Humanists UK

COMMAND PAPER ON ABORTION: HM GOVERNMENT OF GIBRALTAR

Response from Humanists UK, November 2018

ABOUT HUMANISTS UK

1. At Humanists UK, we want a tolerant world where rational thinking and kindness prevail. We work to support lasting change for a better society, championing ideas for the one life we have. Our work helps people be happier and more fulfilled, and by bringing non-religious people together we help them develop their own views and an understanding of the world around them. Founded in 1896, we are trusted to promote humanism by over 70,000 members and supporters and over 100 members of the All Party Parliamentary Humanist Group. Through our ceremonies, pastoral support, education services, and campaigning work, we advance free thinking and freedom of choice so everyone can live in a fair and equal society.

2. Humanists UK campaigns in favour of women's sexual and reproductive rights, in particular with respect to abortion. Our position on abortion is 'pro-choice'. We are a member of the steering group of Voice for Choice, the coalition of UK pro-choice groups. We also work with and support Alliance for Choice in Northern Ireland, being a member of the Trust Women Coalition, as well as other pro-choice groups across the UK such as Abortion Rights, FPA, Brook, Education for Choice, and the Abortion Support Network.

3. **Summary of recommendations**

- We recommend that a separate clause is added to the Bill to address sexual crime as a ground for abortion. The wording of this clause should be 'This subsection applies if, according to the pregnant woman, the pregnancy resulted from rape, incest or other unlawful intercourse.'
- We recommend that the word 'permanent' is omitted from Section 3(5) of this Bill.
- We recommend that in order to be compliant with the ECHR, the Government must reconsider the provisions in the proposed Bill relating to when abortion can be legally available with regards to the right to healthcare, and the eradication of violence against women.
- We recommend that the Government model this Bill on the Abortion Reform Act 2018 recently passed on the Isle of Man. This Act allows women up to the fourteenth week of pregnancy to make a fully autonomous decision to request a termination, and allows for serious social problems to be considered as grounds for an abortion up to the twenty-fourth week of pregnancy.
- Drop proposals to maintain life sentences for women who consensually procure an abortion outside of the terms of this Bill.
- Remove consensual abortion on the part of the pregnant woman from the criminal code.

COMMAND PAPER ON ABORTION

4. **When will abortions be available: rape, incest, and fatal foetal abnormality**
We welcome the opportunity to feed in to the consultation and have outlined how we view this legislation can be made stronger. Notwithstanding the several legal precedents at the United National Human Rights Committee (UNHRC) (e.g. Mellet v Ireland and Wheelan v Ireland) that establish that the near-total prohibition on abortion access without exception made for cases of sexual crime and fatal foetal abnormality (FFA) is a violation of women's rights (including their right to health, equality and non-discrimination, information, privacy, and freedom from torture or other ill-treatment), we agree with the HM Government of Gibraltar's assessment that the recent UK Supreme Court findings in relation to abortion in Northern Ireland means that it is now untenable for similar restrictions to be maintained in Gibraltar.

5. We disagree that the proposal to cover the circumstances described by the Supreme Court, i.e. rape and incest, is met by the addition of 'mental health' to the list of conditions constituting a 'grave permanent injury.' Firstly, these are not the only types of sexual crimes that could result in an unwanted pregnancy and so the wording of the Bill should focus broadly on all types of unlawful intercourse. The victim of a sexual crime may not wish to continue a pregnancy, as she did not consent to the intercourse or to becoming pregnant, but this far from necessarily means that she is mentally ill. Separate and specific provision is needed within the Bill to address sexual crimes.

6. Secondly, being the victim of a crime is not the only circumstance in which a mental health condition might require a woman to seek an abortion. The guidance to the Bill must make it clear that what constitutes a severe mental health condition under the terms of this Bill is for a woman and her doctor to determine, and should include cases where the pregnant woman is suicidal or has a mental disability.

7. We recommend that the language used in the provision of abortion services is revised. Specifically, that the term 'permanent' is removed. It is difficult to determine exactly what constitutes a permanent injury and some permanent injuries may be of little significance, while other injuries that are of a severe nature and should count as grounds for an abortion may be expected in due course to mend themselves and therefore not be considered 'permanent'. For example, it may be in the interests of women who, at the time of their pregnancy, are at risk of suffering severe but temporary illnesses, including feeling suicidal, that they should be able to access abortion services to prevent further injury. We recommend that the severity, and not the duration, of the injury should be the primary consideration.

8. **Recommendations**
    - We recommend that a separate clause is added to the Bill to address sexual crime as a ground for abortion. The wording of this clause should be 'This subsection applies if, according to the pregnant woman, the pregnancy resulted from rape, incest or other unlawful intercourse.'
    - We recommend that the word 'permanent' is omitted from Section 3(5) of this Bill.

9. **When will abortion be available: the right to healthcare**
   The Supreme Court only considered abortions in the context of pregnancies which have arisen from sexual crime or there is a diagnosis of FFA. It is the case that a woman's right to make decisions freely about her reproductive and sexual health, including abortion, is well established in international law beyond these circumstances. We believe that the Government should consider its wider obligations towards its citizens with regard to the right to healthcare and to the eradication of violence against women.

10. The right to reproductive health is well established as an integral part of the international human right to health. Abortion is a core element of this right, as outlined in the UN Convention on Economic, Social and Cultural Rights (ICESCR). This confers a duty upon the state to refrain from denying or limiting access to health services, to ensure equal access to health care and facilities, and to enable individuals to realise their right to health. In this regard, limiting access to abortion to cases of sexual crime or FFA, as currently proposed, would still be an illegitimate limitation on the right of a woman to access healthcare.

11. Additionally, the right to health is also outlined in Article 12 of the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW). This includes a right to access information relating to abortion services and the means for a pregnant women to exercise her right to determine if she will have children, when, and how many. Preventing access to abortion is therefore not only a violation of the right to health, but also a violation of the principle of equality and non-discrimination, as it criminalises only women. Again, limiting access to abortion to cases of sexual crime or FFA falls short of the realisation of this right in Gibraltar.

12. **Recommendations:**
    - We recommend that in order to be compliant with the ECHR, the Government must reconsider the provisions in the proposed Bill relating to when abortion can be legally available with regards to the right to healthcare, and the eradication of violence against women.
    - We recommend that the Government model this Bill on the Abortion Reform Act 2018 recently passed on the Isle of Man. This Act allows women up to the fourteenth week of pregnancy to make a fully autonomous decision to request a termination, and allows for serious social problems to be considered as grounds for an abortion up to the twenty-fourth week of pregnancy.
    - We recommend that a clause is added to the Bill placing a legal duty upon healthcare providers with a conscientious objection to refer the pregnant woman to another provider, or with sufficient information for the woman to do so. Thus a subsection (3) should be added to clause 163C reading:

      "A healthcare professional who has a conscientious objection referred to in subsection (1) must—
      (a) inform the pregnant woman who requests abortion services that she has a right to see another healthcare professional; and
      (b) ensure she has sufficient information to enable her to exercise the right mentioned."

- We recommend that guidance accompanying this legislation makes reference to recent case law in the UK defining the word 'participate' to mean someone directly involved in the procedure to terminate a pregnancy.

13. **The questions of time-limits**
We strongly oppose the Government's proposal to limit access to abortion services after the tenth to fourteenth week of gestation. There are two reasons given in the command paper for this time-limit, both of which are erroneous. The first is that 'this has been the period proposed by all the various groups who have made representations to Government to date'. Choice Gibraltar, in their response to this consultation, claim that this 'is a misrepresentation of our proposal' which was that women should have access to abortion on request up to fourteen weeks, as is the case on the Isle of Man, rather than women's access to abortion being limited to 14 weeks.

14. Secondly, the proposal states that the 24-week limit prescribed in the 1967 Abortion Act has 'now been overtaken by scientific advances.' This statement is untrue and runs against the policy of the major medical bodies in the UK. The British Medical Association's policy on time-limits states:

> 'Periodically, calls are made for the legislation to be amended to reduce the time limit for abortion, most notably during the passage of the Human Fertilisation and Embryology Act in 2008, and again in 2012 following significant coverage of a number of senior politicians' views on the 24-week time limit. Currently, the standard medical threshold of viability is understood to be around 24 weeks' gestation.'
>
> 'The BMA has longstanding policy that opposes any change to the current time limit for abortion. BMA policy agreed in 2013, holds that in light of the technical limitations of screening at earlier gestational stages, it would be unacceptable to change the time limit for abortion.[1]'

15. Similarly, Dr Kate Guthrie, the Spokesperson for the Royal College of Obstetricians and Gynaecologists (RCOG) stated the organisation's position on abortion time-limits in response to the Secretary of State for Health's comments on lowering the limit to 12 weeks in 2012,

> 'Lowering the time limit will not result in a lower abortion rate. Women who are desperate to have an abortion will look for the means to have one, and this includes seeking access to an illegal and unsafe abortion. This would be a huge backward step for women putting them at serious risk of psychological and physical complications, reminiscent of the situation prior to the passage of the Abortion Act of 1967.'[2]

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[1] The Law and Ethics of Abortion: BMA views, November 2014 (updated October 2018) https://www.bma.org.uk/-/media/.../ethics/law_and_ethics_of_abortion_nov2014.pdf

[2] RCOG statement in response to Jeremy Hunt's comments on the abortion time limit, 6 October 2012 https://www.rcog.org.uk/en/news/rcog-statement-in-response-to-jeremy-hunts-comments-on-the-abortion-time-limit/

16. In addition, a joint statement by the British Medical Association, the British Association of Perinatal Medicine, the Faculty of Sexual and Reproductive Healthcare, the Royal College of Nursing, and the Royal College of Obstetricians and Gynaecologists on the survival of extremely preterm infants makes the medical position quite clear:

> 'There is no evidence of a significant improvement in the survival of preterm infants below 24 weeks' gestation, in the UK, in the last 18 years.'[3]

17. Therefore, there is little to no medical evidence that abortion access should be limited to ten to fourteen weeks. Moreover, and as described above, international law places the right of a woman to personal autonomy over her body and to access healthcare to be the most significant factor in determining abortion regulation, regardless of arguments about the viability of the foetus to survive outside of the woman's body.

18. **Recommendations:**
    - We recommend that the proposal to limit access to abortion to 14 weeks of gestation or below is dropped as it is not supported by medical evidence.
    - We recommend the Bill adopt wording of the recent Abortion Reform Act of the Isle of Man, with regards to time limits as this is the most medically accurate and human rights compliant abortion legislation available. Section 3 of the Bill would be replaced with:

> *"The Crimes Act 2011 is amended by inserting the following new sections 163A to 163E after existing section 163 as follows:*
>
> ***163A. Medical termination of pregnancy.***
>
> *(1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion and child destruction in sections 161 to 163 hereof when a pregnancy is terminated—*
>
> *(2) During the first 14 weeks of the gestation period, abortion services may be provided upon request by or on behalf of a pregnant woman.*
>
> *(3) During the period commencing with the beginning of the 15th week and ending at the end of the 23rd week of the gestation period, such services may be provided, upon request by or on behalf of a pregnant woman if the registered medical practitioner attending her is of the opinion, formed in good faith that one or more of subsections (4) to (7) applies in her case.*

[3] Joint statement from the British Medical Association, the British Association of Perinatal Medicine, the Faculty of Sexual and Reproductive Healthcare, the Royal College of Nursing and the Royal College of Obstetricians and Gynaecologists on Survival of extremely preterm infants https://www.rcog.org.uk/globalassets/documents/news/jointstatementbmabapmfsrhrcnrcogmay08.pdf

(4) This subsection applies if the continuation of the pregnancy would pose a substantial risk of serious injury to the pregnant woman's life or health.

(5) This subsection applies if there is a substantial risk that the foetus is or will be affected by a significant physical or mental impairment which —

(a) will have a seriously debilitating effect on the child; or
(b) will result in the death of the foetus in utero.

(6) This subsection applies if, according to the pregnant woman, the pregnancy resulted from rape, incest or other unlawful intercourse.

(7) This subsection applies if, according to the pregnant woman, there are serious social grounds justifying the termination of the pregnancy.

(8) From the start of the 24 th week of the gestation period abortion services may be provided upon the request by or on behalf of a pregnant woman if the registered medical practitioner attending her is of the opinion, formed in good faith, and after taking such specialist medical advice as appears to the practitioner to be appropriate, that —

(a) the termination is necessary to prevent grave injury to her health;
(b) the continuance of the pregnancy would involve risk to her life, greater than if the pregnancy were terminated;
(c) there is a substantial risk that because of its physical or mental condition the foetus would die before or during labour;
(d) there is a substantial risk that, were the child born alive—

(i) the child would die shortly after birth because of severe foetal developmental impairment; or
(ii) the child would suffer a significant impairment which is likely to limit either the length or quality of the child's life.

19. **Conscientious Objection**
Although the 1967 Abortion Act has provision for medical professionals who are actively involved in carrying out the abortion procedure to conscientiously object, it should be understood that the pregnant woman seeking an abortion still has the right to access healthcare and this should not be prevented or hindered by conscientious objection. In practice, this means that those medical professionals who object to abortion have a duty to immediately inform the patient that they have a conscious objection and refer them on to another medical professional without undue delay. We recommend that the Bill specifically make reference to this duty.

20. Case law in the UK (Janaway v Salford Health Authority) has established the limits of conscientious objection by defining what is meant by 'participate' in the 1967 Abortion Act. As such, the conscientious objection clause is limited to those who take an active part in the administration of the procedure in a hospital or approved clinic. For example, a non-clinical employee in charge of timetabling staff to perform abortions would not be covered by the provisions of this Bill. This should be made clear in the guidance accompanying this legislation.

21. **Recommendations:**
    - We recommend that a clause is added to the Bill placing a legal duty upon healthcare providers with a conscientious objection to refer the pregnant woman to another provider, or with sufficient information for the woman to do so. Thus a subsection (3) should be added to clause 163C reading:

> *"A healthcare professional who has a conscientious objection referred to in subsection (1) must—*
> *(a) inform the pregnant woman who requests abortion services that she has a right to see another healthcare professional; and*
> *(b) ensure she has sufficient information to enable her to exercise the right mentioned."*

    - We recommend that guidance accompanying this legislation makes reference to recent case law in the UK defining the word 'participate' to mean someone directly involved in the procedure to terminate a pregnancy.

22. **The penalty? The case for decriminalisation**
    We oppose in the strongest terms the proposal to maintain the penalty of life imprisonment for a woman who seeks an abortion outside of the terms laid down by this Bill. This penalty remains on the statue books in the UK, but is a Victorian piece of legislation, the principles of which have been denounced by the UN Human Rights Committee, Committee on the Elimination of Discrimination against Women, and the World Health Organisation.

23. The United Nations Human Rights Committee has explicitly stated that state parties must remove termination of pregnancy from their criminal codes, as such restrictions endanger the life and health of pregnant women by forcing them to seek illicit and unsafe abortions. General Comment No. 36 (2018) reads,

> '*States parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to undertake unsafe abortions, and they should revise their abortion laws accordingly. For example, they should not take measures such as criminalizing pregnancies by unmarried women or apply criminal sanctions against women and girls undergoing abortion or against medical service providers assisting them in doing so, since taking such measures compel women and girls to resort to unsafe abortion. States parties should not introduce new barriers and should remove existing barriers that deny effective access by women and girls to safe*

and legal abortion, including barriers caused as a result of the exercise of conscientious objection by individual medical providers."[4]

24. Let us be clear, decriminalisation does not mean deregulation. Outside of criminal law, clinicians and healthcare professionals would be able to treat women according to medical regulations, like all other medical procedures, such as those prescribed by the Royal College of Midwives and the Royal College of Obstetricians and Gynaecologists. Abortion would need to be performed in line with professional guidance and only by qualified healthcare professionals; any service or individual involved in poor practice would face disciplinary and potentially criminal sanctions. Abortion is a medical procedure and is best regulated as a medical procedure rather than a criminal offence. There is no evidence that decriminalisation increases the number of abortions performed.

25. **Recommendations**
    - Drop proposals to maintain life sentences for women who consensually procure an abortion outside of the terms of this Bill.
    - Remove consensual abortion on the part of the pregnant woman from the criminal code.

26. **Beyond the law**
    We have some concerns regarding the proposals on support mechanisms. The Bill itself proposes to include mental health matters as a grounds for termination. However, the proposal on support mechanism states women should be dissuaded to seek an abortion because of mental health matters related to social and economic circumstances. The meaning of this proposal seems unclear and contradictory to parts of the Bill itself.

27. As stated above, what constitutes a mental health condition should be made solely by a woman and her doctor, taking into account its severity and impact upon her quality of life. It is not the place of social services to make medical judgements about a pregnant woman, nor, as is implied by the command paper, to pressure her into choosing fostering or adoption as alternatives to abortion. Such 'advice' given to women must be impartial, medically accurate, and be undertaken entirely voluntarily by the woman. Not all women require or would want advice or counselling either before or after an abortion. As with any medical procedure, it is for the woman to consent to what treatment she receives and undergoing such counselling should not be a condition upon accessing an abortion.

[4] United Nation Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life https://www.ohchr.org/Documents/HRBodies/CCPR/CCPR_C_GC_36.pdf

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