

Written Evidence to the Women and Equalities Committee Inquiry on Abortion Law in Northern Ireland

December 2018

About CAJ

1. 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 also Co-Convenes the Equality Coalition with UNISON in Northern Ireland.

Summary

2. This submission focuses on the constitutional question as to whether legislating for abortion law in Northern Ireland is a matter for the devolved institutions.
3. The UK Executive has taken a position that Westminster legislation on this matter would transgress the devolution settlement. This claim is not accurate. Whilst both health and justice are transferred matters, this position disregards the explicit provision in the 1998 Belfast/Good Friday Agreement (GFA) for Westminster “to legislate as necessary” to ensure the UK’s international obligations are met.
4. Northern Ireland abortion law is incompatible with such obligations, as highlighted in particular by a ruling of the UN CEDAW Committee in February 2018 and in the ruling by the UK Supreme Court in June 2018 in relation to the ECHR. The provision under the GFA is not merely permissive. The GFA places an onus on the UK Parliament to legislate to remedy the incompatibility of Northern Ireland’s abortion laws with the UK’s international obligations.
5. There is a precedent for such a circumstance. In 2007, the then First Minister Ian Paisley (MLA) would not introduce legislation transposing the EU Gender Directive (2004/113/EC) into the Northern Ireland Assembly. Accordingly, the UK Parliament stepped in and legislated on the Assembly’s behalf to ensure the international obligation was complied with.

Context

6. In Northern Ireland criminal justice legislation, namely the 1861 Offences Against the Person Act and the Criminal Justice Act (Northern Ireland) 1945, outlaw abortion and provide for 'life in penal servitude' for women, and an indeterminate sentence for medical professionals or others who assist in terminations. Abortion is only lawful where necessary to preserve the life of the pregnant woman or where there is a risk of real and serious adverse effects on the woman's physical or mental health, either long-term or permanent.

The provisions of the Belfast/Good Friday Agreement

7. The relevant provisions are found in Paragraph 33 of Strand 1 of the Agreement which sets out the role of the UK Parliament, stating that (emphasis added):

33. The Westminster Parliament (whose power to make legislation for Northern Ireland would remain unaffected) **will**:

....

(b)...legislate as necessary to ensure the United Kingdom's international obligations are met in respect of Northern Ireland;

8. 'International obligations' include compliance with the human rights treaties ratified by the UK in the UN and Council of Europe Human Rights systems.¹

The CEDAW ruling

9. During periodic monitoring rounds there have been a number of rulings by UN treaty bodies that have found Northern Ireland abortion law incompatible with such UK international obligations.
10. In February 2018, there was also a ruling resulting from an inquiry into Northern Ireland abortion law by the UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW)². This found that the current legislation "violates the rights of women in Northern Ireland by unduly restricting their access to abortion". The inquiry took place further to submissions by Northern Ireland NGOs under the CEDAW Optional Protocol, ratified by the UK.

11. In March 2018 the UK issued its Observations in relation to the CEDAW inquiry. In this response the UK misrepresented the powers of the UK Parliament and the constitutional position further to the 1998 Agreement. The response stated that:

35. The Committee's findings and recommendations which focus on changes to the criminal law on abortion cannot be addressed in the absence of a legislature with authority to legislate on such matters in Northern Ireland. 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.³

The UK Supreme Court Judgement

12. In June 2018, the UK Supreme Court delivered its judgment in the Northern Ireland Human Rights Commission's challenge to abortion law ([2018] UKSC 27). The Court concluded that the law in Northern Ireland is incompatible with the rights of women and girls under ECHR Article 8, in cases of fatal foetal abnormality, rape and incest. On a technicality the Court also concluded the Commission did not have standing to bring the proceedings without a victim, but nevertheless made clear that the legislation is incompatible with the ECHR.

Conclusion

13. Whilst the UK government has declined thus far to act, this has been on the basis of an erroneous presentation of the constitutional position in relation to legislative competence. It is consistent with framework and duties under the 1998 Belfast/Good Friday Agreement and international human rights law that Westminster take forward remedial legislation to remedy the incompatibility of the current legal framework with international obligations.

¹ The Agreement's main implementation legislation, Northern Ireland Act 1998, contains specific provision in relation to compatibility with the European Convention on Human Rights (ECHR) and EU law. The Act, at section 98, then defines other international obligations as any international obligations of the UK.

² CEDAW/C/OP.8/GBR/1 "Report of the 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" 23 February 2018.

³ CEDAW/C/OP.8/GBR/2 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, 6 March 2018 [35].