Written submission from Miss Collette Power (ANI0408)

1. I am a Doctoral Researcher at Nottingham Law School, with an interest in constitutional law and the balancing of conflicting human rights. This submission represents my own personal views and opinions and not that of the institution I research for.

2. This submission sets out the limitations that devolution and human rights obligations (specifically those under the European Convention on Human Rights (hereafter, the Convention or the ECHR)) place on any UK Government action to reform abortion law in Northern Ireland. It argues that this issue is best considered in the Stormont Assembly and that the most appropriate action for Westminster to take, respecting devolution and human rights obligations, is to work towards restoring the power-sharing agreement in Northern Ireland and to let the Assembly deal with this politically and morally sensitive issue.

Devolution

3. Any change in law regarding abortion should be decided by politicians in Northern Ireland and not Westminster. The Assembly has full legislative competence with regards to healthcare, equal opportunities and justice, each of which hinges on arguments made to further access to abortion. This has been reiterated by the Secretary of State for Northern Ireland, Karen Bradley who stated in the Houses of Parliament on September 5, 2018 that; ‘Abortion is a devolved matter in Northern Ireland and this means it is only right that questions of laws and policy on abortion, including the legality of any medicines, are decided by a devolved government.’\(^1\) It is therefore beyond the remit of Westminster to seek to change the laws on this devolved and sensitive matter.

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\(^1\) See also: Prime Minister Theresa May whilst supporting access to safe and legal abortion, her ‘preferred option for it is to be dealt with and addressed by those people who are…elected as accountable politicians in Northern Ireland.’ https://www.theguardian.com/politics/2018/jun/08/theresa-may-enters-northern-ireland-abortion-debate Also: Deputy Chair of the Conservative Party James Cleverely: ‘You can’t make the claim to respect NI devolution, but then demand that it be ignored because an issue is ‘important…the sensitivity about saying ‘the Republic of Ireland have done it so Northern Ireland should do it too’ cannot be overstated either.’
4. Although the Northern Ireland Assembly is currently suspended, the Northern Irish Courts have been clear that abortion is an issue for the legislature to determine. Upholding the Northern Ireland Attorney General’s appeal against the 2015 High Court ruling which held that not permitting abortion in cases of fatal foetal abnormality and rape was a breach of the Convention, the Court of Appeal in Belfast 2017 was clear in its ruling that any change in abortion legislation was a matter for the legislature alone, and only the Assembly could decide on this issue given the complex moral and religious questions surrounding it.

5. Given these complexities, those in closest proximity to the issue at hand should be considered as best placed to lead an Inquiry into existing abortion legislation in Northern Ireland. However, not a single member of the Women and Equalities Commission represents a seat in Northern Ireland.

6. This move by Westminster politicians on something of fundamental importance to the people of Northern Ireland, whatever their position on the issue of abortion, sets a worrying precedent for the working of other devolved assemblies and should raise serious questions about the overreach of Westminster on devolved issues.

International Human Rights Obligations

7. The decision to hold this particular Inquiry was motivated by findings from the 2016 UN Committee on the Elimination of Discrimination Against Women (hereafter, CEDAW) Inquiry into abortion access in Northern Ireland and the recent Supreme Court ruling in June 2018. It should be clearly stated that both are non-binding. The status of both will now be briefly considered.

8. Firstly, with regards to the UN Committee CEDAW, it is a non-judicial, unelected body and has no legal standing to read such a right to abortion into CEDAW. The

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2 Ruth Davidson, leader of the Scottish Conservative Party ‘If I was a politician in Northern Ireland, I would absolutely 100% vote to change the law. But as someone who operates in a devolved administration, I know how angry I would be if the House of Commons legislated on a domestic Scottish issue over the head of Holyrood.’
marginal relevance of the views of bodies such as this Committee has also been highlighted by members of the UK Supreme Court.³

9. Secondly, with the 2018 Supreme Court ruling on the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland), a majority ruled that the NIHRC did not have locus standi, therefore a compatibility declaration could not be made as the Court did not have jurisdiction. Subsequent dicta on the merits of the cases, should it have had standing, are therefore not binding and should not be considered as authoritative in this instance.

10. Even if a future court made a binding ruling on this issue firstly, the cases in question (fatal foetal abnormality, rape and incest) would engage only a tiny number of abortion cases in practice, with less than 2% of recorded abortions in England and Wales in 2017 accounting for these reasons.⁴ Secondly, even if a Declaration of Incompatibility was made, as per s.4(6) of the Human Rights Act 1998, the legislation remains valid and it is for Parliament to consider making amendments or repealing the legislation. As a devolved issue under the NI Act 1998, Stormont would retain full legislative power in this area and should therefore be able to determine how best to deal with a possible Declaration of Incompatibility on this matter.

11. Another point raised by the Supreme Court was the fact that Northern Ireland’s abortion laws are considered to be out of synch with the rest of Europe and existing Convention obligations. The Council of Europe has taken a clear position on abortion access,⁵ yet this resolution is also non-binding and whilst it does provide a political interpretation of Convention rights, subsequent judgments of the European Court of Human Rights have not followed this resolution.⁶ Although there has been a strong consensus on abortion legislation across Europe, this has continued to be an issue

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³ ‘The authority of the recommendation is slight’ Lord Wilson in R (on the application of A and B) (Appellants) v Secretary of State for Health (Respondent) June 2017


⁵ Parliamentary Assembly Resolution No. 1607 ‘Access to Safe and Legal Abortion in Europe’ 16 April 2006

⁶ See A, B & C v Ireland (Application no. 25579/05) 16 December 2010
which the Court considers the State to be best placed to deal with and therefore it has exceptionally not narrowed the margin of appreciate with regard to this,\(^7\) despite this being common practice in other areas of rights recognition by the Court.

12. In this instance, given the sensitivity and moral complexity of the issue, the Court has given a broad interpretation to Convention rights but has been clear that the State is best placed to deal with the issue of abortion. Given the transference of full legislative power on this area to Northern Ireland by virtue of the NI Act 1998, it is clear that Northern Ireland and not Westminster are the most appropriate legislative body to deal with this issue. With the political and moral sensitivity around the issue of abortion alongside the continued suspension of the Stormont Assembly; any attempts by Westminster to take action, or to even consider taking action in this area, is not only constitutionally inappropriate but also politically insensitive and potentially damaging and counter-productive to the restoration of the power sharing agreement.

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\(^7\) A, B & C v Ireland (Application no. 25579/05) 16 December 2010 at 236