

***S466 Submission to the Public Prosecution Service (PPS)  
Consultation on the Draft Equality Action Plan 2017-18***

The Committee on the Administration of Justice ('CAJ') is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.

CAJ welcomes the opportunity to comment on the draft Equality Action Plan 2017-2018, which is being consulted upon by the PPS alongside a draft revised Equality Scheme and disability action plan between April and July 2017. The Equality Coalition, which CAJ co-convenes with UNISON, has made a collective submission to the consultation on the revised Equality Scheme.

The draft PPS Equality Action plan presently contains a number of proposed actions to support six overarching outcomes. The first two outcomes relate respectively to public awareness of the role of the PPS and levels of satisfaction and confidence among Section 75 groups (the nine categories of the equality duty). The third relates to improved services and support to victims and witnesses in Section 75 groups. The fourth relates to increased confidence in the PPS handling of cases involving serious sexual offences; the fifth to procurement and the sixth to staff awareness of equality issues. CAJ is supportive of these outcomes. This submission urges the PPS to consider adding three further issues to the action plan, in summary actions to:

1. Review and ensure compliance with human rights standards of the application of the Public Interest element of the test for prosecution in relation to 'procuring abortion' offences under the 1861 Offences Against the Person Act;
2. Develop guidance, compliant with human rights standards, on interpreting 'incitement to hatred' offences under PIII of the Public Order (NI) Order 1987;
3. Ensure any changes to workforce composition, terms and grading are not regressive in relation to Section 75 groups;

Further information on each of these proposals is provided overleaf.

## 1: 'Procuring Abortion' Offences, public interest test

Northern Ireland maintains 'procuring abortion' offences under the Offences Against the Person Act 1861. Section 58 provides that any woman who in anyway unlawfully procures an abortion can face a sentence of 'penal servitude for life'. Section 59 of the Act provides that any other person (including a medical professional) who assists a woman unlawfully to 'procure a miscarriage' whether through pills or another method can be sentenced to 'penal servitude' for an unspecified period.

These offences have now been held as incompatible with the UK's international human rights obligations with United Nations treaty bodies accordingly calling for their repeal. In 2016 the UN Committee on Economic, Social and Cultural Rights, in relation to the UK's compliance with its obligations under ICESCR<sup>1</sup>, raised concerns about the ongoing criminalisation of abortion. The Committee recommended amendment of the legislation "to make it compatible with other fundamental rights, such as women's rights to health, life and dignity."<sup>2</sup> The Committee drew attention to its general comment No. 22 (2016) on the right to sexual and reproductive health. This authoritative interpretation of duties under ICESCR (to which the UK is party) enumerates core obligations as including: "*To repeal or eliminate laws, policies and practices that criminalize, obstruct or undermine individual's or particular group's access to sexual and reproductive health facilities, services, goods and information*"<sup>3</sup> (emphasis added). In 2016 the UN Committee on the Rights of the Child (UNCRC) also urged the UK to "*Decriminalize abortion in Northern Ireland in all circumstances and review its legislation...*"<sup>4</sup> The issue of reproductive rights in Northern Ireland has also been addressed by the UN Committee for the Elimination of all forms of Discrimination Against Women (CEDAW) and in the UK's recent Universal Periodic Review in front of the UN Human Rights Council.

In 2015 the Northern Ireland Human Rights Commission took a judicial review which led to a finding of ECHR incompatibility of the legislation for not providing for terminations in the cases of fatal abnormality and sexual crime. This decision was recently successfully appealed in the Court of Appeal, and has now been appealed again to the Supreme Court.

In 2016 the PPS took a decision to prosecute a young woman for taking abortion pills holding that the Public Interest limb of the test for prosecution had been met. In doing so the PPS set out that, in this instance:

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<sup>1</sup> International Covenant on Economic, Social and Cultural Rights.

<sup>2</sup> ICESCR Concluding Observations on the UK July 2016 (E/C.12/GBR/CO/6), paras 61-62.

<sup>3</sup> CESCR General Comment No. 22 (2016) on the Right to sexual and reproductive health, para 49(a).

<sup>4</sup> UNCRC Concluding Observations on the UK June 2016 (CRC/C/GBR/CO/5 ) paragraph 64(c).

A range of factors were relevant to the balancing of the public interest, including the important fact that the law in Northern Ireland makes the conduct in question a serious criminal offence in respect of which a conviction carries the potential of a significant custodial sentence.<sup>5</sup>

The current Code for Prosecutors includes under its public interest grounds for favouring a prosecution the context of “*the seriousness of the offence i.e. where a conviction is likely to result in a significant sentence or other penalty...*”<sup>6</sup> No other listed element of the test in favour of prosecution appears to have been particularly relevant to this decision. There are a number of significant human rights compliance issues with this approach to application of the Public Interest test.

First it is not apparent if any consideration and due weight is being given in the assessment of public interest to the offences in question being incompatible with the UK’s international human rights obligations. The list of public interest factors weighing against a decision to prosecute in the Code for Prosecutors is not exhaustive. CAJ would submit that it should surely include the circumstances where the existence of offence itself has become incompatible with the legally binding human rights obligations then entered into by the state party.

Second in a similar vein it is not apparent if the PPS would have taken a similar decision to prosecute in cases involving victims of sexual crime or cases of fatal foetal abnormality, when at the time the domestic courts had held these offences were incompatible with the ECHR.

Finally the reliance itself favouring the public interest due to the ‘seriousness’ of the offence and consideration of a conviction being likely to result in a ‘significant sentence’ is highly problematic in this context. In light of the above any sentence of a woman or girl to ‘life in penal servitude’ for taking an abortion pill would be so grossly disproportionate that it is likely to offend prohibitions on inhuman and degrading treatment found in Article 3 of the ECHR. It is problematic therefore that the potential for serious punishment is given as the rationale favouring the Public Interest for prosecution.

In light of all of this we would urge, as part of the PPS Equality Action plan, that the service reviews the manner in which the public interest test is applied in such cases; with a view to ensuring that due weight is given to conformity with the states’ human rights obligations in prosecutorial decisions in relation to these offences.

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<sup>5</sup> Prosecution of woman who bought abortion drugs online 'in public interest' *Belfast Telegraph* 5 April 2016 <http://www.belfasttelegraph.co.uk/news/northern-ireland/prosecution-of-woman-who-bought-abortion-drugs-online-in-public-interest-34600144.html>

<sup>6</sup> PPSNI Code for Prosecutors 2016, page 17.

## **2. Incitement to hatred: PIII of the Public Order (NI) Order 1987;**

In Northern Ireland Part III of the Public Order (Northern Ireland) Order 1987 prohibits what is generally termed incitement to hatred. The legislation covers offences of ‘stirring up hatred’ or ‘arousing fear’ against a group of persons on grounds of religious belief, sexual orientation, disability, colour, race, nationality (including citizenship) or ethnic or national origins.<sup>7</sup> Offences under this legislation include (with some caveats) threatening, abusive or insulting words or behaviour, or displaying written material which either intend to stir up hatred or arouse fear (on one of the listed protected grounds), or which, having regard to all the circumstances, are likely to have that effect.

This legislation partially fulfils international human rights obligations under UN and Council of Europe instruments. This includes Article 4 of the (UN) International Convention on the Elimination of All forms of Racial Discrimination (ICERD); Article 20 of the (UN) International Covenant on Civil and Political Rights (ICCPR); and Article 6(2) of the (Council of Europe) Framework Convention for the Protection of National Minorities.

Whilst Northern Ireland has had legislation outlawing incitement to hatred since 1970, and the current Act since 1987, it appears the first time there has been a conviction under the provisions was not until 2015.<sup>8</sup> Statistical data released by the PSNI under Freedom of Information indicates there have only been a small number of arrests and charges under the legislation since the inception of the 1987 Act. In the context of significant problems of hate expression in Northern Ireland the current provisions therefore appear ineffective in practice.

A significant factor in the difficulties of prosecuting for such offences has been contestation over what is referred to as the ‘threshold question’. Namely where the boundary is drawn between protected freedom of expression on the one hand and prohibiting incitement to hatred on protected grounds on the other. However, there have been considerable international developments in recent years in codifying a threshold test. This is reflected within standards including the UN Rabat Plan of Action, which is linked to the duties under the ICCPR; General Recommendation 35 of the UN ICERD Committee linked to the duties under that treaty; and the Council of Europe European Commission Against Racism and Intolerance (ECRI) General Policy recommendation 15 on hate expression. There has also been significant case law at the European Court of Human Rights that has helped delineate the threshold question in the context of ECHR rights.

In so far as is possible domestic legislation, including Part III Offences under the 1987 Order must be read and given effect in a way which is compatible with ECHR rights.

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<sup>7</sup> The categories of sexual orientation and disability were added in 2004.

<sup>8</sup> See [‘X convicted over racist slogan on loyalist bonfire’](#) BBC News Online 8 September 2015.

ECHR rights in themselves are to be interpreted in accordance with other international standards, including the above. Further to Section 8 of the Justice (Northern Ireland) Act 2004 the PPS (and other criminal justice organisations) are to have regard to guidance issued by the Attorney General for Northern Ireland on the exercise of functions in a manner consistent with international human rights standards. Such guidance was issued in relation to the PPS in 2014. This includes explicit reference to a number of international standards, including the ICCPR and Rabat Plan of Action, and contains specific guidance on hate speech. This guidance sets out that careful consideration should be given to considering whether the expression in question is protected freedom of expression or whether it is unprotected expression under the terms of international standards including the ECHR.<sup>9</sup>

At present the PPS however has no internal guidance codifying the above developments to inform decision making as to whether the threshold for an offence under Part III has been met. CAJ sought documentation under freedom of information and the only two documents within the PPS are the Hate Crimes Policy and a section of short internal guidance that are limited to outlining what is on the face of the legislation, rather than broader considerations in relation to the threshold question. To improve legal certainty and the effectiveness of the ‘incitement to hatred’ provisions, CAJ would urge the PPS develop and issue internal guidance compliant with international standards on interpreting offences under PtIII of the Order. We would urge this is included as an action in the current action plan.

### **3: Workforce composition and Section 75 compliance**

There are binding duties under the Equality Scheme to ensure monitoring across the Section 75 categories. This includes monitoring of the PPS workforce both in terms of overall composition but also in relation to different grades and terms of work.

There have been a number of developments in recent years with the potential to significantly affect the workforce in the PPS and other public authorities. These include the civil service Voluntary Exit Scheme (VES); the imposition of ‘austerity’ budget cuts in the criminal justice and other sectors; and a number of job evaluation and grading review exercises. Each of these matters has the potential to affect equality of opportunity within the workforce in relation to Section 75 groups that have faced inequality or disadvantage, and impact on matters such as equal pay or employment differentials and opportunities.

In light of this context CAJ would urge the inclusion within the action plan of steps to monitor and report disaggregated data on any changes within the PPS workforce in

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<sup>9</sup> Guidance by the Attorney General for Northern Ireland pursuant to Section 8 of the Justice (Northern Ireland) Act 2004, No. 4 Human Rights Guidance for the Public Prosecution Service, Laid before the Northern Ireland Assembly on 21 March 2014, Paragraph 30.

recent years across all Section 75 categories. This should aim to identify any current and future likely adverse impacts on any disadvantaged Section 75 group and accordingly include a commitment to remedial action in accordance with the provisions of the PPS Equality Scheme.

**CAJ**  
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