



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

ANNEX to “Response to ‘The Criminal Law On Abortion – Lethal Foetal Abnormality and Sexual Crime – A Consultation on Amending the Law by the Department of Justice’”, January 2015

Advice to the Department of Justice and the Department of Health, Social Services and Public Safety: the law on termination of pregnancy in Northern Ireland

Introduction

1. The Northern Ireland Human Rights Commission (the NIHRC or the Commission) pursuant to section 69 (1) of the Northern Ireland Act 1998 reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. Further, and in accordance with section 69 (3) of the Northern Ireland Act 1998, the Commission advises the Executive Committee of the Assembly of legislative and other measures which ought to be taken to protect human rights. In accordance with this function the following statutory advice is submitted to the Department of Justice (the DOJ) and the Department of Health, Social Services and the Public Safety (the DHSSPS) on whether the law on termination of pregnancy in Northern Ireland complies with the state’s obligations under the European Convention on Human Rights (ECHR) and other international law.¹ The Commission’s advices focus on termination in cases of rape, sexual abuse (incest) and serious malformation of the foetus and advises that the law in Northern Ireland violates ICCPR, article 7. The law also falls within the scope of ECHR, articles 3, 8 and 14 and is open to challenge on these grounds.
2. The NIHRC bases its position on the full range of internationally accepted human rights standards, including the

¹ For further information see NIHRC, Response to the Public Consultation on the Draft Guidance on Termination of Pregnancy in Northern Ireland (July 2013), attached at Appendix 1

European Convention on Human Rights as incorporated by the Human Rights Act 1998 (HRA) and the treaty obligations of the Council of Europe and United Nations (UN) systems. The relevant international treaties in this context include:

- The European Convention on Human Rights, 1950 (ECHR) [UK ratification 1951];
 - The International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) [UK ratification 1976];
The International Covenant on Civil and Political Rights (ICCPR) [UK ratification 1976];
 - The United Nations Convention on the Elimination of Discrimination Against Women (CEDAW) [UK ratification 1986];
 - The United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) [UK ratification 1988];
 - The United Nations Convention on the Rights of the Child (CRC) [UK ratification 1991];
 - The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) [UK ratification 2009].
3. The Northern Ireland (NI) Executive is subject to the obligations contained within these international treaties by virtue of the United Kingdom's ratification. The Commission recalls that section 26(2) of the Northern Ireland Act 1998 provides that, "[i]f the Secretary of State considers that any action capable of being taken by a Minister or Northern Ireland department is required for the purpose of giving effect to any international obligations, of safeguarding the interests of defence or national security or of protecting public safety or public order, he may by order direct that the action shall be taken."
 4. The NIIHRC further recalls that Section 24 (1) of the Northern Ireland Act 1998 states that "A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act – (a) is incompatible with any of the Convention rights".
 5. Furthermore, the European Court of Human Rights (ECtHR) has stated that interpretation of the ECHR must take into account relevant rules of international instruments and jurisprudence and specifically, it has been held that a treaty may be referred to whether the respondent State is a party to

it or not.² Courts in Northern Ireland have also considered that interpretation of state obligations under the ECHR should be 'coloured' by those treaties ratified by the UK Government, which will assist the Court in deciding the type and level of obligation applicable both domestically and internationally.

Domestic legal framework

6. In Northern Ireland it is unlawful to perform a termination of pregnancy unless it is necessary to preserve the life of the pregnant woman including where there is a risk of serious and adverse effect on her physical or mental health, which is either long term or permanent.³
7. In terms of 'Preserving the life of the pregnant woman', a doctor must be of the opinion on reasonable grounds and with adequate knowledge that the probable consequence of the continuance of the pregnancy will be to make the woman 'a physical or mental wreck'.⁴
8. Termination of pregnancy based solely on malformation of the foetus is unlawful in Northern Ireland.⁵
9. Anyone who unlawfully performs a termination of pregnancy is liable to criminal prosecution with a maximum penalty of life imprisonment. A person who is secondary party to the commission of such an offence is liable on conviction to the same penalty.⁶ A secondary party will include any person who, with intent to procure a termination of pregnancy, assists another person in carrying out the procedure or who encourages the carrying out of such a procedure.⁷
10. Anyone who knows or believes that an unlawful termination of pregnancy has been performed, and has information which might be of material assistance in securing the prosecution or conviction of an offender, must pass that information to the authorities.⁸ The penalty is ten years imprisonment.⁹

² *Marckx v Belgium* A 31 (1979) 2 EHRR 305

³ Offences Against the Person Act 1861; Infant Life (Preservation) Act 1929; Criminal Justice Act (Northern Ireland) 1945

⁴ *R v Bourne* [1930] KB 687

⁵ *Family Planning Association of Northern Ireland v Minister For Health Social Services and Public Safety* [2004] NICA 39 8 October 2004 – Nicholson LJ para 73

⁶ Section 58, Offences Against the Person Act 1861

⁷ On 17 October 2013 the Director of Public Prosecution clarified that it is not a crime to assist a woman to go elsewhere in the UK for a termination that would be lawful in that jurisdiction

⁸ Section 5, Criminal Law Act (NI) 1967

11. Cases before the Northern Ireland courts seeking a declaration on whether a termination of pregnancy would be lawful have all involved individuals who were unable to consent to a termination of pregnancy themselves by reason of diminished mental competence or age. In those cases¹⁰ the court heard medical evidence that the individuals involved would suffer adverse mental or physical health effects if the pregnancy were to continue.

International legal framework

12. Article 1 of CEDAW states:

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

13. Article 12 of CEDAW states:

1. *States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.*
2. *Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.*

⁹ Ibid

¹⁰ *Re K* [1993] N.I. 268; *Northern Ireland Health and Social Services Board v A and Others* [1994] NIJB1; *Re S.J.B* unreported, High Court (Pringle J.), 28 September 1995; *Re C.H* unreported, High Court, 18 October 1995 and *R v MacDonald* (1999) NI 150

14. In General Recommendation 24 the CEDAW Committee stated that:

*States parties should not restrict women's access to health services or to the clinics that provide those services on the ground...that they are women. Other barriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.*¹¹

15. The CEDAW Committee has considered this issue and has specifically looked at the Northern Ireland jurisdiction in its State examinations. In its 2008 Concluding Observations on the UK the CEDAW Committee noted that "...the Abortion Act (1967) does not extend to Northern Ireland, where, with limited exceptions, abortion continues to be illegal, with detrimental consequences for women's health". It reiterated a previous recommendation on the State party to initiate a process of public consultation in Northern Ireland on termination of pregnancy law and, further, "In line with its general recommendation No. 24 on women and health and the Beijing Declaration and Platform for Action, the Committee urges the State party to give consideration to amending the abortion law so as to remove punitive provisions imposed on women who undergo abortion".¹²
16. In its 2009 Concluding Observations on the UK, the Committee on Economic Social and Cultural Rights made the following recommendation relating to the provision of termination of pregnancy services in Northern Ireland "The Committee calls upon the State party to amend the abortion law of Northern Ireland to bring it in line with the 1967 Abortion Act with a view to preventing clandestine and unsafe abortions in cases of rape, incest or foetal abnormality".¹³
17. In its 2013 Concluding Observations on the UK the CEDAW Committee stated "that abortion continues to be illegal in Northern Ireland in all cases except where continuance of the pregnancy threatens the life of the mother, thus making it

¹¹ <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> .
Para 31 in General Recommendation 24 refers to the criminalisation of women

¹² <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/555/92/PDF/N0955592.pdf?OpenElement>

¹³ <http://www.justice.gov.uk/downloads/human-rights/cescr-concluding-observations.pdf>

*necessary for women to seek abortion in other parts of the State party”.*¹⁴ In addition the Committee recommended that *“the State party should expedite the amendment of the anti-abortion law in Northern Ireland with a view to decriminalise abortion. The State party should also ensure that legal abortion not only covers cases of threats to the life of a pregnant woman but also other circumstances such as threats to her health and in cases of rape, incest and serious malformation of the foetus..”*¹⁵. The Committee also recommended the provision of *“equal access to reproductive treatment for all women in Northern Ireland without discrimination”*.

18. The UN Human Rights Committee has stated that breaches of article 7 of the ICCPR includes forced termination, as well as denial of access to safe terminations to women who have become pregnant as a result of rape and has raised concerns about obstacles to termination where it is legal.¹⁶
19. In a case against Peru, the UN Human Rights Committee considered where a therapeutic termination had been refused to a seventeen year old girl. The complainant had sought a termination of pregnancy on the grounds of foetal abnormality (medical evidence showed she was carrying an anencephalic foetus) but had been refused by the hospital for the reason that it was not lawful under Peruvian law. The Human Rights Committee accepted that forcing the complainant to continue with the pregnancy to full term, to deliver the baby who then died and having to endure and witness this, was a violation of her right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.¹⁷ It stated:

The author also claims that, owing to the refusal of the medical authorities to carry out the therapeutic abortion, she had to endure the distress of seeing her daughter's marked deformities and knowing that she would die very soon. This was an experience which added further pain and distress to that which she had already borne during the

¹⁴ CEDAW / C/GBR/CO/7/ 26 July 2013

¹⁵ The Commission acknowledges that internationally, the ‘degree’ of abnormality must attain a level of severity; for example the CEDAW Committee expresses it as described above i.e. “serious malformation of the foetus” and the Commission adopts this language. The Commission considers the nature and severity of the abnormality is a clinical decision.

¹⁶ General comment No. 28, para. 11; see also CCPR/C/79/Add.92 para. 11, CCPR/C/79/Add.72 para. 15 and CCPR/CO.70/ARG, para. 14

¹⁷ *K.N.L.H. v Peru* CCPR/C/85/D/1153/2003 Rev. 1, 14 August 2006

period when she was obliged to continue with the pregnancy. The author attaches a psychiatric certificate dated 20 August 2001, which confirms the state of deep depression into which she fell and the severe consequences this caused, taking her age into account. The Committee notes that this situation could have been foreseen, since a hospital doctor had diagnosed anencephaly in the foetus, yet the hospital director refused termination. The omission on the part of the State in not enabling the author to benefit from a therapeutic abortion was, in the Committee's view, the cause of the suffering she experienced. The Committee has pointed out in its General Comment No. 20 that the right set out in article 7 of the Covenant relates not only to physical pain but also to mental suffering, and that the protection is particularly important in the case of minors. In the absence of any information from the State party in this regard, due weight must be given to the author's complaints. Consequently, the Committee considers that the facts before it reveal a violation of article 7 of the Covenant.¹⁸

20. Successive UN Special Rapporteurs on torture and other cruel, inhuman or degrading treatment or punishment have identified rape as a form of torture. In his report to the 42nd Session of the UN Economic and Social Council Special, Rapporteur Pieter Kooijmans noted that since rape [or other forms of sexual assault are] a "*particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, [they] accordingly constituted an act of torture*".¹⁹ In his 1992 report to the Inter American Commission on Human Rights, Sir Nigel Rodley stated that "*In addition to being an especially traumatic form of torture for the victim, rape may have insidious correlative consequences...*"²⁰ and in his 2008 report to the UN General Assembly Manfred Nowak noted that "*raped women are often infected with sexually transmitted diseases or may experience unwanted pregnancies, miscarriages, forced abortions or denial of abortion*".²¹

¹⁸ Ibid, para 6.3

¹⁹ E/CN.4/1992/SR.21, para. 35

²⁰ E/CN.4/1995/34

²¹ A/HRC/7/3, para 36

- 21. The Commission advises that the failure to provide a termination on grounds of serious malformation of the foetus constitutes a violation of ICCPR, article 7.**
- 22. The Commission advises that the failure to provide a termination on grounds of rape may constitute a violation of ICCPR, article 7.**

ECHR, Article 8: Respect for private and family life

23. Article 8 ECHR reads:

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.*

24. Article 8 provides protection of physical and moral integrity²² and a person's body has been held to be "the most intimate aspect of private life", this including circumstances of gynaecological medical intervention.²³ While the ECtHR has noted that it has previously held that Article 8 cannot be interpreted as conferring a right to a termination, it has found that the prohibition of a termination when sought for reasons of health and/or well-being falls within the scope of the right to respect for one's private life and accordingly of Article 8.²⁴
25. Specifically, the ECtHR has stated that a prohibition on termination of pregnancy falls for review within the scope of the right to respect for one's private life and accordingly, of Article 8.²⁵ In the case of *P and S v Poland*²⁶ the complainant was a 15 year old girl who was refused a termination of pregnancy after she became pregnant as a result of rape. In this case the ECtHR reiterated that States are under "a positive obligation to secure to their citizens the right to effect

²² *Wainwright v The United Kingdom* application no. 12350/04 26 September 2006 see also *Costello-Roberts v. the United Kingdom*, 25 March 1993 and *Bensaid v. the United Kingdom* 1998

²³ *YF v Turkey* Application no. 24209/94 22 July 2003

²⁴ *A, B and C v. Ireland* application no. 25579/05 December 2010

²⁵ *P and S v Poland* Application no 5737/08 30 October 2012

²⁶ *Ibid*

respect for their physical and psychological integrity” and that “these obligations may involve the adoption of measures including the provision of an effective and accessible means of protecting the right to respect for private life”.²⁷

26. The ECtHR has also held that the State’s obligations include both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals’ rights, and the implementation, where appropriate, of specific measures. In the case of *Tysiac v. Poland*, the ECtHR found a violation of the positive obligation under article 8 as the law did not provide “any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met”.²⁸ The right to information also falls within the scope of article 8 and, according to the ECtHR in *A, B and C v. Ireland*, the legal framework governing lawful termination of pregnancy should be “shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention”.²⁹

27. **The Commission advises that the failure to provide a termination of pregnancy procedure in instances of rape may constitute a violation of ECHR, article 8.**

28. **The Commission advises that a failure to provide a coherent legal framework and a failure to provide an effective and accessible means of protecting the right to respect for private life are violations of ECHR, article 8.**

ECHR, Article 3: Prohibition on torture, inhuman or degrading treatment

29. The Commission recalls the jurisprudence and comment by the UN Human Rights Committee and the CEDAW Committee advising that a prohibition on termination of a pregnancy that has arisen in circumstances of rape or sexual abuse (incest), and in cases of serious malformation of the foetus, constitutes torture or cruel, inhuman or degrading treatment or punishment.

30. ECHR, Article 3 requires that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”. Ill-treatment must attain a minimum level of

²⁷ Ibid, para 96

²⁸ *Tysiac v Poland* Application no 5410/03 20 March 2007, para 124

²⁹ See, *A, B and C v Ireland* op cit

severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim³⁰.

31. Article 3 obliges the state to refrain from subjecting anyone within its jurisdiction to treatment or punishment that meets the threshold for torture, or inhuman or degrading treatment and requires the state to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment³¹.

32. In considering whether treatment is 'degrading' within the meaning of Article 3, the ECtHR will have regard to whether its object was to humiliate and debase the person concerned – although – the absence of such a purpose does not conclusively rule out a finding of a violation³².

33. The State must intervene where it is aware that an individual has suffered inhuman or degrading treatment or torture at the hands of a third party. In *A. v The United Kingdom* the ECtHR had to consider whether the State should be held responsible, under Article 3, for the beating of the applicant by his stepfather. The ECtHR reiterated that State parties are required to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals and State parties are required to have systems in place that will effectively identify and address treatment falling within the scope of Article 3.³³

34. Once Article 3 is engaged, the absolute nature of the right requires the State to take positive steps to protect the individual concerned. In *Van Colle v Chief Constable of Hertfordshire Police*³⁴, the Court of Appeal said this about the standard to be applied in finding a breach where the state had

³⁰ Abuse and mistreatment of women seeking reproductive health services can cause tremendous and lasting physical and emotional suffering, inflicted on the basis of gender. CAT/C/CR/32/5, para. 7 (m); Human Rights Committee general comment No. 28 (2000), para. 11

³¹ *A. v. The United Kingdom*, judgment of 23 September 1998

³² Ibid and refer to *Peers v Greece* application no. 28524/95 ECHR 2001

³³ Op cit para 22

³⁴ [2007] EWCA Civ 325, [2007] 1 WLR 1821 paras 75 and 80

or should have had knowledge of inhuman treatment:

*The test under Article 3 ... does not require it to be shown that "but for" the failing or omission of the public authority ill-treatment would not have happened. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.*³⁵

35. Where the State has knowledge of ill-treatment, it is under a positive obligation therefore to take measures to mitigate the harm arising from the original violation. And in circumstances where Article 3 is engaged, the ECtHR does not give any weight to an argument that the law pertaining to the case reflects the values of the majority of persons in the jurisdiction. In the case of *Tyrer v The United Kingdom*³⁶, the government argued that 'birching' was an accepted practice in the Isle of Man and that, having due regard to the local circumstances in the Island the continued use of judicial corporal punishment on a limited scale is justified as a deterrent and consequently not a breach of the ECHR. The ECtHR accepted that judicial corporal punishment, being degrading, constituted a breach of Article 3 and, being absolute, could not accept it as a ECHR compliant practice, even if it was supported by a populus in that jurisdiction.
36. As Lord Steyn said in a dissenting judgment in *Higgs v Minister of National Security* (a death row case)³⁷:

The European Court of Human Rights has emphasised on numerous occasions that Article 3 of the European Convention prohibits in absolute terms torture or inhuman or degrading treatment of punishment...[T]here is no express or implied derogation in favour of the state: the prohibition is equally applicable during a war or public emergency... A breach cannot be justified on any grounds. It is an absolute and unqualified constitutional guarantee. These propositions are elementary but important. They provide a complete answer to the theory hinted at but not articulated at the hearing of the appeals that

³⁵ Ibid, para 99

³⁶ Application no 5856/72 25 April 1978

³⁷ [1999] UKPC 55, [2000] 2 WLR 1368, (14th December, 1999)

inhuman treatment of condemned men may be justified by cultural relativism.

- 37.** The Commission advises that acts of sexual abuse (incest) and rape have been accepted by the ECtHR as falling within the scope of ECHR, article 3.³⁸ The ECtHR has specifically recognised that rape leaves deep psychological scars on the victim which does not respond to the passage of time as quickly as other forms of physical and mental violence³⁹.
- 38.** The Commission advises that failing to provide a termination of pregnancy that has arisen in circumstances of rape or sexual abuse (incest) or in cases of serious malformation of the foetus may compound the ill-treatment and may constitute a further violation of ECHR, article 3.

Non-discrimination and Access to Health

- 39.** International human rights law prohibits discrimination in the enjoyment of human rights. ICCPR, article 2, ICESCR, article 2(2) and ECHR, article 14 all prohibit discrimination on the grounds of social status. The Committee on Economic, Social and Cultural Rights has confirmed that "*individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society*".⁴⁰ ECHR, article 14 will only become engaged alongside another Convention right; articles 3 and 8 are both relevant throughout this paper.
- 40.** Article 12(1) of the ICESCR protects the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Article 12(1) of the CEDAW also requires states to "take all appropriate measures to eliminate discrimination against women in the field of health care".
- 41.** The Committee on Economic, Social and Cultural Rights has identified that the right to health comprises of four interrelated and essential elements; availability, accessibility,

³⁸ Ibid; see also *D.P. and J.C v The United Kingdom* application no 38719/97 10 October 2002; *E and others v The United Kingdom* application no 33218/95 26 November 2002 and see *M.C. v Bulgaria* application no 39272/98 4 December 2003

³⁹ *Aydin v Turkey* application no. 57/1996/676/866 25 September 1997

⁴⁰ UN Committee on Economic, Social and Cultural Rights, General Comment 20: Non-discrimination in economic, social and cultural rights (2009) E/C.12/GC/20, para 35

acceptability and quality.⁴¹ In respect of availability, the Committee requires that health facilities, goods and services must be available to all, especially the most vulnerable, without discrimination on any of the prohibited grounds.⁴² Such services must be within safe physical reach and affordable for all, including socially disadvantaged groups.⁴³ Finally, accessibility requires the right to seek, receive and impart information and ideas concerning health issues.⁴⁴

42. The Committee has also recognised that “*the realisation of women’s right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health*”.⁴⁵

43. The CEDAW Committee also requires states to “*eliminate barriers that women face in gaining access to health care services and measures ... to ensure women timely and affordable access to such services*”.⁴⁶ The Committee recognises that high fees for health care services would be a barrier to women’s access.⁴⁷

44. Women refused a termination of pregnancy in Northern Ireland must either carry the pregnancy to term or make arrangements for a termination outside of the jurisdiction. Women who undergo a termination of pregnancy in any other jurisdiction in the United Kingdom in circumstances of rape, incest and foetal abnormality⁴⁸ can receive their treatment under the National Health Service. However, a woman in Northern Ireland, seeking a termination of pregnancy in the same circumstances, is faced with the prohibitive costs of the procedure, travel and accommodation in order to travel outside of Northern Ireland. This raises socio-economic issues around access to health care and the right of access to women from a lower socio-economic background.

⁴¹ UN Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health (2000) UN Doc. E/C.12/2000/4, para 12

⁴² Ibid, para 12(b)

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Ibid, para 21

⁴⁶ UN Committee on the Elimination of Discrimination against Women, General Recommendation No.24: Article 12, Women and Health (1999) para 21

⁴⁷ Ibid

⁴⁸ Section 1, Abortion Act 1967

45. **Women in Northern Ireland have to overcome financial obstacles that do not exist for women in the rest of the UK. The Commission advises that, to the extent that ECHR articles 3 and 8 are engaged in this matter, the non-provision of termination may also constitute a violation of ECHR article 14. In this case, a finding by a court of discriminatory treatment of women in Northern Ireland may be found to intensify the ill treatment and violation of privacy suffered by them.**

European consensus

46. The ECtHR interprets the ECHR as a living instrument and will often inquire into the existence of common ground, if it exists, in the law and practice of Member states. In the Northern Ireland case, *Dudgeon v The United Kingdom*⁴⁹, a case challenging the law criminalising homosexuality between consenting adults, the relevant Northern Ireland department sought public comment on amending the law which resulted in a large majority of individuals and institutions against the proposal for change. The ECtHR acknowledged that the intended aim of the existing law was to protect "the rights and freedoms of others" and was for the "protection of morals";⁵⁰ however the cardinal issue arising (under ECHR, article 8) was the extent to which, if at all, the legislation was "necessary in a democratic society" for these aims.
47. While the ECtHR noted that State authorities are, in principle, in a better position than international judges to give an opinion on what are the requirements of morals in their jurisdiction, it stated that the State's margin of appreciation is affected by the nature of the aim of the restriction and the nature of the activity involved. In cases where the most intimate aspect of a persons' private life is affected "*there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of Article 8 (art. 8-2)*"⁵¹.
48. The ECtHR accepted the fact that similar measures are not considered necessary in other parts of the United Kingdom or in other member States of the Council of Europe does not mean that they cannot be necessary in Northern Ireland; however, the Court could not overlook the changes

⁴⁹ Application no 7525/76 22 October 1981

⁵⁰ Ibid para 47

⁵¹ Ibid para 52

which had occurred in the domestic law of other member States and, finding a breach of ECHR, article 8, took into consideration observed consensus within Europe⁵².

- 49. The Commission advises that in the 47 Member states, (other than in Northern Ireland) only 6 do not permit termination of pregnancy on grounds of rape, incest and foetal abnormality⁵³.**

Conclusion

- 50. The Commission advises that the law on termination of pregnancy in Northern Ireland violates ICCPR, article 7. The law also falls within the scope of ECHR, articles 3, 8 and 14 and is open to challenge on these grounds.**

- 51. The Commission notes the commitment of the DHSSPS to issue guidance in this area to clarify the existing law. The Commission recalls however that a change in the law is required and advises that the law in Northern Ireland be amended to provide for termination of pregnancy within this jurisdiction on grounds of rape, sexual abuse (incest) and in cases of serious malformation of the foetus.**

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⁵² For further discussion on the ECtHR acknowledgement of consensus see http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp

⁵³ See UN reference document <http://www.un.org/esa/population/publications/abortion/doc/>