

COMUNICADO

Gobierno de Gibraltar

Borrador Parlamentario sobre el aborto

Gibraltar, 28 de septiembre de 2018

Sigue la traducción de las páginas 11-15 del Borrador Parlamentario del Gobierno de Gibraltar sobre el aborto. El Borrador está abierto a consulta pública hasta el 25 de octubre y se produce tras haber deliberado en detalle con diversas organizaciones de la Sociedad Civil gibraltareña. En términos generales, la propuesta se basa en la legislación vigente sobre el tema en el Reino Unido, ajustándola a las circunstancias de Gibraltar y los avances médicos registrados desde la promulgación de la legislación británica.

La enmienda propuesta

En las circunstancias previstas, y con el fin de garantizar que la legislación gibraltareña se ajusta al Convenio Europeo y la Constitución de Gibraltar, el Gobierno de Gibraltar propone enmendar la ley en los términos expuestos en la propuesta de ley incluida en el presente Borrador Parlamentario con el fin de garantizar el cumplimiento de la sentencia del Tribunal Supremo del Reino Unido¹. Asimismo, se propone un ajuste y una modernización de la legislación vigente en Gibraltar. Los términos de la enmienda propuesta se incluyen como propuesta de ley en el Apéndice 1 del presente.

El presente Borrador Parlamentario constituye una consulta sobre los cambios propuestos a la ley vigente.

En qué circunstancias estará permitido interrumpir un embarazo

Se seguirán practicando abortos en Gibraltar en los supuestos en los que continuar con el embarazo suponga un riesgo para la vida de una mujer embarazada. En este sentido, y con el objeto de clarificar la ley actual, la propuesta de ley contempla disposiciones, en relación con los abortos necesarios para salvar la vida de las mujeres embarazadas, que son más claras y se ajustan a la legislación británica. Por tanto, su objeto es aclarar la ley actual. La propuesta de ley establecería con más claridad aquellas circunstancias en las que está permitido practicar abortos para salvar la vida de mujeres embarazadas o evitarles daños.

Con el fin de garantizar el cumplimiento de la decisión del Tribunal Supremo, será posible, si estas propuestas se convierten en leyes, que una mujer embarazada solicite el aborto cuando continuar con el embarazo suponga un riesgo para su salud mental. El Gobierno considera que este es el mecanismo adecuado para practicar abortos en casos de violación o incesto.

¹ Sentencia que cuestionaba el ajuste de la legislación norirlandesa sobre el aborto (similar a la de Gibraltar) a la Convención Europea de Derechos Humanos.

COMUNICADO

La propuesta de ley también establece que estará permitido interrumpir un embarazo cuando exista un riesgo sustancial de que (a) el feto sufra una anomalía fetal mortal, o (b) de que si el bebé nace, sufra anomalías físicas o mentales tales que conlleven una discapacidad grave. Las circunstancias del supuesto (b) incluyen aquellas para las que la Autoridad Sanitaria de Gibraltar (Gibraltar Health Authority, GHA) realiza (y ha realizado tradicionalmente) pruebas. El Gobierno tendrá en cuenta las respuestas que aborden este aspecto de la propuesta de Ley publicada mediante el presente.

Se controlará atentamente dónde y quién practicará los abortos

El Gobierno considera que las enmiendas a la ley deberán contemplar una restricción para asegurar que los abortos se practiquen únicamente por parte de médicos de la GHA o por médicos que estén expresamente aprobados por el Ministerio de Sanidad y Servicios de Asistencia con el asesoramiento de los profesionales adecuados. Esta restricción está diseñada principalmente para garantizar la seguridad de las mujeres que deben interrumpir su embarazo.

Además, el objetivo del Gobierno es que la legislación garantice que cualquier médico que ejerza en clínicas privadas no cuente con razones más allá de aquellas relativas a motivos de salud reales para certificar que una mujer embarazada debe interrumpir la gestación. Por ello, NO se aceptarán certificados sobre el potencial “daño grave permanente” para la salud física o mental si no provienen de médicos de la GHA.

La política del Gobierno no acepta que se establezcan clínicas de aborto independientes en Gibraltar.

Para los procedimientos en curso que deban llevarse a cabo, que en ocasiones pueden ser invasivos, el Gobierno propone permitir a las mujeres embarazadas que requieran procedimientos invasivos la opción de someterse a este tratamiento en el Hospital St Bernard o como pacientes patrocinados en una clínica o un hospital en el Reino Unido o España que cuenta con la aprobación del Ministerio de Sanidad y Servicios de Asistencia.

¿Cuál debería ser el plazo límite?

El Gobierno está recabando opiniones sobre cuál es el límite temporal que debería aplicarse a las interrupciones de embarazo que se lleven a cabo al amparo de la nueva legislación.

Las disposiciones actuales en la Ley de delitos (Crimes Act), de conformidad con las disposiciones que replica de la Ley sobre delitos contra la persona de 1861 (Offences Against the Person Act 1861) y la Ley de protección de la vida de los niños de 1929 (Infant Life (Preservation) Act 1929), prevé el plazo para la interrupción de veintiocho semanas en circunstancias en las que sea necesaria preservar la vida de la madre. Cualquier otra forma de interrupción está prohibida.

La ley de aborto británica de 1967 (1967 Abortion Act) dispone de un límite temporal de veinticuatro semanas para los distintos tipos de interrupción contemplados. El Gobierno considera que este límite temporal debe ajustarse a la luz de los avances científicos.

COMUNICADO

Por tanto, el Gobierno propone que el plazo aplicable en Gibraltar debería ser de entre diez y catorce semanas, dado que este ha sido el plazo propuesto por los distintos grupos que han presentado sus observaciones al Gobierno hasta la fecha.

El Gobierno tendrá en cuenta las respuestas que aborden este aspecto de la propuesta de ley publicada mediante el presente.

Objetores de conciencia

La enmienda también dispondrá que los objetores de conciencia no deben estar implicados, en determinadas circunstancias, en la práctica de las interrupciones permitidas en virtud de la ley. Esta disposición es idéntica a la contemplada en la Ley de aborto [británica] de 1967.

Penas

El Gobierno propone que se mantenga la pena de cadena perpetua para los casos en los que se practiquen abortos que no respeten los estrictos requisitos previstos por la ley en su forma enmendada.

Esta es la postura del Reino Unido y de la mayoría de territorios en estas circunstancias.

Más allá de la ley

Más allá de las disposiciones de la enmienda propuesta, el Gobierno también desea establecer mecanismos mejorados que respeten la oferta de asistencia educativa, social y sanitaria para los jóvenes y las mujeres embarazadas en general.

Educación

Este ámbito incluirá garantizar que la educación sobre salud, valores y moral en el plano sexual sea moderna, adecuada y actualizada en nuestros colegios. Parte del debate público hasta la fecha se ha centrado en qué material es más o menos adecuado para enseñar a los jóvenes en los centros educativos. A medida que nuestros colegios se acogen a la coeducación, resulta de crucial importancia garantizar que el material que se utiliza constituye una herramienta adecuada desde el punto de vista educativo para ambos sexos.

Asistencia social y sanitaria

En el ámbito de la asistencia social y sanitaria, el Gobierno desea garantizar que cuenta con los siguientes tipos de mecanismos y, en caso contrario, los diseñará:

1. Mecanismos de soporte

Para brindar apoyo a las mujeres embarazadas de modo que ninguna persona tome la decisión de solicitar un aborto o sienta la necesidad de hacerlo (en las circunstancias limitadas en las que estaría permitido) debido a problemas de salud mental relacionados con sus circunstancias sociales o económicas.

COMUNICADO

Este asesoramiento se brindará de forma primordial a través de los servicios de asistencia social. Podría ser necesario diseñar programas específicamente con este fin. Será esencial contar con familias de acogida y con una mayor agilidad en nuestra legislación con respecto de la adopción.

2. Asesoramiento en salud sexual

Además, los recursos de la nueva Clínica de Salud Sexual (Sexual Health Clinic) de la GHA deberán garantizar la disponibilidad de asesoramiento gratuito y de métodos anticonceptivos para evitar embarazos no deseados.

En este sentido, la GHA deberá hacer especial hincapié en mensajes que informen al público sobre el apoyo que existe por parte de los profesionales sanitarios sobre planificación familiar. Se deberán ofrecer métodos de contracepción reversibles de acción prolongada, como los implantes, las inyecciones y los DIU, así como métodos anticonceptivos orales, de barrera y de emergencia. A este respecto, las clínicas de planificación familiar deberán tomarse el tiempo necesario para sopesar cuál es el método anticonceptivo adecuado con el fin de garantizar que se recomienda la opción correcta a un paciente determinado, de modo que tanto el paciente como su pareja se sientan cómodos y seguros.

Y, lo que es más importante, las personas que acudan en busca de asesoramiento sobre métodos anticonceptivos y asesoramiento sexual, incluidas personas jóvenes, deben saber que la confidencialidad está garantizada. (A este respecto, la nueva Clínica de Salud Sexual constituye una innovación de gran calado para la GHA en el ámbito de la salud sexual, dado que los registros de los pacientes se almacenarán con un número único de paciente, y las solicitudes de pruebas y los resultados se archivarán de forma anónima. Realizar estos trámites de forma anónima es crucial para garantizar que los pacientes se sienten cómodos y seguros a la hora de acceder a los servicios de la GHA).

3. Asesoramiento clínico

La GHA también deberá proporcionar (o seguir proporcionando), en caso de que estas propuestas u otras similares se materialicen en leyes, asesoramiento adecuado sobre la pastilla del día después o la disponibilidad de otros mecanismos no invasivos de interrupción de modo que, cuando proceda, se ajuste a las enmiendas a la Ley de delitos de 2001 que hayan podido ser aprobadas en el Parlamento.

Este asesoramiento debe diseñarse de cara a brindar apoyo tanto antes como después de la interrupción (tanto invasiva como no). Esta disposición tendrá que incluir asesoramiento sobre la salud mental de la mujer embarazada cuando sea necesario. En ciertas circunstancias, también los profesionales de los servicios sociales deberán brindar este apoyo.

El Gobierno también tendrá en cuenta opiniones sobre estos aspectos de los problemas que plantea la posibilidad de interrumpir un embarazo en las circunstancias limitadas que pueda contemplar la propuesta de ley que se consulta en el presente Borrador Parlamentario.

COMUNICADO

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HM Government
of Gibraltar

PRESS RELEASE

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Command Paper on Abortion

Please find below the final form of Command Paper No 3 of 2018.

C03/2018



HM Government of Gibraltar

**A COMMAND PAPER FOR A DRAFT BILL TO AMEND THE CRIMES ACT 2011
TO PERMIT ABORTION IN CERTAIN LIMITED CASES AS REQUIRED BY THE
JURISPRUDENCE OF THE SUPREME COURT OF THE UNITED KINGDOM**

PRESENTED TO PARLIAMENT BY THE CHIEF MINISTER

**BY COMMAND OF HER MAJESTY
27th September 2018**

Comments on this Command Paper should be sent by email to command.papers@gibraltar.gov.gi

or delivered to –

Command Papers Consultation c/o Karl Tonna, Ministry of Health Care and Justice, Zone 1, Level 7, St Bernard's Hospital, Harbour Views Road, Gibraltar, no later than Thursday 25th October 2018.

Any comments received later than Thursday 25th October 2018 may not be taken into account for the purposes of the relevant consultation.

INDEX

Introduction	6
Why Amendment is Now Necessary	6
The European Convention & The Gibraltar Constitution	6
The Hierarchy of Gibraltar Courts	8
The Current State of the Law	9
The Key Elements of the Current Law	10
The Proposed Amendment	11
<i>When will Abortions be Available</i>	11
<i>Where Abortions can be Carried Out and by Who to be Tightly Controlled</i>	12
<i>What Should be the Time Limit?</i>	12
<i>Conscientious Objectors</i>	13
<i>The Penalty?</i>	13
Beyond the Law	14
Education	14
Social & Health Care	14
Support Mechanisms	14
Sexual Health Advice	14
Clinical Advice	15
THE SCHEDULE & DRAFT BILL	16
THE ANNEXES	20
1. List of groups and organisations consulted in the preparation of this Command Paper.	
2. A summary of the Judgment in the Supreme Court case on abortion in Northern Ireland.	
3. Article 8 of the European Convention of Human Rights.	
4. Section 7 of the Gibraltar Constitution Order 2006.	
5. Sections 58 & 59 of the Offences Against the Person Act 1861.	
6. The United Kingdom (except Northern Ireland) Abortion Act 1967, as amended.	

Command Paper on Abortion

This Command Paper on abortion is published after the Government's Inter-Ministerial Committee on Abortion, has consulted with a number of groups and individuals who have expressed views or concerns on the subject¹. The Inter-Ministerial Committee is chaired by the Chief Minister and includes also the Ministers for Health, Care & Justice, Education, Equality and Commerce.

Introduction

Her Majesty's Government of Gibraltar has not sought an electoral mandate to reform Gibraltar's law on abortion. The subject has not featured in the electoral manifesto of the parties that make up the Government (the Gibraltar Socialist Labour Party and the Liberal Party of Gibraltar). Similarly, the issue was not referenced by the various persons who now make up the Opposition benches in the Gibraltar Parliament.

Why Amendment is Now Necessary

A recent decision in the Supreme Court of the United Kingdom², in a judgement related to a case brought in respect of the law of abortion in Northern Ireland, has held that the current state of the law in that jurisdiction is incompatible with the right to respect for private and family life (rights which are guaranteed by article 8 of the European Convention of Human Rights) insofar as it prohibits abortion in cases of rape, incest and fatal foetal abnormality. The first two criteria relate to the mental health of the pregnant woman. The third relates to the status of the foetus.

A summary of the case appears at Annex 1 of this Command Paper. The full judgement can be obtained from the website of the United Kingdom Supreme Court at <http://www.bailii.org/nie/cases/NICA/2017/42.html>.

¹ The list of groups and organisations consulted in the preparation of this Command Paper appears at Annex 1 hereof.

² In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland) Reference by the Court of Appeal in Northern Ireland pursuant to Paragraph 33 of Schedule 10 to the Northern Ireland Act 1998 (Abortion) (Northern Ireland). <http://www.bailii.org/nie/cases/NICA/2017/42.html>

The European Convention & The Gibraltar Constitution

The provisions of the European Convention are applicable to Gibraltar. In many respects, the European Convention is similar if not identical to the Gibraltar Constitution Order 2006. Internationally, Gibraltar and all persons in Gibraltar enjoy the benefit and protection of the European Convention and are, conversely, also bound by it.

The European Convention has been confirmed in case law to be directly applicable to Gibraltar. The most high profile instance of this has been the Denise Mathews Case of 1998³ which determined that the European Parliament was a legislature for Gibraltar and that, as a result, Gibraltarians and other British and EU Citizens resident in Gibraltar were entitled to vote in elections to the European Parliament.

Responsibility for compliance with the provisions of the European Convention in respect of Gibraltar rests with the United Kingdom, which is a signatory to it and has extended it to Gibraltar. The European Convention creates international obligations of Her Majesty's Government of the United Kingdom. A failure to comply with the European Convention in Gibraltar could put the United Kingdom in breach of its international obligations should Her Majesty's Government of Gibraltar not take action timeously to rectify such a breach.

Article 8 of the European Convention, which is the article being interpreted by the Supreme Court in the Northern Ireland case, provides as follows:

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The provisions of Section 7(1) of the Gibraltar Constitution are in almost identical terms to the provisions of Article 8(1) of the European Convention. The rest of Section 7 of the Constitution is materially of the same effect to Article 8(2) of the European Convention.

The whole of Section 7 of the Constitution provides as follows:

³ Matthews v United Kingdom (1999) 28 EHRR 361 (ECHR)

Protection for privacy of home and other property

7.-(1) *Every person has the right to respect for his private and family life, his home and his correspondence.*

(2) *Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.*

(3) *Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –*

(a) in the interests of defence, the economic well-being of Gibraltar, public safety, public order, public morality, public health, town planning, the development or utilisation of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit;

(b) for the purpose of protecting the rights or freedoms of other persons;

(c) to enable an officer or agent of the Government, a local government authority, or a body corporate established by law for public purposes, to enter on the premises of any person in order to value those premises for the purpose of any tax, rate or due, or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government, that local government authority or that body corporate, as the case may be;

(d) to authorise, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or the entry upon any premises by such order; or

(e) for the prevention of disorder or crime,

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

The Hierarchy of Gibraltar Courts

It is not possible for Gibraltar to overturn or appeal the interpretation of the law given by the Supreme Court of the United Kingdom in respect of the reference from Northern Ireland requiring abortion to be available in these circumstances. There is now no standing for a Gibraltar party, official or otherwise, to take up such proceedings. The case therefore now ‘stands decided’.

For Gibraltar, the final court of appeal is the Judicial Committee of the Privy Council in London. The Privy Council is, in effect, the same court as the United Kingdom Supreme Court, made up of the same judges acting by another name and with rights conferred by different statutes.

The Current State of the Law

In Gibraltar, the current law in relation to abortion is materially identical to the law in Northern Ireland that was the subject of the appeal to the Supreme Court. The law in Gibraltar is derived from the Offences Against the Person Act 1861 which was the law in the whole of the United Kingdom until the changes made in 1967 to permit abortions. The original source of the law in Gibraltar is provided below. The Act of Parliament which permitted abortion in the whole of the United Kingdom since 1967, except Northern Ireland, is at Annex 6 of this Command Paper.

Under the Crimes Act 2011, the offences of child destruction and abortion are prescribed in the following terms:

Child destruction.

161.(1) *Subject to this section, a person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, commits the offence of child destruction and is liable on conviction to imprisonment for life.*

(2) *A person is not to be found guilty of an offence against this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.*

(3) *For the purposes of this section, evidence that a woman had at any material time been pregnant for a period of 28 weeks or more is prima facie proof that she was at that time pregnant of a child capable of being born alive.*

Attempts to procure abortion

Administering drugs or using instruments.

162.(1) *A pregnant woman who, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or unlawfully uses any other means with that intent, commits an offence and is liable on conviction to imprisonment for life.*

(2) *A person who, with intent to procure the miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means with that intent, commits an offence and is liable on conviction to imprisonment for life.*

Procuring drugs, etc.

163. A person who unlawfully supplies or procures any poison or other noxious thing, or any instrument or thing, knowing that it is intended to be unlawfully used or employed with intent to procure the miscarriage of a woman, whether she is or is not with child, commits an offence and is liable: on summary conviction to imprisonment for 12 months or the statutory maximum fine, or both; on conviction on indictment to imprisonment for 5 years

The Key Elements of the Current Law

A number of key elements of the existing law of Gibraltar should be noted when considering any potential changes.

Firstly, it should be noted that the current law of Gibraltar already provides (Section 161(2)) for terminations not to lead to prosecutions where they are carried out '**in good faith for the purposes only of preserving the life of the mother**'. Abortion is therefore already legal in Gibraltar today because the proviso allows for terminations when necessary to save the life of the pregnant woman.

Secondly, the existing time limit (as provided for in existing section 161(3)) is presently **twenty eight** weeks.

Thirdly, the **penalty of life imprisonment** in the current law has led to comment nationally and internationally suggesting that Gibraltar somehow has a draconian law in place. In fact, the penalty is identical to that in place in the United Kingdom as a whole for abortions which are not carried out in keeping with either the Abortion Act 1967 or the Offences Against the Person Act (Northern Ireland). Similar provisions are the international norm.

The Proposed Amendment

In the circumstances, and in order to ensure that Gibraltar law is compliant with the European Convention and the Gibraltar Constitution, Her Majesty's Government of Gibraltar proposes to change the law in the terms of the draft Bill in this Command Paper in order to ensure compliance with the judgment of the United Kingdom Supreme Court. Some tightening and modernising of the current law in Gibraltar is also proposed. The terms of the proposed amendment appears as a draft Bill in Schedule 1 hereto.

This Command Paper is a consultation on these proposed changes to the current law.

When will Abortions be Available

Abortions will continue to be available in Gibraltar when continuing a pregnancy will involve a risk to the life of a pregnant woman. In this respect, and in order to provide greater clarity to the existing law, the draft Bill makes provisions, in relation to abortions required to save the lives of pregnant women, which are clearer and in keeping with the law in the United Kingdom. This therefore serves to clarify the current law. The draft Bill would provide for those circumstances in which terminations are available to save the lives of, or prevent injury to, pregnant women to be more clearly proscribed.

In order to ensure compliance with the decision of the Supreme Court, it will, if these proposals become law, be possible for a pregnant woman to seek an abortion when continuing the pregnancy would involve a risk to her mental health. The Government considers that this is the mechanism that is required to provide for abortions in cases of rape or incest.

The draft Bill also provides for abortions to be permitted in cases where there is (a) a substantial risk that the foetus is suffering from a fatal foetal abnormality; and/or (b) if the child were born, it would suffer from such physical or mental abnormalities as to be seriously disabled. The circumstances at (b) include those which are, and have traditionally been, tested for by the GHA. The Government will welcome responses that address this aspect of the draft Bill published hereunder.

Where Abortions can be Carried Out and by Who to be Tightly Controlled

The Government considers that amendments to the law should provide for a prescriptive restriction to ensure that abortions should be carried out only by practitioners within the Gibraltar Health Authority or by practitioners who are specifically approved by the Minister for Health & Care on the advice of the appropriate professionals. This restriction is primarily designed to ensure the safety of women who require terminations.

Additionally, it is the policy of the Government that the legislation must ensure that there are no motivations other than those related to genuine health reasons for any medical practitioners in private practice to certify that an abortion is required by a pregnant woman. For that reason, certifications in respect of the potential 'permanent grave injury' to physical or mental health will NOT be accepted other than from GHA practitioners.

The Government, as a matter of policy, does not wish to see independent abortion clinics established in Gibraltar.

In the context of the actual procedures to be carried out, which may in some instances be invasive, the Government proposes to allow pregnant women requiring invasive procedures the choice of undergoing this treatment at St Bernard's Hospital or as sponsored patients in a clinic or hospital in the United Kingdom or Spain that has been approved by the Minister for Health & Care.

What Should be the Time Limit?

The Government seeks views on what time limit should apply for terminations to be carried out as required by the new legislation.

The current provisions in the Crimes Act, in keeping with the provisions it mirrors from the Offences Against the Person Act 1861 and the Infant Life (Preservation) Act 1929, provide for a termination after ***twenty-eight weeks*** in circumstances where it is necessary in preserving the life of the mother. All other forms of termination are prohibited.

The United Kingdom's 1967 Abortion Act provides a ***twenty four week time limit*** for the various types of terminations envisaged. The Government considers that this time limit has now been overtaken by scientific advances.

It is therefore proposed by the Government that the applicable time limit in Gibraltar should be between ten and fourteen weeks, given that this has been the period proposed by all the various groups who have made representations to Government to date.

The Government will welcome responses that address this aspect of the draft Bill published hereunder.

Conscientious Objectors

The amendment will also provide for conscientious objectors not to have to be involved, in certain circumstances, in carrying out terminations otherwise approved under the law. This provision is identical to that in the Abortion Act 1967.

The Penalty?

It is proposed that the penalty of life imprisonment should remain for instances where abortions are carried out other than in keeping with the strict requirements of the law as amended.

This is the position in the United Kingdom and in most other jurisdictions in such circumstances.

Beyond the Law

Beyond the provisions of the amendment proposed, the Government wishes also to establish better mechanisms in respect of education, social and health care provision for young people and pregnant women generally.

Education

This will include ensuring that education in sexual health, values and morality is modern, fit for purpose and up to date in our schools. Part of the public debate to date has centred on which material is more or less appropriate to show young people in schools. As our Comprehensive Schools move to co-education, it will be important to ensure that the material deployed is an educationally appropriate tool for both sexes.

Social & Health Care

In the field of social and health care, the Government wishes to ensure that it has in place, or otherwise designs, the following types of mechanisms:

1. Support Mechanisms

To provide support for pregnant women such that no person makes a decision to seek an abortion, or feels they need to (in the limited circumstances in which it might become available) because of mental health matters related to their social or economic circumstances.

This advice will primarily have to be provided through social services care. Programmes may need to be specifically designed for this purpose. Availability of foster parents and greater agility in our laws in respect of adoption will be essential.

2. Sexual Health Advice

Additionally, the resources of the GHA's new Sexual Health Clinic must adequately provide for the availability of freely available advice and contraception to protect against unwanted pregnancies.

In this respect, it will be important for the GHA to highlight messages that inform the public of the support that exists from health professionals in respect

of family planning. Long-Acting Reversible Contraception, such as the implant, injection and coil must be provided, along with oral, barrier and emergency contraception methods. In this respect, family planning clinics must be able to provide the time necessary to through appropriate methods of contraception to ensure that the right option for a patient is recommended that both a patient and partner will feel comfortable with and confident in using.

Importantly, persons attending for contraception and sexual health advice, including young persons, must know that they are assured of confidentiality. (In this respect, the new 'Well Person Unit' is an important and crucial innovation for the GHA in the field of sexual health as patient records will be stored under a unique 'Well Person Unit' number and test requests and results will be anonymised. Anonymisation is essential to ensure that patients feel confident and secure in accessing GHA services.)

3. Clinical Advice

The GHA must also provide (or continue to provide), in the event of these or similar proposals becoming law, appropriate advice in respect of the morning after pill or the availability of other, non-invasive, mechanisms for terminations in a manner that is, where appropriate, consistent with any amendments to the Crimes Act 2011 that may be approved by Parliament.

This advice must be designed to provide advice and support both before and after a termination is carried out (whether invasive or not). This provision will have to include advice on the pregnant woman's mental health if appropriate and required in any case.

The support to be provided must, in some circumstances, be available also from social services professionals.

The Government will therefore also welcome views in respect of these aspects of the issues raised by the potential availability of abortions in the limited circumstances potentially provided for in the draft law being consulted on by this Command Paper.

THE SCHEDULE

The draft of the Bill to amend the Crimes Act 2011

A

BILL

FOR AN Act to amend and clarify the law relating to termination of pregnancy by registered medical practitioners and for connected purposes.

ENACTED by the Legislature of Gibraltar.

Title.

1. This Act may be cited as the Crimes Act (Amendment NoXX) Act 2018.

Commencement.

2. This Act comes into operation on the day of publication.

Additional Sections on Child Destruction & Abortion.

3. The Crimes Act 2011 is amended by inserting the following new sections 163A to 163E after existing section 163 as follows:

“163A. Medical termination of pregnancy.

(1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion and child destruction in sections 161 to 163 hereof when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—

(a) that the pregnancy has not exceeded its [tenth]/[twelfth]/[fourteenth] week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were

terminated, of injury to the physical or mental health of the pregnant woman; or

(b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or

(c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or

(d) that there is a substantial risk that *[the child is suffering from a fatal foetal abnormality]/[or if the child were born it would suffer from such physical or mental abnormalities as to be seriously disabled.]*

(2) In determining whether the continuance of a pregnancy would involve such risk of injury to health as is mentioned in paragraph (a) or (b) of subsection (1) of this section, account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

(3) Except as provided by subsection (5) of this section, any treatment for the termination of pregnancy must be carried out in a hospital approved for such purposes, whether in or outside of Gibraltar by the Minister for Health.

(4) The power under subsection (3) of this section to approve a place includes power, in relation to treatment consisting primarily in the use of such medicines as may be specified in the approval and carried out in such manner as may be so specified, to approve a class of places.

(5) Subsection (3) of this section, and so much of subsection (1) as relates to the opinion of two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of the opinion, formed in good faith, that the termination is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.

163B. Notification.

(1) The Minister of Health shall have power to make regulations to provide—

(a) for requiring any such opinion as is referred to in section 163A to be certified by the practitioners or practitioner concerned in such form and at such time as may be prescribed by the regulations, and for requiring the preservation and disposal of certificates made for the purposes of the regulations;

(b) for requiring any registered medical practitioner who terminates a pregnancy to give notice of the termination and such other information relating to the termination as may be so prescribed;

(c) for prohibiting the disclosure, except to such persons or for such purposes as may be so prescribed, of notices given or information furnished pursuant to the regulations.

(2) The information furnished in pursuance of regulations made by virtue of paragraph (b) of subsection (1) of this section shall be notified solely to the Director of Public Health.

(3) Any person who wilfully contravenes or wilfully fails to comply with the requirements of regulations under subsection (1) of this section shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

163C. Conscientious objection to participation in treatment.

(1) Subject to subsection (2) of this section, no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by section 163A to which he has a conscientious objection:

Provided that in any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it.

(2) Nothing in subsection (1) of this section shall affect any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman.

163D. Supplementary provisions.

(1) For the purposes of the law relating to abortion, anything done with intent to procure a woman's miscarriage (or, in the case of a woman carrying more than one foetus, her miscarriage of any foetus) is unlawfully done unless authorised by section 163A and, in the case of a woman carrying more than one foetus, anything done with intent to procure her miscarriage of any foetus is authorised by that section if—

(a) the ground for termination of the pregnancy specified in subsection (1)(d) of that section applies in relation to any foetus and the thing is done for the purpose of procuring the miscarriage of that foetus, or

(b) any of the other grounds for termination of the pregnancy specified in that section applies.

163E. Interpretation.

In this Act, the following expression shall have the meaning hereby assigned to it:

“the law relating to abortion” means sections 161 to 163 of this Act and any rule of law relating to the procurement of abortion.”

Explanatory Memorandum

This Act will amend the Crimes Act 2011 to allow terminations of pregnancies in certain defined circumstances.

The relevant provisions of the United Kingdom Abortion Act 1967 are transposed into Section 163 of the Crimes Act.

The period of weeks in which abortions can be carried out are limited to **[ten]/[twelve]/[fourteen]**.

The places in which abortions can be carried out are limited to those which are authorised by the Minister for Health. These can include places outside of Gibraltar.

The circumstances in which an abortion can be carried out are also limited.

The first limited instances in which an abortion would be legal are related to the health of the pregnant woman in cases when the continuation of the pregnancy would involve risk, greater than if the pregnancy were terminated, of risk to the life or of grave injury to the physical or mental health of the pregnant woman.

The second set of limited instances in which a abortion would be legal are related to the health of the foetus in cases where **[the child is suffering from a fatal foetal abnormality]/[or if the child were born it would suffer from such physical or mental abnormalities as to be seriously disabled.]**

The Bill also provides for information to be provided to the Director of Public Health in respect of abortions carried out and for conscientious objectors, in certain circumstances, not to have to participate in the carrying out of any terminations.

THE ANNEXES

Index of Annexes

Annex Number

1. List of groups and organisations consulted in the preparation of this Command Paper.
2. A summary of the Judgment in the Supreme Court case on abortion in Northern Ireland.
3. Article 8 of the European Convention of Human Rights.
4. Section 7 of the Gibraltar Constitution Order 2006.
5. Sections 58 & 59 of the Offences Against the Person Act 1861.
6. The United Kingdom (except Northern Ireland) Abortion Act 1967, as amended.

ANNEX 1

List of groups and organisations consulted in the preparation of this Command Paper

**TOGETHER GIBRALTAR
PRO-CHOICE MOVEMENT
PRO-LIFE MOVEMENT
EVANGELICAL ALLIANCE
EQUALITY RIGHTS GROUP
UNITE THE UNION
NO MORE SHAME**

ANNEX 2

Summary of judgement in the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland) Reference by the Court of Appeal in Northern Ireland pursuant to Paragraph 33 of Schedule 10 to the Northern Ireland Act 1998 (Abortion) (Northern Ireland).



PRESS SUMMARY

In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland) Reference by the Court of Appeal in Northern Ireland pursuant to Paragraph 33 of Schedule 10 to the Northern Ireland Act 1998 (Abortion) (Northern Ireland) [2018] UKSC 27

On appeal from [2017] NICA 42 JUSTICES: Lady Hale (President), Lord Mance, Lord Kerr, Lord Wilson, Lord Reed, Lady Black,

Lord Lloyd-Jones

BACKGROUND TO THE APPEAL

Ss. 58 and 59 of the Offences Against the Person Act 1861 (an Act of the UK Parliament) (**'the 1861 Act'**) and s.25(1) of the Criminal Justice Act (NI) 1945 (an Act of the Northern Ireland legislature) (**'the 1945 Act'**) criminalise abortion in Northern Ireland. It is not however a crime to receive or supply an abortion where it is done in good faith for the purpose of preserving the life of the mother. Further it is not a crime to receive or supply an abortion where the continuance of the pregnancy will make the woman a physical or mental wreck – **'the Bourne exception'** following *R v Bourne* [1939] 1 KB 687.

The Northern Ireland Human Rights Commission (**'NIHRC'**) challenges the compatibility of the law of Northern Ireland with Art 3 (the prohibition of torture and of inhuman or degrading treatment), Art 8 (the right of everyone to respect for their private and family life) and Art 14 (the prohibition of discrimination) of the European Convention on Human Rights (**'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. NIHRC seeks declarations to that effect under s.6 and s.4 of the Human Rights Act 1998 (**'HRA 1998'**). These proceedings are brought in the name of NIHRC, rather than the name of particular victims. Examples of particular individuals however were relied on by NIHRC during the proceedings.

In the High Court Horner J held that NIHRC had standing to bring these proceedings in its own name. Further Horner J held that ss. 58 and 59 of the 1861 Act were incompatible with Art 8 insofar as they criminalise abortion in cases of (a) *fatal* foetal abnormality, (b) rape up to the date when the foetus is capable of being born alive and (c) incest up to the date when the foetus is capable of being born alive. He made a declaration of incompatibility to that effect under s.4 HRA 1998. He did not consider that the law was incompatible with Art 3. The Northern Ireland Court of Appeal ('**NICA**') held that NIHRC had standing to bring these proceedings. However, in three differently reasoned judgments it concluded that there was no incompatibility with any of the articles of the ECHR. NIHRC appeals the decision of NICA. NICA has also referred a reference from the Attorney General for Northern Ireland on devolution issues under para 33 of sch 10 to the Northern Ireland Act 1998 ('**NIA 1998**'). The reference relates to whether NIHRC has standing to bring these proceedings, specifically, whether NIHRC has the power to institute human rights proceedings or to seek a declaration of incompatibility other than in relation to an identified unlawful act.

7 June 2018

JUDGMENT

A majority of the court dismisses the appeal. A majority (Lord Mance, Lord Reed, Lady Black and Lord Lloyd-Jones) concludes that NIHRC does not have standing to bring these proceedings. As such, the court does not have jurisdiction to make a declaration of incompatibility in this case. A minority of the court (Lady Hale, Lord Kerr and Lord Wilson) considers that NIHRC does have standing to bring these proceedings.

A majority of the court (Lady Hale, Lord Mance, Lord Kerr and Lord Wilson) does however consider that the current law in Northern Ireland is disproportionate and incompatible with Art 8 ECHR insofar as that law prohibits abortion in cases of (a) fatal foetal abnormality, (b) pregnancy as a result of rape and (c) pregnancy as a result of incest. Lady Black joins that majority on (a) but not on (b) or (c). A minority of the court (Lord Reed, Lady Black on (b) and (c) and Lord Lloyd-Jones) considers that it is not possible to conclude in the abstract, in proceedings of the present nature (as distinct from individual applications), that the current law is disproportionate or incompatible with Art 8. A majority of the court (Lord Mance, Lord Reed, Lady Black and Lord Lloyd-Jones) concludes that the current law, in the abstract, is not incompatible with Art 3 ECHR. A minority of the court (Lord Kerr and Lord Wilson) disagrees and considers that it is. Lady Hale expresses sympathy with the view

expressed by Lord Kerr but does not consider it necessary to decide on incompatibility in relation to Art 3 in light of her decision on Art 8.

REASONS FOR THE JUDGMENT

Standing

Lord Mance (with whom Lord Reed, Lady Black and Lord Lloyd-Jones agree) considers that NIHRC does not have standing to bring these proceedings. They were not instituted by identifying any unlawful act or any potential victim of it **[73]**.

NIHRC relies on s.69(5)(b) of the NIA 1998 for its power to institute these proceedings. These proceedings constitute 'human rights proceedings' under s.71(2C)(a)(ii) and are therefore subject to the restrictions in s.71(2B) **[54]**. Under s.71(2B) and (2C), where NIHRC is instituting human rights proceedings, it need not be a victim, but there must be an actual or potential victim of an unlawful act to which the proceedings relate **[54 and 56]**.

S.71(2C)(b) states that an expression used in s.71(2B) has the same meaning as the same expression used in s.7 HRA 1998. S.7 HRA 1998 refers to s.6(1) for the concept of 'unlawful act'. It does not apply to an authority's act which was (a) compelled by a provision of primary legislation or was (b) to give effect to or enforce one or more provisions of or made under primary legislation which cannot be read or given effect in a way which is compatible with ECHR rights. Further, under s.6(6) HRA 1998, an act does not include a failure to introduce or lay before Parliament a proposal for legislation or make any primary legislation **[57]**. It follows that NIHRC's powers under ss.69 and 71 NIA 1998 do not include either instituting or intervening in proceedings where the only complaint is that primary legislation, such as the 1861 Act, is incompatible with the ECHR because such proceedings would not involve any 'unlawful act' within the meaning of ss.6 and 7 HRA 1998 and consequently s.71 NIA 1998 **[58]**. It is no surprise that Parliament did not provide for NIHRC to have capacity to pursue what would amount to unconstrained *actio popularis* regarding the interpretation or compatibility of primary legislation with Convention rights **[61]**.

The 1945 Act, as an act of a devolved legislature, is not primary legislation. It might have been open to NIHRC to claim that the failure of the Northern Ireland Assembly to repeal or amend s.25 constituted an 'unlawful act' within the meaning of ss.6 and 7 HRA 1998. However, NIHRC, pursuant to s.71(2B), would still have to demonstrate that there is or would be one or more victims of the unlawful act. That restriction is not satisfied by a general assertion that the failure to abrogate or amend s.25 is likely

to give rise to victims. There must be a specific and identifiable victim who is or would be the victim of an unlawful act [72]. Even if NIHRc could establish standing regarding the 1945 Act it would have little practical effect given the ongoing effect of the 1861 Act [72].

A minority of the court (Lady Hale, Lord Kerr and Lord Wilson) concludes that NIHRc does have standing to bring these proceedings. Lady Hale and Lord Kerr (with whom Lord Wilson agrees) hold that there are two separate species of challenge under the HRA 1998. One is for victims to bring proceedings in respect of an unlawful act of a public authority, or to rely on such an unlawful act in other proceedings, pursuant to s.7(1). The other is to challenge the compatibility of legislation under ss. 3 and 4 irrespective of whether there has been any unlawful act by a public authority. NIHRc has standing to bring such proceedings by virtue of s.69(5)(b) [17 and 183-184].

In Lady Hale's view s. 71(2B) and (2C) deal only with proceedings brought by NIHRc or interventions by NIHRc in proceedings brought by others in respect of claims that a public authority has acted or proposes to act unlawfully. But it does not apply to or limit the general power of the NIHRc to challenge the compatibility of legislation under ss. 3 and 4 of HRA 1998. The 'unlawful act' means 'the unlawful act alleged in the proceedings' so does not apply where no such unlawful act is alleged [18].

In Lord Kerr's view the only restriction on NIHRc's power to bring proceedings under s.69(5)(b) NIA 1998 is that the proceedings must involve law or practice relating to human rights [184]. Under s.71(2B)(c) the NIHRc may act only if 'there is or would be one or more victims of the unlawful act'. 'Would be victims' indicates an intention that NIHRc should be able to act pre-emptively [195]. The majority decision departs in his view from well-established authority that an interpretation of a statute which gives effect to the ascertainable will of Parliament should be preferred to a literal construction which will frustrate the legislation's true purpose [202-213]. S.71(2B)(c) can reasonably be interpreted to mean that NIHRc may act where it is clear that there have been and will be victims of the implementation of the provisions of the 1861 and 1945 Acts, which is satisfied in this case [195 and 208]. If NIHRc is unable to bring proceedings to protect the rights of women in the three situations in this case, they will be deprived of an effective remedy under Art 13 ECHR [199].

Article 8

The court's decision on standing means that there is no possibility of making a declaration of incompatibility under s.4 HRA 1998. However, a majority of the court

(Lady Hale, Lord Mance, Lord Kerr and Lord Wilson) considers that the current law in Northern Ireland on abortion is disproportionate and incompatible with Art 8 insofar as it prohibits abortion in cases of (a) fatal (as distinct from serious) foetal abnormality (b) pregnancy as a result of rape and (c) pregnancy as a result of incest. If an individual victim did return to court in relation to the present law, a formal declaration of incompatibility would in all likelihood be made. Lady Hale agrees with the reasons provided by Lord Mance and Lord Kerr and writes separately only on a few points. Lady Black joins the majority in relation to (a) but not in relation to (b) and (c).

The majority on this issue starts from the position that the current law is an interference with the right of pregnant women and girls to respect for their private lives, guaranteed by Art 8(1). The question is whether the Northern Ireland abortion law is justified under Art 8(2) **[9, 104, 263 and 265]**. The majority concludes that it is not.

Lord Mance and Lord Kerr (with whom Lord Wilson agrees) hold that the general clarity of the existing law on abortion was not the focus of the present appeal. Lord Mance holds that it is clear that all the categories in issue are prohibited under the 1861 and 1945 Acts **[81, 105 and 269]**. Lady Hale considers that it is no more uncertain than other areas of law which rely upon the application of particular concepts to particular facts **[20]**.

All of the majority accept that the current law pursues a legitimate aim: the moral interest in protecting the life, health and welfare of the unborn child **[21, 105 and 278]**. Lady Hale highlights that the community also has an interest in protecting the life, health and welfare of the pregnant woman **[21]**. It is accepted that the unborn are not right holders under Art 2 ECHR and do not have a right to life in domestic law or in Northern Ireland **[21, 24, 94 and 305-306]**. The law as it currently stands already permits abortion to protect not only the life of the pregnant woman but also her mental health from serious long-term injury **[24 and 106-108]**.

The majority refer to the opinion polls produced by NIHRC demonstrating strong public support for changes in the law **[24, 110 and 322]**. Lord Mance accepts that views elicited by opinion polls cannot prevail over the decision to date by the Northern Ireland Assembly which is to maintain the existing policy and law **[111]**. However, Lady Hale and Lord Kerr (with whom Lord Wilson agrees) state that this evidence cannot be lightly dismissed when the argument is that profound moral views of the public are sufficient to outweigh the grave interference on the rights of pregnant women and a change in the law **[24 and 325]**. All of the majority however

agree that the Working Group established by the Northern Irish Assembly demonstrates that the Assembly is not necessarily opposed to amending the law in the future but that any such solution has been precluded by the cessation of the Assembly's activities since January 2017 **[112 and 228-229]**.

The majority holds that the banning of abortion in all the categories at issue is rationally connected to the legitimate aim **[113 and 279]**. The real issue on this appeal is whether the interference with women's Art 8 rights is necessary in a democratic society in that it strikes a fair balance between the rights of the pregnant woman and the interests of the foetus by maintaining the 1861 and 1925 Acts **[21, 117 and 287]**.

The majority all refer to the institutional role of the UKSC in relation to the legislature. A distinction is drawn between the margin of appreciation applied by Strasbourg and considerations of institutional competence required in a domestic context **[37-28, 115 and 289-295]**. Lady Hale remarks that this is not a matter on which the domestic legislature enjoys a unique competence. Lady Hale, Lord Mance and Lord Kerr all highlight that Parliament, through s.4 HRA 1998, has expressly given the high courts power to rule on compatibility of legislation with the ECHR **[39 and 292]**.

The majority on this issue also distinguishes the present case from *R (Nicklinson)* [2014] UKSC 38 in reaching a decision that it is institutionally appropriate for the Supreme Court to consider the compatibility of the existing law on abortion with the Convention rights. The Northern Irish Assembly is not about to actively consider the issue of abortion – there is no assurance as to when it will resume its activity **[40, 117 and 299]**. There is no question of a balance being struck between the interests of two different living persons as in *Nicklinson*. The unborn foetus is not in law a person, although its potential must be respected **[119]**. *Nicklinson* was also decided against a background where the attitude maintained by the UK Parliament reflected a similar attitude across almost the whole of Europe. Northern Ireland, in contrast, is almost alone in the strictness of its current law. The close ties between the different parts and peoples of the UK make it appropriate to examine the justification for differences in this area with care **[120]**. Lord Kerr also distinguishes the present case from *Nicklinson* on the basis that the present incompatibility is not difficult to identify or cure. A simple amendment to the 1861 and 1945 Acts permitting termination of pregnancy in the three situations would achieve that aim **[298]**.

Fatal foetal abnormality: the majority and Lady Black conclude that there is no community interest in obliging the woman to carry a pregnancy to term where the foetus suffers from a fatal abnormality **[28, 133, 326, 368 and 371]**. Lord Mance

remarks that the present law treats the pregnant woman as a vehicle and fails to attach any weight to her personal autonomy **[125]**. The present law also fails to achieve its objective in the case of those who may choose to travel for an abortion, merely imposing on them harrowing stress and inconvenience as well as expense, while it imposes severe and sometimes life-time suffering on the most vulnerable who, because of lack of information, or support are forced to carry their pregnancy to term **[27, 28 and 126]**.

Serious foetal abnormality: By contrast, it is not possible to impugn as disproportionate and incompatible with Art 8 legislation that prohibits abortion of a foetus diagnosed as likely to be seriously disabled. A disabled child should be treated as having equal worth in human terms as a non-disabled child **[31, 133 and 331]**.

Rape: the majority considers that the current law is disproportionate in cases of rape and that the rights of the pregnant woman should prevail over the community interest in the continuance of the pregnancy **[27, 127 and 326]**. Lord Mance mentions that NIHRC made it clear that its submissions on rape included offences against children under the age of 13 who could not give consent in law but that it had not focused on sexual offences (not described as rape) committed against girls aged 13 or more but under the age of 16 **[44]**. Lady Hale, however, considers that for the purposes of this case, it is unnecessary to distinguish between offences where the child is under 13 and offences where the child is under 16 where no offence is committed if the perpetrator reasonably believed she was over 16. It is presumed under the law of Northern Ireland that children under 16 are incapable of giving consent to sexual touching, including penetration of the vagina by a penis, irrespective of the perpetrator's belief and there is no reason to exclude such pregnancies from this case **[25]**. Lord Mance considers that causing a woman to become pregnant and bear a child against her will is an invasion of the fundamental right to bodily integrity. Neither Lord Mance nor Lady Hale consider the possibility of travel for an abortion as a justification for the law but rather a factor demonstrating its disproportionality **[27 and 127]**.

Incest: A blanket prohibition of abortion in cases of incest is not proportionate **[27, 132 and 326]**. Lord Mance (with whom Lady Hale agrees) points to the fact that the most typical cases of incest involve abusive relationships with young or younger female relatives. The agony of having to carry a child to birth and have a potential responsibility and lifelong relationship with the child thereafter against the mother's

will cannot be justified **[27 and 132]**.

Lord Reed (with whom Lord Lloyd-Jones and Lady Black (on pregnancy resulting from rape and incest) agree) would not make a declaration of incompatibility under Art 8. They are not convinced that the three situations are, as abstract categories, materially different from those explored in the case of *A, B and C v Ireland* (2011) 53 EHRR 13. Women are free to travel to obtain abortions on the NHS in England and Scotland. They should be provided with advice about termination, by medical professionals in Northern Ireland, and should receive whatever care they may require there after the termination has been carried out **[357 and 369]**. The court has been provided with information about individual cases which, if established in individual applications, would almost certainly demonstrate violations of Art 8, due principally to shortcomings in the provision of medical advice and support. However, this does not warrant a bald declaration that the legislation as such is inherently incompatible with Art 8 **[359]**. The difficulty with the form of the present appeal is that it does not enable the court to examine the facts of individual cases **[361 and 369]**. Defining categories of pregnancy in which abortions should be permitted involves highly sensitive and contentious questions of moral judgment **[362]**. They are pre-eminently matters to be settled by democratically elected and accountable institutions **[362 and 369]**. That democratic consideration has not been completed in Northern Ireland as a result in the breakdown of devolved government in January 2017. However, there is every reason to fear that violations of the ECHR will occur if the arrangements in place in Northern Ireland remain as they are **[363 and 370]**.

Article 3

A majority of the court (Lord Mance, Lord Reed, Lady Black and Lord Lloyd-Jones) would not have made a declaration that the law of Northern Ireland is incompatible with Art 3 ECHR **[34 and 100]**.

Art 3 is an absolute right. The treatment complained of has to reach a 'minimum level of severity' in order to contravene it **[95]**. The majority all agree that there will be some women in the three situations in this case, whose suffering on being denied an abortion in Northern Ireland will reach the threshold of severity required to label the treatment 'inhuman or degrading'. But Lord Mance notes that it cannot be said that legally significant number of women denied an abortion in such circumstances will suffer so severely that her Art 3 rights have been violated **[82]**. Whether there has been any violation also depends on the facts of the individual case **[34, 95, 103, 354 and 367]**. Lord Mance (with whom Lord Reed, Lady Black and Lord Lloyd-Jones agree) considers that the cases relied on by NIHRC to demonstrate breach of Art 3:

RR v Poland (2011) 53 EHRR 31, *P & S v Poland* [2012] 129 BMLR 120 and *Tysiac v Poland* (2007) 45 EHRR 412 were decided on an assessment of the actual circumstances of the conduct relied on. They were not decided on the basis of a risk that the State might commit a breach of Art 3 [100, 353 and 367]. Lord Mance (with whom Lord Reed, Lord Lloyd- Jones and Lady Black agree) notes that women are able to travel elsewhere to obtain an abortion. Although this can be a distressing and expensive experience, it does not generally or necessarily give rise to distress of such severity so as to infringe Art 3: see *A, B and C* [100, 353 and 367].

A minority (Lord Kerr with whom Lord Wilson agrees) would have made a declaration that the law of Northern Ireland is incompatible with Art 3 ECHR insofar as it prohibits abortion in the three categories of case presented [262]. Even though some mothers may not, there is a risk that some mothers who are denied an abortion in cases (a), (b) and (c) above will suffer profound psychological trauma which is sufficient to give rise to a violation of Art 3 [235]. The state owes individuals an obligation to protect them from the risk of a breach of Art 3 as well as a positive duty to provide appropriate healthcare treatment where the denial of that treatment would expose victims to ill- treatment contrary to Art 3 [235]. The risk of women and girls being subject to ill-treatment contrary to Art 3 is sufficient to trigger the state's positive obligations. Travelling to England or Scotland to obtain an abortion does not avoid this. The fact of being required to do so is in itself sufficient to expose women and girls to the risk of inhuman and degrading treatment [238].

Lady Hale expresses sympathy with the view expressed by Lord Kerr (with whom Lord Wilson agrees) but does not consider it necessary to decide on incompatibility in relation to Art 3 in light of her decision on Art 8 [34].

References in square brackets are to paragraphs in the judgment

NOTE This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: <http://supremecourt.uk/decided-cases/index.html>

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ANNEX 3

The European Convention of Human Rights Section 8

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ANNEX 4

The Gibraltar Constitution Order 2006

Section 7

Protection for privacy of home and other property

7.-(1) Every person has the right to respect for his private and family life, his home and his correspondence.

(2) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(a) in the interests of defence, the economic well-being of Gibraltar, public safety, public order, public morality, public health, town planning, the development or utilisation of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit;

(b) for the purpose of protecting the rights or freedoms of other persons;

(c) to enable an officer or agent of the Government, a local government authority, or a body corporate established by law for public purposes, to enter on the premises of any person in order to value those premises for the purpose of any tax, rate or due, or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government, that local government authority or that body corporate, as the case may be;

(d) to authorise, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or the entry upon any premises by such order; or

(e) for the prevention of disorder or crime,

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

ANNEX 5

Sections 58 & 59 of The Offences Against the Person Act

58. Administering drugs or using instruments to procure abortion.

Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life.

59. Procuring drugs, &c. to cause abortion.

Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude.

ANNEX 6

The United Kingdom (except Northern Ireland) Abortion Act 1967, as amended



Abortion Act 1967

1967 CHAPTER 87

An Act to amend and clarify the law relating to termination of pregnancy by registered medical practitioners.

[27th October 1967]

1. Medical termination of pregnancy.

(1) Subject to the provisions of this section, 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—

(a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or

(b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or

(c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or

(d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

(2) In determining whether the continuance of a pregnancy would involve such risk of injury to health as is mentioned in paragraph (a) or (b) of subsection (1) of this section, account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

(3) Except as provided by subsection (4) of this section, any treatment for the termination of pregnancy must be carried out in a hospital vested in the Secretary of State for the purposes of his functions under the National Health Service Act 2006 or the National Health Service (Scotland) Act 1978 or in a hospital vested in a National Health Service trust or an NHS foundation trust or in a place approved for the purposes of this section by the Secretary of State.

(3A) The power under subsection (3) of this section to approve a place includes power, in relation to treatment consisting primarily in the use of such medicines as may be specified in the approval and carried out in such manner as may be so specified, to approve a class of places.

(4) Subsection (3) of this section, and so much of subsection (1) as relates to the opinion of two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of the opinion, formed in good faith, that the termination is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.

2. Notification.

(1) The Minister of Health in respect of England and Wales, and the Secretary of State in respect of Scotland, shall by statutory instrument make regulations to provide—

(a) for requiring any such opinion as is referred to in section 1 of this Act to be certified by the practitioners or practitioner concerned in such form and at such time as may be prescribed by the regulations, and for requiring the preservation and disposal of certificates made for the purposes of the regulations;

(b) for requiring any registered medical practitioner who terminates a pregnancy to give notice of the termination and such other information relating to the termination as may be so prescribed;

(c) for prohibiting the disclosure, except to such persons or for such purposes as may be so prescribed, of notices given or information furnished pursuant to the regulations.

(2) The information furnished in pursuance of regulations made by virtue of paragraph (b) of subsection (1) of this section shall be notified solely to the Chief Medical Officers of the Department of Health and Social Care, or of the Welsh Office, or of the Scottish Administration.

(3) Any person who wilfully contravenes or wilfully fails to comply with the requirements of regulations under subsection (1) of this section shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) Any statutory instrument made by virtue of this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

3. Application of Act to visiting forces etc.

(1) In relation to the termination of a pregnancy in a case where the following conditions are satisfied, that is to say—

(a)the treatment for termination of the pregnancy was carried out in a hospital controlled by the proper authorities of a body to which this section applies; and

(b)the pregnant woman had at the time of the treatment a relevant association with that body; and

(c)the treatment was carried out by a registered medical practitioner or a person who at the time of the treatment was a member of that body appointed as a medical practitioner for that body by the proper authorities of that body,

this Act shall have effect as if any reference in section 1 to a registered medical practitioner and to a hospital vested in the Secretary of State included respectively a reference to such a person as is mentioned in paragraph (c) of this subsection and to a hospital controlled as aforesaid, and as if section 2 were omitted.

(2)The bodies to which this section applies are any force which is a visiting force within the meaning of any of the provisions of Part I of the Visiting Forces Act 1952 and any headquarters within the meaning of the Schedule to the International Headquarters and Defence Organisations Act 1964; and for the purposes of this section—

(a)a woman shall be treated as having a relevant association at any time with a body to which this section applies if at that time—

(i)in the case of such a force as aforesaid, she had a relevant association within the meaning of the said Part I with the force; and

(ii)in the case of such a headquarters as aforesaid, she was a member of the headquarters or a dependant within the meaning of the Schedule aforesaid of such a member; and

(b)any reference to a member of a body to which this section applies shall be construed—

(i)in the case of such a force as aforesaid, as a reference to a member of or of a civilian component of that force within the meaning of the said Part I; and

(ii)in the case of such a headquarters as aforesaid, as a reference to a member of that headquarters within the meaning of the Schedule aforesaid.

4. Conscientious objection to participation in treatment.

(1)Subject to subsection (2) of this section, no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection:

Provided that in any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it.

(2)Nothing in subsection (1) of this section shall affect any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman.

(3)In any proceedings before a court in Scotland, a statement on oath by any person to the effect that he has a conscientious objection to participating in any treatment authorised by this Act shall be sufficient evidence for the purpose of discharging the burden of proof imposed upon him by subsection (1) of this section.

5. Supplementary provisions.

(1) No offence under the Infant Life (Preservation) Act 1929 shall be committed by a registered medical practitioner who terminates a pregnancy in accordance with the provisions of this Act.

(2) For the purposes of the law relating to abortion, anything done with intent to procure a woman's miscarriage (or, in the case of a woman carrying more than one foetus, her miscarriage of any foetus) is unlawfully done unless authorised by section 1 of this Act and, in the case of a woman carrying more than one foetus, anything done with intent to procure her miscarriage of any foetus is authorised by that section if—

(a) the ground for termination of the pregnancy specified in subsection (1)(d) of that section applies in relation to any foetus and the thing is done for the purpose of procuring the miscarriage of that foetus, or

(b) any of the other grounds for termination of the pregnancy specified in that section applies.

6. Interpretation.

In this Act, the following expressions have meanings hereby assigned to them:—

“the law relating to abortion” means sections 58 and 59 of the Offences against the Person Act 1861, and any rule of law relating to the procurement of abortion.

7. Short title, commencement and extent.

(1) This Act may be cited as the Abortion Act 1967.

(2) This Act shall come into force on the expiration of the period of six months beginning with the date on which it is passed.

(3) This Act does not extend to Northern Ireland.