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Reproductive Health Law and Policy Advisory Group

A joint initiative between Queen's University Belfast, Ulster University and University of
Liverpool

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Briefing Document

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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

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BACKGROUND

In 2010 the Family Planning Association for Northern Ireland (FPA), Alliance for Choice and the Northern Ireland Women's European Platform (NIWEP) submitted evidence to the United Nations Convention on the Elimination of Discrimination against Women (CEDAW) Optional Protocol inquiry procedure on the basis that the United Kingdom of Great Britain and Northern Ireland (UK) has committed rights violations through restrictive access to abortion in Northern Ireland (NI) (fpa et al, 2010). The procedure enables the CEDAW Committee to initiate inquiries into grave or systemic violations of rights under the Convention.

In 2014 the UK submitted written observations on the Optional Protocol submission to CEDAW. These observations denied that violation of rights had occurred and outlined that legislative change was not envisaged. Upon reviewing the UK response and the FPA/ Alliance for Choice/ NIWEP partnership evidence, CEDAW determined the allegations were reliable. It assigned two delegates to conduct an inquiry.

The inquiry comprised a detailed analysis of documentary material and primary research conducted in 2016. During this visit the investigation team met with a range of lawmakers, non-governmental organisations, reproductive health providers, academics, trade unions and women affected by the law. In July 2017 CEDAW submitted a report to the UK detailing its findings. On 23 February 2018 it published the findings. The UK response was published at the same time.

In the sections that follow we summarise the key findings and provide commentary on the UK response.

CEDAW REPORT FINDINGS: FACTS

A. Access to Abortion in Northern Ireland

From its investigation, the CEDAW Committee found that there are several factors impeding **access to abortion** in NI, these include:

- Institutional and geographical limitations.
- Lack of clarity on when an abortion can be performed legally.
- Chilling effect on clinicians.
- Inability to access services due to harassment by anti-abortion protestors.

The report accordingly concluded that 'despite legal provision for abortion in very limited circumstances, de facto limitations render access to abortion virtually impossible' (CEDAW, 2018:5).

In relation to the **reality of illegal abortions** in NI, CEDAW identified:

- Cases of women being arrested, prosecuted and in some cases convicted for procuring abortions.
- Evidence of self-administration of medical abortions.

- A “don’t ask, don’t tell” practice, resulting in women neither asked, nor encouraged to reveal, if they had ingested abortifacients. As a result women are discouraged from seeking post-abortion care, fearing criminal sanction.

Until mid 2017 those **travelling to England** were required to pay approximately £600 to £2,000, including travel and accommodation costs. Financial costs presented a particular barrier for low income women. Both financial and logistical challenges resulted in some travelling at later stages of pregnancy. This carried a greater risk to their physical and mental health and in some instances may lead to women being forced to continue a pregnancy. Post-abortion care is problematic, due to a reluctance to disclose the procedure to health providers in NI. The absence of a referral pathway was noted as well as the absence of official statistics on those that have accessed post-abortion healthcare or support. The lack of referral pathway for return of foetal remains was also highlighted.

B. Criminalisation of Abortion in Northern Ireland and its Effect

In relation to the impact of restricted access to abortion the investigation team stated that all women interviewed:

... who were denied access to safe abortion in NI, conveyed the extreme vulnerability, physical and psychological stress, mental anguish, desperation and isolation they experienced in seeking appropriate medical treatment to terminate their pregnancy (CEDAW, 2018:8).

In sum, the committee found that:

... the NI legal and policy framework criminalising abortion deprives women of any real choice in influencing circumstances affecting their mental and physical health. Being forced to either continue a pregnancy, particularly in grievous situations of FFA, rape and incest, as well as for children and poor women, or to travel to receive intimate care in unfamiliar surroundings in the absence of support networks, do not represent reasonable or acceptable options. Both avenues entail significant physical and psychological suffering (CEDAW, 2018:10).

C. Inadequacy of Family Planning Support in Northern Ireland

The report observed an absence of adequate sexual health education and information necessary to enjoy sexual and reproductive health and rights. They also noted the limited availability of facilities in NI producing family planning services and access to contraception.

D. Social Context of Abortions in Northern Ireland

The Committee acknowledged that access to abortion cannot be separated from the socio-political and religious context of NI including the anti-abortion sentiments

expressed by politicians. It observed a lack of lack of political will to change the law and improve access to abortion. It determined that statements by authorities were focused on the characterisation of abortion as a strictly moral issue rather than one of health and human rights. Further it noted the characterisation of a woman's primary role as a mother, have "reinforced gender stereotypes steeped in patriarchy, thereby contributing to the belief that it is acceptable to deny women reproductive choice" (CEDAW, 2018:12). This positioning of women in society and of abortion as a strict moral issue served to reinforce the stigma associated with the procedure and contributed to silencing on the issue.

CEDAW REPORT FINDINGS: LAW

The CEDAW Committee outlined that the devolved system of government established following the Belfast/Good Friday Agreement could not be used to justify failure to implement legislative change where present law violates the CEDAW Convention.

A number of Articles of CEDAW were highlighted as placing relevant obligations on the UK in relation to provision of and access to abortion in NI:

- Article 12, complemented by Article 16(1)(e), which guarantee women the right to health, including sexual and reproductive health.
- Article 2(c),(d),(f) and (g) which require states to establish legal protection of the rights of women on an equal basis of men and refrain from engaging in acts or practices discriminatory to women, and to take appropriate measures, including legislation, to modify or abolish existing laws, particularly penal laws, discriminatory to women.
- Article 5, read with Articles 12 and 16, which requires states to eliminate gender stereotypes that impede equality in the health sector and negatively impact women's capacity to make free and informed choices about their health care, sexuality and reproduction.
- CEDAW General Recommendation 24 (1999) on women and health.

CEDAW CONCLUSIONS ON VIOLATIONS OF RIGHTS

Concluding the investigation, CEDAW determined that women and girls in NI had experienced grave and systemic violations of their rights as a result of restricted access to abortion.

The specific articles of the Convention found to be violated were:

- a. 1 and 2 read with articles 5, 12 and 16 for perpetrating acts of gender-based violence against women through its deliberate maintenance of criminal laws disproportionately affecting women and girls, subjecting them to severe physical and mental anguish that may amount to cruel, inhuman and degrading treatment;
- b. 12 for failing to respect women's right to health by obstructing their access to health services including through laws criminalising abortion, which punish women and those assisting them, and rendering access to post-abortion care, irrespective of the legality of the abortion, inaccessible as clinicians fear prosecution;

- c. 2, 12, and 16 for denying women the right to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise those rights;
- d. 2, 12, 14(2)(b) and 16(1)(e), read with article 1 for dereliction of its public health duties. The concentration of sexual and reproductive services in Belfast and the exportation of abortion to England seriously impacts disadvantaged groups unable to travel for socioeconomic reasons, exacerbating multiple forms of discrimination already suffered by rural, migrant, asylum-seeking, refugee women and women in situations of poverty; and
- e. 10 and 12 for failing to protect women from harassment by anti-abortion protestors when seeking sexual and reproductive health services and information.
- f. 5, read with articles 1 and 2, for failure to combat stereotypes depicting women primarily as mothers.
- g. 10(h) for failing to prioritise the prevention of unplanned pregnancy through the provision of quality sexual education.

In commenting on the **grave** nature of these violations in relation to those unable to access abortion, the report noted:

... the great harm and suffering resulting from the physical and mental anguish of carrying an unwanted pregnancy to full term, especially in cases of rape, incest and severe foetal impairment, particularly FFA (CEDAW 2018: 17).

It determined that the violation of rights was **systematic**, resulting from:

... the deliberate retention of criminal laws and State policy disproportionately restricting access to sexual and reproductive rights, in general, and highly restrictive abortion provision, in particular. (CEDAW, 2018:18)

CEDAW accordingly determined that the UK's position had permitted grave and systematic violations of human rights. Grave violations arose through lack of abortion provision to cases of severe foetal impairment, and victims of sexual crime, resulting in severe physical and mental anguish, which constitutes gender-based violence against women. Systematic violations arose as a result of the deliberate criminalisation of abortion and continuation of a highly restrictive policy on accessing abortion which women to carry pregnancies to full term, travel outside NI to undergo legal abortion or self-administer abortifacients.

CEDAW RECOMMENDATIONS

The report made recommendations in two areas; **legal and institutional framework**, and **sexual and reproductive health rights and services**.

Regarding the former, the Committee recommended urgent repeal of sections 58 and 59 of the Offences Against the Person Act 1861 to decriminalise access to and provision of abortion. Alongside this, it recommended adoption of legislation which provided

expanded grounds for access to abortion. The Committee also recommended an interim cease on application of the criminal law to women and healthcare professionals; evidence-based protocols for healthcare professionals providing legal abortions; mechanisms to monitor authorities' compliance with rights concerning sexual and reproductive health; and enhanced data collection around self-induced abortions between DHS and PSNI.

In regard to sexual and reproductive health rights and services, the report recommended the following:

- The state take action to provide rights-based counselling and information on sexual and reproductive health services.
- Ensure such services and contraception is accessible and affordable, provide access to high quality abortion and post-abortion care, including guidance on doctor-patient confidentiality.
- Reform sex education to ensure age-appropriate, comprehensive and scientifically accurate education.
- Intensify awareness-raising campaigns on reproductive and sexual health.
- Combat gender-based stereotypes regarding women's primary role as mothers.
- Protect from harassment by anti-abortion protestors.

UK RESPONSE TO CEDAW REPORT

On 23 February 2018, the UK Government published a response to the CEDAW Optional Protocol report. The UK does not accept that women from NI have been subject to grave and systemic violations of rights under CEDAW.

The UK's arguments responding to the violations noted by CEDAW were as follows:

- a) Violation of articles 1 and 2 read with articles 5, 12 and 16 for perpetrating acts of gender-based violence through deliberate maintenance of criminal laws: The state noted *inter alia* that an inter-Departmental working group on fatal foetal abnormality has now concluded (although no further action can be taken until NI political structures are reinstated); that, as of June 2017, women resident in NI can now access abortion services in England free of charge.
- b) Violation of article 12 for failing to respect women's right to health by obstructing their access to health services including through criminalising abortion: Guidance has been provided for healthcare professionals on lawful abortion, there is no evidence that abortion services are not being provided where lawfully justified.
- c) Violation of articles 2, 12 and 16 for denying women the right to decide freely and responsibility on the number and spacing of their children, and to have access to information, education and means to enable exercise of this right: Emergency contraception is available in NI, including free of charge.
- d) Violation of articles 2, 12, 14(2)(b) and (e), read with article 1, for dereliction of its public health duties (as sexual and reproductive health services are based in Belfast or exported to England): That all five Health and Social Care Trusts across NI provided sexual and reproductive health services in line with the population and profile they serve.

- e) Violation of articles 10 and 12 for failing to protect women from harassment by anti-abortion protestors: The Police Ombudsman for NI exists to receive and consider complaints of police misconduct.
- f) Violation of article 5, read with articles 1 and 2, to fail to combat gender stereotypes: The Government stated there is a lack of factual evidence supporting this assertion.
- g) Violation of article 10(h) to fail to provide quality sexual education: Teachers have considerable flexibility under current legislative and regulatory arrangements to select what content is delivered to students.

COMMENTARY

The response issued by the Government in February 2018 must be read with four important comments.

First, action taken to date has not been directed at reconsideration of the criminal framework within which abortion is regulated in Northern Ireland. This central issue raised by CEDAW cannot be addressed by the provision of free services for NI women in England. It is also important to note that the inter-departmental Working Group on Fatal Foetal Abnormality mentioned in the Government response has now released its report, which included recommendations regarding changes to the law to decriminalise access to abortion in these circumstances (Department of Justice-Department of Health, 2018).

Second, the response of the Government does not appear to indicate a commitment to investigation of the *de facto* experience of access to family planning services in Northern Ireland, including practical factors which may inhibit access.

Third, the Government also does not appear to adequately reflect on the experience of healthcare professionals and their engagement with application of the law as well as communication and interpretation of the guidelines issued in 2016.

Fourth, seeking to fulfil rights obligations under CEDAW may require a more active approach to sex education, awareness-raising around sexual and gender relationships and identities, and protection from harassment than is demonstrated in the response above.

OUR RECOMMENDATIONS GOING FORWARD

The investigation report finds the UK in breach of a number of its commitments under CEDAW. Accordingly, the report and its findings provide a basis from which to advocate for change in law, healthcare policy and sexual and reproductive health education. A number of steps must be taken to effectively respond to the report:

- With the suspension of the Northern Ireland Assembly, onus is on the Westminster government to reform existing legislation pertaining to abortion in Northern Ireland. Devolution does not facilitate a shift in human rights obligations from central state government under international human rights law. The UK Government should reconsider attempt to use devolution in such a way.

- Following from the above, we recommend that Westminster repeal the criminal framework for abortion provided by the Offences Against the Person Act 1861 and that Northern Ireland is integrated into existing debates on decriminalising currently taking place in Great Britain (Sheldon, 2015). In its place a new legislative framework should be created providing for lawful access to abortion following international good practice (Berger, 2017).
- Legislation should include buffer zones outside clinics providing sexual health and reproductive advice and services. Northern Ireland should also be included on existing debates on reform of this area currently taking place in Great Britain.
- March 2016 guidance for healthcare professionals on termination of pregnancy in Northern Ireland should be reviewed to allow disclosure of abortion procedures without risk of prosecution.
- Evidence of gender stereotyping in law, politics, policy and society should be considered by the UK Government. For instance, policy analysis on gender issues (Gray, and Birrell, 2012; Horgan and Gray, 2012) gender stereotyping in politics and political debates (Pierson and Bloomer, in press; Hayes and McAllister, 2013); on attitudes, education, employment, caring, public life, violence, healthcare, sport, social protection, law reform and institutional mechanisms (Equality Commission Northern Ireland, 2016).
- Evidence on sexual health education practice across Northern Ireland should be gathered and reviewed. A Departmental policy on non-discriminatory, factual sexual health education should be developed, implemented and monitored to ensure compliance across all educational settings should be created (Bloomer et al., 2017).
- An evaluation should be conducted of the implementation and effectiveness of the policy changes in 2017 regarding free access to abortion services in the rest of the UK.

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