Written submission from the Northern Ireland Office (ANI0411)

Introduction

1. The Government recognises that the issue of abortion law in Northern Ireland has received a lot of attention at Westminster in recent months; and welcomes the current inquiry of the Women and Equalities Committee. This is clearly an extremely sensitive area of policy and law that raises a number of different issues to consider, which this inquiry will no doubt explore.

2. This UK Government written evidence seeks to address the third strand of the Committee’s inquiry, namely:

   ‘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?’

3. The UK has a long tradition of protecting rights and liberties domestically and of meeting our international human rights obligations. We have strong human rights protections within a comprehensive and well-established constitutional and legal system. In domestic law, rights are protected through the common law, the Human Rights Act 1998 (HRA) and the devolution statutes as well as other legislation across the UK.

Northern Ireland devolution settlement and current state of play

4. The absolute priority of the Government, and indeed the Secretary of State for Northern Ireland, remains the restoration of devolved government in Northern Ireland. In part, so that the people of Northern Ireland, and locally elected representatives, can decide what is right, for Northern Ireland, and have the opportunity to fully discuss and debate sensitive devolved issues, such as abortion.

5. The Government has recently taken the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 (NIEFEF Act) through Parliament, which has now received Royal Assent. The Act extends until March 26 2019\(^1\) the period provided in the Northern Ireland Act 1998\(^2\) in which Executive Ministers can be appointed and a restored Government in Northern Ireland can be formed. The Act provides for the time and space that is needed to get devolved government back up and running again in Northern Ireland, and in the interim provides the Northern Ireland Civil Service with the certainty and clarity they need to continue to deliver vital services in the public interest. It does not give the Civil Service any new powers, but the guidance, which has been recently issued, provides clarity on how they can continue to use their existing powers in the public interest. The Government does not believe that during this time it is right for Westminster to step in and legislate on devolved equality and rights issues for Northern Ireland.

6. The section 4 guidance issued under the NIEFEF Act states that it does not, and cannot be used to, change the current law on abortion in Northern Ireland. The guidance notes that no declaration of incompatibility has been made in relation to Northern Ireland’s abortion laws,

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1 Subject to the possibility of one extension for a further period of up to 5 months.
2 Prior to its extension that period last expired on 29 June 2017.
and that the relevant Northern Ireland departments should continue to have regard to all of their legal obligations, including the Human Rights Act 1998 and sections 24 and 75 of the Northern Ireland Act 1998 in exercising any relevant functions. Further, relevant Northern Ireland departments, in light of any relevant emerging legal judgments or other developments, as appropriate, should consider whether their Guidance for Health and Social Care Professionals on Termination of Pregnancy in Northern Ireland should be reviewed; and whether policy advice and options should be prepared to inform Northern Ireland Ministers on the issues arising.

7. The Secretary of State for Northern Ireland is required to report on the section 4 guidance under the NIEFEF Act on a quarterly basis to the House of Commons and also to set out her plans to address the impact of the absence of Northern Ireland Ministers on human rights obligations within three months of the day the Act was passed. She must do both of these things, therefore, before 28 February 2019.

**Constitutional framework in Northern Ireland**

8. The Belfast Agreement (also known as the Good Friday Agreement), entered into in 1998, sets out in Strand One that there would be an elected Assembly in Northern Ireland capable of exercising legislative and executive competence. This was implemented through the Northern Ireland Act 1998, which has been amended further since 1998. The Northern Ireland devolution settlement gives legislative competence in relation to transferred matters, to the Northern Ireland Assembly. Schedules 2 and 3 to the Northern Ireland Act 1998 set out the ‘excepted’ and ‘reserved’ matters, with ‘excepted matters’ falling solely within the legislative competence of Westminster; and ‘reserved matters’ generally being within the legislative competence of Westminster, though the Northern Ireland Assembly may also legislate in those reserved areas with the consent of the Secretary of State for Northern Ireland. Other matters not listed in either Schedules 2 or 3 to the Northern Ireland Act 1998 are referred to as “transferred” (or devolved) matters. For those areas, the Northern Ireland Assembly has full legislative competence, and does not require consent from Westminster or the UK Government to legislate. Westminster retains competence in relation to transferred matters\(^3\), but that is subject to the convention discussed further below.

9. Under the Northern Ireland devolution settlement, the following areas, relevant to the provision of abortion services, are “transferred matters” and therefore devolved in Northern Ireland: health and social services; equal opportunities (including as provided for in equality law); and justice and policing. As a result, any questions of reform or legislative changes to the law or policy in these areas are matters that are within the competence of the Northern Ireland Assembly and Executive.

10. The UK Government and the Northern Ireland Executive have agreed a Memorandum of Understanding\(^4\) setting out the principles that underlie relations between them.\(^5\) In terms of legislation, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the

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\(^3\) See section 5(6) of the 1998 Act.


\(^5\) The same arrangements are in place in relation to Scotland and Wales in relation to the legislation for devolved matters.
agreement of the devolved legislature. It is the Government’s view that the convention should be adhered to in this context as the issue of abortion is a devolved matter and therefore, should rightly be a matter for the Northern Ireland Assembly to legislate on.

**Abortion in Northern Ireland: the current law**

11. The law governing abortion in Northern Ireland does not allow interventions that have as their sole purpose the ending of the life of the foetus. The Abortion Act 1967 that applies in England, Wales and Scotland, which ensures that a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith that the woman concerned meets one of the relevant criteria under that Act, does not extend to Northern Ireland.

12. Under the law in Northern Ireland, abortion is criminalised, and any intervention to a pregnant woman that is potentially harmful to the foetus must only be carried out with the intention of protecting the woman against physical or mental health issues that are ‘real and serious’ and ‘permanent or long term’.

13. The relevant legislation is the Offences Against the Person Act 1861 (OAPA) which makes it a criminal offence for any woman, being with child, unlawfully to do any act with intent to procure a miscarriage; and for any person unlawfully with intention to do an act to procure a miscarriage of any woman. It also makes it an offence to unlawfully supply or procure poison, drugs or other noxious thing or any instrument knowing the same will be employed to procure abortion, or procure drugs or instruments to cause abortion.

14. Section 25(1) of the Criminal Justice Act (Northern Ireland) 1945 also makes it a criminal offence for anyone to assist or wilfully act to ‘destroy the life of a child then capable of being born alive’, except where the purpose is to preserve the life of the mother ‘in good faith’. ⁶

15. Common law has determined that if a doctor is of the reasonable opinion that the probable consequence of the continuation of the pregnancy is to make a woman a ‘physical or mental wreck’ that will have ‘real and serious’ effects that would be ‘permanent or long term’ it can be construed that the doctor is ‘operating for the purpose of preserving the life of the woman’. ⁷

**Relevant international human rights obligations and the Human Rights Act 1998**

16. The Government remains committed to its obligations under international law including under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); and the European Convention on Human Rights, which is given further effect in domestic law by the Human Rights Act 1998.

17. Whilst the UK is the State party to these international treaties, it is for the devolved administrations, here the Northern Ireland Assembly and Executive, to ensure that their domestic laws and actions are compliant. The observance and implementation of

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⁶ The Act provides that a child is capable of being born alive after a 28 week gestation period, and replicates the Infant Life Preservation Act 1929 for England and Wales.

⁷ *R v Bourne* [1939] 1 KB 687 and subsequent cases.
international obligations and obligations under the ECHR (so far as they are otherwise within the competence of the Assembly) are matters for the Northern Ireland Assembly.\textsuperscript{8} Powers are conferred on the UK Government to ensure that the devolved administrations take action to give effect to the UK’s international obligations\textsuperscript{9} and do not take actions that would be incompatible with those obligations (sections 14 and 26 Northern Ireland Act 1998) but annex D3, paragraph 3.6 of the memorandum of understanding, acknowledges that other than in instances of genuine urgency, these powers will not be exercised unless the other mechanisms provided for have been exhausted.

\textit{Supreme Court’s comments in the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review [2018] UKSC 27}

18. In June this year, the Supreme Court ruled in the \textit{matter of an application by the Northern Ireland Human Rights Commission for Judicial Review [2018] UKSC 27}. The Northern Ireland Human Rights Commission (NIHRC) brought a challenge against the Northern Ireland Department of Justice on the basis that abortion law in Northern Ireland is incompatible with Article 3 (the prohibition of torture and of inhuman or degrading treatment), Article 8 (the right of everyone to respect for their private and family life) and Article 14 (the prohibition of discrimination) of the ECHR, insofar as that law prohibits abortion in cases of (a) serious malformation of the foetus, (b) pregnancy as a result of rape, and/or (c) pregnancy as a result of incest. The NIHRC sought declarations to that effect under section 6 and section 4 of the HRA. In addition, the Northern Ireland Court of Appeal referred a devolution issue from the Attorney General for Northern Ireland asking whether the NIHRC in fact has the ability to bring human rights proceedings or to seek a declaration of incompatibility other than in relation to an identified unlawful act.

19. The case was dismissed on procedural grounds on the basis that the NIHRC does not have the legal standing to bring a case in its own name (without an actual or perceived victim) and therefore, the Supreme Court did not make a declaration of incompatibility. However, the majority of the Supreme Court took the view that, to the extent that the current law governing abortion in Northern Ireland prohibited abortions in the case of sexual crimes (rape and incest) and fatal foetal abnormalities, it was incompatible with the right to respect for private and family life provided for under Article 8 of the ECHR.

\textit{Human Rights Act 1998}

20. In the event that the Supreme Court had made a declaration of incompatibility, this would not have resulted in an automatic change to the law. The structure of the HRA respects Parliament’s role since a declaration leaves it for Parliament to consider the declaration and the issues it raises and to determine how the declaration should be addressed by the relevant legislature either through primary legislation or by way of a remedial order provided for under the HRA.

21. The Government is aware of the ongoing relevant litigation on related abortion issues challenging compatibility with the ECHR. The Government remains of the view that it would be a matter for the restored devolved government in Northern Ireland to carefully consider

\textsuperscript{8} Schedule 2, paragraph 3, Northern Ireland Act 1998; see also paragraph 21 of, and annexes D3 and D4 to, the memorandum of understanding referred above.

\textsuperscript{9} Which in this context does not include ECHR rights.
the Supreme Court’s comments in the above matter and any other relevant emerging legal judgments or developments, as appropriate.

**Other international human rights obligations**

22. The UK government takes its international human rights obligations seriously and has put in place a combination of policies and legislation to give effect to the UN human rights treaties that it has ratified.

23. Through the periodic reporting mechanisms under the different UN treaties, including CEDAW, the Government demonstrates to the relevant UN committee how, in each of the Devolved Administrations, implementation of the relevant rights on areas which may be reserved or transferred is approached. This includes abortion in Northern Ireland. The Government recently responded to the CEDAW committee’s List of Issues\(^\text{10}\) as part of the UK’s periodic examination.

**Committee on the Elimination of Discrimination against Women (CEDAW) comments**

24. The CEDAW Committee conducted an inquiry\(^\text{11}\) into the “restrictive access to abortion for women and girls in Northern Ireland”, which reported in March 2018. The Government responded to their inquiry at the time. In its response, the UK Government highlighted that the Committee’s findings and recommendations, which focus on changes to criminal law on abortion, should not be addressed in the absence of a legislature with authority to legislate on such matters in Northern Ireland. In addition, the UK Government committed that 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.

**Concluding remarks**

25. The Government remains of the view that any reform to policy or law on the issue of abortion in Northern Ireland is rightly one for a restored Executive and Assembly, and the people of Northern Ireland, to carefully consider, discuss and debate.

26. While the UK Government recognises that it remains responsible as a matter of international law for compliance with its international obligations, it is for the devolved administrations to ensure compliance in relation to devolved matters. This is enshrined in domestic law and the memorandum of understanding. The UK Government does not believe that the current situation in Northern Ireland should dislodge that principle, particularly in circumstances where the Government is working towards the restoration of devolved government in Northern Ireland. The UK Government will keep this position under review in light of its international and domestic obligations, and in light of any relevant emerging legal judgments, as appropriate.

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\(^{10}\) [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/GBR/CEDAW_C_GBR_Q_8_Add-1_31122_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/GBR/CEDAW_C_GBR_Q_8_Add-1_31122_E.pdf)