social Services and Public Safety [2004] NICA 39, para 75.
[4] In the matter of an application by the Northern Ireland Human Rights Commission [2018] UKSC 27.
[5] Ibid, para 40.
[6] Ibid, para 6.

and the freedom to control one's own life: values which underpin article 8 of the Convention".[7]

13. Lord Mance also commented, "*it is difficult to see what can be said to justify inflicting on the woman the appalling prospect of having to carry a fatally doomed foetus to term, irrespective of such associated physical risk as that may on the evidence involve*."[8] In respect of cases of incest, "*the agony of having to carry a child to birth, and to have a potential responsibility for, and lifelong relationship with, the child thereafter, against the mother's will, cannot be justified*".[9]

14. This is the first time a UK Court has found that access to termination of pregnancy falls within the scope of Article 8 and a woman's autonomy to make decisions about her own life and healthcare. A number of the judgments reference the humiliation and extreme distress of women and girls in an already vulnerable situation caused by a chilling effect and the requirement to travel to another jurisdiction to access healthcare. Lord Mance identifies the NI law "*merely outsources the issue, by imposing on the great majority of women within the categories in issue on this appeal the considerable stress and the cost of travelling abroad, away from their familiar home environment and local care, to undergo the humiliating "conveyor belt" experience*".[10] Lord Kerr comments "*distress can only be increased and compounded by forcing the woman to seek termination of her pregnancy in a different country, away from her family and friends and without the support of her own doctor*."[11]

15. While only two of the judges (Lord Kerr and Lord Wilson) recognised incompatibility in respect of Article 3 ECHR, the other justices recognised the possibility that the facts of an individual case could reach the threshold for a breach of the prohibition on torture, inhuman and degrading treatment.

16. Lord Kerr, who would have concluded a breach of Article 3, stated:

> "*We need to be clear about what the current law requires of women in this context. It is not less than that they cede control of their bodies to the edict of legislation passed (in the case of the 1861 Act) more than 150 years ago and (in the case of the 1945 Act) almost 75 years ago. Binding the girls and women of Northern Ireland to that edict means that they may not assert their autonomy in their own country. They are forbidden to do to their*

[7] Ibid, para 125.
[8] In the matter of an application by the Northern Ireland Human Rights Commission [2018] UKSC 27, para 123.
[9] Ibid, para 132.
[10] Ibid, para126.
[11] Ibid, para 238.

own bodies that which they wish to do; they are prevented from arranging their lives in the way that they want; they are denied the chance to shape their future as they desire. If, as well as the curtailment on their autonomy which this involves, they are carrying a foetus with a fatal abnormality or have been the victims of rape or incest, they are condemned, because legislation enacted in another era has decreed it, to endure untold suffering and desolation. What is that, if it not humiliation and debasement?"[12]

17. Ultimately, the UKSC could not make a Declaration of Incompatibility under the HRA due to its finding on the Commission's standing.[13] However, even if a Declaration had been made, the task of remedying any incompatibility would have fallen to the legislature, either at Stormont or at Westminster.

18. Lord Mance described the situation as follows:

> *"I return to the question whether a positive conclusion of incompatibility is appropriate in relation to cases where there is a diagnosis of fatal foetal abnormality or where the pregnancy is due to rape or incest. Should this Court leave the position in relation to these categories to be considered further whenever the Northern Ireland Assembly resumes operation and receives whatever report or recommendations the working group presents? First, there is the consideration that it is unclear what will happen in Northern Ireland, in particular whether and when the Assembly will resume its operations. But this is not itself decisive. What is clear is that the issue has been under discussion for some five years, since it was first raised by the Commission, without any definite upshot. Further, if we were to refrain now from any conclusion on it, or were to defer to the Assembly for the time being, in order for it to reach and express its own definitive position, we would have in my opinion to do so on the basis that it would then still be open to a person affected to return to court to have the matter finally resolved, if the legislature did not amend the existing law in the three areas identified. In my opinion, that is not an appropriate course, as the need for such amendment is evident and the outcome of any further litigation would in that respect be inevitable. I am in short satisfied that the present legislative position in Northern Ireland is untenable and intrinsically disproportionate in excluding from any possibility of abortion pregnancies involving fatal foetal abnormality or due to rape or incest. My conclusions about the Commission's lack of competence to bring these proceedings means that there is however no question of making any declaration of incompatibility.*

[12] In the matter of an application by the Northern Ireland Human Rights Commission [2018] UKSC 27, para 261.
[13] Ibid, para 3.

But the present law clearly needs radical reconsideration. Those responsible for ensuring the compatibility of Northern Ireland law with the Convention rights will no doubt recognise and take account of these conclusions, at as early a time as possible, by considering whether and how to amend the law, in the light of the ongoing suffering being caused by it as well as the likelihood that a victim of the existing law would have standing to pursue similar proceedings to reach similar conclusions and to obtain a declaration of incompatibility in relation to the 1861 Act."[14]

19. **The Commission recommends that the UK government, in the absence of a NI Assembly, remedies the incompatibility with Article 8 ECHR identified by the UK Supreme Court.**

Policy and legal developments in the UK & NI

20. Alongside the Commission's litigation, initiated in 2014, there have been a number of notable legislative and policy developments in both NI and GB.

21. In the course of the passage of the Justice (No.2) Bill, during February 2016, a number of amendments relating to access to termination of pregnancy were proposed by members of the NI Assembly. The amendment to change the law in respect of sexual crime was defeated by 64 to 32 votes and an amendment to change the law in respect of fatal foetal abnormality was defeated by 59 to 40 votes.[15] Later that month the leader of the DUP proposed an inter-departmental working group on the issue of fatal foetal abnormality, which was then formally established by the then Minister for Health in March 2016.[16]

22. The report of the Working Group was provided to the relevant Ministers in October 2016 but no action has been taken in respect of it due to the fall of the NI Assembly in January 2017.

23. Litigation before the courts in England and Wales has also highlighted the law in NI, with the UK courts having to determine whether a child ordinarily resident in NI was entitled to access a termination in England under the National Health Service, as a child resident there could. Unsuccessful in the High Court and Court of Appeal in England and Wales, the UKSC ultimately dismissed the appeal, holding that the

[14] In the matter of an application by the Northern Ireland Human Rights Commission [2018] UKSC 27, para 135.
[15] NI Assembly, Official Report, 10 February 2016.
[16] Members of the group were the Chief medical officer, Michael McBride (chair), Chief Nursing Officer, Charlotte McArdle; Chief Social Services Officer, Seán Holland; Department of Health Secondary Care Directorate, Jackie Johnston; Departmental Solicitor's Officer, Hugh Widdis; and the Department of Justice's, Brian Grzymek and Amanda Patterson.

legislation did not permit the Minister for Health to provide in this way under the legislation.[17] However, just over a fortnight after this judgment, the Minister for Women and Equalities announced that the Government Equalities Office would provide funding for women and girls from NI to access services in England.[18] On the eve of the UKSC hearing of the Commission's challenge, this support was extended to the cost of travel for those meeting the financial hardship criteria and the creation of a centralised booking service for women to access these services.[19]

24. In the absence of a functioning Assembly, the Working Group Report was published in April 2018. The group consulted with some affected women and clinicians from the Royal Colleges of Obstetricians and Gynaecologists, Midwives, Psychiatrists and General Practitioners. It states, "*it is clear that the health service standards set out in the Department of Health's Maternity Strategy are not being applied to women who receive a diagnosis of fatal fetal abnormality. These women therefore experience a particularly stark inequality, compared to other expectant women, in relation to communication, locally accessible care, appropriate advice and support at a time when they are at their most vulnerable*."[20]

25. The report also details evidence from health professionals, highlighting the medical risks for women and girls with a diagnosis of fatal foetal abnormality and the "*increased risk of harmful physical and mental health outcomes for women who travel to other jurisdictions*".[21] The report also highlights gaps in healthcare provision, including that "*health professionals working with the PHA [Public Health Agency] have identified a number of scenarios where they consider that their duty of care is compromised and the existing law and guidance is insufficiently clear*".[22]

26. The Report concludes that the current legal framework does not allow the health needs of women to be met and current practices result in inequalities of outcome for women, in particular those who travel outside the jurisdiction.[23] In respect of changing the law, three options were put forward within the terms of reference on FF, which include (a) retaining the case law and creating a statutory exception for FFA,

[17] R (on the application of A and B) v. Secretary of State for Health [2017] UKSC 41.
[18] Open letter from Minister Justine Greening, 29 June 2017.
[19] Hansard, 23 October 2017, Vol 630, HCWS192.
[20] Department of Justice and Department of Health, Report of the Working Group on Fatal Fetal Abnormality (11 October 2016), para 5.4.
[21] Ibid, para 4.11.
[22] Ibid, para 5.5.
[23] Ibid, para 5.22.

(b) replacing case law with statute to provide for FFA; and, (c) replacing case law by statute, revisiting the Bourne interpretation.[24]

27. On 23 October 2018, Diana Johnson MP introduced a private members bill into Parliament in respect of amending the law on termination of pregnancy in England, Wales and NI.[25]

28. During the passage of the Northern Ireland (Executive Formation and Exercise of Functions) Bill through the House of Commons, Stella Creasy MP and Conor McGinn MP tabled an amendment, which states:

> *"(1) In the absence of Northern Ireland Ministers to address the matters identified by recent, current and future court proceedings in relation to the human rights of the people of Northern Ireland, the Secretary of State must issue guidance to senior officers of all Northern Ireland departments which will specify how to exercise their functions in relation to—*
> *(a) the incompatibility of the human rights of the people of Northern Ireland with the continued enforcement of sections 58 and 59 of the Offences against the Person Act 1861 with the Human Rights Act 1998".*[26]

29. The Commission met with the Director of Public Prosecutions ('DPP') following the judgment of the UKSC with a view to determining the intentions of the Public Prosecution Service regarding prosecutions under ss.58-9 OAPA. The DPP confirmed, in correspondence with the Commission, that he could not provide an assurance that further prosecutions would not occur and that individual cases would be subject to the test for Prosecution.[27]

30. The Commission has also recently met jointly with the Permanent Secretaries of the Departments of Justice and Health, in the absence of Ministers to discuss current or proposed action in relation to both the UKSC judgment and the domestic inter-departmental Working Group. The Commission also requested information about future planning related to the possibility of decriminalisation at the UK level and any engagement with counterparts in Ireland regarding the legislative changes and proposals to extend access to women in NI.

31. Regarding the role of the Secretary of State for NI, the Commission also sought to ascertain if the Departments had formally raised concerns to the NIO in relation to the incompatibility identified by the

[24] Ibid, paras 5.31-5.50.
[25] At the time of writing, the text of the Abortion Bill 2017-19 was unavailable. The second reading is due on 23 November 2018.
[26] Clause 4, Northern Ireland (Executive Formation and Exercise of Functions) Bill.
[27] Correspondence between DPP and NIHRC, 13 September 2018. See Annex 1.

UKSC in the absence of Ministers.[28] The Commission itself has contacted the Secretary of State on this issue and is awaiting a formal response.

International human rights standards

32. The focus of this next section is to set out the relevant international standards that are relevant in the context of sexual and reproductive rights for women and girls.

33. The most recent and in depth consideration of the law in NI, was conducted by the CEDAW Committee, following a complaint from NGOs in NI of grave and systemic violations of the Convention due to the restrictive nature of termination of pregnancy law in NI. The Committee undertook a confidential inquiry following this complaint, pursuant to Article 8 of the Optional Protocol to CEDAW.[29] Designated members of the Committee undertook a visit to NI, in January 2016, to meet with relevant stakeholders, including the Commission, and affected women. The report of the Inquiry was published in March 2017 ('Inquiry Report') and key findings and recommendations will be highlighted in the following sections.

34. The UK response to the Inquiry report set out that it does not accept that women from NI have been subject to grave and systemic violations under CEDAW.[30] The UK response was provided to CEDAW in advance of the most recent domestic developments, namely the publication of the report of the Working Group on Fatal Foetal Abnormality and the judgment of the UK Supreme Court.

35. The UK response further notes that *"[t]he Committee's findings and recommendations which focus on changes to the criminal law on abortion cannot be addressed in the absence of a legislature with authority to legislate on such matters in Northern Ireland. A substantive response to the findings and recommendations contained in the CEDAW report will be provided once political structures are in place to authorise and approve the response*."[31]

Right to health

36. The right to the highest attainable standard of health is protected by a number of the core United Nations human rights treaties, such as

[28] Correspondence between DH/ DoJ and NIHRC, 31 October 2018. See Annex 2.

[29] The UK acceded to the Optional Protocol on 17 December 2004.

[30] CEDAW, Observations of the Government of the United Kingdom of Great Britain and Northern Ireland on the report of the inquiry concerning United Kingdom of Great Britain and Northern Ireland of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (23 February 2018) CEDAW/C/OP.8/GBR/2, para 34.

[31] Ibid, para 35.

ICESCR[32], CEDAW[33] and UNCRC[34]. The Committee on Economic, Social and Cultural Rights ('CESCR') has confirmed, "*the right to sexual and reproductive health is an integral part of the right to health enshrined in article 12*" of ICESCR.[35] This "*requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health*."[36]

37. The right to health is "*indispensable for the exercise of other human rights*"[37] and there is a clear relationship between this right and others such as prohibition on torture, inhuman and degrading treatment, the right to private life and non-discrimination.[38]

Torture and the right to private and family life

38. Failure to provide appropriate healthcare to women can engage the right not to be subject to torture, inhuman or degrading treatment or punishment, protected by CAT[39], ICCPR[40], UNCRC[41] and the ECHR.[42] As an absolute right, there is no permissible justification to a breach of this nature.

39. Private and family life is also protected under Article 8 ECHR and Article 17 ICCPR. The European Court of Human Rights ('ECtHR') has also ruled that where the treatment does not reach the severity of Article 3 ECHR it may "*nonetheless breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity*."[43]

40. The UN Human Rights Committee has recognised the failure to provide termination of pregnancy as causing "*intense physical and mental suffering*" which amounted to a violation of Article 7 ICCPR.[44] The CAT Committee has noted that the denial of medical care to women who have had accessed termination of pregnancy services "*…could*

[32] Article 12, ICESCR.
[33] Article 12, CEDAW.
[34] Article 24, UNCRC.
[35] CESCR, General comment No. 22 (the right to sexual and reproductive health) (2 May 2016) E/C.12/GC/22, para 1.
[36] Ibid, para 21.
[37] Ibid, para 1.
[38] Ibid, para 3.
[39] Articles 2, 16, CAT.
[40] Article 7, ICCPR.
[41] Article 37a, UNCRC.
[42] Article 3, EHCR.
[43] Bensaid v. the United Kingdom, Application no. 44599/98 (06 May 2001) para 46.
[44] UN Human Rights Committee, AM v. Ireland, Communication No. 2324/2013 (9 June 2016) CCPR/C/116/D/2324/2013, para 7.4.

seriously jeopardize their physical and mental health and could constitute cruel and inhuman treatment."[45]

Non-discrimination

41. The concept of non-discrimination is clear in all of the relevant core UN treaties: CEDAW, ICCPR,[46] UNCAT and UNCRC.[47] Article 14 ECHR guarantees equal treatment in the enjoyment of other rights in the Convention. The HRC confirms that "*non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights*."[48]

42. In 2008, the Parliamentary Assembly of the Council of Europe noted that where States impose numerous restrictions on access to safe termination of pregnancy services, "*these restrictions have discriminatory effects, since women who are well informed and possess adequate financial means can often obtain legal and safe abortions more easily*."[49]

43. In 2016, the Human Rights Committee concluded, in the case of Amanda Mellet v. Ireland,*"[l]aws criminalizing abortion violate the rights to non-discrimination and equal enjoyment of other rights on the grounds of sex and gender. The rights to equality and non-discrimination compel states to ensure that health services accommodate the fundamental biological differences between men and women in reproduction. Such laws are discriminatory also because they deny women moral agency that is closely related to their reproductive autonomy. There are no similar restrictions on health services that only men need*."[50]

Decriminalisation

44. While the focus of many of the international standards and recommendations directed to the UK State Party have been on access to termination, a clear trend towards decriminalisation is emerging. This has been evident in the more recent examinations of the UK by UN treaty bodies.

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[45] CAT, Concluding Observations on Paraguay, (14 December 2011) CAT/C/PRY/CO/4-6, para 22.

[46] Articles 2 and 24, ICCPR.

[47] Article 2, UNCRC.

[48] Human Rights Committee, General Comment No. 18: Non-discrimination (1989) para 1.

[49] Parliamentary Assembly of the Council of Europe, Access to Safe and Legal Abortion in Europe, Resolution 1607 (2008), para 2

[50] UN Human Rights Committee, AM v. Ireland, Communication No. 2324/2013 (9 June 2016) CCPR/C/116/D/2324/2013, para 3.15.

45. While the international treaties do not expressly refer to decriminalisation and termination, CEDAW requires a State Party to "*repeal all national penal provisions that constitute discrimination against women*".[51] The CEDAW Committee has further explained that "*barriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women punish women who undergo those procedures*."[52]

46. The recent CEDAW Inquiry Report concluded that:

> "*A restriction affecting only women from exercising reproductive choice, and resulting in women being forced to carry almost every pregnancy to full term, involves mental or physical suffering constituting violence against women and potentially amounting to torture or cruel, inhuman and degrading treatment, in violation of articles 2 and 5, read with article 1. It affronts women's freedom of choice and autonomy, and their right to self-determination. The mental anguish suffered is exacerbated when women are forced to carry to term a non-viable foetus (FFA) or where the pregnancy results from rape or incest. Forced continuation of pregnancy in these scenarios is unjustifiable State-sanctioned coercion*."[53]

47. In respect of criminalisation, the Committee found that the State Party is in breach of Articles:

> *"(a) 1 and 2 read with articles 5, 12 and 16 for perpetrating acts of gender-based violence against women through its deliberate maintenance of criminal laws disproportionately affecting women and girls, subjecting them to severe physical and mental anguish that may amount to cruel, inhuman and degrading treatment;*
> *(b) 12 for failing to respect women's right to health by obstructing their access to health services including through laws criminalising abortion, which punish women and those assisting them, and rendering access to post-abortion care, irrespective of the legality of the abortion, inaccessible as clinicians fear prosecution;*"[54]

48. The Committee further identified the grave and systemic nature of the breaches, stating:
> "*The systematic nature of the violations stems from the deliberate retention of criminal laws and State policy disproportionately*

[51] Article 2(g), CEDAW.
[52] CEDAW, General Recommendation No. 24: Article 12 of the Convention (women and health) (1999) para 14.
[53] CEDAW, Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (19 July 2017) CEDAW/C/OP.8/GBR/1, para 65.
[54] Ibid, para 72.

restricting access to sexual and reproductive rights, in general, and highly restrictive abortion provision, in particular."[55]

49. In light of its findings, the Committee recommended that the State Party urgently, *"[r]epeal sections 58 and 59 of the Offences against the Person Act, 1861 so that no criminal charges can be brought against women and girls who undergo abortion or against qualified health care professionals and all others who provide and assist in the abortion."*[56]

50. It further recommended the State Party:
    "[i]ntroduce, as an interim measure, a moratorium on the application of criminal laws concerning abortion, and cease all related arrests, investigations and criminal prosecutions, including of women seeking post-abortion care and healthcare professionals."[57]

51. The UK's compliance with CEDAW Committee is due to be examined in February 2019; the issue of termination of pregnancy having been identified in the list of issues which will guide the constructive dialogue with the State Party.[58] Previous examinations have identified concerns with the law in NI, with recommendations for decriminalisation in both 2013[59] and 2008[60].

52. In March 2016, the Committee on Economic, Social and Cultural Rights (CESCR) published its general comment on the right to sexual and reproductive health. It provides that State Parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of the right to sexual and reproductive health. It notes the core obligations as being:

    "(a) to repeal or eliminate laws, policies and practices that criminalise, obstruct or undermine individuals or particular group's access to sexual and reproductive health facilities, services, goods and information ….. (c) to guarantee universal and equitable access to affordable, acceptable and quality sexual and reproductive health services, goods and facilities, in particular for women and disadvantaged and marginalised groups".[61]

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[55] Ibid, para 82.
[56] Ibid, para 85a.
[57] CEDAW, Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (19 July 2017) CEDAW/C/OP.8/GBR/1, para 85c.
[58] CEDAW, List of issues and questions in relation to the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland (3 August 2018) CEDAW/C/GBR/Q/8, para 19.
[59] CEDAW, Concluding Observations on the UK (30 July 2013) CEDAW/C/GBR/CO/7, para 51.
[60] CEDAW, Concluding Observations on the UK (10 July 2008) CEDAW/C/UK/CO/6, para 289.
[61] CESCR, General Comment No.22 on the Right to sexual and reproductive health (March 2016) E/C.12/GC/22, para 49.

53. The CESCR Committee, in its examination of the UK in 2016, recommended "*the State party amend the legislation on termination of pregnancy in Northern Ireland to make it compatible with other fundamental rights, such as women's rights to health, life and dignity. In this respect, the Committee draws the attention of the State party to its general comment No. 22 (2016) on the right to sexual and reproductive health.*"[62]

54. In December 2016, the Committee on the Rights of the Child published its general comment on the implementation of the rights of the child during adolescence. It noted that there should be no barriers to sexual and reproductive health and rights and urged States to decriminalise termination of pregnancy.[63] This followed its consideration of the UK earlier that year, in which it recommended the State "*decriminalise abortion in Northern Ireland in all circumstances and review its legislation with a view to ensuring girls' access to safe abortion and post-abortion care services*."[64]

55. The Parliamentary Assembly of the Council of Europe has also made recommendations about the availability of termination of pregnancy. In Resolution 1607, it states that States should *"decriminalize abortion within reasonable gestational limits, if they have not already done so"*[65] *and "guarantee women's effective exercise of their right of access to a safe and legal abortion".*[66]

56. It is clear from the recommendations of the CEDAW, CESCR and CRC Committees, which are specific on the law of NI, that the existing criminal law represents a barrier to a woman or girls rights to sexual and reproductive health, autonomy and non-discrimination. The UKSC has also recognised that the UK Government has been advised of the incompatibility with international treaties.[67]

57. **The Commission recommends that, in the absence of the NI Assembly, that the UK Government introduces legislation to end the criminalisation of women and girls in NI if they seek a termination of pregnancy.**

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[62] CESCR, Concluding Observations on the UK (14 July 2016) E/C.12/GBR/CO/6, para 62.

[63] CRC, General Comment No. 20 on the implementation of the rights of the child during adolescence (6 December 2016) CRC/C/GC/20, paras 59-60.

[64] CRC, Concluding Observations on the UK (9 June 2016) CRC/C/GBR/CO/5, para 64(c).

[65] Parliamentary Assembly of the Council of Europe, Resolution 1607 Access to safe and legal abortion in Europe (2008) para 7.1.

[66] Ibid, para 7.2.

[67] In the matter of an application by the Northern Ireland Human Rights Commission [2018] UKSC 27, para 40.

Access to termination: sexual crime

58. A number of the UN Treaty bodies have specifically recommended that the State Party provide access to termination of pregnancy in a number of limited circumstances, including rape and incest. The UN Human Rights Committee made this recommendation in 2015[68], as did the CESCR Committee in 2009, whereby it "*calls upon the State party to amend the abortion law of Northern Ireland to bring it in line with the 1967 Abortion Act with a view to preventing clandestine and unsafe abortions in cases of rape, incest or foetal abnormality*."[69]

59. The Committee on the Rights of the Child (CRC), in its general comment on the enjoyment of the highest attainable standard of health, recommends that "*recommends that States ensure access to safe abortion and post-abortion care services, irrespective of whether abortion itself is legal*."[70]

60. In line with its previous recommendations in respect of NI[71], the CEDAW Inquiry Report recommends that the State Party "*adopt legislation to provide for expanded grounds to legalise abortion at least in the following cases: … (ii) rape and incest…*".[72] The Committee interprets Articles 12 and 16 of CEDAW as requiring "*State parties to legalise abortion, at least in cases of rape, incest.... This positive obligation entails providing access to health care services, including ensuring the provision of accessible and safe (medically-approved) legal abortions*."[73]

61. The CEDAW Committee also identified that the lack of clear protocols for the repatriation of foetal remains was a "*significant source of stress*"[74] for women and girls who had to travel to access a termination of pregnancy, including situations where the foetal remains would be considered prosecution evidence. The Committee also highlighted that this led to the resignation of one of NI's paediatric pathologists.

62. No official figures exist for the number of pregnancies arising from a sexual crime or those victims seeking access to a termination.

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[68] UN HRC, Concluding Observations on the UK (17 August (2015) CCPR/C/GBR/CO/7, para 17.
[69] CESCR, Concluding Observations on the UK (12 June 2009) E/C.12/GBR/CO/5, para 25.
[70] CRC, General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (17 April 2013) CRC/C/GC/15, para 70.
[71] CEDAW, Concluding Observations on the UK (30 July 2013) CEDAW/C/GBR/CO/7, para 51
[72] CEDAW, Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (19 July 2017) CEDAW/C/OP.8/GBR/1, para 85b.
[73] Ibid, para 60.
[74] Ibid, para 32.

However, the CEDAW Inquiry Report details the evidence of a 12 year old child who was forced to travel to England to access a termination, accompanied by the Police Service of Northern Ireland to collect the conception tissue to determine the DNA of the accused.[75] The report also identifies four compensation awards between 2011 and 2016 for pregnancies attributable to a sexual offence.[76]

63. The domestic law permits the criminalisation of a woman or girl, pregnant as a result of rape or incest, if she procures a termination of her pregnancy.[77] The threat of prosecution in NI is a real one, with a number of prosecutions in the past few years.[78]

64. The UKSC, in the Commission's case, found by a majority that the law in NI would have breached Article 8 ECHR in respect of sexual crime. The Court referred to the particular situation of JR76, with Lord Mance highlighting the position of the second applicant in JR76 and her inability to consent to sexual intercourse:

> "*They are mother and daughter, identified as the JR76 interveners, referring to judicial review proceedings to which they are party in Northern Ireland. The daughter aged 15, and therefore legally unable to consent to sexual intercourse, became pregnant as a result of a relationship with a boy one year older. The boy was abusive, and threatened to kick the baby out of her and to stab it if born. The daughter wanted to continue her schooling and go to university. Discussing the situation with her supportive mother, the daughter decided that she could not go through with the pregnancy or a termination in England. She would have had to obtain travel documents and go with her mother. Instead, she asked her mother to obtain pills to put an end to the pregnancy, neither apparently realising this was unlawful. Taking the pills led to heavy bleeding, as a result of which the daughter saw her GP, but not to termination of the pregnancy. The GP referred her to Children and Adolescent Mental Health Services ("CAMHS"), who advised a referral to a local maternity/gynaecologist clinic and also contacted Social Services, who a month later contacted the Police Service of Northern Ireland ("PSNI"). The PSNI then, without notice, obtained her medical records from her GP and CAMHS, which led to her being questioned on child protection grounds in her mother's absence, and then to her mother being interviewed under caution and charged by the Public Prosecution Service for Northern Ireland*.

[75] Ibid, para 36.

[76] Ibid, para 38.

[77] Ss.58-59, Offences against the Person Act 1861.

[78] Ashleigh McDonald, Northern Ireland woman who bought abortion pills given suspended prison sentence, Belfast Telegraph (4 April 2016) (last accessed 19.10.2018); BBC News, Man and woman cautioned over abortion pills (18 January 2017) (last accessed 19.10.18).

The pending judicial review proceedings relate to that decision to prosecute."

65. In considering Article 8 ECHR in the context of rape, and coming to his conclusion that the law in NI is disproportionate, Lord Mance also noted that "*[t]his is a situation where the law should protect the abused woman, not perpetuate her suffering. That this trauma will not by definition amount to serious and long-term psychological injury seems to me quite insufficient to outweigh this consideration*."[79]

66. The UKSC considers the issue of incest separately and sets out research highlighting the impact of incest as harmful and destructive on its victims.[80] Lord Mance explained that "*[t]he agony of having to carry a child to birth, and to have a potential responsibility for, and lifelong relationship with, the child thereafter, against the mother's will, cannot be justified*."[81]

67. In the particular context of JR76, the question has arisen about the form of sexual crime, as under the Sexual Offences (NI) Order 2008 it is considered separately to the offence of rape. In addition to the comments from Lord Mance, above, Lady Hale notes "*it is conclusively presumed in the law of Northern Ireland that children under 16 are incapable of giving consent to sexual touching, including penetration of the vagina by a penis*".[82]

68. The international standards make clear that termination of pregnancy should be available in a number of particular scenarios, one of which is where the pregnancy has arisen through a sexual crime, including rape and incest. This has been confirmed by the UKSC, in finding that the failure to provide access in the context of rape or incest was in breach of Article 8 ECHR.[83]

69. **The Commission recommends that, following a change in the criminal law and in line with international human rights standards, the Department of Health (NI) ensure that women and girls have access to termination of pregnancy in at least circumstances of rape or incest. The Commission also recommends that women and girls have access to appropriate aftercare services.**

[79] In the matter of an application by the Northern Ireland Human Rights Commission [2018] UKSC 27, para 127.
[80] Ibid, paras 128-9.
[81] Ibid, para 132.
[82] Ibid, para 25.
[83] Ibid, para 2.

Access to termination: serious (incl. fatal) foetal abnormalities

70. The UN Treaty Bodies mostly identify foetal abnormality as one of the minimum grounds on which a termination should be available; however, their descriptions and language differs.

71. The CESCR Committee has the broadest reference and recommends that the State Party "*amend the abortion law of Northern Ireland to bring it in line with the 1967 Abortion Act with a view to preventing clandestine and unsafe abortions in cases of rape, incest or foetal abnormality.*"[84]

72. The UN Human Rights Committee's 2015 concluding observations recommend that the State "*amend its legislation on abortion in Northern Ireland with a view to providing for additional exceptions to the legal ban on abortion, including in cases of rape, incest, and fatal fetal abnormality*."[85]

73. The CEDAW Committee uses the terms 'serious' or 'severe' in referring to foetal abnormality. In line with its previous recommendations, the Inquiry Report recommends that the State Party "*adopt legislation to provide for expanded grounds to legalise abortion at least in the following cases: … (iii) Severe foetal impairment, including FFA, without perpetuating stereotypes towards persons with disabilities and ensuring appropriate and ongoing support, social and financial, for women who decide to carry such pregnancies to term*."[86]

74. Although it has not yet commented on termination of pregnancy law in NI, the Committee against Torture has identified access to lawful termination in its list of issues for the upcoming examination in spring 2019.[87]

75. The law in NI permits a termination where there is a serious and adverse effect on the woman or girl's physical or mental health, which is either long term or permanent.[88] It does not expressly permit a termination in the instances of a serious or fatal foetal abnormality. The Department of Health guidance states that:

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[84] CESCR, Concluding Observations on the UK (12 June 2009) E/C.12/GBR/CO/5, para 25.

[85] UN HRC, Concluding Observations on the UK (17 August 2015) CCPR/C/GBR/CO/7, para 17.

[86] CEDAW, Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (19 July 2017) CEDAW/C/OP.8/GBR/1, para 85b.

[87] CAT, List of issues prior to submission of the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland (7 June 2016) CAT/C/GBR/QPR/6, para 44.

[88] R v. Bourne [1939] KB 687, at 694.

"*Fetal abnormality, including an abnormality which inevitably means that the fetus will not survive, is not in itself grounds for a termination of pregnancy in Northern Ireland. However the impact of fetal abnormality on a woman's physical or mental health may be a factor to be taken into account when a health professional makes an assessment of a woman's clinical condition and recommends options for her ongoing care*."[89]

76. The CEDAW Inquiry report noted that health professionals remain responsible for assessing whether the legal test for a termination is met[90] and that despite the above consideration of a foetal abnormality, it "*does not clarify whether abortion is an option*".[91]

77. A majority of the UKSC, in the Commission's case, held a breach of Article 8 ECHR in respect of failure to provide termination for women and girls in situations of fatal foetal abnormalities. However, the justices clearly distinguished this from serious foetal abnormalities and did not conclude a breach of the ECHR.[92]

78. In respect of fatal foetal abnormalities, Lord Mance highlighted that "*it is difficult to see what can be said to justify inflicting on the woman the appalling prospect of having to carry a fatally doomed foetus to term, irrespective of such associated physical risk as that may on the evidence involve*."[93] He concluded that:

> "*I cannot therefore regard the present law as striking a proportionate balance between the interests of women and girls in the cases of fatal foetal abnormality, when it fails to achieve its objective in the case of those who are well-informed and well-supported, merely imposing on them harrowing stress and inconvenience as well as expense, while it imposes severe and sometimes life-time suffering on the most vulnerable, who, commonly because of lack of information or support, are forced to carry their pregnancy to term*."[94]

79. The Committee on the Rights of Persons with Disabilities published its first concluding observations on the UK in July 2017. In its consideration of Article 5 CRPD (equality and non-discrimination), it

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[89] Department of Health, Guidance for health and social care professionals on termination of pregnancy in Northern Ireland (24 March 2016), para 2.9.

[90] CEDAW, Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (19 July 2017) CEDAW/C/OP.8/GBR/1, para 15.

[91] Ibid, para 16.

[92] In the matter of an application by the Northern Ireland Human Rights Commission [2018] UKSC 27, see paras 29, 133 and 332.

[93] Ibid, para 123.

[94] Ibid, para 126.

raised concerns about "*perceptions in society that stigmatize persons with disabilities as living a life of less value than that of others and about the termination of pregnancy at any stage on the basis of fetal impairment*."[95]

80. Unlike the other treaty bodies, the Committee did not focus on the specific law of NI, raising its concerns about the relevant UK legislation. It recommended, "*the State party amend its abortion law accordingly. Women's rights to reproductive and sexual autonomy should be respected without legalizing selective abortion on the ground of fetal deficiency*."[96]

81. **The Commission recommends that, following a change in the criminal law and in line with the international human rights standards, the Department of Health (NI) ensure that women and girls have access to termination of pregnancy in at least circumstances of serious (including fatal) foetal abnormality. The Commission also recommends that women and girls have access to appropriate aftercare services.**

Chilling effect and guidance for healthcare professionals

82. The legal framework in NI is accompanied by guidance from the Department of Health NI for healthcare professionals, published in March 2016.[97] This guidance followed lengthy litigation, for over almost a decade, by the Family Planning Association, who sought to clarify the Department of Health's guidelines on termination. The Court of Appeal held that in order to comply with its statutory duty the Department needed to know what the law was and to impart that knowledge to medical practitioners who carried out abortions on its behalf and to those women who gave their consent to abortion.[98] The subsequent 2009 guidance was subject to two judicial reviews by the Society for the Protection of the Unborn Child (SPUC) over its contents, which SPUC argued were a misinterpretation of the law.[99] The guidance was withdrawn and the FPA returned the issue to court in 2013 following a failure of the Department of Health to provide guidance for clinicians.[100]

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[95] CRPD, Concluding Observations on the UK (29 August 2017) CRPD/C/GBR/CO/1, para 12.

[96] CRPD, Concluding Observations on the UK (29 August 2017) CRPD/C/GBR/CO/1, para 13.

[97] Department of Health NI, Guidance for health and social care professionals on termination of pregnancy in Northern Ireland (24 March 2016).

[98] Family Planning Association of Northern Ireland v. Minister for Health, Social Services and Public Safety [2004] NICA 37–39, para 46.

[99] Society for the Protection of Unborn Children's Application [2009] NIQB 92.

[100] Family Planning Association of Northern Ireland's Application [2013] NIQB 1.

83. The present 2016 guidance states that:

> "*A health and social care professional has a legal duty to refuse to participate in any procedure leading to termination of pregnancy if it would be an offence under the law of Northern Ireland. Under Section 5 of the Criminal Law Act (NI) 1967, if they know or believe that such an offence has been committed and have information which is likely to be of material assistance in securing the apprehension, prosecution, or conviction of the person who committed it, then they are under a duty to give that information within a reasonable time to the police. Failure to do so without a reasonable excuse is an offence which upon conviction carries a maximum penalty of ten years imprisonment*."[101]

84. It further explains that:

> "*However the health and social care professional need not give that information if they have a reasonable excuse for not doing so; the discharge of their professional duties in relation to patient confidentiality may amount to such a reasonable excuse. Professionals should be clear, however, that patient confidentiality is not a bar to reporting offences to the police*."[102]

85. The CEDAW Committee considered the so-called 'chilling effect' that the NI law has upon clinicians and their willingness to perform terminations, even those that may fall within the scope of the criminal law. The Committee's view of the guidance was that "*it does not clarify the circumstances in which abortions are lawful in NI*."[103]

86. The Committee found the State-issued guidance has a chilling effect, as "*it is unclear when an abortion performed under the physical or mental health grounds is legal. Consequently, they decline service provision to avoid criminal sanctions*."[104]
87. The Committee has recommended that the State Party "*adopt evidence-based protocols for healthcare professionals on providing legal abortions particularly on the grounds of physical and mental health; and ensure continuous training on these protocols*".[105]

88. The UKSC, in the Commission's case, also highlighted the chilling effect referred to by CEDAW and others. Lord Kerr concluded, "*[u]nder the*

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[101] Department of Health NI, Guidance for health and social care professionals on termination of pregnancy in Northern Ireland (24 March 2016), para 9.4.
[102] Ibid, para 6.1.
[103] CEDAW, Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (19 July 2017) CEDAW/C/OP.8/GBR/1, para 15.
[104] Ibid, para 67.
[105] Ibid, para 85d.

current law, no account is taken of a woman's right to autonomy. Severe criminal sanctions are applied to those who obtain an abortion in Northern Ireland save in the narrowly circumscribed circumstances permitted by the 1861 and 1945 Acts. These undoubtedly have a significant chilling effect both on women who wish to obtain an abortion and doctors who might assist them."[106]

89. Department of Health (NI) statistics show the decreasing numbers of terminations carried out in NI:[107]

Year	Medical abortion	Termination of pregnancy
2007/08	76	47
2008/09	71	44
2009/10	64	36
2010/11	73	43
2011/12	56	35
2012/13	75	51
2013/14	25	23
2014/15	22	16
2015/16	30	16
2016/17	20	13

90. The joint Department of Health and Justice Working Group Report noted, "*health professionals are concerned, bearing in mind their existing duty of care to a woman before she travels and after her return, that they may risk prosecution if they advise a woman of NHS facilities, or a specific NHS facility, where the health professional is aware that the standard of care and services available will meet the specific clinical needs of the women*."[108] It further identified that signposting to NHS facilities "*may not be lawful, and there is uncertainty whether health professionals would risk prosecution*."[109]

91. The CEDAW Committee also identified that "*no clear communication strategy exists for health professionals or the public on the circumstances in which legal abortions can be accessed. The Committee finds that the ambiguous NI legal and policy framework does not provide a clear pathway for care of women requiring an abortion*."[110]

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[106] In the matter of an application by the Northern Ireland Human Rights Commission [2018] UKSC 27, para 326.
[107] Department of Health NI, Northern Ireland Termination of Pregnancy Statistics 2016/17 (24 January 2018), Table 1, p.2.
[108] Department of Justice and Department of Health NI, Report of the Working Group on Fatal Fetal Abnormality (11 October 2016), para 5.6.
[109] Ibid, para 5.12.
[110] CEDAW, Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (19 July 2017) CEDAW/C/OP.8/GBR/1, para 16.

92. The Commission also notes that no official information about the UK government pathway to access a termination of pregnancy in England and Wales is provided to women and girls in NI. The Commission understands that information of this nature was circulated to all GPs in NI by the British Pregnancy Advisory Service, a charity, and has raised this issue with the Permanent Secretary to the Department of Health.

93. **The Commission recommends that the current guidance from the Department of Health (NI) is reviewed to ensure that it provides sufficient direction for healthcare professionals to provide termination of pregnancy within the present legal framework.**

94. **The Commission recommends that appropriate information is provided to women and girls in respect of their options relating to sexual and reproductive health. This includes the current pathway available in Great Britain to access a lawful termination of pregnancy.**

Devolution & UK State Party obligations

95. Health and justice are 'transferred' matters, and so responsibility for these areas falls within the competence of the NI Assembly and relevant Ministers. The observance and implementation of international treaties, including the ECHR, is considered an 'excepted' matter[111], which remains the sole responsibility of the UK Government. The UK Government is therefore the State Party for the purposes of the ECHR, CEDAW and other international human rights treaties referred to in this submission.

96. NI has been without a functioning administration since January 2017. The Secretary of State for NI ('SoS') also has a role, pursuant to section 26 of the Northern Ireland Act. She may direct that action be taken *"[i]f the Secretary of State considers that any action capable of being taken by a Minister or Northern Ireland department is required for the purpose of giving effect to any international obligations…"*.[112] The Commission has raised its concerns about breach of international obligations, including the ECHR, with the SoS but no action has been taken to date.

97. The CEDAW Committee dealt with the issue of the obligations of the State Party, with respect to a devolved administration, in its Inquiry Report. It noted the UK system of decentralised government, including

[111] Schedule 2, Northern Ireland Act 1998.
[112] Section 26(2), Northern Ireland Act 1998.

the Sewel Convention and the Belfast Agreement and Northern Ireland Act 1998.[113] However, the Committee concluded that:

> "*The Committee recalls that under international law of State responsibility, all acts of State organs are attributable to the State. The Vienna Convention on the Law of Treaties provides in article 27 that a party to a treaty may not invoke the provisions of its internal law as a justification for its failure to perform it. Moreover, the Committee's General Recommendation (GR) No. 28 (2010) on the core obligations of States parties reiterates that the delegation of government powers "does not negate the direct responsibility of the State party's national or federal Government to fulfil its obligations to all women within its jurisdiction". Thus, the UK cannot invoke its internal arrangements (the Belfast Agreement) to justify its failure to revise NI laws that violate the CEDAW Convention*."[114]

98. The CEDAW Committee's findings and recommendations were directed towards the UK Government, as the signatory and State Party of CEDAW and its Optional Protocol.

99. In the recent UKSC judgment, notwithstanding the findings on standing, highlighted the need for reform of NI law. Lord Mance indicated the present law is "*untenable*"; "*clearly needs radical reconsideration"* and that those *"responsible for ensuring the compatibility of Northern Ireland law with the Convention rights will no doubt recognise and take account of these conclusions, at as early a time as possible, by considering whether and how to amend the law, in light of the ongoing suffering being caused by it as well as the likelihood that a victim of the existing law would have standing to pursue similar proceedings to reach similar conclusions and to obtain a declaration of incompatibility in relation to the 1861 Act*."[115]

100. Lord Reed, with Lady Black in agreement, explains, "*there is every reason to fear that violations of the Convention rights will occur, if the arrangements in place in Northern Ireland remain as they are.*""[116]

101. Failure to act in respect of access to termination of pregnancy in certain circumstances in NI may result in further legal actions against the government.

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[113] CEDAW, Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (19 July 2017) CEDAW/C/OP.8/GBR/1, para 52.

[114] Ibid, para 53.

[115] In the matter of an application by the Northern Ireland Human Rights Commission [2018] UKSC 27, para 135.

[116] Ibid, para 363, 370.

102. **The Commission recommends that the UK Government, in the absence of the NI Assembly, introduce legislation to end the criminalisation of women and girls in NI if they seek a termination of pregnancy.**

103. **The Commission also recommends that, following a change in the criminal law and in line with international human rights standards, the Department of Health (NI) ensure that women and girls have access to termination of pregnancy in at least circumstances of a threat to physical or mental health, serious (including fatal) foetal abnormality, rape or incest. In addition, women and girls should have access to appropriate aftercare services.**

Annex 1: correspondence from PPS to NIHRC

PUBLIC PROSECUTION SERVICE

Director

PUBLIC PROSECUTION SERVICE
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BELFAST
BT1 3JR

RECEIVED
13 SEP 2018

Les Allamby
Chief Commissioner
Northern Ireland Human Rights Commission
Temple Court
39 North Street
BELFAST
BT1 1NA

7 September 2018

Dear Mr Allamby

I refer to your correspondence dated 13 June 2018 and mine of 9 July 2018 which issued following our helpful meeting on 4 July 2018.

In your letter of 13 June 2018, you asked that I consider confirming that my office will not prosecute any woman, girl or healthcare professional who provides or assists in accessing a termination of pregnancy in situations of rape, incest or fatal foetal abnormality. In our meeting you made further representations by reference to the Report of the Working Group on Fatal Fetal Abnormality. Since our meeting, I have given careful consideration to that Report and also the Supreme Court ruling in the *Human Rights Commission* case.

I have concluded that it would not be appropriate for me to provide an assurance of the nature sought. As I stated in my letter dated 9 July 2018, the primary function of my office is to take decisions in individual cases by fairly and impartially applying the Test for Prosecution to the particular facts and circumstances. Whilst the *obiter* finding of the Supreme Court is that the current law, as it applies to the particular categories of cases, is incompatible with Article 8 of the ECHR, there are, as the Supreme Court pointed out, a number of different ways in which Parliament might respond to it. The Working Group's report and the circumstances in which it was commissioned would suggest that, at least in cases of Fatal Fetal Abnormality, legislative change may be introduced once a functioning Executive is restored.

In these circumstances, and having regard also to the issues of social policy that arise, I consider that any change to the criminal law should properly be delivered by the normal legislative process rather than by statements or guidance issued by the Director of Public Prosecutions. I would further suggest that reform delivered in this way would be more effective in terms of providing the medical profession with the clarity and certainty that is sought.

I hope to be in a position to write shortly with information in relation to the other matters discussed at our meeting and raised in the subsequent letter by Dr Russell.

Yours sincerely

Susan.

S HERRON
Director of Public Prosecutions

Annex 2: correspondence from DoJ/DH to NIHRC

Department of Justice
www.justice-ni.gov.uk

FROM THE PERMANENT SECRETARY
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FROM THE PERMANENT SECRETARY AND HSC CHIEF EXECUTIVE
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RP3091
SCORR-0842-2018

Les Allamby
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Rebecca.Magee@nihrc.org

Dear Les

Thank you for your letter of 27 September 2018, following our meeting on 21 September.

As you acknowledge, in the absence of Ministers and a legislature, the Department of Justice cannot bring forward proposals to amend the law on abortion for fatal fetal abnormality or for rape and incest. You will appreciate that the Department has already consulted on legislative reform but proposals by a previous Justice Minister failed to achieve Executive agreement. The Supreme Court judgment in June may have heightened the case for reform, but without a Minister and Northern Ireland Executive there is no action that the Department of Justice can take to change the law.

On the question of human rights implications following the Supreme Court judgment, we have written to the Permanent Secretary of the Northern Ireland Office to alert him to the ongoing difficulties faced by health professionals in providing acceptable health care provision for women with fatal fetal abnormalities. We made the point that, while the criminal law is clearly a devolved issue, the question now arises as to whether there are human rights responsibilities (under section 4 and paragraph 3(c) of Schedule 2 of the 1998 Act) held by the UK Government in relation to the law on termination of pregnancy for fatal fetal abnormalities, and, if so, whether they should take precedence given the lack of devolved structures.

We also note your comments on future domestic and international inquiries into abortion law and human rights in Northern Ireland.

You asked what steps are being taken to revise the current guidance on termination of pregnancy. The Department of Health's 2016 guidance was intended to clarify the current law because health and social care professionals were unclear of the duties and responsibilities placed upon them by the law governing termination of pregnancy. We believe that the guidance continues to fulfil those objectives. Our view is that neither the Supreme Court obiter judgment, nor the conclusions of the working group's report on fatal fetal abnormality can change the actions that can legally be taken by a health and social care professional in relation to terminating a pregnancy.

As the law has not changed, it remains the Department of Health's view that the guidance, which can only reflect current law, does not need to change. You will be aware that the working group on fatal fetal abnormality found that it was the law that was placing unacceptable burdens on women's health and wellbeing, and professionals' ability to fully meet their duty of care, not the guidance.

At our meeting you stated that doctors have claimed that the guidance, as opposed to the law, lacks clarity. We have not been made aware of such concerns, but if there is any further information you can offer on this issue it would be most helpful.

Turning to abortion services in other parts of the UK, you raised the question of whether the Department of Health should provide guidance to GPs in Northern Ireland on how women can access the services now available free of charge elsewhere. As you know, the Public Health Agency has prepared a series of leaflets on termination of pregnancy and we are currently seeking legal advice on whether those leaflets can include reference to the services now available in other parts of the UK.

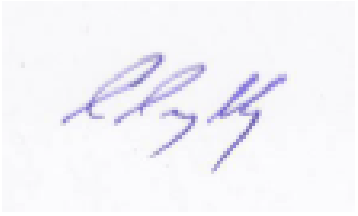
In your letter you also ask for a copy of a 2016 circular, relating to the duty to provide post abortion care. The 2016 circular to which you refer is a letter from the Chief Medical Officer covering the 2016 departmental guidance. The document is available online at:
https://www.health-ni.gov.uk/sites/default/files/publications/dhssps/hss-md-8-2016.pdf

Finally, you were interested in the Department of Health's position on the recent publication of Ireland's Bill following its referendum. The Irish authorities have indicated that they wish their proposed service to be available to women from Northern Ireland. However, we note that the draft Bill, debated in the Oireachtas on 4 October 2018, made no mention of Northern Ireland. As discussed during our meeting, we will continue to monitor developments and address any impacts relating to health provision in this jurisdiction as necessary and/or appropriate.

It is acknowledged that there is a growing body of evidence to support a change to the law, particularly in cases of fatal fetal abnormality. However, neither Department has political authority to bring forward legislative proposals to make that change. Both Departments are very aware what this means to individual women in these circumstances and for professionals in meeting their duty of care to those women.

We welcome your ongoing contribution to this important issue and we will continue to observe and monitor developments.

Yours sincerely



P MAY **RICHARD PENGELLY**