1. About CARE Northern Ireland

1.1. CARE (Christian Action Research and Education) Northern Ireland is a well-established mainstream Christian charity providing resources and helping to bring Christian insight and experience to matters of public policy and practical caring initiatives in Northern Ireland. CARE NI has responded to numerous consultations on issues related to abortion in the jurisdiction and until the collapse of the Northern Ireland Executive provided the secretariat to the All Party Group on Human Life in the Northern Ireland Assembly.

2. Executive summary

2.1. CARE Northern Ireland believes the issue of abortion should be decided by the people of Northern Ireland through their elected representatives. We do not believe the Women and Equalities Committee is the correct forum to consider the issue of abortion in Northern Ireland due to the fact that no member of the Committee represents a constituency from this part of the United Kingdom. We do not think an inquiry of this nature into a devolved competence would be deemed acceptable by the Scottish Parliament or the Welsh Assembly.

2.2. We believe legislating to allow for widespread access to abortion in Northern Ireland, as has been proposed by some Westminster parliamentarians, would be a deeply retrograde step for women and unborn children.

2.3. We do not accept the argument that legislating to allow for widespread access to abortion on request is required as a result of human rights jurisprudence. A significant number of problematic assertions have taken root in the debate around abortion in Northern Ireland which we will seek to highlight and correct in this submission.

3. Devolution

3.1. It is well known the Northern Ireland Executive collapsed in January 2017 and has regrettably not been reformed at the time of writing. It is the desire of many in Northern Ireland, including us, and across the British Isles that the Executive be reformed as soon as possible. We believe all parties across the House at Westminster should be putting their efforts with regard to Northern Ireland into seeing the Executive reformed. Moves which will antagonise and make this more difficult should be avoided.

3.2. In our view, interference on a selective basis with regard to an issue as sensitive as abortion is not justified under the devolution settlement. If it was decided to introduce Direct Rule and to govern Northern Ireland entirely from Westminster, this debate would be a different one. However, while Westminster understandably resists the idea of introducing Direct Rule, it is important they act in a consistent manner and do not selectively undermine the devolution settlement. If Westminster decides to override the devolution settlement with regard to abortion, no consistent reason can be given as to why Westminster would not override the current constitutional settlement in a host of other policy areas such as education, health and justice.

3.3. We note and agree with the numerous comments made by Westminster parliamentarians in the recent months that abortion is rightly a matter for the Northern Ireland Assembly to decide. The Secretary of State for Northern Ireland, Karen Bradley MP, was right when she said: “The Government believe that the question of any future reform in Northern Ireland must be debated and decided by the people of Northern Ireland and their locally elected, and therefore
accountable, politicians.”¹ To the credit of the British Government, they have consistently upheld this line in Parliament and beyond. However, we were disappointed that they did not act to prevent the addition of sections on abortion in the recent Northern Ireland (Executive Formation and Exercise of Functions) Act.²

3.4. The principle of upholding devolution is the reason we do not believe it is appropriate for the Women and Equalities Committee to be holding this inquiry into the issue of abortion in Northern Ireland. We note the Committee does not have a single member representing a constituency in Northern Ireland. If a Committee at Westminster was to consider abortion in Northern Ireland, it should be the Northern Ireland Affairs Committee which has members representing Northern Ireland constituencies. It seems to us that the Scottish Parliament and Welsh Assembly would rightly object if a Westminster committee sought to directly consider an issue which falls within their ambit under the devolution settlement. This would especially be the case if not a single representative representing a Westminster seat from the jurisdiction concerned was on the Committee.

3.5. One proposal that has been put forward by a number of political representatives is that there should be a referendum on the issue of abortion in Northern Ireland.³ We do not support this idea because referenda are deeply divisive devices, as has been well illustrated in recent years, and should be used sparingly for the purpose of solving constitutional questions only. If a referendum was granted in Northern Ireland on an issue such as abortion, a rubicon would have been crossed within UK constitutional governance. For the first time, a referendum would have been held on a policy issue as opposed to a constitutional one. Comparisons with the Republic of Ireland need to bear in mind the significant difference in the constitutional arrangements adopted in both countries. In our view this would be a very unhelpful precedent to set. We live in a representative democracy where we elect politicians to consider complex policy issues. An issue such as abortion does not lend itself to easy resolution through a binary yes/no question.

3.6. We would further raise a number of practical questions about the prospect of such a referendum: what would the question be? Who would decide on the question? Would a legislative proposal be put forward to the people of Northern Ireland before a referendum? Who would determine what this proposal would be? What issues would be considered in the referendum? Once reflection is given to the practicalities behind holding a referendum it should become evident that this is not the right path to go down.

4. Introducing widespread access to abortion would be a retrograde step

4.1. We fundamentally believe that allowing widespread access to abortion on request in Northern Ireland would be a deeply retrograde step for women, unborn children and our society as a whole. We believe the law and policy adopted in Northern Ireland has proven to be life-saving.

4.2. Frequently it has been asserted that legislating against abortion does not stop abortion. We believe the evidence from Northern Ireland has illustrated this claim simply does not stand up to scrutiny. In 2017, the campaign organisation Both Lives Matter published research which found that an estimated 100,000 individuals are alive today who would otherwise not be if the 1967 Abortion Act had been introduced in Northern Ireland. The campaign sought to advertise this in public through a series of billboards. A number of individuals, in seeing these billboards,

¹ House of Commons Official Report, 5 June 2018; Vol. 642, c. 220
² https://services.parliament.uk/Bills/2017-19/northernirelandexecutiveformationandexerciseoffunctions.html
complained to the Advertising Standards Authority which led to an independent investigation into the claim. Following a five-month process involving an independent health statistician appointed by the ASA, the complaint was not upheld. The ASA concluded by saying the following: “On balance, we concluded that the evidence indicated that there was a reasonable probability that around 100,000 people were alive in Northern Ireland today who would have otherwise been aborted had it been legal to do so.” Since this finding was made, no evidence from organisations campaigning for the liberalisation of the law in this area has been adduced to contradict the claim. Consequently, we believe it is empirically the case that the law in Northern Ireland has in fact saved lives and helped to shape a culture where the lives of both mothers and unborn life are affirmed.

4.3. We do not believe allowing for widespread access to abortion is beneficial to women. Admittedly, this is an area of considerable dispute and relevant studies have come to hugely variable conclusions. Nevertheless, there is enough evidence to question the stance that continuance of an unwanted pregnancy incontrovertibly involves greater injury to a woman’s physical and mental health than if the pregnancy were terminated.

4.3.1. A comprehensive review of the evidence in the United Kingdom by the Academy of Medical Royal Colleges in 2011 found no difference between the mental health outcomes of women with unwanted pregnancies who gave birth from those who had abortions, except for women who had a history of mental health difficulties before an unwanted pregnancy—these women were found to be at greater risk of mental health problems following an abortion. In 2013, Fergusson et al re-examined the results of this review and additional evidence in this area. They came to the following conclusion: “there is no available evidence to suggest that abortion has therapeutic effects in reducing the mental health risks of unwanted or unintended pregnancy. There is suggestive evidence that abortion may be associated with small to moderate increases in risks of some mental health problems.” Two other longitudinal studies in recent times have come to similar conclusions.

4.3.2. It is notable that a meta-analysis study by Coleman published in *The British Journal of Psychiatry*—the largest quantitative estimate of mental health risks associated with abortion in world literature—found that women who had undergone an abortion experienced an 81% increased risk of mental health problems. The study concluded that, based on the data from 22 studies incorporating 877,181 participants, there is a strong indication that abortion is associated with a moderate to highly increased risk of subsequent psychological problems. Furthermore, nearly 10% of the incidence of mental health problems as a population attributable risk (PAR) was shown to be attributable to abortion. Most alarmingly, the PAR of suicide was as high as 34.9%.

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8. A population attributable fraction (PAF) is an “epidemiologic measure widely used to assess the public health impact of exposures in population”, https://www.bmj.com/content/380/bmj.k757
4.3.3. It is frequently suggested that it is riskier to the life of a mother to carry an unwanted baby to term than have an abortion. However, a study by Gissler et al found that the mortality risk for a nonpregnant woman drops dramatically for a woman who becomes pregnant and carries the baby to term, yet increases considerably for those who have abortions. 10

4.3.4. Regarding the impact of abortion on women’s physical health, there is solid evidence of a link between abortion and subsequent preterm birth. This risk is small but certainly real, and is acknowledged by the RCOG. 11 In 2013, a review of induced abortion and early preterm birth found “a significant increase in the risk of preterm delivery in women with a history of previous induced abortion.” Women who had one prior induced abortion were 45% more likely to have premature births by 32 weeks, 71% more likely to have premature births by 28 weeks, and more than twice as likely (117%) to have premature births by 26 weeks. 12 A further study conducted in Finland in 2013 found a 28% higher risk of an extremely preterm birth. 13

4.4. We particularly believe allowing for widespread access to abortion would have a significant impact on individuals with disabilities. If Diana Johnson MP’s Abortion Bill 2017-19 14, which proposes to decriminalise abortion up to 24 weeks, was to become law in Northern Ireland, the discriminatory aspect of the current abortion system in Great Britain would be brought to Northern Ireland. In Great Britain, abortion on the grounds of disability is allowed up to term under section 1(1) (d) of the 1967 Abortion Act. In our view, this is a stain on the record of England, Scotland and Wales as it is an inherently discriminatory provision against individuals who are disabled. The disabilities in view are not the incredibly difficult situations around life limiting conditions deemed fatal before, during or shortly after birth but conditions where the individuals concerned can and do live full lives.

4.5. The law in Northern Ireland makes a major difference in terms of the culture around disability. For instance, with regard to Down’s Syndrome in 2016, 74% of unborn children identified in utero with this condition were aborted. 15 In contrast, in Northern Ireland well over 90% of babies identified with Down’s Syndrome were born in 2016. 16 This is a major difference which the law and policy in operation in Northern Ireland has made.

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11 ‘The Care of Women Requesting Induced Abortion: Evidence-based Clinical Guideline Number 7’, Royal College of Obstetricians and Gynaecologists, November 2011, p. 44


15 Congenital anomaly statistics 2016, National Congenital Anomaly and Rare Disease Registration Service, p. 5

16 See http://www.publichealth.hscni.net/sites/default/files/Core%20Tables%202016%20%20final%20-%202Dec%202017%20_0.pdf p39

5. **Human Rights**

5.1. Much has been made of claims that Northern Ireland has to change its law on abortion to allow for abortion on request as a consequence of human rights laws. However, these claims do not stand up to scrutiny.

5.2. We note the decision of the Supreme Court case of **In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland).** The impact of this judgment has been much misunderstood. The case was dismissed on the grounds that the Northern Ireland Human Rights Commission did not have standing to bring forward the case without an identified individual victim. A majority of the Judges on this panel, in an unusual move, then made a set of non-binding comments on how they would have ruled if the Northern Ireland Human Rights Commission had standing. The judges indicated by a majority of 5-2 that they would have made a declaration of incompatibility with regard to the impact of the law on abortion in Northern Ireland in cases involving life-limiting conditions deemed fatal before, during or shortly after birth, and by a majority of 4-3 in cases of sexual crime. With regard to serious foetal abnormalities, the panel of judges unanimously held they would not have made a declaration of incompatibility.

5.3. Two important points need to be made with regard to this judgment. First, binding declarations do not themselves change the law, nor do they require the law to be changed. If a case with an identifiable victim does come before the Supreme Court and the Court made a judgment of incompatibility with regard to life-limiting conditions deemed fatal before, during or shortly after birth, or for sexual crime, it would be up to the Northern Ireland Assembly to decide whether or not the law should then be changed to address the points in question. Second, in the event that a declaration of incompatibility was made, and the Assembly then determined to change the law, this would only slightly widen the scope for abortion provision in Northern Ireland. It would not come anywhere close to ‘decriminalising’ abortion.

5.4. It should be further noted that the Supreme Court panel unanimously held it was human rights compliant to restrict abortion on the grounds of foetal abnormality, i.e. disabilities that do not cause death. This should pose a challenge to legislators in England, Scotland and Wales who are standing over a discriminatory regime which allows for abortion in cases of disability up to term. Any impression this judgment demands, on the basis of the European Convention on Human Rights, legislating for abortion on request in Northern Ireland (or indeed in Great Britain) should be dispelled.

5.5. We are fully aware of the recently adopted reports of the CEDAW Committee of the United Nations on abortion in Northern Ireland and the General Comment of the Human Rights Committee on Article 6 of the International Covenant on Civil and Political Rights (ICCPR). Considerable misunderstanding exists as to the standing of these reports and consequently misleading claims have been made as to their importance.

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17 [2018] UKSC 27.
18 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, CEDAW/C/OP.8/GBR/1, 8 March 2018, http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkKG1d%2fzPPRcAqkhb7yhalpSF4L4DUhQcPE9cYLOQYx9oGgA60Wd45pXihvBTbo%2b06DYTNbR95rweY01b%2b8zmILi%INy6d665JEzE8QUpv7ZmADvH5%2bPVef401375
5.6. Claims have been made that the United Nations as an entity has demanded Northern Ireland change its law on abortion. However, when this claim has been made, it refers to the comments of only one unelected Committee of the United Nations, the Committee for the Elimination of Discrimination Against Women (CEDAW). This body does not represent the United Nations as a whole. The comments by the Committee could be interpreted to mean that the UN Convention on the Elimination of Discrimination Against Women (CEDAW), which defines the remit of the CEDAW Committee, sets out a right to abortion, which Northern Ireland is failing to deliver. In truth, however, at no point does the Convention mention abortion. Moreover, it is the legal opinion of Mark Hill QC that, as a non-judicial body, CEDAW has no legal standing to read such a right into the Convention, much as some of its members may wish to do so. As such the CEDAW report simply reflects the views of its members and creates no legal imperative for change.

5.7. The recently published general comment of the Human Rights Committee on article 6 of the ICCPR faces similar issues. The ICCPR at no point, like the CEDAW convention, mentions abortion. The Committee has adopted a new contentious reading of article 6 which effectively suggests that while it is appropriate to restrict access to abortion, there are limits to those restrictions. The general comment, however, like the CEDAW report, is not binding and creates no legal imperative for member states to change their laws in line with its perspective.

5.8. Members of the United Kingdom Supreme Court have also highlighted that the views of bodies such as the CEDAW Committee are only of marginal relevance. As Lord Wilson put it, “the authority of their recommendations is slight.”\(^{20}\) We would submit that the general comment made by the Human Rights Committee on Article 6 of the ICCPR should be viewed in a similar way.

5.9. In our view it should be evident there is no basis in human rights jurisprudence to require Northern Ireland to legislate for widespread access to abortion in Northern Ireland. The devolution settlement should be upheld.

6. **Conclusion**

In conclusion, we do not believe Westminster should interfere to change abortion law in Northern Ireland. It is for the people of Northern Ireland through their elected political representatives to decide what the law in this area should be. For Westminster to override the devolution settlement would have major consequences and repercussions. Such an action is not required on the basis of human rights.

December 2018

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20. *R (A and B) v Secretary of State for Health* [2017] 1 WLR 2492 per Lord Wilson at [35], with whom Lord Reed and Lord Hughes agreed.
Appendix

IN THE MATTER OF THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW)

OPINION

1. I am asked to advise upon the status of a report of the United Nations Committee on the Elimination of Discrimination Against Women (hereafter “the Committee”), concerning an inquiry into claimed violations of the Convention on the Elimination of All Forms of Discrimination Against Women (hereafter “CEDAW”). I am asked to give particular regard to the report’s status, and the competence and jurisdiction of the Committee as a matter of international law. I understand that a group of parliamentarians, headed by Stella Creasy MP, have written to the Secretary of State for the Home Department, Amber Rudd MP, in her additional capacity as Minister for Women and Equalities, enjoining her to commit to legislating for equal access to abortion for all citizens in Northern Ireland.

2. The issue of criminalisation of abortion in Northern Ireland is currently the subject of proceedings in the United Kingdom Supreme Court in In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (UKSC 2017/0131). Oral argument took place in October 2017 and judgment is awaited.

Lack of competence and jurisdiction

3. For the reasons given below, the invitation to the Home Secretary to treat the content of the Committee’s report as authoritative and determinative of the complex issues involved in the specific case of Northern Ireland is flawed. The report is based upon a misapprehension as to the status of the Committee and its competence to make declaratory determinations, still less juridical rulings regarding CEDAW whilst States parties are obliged to follow.

4. The Committee does not have the capacity or standing to give a binding adjudication on the United Kingdom’s obligations under CEDAW or on the proper interpretation of CEDAW.
The interpretative function under the CEDAW is reserved, not to Committee, but to the International Court of Justice. See Article 29.

**Article 29**

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.

3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

5. Under the Optional Protocol to CEDAW, the United Kingdom has agreed to co-operate with the Committee if the Committee initiates an inquiry after having received reliable information indicating grave or systematic violations of the rights in CEDAW in the United Kingdom. In considering whether the foregoing threshold has been met, the Committee is entitled to take a view as to what constitutes a violation of CEDAW obligations. But it must do so in accordance with the ordinary rules of interpretation set out in the Vienna Convention on the Law of Treaties. The Committee’s views are not binding interpretations of the law, nor do they contribute to customary international law when approaching the interpretation of these rights.

6. In initiating the present inquiry, and in coming to its conclusions and recommendations, the Committee has instead chosen to rely on its own interpretation of CEDAW. In consequence it initiated an inquiry (and published a report) when it was not properly open to the Committee to do so under its own terms of reference. Further it purported to make an interpretation which, at best, can amount to nothing more than an opinion, but at worst, for the reasons appearing below, is demonstrably wrong.

7. The text of international treaties such as CEDAW are carefully crafted expressions of intent and belief. There is no reference to abortion in the text of CEDAW. There is nothing in the text of CEDAW which requires a state party to allow abortion on specified grounds and/or decriminalise abortion generally. The absence of such a provision in the formal text gives a clear indication that no such obligation exists. The International Court of Justice has not

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interpreted CEDAW in a manner which departs from the plain wording of the text so as to require a right to abortion or the decriminalisation of abortion to be “read in”.

8. The lack of a right to abortion in any international treaty was noted by the United Kingdom Supreme Court in *R (A and B) v Secretary of State for Health* [2017] 1 WLR 2492 per Lord Wilson at [35], with whom Lord Reed and Lord Hughes agreed:

The conventions and the covenant to which the UK is a party carefully stop short of calling upon national authorities to make abortion services generally available. Some of the committees go further down that path. But, as a matter of international law, the authority of their recommendations is slight: see *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270, para 23, Lord Bingham of Cornhill.

9. Nevertheless, the Committee, “based on its expertise in interpreting [the Convention]”, recommends that abortion be decriminalised in all cases and asserts that “States parties are obligated not to penalise women resorting to, or those providing such services [abortion]”. The Committee is not a judicial body, no source is given for its claimed ‘expertise in interpreting’ in CEDAW, and even if it were to possess some expertise or experience in this regard, it lacks the jurisdiction to interpret CEDAW, this being a matter expressly reserved to the International Court of Justice. That it may in the past have arrogated to itself an interpretative function beyond that granted to it cannot create such a power.

10. The Committee purports to interpret the CEDAW as requiring ‘States parties to legalise abortion, at least in cases of rape, incest, threats to the life and/or health (physical and mental) of the woman, or severe foetal impairment’. This is derived from the Committee’s own General Recommendations and from its views on individual communications under the Optional Protocol. In none of these source documents is there an analysis of how these “obligations” have come about given the text of the Convention and, in particular, within articles 2, 5, 12 and 16, on which the Committee principally relies. The Committee might well wish such “obligations” to be present, but the States who agreed CEDAW and are signatories to it chose not to insert such terms.

**Flawed interpretation**

11. Article 12 of CEDAW (read with Articles 1, 2, 5, 14 and 16) is said by the Committee to constitute the “legal underpinnings of the Committee’s jurisprudence in this area”. It reads:

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23 This quotation is taken from paragraph 58 of the Report.
24 The Committee’s use of the expression ‘jurisprudence’ in paragraph 54 of the Report is revealing. The Committee is not a court
Article 12

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

12. The Committee seems to treat “health care” as necessarily including all forms of termination of pregnancy whatever the motivation. It make no differentiation in cases, for example, when the abortion may be for family planning purposes or on account of any other form of subjective selectivity. Whilst “family planning” is expressly brought within the definition of “health care” for the purposes of Article 12, it is instructive to note that abortion is not.

13. The seemingly expansive interpretation taken by the Committee is not supported by an analysis of State action in other international agreements. When the Programme of Action of the International Conference on Population and Development referred to family planning, a significant number of reservations were made which noted that the concept of family planning did not include abortion. The Programme of Action declared that:

Governments should take appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning. [7.24]

Any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process. In circumstances where abortion is not against the law, such abortion should be safe [8.25].

14. This makes it clear, first and foremost, that the international consensus is that States can legitimately outlaw abortion. Secondly, it was agreed that abortion cannot be promoted as a method of family planning. Therefore the suggestion in the Report that these same States would have considered abortion to be ‘related to family planning’ for the purposes of Article 12 of CEDAW is misplaced.

15. In the absence of a specific reference to abortion in the definition of “healthcare” in Article 12, given the specific inclusion of family planning, it must be concluded that the State parties did not intend abortion to be treated as healthcare for the purposes of Article 12. That it had

and has no standing or power to act as an authoritative judicial interpreter of the text of CEDAW.

25 The statement in paragraph 60 of the Report that “The Committee consistently discourages the use of abortion as a means of family planning” does not sit happily with the broadly stated generality deployed elsewhere in the Report.

to be made explicit that healthcare included family planning tells against any presumption or assumption that healthcare implicitly included access to abortion. The absence of reservations to Article 12 of CEDAW by States which restrict abortion further emphasises this.

16. The same analysis applies to the references to health and family planning in Articles 10 and 14 of CEDAW. There is therefore no basis for the Committee’s findings that a restriction on access to abortion can constitute a violation of these articles, which relate to the arrangements made for relationships and sexuality education or for rural women’s access to abortion.

17. General Recommendation No. 24 constitutes the Committee’s formal elaboration of its understanding of Article 12 of CEDAW.²⁷ It comments, albeit obliquely, on abortion, at two points. First, when it suggests that it is discriminatory for a State to refuse to provide legally for the performance of ‘certain reproductive health services for women’; and secondly, when it is said 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’ [sic]. It is only at the end, when recommendations are made for government action, that laws on abortion are specifically highlighted. The recommendation is that, ‘when possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion’ (emphasis added).

18. This recommendation cannot have its roots in Article 12 as stated above. It is not for the Committee to read in words which are not in the carefully agreed text of the international commitment entered into by States. However even if this recommendation were validly made, what General Recommendation No. 24 commends falls far short of the supposed obligations to which the United Kingdom seems to be held in the inquiry report.

19. The inquiry report also references General Recommendation No. 28 on the core obligations under Article 2 of the Convention. This general recommendation calls on States to promote equality of opportunity for women through implementation of plans and programmes ‘in line with the Beijing Declaration and Platform for Action’. In this context, the Beijing Platform asks States to, ‘consider reviewing laws containing punitive measures against women who have undergone illegal abortions’ [106-k] (emphasis added). What was agreed by States in Beijing is far more respectful of the extent to which States might wish to protect unborn life than the

²⁷ General Recommendations Adopted by the Committee on the Elimination of Discrimination Against Women (Twentieth sessions, 1999).
position adopted by this inquiry report. In light of this, General Recommendation No. 28, purporting as it does to be ‘in line with the Beijing Declaration’ cannot serve as a basis for the inquiry findings.

20. The inquiry report also gives some free-standing weight to Article 16 (rather as simply a context for interpreting Article 12) in reaching its conclusion in [60] of the report. It appears to rely on the following particular provision of article 16:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

21. Again, there is no specific mention of a right to abortion, the textual focus very much being on equality in decision-making, as opposed a undefined right vested solely in the mother. However, Monaco and Malta entered reservations on abortion to the extent that this commitment might be interpreted as requiring the decriminalising of abortion. Such an interpretation (however strained) could, of course, only come about as a result of a decision of the International Court of Justice and none has been forthcoming.

22. Nothing in General Recommendation No’s. 19 or 35, the latter of which suggests that criminalisation of abortion is a form of gender based violence, reveals any sound basis for the inquiry’s findings.

23. Similarly, the report’s reliance on Article 5 (and what it sees as stereotyping of women) does not empower it to recommend decriminalisation of abortion and/or positive rights to abortion in certain specific cases. At most, a legitimate comment from the Committee on a perceived failure to meet the Article 5 obligation would be a call for state action to combat a form of stereotyping that views women primarily as mothers.

24. Nothing in any of the other General Recommendations cited by the Committee (for example, on rural women, migrant workers and refugees) casts any light on how the obligations to provide for and decriminalise abortion can be derived from CEDAW.

25. In summary, the Committee’s suggestion that the Northern Irish criminal law on abortion is discriminatory against women cannot withstand scrutiny. Discrimination under Article 1 of
CEDAW involves differential treatment or impact. It is meaningful to compare the treatment of pregnant women with the treatment of others in the context of, for example, employment or benefits. Where the prohibition under challenge deals in terms with the circumstances in which termination of pregnancy is permitted there can be no meaningful comparison. Any law dealing with that subject matter must necessarily apply to pregnant women and not others (setting aside the doctors who perform abortions). In the context of such a law, it makes no sense to talk of discrimination against pregnant women. That is why there is no authority suggesting that laws governing termination of pregnancy fall to be justified as discriminatory against pregnant women or women generally, in the jurisprudence of the European Court of Human Rights in Strasbourg, the Court of Justice of the European Union in Luxembourg, or in the domestic courts of the United Kingdom.

Other international human rights instruments

26. The protection in international law for the unborn child is inconsistent with the Committee’s reading in of obligations to provide for abortion as of right. The preamble of the United Nations Convention on the Rights of the Child refers to legal protection of the child ‘before as well as after birth’ when it says:

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth"

27. Article 6 of the UN Convention on the Rights of the Child then sets out that:
1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

28. The text of the Convention on the Rights of the Child acknowledges that rights can exist before birth and in particular, the right to life. The plain text aside, one of the reasons we know this is that the United Kingdom felt it necessary to make a declaration when agreeing the treaty, advising that it interprets the Convention as only applicable following a live birth. France also entered a declaration to protect its domestic law on abortion. The majority position is therefore at odds with any suggestion that there is an internationally agreed right to end life in cases of rape, incest, maternal ill-health or severe foetal impairment.

29. The United Nations Convention on the Rights of Persons with Disabilities is of central importance on the supposed creation or extension of a right to end the life of an unborn child
because she or he has been diagnosed with a severe impairment. The focus throughout
Convention on the Rights of Persons with Disabilities, adopted in 2006, is equal protection
for those with disabilities. Importantly, the text of Article 10 expressly does not restrict the
right to life to those who are born:

States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures
to ensure its effective enjoyment by persons with disabilities on an equal basis with others.

30. Even where abortion is provided for in state law, the Committee of the Convention on the
Rights of Persons with Disabilities has consistently criticised any practice which provides for
abortion in a way which distinguishes between the unborn on the basis of disability. Most
recently it has recommended that the law in Great Britain be changed so as to not to legalise
selective abortions on the ground of foetus deficiency: CRPD/C/GBR/CO/1, August 2017.

31. The attempt of the Committee of CEDAW to align itself with the Committee of the
Convention on the Rights of Persons with Disabilities CRPD in condemning disability
selective abortion while finding that the United Kingdom is in violation of the CEDAW for
not providing for a right to abort on the ground of severe foetal impairment is not a tenable
position. A suggestion that the State should introduce such a right but somehow ensure that
women’s decisions to end pregnancies on receipt of a diagnosis do not perpetuate stereotypes
towards people with disabilities (as living a life of less value) makes no sense.

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16 March 2018

IN THE MATTER OF THE
UNITED NATIONS COMMITTEE ON
THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW)

OPINION

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