

# ‘Too Much, too Indigestible, too Fast’? The Decades of Struggle for Abortion Law Reform in Northern Ireland

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In July 2019, the UK Parliament voted by an overwhelming majority for fundamental reform of Northern Ireland’s archaic abortion laws. Regulations implementing the reform came into effect on 25 March 2020. Drawing on extensive archival resources and a small number of interviews, we locate this extraordinary political moment in a broader historical context. We explore the factors that blocked the possibility of reform in either Westminster or Stormont for over five decades and consider what it was that had changed in 2019 to render it possible. While the measure passed in Westminster represents a radical rupture with the past, we suggest that it was anything other than sudden, rather representing the culmination of decades of sustained campaigning. We conclude by briefly discussing what this change is likely to mean for the future.

## INTRODUCTION

In July 2019, the UK Parliament voted by an overwhelming majority for fundamental reform of Northern Ireland’s abortion law. The existing law, which relied on statutory criminal prohibitions dating from the mid-Victorian era, had long been amongst the most restrictive in Europe. Now, it is set to become, in certain respects at least, amongst the most liberal and, moreover, more permissive than that in force elsewhere in the UK. The vote represented a dramatic rupture with the past, with successive UK governments having long steered a careful course of studied inaction on the issue. Indeed, Karen Bradley (Con)’s very recent statement – that any such reform must be ‘debated and decided by the people of Northern Ireland and their locally elected, and therefore accountable, politicians’ – could have been made by any one of her predecessors in the Northern Ireland Office over the previous five decades.<sup>1</sup> However, while public opinion in Northern Ireland had moved firmly in favour of reform over that period, discussions at Stormont had proved tortuous and ultimately inconclusive.

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1 HC Deb vol 642 col 220 5 June 2018.

Drawing on archival resources and a small number of interviews with those active in campaigns for reform, we aim to locate this extraordinary political moment in a broader historical context extending back five decades.<sup>2</sup> We explore the factors that blocked the possibility of even limited change before now, beginning at Westminster (which retained legislative responsibility for criminal justice in Northern Ireland until 2010), then moving to Stormont (which debated abortion on multiple occasions before the most recent collapse of the Assembly between January 2017 and January 2020), and finally returning to Westminster. We then consider what had changed in 2019 to render this reform possible and conclude by briefly discussing what it means for the future.

### NORTHERN IRELAND'S ABORTION LAW

Until the late 1960s, England, Wales and Northern Ireland were subject to broadly the same abortion laws. Abortion was an offence under the Offences Against the Person Act 1861, which punished 'unlawful procurement of miscarriage' with life imprisonment.<sup>3</sup> A separate and overlapping offence applied after viability, prohibiting the intentional destruction of a child 'capable of being born alive'.<sup>4</sup> While the 1861 Act contained no explicit defence for its abortion offences, the case of *R v Bourne (Bourne)* in 1938 carved out a therapeutic exception, providing that no offence was committed when abortion was performed to 'preserve the life of the mother'. This was held to include cases where a termination was deemed necessary to prevent the pregnant woman from becoming a 'mental or physical wreck'.<sup>5</sup>

In 1967, the Abortion Act was passed, providing a statutory framework for the provision of legal abortion in England, Wales and Scotland. While remaining a criminal offence where the Act's terms were not met, abortion would henceforth be lawful where two doctors certified in good faith that it was appropriate on the basis of one of four broad grounds laid down in the Act, and where performed by a doctor within NHS or other approved premises. Most abortions would be authorised under the first ground: that continuing with a pregnancy would pose greater risk to a woman's mental or physical health than would termination.<sup>6</sup> While this provision was initially subject to widely diverging interpretations by doctors, a liberal interpretation came to

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2 For a list of those interviewed and the archives consulted in the course of this research, see <https://research.kent.ac.uk/abortion-act/>. For the purposes of this paper, we rely, in particular, on resources held in the Public Records Office of Northern Ireland (PRONI). All interviews were conducted by O'Neill.

3 Offences Against the Person Act 1861, s 58, with s 59 creating the lesser offence of supplying or procuring the means of procuring a miscarriage.

4 Criminal Justice Act 1945 (for Northern Ireland); Infant Life Preservation Act 1929 (for England and Wales). Under the law of Scotland, abortion was punishable at common law.

5 *R v Bourne* [1938] 3 All ER 615.

6 98 per cent of abortions are certified on this ground: Department of Health and Social Care, *Abortion Statistics, England and Wales: 2018* (London: HMSO, 2019).

dominate and, in practice, NHS-funded abortion is today readily available on request in England, Wales and Scotland within the earlier stages of pregnancy.<sup>7</sup>

In Northern Ireland, the position was very different, with the statutory position remaining that which had pertained before 1967. Moreover, *Bourne* was subject to a narrow interpretation within the Northern Irish courts: abortion would be lawful only where any adverse effects on a woman's health would be 'real and serious', and 'permanent or long term'.<sup>8</sup> This test came to be understood increasingly restrictively within clinical practice over time. While it is likely that many thousands of legal abortions were performed in England and Wales on the basis of *Bourne* before 1967, and several hundred in Northern Ireland each year during the 1970s and 1980s, there were just 12 in 2017/18.<sup>9</sup>

Why was the Abortion Act not extended to Northern Ireland? In 1967, this question scarcely needed to be asked: it was standard practice to exclude the region when legislating on issues of sexual morality.<sup>10</sup> The UK Government believed that Northern Ireland's inclusion in liberalising abortion law reform 'would provoke religious and political controversy of a most undesirable kind' that might militate against efforts 'to promote a better relationship between the communities in the Province.'<sup>11</sup> As a Scottish MP, the Act's sponsor, David (now Lord) Steel (Lib), was respectful of the significance of devolution.<sup>12</sup> Moreover, with a majority for his Bill far from assured, its supporters feared mobilising the certain opposition of Northern Irish MPs. The veteran Abortion Law Reform Association campaigner, Diane Munday, who had lobbied for the introduction of the 1967 Act, told us: it was 'appalling to exclude Northern Irish women.

7 On the initially diverging interpretations of the Act, see I.M. Ingram, 'Abortion Games: An Inquiry into the Working of the Act' (1971) 2 *Lancet* 969; J. O'Neill, "'Abortion Games": the Negotiation of Termination Decisions in Post-1967 Britain' (2019) 104 *History* 169; G. Davis, J. O'Neill, C. Parker and S. Sheldon, 'All Aboard the "Abortion Express": Geographic Variability, Domestic Travel, and the 1967 British Abortion Act, in C. Sethna and G. Davis (eds), *Abortion Across Borders: Transnational Travel and Access to Abortion Services* (Baltimore, MD: Johns Hopkins University Press, 2019) On the current liberal interpretation, see S. Sheldon, 'British Abortion Law: Speaking from the Past to Govern the Future' (2016) 79 *MLR* 283.

8 These cases also confirmed that *Bourne* (which as a jury direction in a Crown Court trial was technically not binding in Northern Ireland) applied in the jurisdiction. See *Western Health and Social Services Board v CMB and the Official Solicitor* (unreported 1995); *Down Lisburn Health and Social Services Board v CH and LAH* (unreported 1995); *In the Matter of an Application by The Family Planning Association of Northern Ireland for Judicial Review* [2003] NIQB 48.

9 Official statistics were not collected before the Abortion Act, but see *Committee on the Workings of the Abortion Act* (the Lane Committee) Cmnd 5579 (1974) vol 1 [35]; and P. Ferris, *The Nameless: Abortion in Britain Today* (London: Pelican, 1966) for discussion of the large numbers of 'West End Legal' abortions. For an explanation of the declining numbers of abortions reported in Northern Ireland figures, see text to notes 146–149 below.

10 See generally V. Bogdanor, *Devolution in the United Kingdom* (Oxford: OUP, 2001) 79. Bill Rolston, member of the Northern Irish Abortion Law Reform Association (NIALRA), told us that the 'British government's notion was that they deferred to the devolved government on controversial issues. In reality, the controversial issues only related to sex.' Interview (29 April 2017).

11 Letter from E.M. Chadwell (Home Office) to R.A. Devereux Esq (Ministry of Defence) (8 December 1966). PRONI HA/8/1994.

12 Sir David Steel, Minutes of a meeting to discuss the abortion law in NI, organised by the Birth Control Campaign in the House of Commons (23 March 1994). PRONI HSS/13/52/46. See further J. Thomson, *Abortion Law and Political Institutions: Explaining Policy Resistance* (Cham: Palgrave Macmillan, 2019) 86–87.

But if we hadn't done it, we wouldn't have got anything at all. [The Abortion Act] was by the skin of its teeth getting through.<sup>13</sup>

While barely considered at the time, this decision would nonetheless have profound consequences for the women of Northern Ireland. Only a vanishingly small number would be able to access abortion services in local hospitals.<sup>14</sup> Many more would attempt to end their pregnancies illegally. While today this generally means buying abortion pills from the internet,<sup>15</sup> in earlier years it involved gin and hot baths, jumping off steps, drinking porter and castor oil, or using syringes to squirt hot soapy water or disinfectant into the uterus.<sup>16</sup> A Pro-Choice booklet published in 1980 paints a stark picture of the options open to women in a one page 'Abortion Game' set out to resemble a Monopoly board. Alongside squares for 'period comes relax' or 'have money and sympathetic GP', the board includes squares for 'friend uses knitting needles', 'take gin and hot baths', 'sterilization' (reflecting the practice whereby doctors would agree to an abortion only on condition of simultaneous sterilisation),<sup>17</sup> 'go to England', 'commit suicide', 'puncture uterus and go to hospital' and 'die from septicaemia'.<sup>18</sup> Some women did indeed die in the process.<sup>19</sup> Others resorted to the abandonment of newborn babies: three were reported found in just one month in 1980, two of them dead.<sup>20</sup>

Some women travelled to access services, with a rapidly increasing number 'taking the boat' to England: 199 made the trip in 1970 rising to 1,565 in 1980. However, this was not an easy option. Information about services was initially difficult to find, with leaflets containing details of British abortion clinics deemed to fall within a prohibition on the advertising of services 'abroad'.<sup>21</sup> Moreover, the problems of explaining one's absence from home or finding the necessary money could prove prohibitive,<sup>22</sup> with difficulties sometimes further compounded by the Troubles. One woman, married to a political prisoner and

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13 Interview (10 November 2017).

14 See notes 147–149 below and accompanying text.

15 T. Hervey and S. Sheldon, 'Abortion by Telemedicine in Northern Ireland: Patient and Professional Rights to Free Movement across Borders' (2018) 68 NILQ 1.

16 L. McCormick, "'No Sense of Wrongdoing": Abortion in Belfast 1917–1967' (2015) 49 *Journal of Social History* 125.

17 See G. Davis, J. O'Neill, C. Parker and S. Sheldon, *The Abortion Act 1967: a Biography of a UK Law* (Cambridge: Cambridge University Press, forthcoming 2021); Ingram, n 7 above.

18 Women in Media, *A Woman's Choice* (1980) 17.

19 A handwritten file note recording information provided by the Registrar General's Office, notes four deaths from 1967–78 and one from 1979–83: A. Kennedy, 'Illegal Abortion Deaths' (4 March 1983) PRONI HSS/13/40/36.

20 M.T. McGivern, *Abortion in Northern Ireland* (1980) reprinted in A. Bourke, S. Kilfeather, M. Luddy, M. Mac Curtain, G. Meaney, M. Ní Dhonnchadha, M. O'Dowd and C. Wills (eds), *Field Day Anthology of Irish Writing Volume V: Irish Women's Writing and Traditions* (Cork: Cork UP and Field Day, 2002) 390–391.

21 BPAS presentation to Tribunal, NIALRA, *Abortion in Northern Ireland: the Report of an International Tribunal* (Belfast: Beyond the Pale Publications, 1989) 39, explaining that advertising abroad was prohibited by the licensing requirements for service providers and that these also 'frowned on' the known association between BPAS and Northern Irish family planning advisory groups.

22 M. Boyle and J. McEvoy, 'Putting Abortion in its Social Context: Northern Irish Women's Experiences of Abortion in England' (1998) 2 *Health* 283, 289; A. Rossiter, *Ireland's Hidden Diaspora: the 'Abortion Trail' and the Making of a London-Irish Underground 1980–2000* (London: Iasc, 2009).

pregnant by another man, went to England for an abortion. On her return, she was taken to a holding centre and threatened that her abortion would be revealed to her husband if she did not become a police informer.<sup>23</sup> Nonetheless, reported figures suggest that well over 60,000 women have made this journey since 1968, with numbers rising sharply across the 1970s, stabilising at between 1,400–1,800 per year in the 1980s and 1990s and then declining gradually from 2002, as the morning after pill became available over the counter and illegal home use of abortion pills became more widespread.<sup>24</sup> A pronounced uptick in numbers from 2017 reflects the fact that – fifty years after the introduction of the Abortion Act – NHS funded services elsewhere in the UK were made available to Northern Irish women for the first time.<sup>25</sup>

Other women undoubtedly felt forced to continue unwanted pregnancies. This result was recently welcomed by Northern Ireland's then Health Minister, Edwin Poots (DUP), who suggested that 'not having the ability to pop into a facility that can basically give you an abortion on demand' has had the 'happy result of many tens of thousands of births'.<sup>26</sup> While the true figure is unknowable, it is sometimes claimed that 100,000 people are alive today in Northern Ireland because of its abortion laws.<sup>27</sup> If so, the flipside is that 100,000 women were required to continue pregnancies against their will.

Elsewhere in the UK, a burgeoning feminist movement took up the issue of abortion rights from the 1970s onwards.<sup>28</sup> This did not happen in Northern Ireland, where the women's movement was heavily circumscribed by nationalistic politics,<sup>29</sup> and abortion was an 'unmanageable and unmentionable subject'.<sup>30</sup> Academic and activist, Goretti Horgan would go on to become a founding member of the grassroots Pro-Choice campaign group, Alliance for Choice (AFC), which established branches in Belfast and Derry in the mid-1990s. In these earlier years, she reported being 'really shocked' by the women's groups meetings that she attended:

every time I raised the question of abortion it was as if I, I don't know, said something really rude and people didn't want to talk about it. I mean they just didn't want to talk about it, and literally would actually deny it when I would say,

23 E. Fairweather, R. McDonough and M. McFadyean, *Only the Rivers Run Free, Northern Ireland: the Women's War* (London: Pluto, 1984) 46.

24 Figures are taken from the annual volumes of statistics published by the Government, see for example most recently, Department of Health, n 6 above. Official figures are likely an underestimate, given the incentive for women to claim an English address in order to access NHS funding.

25 See text to notes 200–205 below.

26 Edwin Poots, Health Minister, NIA Official Report (19 March 2013), response to oral questions (AQO 3693/11–15).

27 Jim Shannon (DUP) HC Deb vol 663 col 213 9 July 2019.

28 Davis et al, n 17 above.

29 Y. Galligan, 'Women in Northern Ireland's Politics: Feminising an "Armed Patriarchy"' in M. Sawyer, M. Tremblay and L. Trimble (eds), *Representing Women in Parliament: a Comparative Study* (London: Routledge, 2006) 205–206.

30 E. Evason, *Against the Grain: the Contemporary Women's Movement in Northern Ireland* (Dublin: Attic, 1991) 27.

there is probably a woman in this room who has had an abortion. They would go, 'don't be ridiculous!' [laughs] It was really, really difficult.<sup>31</sup>

Audrey Simpson, the former Director of the Family Planning Association in Northern Ireland (FPANI) likewise told us that while the FPANI would become 'gradually known as the agency working for abortion rights', 'the feminist movement were saying nothing.'<sup>32</sup>

A recognisable campaign for abortion law reform would nonetheless gradually emerge. In 1970, following the attempted suicide of a nineteen year old woman who had been unable to procure an abortion, the Ulster Pregnancy Advisory Association (UPAA) was established to offer advice and support.<sup>33</sup> Its charitable status made it difficult for it to publicise its services; the Northern Ireland Abortion Law Reform Association (NIALRA) was thus established to take on this role and to work for a limited relaxation of the law.<sup>34</sup> In 1980, following the death of a second woman, this time in a backstreet abortion, the Northern Ireland Abortion Campaign (NIAC) was formed.<sup>35</sup> In 1981, it delivered 600 coat hangers with a copy of a British Airways ticket attached to the House of Commons, explaining to MPs that these were the only two ways for Northern Irish women to get abortions. The creation of NIAC provoked the formation of a local Life group,<sup>36</sup> which carried out 'crisis pregnancy' work and campaigned against the introduction of 'the British Abortion Act'.<sup>37</sup>

While the groups involved on both sides of the debate would change over time, a coordinated campaign for reform existed from this time, playing an important role in increasing public and political awareness of the harsh effects of the law. Abortion support groups were established in England.<sup>38</sup> The FPANI took on an increasingly significant role. NIAC folded, with the call for reform taken up by a second iteration of NIALRA, which in turn would eventually be superseded by the Women's Right to Choose Group and then the organisation that remains most active today, AFC. The Society for the Protection of Unborn Children (SPUC) joined Life in working against reform in Northern Ireland and, later, a home-grown organisation, Precious Life, was also founded. For many years, these campaigns would be dominated by the question of the possible extension of the Abortion Act and, with the Parliament of Northern

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31 Interview (30 April 2017). Bill Rolston confirmed that 'there were a lot of reasons why even as a feminist academic you would not have stuck your head above the parapet and started talking about abortion. It was the taboo issue on all sorts of levels', n 10 above.

32 Interview (27 September 2017).

33 NIALRA, n 21 above, 31. 'A Woman's Right to Choose?' *Scope* June 1981. PRONI HSS/13/37/48. Women in Media, n 18 above, 23. Women in Media were a sub-group of Belfast Women's Collective, formed in 1978, see Evason, n 30 above, 27.

34 See NIALRA, *ibid*, 14; and NIALRA factsheet, attached to Letter from Jim Reid, NIALRA Chairman, to Harold Wilson MP (15 May 1972). LSE archives: Merlyn-Rees/7/4.

35 Charlotte Hutton, a 21 year old working class woman from Belfast, see NIALRA, *ibid*, 15-16.

36 'Note on Mr Patten's meeting with LIFE representatives on abortion law reform' (27 April 1981) PRONI HSS/13/37/48.

37 Dr G.J. Wenham, 'Abortion in Northern Ireland' (c. 1980) PRONI HSS/13/37/48; Life papers sent in preparation for meeting with Mr Patten (c. April 1981) PRONI HSS/13/40/36.

38 The Irish Women's Abortion Support Group was founded in the early 1980s, followed by the Irish Abortion Solidarity Campaign in 1990. See Rossiter, n 22 above, 24.

Ireland having been suspended in 1972, the attention of campaigners was initially directed firmly towards Westminster.

### WESTMINSTER (1972-2010): 'THE GOVERNMENT HAS NO PLANS FOR AMENDING THE LAW'

While the establishment of direct rule in 1972 increased the opportunity for Westminster to legislate on abortion law, it would prove reluctant to do so for the same broad reasons that had originally militated against including Northern Ireland within the Abortion Act. The region was seen as a place apart with its own conservative, deeply religious culture and values; moral issues were viewed as a matter for local resolution; local people and politicians were believed to be uniformly and unequivocally opposed to reform; and the region's distinctive position on moral issues was conceived as a kind of 'glue' that bound the community together, protecting against social and political disintegration.<sup>39</sup>

These assumptions have remained powerful across the past five decades, serving to block the possibility of reform, even as it became clear that Northern Irish abortion law was incompatible with human rights norms and that public opinion within the region was far more open to change than its politicians suggested. Successive UK governments would maintain a stance of studied neutrality, deliberate procrastination and, at times, carefully choreographed ignorance, refusing to generate the official knowledge that might indicate the need for action.

### 'Much better to leave it for the time being'

For more than a decade after the introduction of the Abortion Act, there was near silence regarding the issue of abortion law reform in Northern Ireland. When a recognisable campaign for reform did emerge, it faced formidable challenges. First, for many republicans, it was anathema to suggest that demands for legal change should be put to the 'British imperial state',<sup>40</sup> and campaigns for reform would struggle against the accusation that the 'British Abortion Act' was fundamentally 'other' to the unique history and character of Northern Ireland.<sup>41</sup> Moreover, the alleged harms that would inevitably flow

39 See R. Whitaker and G. Horgan, 'Abortion Governance in the New Northern Ireland' in L. Anton, S. DeZordo and J. Mishtal (eds), *A Fragmented Landscape. Abortion Governance and Associated Protest Logics in Postwar Europe* (New York, NY: Berghahn, 2016); L. Smyth, 'The Cultural Politics of Sexuality and Reproduction in Northern Ireland' (2006) 40 *Sociology* 663; J. Thomson, n 12 above.

40 Campaigners for reform were forced to take a pragmatic position on this issue, accepting the Abortion Act 'warts and all', for '[w]hether we like it or not – and some of us do, while others do not – legislation for us is determined in Westminster.' NIALRA letter (13 March 1986) SA/NAC/B/7/6. See generally, M. Ward, 'The Women's Movement in the North of Ireland' in S. Hutton and P. Stewart (eds), *Ireland's Histories: Aspects of State, Society and Ideology* (London: Routledge, 1991) 155.

41 See generally, n 37 above and correspondence, PRONI HSS/13/40/36.

from extending the Act were repeatedly evoked by nationalists and unionists alike, with abortion one of the few issues to unite them on public platforms at the height of the Troubles. One NIAC member would later recall:

It was one of the few issues on which it seemed that everyone agreed, and they were all against us! To give you just one example, Frank Maguire, who was elected to Westminster on an abstentionist ticket for Fermanagh/South Tyrone as an Independent Nationalist, went to the House of Commons on two occasions, one of which was to vote for a tightening of abortion laws which did not apply in Northern Ireland anyway.<sup>42</sup>

Second, pro-reform campaigners encountered a culture of ignorance, indifference, and unwillingness to ‘rock the boat’ at Westminster. In a period where Northern Ireland suffered from marked deprivation and acute social problems,<sup>43</sup> it had taken an average of no more than two hours of Westminster’s time each year until 1972,<sup>44</sup> with scrutiny remaining ‘lamentable’ thereafter.<sup>45</sup> Northern Irish constituencies have never been represented by MPs from the Labour or Conservative parties at Westminster, meaning that UK governments have never been able to appoint ‘home grown’ ministers. This contributed to the limited understanding of Northern Irish affairs: Karen Bradley was far from the first Northern Ireland Secretary to confess a deep ignorance of her brief.<sup>46</sup>

On the rare occasions that Westminster could be persuaded to turn its attention to the issue of abortion law, the primary concern of successive governments of either political hue was to avoid destabilising progress towards a lasting political settlement. In 1972, the chair of NIALRA attempted to persuade Westminster to take an interest in the subject. The Labour spokesperson for Northern Ireland, Merlyn Rees MP, told him that ‘matters of this kind, important as they are of themselves, must take second place at the moment to the major problem of bringing peace to Ulster’.<sup>47</sup> William Whitelaw, Conservative Northern Ireland Secretary, noted simply that ‘this does not seem an opportune time to raise this subject’.<sup>48</sup>

In 1978, the Northern Ireland Standing Advisory Commission on Human Rights (the predecessor to the current Northern Ireland Human Rights Commission) asked the Northern Ireland Secretary, Roy Mason (Lab), for his views on whether it should study various potential reform projects. His response, given in a brief handwritten marginal note, speaks volumes:

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42 Marilyn Hyndman, describing the history of NIAC, NIALRA, n 21 above, 16.

43 Evason, n 30 above.

44 C. Coulter, ‘Direct Rule and the Ulster Middle Classes’ in R. English and G.S. Walker, *Unionism in Modern Ireland* (Basingstoke: Macmillan, 1996) 169–170.

45 J. Prior, *A Balance of Power* (London: Hamish Hamilton, 1986) 191.

46 R. Carroll, ‘Karen Bradley Admits Ignorance of Northern Ireland Politics’ *The Guardian* 7 September 2018; James Prior, Secretary of State for Northern Ireland (1981–84) had also described Northern Ireland as a ‘foreign country’ to him, ‘Obituary: James Prior, former Northern Ireland secretary of state’ *Irish Times* 7 January 2017.

47 Letter from Rees to Jim Reid, NIALRA (26 May 1972). LSE archives, Merlyn-Rees papers, Merlyn-Rees/7/4.

48 Letter to Rees from Whitelaw (7 July 1972) LSE archives, Merlyn-Rees papers, Merlyn-Rees/7/4.



Divorce law reform – fine

Homosexual law reform – fine

Abortion law reform!!! – this is too much, too indigestible, the pace is too fast – politicians in Northern Ireland and the people too would revolt if we tried to bring in this almost on top of the others, which are quite controversial enough – therefore, much better to leave it for the time being.<sup>49</sup>

This view – that it was ‘much better to leave it for the time being’ – would remain firmly entrenched as the unofficial policy of successive governments, albeit becoming gradually more difficult to sustain over time. In 1981, a civil servant wrote:

Ministers know well that abortion is an active and emotional issue with ‘rights’, women’s and foetuses’, on both sides; offering no simple choice between happiness and misery. They may wish to bear in mind –

- (a) that such a distinction as there is now between the law in GB and Northern Ireland may be difficult to sustain always, especially when one main result is that Northern Ireland simply exports its problems;
- (b) that law enforcement is not always easy in an area which may be seen by many responsible people as one for legitimate personal decision; and
- (c) that it is not impossible that the issue will be taken up in a European context and that we find ourselves confronted, as on homosexuality, with a human rights decision.<sup>50</sup>

This awareness that the law was unfair, difficult to enforce and potentially incompatible with human rights norms would grow. However, human rights obligations would be viewed not as a prompt for pre-emptive action but rather as an external threat that might eventually force government’s hand.<sup>51</sup>

Over time, however, it would become increasingly difficult to justify replying to calls for reform with nothing more than ‘the Government has no plans for amending the law’. The following year, another civil servant from the Northern Ireland Office reported ‘a feeling over here’ that this ‘curt answer’ was ‘not enough and that we should give a brief reason for not intending to legislate’.<sup>52</sup> His correspondent in the Department of Health apologised for not being of greater assistance but explained that there were ‘no “medical” or

49 Letter from A.R. Brown (NIO) to the Northern Ireland Standing Advisory Commission on Human Rights (the predecessor to the Northern Ireland Human Rights Commission) (18 January 1978), advising that the Secretary of State for Northern Ireland did not wish it to undertake a study of abortion. PRONI HSS/13/37/48.

50 Memo, R.G. Smartt (NIO) (4 March 1981) PRONI HSS/13/33/24. The case of *Dudgeon v UK* [1981] 4 EHRR 149, which would lead to legislation decriminalising sex between men in Northern Ireland, was then before the courts.

51 Likewise, a minister in the Northern Ireland Office told a deputation from Life NI that the government might be forced to act by a finding the law breached human rights norms. Note for the Record, ‘Mr Patten’s Meeting on Abortion Law Reform’ (27 April 1981) PRONI HSS/13/37/48.

52 ‘Restricted’ note from Alexander NIO to Dugdale DHSS (undated c. April 1982); and Mills DHSS to Alexander NIO (7 April 1982) PRONI HSS/13/37/48.

“social welfare” arguments’ that might be offered in explanation for Northern Ireland’s distinctive legal position.<sup>53</sup>

The short response that ‘the Government has no plans for amending the law’ would thus remain the official, uneasy mantra of successive administrations, even as pressure for action started to build. During the 1980s, advocates for<sup>54</sup> – and particularly against<sup>55</sup> – reform would make repeated representations to government on the issue. By 1984, interest had become sufficient to provoke a response from Stormont, where an Assembly was briefly established to scrutinise decisions made by the Northern Ireland Office: a motion opposing the extension of the Abortion Act was passed by 74 votes to one.<sup>56</sup>

### Abortion in the Twilight Zone

While the government clung firmly to a position of studied inaction, in 1990 there was a real possibility that the matter would be taken out of its hands. A proposal to extend the Abortion Act to Northern Ireland came before Parliament for the first time, as one of a number of amendments tabled during the passage of the Human Fertilisation and Embryology Act (1990). David Steel argued that, with no government in Stormont and women forced to travel to access services, Parliament must now address whether they should be denied the ‘right which is extended to all other female citizens of the United Kingdom.’<sup>57</sup> His fellow Liberal MP and leading opponent of liberal abortion laws, David Alton, condemned the proposal as ‘extraordinarily arrogant’, ‘neo-colonialist’, and in direct contradiction to the strong view expressed by the Assembly in 1984.<sup>58</sup> The Reverend Ian Paisley, founder and leader of the Democratic Unionist Party (DUP), likewise proclaimed that the issue of abortion ran ‘to the very gut and heart of the Ulster people’ and cited ‘overwhelming opposition’ to the Abortion Act from all quarters.<sup>59</sup> Moreover, reflecting the more expansive understanding of the law then prevalent in Northern Ireland, he claimed that abortion was already available where needed because of ‘[f]oetal abnormality, rape, risk to the physical health of a mother and severe psychological trauma’.<sup>60</sup> By convention, abortion is treated as an issue of conscience and subject to a free vote at Westminster. While this was respected for all other abortion

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53 Mills DHSS to Alexander NIO (7 April 1982) PRONI HSS/13/37/48.

54 In 1985, a letter from the British Medical Association informing the Government that it had passed a resolution in support of extending the Abortion Act to Northern Ireland, was ‘just one of several such letters’ received. Anon ‘Patten urged by BMA to legalise abortion in Ulster’ *Belfast Telegraph* 29 May 1985, PRONI HSS/13/40/36.

55 A number of delegations from Life NI visited the Northern Ireland Office in the early 1980s, see correspondence, PRONI HSS/13/37/48; PRONI HSS/13/40/36.

56 The Assembly ran from 1982–86 but was boycotted by nationalist parties, rendering it impossible to devolve any functions to it, see Bogdanor, n 10 above, 104–105. The motion was proposed by the Reverend Ivan Foster (DUP), with Addie James Morrow (Alliance) the sole MLA to vote against, NIA Official Report (29 February 1984) 83.

57 Steel, HC Deb vol 174 cols 1142–43 21 June 1990.

58 Alton, HC Deb vol 174 cols 1148–49 21 June 1990.

59 Paisley, HC Deb vol 174 col 1153 21 June 1990.

60 Paisley, HC Deb vol 174 col 1154 21 June 1990.

law amendments tabled to the 1990 Act, the Government opposed this one, noting that it concerned a devolved matter and would be 'offensive to the overwhelming majority of people in the Province'.<sup>61</sup> It was defeated by a ratio of two votes to one.<sup>62</sup>

Notwithstanding this setback, the campaign for reform continued to grow during the 1990s, bolstered by surveys revealing growing support for liberalising reform amongst both doctors and the general population in Northern Ireland. These showed substantial public support for abortion to be permitted where pregnancy resulted from rape or incest; where the woman's health was at risk; or where there was evidence of fetal anomaly.<sup>63</sup> While politicians might remain firmly opposed to any reform, the evidence now contradicted any claim that the public did not support change.

In 1993, the campaign also received a significant boost from the publication of an influential report by Professor Simon Lee of Queen's University Belfast for the Northern Ireland Standing Advisory Commission on Human Rights. Lee argued that abortion law had been left to operate in a 'twilight zone', being so uncertain as to violate the standards of international human rights law.<sup>64</sup> As a result, some women were wrongly forced to travel to end pregnancies even though legally eligible to do so in Northern Ireland, with decisions resting on the 'moral views and legal boldness of doctors'.<sup>65</sup> Uncertainty was compounded by the fact that 'astonishingly' the government did not collate abortion statistics.<sup>66</sup> However, the 'best informed guess' was that most abortions in Northern Ireland were performed for reason of fetal anomaly, and while it was widely assumed that such abortions were lawful under *Bourne*, this was mistaken.<sup>67</sup> Abundant contemporary sources confirm Lee's finding that the law was confusing and poorly understood by the doctors required to operate within it.<sup>68</sup> A senior gynaecologist explained that '[e]very time you carry out

61 Virginia Bottomley (Health Minister), HC Deb vol 174 col 1161-2 21 June 1990.

62 267 votes to 131.

63 Annual Polls conducted from 1992-95 by Ulster Marketing. For a summary of findings, see FPANI, Northern Ireland Women's European Platform, Alliance for Choice, *Submission of Evidence to the CEDAW Committee Optional Protocol: Inquiry Procedure* Transitional Justice Institute Research Paper (No 15-01) 60-61. For contemporary use of the polling data in campaigning, see Birth Control Trust, 'New opinion poll shows increased support in Northern Ireland for legal abortion on social grounds' (press release, 11 November 1994), PRONI HPA/3/3; correspondence between N. Lunn (DHSS) and M. Simms (BCT) (10 February 1995; 30 May 1995), PRONI HSS/13/52/46; for a survey of doctors' views, see C. Francome, 'Gynaecologists and Abortion in Northern Ireland' (1994) 26 *Journal of Biosocial Sciences* 389.

64 S. Lee, *Abortion Law in Northern Ireland: The Twilight Zone* (Standing Advisory Commission on Human Rights for Northern Ireland, May 1993) [1], further recommending that the government should bring forward proposals to clarify the law without waiting to be defeated in the European Court of Human Rights. See further, S. Lee, *An A to K to Z of Abortion Law in Northern Ireland: Abortion on Remand* (Paper for the Standing Advisory Commission on Human Rights, February 1994) PRONI HPA/3/3.

65 Lee (1993), *ibid.*, [10].

66 Lee (1994), n 64 above, [4.2].

67 Lee (1993), n 64 above, [15].

68 For example Francome, n 63 above, found enormous variation in the willingness of Northern Irish gynaecologists to perform abortions. For other examples of this misunderstanding of the law, see also Paisley's statement to Parliament, text to n 60 above; J. Wells (DUP), NIA Official

an abortion, you are left wondering if you are going to get arrested for it. It's an appalling situation. People are very frightened'.<sup>69</sup>

Lee's findings were widely reported,<sup>70</sup> with one newspaper proclaiming that '[r]adical changes to Northern Ireland's abortion law could be just around the corner'.<sup>71</sup> They were also fiercely contested: Life warned the Commission to keep out of the 'right to life' debate;<sup>72</sup> SPUC focused its annual conference on the theme of *Forcing Abortion on Northern Ireland*;<sup>73</sup> and Northern Irish MPs issued a press release opposing reform:

We do not want the abortion culture which has so undermined the family in this country tainting our people and our standards of medicine . . . In Northern Ireland we have never lost our respect for women, for children and for the family and we have no intention of allowing English-based organisations to impose laws, eroding our quality of family life, against the wishes of our people.<sup>74</sup>

Meanwhile, the FPANI began a long campaign for clarification of the law, initially demanding a Commission of Inquiry.<sup>75</sup>

The Government felt obliged to respond but walked a painfully fine line in doing so. First, it could not deny that statistics were inadequate. Its own, unpublished figures revealed that in 1992/1993 there had been 44 primary diagnoses of 'therapeutic abortion'; 1129 of 'spontaneous abortion'; and 627 of 'unspecified abortion', with the substantial number in the last category reflecting 'either an incomplete description of the diagnosis or a reluctance to be specific in what is a sensitive area'.<sup>76</sup> Officials were aware, however, that any attempt to improve coding practice risked a chilling effect on practice, with 'even more reluctance to use the "therapeutic abortion" code (even where appropriate) if the subject is known to be under scrutiny'.<sup>77</sup>

Neither could the Government easily refute the claim that the law was unclear, with internal discussions amply illustrating the confusion. A doctor within the Department of Health was invited to comment on the issue. His detailed reply stated that the majority of doctors within Northern Ireland probably believed abortion to be legal in the case of severe fetal anomaly; that such abortions were not legal; and that most doctors would welcome

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Report (20 June 2000); A. Simpson (FPANI), 'The Victorian Law of Northern Ireland' (1993) 22 *Planned Parenthood in Europe* 7; and Dugdale, n 146 below.

69 W. Thompson, Professor of Gynaecology at Queens, cited in D. Carton, 'Abortion Row Brews' *Ulster News Letter* 7 February 1994, PRONI HSS/13/52/46.

70 The *Belfast Telegraph* ran an extended special feature on 'Abortion, the Dilemma, the Debate' 29 March 1995, 12 April 1995, PRONI HPA/3/3.

71 C. Cooper, 'Abortion Law Changes Firmly on Agenda' *South Belfast Herald and Post* 25 May 1995, PRONI HSS/13/52/46.

72 D. Templeton, 'Stay out of Abortion Row, Rights Body Told' *Belfast Telegraph* 3 August 1993, PRONI HSS/13/52/46.

73 Anon, 'Forcing Abortion on Northern Ireland' *Newtownards Chronicle* 18 November 1993, PRONI HSS/13/52/46.

74 Issued by Martin Smyth MP (UUP) (23 March 1995) PRONI HSS/13/52/46.

75 'Dear Colleague' letter from Audrey Simpson FPANI (3 April 1995). PRONI HPA/3/3.

76 R. Beckett (DHSS) Memo, 'Restricted Policy. Abortion Statistics' (12 October 1994), citing figures for 1992/1993, PRONI HSS/13/52/46.

77 *ibid.*

clarification of the law. He concluded, however, by denying that there was ‘any doubt in the minds of the medical profession as to the circumstances where abortion is legal in Northern Ireland’ and advising against the publication of official guidance on the matter.<sup>78</sup> The inconsistencies in his view did not go unremarked by the colleague who had invited it.<sup>79</sup>

To determine an official response, the Conservative Secretary of State, Patrick Mayhew, convened a meeting of ministers and senior civil servants in the Northern Ireland Office. The minutes record acknowledgment that the law was unclear and that this had been recognised in recent court cases. Moreover, it was noted that it was ‘difficult to defend’ in terms of fairness, given that the middle class could travel to access abortion services, whilst the working class could not.<sup>80</sup> However, while the FPANI’s proposal for a Commission of Inquiry was considered, it was firmly rejected.<sup>81</sup> First, it was already known that the law was unclear, with no need for further confirmation of this fact. Second, there was a danger that a Commission would make recommendations to which the Government would then need to react.<sup>82</sup> Rather, there was benefit in ‘keeping the overall political temperature in Northern Ireland as low as possible,’ with a decision better deferred for six months when it might be ‘somewhat cooler’.<sup>83</sup> The one female minister present – Baroness Denton – wondered, with some prescience, if ‘in following this analysis, the time would ever be right to make a change.’<sup>84</sup>

A senior official in the Department of Health concluded as follows (with the emphasis in the original):

In the light of the opinions expressed by Simon Lee, Professor of Juresprudence [sic], Queen’s University and High Court judges, it would be difficult, it [sic] not impossible, to argue against the contention that the Northern Ireland abortion law is unclear. Equally, if the Government publicly accepted that the law is unclear, it would be difficult to defend a ‘do nothing’ stance. *It is therefore recommended that the Secretary of State’s response does not express any view on the state of the law.*<sup>85</sup>

The chosen course was thus studied inaction and carefully choreographed ignorance.<sup>86</sup> A one sentence response to a parliamentary question reiterated that

78 Dr C. Hall to A. Sharp (1 March 1995) Memo, PRONI HSS/13/52/46.

79 A. Sharp to N. Lunn (14 March 1995) Memo, PRONI HSS/13/52/46.

80 Confidential Minutes of Meeting of Ministers (19 April 1995), PRONI HSS/13/52/46.

81 A paper had been prepared offering a detailed consideration of its potential membership. See memo from J.P. Bill (DHSS) (14 February 1995) ‘Abortion Law in NI’ PRONI HSS/13/52/46.

82 See comments of Mayhew and Ancram, Confidential Minutes, n 80 above.

83 *ibid.*

84 *ibid.*

85 J.J.M. Harbison, ‘Restricted – Policy: Abortion Law in Northern Ireland’ DHSS, memo sent to civil servants in a range of departments including the NIO and DHSS (4 May 1995) [14], PRONI HSS/13/52/46.

86 On the idea of choreographed ignorance, see R. Proctor and L. Schiebinger (eds), *Agnology: the Making and Unmaking of Ignorance* (Stanford, CA: Stanford University Press, 2008); L. McGoey, ‘The Logic of Strategic Ignorance’ (2012) 63 *The British Journal of Sociology* 553; S. Sheldon, ‘Empowerment and Privacy? Home Use of Abortion Pills in the Republic of Ireland’ (2018) 43 *Signs* 823.

the Government did not propose to suggest any changes to the law at present.<sup>87</sup> While privately aware that the law was unclear, publicly the Government maintained that ‘medical colleagues in the Department do not consider that there is any doubt in the minds of the medical profession about the circumstances in which abortions are legal in Northern Ireland’ (a claim that appears to have relied on the confused opinion of the single doctor cited above).<sup>88</sup> While privately briefed on ‘a surprising degree of support among both sections of the community in Northern Ireland for the liberalisation of the existing law’,<sup>89</sup> publicly the Government noted that the overwhelming majority of the representations it had received expressed opposition to change, and that abortion was properly a matter for Northern Irish MPs.<sup>90</sup> It did, however, commit to improving the quality of abortion statistics: the resulting changes in coding practices would fully justify the fears expressed above that such a move might have a chilling effect on practice.<sup>91</sup>

In 1997, there seemed some prospect that this long-established status quo might be disrupted by the coming to power of ‘New Labour’ with a substantial injection of female Labour MPs, who had emerged as the prime defenders of abortion rights in Westminster.<sup>92</sup> Further, for the first time, the Northern Ireland Office was to be occupied by a woman and one, moreover, known to be personally supportive of ‘the right to choose for the women of Northern Ireland’: Mo Mowlam.<sup>93</sup> Goretti Horgan recalls that for the first time, the issue of abortion law reform seemed up for discussion, with Pro-Choice campaigners ‘welcomed to Westminster’ and finding that ‘people were willing to have a dialogue.’<sup>94</sup>

However, if a change in tack was anticipated, it was not forthcoming. When the Good Friday Agreement was signed in 1998, the Labour Government maintained the long-standing position that the Abortion Act would be extended only with the broad support of the people of Northern Ireland. Indeed,

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87 HC Deb vol 260 col 267 24 May 1995 (written answers).

88 Letter from N. Lunn (DHSS) to M. Simms (BCT) (30 May 1995) PRONI HSS/13/52/46.

89 ‘Restricted – Policy. Background Note: Abortion Law in Northern Ireland’ (no author, undated, Spring 1995), noting that polls in 1992 and 1993 had found that 76 per cent of those questioned thought that abortion should be legal in cases of rape and incest; and 60 per cent where a child would be seriously handicapped; and that a survey had found that two-thirds of consultant gynaecologists questioned supported a change in the law. PRONI HSS/13/52/46.

90 See letter from Patrick Mayhew to Charles Hill (Chairman, Standing Advisory Committee on Human Rights), noting that an overwhelming majority of the representations received by the Government had ‘expressed consistently their opposition to changes in the present laws’ (10 May 1995); Letter from Patrick Mayhew to Harry Barnes MP (3 July 1995), both PRONI HSS/13/52/46.

91 Letter to Hill, *ibid.* On the chilling effect of work to improve statistics, see text to notes 146–149 below.

92 See generally, Davis et al, n 17 above. In 1997, for the first time the proportion of women in parliament would exceed 10 per cent, with the election of 120 women, 101 of them Labour. No women were elected by Northern Irish constituencies. See House of Commons Library, *Women in Parliament and Government, Briefing Paper Number 01250* (4 March 2019).

93 Letter from M. Mowlam, then Shadow Northern Ireland Secretary, to K. Fearon and A. Ahern (Alliance for Choice NI) (15 November 1995), noting that ‘I am not the MP who needs to be convinced of the right to choose for the women of Northern Ireland’ (emphasis in original). PRONI HPA/3/3.

94 n 31 above.

it was rumoured that, in order to encourage all parties to sign, Mowlam had privately committed that there would be no subsequent moves to extend the Act.<sup>95</sup> She would later note her regret at having failed to achieve reform.<sup>96</sup>

### Westminster during power sharing

While legislative responsibility for health was immediately transferred to the newly formed Northern Ireland Assembly, responsibility for criminal justice was initially reserved, leaving one further significant opportunity for the UK parliament to debate the extension of the Abortion Act to the region. The Human Fertilisation and Embryology Act 2008 was designed to update the 1990 Act of the same name, which had earlier been used as a vehicle for abortion law reform. The opportunity of tabling further amendments to it was firmly grasped by MPs on all sides of the debate. A first set of amendments sought to restrict the Abortion Act and these were duly put to a vote. However, a second group of amendments proposing liberalising changes, including a proposal to extend the Abortion Act to Northern Ireland, was blocked without debate.<sup>97</sup> This prompted furious accusations that the Government had acted 'in an asymmetrical way, so that those who sought at an earlier stage to curtail abortion rights were heard, but those who seek at this stage to extend them are to be silenced.'<sup>98</sup>

With its official position one of neutrality towards abortion law, the Government's action was indeed unusual. It sought to justify it as necessary to protect the available parliamentary time for matters which went 'to the very heart' of the Bill.<sup>99</sup> However, with restrictive amendments given time and Parliament awarded a Christmas recess of 'unprecedented length', this rang hollow.<sup>100</sup> Kenneth Clarke (Con), who as Health Secretary had created time for abortion law reform in 1990, described the action as a 'particularly cynical' piece of political expediency designed to prevent a vote.<sup>101</sup> It was very widely rumoured that it was motivated by the desire to avoid a vote on the extension of the Abortion Act to Northern Ireland, with this the quid pro quo offered to secure the support of DUP MPs for a controversial anti-terrorist measure.<sup>102</sup>

While this suggestion was flatly denied at the time,<sup>103</sup> it was strongly confirmed by our interviewees. Horgan reported that campaigners were preparing

95 G. Horgan and J.S. O'Connor, 'Abortion and Citizenship Rights in a Devolved Region of the UK' (2014) 13 *Social Policy and Society* 39.

96 Simpson, n 32 above, noted that 'when she [Mowlam] left here she said she had three regrets, and one of those three regrets was not doing anything on abortion rights. She said her hands were tied, because of the peace process, and that was one of her three biggest regrets.'

97 S. Sheldon, 'A Missed Opportunity to Reform an Outdated Piece of Legislation' (2009) 4 *Clinical Ethics* 3.

98 Mactaggart, HC Deb vol 481 col 331 22 October 2008.

99 Primarolo, HC Deb vol 481 col 323 22 October 2008.

100 Clarke, HC Deb vol 481 col 331 22 October 2008.

101 Clarke, HC Deb vol 481 cols 329-330 22 October 2008.

102 See Thomson, n 12 above, 97; Rossiter, n 22 above; Editorial, *The Guardian* 22 October 2008; D. Sharrock and S. Coates, '42 Day Detention: Bribes and Concessions that got DUP on side' *The Times* 12 June 2008.

103 Donaldson (DUP) HC Deb vol 481 col 331 22 October 2008.

to send a deputation to Westminster when they received a call from Emily Thornberry (Lab), who had intended to table the Northern Ireland amendment:

[Thornberry had] been called to No. 10 and she had been told that she couldn't put down the amendments, that if she did she would destroy the peace process and she would make life very difficult for the prime minister, who was Gordon Brown . . . And I was like, 'do you not think we are the ones [who] know? Both sides are both against it and for it, and it would make no difference to the peace process. This is just a load of nonsense.' Now I have to say I admire her that she actually had the guts to phone . . . And then it became obvious that it wasn't going to happen actually, because although Diane Abbott took it over, and she put down the amendment in October, it became clear then that okay, the apparatus is against it, so it's not going to go through.<sup>104</sup>

Audrey Simpson related the same story, noting that the amendment was then picked up by the one who 'couldn't give a damn', Diane Abbott (Lab).<sup>105</sup> Marge Berer, then Chair of the UK Voice for Choice coalition, likewise reports having been told that 'if we would drop Northern Ireland we would get the other six amendments [that we were supporting]. It was outrageous and we said no.'<sup>106</sup>

While the motivation for blocking debate of the liberalising amendments remains disputed, the consequences were clear. Diane Abbott noted that women in Northern Ireland would thus be denied for another generation the rights that had been enjoyed elsewhere in the UK for 40 years.<sup>107</sup> Horgan made this point more forcefully, suggesting that, with legislative responsibility for criminal justice transferring to the Northern Ireland Assembly, women's abortion rights were now 'in the hands of an evangelical taliban'.<sup>108</sup>

## STORMONT (1998-2017): 'BLEAK HOUSE'

### An inauspicious context for reform

From 2010, it was nonetheless to Stormont that campaigners were forced to look. They had little reason for optimism. In 1984, a motion against the extension of the Abortion Act had passed by 74 votes to one.<sup>109</sup> In 2000, a second, similarly framed motion had likewise passed by a clear, if less emphatic majority.<sup>110</sup> And the Assembly's opposition to abortion would again be demonstrated in 2013, with a measure designed to end the work of a Marie Stopes

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104 n 31 above.

105 n 32 above.

106 Interview (6 October 2017).

107 HC Deb vol 481 col 328 22 October 2008.

108 G. Horgan, 'Foreword' in Rossiter, n 21 above, 20.

109 NIA Official Report (29 February 1984) 78.

110 43 votes to 15. See Wells, NIA Official Report (20 June 2000) 103, noting that the motion aimed to send 'a very clear, cross-community message . . . that the people of Northern Ireland totally resist any extension of the 1967 Abortion Act to this community'.



clinic, which had recently opened in Belfast in order to provide a small number of legal abortions and offer referrals to British clinics. In an attempt to shut down the clinic, Paul Givan (DUP) and Alban Magennis (SDLP) tabled an amendment to prohibit abortions being performed outside NHS premises. This again won an absolute majority (53 votes to 40), but was blocked through a petition of concern.<sup>111</sup> Its defeat followed the well-publicised publication of an open letter signed by 100 people, mainly women, describing the prevalence of illegal abortion in the region: signatories declared that they had either used abortion pills to end pregnancies or had helped others to do so.<sup>112</sup>

At least three factors were significant in making the Northern Ireland Assembly a hostile climate for abortion law reform. First, religion has historically played a far more central role in political debates in Northern Ireland, offering a powerful marker of identity in social and political conflict. While a significant proportion of the Northern Irish public has now come to identify with neither the nationalist nor unionist community,<sup>113</sup> this has not translated readily into a less religiously divided Assembly as the majority of these 'Neithers' tend to support no party at all.<sup>114</sup> Indeed, in Stormont, the conditions of the political settlement agreed in the Good Friday Agreement have tended to harden lines of political debate, assuming the existence of two distinct 'communities' divided along sectarian lines and creating obstacles to the emergence of an alternative, 'third way' politics.<sup>115</sup> This has served to entrench the role of religious values within the Assembly, with political representatives taking a considerably harder line against the possibility of relaxing abortion laws than have their constituents,<sup>116</sup> and debate of abortion dominated by a 'holy alliance' of evangelical Protestantism and fundamentalist Catholicism.<sup>117</sup>

While smaller parties in Stormont have tended to see abortion as an issue of conscience,<sup>118</sup> the larger parties have historically been strongly opposed to

111 The petition of concern is a mechanism designed to safeguard minority rights, permitting one 'community' to block the introduction of a measure that commands absolute support in the Assembly. Here, the measure was blocked by Sinn Féin, joined by two MLAs from the Alliance and the Green Parties. See BBC News, 'NI Assembly fails in bid to change abortion law' 12 March 2013 at <https://www.bbc.co.uk/news/uk-northern-ireland-21755507>.

112 BBC News, 'Over 100 Women Sign Abortion Change Protest Letter' 11 March 2013 at <https://www.bbc.co.uk/news/uk-northern-ireland-21735029>.

113 In the most recent survey, 50 per cent identified themselves as being neither unionist nor nationalist (26 per cent unionist and 21 per cent nationalist) and 17 per cent said that they had no religion (39 per cent Catholic; 15 per cent Presbyterian). ARK, *Northern Ireland Life and Times Survey 2018* (June 2019) at <https://www.ark.ac.uk/nilt/2018/>.

114 K. Hayward and C. McManus, 'Neither/Nor: The Rejection of Unionist and Nationalist Identities in Post-Agreement Northern Ireland' (2019) 43 *Class and Capital* vol 139.

115 *ibid.*

116 ARK, *Northern Ireland Life and Times Survey 2016* at <https://www.ark.ac.uk/nilt/2016/index.html>. See A.M. Gray, G. Horgan and P. Devine, 'Do Social Attitudes to Abortion Suggest Political Parties in Northern Ireland are Out of Step with their Supporters?' *ARK Feature* (No 7, June 2018) at [www.ark.ac.uk](http://www.ark.ac.uk). See further, discussion of polling data below, text accompanying notes 167-168 below.

117 G. Horgan, 'A Holy Alliance? Obstacles to Abortion Rights in Ireland North and South' in A. Quilty, S. Kennedy and C. Conlon (eds), *The Abortion Papers Ireland Vol II* (Dublin: Attic Press, 2015).

118 The Ulster Unionist and Alliance parties (ten and eight MLAs respectively) each consider abortion a matter of conscience. The small Green Party (two MLAs) supports decriminalisation

reform. The Social Democratic and Labour Party (with twelve MLAs) considers itself a ‘pro-life party’ albeit, since May 2018, allowing its members a conscience vote on abortion. Sinn Féin (27 MLAs) has only very recently revised a previously strongly anti-abortion position to favour allowing abortion within ‘a limited gestational period’.<sup>119</sup> The region’s largest party, the Democratic Unionist Party (DUP, 28 MLAs) – with its close association with a particular brand of evangelical Protestantism<sup>120</sup> – has remained staunchly and consistently opposed to even the most limited relaxation of the law, with its politicians playing a leading role in blocking reform. The gulf between political representatives and their supporters is particularly visible with regard to the DUP. In 2016, the authoritative Northern Irish Life and Times survey collected views on whether abortion should be legal in a range of seven different circumstances: it found that DUP supporters believed that abortion should definitely or probably be legal in six of the seven (excluding just the case where a woman simply did not want to have children).<sup>121</sup> Indeed, it is possible that individual MLAs might themselves privately favour a softer line than that officially espoused by their parties. Audrey Simpson speculated:

Every political party has sympathetic MLAs. But all the political parties are so scared of change, so scared that they are going to lose the moral high ground, that they won’t give anybody a free vote on it . . . I think the political shift probably reflects the change that there has been in public opinion as well. But you can’t get a clear sense of the political shift, because you know some of them are being quiet. You’d love to have a one-to-one with all MLAs, and say off the record, tell me what you think.<sup>122</sup>

Second, abortion has never been adopted as a women’s issue in Stormont in the same way as in Westminster, where female Labour MPs have formed a highly visible lobby for abortion rights. While women are also in the minority in Westminster, this was for many years still more pronounced at Stormont, which remained ‘a virtual male monopoly’.<sup>123</sup> This in itself was partly attributable to the strongly religious, ‘rigidly patriarchal’ nature of Northern Irish society,<sup>124</sup>

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of abortion. For a useful overview, see K. McNeilly, F. Bloomer, and C. Pierson, *Northern Ireland and Abortion Law Reform* (Ulster University, Queen’s University Belfast, and Liverpool University, Reproductive Health Law and Policy Advisory Group, 2018).

119 See McNeilly et al, *ibid*. This follows an earlier, far more modest relaxation in its position, to include access to abortion in cases of fatal fetal anomaly, H. McDonald, ‘Sinn Féin Drops Opposition to Abortion at Derry Congress’ *The Guardian* 7 March 2015.

120 The party was founded and for many years led by the Reverend Ian Paisley, an important religious leader and co-founder of the fundamentalist Free Presbyterian Church of Ulster, and retains links with the Caleb Foundation, a Biblical pressure group, which lobbies for laws to be based on a literal reading of the Bible and the teaching of creationism. See L. Clarke, ‘Caleb Foundation: The Creationist Bible Group and its Web of Influence at Stormont’ *Belfast Telegraph* 1 September 2012. See further, <https://web.archive.org/web/20150308105337/http://www.calebfoundation.org/index.htm>.

121 ARK, n 116 above.

122 Interview, n 32 above.

123 R.L. Miller, R. Wilford and F. Donoghue, *Women and Political Participation in Northern Ireland* (Aldershot: Avebury, 1996) 9.

124 Ward, n 40 above; see further Evason, n 30 above, describing Northern Ireland in the 1980s as ‘a deeply oppressive, conservative society with a rigid perception of women’s roles and duties’.

and the fact that the legacy of divided politics left little space for other types of politics, such as feminism.<sup>125</sup> However, it is changing: while just four per cent of Assembly seats were held by women in the early 1980s,<sup>126</sup> today, almost one third of MLAs are women.<sup>127</sup> And as numbers have grown, female MLAs have played an active and growing role in challenging the status quo. For example, all women who spoke in the 2000 debate on the motion against extending the Abortion Act either argued against it or spoke in favour of an amendment proposed by Monica McWilliams (Northern Ireland Women's Coalition), to establish a Committee of Inquiry.<sup>128</sup> Nonetheless, while female representation has expanded at Stormont, the explicit framing of arguments for reform in terms of women's rights – which has become gradually more dominant in Westminster – has remained marginal.<sup>129</sup>

Third, debates at Stormont have been haunted by the spectre of the Abortion Act, which has been consistently presented as a thoroughly bad law and the antithesis of Northern Irish values. The threat of the Act has played a powerful role in closing down debate over even the most limited reform. In a 2014 debate, for example, the Justice Minister, David Ford (Alliance) was obliged to refute the repeated 'serious misrepresentation' that an amendment aiming solely to make provision for abortion in the case of fatal fetal abnormality was 'the 1967 Act by the back door'.<sup>130</sup>

### The long battle for legal clarification

With legal reform efforts focused primarily on Westminster before 2010, debate had nonetheless continued within Northern Ireland, with a powerful initial focus on the need for clarification of the law. When Westminster refused to establish a Commission of Inquiry following publication of the Lee Report, the FPANI had turned to the courts, where it eventually won a judgment confirming the need for official guidance to clarify the law for health professionals.<sup>131</sup> Simpson, then Director of the FPANI notes:

We took nine months to build up a case and we kept it completely in house, and nobody in Northern Ireland knew that we were doing it . . . as soon as we lodged it, the story broke . . . and all hell did break loose. It took 15 months to get it to

125 Horgan, n 113 above.

126 Miller et al, n 123 above, 9.

127 House of Commons Library, n 92 above.

128 NIA Official Report (20 June 2000).

129 See generally, C. Pierson and F. Bloomer, 'Anti-Abortion Myths in Political Discourse' in C. MacQuarrie, F. Bloomer, C. Pierson and S. Stettner (eds), *Crossing Troubled Waters: Abortion in Ireland, Northern Ireland, and Prince Edward Island* (PEI: Island Studies Press, 2018) on the conservative ideas of gender underpinning contemporary debates of abortion in Northern Ireland; and Davis et al, n 17 above, on the growing dominance of the 'women's rights' frame at Westminster.

130 NIA Official Report (10 February 2016) 115(2). For examples of the claims that he was refuting, see for example NIA Official Report (9 December 2014), McCarthy at 80; Pengelly at 81; Ruane at 82; Kelly at 84; and McKinney at 89.

131 *FPANI v Minister for Health, Social Services and Public Safety* [2004] NICA 37 (FPANI).

court, and . . . there were something like 12 barristers and an equal number of solicitors on this case. There wasn't enough room for them all. Because we had interveners: Precious Life, Life, SPUC, the Catholic Church [laughs], everybody! . . . And then it took eighteen months for judgement, it was in the law journals as the longest judgement ever awaited. And then when it came out, he ruled against us . . . [But] the three appeal judges ruled in our favour. So by initiating that process, the amount of publicity that attracted, it just really, really blew the lid off the situation in Northern Ireland. I think that was one of the major, major things that we did.<sup>132</sup>

This was, however, only the beginning. In finding for the FPANI, the Court of Appeal noted that any legal uncertainty might 'easily be removed' by guidance.<sup>133</sup> However, the subsequent process of clarifying the precise legal meaning of statutory language dating back to the Victorian era and the ambiguously worded *Bourne* judgment – which had 'left plenty of loose ends and ample scope for clarification'<sup>134</sup> – was to prove tortuous, highly politicised and painfully slow.

A first attempt at producing official guidance in 2007 provoked another debate in Stormont, which voted to reject it on the basis that it had the effect of relaxing, rather than clarifying, the law.<sup>135</sup> Jeffrey Donaldson (DUP), who proposed the motion, also commended it as an opportunity to send another clear message to Westminster opposing any extension of the Abortion Act, at a time when the Human Fertilisation and Embryology Act 2008 was under consideration.<sup>136</sup> A second (2009) draft of official guidance, containing a more restrictive statement of the law, was challenged by SPUC.<sup>137</sup> This was found to offer an accurate description of the grounds for abortion but to be misleading in its advice on counselling and conscientious objection.<sup>138</sup> While these sections were being redrafted, interim guidance was issued but swiftly withdrawn following the threat of further legal challenge. A fourth draft was then published and submitted to the Executive for approval but had not been considered before the Assembly was dissolved in March 2011.<sup>139</sup>

With the *SPUC* court having both confirmed the substantial accuracy of the second draft of the guidance and offered a clear statement of the changes required to render it capable of withstanding further legal challenge, the possibility of publishing clear and accurate guidance nonetheless now appeared within easy grasp. However, the incoming Health Minister, Edwin Poots (DUP), sent

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132 n 32 above.

133 *FPANI*, n 131 at [4] *per* Sheil LJ.

134 *Royal College of Nursing v Department of Health and Social Security* [1981] AC 800 *per* Lord Diplock.

135 See NIA Official Report (22 October 2007). The motion was proposed by Jeffrey Donaldson and Iris Robinson (both DUP), and supported by other members of the Health Committee.

136 Donaldson (DUP), NIA Official Report (22 Oct 2007), no page numbers available in online publication.

137 DHSSPS, Northern Ireland Executive, *Guidance on the Termination of Pregnancy: The Law and Clinical Practice in Northern Ireland* (Belfast: DHSSPS, 2009).

138 *In the Matter of an Application by SPUC for Judicial Review* [2009] NIQB 92 (*SPUC*).

139 For a chronology of events, see NIA Official Report AQW 23793/11–15, question answered (12 June 2013).

civil servants back to the drawing board.<sup>140</sup> The result was substantially new guidance, offering the most restrictive reading of the law yet.<sup>141</sup> A chorus of criticism now came from the other side.<sup>142</sup> While abortion had hitherto not been prominent within the work of human rights organisations in Northern Ireland, this fifth draft was to prove ‘a game changer’, doing ‘what several decades of pro-choice advocacy did not: prompting mainstream human rights advocates to take on the human rights concerns inherent in restrictive access to abortion in Northern Ireland.’<sup>143</sup> Amnesty International, the Northern Ireland Human Rights Commission (NIHRC), and the Committee on the Administration of Justice each now intervened in the debate for the first time.<sup>144</sup> The guidance was again withdrawn, with a further and significantly revised sixth iteration eventually published only in 2016, more than twenty years after the Lee Report and the start of the FPANI’s campaign for clarification of the law, and over a decade since a court had required its production.<sup>145</sup>

In more than one way, the 2016 guidance represented an important victory for pro-reform campaigners. In particular, the legacy of a focus on human rights would prove crucial over the following years. However, the process of clarifying the law had also cast a powerful spotlight on an area of long-standing legal ambiguity. Combined with earlier government work to improve the clinical coding used by gynaecologists, this would have a marked chilling effect on practice. Most importantly, there was no longer any space for lingering confusion concerning the legality of abortion for fetal anomaly. In 1976, it was estimated that around 400 terminations were performed within Northern Ireland’s health services.<sup>146</sup> By 2005, this number had dwindled

140 Asked why the DHSSPS did not simply address the two issues identified as problematic in the *SPUC* ruling, a senior civil servant explained that ‘[t]he short answer is that there was an election, and we got a new Minister.’ Committee for Health, Social Services and Public Safety, *Guidance on Termination of Pregnancy in Northern Ireland: DHSSPS Briefing Committee NIA Official Report* (22 October 2013) at [http://www.niassembly.gov.uk/globalassets/documents/official-reports/health/2013-2014/131022\\_guidanceonterminationofpregnancydhsspsbriefing.pdf](http://www.niassembly.gov.uk/globalassets/documents/official-reports/health/2013-2014/131022_guidanceonterminationofpregnancydhsspsbriefing.pdf).

141 Department of Health, *The Limited Circumstances for a Lawful Termination of Pregnancy in NI: A Guidance Document for Health and Social Care Professionals on Law and Clinical Practice* (Draft, Belfast: DHSSPS, 2013).

142 For a particularly blistering response, see RCN, *Response of the Royal College of Nursing to a DHSSPS Consultation on the Limited Circumstances for a Lawful Termination of Pregnancy in Northern Ireland* (Belfast: RCN, 2013).

143 C. O’Rourke, ‘Advocating Abortion Rights in Northern Ireland: Local and Global Tensions’ (2016) 25 SLS 716. In interview, Simpson likewise noted the reluctance of human rights bodies to get involved, explaining that the NIHRC ‘didn’t become visible until the last five years’, with Amnesty International likewise refusing to engage. Interview, n 32 above.

144 O’Rourke, *ibid*, 730.

145 Department of Health, *Guidance for Health and Social Care Professionals on Termination of Pregnancy in Northern Ireland* (Belfast: DHSSPS, 2016).

146 N. Dugdale, ‘Abortion and Contraception (note for the Minister)’ (DHSS) (26 July 1976) PRONI HSS/13/33/24, further noting that ‘medical practice under the law in NI does not seem widely divergent from the explicit criteria written into the “reformed” law in Gt. Britain’.

to 82;<sup>147</sup> by 2011/12 it was 35;<sup>148</sup> and in 2017/18 just 12 abortions were reported.<sup>149</sup>

Moreover, the acceptance of a far more restrictive understanding of the law was accompanied by a vehement defence of the new status quo. In the 1990s, the Reverend Ian Paisley had been one of many to believe that abortion was already available in 'hard cases', including for serious fetal anomaly, or where a pregnancy resulted from rape.<sup>150</sup> Now, however, Northern Irish politicians would block moves to relax the law to permit termination for these reasons, including even in cases of anomalies so severe as to be incompatible with life.

### **'Bleak House'**

Outside Stormont, public opinion had continued to shift in favour of reform.<sup>151</sup> Opposed every step of the way by an equally vociferous anti-abortion movement, pro-reform campaigners had been active and creative in raising public awareness of the ways in which the restrictive law impacted on women.<sup>152</sup> A particularly prominent role was played by AFC, which worked closely with activists in the Republic as well as a range of civil society organisations across Northern Ireland. AFC highlighted the burdens that the existing law imposed on Northern Irish women, organising 'speak outs' to disrupt the silence around abortion. It used creative artistic interventions to demonstrate the reality of abortion within Northern Ireland, often focusing on the individual stories behind the statistics of women forced to travel or self-induce abortions.<sup>153</sup> It also took every opportunity to inform women about not-for-profit groups that would prescribe and supply abortion pills,<sup>154</sup> with activists sometimes openly inviting prosecution for their actions.<sup>155</sup> While the number of women travelling to access services in England had initially gradually risen across the 1970s and then stabilised during the 1980s and 1990s, numbers would now halve in the space of fifteen years from 1,391 in 2002 to 724 in 2016.<sup>156</sup>

The use of abortion pills transformed the reality of illegal abortion within Northern Ireland, becoming an increasingly open secret. While concerns were expressed regarding the public health risks of buying medicines online,<sup>157</sup> the

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147 Answer to written question of Simon Hamilton (DUP), QWA 2577 (09), NIA Official Report (2 December 2008).

148 House of Commons Women and Equalities Committee, *Abortion law in Northern Ireland* (Eighth Report of Session 2017-19 HC 1584 (2019)).

149 *ibid.*

150 See text to n 60 above.

151 ARK, n 116 above.

152 See generally, E. Campbell and S. Clancy, 'From Grassroots to Government: Arts Engagement Strategies in Abortion Access Activism in Ireland' in MacQuarrie et al, n 129 above, for some of the more creative strategies adopted.

153 *ibid.*

154 *ibid.*, 220; Hervey and Sheldon, n 15 above.

155 A. Gentleman, 'Northern Irish Women Ask to be Prosecuted for Taking Abortion Pills' *The Guardian* 23 May 2016.

156 See n 24 above.

157 For example BBC Newsbeat, *Concern Over Abortion Pills Bought Online* 11 February 2013.

authorities long appeared to be turning a blind eye.<sup>158</sup> However, this came to a sudden end in 2016, with the conviction of a nineteen year old woman for ending an early pregnancy using pills. Imposing a suspended sentence, the judge is reported to have noted his discomfort at being asked to enforce a statute that was 150 years old.<sup>159</sup> In a second case, a young man and woman were released with a caution in light of evidence of the impact on the woman's fragile mental health.<sup>160</sup> A further prosecution was brought against a mother charged with procuring abortion pills to allow her teenage daughter to end a pregnancy conceived during an abusive relationship,<sup>161</sup> with the mother going on to seek judicial review of the decision to prosecute.<sup>162</sup>

These cases appear to have played a powerful role in increasing public awareness of, and empathy with, Northern Irish women experiencing unwanted pregnancies: polling data demonstrates strong and rapidly increasing public disapproval of using criminal abortion laws against them.<sup>163</sup> Public opinion was also undoubtedly influenced by the high profile case of Sarah Ewart, a young woman given a diagnosis of anencephaly following her 20 week scan. Ewart was advised that there was no prospect of her child surviving, that she faced the likelihood of a 'very traumatic' birth, and that she could not have a legal termination within Northern Ireland until such time as 'the baby has passed away'. She thus travelled to England to end her pregnancy, away from the support of family and friends, emerging as a powerful advocate for legal reform on her return.<sup>164</sup> With mainstream human rights organisations now actively engaged on the issue, the NIHRC brought a legal action arguing that the failure to permit abortion in cases of fatal fetal anomaly or pregnancies resulting from rape or incest was incompatible with human rights law. The case was won in the High Court, lost in the Court of Appeal, and then proceeded to the Supreme Court.<sup>165</sup>

These interventions were widely discussed in the press and were clearly influential in shaping public opinion. Simpson notes:

the sea-shift has been incredible. You've even got a supportive press, as well. The big thing is that you've got more politicians speaking out, more doctors speaking out, importantly more women speaking out. We've got human rights organisations finally involved. And when I think about it, that's all happened in a relatively short

158 A Freedom of Information request submitted by Dr Goretti Horgan found that no woman had been convicted under section 58 between 1 April 2007 and 31 March 2015 (on file with the authors).

159 H. McDonald, 'Northern Irish Woman Given Suspended Sentence over Self-Induced Abortion' *The Guardian* 4 April 2016.

160 A. Irwin, 'Man and Woman Cautioned over "Abortion Pills" in Northern Ireland' *Belfast Telegraph* 19 January 2017.

161 H. McDonald, 'Pro-Choice Activists Picket Derry Police Station over Mother's Abortion Trial' *The Guardian* 15 July 2015.

162 bpas, *JR76 Case Report* at <https://www.bpas.org/media/3060/jr76-case-report.pdf>.

163 See text to notes 167–168 below.

164 *BBC News*, 'Woman's Abortion "Ordeal" Considered by NI Health Officials' 9 October 2013 at <http://www.bbc.co.uk/news/uk-northern-ireland-24458241>.

165 *In the Matter of an Application by the Northern Ireland Human Rights Commission for Judicial Review* [2015] NIQB 96; [2017] NICA 42; [2018] UKSC 27. See text to notes 182–183 below on the Supreme Court decision.

space of time . . . Women sum up the situation perfectly. Women's voices, to me, are the strongest lobbyists and campaigners.<sup>166</sup>

The impact on opinion was clear. As noted above, the Northern Ireland Life and Times survey asks respondents whether abortion should be legal in seven separate circumstances. In 2016, in just one of these circumstances – where a woman simply did not want to have children – did a majority (60 per cent) believe that abortion should not be legal. A solid 81 per cent of respondents thought that abortion should be legal where the fetus had a lethal fetal anomaly and would not survive birth; 78 per cent where pregnancy resulted from rape or incest; and 75 per cent where a doctor said there was a greater risk to a woman's health in continuing, as opposed to terminating, a pregnancy (with this wording based on section 1(1)(a) of the Abortion Act, which offers the legal basis for 98 per cent of abortions carried out in England and Wales).<sup>167</sup> Suggesting clear public sympathy for the women who had been prosecuted for use of abortion pills, 71 per cent of respondents agreed both that abortion should be a matter of medical regulation and not criminal law; and that a woman should never go to prison for having an abortion. With the prosecutions discussed above being widely reported within Northern Ireland, just two years later in 2018, the proportions agreeing with these two last claims had grown to 82 per cent and 89 per cent respectively.<sup>168</sup>

While the Northern Irish public was thus overwhelmingly supportive of some legal reform, the process of negotiating even the most modest change within the Northern Ireland Assembly would prove just as tortuous as the attempt to agree guidelines. With official guidance confirming that fetal anomaly was not a ground for abortion within Northern Ireland, the Justice Minister, David Ford (Alliance) wrote to the Health Minister, Edwin Poots (DUP) to suggest that their two Departments might work together to conduct a joint consultation on this issue. No response was forthcoming. The Justice Department therefore proceeded alone to consult on whether abortion should be permitted in cases of fatal fetal anomaly and pregnancy resulting from sexual assault,<sup>169</sup> eventually publishing a recommendation for narrowly drawn reform in just the former case.<sup>170</sup> Ford then twice asked the Executive to agree the introduction of such a measure in the Assembly.<sup>171</sup>

With the Executive making no move to respond to Ford's request, an attempt was then made to bring reform via two amendments introduced by individual

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166 n 32 above.

167 See Department of Health (2019), n 6 above. See ARK, n 116 above; A.M. Gray (2017) Attitudes to Abortion in Northern Ireland 115 *Research Update* ARK at <https://www.ark.ac.uk/publications/updates/update115.pdf>.

168 ARK, n 113 above. This figure includes those who both agreed and strongly agreed.

169 Department of Justice, *The Criminal Law on Abortion. Lethal Foetal Abnormality and Sexual Crime. A Consultation on Amending the Law by the Department of Justice* (Belfast: Department of Justice, 2014).

170 Department of Justice, *The Criminal Law on Abortion. Lethal Foetal Abnormality and Sexual Crime. Response to the Consultation and Policy Proposals* (Belfast: Department of Justice, 2015).

171 This summary of events is taken from David Ford, NIA Official Report Vol 112 (10 February 2016) 111-113.



backbench Alliance MLAs to a criminal justice Bill.<sup>172</sup> The first sought to permit abortion in the presence of a fatal fetal anomaly; the second where pregnancy resulted from rape, incest or serious sexual assault.<sup>173</sup> As is clear from the polling data discussed above, there was very strong public support for these changes, and the Department of Justice had already consulted extensively on them. Nonetheless, the amendments were rejected in favour of a further commission,<sup>174</sup> a move described by an Assembly Member who had tabled one of the amendments as an attempt to ‘kick this proposal into the long grass’.<sup>175</sup> The Commission went on to recommend the introduction of a tightly worded statutory exception to permit abortion in the presence of a fatal fetal anomaly, with a subsequent proposal for reform falling with the collapse of the Assembly and Executive in January 2017.<sup>176</sup> This put an end to any movement towards even such highly limited reform.

In the words of one MLA, the Northern Ireland Executive had suffered from ‘a collective inability to agree legislation, and indeed can barely agree on much more than a consultation’ on the issue of abortion.<sup>177</sup> As another put it, Stormont had become a kind of ‘Bleak House’, with MLAs ‘in the Chancery Courts, waiting day after day after day after day for a decision that never comes.’<sup>178</sup>

## WESTMINSTER (2018-19): ‘HUMAN RIGHTS DELAYED ARE HUMAN RIGHTS DENIED’

### Abortion as an issue of women’s rights

As the period without functioning government in Stormont gradually extended, the attention of pro-reform campaigners turned back to Westminster. While the position of the UK Government remained unchanged, they would now encounter a climate that was otherwise radically more favourable to abortion law reform. Notably, Northern Ireland’s law now became subject to a series of well-publicised indictments for breaching human rights, representing the culmination of many years’ work of pro-reform campaigners and particularly, in recent years, that of AFC and FPANI.

First, in early 2018, the monitoring committee of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

172 Justice Bill (No 2) 2016 (NI).

173 Stewart Dickson and Trevor Lunn; and Anna Lo.

174 *Report of the Working Group on Fatal Fetal Abnormality Healthcare and the Law on Termination of Pregnancy for Fatal Fetal Abnormality: Proposals to the Minister of Health and the Minister of Justice* (11 October 2016), published in April 2018, following delay caused by the continuing absence of devolved institutions.

175 Dickson, NIA Official Report Volume 112 (10 February 2016) 79.

176 Abortion (Fatal Foetal Abnormality) Bill 2016 (NI).

177 McCallister, NIA Official Report Volume 112 (10 February 2016) 109(2). John McCallister was a member of the UUP until early 2013, when he resigned and co-founded the short-lived NI21 party.

178 Nesbitt (UUP), NIA Official Report, Vol 112 Col 91(2) (10 February 2016).

published a damning report, finding that women were subject to grave and systematic rights violations when compelled either to carry a pregnancy to term or to travel outside Northern Ireland for a legal abortion.<sup>179</sup> CEDAW made wide-ranging recommendations including, *inter alia*, the repeal of sections 58 and 59 of the 1861 Act; the adoption of legislation permitting abortion on expanded grounds; and a moratorium on the application of current criminal laws concerning abortion.<sup>180</sup> The report resulted from a joint request for an inquiry under CEDAW's Optional Protocol made by the FPANI, the Northern Ireland Women's European Platform and AFC. In support of their request, they had submitted a volume of evidence that remains the 'most detailed, comprehensive and robustly evidenced documentation of the legal, political and social contexts of access to abortion in Northern Ireland, as well as the material, emotional and political consequences of the restrictive abortion regime'.<sup>181</sup> The CEDAW report offered a powerful vindication of their concerns.

Second, in June 2018, the Supreme Court handed down its judgment in the NIHRC case. In formal legal terms, the NIHRC failed: it was held to lack locus standi to bring the case in its own right and thus was not granted the declaration of incompatibility that had been sought.<sup>182</sup> However, in broader political terms, it was very successful. A majority of the seven judges who heard the case accepted that the then current law in Northern Ireland was incompatible with the right to respect for private and family life under Article 8 of the European Convention on Human Rights, in failing to permit abortion in the presence of a fatal fetal anomaly or where a pregnancy resulted from rape or incest. Two judges also found an incompatibility with Article 3 (the right not to be subjected to inhuman or degrading treatment). Given that the case had been lost on the issue of standing, Sarah Ewart then brought – and eventually would win – an action in her own name.<sup>183</sup>

Third, in April 2019, the House of Commons Women and Equalities Committee published a damning report on Northern Ireland's abortion law.<sup>184</sup> Evidence had been taken in Belfast, Derry and London, with Committee members later to report that hearing women's testimonies had offered the most 'harrowing' experience of their time in parliament.<sup>185</sup> The Committee made a number of recommendations, including the need for better information and

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179 CEDAW, *Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* 2018 CEDAW/C/OP8/GBR/1.

180 *ibid.* The expanded grounds should include, at least threat to the pregnant woman's physical or mental health (without conditionality that this be 'long-term or permanent'); cases of rape and incest; and the presence of a severe fetal impairment.

181 The submission took over a year to prepare and ran to over 100 pages, see O'Rourke, n 143 above, 725; FPANI et al, n 63 above; C. O'Rourke, 'Bridging the Enforcement Gap? Evaluating the Inquiry Procedure of the CEDAW Optional Protocol' (2019) 27 *American University Journal of Gender, Social Policy & the Law* 1.

182 *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27. For criticism of the ruling on standing, see J.M. Rooney, 'Standing and the Northern Ireland Human Rights Commission' (2018) 82 *MLR* 525.

183 *Ewart's Application* [2019] NIQB 88.

184 Women and Equalities Committee, n 148 above.

185 See, for example, Vicky Ford (Con) HC Deb vol 663 col 201 (9 July 2019).

guidance for women and healthcare professionals on certain aspects of the law; for the introduction of measures to improve access to services in the UK for marginalised women and girls; and for the UK Government to legislate as a matter of urgency to allow access to abortion within Northern Ireland in cases of fatal fetal anomaly.<sup>186</sup>

Finally, the campaign for reform had been given a powerful boost by events south of the border. In May 2018, following a bitterly contested campaign, the Republic of Ireland voted by a large majority to repeal the Eighth Amendment of the Irish Constitution and to permit abortion on request within the first twelve weeks of pregnancy (and, thereafter, in tightly limited circumstances). In the British and Irish media, this move was generally lauded as humane, progressive and long overdue; reports were frequently accompanied by images of smiling young people travelling home to vote, emphasising the modernising nature of the reform.<sup>187</sup> A rare critical commentary was offered in the *Spectator*, where Melanie McDonagh decried what she saw as partisan media coverage and concluded that:

The result of this vote is, of course, that the pressure is now on Northern Irish politicians to follow the Republic, an interesting inversion of the old unionist trope that Home Rule is Rome Rule; indeed Mary Lou McDonald, Sinn Féin leader, cheerfully suggested that women may be travelling from north to south to procure abortions. Rarely have I been so grateful for the robust and intransigent character of the DUP; hang on in there Arlene.<sup>188</sup>

Not only had the referendum result cast a powerful spotlight on the equally restrictive law in the North, it also had the further important result of prompting Sinn Féin radically to revise its earlier policy and to join calls for liberalisation of the law within ‘a limited gestational period’.<sup>189</sup> Mary Lou McDonald was now pictured with Michelle O’Neill (Sinn Féin’s leader in Stormont), together holding a sign proclaiming that the ‘north is next’.<sup>190</sup> While the ‘robust and intransigent character’ of the DUP had hitherto been of sustained importance to blocking even the most modest reform of the law, the party would now find itself increasingly politically isolated.

The Irish Referendum also had one further important effect: it highlighted the possibility of achieving reform that, in certain respects at least, went far beyond the current British framework for legal abortion.<sup>191</sup> With the human

186 Women and Equalities Committee, n 148 above, ch 10.

187 See, for example, C. Pleasance, ‘Is Ireland Heading for a Yes Vote?’ *Daily Mail* 25 May 2018.

188 Referring to Arlene Foster, the party leader. M. McDonagh, ‘What Really Happened in Ireland’s Abortion Referendum’ *Spectator Blogs* 26 May 2018 at <https://blogs.spectator.co.uk/2018/05/what-really-happened-in-irelands-abortion-referendum/>.

189 J. McCormack, ‘Sinn Féin Votes to Change Abortion Policy’ *BBC News NI* 16 June 2018 at <https://www.bbc.co.uk/news/uk-northern-ireland-44507054>.

190 *ibid.*

191 In Ireland, abortion is now available on request within the first twelve weeks of pregnancy and in highly restricted circumstances thereafter under the Health (Regulation of Termination of Pregnancy) Act 2018. See F. de Londras ‘“A Hope Raised and then Defeated”? The Continuing Harms of Irish Abortion Law’ (2020) 124 *Feminist Review* 33, for an excellent overview, including a discussion of the failings of the new law.

rights frame now dominant and campaigners elsewhere in the UK fighting for decriminalisation of abortion, any call for the extension of the Abortion Act would now appear long forgotten. While they remained powerfully opposed by anti-abortion groups, Pro-Choice campaigners now coalesced powerfully behind the demand for decriminalisation of abortion in Northern Ireland as the logical next step, adopting the hashtags: #NowforNI, #theNorthIsNow and #theNorthIsNext.

With no end in sight to the suspension of the Northern Ireland Assembly and the chorus of condemnations of human rights abuses becoming louder, it would become increasingly difficult for Westminster to ignore the issue. And while there was no notable softening in the Government's position, parliament had grown more receptive to the desirability of liberal abortion laws, understood within a framework of reproductive health and women's rights. In March 2017, Diana Johnson (Lab) brought the first of two Ten Minute Rule Bills proposing the decriminalisation of abortion in England and Wales. Johnson positioned herself firmly within a long tradition of Labour women's campaigning on this issue, arguing that reform was necessary in order to recognise women 'as the authors of our own lives'.<sup>192</sup> While furiously opposed by Maria Caulfield (Con), the Bill nonetheless passed its first reading by a majority of thirty votes.<sup>193</sup> With no prospect of the restoration of government in Stormont in sight, in October 2018, Johnson introduced a second Bill that included Northern Ireland within its remit. This was again robustly opposed, with Fiona Bruce (Con) devoting most of the ten minutes permitted for her response to criticism of the 'ignoble endeavour to take advantage of a temporary Executive lacuna and to foist legislation unconstitutionally on to the people of Northern Ireland'.<sup>194</sup> The second Johnson Bill nonetheless succeeded by a wider margin than the first.<sup>195</sup> As Ten Minute Rule Bills, neither measure had any realistic prospect of progressing further; they had nonetheless offered an important gauge of parliamentary opinion.

### The Creasy amendments

While in some ways, the political context thus appeared favourable to those seeking abortion law reform in Northern Ireland, in others it did not. Westminster was floundering in the face of Brexit and, following a snap general election in June 2017, the Conservative Government's wafer thin parliamentary majority now depended on a 'confidence and supply' arrangement with the DUP, which had made it clear that it did not intend to compromise its views on abortion as 'the rights of the unborn child trump any political agreement'.<sup>196</sup> Nonetheless, Stormont's suspension and the volatile political climate of a hung parliament

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192 HC Deb vol 623 cols 26–28 13 March 2017.

193 172 to 142. For Caulfield's response, see HC Deb vol 623 cols 28–31 13 March 2017.

194 HC Deb vol 648 col 145 23 October 2018.

195 208 votes to 123.

196 Ian Paisley (DUP), cited in K. Foster, 'Free NHS abortions Offered to Northern Irish Women in Scotland and Wales' *Independent* 5 July 2017.

at Westminster created unusual opportunities, which would be seized with both hands by Stella Creasy (Lab), supported by a parliamentary researcher, Cara Sanquest, who had co-founded the London-Irish Abortion Rights Campaign.<sup>197</sup> In earlier decades, MPs had been highly creative in their attempts to restrict abortion law.<sup>198</sup> Commenting on the particularly frenzied activity in one parliamentary session, the veteran Abortion Law Reform Association campaigner, Dilys Cossey, complained of the “lateral arabesque” school of anti-choice activity’, whereby amendments relating to abortion were ‘tabled to any Bill where there could be some remote connection’.<sup>199</sup> Some thirty years later, the boot was on the other foot.

Creasy’s first success was to secure access to NHS-funded services for Northern Irish residents who travelled to end pregnancies in England.<sup>200</sup> While the Government had vigorously opposed such a demand in the courts,<sup>201</sup> it swiftly capitulated in the face of Creasy’s plan to table an amendment to this effect to the Queen’s Speech. Her proposal had garnered significant support from ‘dozens of Conservative MPs’, including several former ministers, raising the possibility that it would be accepted.<sup>202</sup> Were this to be so, DUP MPs would have found themselves forced either to vote in favour of a legislative programme that included improved abortion access for Northern Irish residents or, alternatively, to vote down the entire programme.<sup>203</sup> The Government thus performed a speedy volte face, agreeing to provide the funding demanded.<sup>204</sup> As a result, the number of Northern Irish residents accessing abortion services in England and Wales, which had declined gradually over the previous decades, now rose by half over the space of two years.<sup>205</sup>

Creasy now built momentum towards substantive legal reform. Having first secured an emergency debate on the issue,<sup>206</sup> she then took advantage of a series of Bills designed to address the absence of a functioning Executive in Stormont, which offered convenient vehicles for other amendments. First, she secured the passage of a measure that required the Government to issue guidance to officials regarding how they should provide and manage public services within Northern Ireland, given the incompatibility with human rights norms of those statutory provisions that criminalised abortion and denied same

197 A London-based branch of the Abortion Rights Campaign in Ireland, which supports Alliance for Choice in Northern Ireland, see <https://londonirisharc.com/>.

198 Davis et al, n 17 above.

199 D. Cossey, ‘The Politics of the Abortion Pill: Breaking Down Barriers’ in Birth Control Trust (ed), *The Abortion Pill (Mifepristone/RU486): Widening the Choice for Women* (London: BCT, 1990) 54.

200 Swiftly followed by Scotland and Wales: Foster, n 196 above.

201 *R (on the application of A and B) v Secretary of State for Health* [2017] UKSC 41.

202 J. Elgot and H. McDonald, ‘Northern Irish Women Win Access to Free Abortions as May Averts Rebellion’ *The Guardian* 29 June 2017.

203 ‘Move on Free NHS abortions for Northern Ireland Women is Hailed and Criticised in Equal Measure’ *Belfast Telegraph* 30 June 2017.

204 Written Statement, HC Deb vol 630 HCWS192 23 October 2017.

205 Rising from 724 in 2016 to 1053 in 2018, see Department of Health (2019), n 6 above.

206 HC Deb vol 642 cols 205–257 5 June 2018.

sex marriage rights.<sup>207</sup> The resulting guidance was disappointing: it stated merely that Northern Ireland departments should continue to have regard to all legal obligations; and that it was for the devolved administration both to legislate on, and to ensure compliance with, human rights obligations in relation to devolved matters.<sup>208</sup> Creasy criticised this latter claim as factually wrong, with human rights a matter of reserved competence and devolution ‘no excuse for denying women in Northern Ireland their human rights.’<sup>209</sup>

Next, Creasy tabled an amendment that would have prohibited UK taxpayers’ money ‘being used to perpetuate . . . human rights abuses by funding prosecutions and defending claims that are having to be brought by Northern Irish citizens to uphold their rights’.<sup>210</sup> While ultimately she withdrew the amendment without forcing a vote, she again advised the Government that until it recognised its responsibility for the human rights of Northern Irish women, ‘this House will take every single opportunity to speak up for the Sarah Ewarts’.<sup>211</sup>

Finally and most importantly, Creasy was one of a number of MPs to make use of the vehicle offered by a narrowly framed process Bill, intended to extend the period available for negotiating the re-establishment of an Executive at Stormont. Other amendments were tabled to extend same sex marriage and civil partnership in Northern Ireland, and to establish a scheme to compensate those who suffered injuries as a result of the Troubles.<sup>212</sup> Creasy’s amendment was enormously ambitious: it required the UK Government to implement the wide-ranging recommendations of the CEDAW. With abortion law falling within the legislative competence of Stormont, Creasy claimed her amendment to be carefully framed so as to respect devolution: it would come into effect only if the Northern Ireland Assembly was still not sitting by 21 October and was thus itself unable to introduce legislation. In any case, she noted that Westminster retained responsibility for the human rights of all UK citizens, and that ‘human rights delayed are human rights denied’.<sup>213</sup> It was now time to end five decades of ‘turning a blind eye’.<sup>214</sup>

The tabling of any of these amendments to a narrowly focused process bill was controversial and made doubly so given the sensitive nature of the issues concerned. Northern Irish constituencies had returned 18 MPs to Westminster, only 11 of whom had taken up their seats: one independent, and ten from the DUP.<sup>215</sup> The DUP MPs were vocal in opposing the amendment, with debate focused heavily on the question of Westminster’s authority

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207 Northern Ireland (Executive Formation and Exercise of Functions) Act 2018, s 4, also requiring the Government to report on how it planned to address the impact of the absence of Northern Ireland Ministers on its human rights obligations. The amendment passed 207 to 117.

208 Written statement, HC Deb vol 653 col 40ws 30 January 2019.

209 R. Merrick, ‘Northern Ireland Secretary Accused of Misleading MPs after Refusing to Act on Abortion and Same-Sex Marriage Bans’ *Independent* 30 January 2019.

210 Northern Ireland Budget (Anticipation and Adjustments) (No 2) Bill (2019); HC Deb vol 655 col 911 5 March 2019.

211 HC Deb vol 655 col 926 5 March 2019.

212 ss 8, 9 and 10.

213 HC Deb vol 663 col 180 9 July 2019.

214 Smyth (Lab), HC Deb vol 663 col 187 9 July 2019.

215 Seven Sinn Féin MPs do not take up their seats.

to act on a devolved issue;<sup>216</sup> and the possibility that the amendments might ‘jeopardise fragile talks’ regarding the restoration of the Northern Ireland Executive.<sup>217</sup> Others argued that too much authority was being given to CEDAW (a ‘minor sub-committee of the UN’ with ‘no judicial authority’) and recalled that the Supreme Court was yet to issue a declaration of incompatibility.<sup>218</sup> Further, it was noted that the effect of the Creasy amendment – with CEDAW’s recommendations including the repeal of sections 58 and 59 – went far beyond either the *obiter* findings of human rights breaches made by the Supreme Court or the recommendations of the Women and Equalities Committee.<sup>219</sup> Further, the Bill was not the best vehicle for these changes,<sup>220</sup> with Parliament asked to legislate in a ‘hop, skip, jump and a prayer manner’, on the basis of an amendment that had received none of the sustained scrutiny normally accorded to such significant statutory reform.<sup>221</sup>

The Government agreed that the amendment suffered from ‘technical’ problems.<sup>222</sup> Indeed, on its initial drafting, it was unclear whether it would decriminalise abortion just in Northern Ireland or also in England and Wales;<sup>223</sup> and whether it would apply only to consensual abortions or also those provoked as a result of assault or the surreptitious administration of pills.<sup>224</sup> Moreover, if sections 58 and 59 of the Offences Against the Person Act (1861) were repealed, then the criminal prohibition of post-viability abortion would rely upon the separate offence of ‘child destruction’ and it was unclear whether this would create an upper time limit for abortion of 24 or 28 weeks, with parliament having previously strongly rejected the higher gestational limit.<sup>225</sup>

However, any concerns – technical or otherwise – were swept aside in the face of Parliament’s apparent overwhelming support for the issue of principle: that abortion was an issue of human rights and an appropriate focus of its attention in the absence of a sitting Northern Ireland Assembly. The Creasy amendment passed by an emphatic majority of 332 to 99 votes. The independent Northern Irish MP, Sylvia Hermon, joined DUP MPs in voting against it, with two DUP MPs acting as tellers for the noes. As such, all MPs representing Northern Irish constituencies who voted on the amendment, voted against it. The UK Government maintained to the end its position that abortion law

216 For example Wilson (DUP), HC Deb vol 663 col 190 9 July 2019.

217 For example Hoare (Con), Chair of Northern Ireland Affairs Committee, HC Deb vol 663 col 190 9 July 2019.

218 Bruce (Con), HC Deb vol 663 col 185 9 July 2019.

219 Miller (Con), HC Deb vol 663 col 172 9 July 2019.

220 Merriman (Con), HC Deb vol 663 col 208 and 199 9 July 2019.

221 Paisley (DUP), HC Deb vol 663 col 205 9 July 2019.

222 Penrose (Con), NIO Minister, HC Deb vol 663 col 222 9 July 2019 noting ‘real and genuine concerns about the technical effectiveness’ of the clause.

223 Ford (Con), HC Deb vol 663 col 202 9 July 2019.

224 *ibid.*

225 For example Paisley (DUP), HC Deb vol 663 col 204 9 July 2019. The ambiguity stems from the wording of the Criminal Justice Act 1945 which prohibits the destruction of a child ‘capable of being born alive’: while viability is now generally accepted to be achieved at around 24 weeks, this anachronistic law contains a rebuttable presumption that it is achieved at 28 weeks. A similarly worded provision in English law was likewise a matter of concern until a limit of 24 weeks was enshrined on the face of the Abortion Act in 1990, see further Davis et al, n 17 above.

reform was a matter for Stormont, with many Conservative MPs joining the Prime Minister and Northern Ireland Secretary in abstaining. Those Conservatives who did vote proved relatively evenly split.<sup>226</sup> However, the response from all other political parties was overwhelmingly in favour of reform: all ten Liberal Democrat MPs who voted were in favour of the amendment, as were 220 of 225 Labour MPs, and 20 of 22 SNP MPs.<sup>227</sup> The amendment, lightly revised to address some of the technical issues identified by the Government, was likewise accepted by a strong majority – of almost five to one – in the House of Lords.<sup>228</sup>

With no executive re-established in Stormont by 21 October 2019, the Creasy amendment came into effect. Close to the deadline, it was suggested that the Conservative Government was attempting to buy the support of the DUP for Boris Johnson's Brexit withdrawal deal, with the offer of returning responsibility for the legal change to Stormont. If true, these rumoured attempts to use 'women as "bargaining chips"' were unsuccessful.<sup>229</sup> In a final 'high stakes move', the DUP attempted to recall the Assembly for the first time since 2017 to pass their Defence of the Unborn Child Bill (2019), which sought to repeal the Creasy amendment.<sup>230</sup> However, the Speaker, himself a DUP MLA, rejected the request to suspend standing orders so that the Bill might be debated. Sinn Féin boycotted the meeting, saying that they welcomed 'the decriminalisation of women'. The DUP then followed the SDLP in walking out.<sup>231</sup>

The Creasy amendment obliged the UK Government to act 'expeditiously, recognising the importance of doing so for protecting the human rights of women in Northern Ireland'.<sup>232</sup> Sections 58 and 59 of the Offences Against the Person Act were repealed for Northern Ireland. Any ongoing prosecutions – including that of the mother who had sourced abortion pills online for her fifteen-year old daughter<sup>233</sup> – have been dismissed. For an interim period, while local services were developed, the UK Government agreed to fund travel, accommodation and the cost of the procedure for all Northern Ireland

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226 72 ayes; 84 noes.

227 The one Green MP, and four each from Plaid Cymru and the Independent Group also supported the amendment, with no MPs from those parties opposing it. For a breakdown of voting by party, see: [https://hansard.parliament.uk/Commons/2019-07-09/division/2E44EFA1-11E7-45FF-9660-C24C4FE49759/NorthernIreland\(ExecutiveFormation\)Bill?outputType=Party](https://hansard.parliament.uk/Commons/2019-07-09/division/2E44EFA1-11E7-45FF-9660-C24C4FE49759/NorthernIreland(ExecutiveFormation)Bill?outputType=Party).

228 182 to 37.

229 K. Proctor and H. Stewart, 'Abortion Rights used to get DUP to Back Brexit Deal, says Stella Creasy' *The Guardian* 16 October 2019.

230 G. Gordon, 'High Drama another Possible Blow to Stormont's Battered Image' *BBC News* 21 October 2019 at <https://www.bbc.co.uk/news/live/uk-northern-ireland-50088547>. A photograph of the Bill was tweeted by the BBC NI correspondent and can be read at [https://twitter.com/markdevenport/status/1186277255397478401?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1186277255397478401&ref\\_url=https%3A%2F%2Fwww.bbc.co.uk%2Fnews%2Ffive%2Fuk-northern-ireland-50088547](https://twitter.com/markdevenport/status/1186277255397478401?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1186277255397478401&ref_url=https%3A%2F%2Fwww.bbc.co.uk%2Fnews%2Ffive%2Fuk-northern-ireland-50088547).

231 *ibid*.

232 Northern Ireland (Executive Formation etc) Act 2019, s 9.

233 'Prosecution of Woman who Bought Abortion Pills for Daughter Dropped' *Irish Legal Times* 23 October 2019.



residents who access abortion services in England.<sup>234</sup> Following a six-week consultation,<sup>235</sup> Regulations came into effect on 25 March 2020.<sup>236</sup>

The Regulations provide for abortion on request where a ‘registered medical professional’ (a nurse, midwife or doctor) believes in good faith that the pregnancy has not exceeded 12 weeks.<sup>237</sup> Thereafter, abortion is permitted on grounds consistent with those that apply elsewhere in the UK: that two medical professionals are of the good faith opinion that continuance of pregnancy would involve ‘risk of injury to the physical or mental health of the pregnant woman which is greater than if the pregnancy were terminated’ (up to 24 weeks<sup>238</sup>); or that there is a risk to her life, or a risk of grave permanent injury to her physical or mental health, or a substantial risk of severe fetal impairment or fatal fetal abnormality (without gestational limit).<sup>239</sup> In emergency situations, a termination may be performed with no need for a second medical opinion or prior certification.<sup>240</sup> There is a right of conscientious objection.<sup>241</sup> Provision is made for abortion services to be offered in primary care, as well as hospital settings, and for the second course of medication used in an early medical abortion to be taken in the woman’s own home.<sup>242</sup> There is no provision for the creation of exclusion (or safe) zones around clinics.

The Northern Irish Office claims that the Regulations align Northern Irish law with the rest of the UK.<sup>243</sup> In some respects this is true, while in others the Regulations are clearly more liberal. A woman can no longer be prosecuted for anything done in relation to her own pregnancy; and infractions committed by others are liable to result in a fine, rather than the onerous criminal sanctions foreseen elsewhere in the UK, with additional measures introduced to protect medical professionals from vexatious prosecutions.<sup>244</sup> As in the Republic of Ireland, abortion is available on request in early pregnancy.<sup>245</sup> Further, in permitting abortions to be certified and performed by a wider range of health professionals, including in primary care settings, the Regulations recognise the need for an ‘approach which reflects modern practice’.<sup>246</sup>

234 Northern Ireland Office, *UK Government Guidance for Healthcare Professionals in Northern Ireland on Abortion Law and Terminations of Pregnancy in the Period 22 October 2019 to 31 March 2020 in relation to the Northern Ireland (Executive Formation Etc) Act 2019* (London: NIO, 2019).

235 Northern Ireland Office, *A New Legal Framework for Abortion Services in Northern Ireland* (London: NIO, 2019). See *Explanatory Memorandum to the Abortion (Northern Ireland) Regulations 2020*, para 10, for a brief summary of responses.

236 The Abortion (Northern Ireland) Regulations 2020 (SI 2020 No. 345).

237 Regulation 3.

238 Regulation 4. As in the Abortion Act, here they may take account of the woman’s ‘actual or reasonably foreseeable circumstances’ under Regulation 4(2).

239 Regulations 6 and 7.

240 Regulation 5.

241 Regulation 12, to apply to any treatment authorised by the Regulations, other than where offered in cases of immediate necessity.

242 Regulation 8.

243 Quoted in Jayne McCormack ‘Abortion: Northern Ireland Opens New Chapter but Questions Remain’ *BBC News* (31 March 2020), <https://www.bbc.co.uk/news/uk-northern-ireland-politics-52091046>; Explanatory Memorandum, n 235 above, [7.12, 7.16].

244 Regulations 11 and 13 respectively. Any proceedings under these provisions can be brought only with the consent of the Director of Public Prosecutions for Northern Ireland.

245 See n 191 above.

246 Explanatory Memorandum, n 235 above, [7.18].

While the re-established Northern Ireland Government could seek to introduce new restrictive legislation regarding abortion (within the limits set by human rights law), it would be unlikely to secure the necessary cross-party agreement for such a move, with Sinn Fein having expressed support for the Regulations.<sup>247</sup> Where it enjoys greater influence is in the manner and timing with which services are rolled out, with its powers cast into immediate and sharp relief in light of the Covid-19 pandemic. After a period of significant confusion, during which it performed two complete U-turns, the UK Department of Health has announced that it will follow the recommendation of the RCOG and permit telemedical abortion services (with an online consultation and abortion pills sent by post) to be offered to women in England during the period in which travel restrictions apply, with Wales and Scotland adopting the same position.<sup>248</sup> At the time of writing (15 April 2020), the Northern Irish Government has shown no intention of making use of its powers under the Regulations to follow suit, suggesting rather that the pandemic would require reconsideration of how abortion services could be rolled out, and that, in the meantime, women ‘could continue to use the services offered in England’.<sup>249</sup> BPAS responded by dusting off the only recently moth-balled hashtag #NowForNI and announcing its intention to launch a free telemedical abortion service for women in Northern Ireland. Meanwhile, a number of Northern Ireland NHS Trusts were reported to have begun to offer early medical abortion services, only to be temporarily instructed to stop by the Northern Ireland Department of Health, which swiftly reversed its position in light of legal advice. Issues relating to the commissioning of services are still to be resolved at the time of writing.<sup>250</sup> While the reforms described in this paper represent a significant victory for campaigners, these events make it clear that they do not mark the end of struggle over abortion within Northern Ireland.

247 Rebecca Black ‘NI’s First and Deputy First Ministers Divided over New Abortion Regulations’ *Belfast Telegraph* (25 March 2020) <https://www.belfasttelegraph.co.uk/news/northern-ireland/nis-first-and-deputy-first-ministers-divided-over-new-abortion-regulations-39075971.html>.

248 See Jim Connolly ‘Coronavirus: Home Abortions Approved during Outbreak’ *BBC News* (31 March 2020); <https://www.bbc.co.uk/news/newsbeat-52092131>. The extent of confusion is illustrated by the fact that until lunchtime on 31 March (after media announcements had started to appear), the Department of Health’s own website still read ‘The information on this page has been removed because it was published in error. This was published in error. There will be no changes to abortion regulations’ notwithstanding the clear intention to the contrary in the website address, see <https://www.gov.uk/government/publications/temporary-approval-of-home-use-for-both-stages-of-early-medical-abortion> (last visited 31 March 2020). See further, RCOG, *Coronavirus (COVID-19). Infection and Abortion Care: Information for Healthcare Professionals* (21 March 2020), <https://www.rcog.org.uk/globalassets/documents/guidelines/2020-03-25-covid19-abortion.pdf>.

249 Quoted in Connolly, *ibid*.

250 BPAS, ‘We Did It! But #NowForNI’, e-mail sent to supporters (30 March 2020), on file with the authors. See BPAS press release (9 April 2020) for the announcement of its telemedical abortion service, <https://www.bpas.org/about-our-charity/press-office/press-releases/bpas-launches-emergency-abortion-pills-by-post-for-women-in-northern-ireland-amid-shameful-political-gameplay-with-women-s-health-during-the-covid-19-pandemic/>. On the Northern Ireland Department of Health’s u-turn, see Henry McDonald, ‘Northern Ireland Confirms Abortions Can Now be Carried Out’ *Guardian* (9 April 2020).

## CONCLUSIONS

The reform described in this paper represents a radical rupture with the past but, in light of the history set out above, it is also one that appears anything but sudden. Rather, it offers the culmination of over four decades of sustained struggle by pro-reform campaigners, opposed every step of the way by a highly active, well-organised and vociferous anti-abortion movement. Across those decades, campaigners have cast a sustained light on the law's harsh effects, encouraging women to tell their stories, and playing an important role in informing public opinion in the region. They have worked within official channels, lobbying politicians, giving evidence to enquiries, bringing or supporting legal cases, and inviting the influential intervention of CEDAW. They have also worked outside these channels, with a particular focus in recent years on spreading awareness of, and supporting the safe use of, abortion pills.

Over the same period, successive UK governments have charted a course of studied inaction, which has been apparently unaffected by political party, the personal views of relevant ministers, or the locus of legislative competence for abortion law and policy. While long aware that public opinion had moved in favour of some reform and that Northern Ireland's harsh and archaic law was in breach of human rights norms, women's reproductive rights have been treated, at best, as of secondary importance to other political considerations. Moreover, it has been rumoured on several occasions – in 1998, 2008 and 2019 – that they were offered as trading chips to achieve unrelated political ends. And while Westminster has maintained that abortion law reform is a matter for Stormont, the latter has offered a 'Bleak House', which has been unwilling or incapable of agreeing even the most limited reform.

It remains to be seen whether this move to liberalising reform will prove 'too much' and 'too indigestible' for the Northern Irish people, dissolve the invisible 'glue' that holds together communities, and derail the peace process. However, it appears highly unlikely: with the Regulations published during a period of heightened national concern regarding the coronavirus pandemic, they received little media attention. Further, the belief that the public are united in opposition to liberalisation of abortion law seems to be more grounded in the assumption that Northern Ireland is a 'unique wee place' apart,<sup>251</sup> than hard polling data. Indeed, while vehemently opposed by some within the region,<sup>252</sup> the proposed changes to the law are arguably better aligned with public opinion than was the previous status quo. While polling data shows that the majority of people in Northern Ireland do not support permitting abortion purely on the basis that a woman does not wish to continue a pregnancy, it also demonstrates that the majority do support regulating abortion as a medical rather than a criminal matter, and permitting access on a wide range of other grounds.<sup>253</sup> Nor has taking this issue out of the hands of the Northern Ireland Assembly

251 Anonymous activist interviewed by Thomson, n 12 above, 98.

252 '20,000 people bring Belfast to a standstill for the "March for Their Lives"' *Precious Life* at <https://www.preciouslife.com/news/756/20000-people-bring-belfast-to-a-standstill-for-the-march-for-their-lives/>.

253 ARK (2018), text to n 113 above.

served to derail progress towards the re-establishment of devolved government. After a three year hiatus, power-sharing was restored in January 2020. Further, any hypothetical threat that abortion rights might pose to the peace process must surely pale in comparison to the very real risks posed by Brexit and the possible recreation of a hard border with the Republic of Ireland.

Finally, the UK parliament's overwhelming support for the repeal of criminal prohibitions against abortion in Northern Ireland necessarily also raises the question of decriminalisation in the rest of the UK.<sup>254</sup> The UK Government has made it clear that it has no plans to act in this regard.<sup>255</sup> However, it may not be too long before those in favour of reform elsewhere in the UK identify a suitable legislative vehicle through which to force further change. Jackie Doyle-Price (Con) recently went further than had previous health ministers in recognising the problems caused by the statutory framework established by the aging Abortion Act 1967 and, speaking in a personal capacity, expressed the hope that 'in future we can have sensible discussions about how we might modernise it'.<sup>256</sup>

In seeking further liberalising reform, campaigners elsewhere in the UK will of course face the same considerable parliamentary hurdles as those who for many decades sought further restriction of abortion law: it is nearly impossible to secure controversial reform by way of private members' bills without government support and that has proved infrequently forthcoming.<sup>257</sup> Nonetheless, the decades' long struggle of Northern Irish campaigners has demonstrated that sustained campaigning may eventually achieve success in unforeseen ways, with hurdles that once seemed insurmountable quickly turning to dust.

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254 Sharon Hodgson, Labour's spokesperson for health, observed that a woman who has an abortion without first seeking the permission of two doctors could be prosecuted and face up to life imprisonment elsewhere in the UK, but not now in Northern Ireland; see further remarks by Stella Creasy and Heidi Allen, all HC Deb vol 663 cols 1225, 1226, 1227 respectively 23 July 2019.

255 HC Deb vol 663 col 1227 23 July 2019.

256 *ibid.*

257 R.B. Taylor and A.L.M. Wilson, 'UK Abortion Law: Reform Proposals, Private Members' Bills, Devolution and the Role of the Courts' (2019) 82 MLR 71.