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1. This submission intends to bring to the Committee’s attention particular issues relating to the third strand of investigation raised by the Inquiry, namely the UK’s responsibilities under its international obligations and the reconciling of these obligations with the devolutionary settlement of Northern Ireland.


I. The UK’s International Obligations

United Nations


2. In 2018, CEDAW published a report on abortion in Northern Ireland following complaint to it by various interest groups in Northern Ireland. The CEDAW report alleged various breaches of the Convention and made suggestions for reform accordingly. The UK is not legally obligated to implement the report’s findings. However, the UK Government gave a robust response, which doubted some of the findings, noted various changes in the legal position since the research had been undertaken, and observed that the devolved legislature of Northern Ireland was not currently sitting.

The European Convention on Human Rights

3. The European Convention on Human Rights sets down various fundamental rights and freedoms. The UK became a signatory of the Convention in 1950, and ratified the Convention in 1951. The Convention was incorporated into UK domestic law by of the Human Rights Act 1998, which came into force in October 2000. As a result, the so-called ‘Convention rights’ are capable of domestic enforcement by UK courts. The courts cannot invalidate any Act of the Westminster Parliament which is contrary to the Convention rights. Under section 3 of the Human Rights Act, the courts should where possible interpret legislation in a manner which renders it compatible with the Convention rights. Where that is not possible, the higher courts of the UK can issue a declaration of incompatibility under section 4 of the Act. Crucially, this declaration does not affect the continuing validity of the infringing Act but merely brings the incompatibility to the attention of Parliament. It is up to

1 The report can be found here: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/GBR/INT_CEDAW_ITB_GBR_8637_E.pdf.
Parliament to decide whether and how to address any identified incompatibility. Crucially, this means that Parliament can legislate contrary to the Convention rights.

4. However, the legal position of the devolved institutions differs significantly from that of Westminster. It is beyond the competence of the devolved institutions to pass legislation which is incompatible with Convention rights. This is confirmed for Northern Ireland under section 6(2) of the Northern Ireland Act 1998. Any such legislation is ‘not law’ under section 6(1) of the Northern Ireland Act 1998, and can be struck down by the courts accordingly.

5. The European Convention on Human Rights contains no express acknowledgement of a right to abortion. The European Court of Human Rights has not recognised a right to abortion. There is significant variation in the provision of legal abortion services across the signatory states.

II. Northern Ireland Devolutionary Settlement

6. The current Northern Irish devolutionary settlement was established in the Northern Ireland Act 1998. The powers of the Northern Ireland Assembly so created are limited, and cannot contravene the Convention rights (as noted above in paragraph 4).

7. The devolutionary settlement recognises a tripartite classification, unique to Northern Ireland, with respect to the devolution of powers to the Assembly and Executive:
   a. ‘Transferred’ matters are those given into the competence of Northern Ireland.
   b. ‘Reserved’ matters are those which are yet to be given into that competence but which could be transferred by the Secretary of State subsequently. The Northern Ireland Assembly can pass legislation on reserved matters with the consent of the Secretary of State under section 8 of the Northern Ireland Act 1998.
   c. ‘Excepted’ matters are those which are kept to Westminster and cannot be transferred without further primary legislation.

8. Abortion was not expressly mentioned in the Northern Ireland Act 1998. Rather, Northern Irish criminal law was interpreted as including abortion law; paragraphs 10-14 below set out the offences relevant to abortion in Northern Ireland. Northern Irish criminal law was originally a reserved matter under schedule 3, article 9(a) of the Northern Ireland Act 1998. It afterwards became a transferred matter, and so within the legislative discretion of the Assembly, per the Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010.

9. It is worth noting that legislative powers in abortion were at this time expressly identified as being outside the competence of the Scottish parliament. Legislative powers in abortion were only devolved to the Scottish parliament under section 53 of the Scotland Act 2016.

III. Abortion Law in Northern Ireland

10. Abortion is an offence in Northern Ireland under two statutes.
11. The Offences Against the Person Act 1861 was passed by Westminster and extends to Northern Ireland as well as England and Wales. Under section 58, it is an offence on the part of the pregnant woman and any assisting party to procure a miscarriage. Under section 59, it is an offence to procure any substance or instrument knowing that it will facilitate an induced miscarriage.

12. The Criminal Justice (Northern Ireland) Act 1945 was passed by the then Parliament of Northern Ireland, following the introduction of home rule in 1921. This Act introduced to Northern Ireland provisions similar to those introduced in England and Wales by the Infant Life (Preservation) Act 1929, which was passed by Westminster after the introduction of
home rule in Northern Ireland. Section 25 of the 1945 Act (and section 1 of the 1929 Act) created the offence of child destruction where the pregnancy had passed 28 weeks, unless it was done in good faith to preserve the mother’s life. Section 26 of the 1945 Act (and section 2 of the 1929 Act) relates to the prosecution of this offence relative to other offences, including that under section 58 of the 1861 Act.

13. The Abortion Act 1967 introduced lawful abortion under some circumstances in England and Wales and in Scotland. The 1967 Act was not extended to Northern Ireland. This difference in extent explains the variability of access to lawful abortion between the constituent nations.

14. Case law interprets the legislative framework in Northern Ireland as setting a high threshold for exemption from prosecution, namely where the pregnancy is a threat to the life or a serious threat to the physical or mental health of the mother. This high threshold leads to highly restricted access to lawful abortion in Northern Ireland.

IV. Reform Attempts at Stormont

15. There have been recent proposals for reform introduced in the Northern Ireland Assembly.

16. Amendments proposed to the Justice (No 2) Bill at the Consideration Stage in February 2016 gave the Northern Ireland Assembly the opportunity to consider whether to allow lawful abortion. Amendment number 61 proposed lawful abortion where there was fatal foetal abnormality. Amendment number 68 proposed lawful abortion where the pregnancy was a result of ‘rape, incest or indecent assault’. Neither amendment was successful, but a working group was commissioned to review these issues. The report of the working group advocated abortion on the grounds of fatal foetal abnormality.

17. In December 2016, the Abortion (Fatal Foetal Abnormality) Bill was introduced as a Private Members’ Bill but fell before its second reading when the Assembly was dissolved in January 2017. It was based on a previous commission which had looked at this issue. The Bill had proposed allowing lawful abortion where the foetus had fatal foetal abnormalities, where the abortion would be undertaken by suitably qualified medical personnel and where the woman would be provided with appropriate support.

V. Recent reform at Westminster

18. Since the Northern Ireland Assembly stopped sitting, there have been two reforms at Westminster which could affect the provision of legal abortions to Northern Irish women.

19. Due to the restrictive abortion laws in Northern Ireland, some Northern Irish women will travel to other constituent nations of the UK to procure a legal abortion. These women used to be charged for this medical procedure because they were not resident in the nation in

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4 NI Ass Deb 10 February 2016 vol 112 no 5 pp 77-122,


which they were being treated; a UK Supreme Court decision in June 2017 confirmed that the levying of such charges on these women was lawful.\(^7\) In light of the political backlash to this decision, in July 2017, the Women and Equalities Minister (Justine Greening) confirmed that her departmental budget would cover the cost of the procedure.\(^8\) However, Northern Irish women must still pay for other expenses, such as travel and subsistence.

20. The Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 was passed by Westminster to facilitate public administration in Northern Ireland in the absence of a devolved government. Under section 4 of that Act, the Secretary of State is required to advise senior public servants how to exercise their duties where there is any incompatibility of the legislative framework on abortion with human rights. There are three difficulties which arise from this section. First, it mentions only the 1861 Act and not the 1945 Act, so it may be unclear how to address any instruction relative to the overall legislative framework. Secondly, public servants have no legal power to disapply a legislative provision. Thirdly, as will be shown in paragraph 21 below, no declaration of incompatibility has been issued by the courts so there is as yet no legally-recognised incompatibility.

VI. The Supreme Court

21. The Supreme Court in 2018 considered whether the current legislative framework in Northern Ireland was incompatible with the Convention rights. The case was brought by the Northern Ireland Human Rights Commission but was unsuccessful because the majority of the Justices held that the Commission did not have standing to bring an action. However, the majority also indicated that they would have been prepared to issue a declaration of incompatibility with Article 8 of the European Convention on Human Rights, ‘Right to respect for private and family life’, had the petitioner had standing.\(^9\) It is therefore likely that the Supreme Court will in the future be in the position to issue a declaration of incompatibility, should an appropriate case arise.

VII. Future Reform Options for the Committee’s Consideration

22. Parliament currently has no obligation to consider the question of abortion law reform in Northern Ireland because no incompatibility with the Convention rights has been formally declared by the courts. As noted above in paragraph 3, even if the courts did hold that there was such an incompatibility, Parliament is not under any obligation to institute any reform. The Human Rights Act 1998 does not allow the courts to strike down legislation of the Westminster parliament.

23. Ordinarily the impetus for reform would fall to the Northern Ireland Assembly. However, Parliament can legislate for this issue under the doctrine of parliamentary sovereignty, which was explicitly preserved under section 5(6) of the Northern Ireland Act 1998. Ordinarily Parliament would consult the Northern Ireland Assembly when passing legislation on issues within devolved competence, per the Sewel Convention. However, this is not

\(^7\) R (on the application of A and B) (Appellants) v Secretary of State for Health (Respondent) [2017] 1 W.L.R. 2492; [2017] 4 All E.R. 353.


legally required. Recent parliamentary involvement with the Brexit legislation suggests that, where the Assembly is not sitting, then no consultation will be had.

24. Should Parliament decide to legislate for abortion in Northern Ireland, it would be possible to include a sunset clause which meant that the legislation would expire or be subject to parliamentary review at a set point in time or under certain conditions. This might include a specified period of time after the Northern Ireland Assembly resumes sitting or if the Northern Ireland Assembly passes a motion against the Act.

25. It is important to note that the legal situation would differ depending on whether any Westminster legislation was passed before or after any declaration of incompatibility had been issued by the courts.

*Where a declaration of incompatibility is made first*

26. If the courts issued a declaration of incompatibility, then Westminster could choose either to legislate to address the incompatibility or to ignore the incompatibility. If it passed legislation to address the incompatibility, then it could choose whether to issue legislation to address the incompatibility only or to extend a wider legislative framework of access to abortion in Northern Ireland (e.g. by extending the Abortion Act 1967 to Northern Ireland).

27. If Westminster passed legislation to address the incompatibility only, then the Northern Ireland Assembly could not reduce this statutory access under its devolved legislative powers once it resumed sitting. To do so would be incompatible with the Convention rights as interpreted by the UK Supreme Court and therefore beyond the Assembly’s powers under section 6(2) of the Northern Ireland Act 1998. The Assembly could only expand upon that statutory access.

28. If Westminster passed legislation which provided statutory access to abortion beyond that incompatibility, then the Northern Ireland Assembly would be able to amend that legislation to revoke or amend the access once it resumed sitting. If Westminster sought to permanently provide that extended access to abortion to women in Northern Ireland, it would necessitate either returning abortion provision as an excepted matter through amendment of the Northern Ireland Act 1998 or providing an exception in the terms of the Act. Any changes to the legislative competence of the Assembly are likely to be politically contentious.

*Where Westminster’s legislative reform is passed first*

29. Parliament could decide to precipitate any declaration of incompatibility and pass legislation to reform abortion law in Northern Ireland. As per the above scenario, Parliament could limit that reform to addressing the issues identified in the *Northern Ireland Human Rights Commission* case or could provide a wider legislative framework for access.

30. If Westminster passed such legislation before any declaration of incompatibility, then the Northern Ireland Assembly could amend or repeal the legislation to reduce the statutory access once it resumed sitting on the basis that no incompatibility with the Convention rights had been formally declared by the courts. The Northern Ireland Assembly has the power to alter primary legislation in relation to transferred matters, under section 5(6) of the Northern Ireland Act 1998. It is likely that such legislation would be subject to judicial review action seeking a declaration of incompatibility in the future.

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