



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

### **Justice (NI) Bill**

1. The Northern Ireland Human Rights Commission ('the Commission'), pursuant to Section 69(4) of the Northern Ireland Act 1998 is obliged to advise the Assembly whether a Bill is compatible with human rights. In accordance with this function the following statutory advice is submitted to the Committee for Justice ('the Committee').

2. The Commission bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. Each of the international treaties is potentially relevant to the development of domestic laws and policies that seek to implement the State's obligations. In the context of this advice, the Commission relies in particular on,

- European Convention on Human Rights (ECHR), as incorporated into domestic law by the Human Rights Act 1998;
- The United Nations Convention on the Rights of the Child, 1989 (UNCRC);
- The International Covenant on Economic, Social and Cultural Rights (ICESCR) ;
- The United Nations Convention on the Rights of Disabled People, 2009 (UNCRPD)

3. The NI Executive is subject to the obligations contained within these international treaties by virtue of the United Kingdom's (UK) ratification. In addition, Section 26(1) of the Northern Ireland Act 1998 provides that *"If the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations... he may by order direct that the proposed action shall not be taken."* Further, Section 26(2) states that *"the Secretary of State may, by order, direct that an action be taken on a matter within the legislative competency of the Assembly as required for the purpose of giving effect to international obligations. Such action can include the introduction of a Bill into the Assembly."*

4. In addition to these treaty standards there exists a body of 'soft law' developed by the human rights bodies of the United Nations. These declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context include;

- *The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985* ('Basic Principles')

5. The NIHRC further recalls that Section 24 (1) of the Northern Ireland Act 1998 provides that *"A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act – (a) is incompatible with any of the Convention [ECHR] rights"*.

#### 1. Declaration of Compatibility

6. The Commission notes that paragraph 100 of the Explanatory and Financial Memorandum states that *"All proposals have been screened and are considered to be Convention compliant"*. The Commission recalls that, acting on advice from the the Joint Committee of Human Rights, the Westminster Government has issued guidance to departments encouraging fuller disclosure of views about Convention compatibility in the Explanatory Notes which accompany a Bill.<sup>1</sup>

**The Commission advises the Committee to ask the Department to share its legal analysis upon which its statement of compatibility is based.**

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<sup>1</sup> Murray Hunt 'Reshaping Constitutionalism' in Judges, Transition, and Human Rights 2007 pg 473

## 2. Prosecutorial Fines Clauses 17 – 27

7. The Commission notes that clauses 17 – 27 of the Bill will make provision for prosecutorial fines. The Commission recalls that the Treaty bodies of the United Nations have continually recommended that the UK address the over use of imprisonment for low level offenders, the UN Committee against Torture has urged the UK Government:

*"to strengthen its efforts and set concrete targets to reduce the high level of imprisonment and overcrowding in places of detention, in particular through the wider use of non-custodial measures as an alternative to imprisonment..."*<sup>2</sup>

**In light of the UNCAT Committee's recommendation, the Commission advises that the Committee enquire as to the impact the provision of prosecutorial fines will have upon the number of persons imprisoned in Northern Ireland annually. The Commission advises the Committee to enquire how this impact will be monitored, monitoring should include the number of occasions upon which a non-payment has occurred and enforcement action has been taken.**

8. With respect to the procedure set out in the Bill, the Commission notes that under clause 19 in determining the amount of a prosecutorial fine a Public Prosecutor must have regard to the circumstances of the offence, but not to the circumstances of an offender and their ability or inability to pay. The Commission notes that under ICESCR, Article 11 the state must guarantee to everyone an adequate standard of living.

**The Commission advises the Committee to consider if clause 45 should be amended to provide that a Public Prosecutor must have regard to the circumstances of an offender.**

## 3. Victims and Witnesses Clauses 28 – 35

9. The Commission notes that clause 28 requires the Department to issue a Victims Charter and that clause 30 requires the Department to issue a Witnesses Charter.

10. The Commission submitted a detailed response to the Department of Justice consultation on Improving Access to Justice for Victims and

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<sup>2</sup> Committee Against Torture 'Concluding observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session (6-31 May 2013) Para 30

Witnesses of Crime.<sup>3</sup> In its response the Commission advised that the Department ensure that any definition of victim in a Victim's Charter should fully reflect international human rights standards.

11. The UN Basic Principles define victims as:

*"persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member states, including those laws proscribing criminal abuse of power."*<sup>4</sup>

12. The UN Basic Principles further state:

*"A person may be considered a victim... regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim."* [the definition of victims] *"includes, where appropriate, the immediate family or dependants of the direct victim .."*<sup>5</sup>

**The Commission advises that the broad definition of victim provided at clause 29 is compliant with the UN Basic Principles.**

#### 4. Criminal Records Clauses 36 – 43

13. The Commission notes that clauses 36 to 43 of the Bill will make provision for reform of the law governing criminal records. The Commission recalls that the recording and communication of criminal record data amounts to an interference with the right to private and family life, ECHR Article 8. The ECHR, Article 8 states:

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

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

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<sup>3</sup> NIHRC 'Response To The Public Consultation on Making A Difference: Improving Access to Justice For Victims and Witnesses of Crime' 2013 available at: <http://www.nihrc.org/uploads/documents/advice-to-government/2013/NIHRC%20Response%20on%20the%20Victims%20Strategy%201%202%202013-Final.pdf>

<sup>4</sup> Annex to Basic Principles: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

<sup>5</sup> Ibid

the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”.

14. The case of M.M v UK concerned the indefinite retention and disclosure of data regarding a police caution for child abduction received by the applicant following a family dispute in 2000.<sup>6</sup> The applicant lived in Northern Ireland. In light of various shortcomings in the legal framework in place, the ECt.HR found that there were insufficient safeguards in the system for retention and disclosure of criminal record data to ensure that data relating to the applicant’s private life had not been, and would not be, disclosed in violation of her right to respect for private life.<sup>7</sup>

15. With respect to the statutory framework in Northern Ireland the ECt.HR stated:

*“No distinction is made based on the seriousness or the circumstances of the offence, the time which has elapsed since the offence was committed and whether the caution is spent. In short, there appears to be no scope for the exercise of any discretion in the disclosure exercise. Nor, as a consequence of the mandatory nature of the disclosure, is there any provision for the making of prior representations by the data subject to prevent the data being disclosed either generally or in a specific case. The applicable legislation does not allow for any assessment at any stage in the disclosure process of the relevance of conviction or caution data held in central records to the employment sought, or of the extent to which the data subject may be perceived as continuing to pose a risk such that the disclosure of the data to the employer is justified.”<sup>8</sup>*

16. The Commission notes that the Northern Ireland Executive is required to introduce general measures to ensure compliance with the judgement. An action plan has been submitted to the Committee of Ministers setting out measures to be taken to ensure compliance with the ECt.HR judgement in M.M.<sup>9</sup>

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<sup>6</sup> (Application no. 24029/07) 13 November 2012

<sup>7</sup> See Council of Europe Case descriptor available at:

[http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases\\_en.asp?CaseTitleOrNumber=&StateCode=UK.&SectionCode=](http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=&StateCode=UK.&SectionCode=)

<sup>8</sup> M.M v UK (Application no. 24029/07) 13 November 2012 Para 204

<sup>9</sup> Council of Europe DH-DD(2014) 770 13/06/2014

17. To address the need for some distinction between criminal records the Department of Justice introduced a filtering scheme for criminal record disclosures, this measure was approved by the Assembly on 24 March 2014.<sup>10</sup> The Commission further notes that the relevancy test which is referred to when determining details for inclusion in an enhanced criminal record disclosure is to be amended, to require a chief officer to have a reasonable belief in the relevancy of the information.<sup>11</sup> This provision increases scope for discretion. In addition the Commission notes that individuals will be able to apply to the Independent Monitor to question the relevancy of information to be provided in an enhanced criminal record certificate.

**The Commission advises the Committee to ask the Department to provide details on how an individual will apply to the Independent Monitor. In addition the Commission advises the Committee to ask the Department if the proposals are considered sufficient to ensure full compliance with M.M v UK.**

#### 5. Live Links Clauses 44 – 49

18. The Commission notes that the Bill at clauses 44 - 49 will make provision for the enhanced use of live links. With regard to the use of live links the ECt.HR has found:

*"that this form of participation in proceedings is not, as such, incompatible with the notion of a fair and public hearing, but it must be ensured that the applicant is able to follow the proceedings and to be heard without technical impediments, and that effective and confidential communication with a lawyer is provided for."<sup>12</sup>*

19. The use of live links must not impact on the ability of a defendant to effectively participate in proceedings. The ECt.HR has elaborated on the essential elements of effective participation in the case of SC v UK, in which it stated:

*"Effective participation" in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter,*

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<sup>10</sup> See DoJNI Press Release <http://www.northernireland.gov.uk/news-doj-270314-ford-introduces-filtering>

<sup>11</sup> Amendments to section 113B(4) Police Act 1997

<sup>12</sup> Sakhnovskiy v Russia (App. No. 21272/03) 2 November 2010 para 98

*lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.*"<sup>13</sup>

**The Commission advises that the Committee seek an assurance from the Department that the extended use of live links will not impede upon the ability of an accused to effectively participate in proceedings. The Committee should also enquire how the Department will in practical terms ensure that an accused is able to effectively participate. Furthermore the Committee should enquire how the confidentiality of communications is to be assured.**

#### *5.1 First Remands*

20. The Commission notes the proposal that the law allow for an individual appearing before a court for a first remand hearing to appear by live link during the weekend or on bank holidays.<sup>14</sup>

21. The ECHR, Article 5(3) states:

*"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."*

22. In the case of *Ocalan v Turkey* the ECt.HR said that the purpose of Article 5(3) is *"to ensure that arrested persons are physically brought before a judicial authority promptly"*.<sup>15</sup>

23. The Commission notes that remand hearings held under this provision may take place during the weekend or on public holidays. During such times it may be difficult for an individual to seek legal advice relating to bail or to prepare properly for the hearing to enable their effective participation.

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<sup>13</sup> S.C v UK (App. No. 60958/00) 10/11/2004 para 29

<sup>14</sup> Clause 45

<sup>15</sup> Para 103

**The Commission advises that the Committee ask the Department to set out what additional provision has been made to ensure that individuals participating in a first remand hearing by way of a live link are able to seek and obtain legal advice and representation to enable their effective participation.**

24. With respect to the wording of section 45, the Commission notes that the court may not grant a live link hearing unless it is satisfied that it is not "*contrary to the interests of justice*". The Explanatory Memorandum does not contain examples of scenarios in which a live link direction will be considered to not be in the interests of justice.

25. In addition whilst the court may adjourn a live link hearing when it appears the individual "*is not able to see and hear the court and to be seen and heard by it ...*", there is no obligation to ensure the individual is able to effectively participate in the proceedings.<sup>16</sup>

**The Commission advises that the wording of clause 45 be amended to ensure that a live link should never be authorised or continue to be authorised where its use undermines the effective participation of an accused in a hearing.**

## 6. Violent Offenders Prevention Orders

26. The Commission notes that clauses 50 – 71 propose to make provision for violent offences prevention orders. The Commission notes that in 2010 the Criminal Justice Inspectorate recommended the introduction of Domestic Violence Protection Orders.<sup>17</sup> DVPOs allow the police to prevent the suspected perpetrator from entering the victim's residence for a set period of time. In a follow up review in 2013 the Department of Justice stated they were awaiting the outcome of a pilot of DVPOs in England & Wales.<sup>18</sup> The Commission notes that following a successful pilot DVPOs are now available throughout England & Wales.<sup>19</sup> Furthermore the Commission notes that similar systems have been found to be successful

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<sup>16</sup> Clause 45 (9)

<sup>17</sup> CJINI 'Domestic Violence and Abuse: A thematic inspection of the handling of domestic violence and abuse cases by the criminal justice system in Northern Ireland' December 2010 Recommendation 2

<sup>18</sup> CJINI 'Domestic Violence and Abuse - A follow up review' 29/10/13 pg 9

<sup>19</sup> The Rt Hon Theresa May MP Written statement to Parliament 'Domestic violence protection orders and domestic violence disclosure scheme' 25 November 2013



in many EU states.<sup>20</sup> However, no provision is included in the current Bill for the introduction of DVPOs.

**The Commission advises the Committee to ask the Department to explain why legislative provision for Domestic Violence Prevention Orders has not been included within the Bill.**

7. Early guilty pleas

27. The Commission notes proposals relating to early guilty pleas at clauses 77 and 78. The ECt.HR has noted:

*"that it may be considered as a common feature of European criminal justice systems for an accused to obtain the lessening of charges or receive a reduction of his or her sentence in exchange for a guilty or nolo contendere plea in advance of trial..."<sup>21</sup>*

28. The ECt.HR has further ruled that by pleading guilty a defendant is waiving his/her right to have the criminal case against them examined on the merits, such a decision should only be taken when fully aware of the facts and the legal consequences and should be entered in a genuinely voluntary manner.<sup>22</sup>

29. The Commission notes that under clause 78 a solicitor is to advise his or her client on the likely effect on any sentence that might be passed on pleading guilty at the earliest reasonable opportunity. The term "*earliest reasonable opportunity*" is not defined in the Bill or in the explanatory memorandum. It is unclear if a definition will be included within the required regulations.

**The Commission advises that the "earliest reasonable opportunity" should occur only when a defendant is fully aware of the facts of the case and the legal consequences of his or her decision.**

8. Youth Justice

30. On publication of the Youth Justice Review the Commission advised the Minister of Justice that the Justice (NI) Act 2004 should be amended

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<sup>20</sup> It was first piloted in Austria in 1997. See, European Institute for Gender Equality, 'Review of the implementation of the Beijing Platform for Action in the EU Member States: Violence Against Women - Victim Support: Main findings' EU (2013), para 1.3.3.

<sup>21</sup> SN v Sweden (app. No. 34209/96) 2 July 2002 para 44

<sup>22</sup> Ibid

to fully reflect the best interest principles as espoused in Article 3 of the UNCRC.<sup>23</sup>

**The Commission advises that the amendment at clause 84 is a positive measure.**

9. Amendment: Inclusion of a clause amending the Coroners Act (NI) 1959

31. The Commission notes that the Committee is giving further consideration to the proposal that the Attorney General for NI be empowered to obtain papers or information that may be relevant to the exercise of his power to direct an inquest. The Commission previously provided views in its submission to the Committee stage on the Legal Aid and Coroners Bill.<sup>24</sup>

32. The power of the Attorney General to order an inquest provides a safeguard to ensuring an effective investigation into the circumstances of a death is carried out. The empowerment of the Attorney General to obtain relevant papers and information to inform the exercise of powers under section 14 (1) of the Coroners Act (NI) 1959 should further strengthen this safeguard.

33. Noting that the Attorney General has raised specific concerns regarding deaths in which there is a suggestion that a medical error has occurred, the Commission recalls that the procedural obligation under Article 2 of the ECHR extends to deaths in a medical context.<sup>25</sup>

**The Commission advises the Committee to enquire if the current arrangements in place for the investigation of deaths in which there is a suggestion that a medical error has occurred, are sufficiently robust to satisfy the requirements of Article 2 of the ECHR and to consider the potential strengthening impact of this amendment.**

10. Amendment: 11A "Ending the life of an unborn child"

34. The Commission notes that an amendment entitled "Ending the life of an unborn child" ("the proposed amendment" or "the current amendment") has been proposed to the draft Bill.

35. The Commission notes that the proposed amendment is untimely in light of the Minister for Justice's expressed intention to publish proposals

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<sup>23</sup> NIHRC 'Response to a Review of the Youth Justice System in Northern Ireland' January 2012

<sup>24</sup> NIHRC 'Submission to the Committee for Justice Call for Evidence on Legal Aid and Coroners Court Bill' 2014

<sup>25</sup> *Silih v Slovenia*, ECtHR, App No. 71463/01 (9 April 2009) see para 155

for abortion law changes in NI by the autumn,<sup>26</sup> and the UN Committee on the Elimination of Discrimination against Women's ("CEDAW Committee") follow-up to its concluding observation regarding women's access to termination of pregnancy in NI, which is due in November 2014.<sup>27</sup>

### 10.1 *The Right to Privacy*

36. The Commission recalls that ECHR, Art. 8 protects the right to respect for private and family life;

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

Similar protections of the right to privacy are found in ICCPR, Art. 17.<sup>28</sup>

37. The European Court of Human Rights (ECt.HR) has found that:

the decision of a pregnant woman to continue her pregnancy or not belongs to the sphere of private life and autonomy. Consequently, also legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus.<sup>29</sup>

38. The UN Human Rights Committee has noted that an "area where States may fail to respect women's privacy relates to their reproductive

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<sup>26</sup> BBC News Northern Ireland, *David Ford: NI abortion consultation 'ready by autumn'*, 18 August 2014, available at: <http://www.bbc.co.uk/news/uk-northern-ireland-28833136>.

<sup>27</sup> UN CEDAW Committee, Concluding Observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, July 2013, paras. 51 and 68.

<sup>28</sup> ICCPR, Art. 17. 1: No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2: Everyone has the right to the protection of the law against such interference or attacks.

<sup>29</sup> *R.R. v. Poland*, ECt.HR, no. 27617/04, 26 May 2011, §181. See also, *P. and S. v. Poland*, ECt.HR, no. 57375/08, 30 January 2013, §96; *A, B and C v. Ireland*, ECt.HR, [GC], no. 25579/05, 16 December 2010, §214.

functions...<sup>30</sup> and has also considered the prohibition of abortion in the context of the right to privacy.<sup>31</sup>

#### *10.1.1. Interference*

39. The Commission recalls that any interference with the right to privacy protected under the first paragraph of ECHR, Art 8 must be justified in terms of the second paragraph as being “in accordance with the law” and “necessary in a democratic society” for one or more of the legitimate aims listed therein.<sup>32</sup>

##### *10.1.1.1 In accordance with the law*

40. In a case examining access to abortion in Ireland the ECt.HR explained that in order to satisfy the requirement that it is “in accordance with the law”:

an impugned interference must have some basis in domestic law, which law must be adequately accessible and be formulated with sufficient precision to enable the citizen to regulate his conduct, he or she being able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>33</sup>

41. The ECtHR has further noted that “the domestic law must indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise”<sup>34</sup> and “must afford adequate legal protection against arbitrariness.”<sup>35</sup>

42. The Commission notes that the proposed amendment does not provide definitions for a number of terms used, including for example: what would constitute “circumstances of urgency”; what conditions are required so that “access to premises operated by a Health and Social Care Trust was not possible”; and what conduct is encompassed in the phrase “causes or permits any act, with the intention of bringing about the end of the life of an unborn child, and, by reason of any such act, the life of that unborn child is ended.”

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<sup>30</sup> UN Human Rights Committee, General Comment No. 28, Article 3 (The equality of rights between men and women), 2000, para 20.

<sup>31</sup> *K.L. v. Peru*, UN Human Rights Committee, CCPR/C/85/D/1153/2003, 22 November 2005, Para 6.4.

<sup>32</sup> *P. and S. v. Poland*, ECt.HR, no. 57375/08, 30 January 2013, §94; *A, B and C v. Ireland*, ECt.HR, [GC], no. 25579/05, 16 December 2010, § 218.

<sup>33</sup> *A, B and C v. Ireland*, ECt.HR, [GC], no. 25579/05, 16 December 2010, §220.

<sup>34</sup> *Petrova v Latvia*, ECt.HR, no. 4605/05, 24 June 2014, §86.

<sup>35</sup> *L.H. v Latvia*, ECt.HR, no. 52019/07, 29 April 2014, §47.

43. The Commission further notes that the accessibility and clarity of the current amendment is compromised by cross-referencing the Offences Against the Person Act 1861 (“the 1861 Act”) and the Criminal Justice Act (Northern Ireland) 1945. The Commission also notes that practitioners have expressed concerns regarding the accessibility of the existing law regarding termination of pregnancy in NI.<sup>36</sup>

*10.1.1.2 Necessary in a democratic society and pursuing a legitimate aim*

44. As noted above, any interference with the right to privacy must be “necessary in a democratic society” for one or more of the legitimate aims listed in ECHR, Art 8.2.<sup>37</sup> The Commission recalls that the ECtHR has made clear, including in the context of termination of pregnancy, that the concept of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to one of the legitimate aims pursued by the authorities.<sup>38</sup>

45. The ECtHR has set out that in this assessment a fair balance must be struck between the relevant competing interests, in respect of which the State enjoys a margin of appreciation.<sup>39</sup> The Commission notes that this margin of appreciation is not unlimited and any impugned provision must be compatible with a State’s Convention obligations.<sup>40</sup> The Commission recalls that in assessing proportionality the severity of the relevant sanction will be considered.<sup>41</sup>

46. The Commission notes that pursuant to the proposed amendment “any person who ends the life of an unborn child at any stage of that child’s development shall be guilty of an offence...” The Commission notes that the restriction in the amendment may be read as being so broad as to include certain forms of contraception which are legally available in Northern Ireland.

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<sup>36</sup> See for example, The Royal College of Midwives, Response to DHSSPS on The Limited Circumstances for a Lawful Termination of Pregnancy in Northern Ireland, July 2013; Royal College of Nursing Northern Ireland, Response of the Royal College of Nursing to a DHSSPS consultation on The limited circumstances for a lawful termination of pregnancy in Northern Ireland: a guidance document for health and social care professionals on law and clinical practice, July 2013.

<sup>37</sup> *P. and S. v. Poland*, ECt.HR, no. 57375/08, 30 January 2013, §94; *A, B and C v. Ireland*, ECt.HR, [GC], no. 25579/05, 16 December 2010, § 218.

<sup>38</sup> *P. and S. v. Poland*, ECt.HR, no. 57375/08, 30 January 2013, §94; *R.R. v. Poland*, ECt.HR, no. 27617/04, 26 May 2011, §183; *Tysi c v. Poland*, ECt.HR, no. 5410/03, 20 March 2007, §109; *Norris v Ireland*, ECt.HR, no. 10581/83, 26 October 1988, §44.

<sup>39</sup> *Tysi c v. Poland*, ECt.HR, no. 5410/03, 20 March 2007, §111; *A, B and C v. Ireland*, ECt.HR, [GC], no. 25579/05, 16 December 2010, §229.

<sup>40</sup> *A, B and C v. Ireland*, ECt.HR, [GC], no. 25579/05, 16 December 2010, §238; *Norris v Ireland*, ECt.HR, no. 10581/83, 26 October 1988, §45.

<sup>41</sup> *Norris v Ireland*, ECt.HR, no. 10581/83, 26 October 1988, §46; *Mahmudov and Agazade v Azerbaijan*, ECt.HR, no. 35877/04, 18 March 2009, §48-49.

47. The Commission recalls that in Northern Ireland termination of pregnancy is lawful only where the continuance of the pregnancy threatens the life of the woman, or would adversely affect her physical or mental health. The adverse effect on her physical and mental health must be a 'real and serious' one, and must also be 'permanent or long term'. The Commission notes that the proposed amendment would introduce further additional restrictions on access to termination of pregnancy and reproductive rights for women in NI. These additional restrictions are unclear in scope and yet are accompanied by the threat of serious criminal sanctions.

**The Commission notes that the proposed amendment would constitute a further significant restriction on the right to privacy in NI. The Commission advises that it is likely that the current amendment does not satisfy the criteria set out above and thus adoption of the amendment would be a violation of ECHR, Art 8 and ICCPR, Art 17.**

#### *10.1.2 Framework*

48. The ECtHR has held that ECHR Art 8 contains certain duties (positive obligations), which are inherent in ensuring effective respect for private life.<sup>42</sup> Thus, the State must fulfil positive, as well as negative, obligations in order to comply with the ECHR and the Human Rights Act protections of the right to privacy.

49. The Grand Chamber of the ECtHR has determined that the State's obligations

may involve the adoption of measures, including the provision of an effective and accessible means of protecting the right to private life... including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individual's rights and the implementation, where appropriate, of specific measures in an abortion context.<sup>43</sup>

50. In the context of termination of pregnancy the ECtHR held that

once the State, acting within its limits of appreciation, adopts statutory regulations allowing abortion in some situations, it must

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<sup>42</sup> *P. and S. v. Poland*, ECtHR, no. 57375/08, 30 January 2013, §95.

<sup>43</sup> *A, B and C v. Ireland*, ECtHR, [GC], no. 25579/05, 16 December 2010, §245. See also, *P. and S. v. Poland*, ECtHR, no. 57375/08, 30 January 2013, §96; *Tysic v. Poland*, ECtHR, no. 5410/03, 20 March 2007, §110; *R.R. v. Poland*, ECtHR, no. 27617/04, 26 May 2011, §184.

not structure its legal framework in a way which would limit real possibilities to obtain an abortion. In particular, the State is under a positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion.<sup>44</sup>

51. The Commission recalls that in *Tysic v. Poland* the ECt.HR noted the “chilling effect” of criminal provisions regarding abortion on the medical consultation process, stating that:

the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility... can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case. The provisions regulating the availability of lawful abortion should be formulated in such a way as to alleviate this effect.<sup>45</sup>

52. The ECtHR similarly noted the “chilling effect” of the 1861 Act in *A, B and C v. Ireland*.<sup>46</sup>

**The Commission recalls that it has previously advised the Department of Health Social Services and Public Safety that the legal and procedural framework in place regarding termination of pregnancy in Northern Ireland would likely be held not to meet the requirements of the ECHR as it does not provide the essential elements required in ECtHR jurisprudence.<sup>47</sup> The Commission observes that these concerns have not been addressed.**

**Moreover, the Commission advises that contrary to the requirements reiterated in recent ECtHR jurisprudence, the proposed amendment would further hinder the State’s ability to fulfil its positive obligation to “create a procedural framework**

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<sup>44</sup> *P. and S. v. Poland*, ECt.HR, no. 57375/08, 30 January 2013, §99. See also, *A, B and C v. Ireland*, ECt.HR, [GC], no. 25579/05, 16 December 2010, §249; *Tysic v. Poland*, ECt.HR, no. 5410/03, 20 March 2007, §116-124; *R.R. v. Poland*, ECt.HR, no. 27617/04, 26 May 2011, §200; UN Committee Against Torture, Concluding Observations regarding Ireland, 17 June 2011, para 26.

<sup>45</sup> *Tysic v. Poland*, ECt.HR, no. 5410/03, 20 March 2007, §116. See also, *A, B and C v. Ireland*, ECt.HR, [GC], no. 25579/05, 16 December 2010, § 254; *R.R. v. Poland*, ECt.HR, no. 27617/04, 26 May 2011, §193.

<sup>46</sup> *A, B and C v. Ireland*, ECt.HR, [GC], no. 25579/05, 16 December 2010, § 254.

<sup>47</sup> NIHRC, Response to the Public Consultation on the Draft Guidance on Termination of Pregnancy in Northern Ireland, July 2013.

**enabling a pregnant woman to effectively exercise her right of access to lawful abortion.”<sup>48</sup>**

10.2 The Right to Life

53. The right to life is protected by ECHR, Art. 2<sup>49</sup> and ICCPR, Art. 6.<sup>50</sup> The State is not only required to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.<sup>51</sup> In a case examining the death of a pregnant woman the ECtHR reiterated that:

The positive obligations imposed on the State by Article 2 of the Convention imply that a regulatory structure be set up, requiring that hospitals, be they private or public, take appropriate steps to ensure that patients’ lives are protected.<sup>52</sup>

54. The Commission notes that the proposed amendment would impose restrictions that may hinder the ability of health care professionals to “take appropriate steps to ensure that patients’ lives are protected.”<sup>53</sup>

55. The Commission recalls, for example, that the proposed amendment, without providing further definition, states that:

It shall be a defence for any person charged with an offence under this section to show – ...  
(b) that the act or acts ending the life of the unborn child were lawfully performed without fee or reward in circumstances of urgency when access to premises operated by a Health and Social Care Trust was not possible.

56. The proposed amendment clearly sets out the threat of criminal sanction of ten years’ imprisonment and a fine of undefined amount which may be imposed on “any person who ends the life of an unborn child at

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<sup>48</sup> *P. and S. v. Poland*, ECt.HR, no. 57375/08, 30 January 2013, §99.

<sup>49</sup> ECHR, Art. 2.1: Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

<sup>50</sup> ICCPR, Art. 6.1: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

<sup>51</sup> *Şentürk v. Turkey*, ECt.HR, no. 13423/09, 9 April 2013, §79. See also, *Hristozov and others v Bulgaria*, ECt.HR, Nos. 47039/11 and 358/12, 13 November 2012, §106; UN Human Rights Committee, General Comment No. 6, Article 6: The right to life, 1982, para 5: “The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.”

<sup>52</sup> *Şentürk v. Turkey*, ECt.HR, no. 13423/09, 9 April 2013, §81. See also, *Z. v Poland*, ECt.HR, no. 46132/08, 13 November 2012, §76; *Csoma v. Romania*, ECt.HR, no. 8759/05, 15 April 2013, § 41.

<sup>53</sup> *Şentürk v. Turkey*, ECt.HR, no. 13423/09, 9 April 2013, §81.



any stage of that child's development". However, the Commission notes that the proposed amendment does not provide guidance as to the meaning of the requirement that acts are "performed without fee or reward in circumstances of urgency when access to premises operated by a Health and Social Care Trust was not possible."

**The Commission notes that the right to life would be engaged in certain circumstances covered by the proposed amendment. The Commission advises that the proposed amendment would likely not be compatible with the State's positive obligations to protect the right to life pursuant to the ECHR and the ICCPR.**