Northern Ireland and Abortion Law Reform


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The purpose of this paper is to provide an overview of Northern Ireland and abortion law reform. The briefing is particularly relevant to the current UK-wide decriminalisation debate, providing an analysis of the Northern Ireland context.

Section 1:
In this section we provide an overview of the political context, addressing issues such as the processes of decision-making and the development of legislation.

Section 2:
In this section we review current law and human rights in the context of national and international standards; specifically, we highlight how current law contravenes human rights standards.

Section 3:
Our focus shifts to those directly impacted; women seeking abortions. We consider monitoring data relating to those who travel to England and identify public opinion and health professional opinion on legal reform. Finally, in this section we consider the impact of the fear of criminalisation on those self-aborting at home.
A very worried young woman called to ask all about the abortion pills. She had a lot of questions; ‘How do you take them? Are they safe? Will it show on my medical records? Can they trace the pills to me? What is the name of the medication? What are the side effects? Where’s the best site to get them?’ I told her as much as I could but made sure I told her about the funding and travel help from the UK. She was adamant it wasn’t possible. It was exam time, turned out she was a medical student and there was no way she could miss the exams; what possible reason could she give? She was already having to hide her morning sickness in classes. She wondered aloud if she were ever to be caught would it mean she was struck off from her classes. She wondered aloud if she were ever to be...
Current Law in Northern Ireland and Human Rights
Abortion in Northern Ireland is currently a criminal offence under sections 58 and 59 of the Offences Against the Person Act 1861. The only exception to this is where abortion is carried out in good faith to preserve the life of the woman or prevent long-term serious effect to her mental or physical health.10

This law predates the development of human rights norms. These norms have evolved to recognise restrictive and criminal frameworks for abortion provision as engaging important fundamental human rights.11 The section below overviews relevant human rights issues nationally, regionally, and internationally.

National Human Rights Provision
In the UK human rights are protected by the Human Rights Act 1998. This legislation enshrines the provisions of the European Convention on Human Rights (ECHR) in national law and allows them to be drawn upon in UK courts. In 2015 the Northern Ireland Human Rights Commission brought a legal challenge against the prohibition of abortion in Northern Ireland in three circumstances: fatal foetal abnormality; severe foetal malformation; cases of sexual crime. The Commission advanced that this position violated the right to respect for private and family life (Article 8) and the right to be free from torture, cruel, inhuman or degrading treatment (Article 3).

At first instance the Northern Ireland High Court determined that there was a violation of Article 8 in cases of fatal foetal abnormality and sexual crime.12 This decision was reversed, however, by the Northern Ireland Court of Appeal.13 In 2018 the UK Supreme Court heard this case. While ultimately determining that the Northern Ireland Human Rights Commission did not have standing to bring the case, the majority found that prohibition of abortion in the case of fatal foetal abnormality and sexual crime was incompatible with Article 8. A minority also found a violation of Article 3.

Delivering their judgment, the Supreme Court Law Lords stated that while remedy could not be awarded due to the legal issue of standing, the Court had made a clear statement that the current law regulation abortion in Northern Ireland is incompatible with human rights provisions enshrined in domestic law.14

The European Convention on Human Rights
The UK is a party to the ECHR, and bound by the judgments of its adjudicative body, the European Court of Human Rights. From the early 2000s this Court has heard a number of cases related to restrictive legal frameworks for abortion. This provides a corpus of jurisprudence determining when human rights under the ECHR are engaged and may be violated. In cases where abortion is lawful but access is prohibited in practice – for example, by health professionals, structures or unclear information – the Court has found a violation of Article 815 and Article 3.16 These issues may be engaged in Northern Ireland due to a lack of appropriate and timely pathways and information on lawful abortion, even where funding is available for services in Great Britain.17

International Human Rights Law
The UK is a signatory to all major international human rights treaties. In the past twenty years international human rights law has evolved to recognise the denial of safe abortion services as a human rights violation. The 1994 International Conference on Population Development and the 1995 Beijing Declaration and Platform for Action both outlined the importance of access to safe, legal abortion as a human rights concern.

The United Nations Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee Against Torture and the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) have stressed that states must guarantee accessible legal abortion services.18 In particular, they have noted that criminal frameworks and punishments for abortion are not human rights compliant.19

In 2016 the CEDAW Committee carried out an inquiry into Northern Ireland’s abortion laws in 2016 it published its report which determined that the current law in Northern Ireland results in grave and systematic violation of human rights under CEDAW. The Committee made recommendations in two areas to remedy the violation:

1. Change of Legal Framework: Repeal sections 58 and 59 of the Offences Against the Person Act 1861 and create new legislation with expanded grounds for access to abortion. Interim cease on application of criminal law should be put in place.

2. Improvement to local sexual and reproductive health rights and services: This should include access to contraception and high quality abortion/post-abortion care; rights-based counselling and information on sexual and reproductive health and services; reform of sex education; awareness-raising campaigns on reproductive and sexual health; combating of gender stereotypes; protection of clinic staff and service users from harassment by anti-abortion protestors.

Human Rights Summary
In 2018 the UK Supreme Court and the United Nations CEDAW Committee outlined that the current framework regulating abortion in Northern Ireland is in violation of both national and international human rights commitments. These developments reflect a wider international movement conceiving access to abortion as a human rights issue.20 Human rights are not only a transformative language which transcends the limitations of polarised debate on abortion,21 but legal imperatives which the UK has commitments to protect, respect and fulfill.

Section 2: Human Rights
Section 3: Monitoring Data, Public and Health Professional Views, case studies Monitoring Data

Access to abortion in Northern Ireland is highly restricted, resulting in less than 20 legal abortions being carried out in the last reported year. Others travel outside of Northern Ireland or self-abort at home.23

An analysis of data provided by the Department of Health24 provides insight into the demographic profile of Northern Ireland residents who access abortions in England and Wales. In broad terms their profile is similar to residents of England and Wales:

- In terms of marital status over 60% have a partner/ are married / are in a civil partnership
- In terms of age 12% are teenagers, 48% are aged 20-29 and the remainder are aged 35+
- 50% of those who obtain abortions are already mothers

Whilst the category of religions/ community background is not collected, interpreting the preferred ethnic identity of Northern Ireland residents - white British (39%) and white Irish (48%) - suggests members of both communities are travelling to access abortion in in England and Wales.

Key differences can be observed between Northern Ireland residents and those resident in England and Wales in terms of gestation of the pregnancy and method of termination. For instance, women in Northern Ireland are less likely to obtain an early abortion compared to residents of England and Wales as detailed in Table 1 (67%; 77%). This is likely to be due to delays in accessing information on abortion services, the need to make travel plans, arrange time off work and organise childcare. It is noteworthy that later gestation times require more invasive procedures and carry higher risks of complications.

In terms of the type of procedure, the data indicate that those from Northern Ireland are much more likely to choose a surgical method compared to residents of England and Wales, as detailed in Table 2 (66%; 35%). This is likely due to a preference to complete the abortion at the clinic, using the surgical method, as opposed to the medical method which entails ingesting medication, and requires some hours to complete the abortion, during which time they may be travelling back to Northern Ireland. Again, it is noteworthy that surgery is more invasive and carries higher risks of complications.

Table 1 Gestation time of those who obtain abortions in England and Wales26

<table>
<thead>
<tr>
<th>Gestation weeks</th>
<th>NI residents</th>
<th>England and Wales residents</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 – 9 weeks</td>
<td>67</td>
<td>77</td>
</tr>
<tr>
<td>10 – 12 weeks</td>
<td>16</td>
<td>13</td>
</tr>
<tr>
<td>13 – 19 weeks</td>
<td>12</td>
<td>8</td>
</tr>
<tr>
<td>20 weeks and over</td>
<td>5</td>
<td>2</td>
</tr>
</tbody>
</table>

Table 2 Abortion procedure accessed by those who obtain abortions in England and Wales24

<table>
<thead>
<tr>
<th>Type of abortion procedure</th>
<th>NI residents</th>
<th>England and Wales residents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Surgical</td>
<td>66</td>
<td>35</td>
</tr>
<tr>
<td>Medical</td>
<td>34</td>
<td>65</td>
</tr>
</tbody>
</table>

Health Professional Opinion

The authors of this paper have engaged with health professional organisations such as the Royal College of Midwives (RCM), the Royal College of Nurses (RCN) and the Royal College of Obstetricians and Gynaecologists (RCOG) since 2016 in a series of roundtables. These sessions have evidenced that access to abortion is regarded as being deeply problematic. Concerns have been raised as to the implementation of guidelines, and that there is a lack of awareness over policy changes elsewhere in the UK.29

Senior health professionals have also publicly articulated concerns related to those self-aborting at home. Breedagh Hughes (recently retired director of the RCM) stated that she is extremely concerned that the threat of criminalisation will lead to the untimely death of a woman, due to the fear of seeking medical treatment if complications arise.30
Impact of the fear of criminalisation

Consultation sessions with the activist organisation, Alliance for Choice, identified a series of case studies which provide insight into the stresses experienced by those who self-abort at home. In each case the woman sought information on accessing abortion medication, discussed the fear of criminalisation and, as outlined below, detailed the circumstances which prevented them accessing abortion elsewhere.

“We had a few calls, secretly, from someone who had to hang up and call back a number of times as she was so afraid. It turned out her ex had destroyed all of her documents, she was in the process of losing him because he was so abusive but she was pregnant. She had nothing to say who she was, she was far away from him which meant being far away from her support network and had no-one to be with, no-one to look after her young children for days. There was just no way for her to travel. We discussed her about the safety of the pills but told her she had to not tell anyone at hospital if she needed to go. We had to reassure her that though it was illegal very few people had been prosecuted. We were asking her to add more secrets and trauma to the awful experience she was going through. She was frightened if he ever found out what she was doing that she would lose her children to her violent ex-partner.”

“A very worried young woman called to ask about the abortion pills. She had a lot of questions; ‘How do you take them? Are they safe? Will it show on my medical records? Can they trace the pills me? What is the name of the medication? What are the side effects? Where’s the best site to get them?’ I told her as much as I could but made sure I told her about the funding and travel help from the UK. She was adamant it wasn’t possible. It was exam time, turned out she was a medical student and there was no way she could miss the exams, what possible reason could she give? She was already having to hide her morning sickness in classes. She considered abortion if the exams were to be caught would it mean she was struck off from her potential career.”

“A text message comes through, ‘Hi, you don’t know me but someone told me you can help?’ We communicated by text for the next day about how to access abortion at later times and using more invasive procedures, without fear of criminalisation.

The impact of decriminalisation would result in women being able to access abortion locally, at earlier times, using less invasive procedures, and without fear of criminalisation.

Conclusions

The evidence reviewed in this briefing sets out the issues impacting on how access to abortion is considered in the political context, identifying that whilst there is a clear need for reform, that this would be supported by the public and health professionals, and that the peculiarity of legislative structures mean that reform to date has been unachievable. It is also evident that the current framework regulating abortion in Northern Ireland is in violation of national and international human rights commitments. As a result of this, women from Northern Ireland are under threat of criminality, or travelling to access abortion at later times and using more invasive options than their counterparts elsewhere in the UK.

Should intervention from Westminster occur, leading to decriminalisation, this would likely result in a mixed reaction from political parties, dependant on their position as outlined in this paper. Notably a similar intervention occurred in 2004 when the Civil Partnership Act was introduced under a period of direct rule. This Act remains in place and has not been subject to any challenge by any political party. It is again worth noting that public opinion is in favour of reform, with less than 10% identifying themselves as being opposed to any access to abortion.

Endnotes

6 SDLP Party Manifesto 2016 www.slpd.org/sites/assets/sites/430324/sdp_manifesto_web_1.pdf
7 UUP Manifesto 2016 uup.org/assets/policies/assembly2016 manifesto.pdf
10 R v Bourne [1939] 1 KB 687. Commentary from lawyers, judges and, in our own research, from health professionals indicates that the law lacks clarity and it is difficult to determine when a case will fall within this exception, and that health professionals are reluctant to take the risks of prosecution. See for example Bloomer, Kathryn McKeown and Claire French, Moving Forward From Judicial Review on Abortion in Situations of Fatal Fetal Abnormality and Sexual Crime: The Experience of Health Professionals (Belfast, 2016) p 8
12 The Northern Ireland Human Rights Commission’s Application to the European Court of Human Rights (Case No. 2740/07, 28 May 2007)
17 Data extracted from source 2
18 Data extracted from source 2a
19 Bloomer, F., Dean-Trean, J., Pierson, C., MacNamara, N. and Mackle, D. (2017) Abortion as a workplace issue. Trade union survey – North and South of Ireland, Dublin: UNITE the Union, Unionise, Mandate Trade Union, the CWU Ireland, the GMB – Alliance for Choice, Trade Union Campaign to Repeal the 8th.
21 See note 23.
22 McDowell, L (2018) ‘I have nightmares about women here buying abortion pills over the internet... one of these days someone is going to die’ interview with Brenda Hughes, Belfast Telegraph, 30 July 2018, available at: www.belfasttelegraph.co.uk/life-features/i-have-nightmares-about-women-here-buying-abortion-pills-over-the-internet-one-of-these-days-someone-is-going-to-die-37165354.html
23 Alliance for Choice is an organisation that campaigns to end the criminalisation of abortion and gain access to reproductive justice in Northern Ireland www.allianceforchoice.org