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STORMONT  
BELFAST  
BT4 3PP



From: Tony Worthington

Date: 1 July 1998

Secretary of State (L&B)

**ABORTION LAW IN NORTHERN IRELAND - THE WAY FORWARD**

Summary

**Issue:** Handling the review of abortion law.

**Recommendation:** To write to the Prime Minister as attached.  
To write to Jeffrey Donaldson as attached.  
To consult the First Ministers in the Shadow Administration before announcing the review.

**Timing:** Priority: I am keen to commission the review as soon as possible.  
A reply to Jeffrey Donaldson is overdue.

Background

1. Mr Kyle's minute of 20 April recorded your agreement to the proposals in my submission of 15 April for an expert review; and asked for amendments to the draft letter to the Prime Minister which that submission introduced. Before the amended letter was sent, the issue arose of whether abortion law is transferred or reserved, and the implications of this categorisation for the management of the review. Jeffrey Donaldson wrote to you about this on 7 May.

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### Status of Law

2. Mrs Rogers' submission of 9 June to your PS set out officials' agreed advice on the status of the law. This clears the way for the review to proceed, and to do so as I had envisaged on the basis that the expert committee would report to the Northern Ireland Assembly. Decisions on the review recommendations would be for them to take. If the experts recommend amending the criminal justice legislation, this could be done either at Westminster or, by agreement, through the NI Assembly. Which would be for discussion between the Secretary of State and the devolved administration. This should help us to rebut any substantive criticisms on constitutional grounds of the decision to commission a review.

### The Human Rights Dimension

3. Legal and human rights experts have argued that the present status of the law is unsatisfactory and inconsistent with the European Convention on Human Rights and rulings of the European Court of Human Rights. NIO legal advisers largely accept this argument. The need for rapid progress is therefore reinforced by the proposed incorporation of the ECHR into Northern Ireland law, from 2000 on present plans. This would give the courts here power to overrule legislation on the ground of inconsistency with the Convention.
4. We can also expect the proposed Northern Ireland Human Rights Commission to pick up the argument for clarification of the law from SACHR and carry it forward with renewed vigour within its extended and enhanced role.
5. We will have to be clear, therefore, that Westminster will retain the ultimate responsibility for ensuring that the law complies with the requirements of the ECHR, and any other national or international legal obligation. The Assembly will not have the power to veto any change in the law which may be required either as

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the result of a legal challenge, or of a strong recommendation from the review committee.

### Consultation

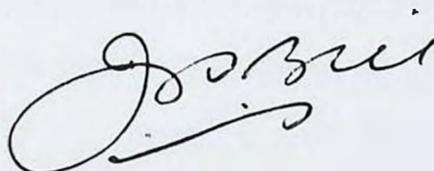
6. You have agreed that the Shadow Administration should be advised of the review. I would recommend that this should be done through the First Minister and Deputy First Minister as soon as practicable and politically feasible. I agree with Paul Murphy that their views should be taken carefully into consideration before any public announcement is made.

### Developments in Ireland

7. I understand from the Department of Health in Dublin that a draft of their Green Paper on abortion, setting out options for clarifying their legislation, is due to be considered by the Irish Cabinet shortly.

### Next Steps

8. The way is now clear for you to write to the Prime Minister, and I attach an amended draft letter for your consideration. If he agrees, the next step should be to consult the 2 First Ministers before making any public announcement.
9. I also attach a draft reply to Jeffrey Donaldson for your signature.



**TONY WORTHINGTON**

**Minister for Health and Social Services**

*(Approved by the Minister + signed in his absence)*

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LETTER DRAFTED FOR SIGNATURE BY SECRETARY OF STATE

REVIEW OF ABORTION LAW IN NORTHERN IRELAND

Summary

**Issue:** The unsatisfactory state of the law in Northern Ireland renders Government vulnerable to legal challenge. The incorporation of European Convention on Human Rights into Northern Ireland legislation will increase this vulnerability.

**Recommendation:** I should be grateful for your agreement to commission an expert review of the current state of the law and practice on abortion in Northern Ireland, to consult the Northern Ireland Shadow Administration before making any public announcement, and to do so on the basis that it will be for the devolved administration, in

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<p>To:</p> <p>Prime Minister</p>	<p>Enclosures:</p>	<p>Copies to be sent to:</p> <p>PS/Secretary of State (B&amp;L)</p> <p>PS/Mr Ingram (B&amp;L)</p> <p>PS/Mr Murphy (B&amp;L)</p> <p>PS/Lord Dubs (B&amp;L)</p> <p>PS/Mr Worthington (DHSS &amp;L)</p> <p>PS/PUS (B&amp;L)</p> <p>PS/Mr Semple</p> <p>Mr Gowdy</p> <p>hidden cc list:</p>
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**LETTER DRAFTED FOR SIGNATURE BY SECRETARY OF STATE**

June 1998

**REVIEW OF ABORTION LAW IN NORTHERN IRELAND**

**Summary**

**Issue:** The unsatisfactory state of the law on abortion in Northern Ireland renders Government vulnerable to legal challenge. The incorporation of the European Convention on Human Rights into Northern Ireland legislation will increase this vulnerability.

**Recommendation:** I should be grateful for your agreement to:

- commission an expert review of the current state of the law and practice on abortion in Northern Ireland;
- consult the Northern Ireland Shadow Administration before making any public announcement, and to do so on the basis that it will be for the devolved administration, in

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the first instance, to consider what action to take in response to the review recommendations.

**Timing:** **Priority.** I am keen to act as soon as practicable and politically feasible

### The Current State of The Law

As you know the Abortion Act 1967 does not extend to Northern Ireland and the grounds for abortion here are more restricted than in Great Britain. The law on abortion in Northern Ireland is governed by a combination of statute - the Offences Against the Person Act 1861 and the Criminal Justice (Northern Ireland) Act 1945 - and case law.

The 1861 Act provides that abortion is a criminal offence. Section 58 refers to "unlawfully" procuring a miscarriage. It has long been contended that this wording means that the prohibition against abortion is not absolute and that the word "unlawfully" exempts abortion carried out in the interests of the life or health of the mother. However, case law on section 58 has not laid down with any certainty the range of circumstances which might constitute lawfulness. There is further uncertainty and confusion around section 25 of the 1945 Act. The 1967 Act resolved these uncertainties for Great Britain.

This unsatisfactory state of the law is reflected in wide variations across individual medical practitioners and has attracted criticism from senior judges. In recent years Government has been pressed to clarify the law by legal and medical practitioners, human rights experts, and women's and counselling organisations. We have already acknowledged in Parliamentary Answers that the current state of the law is unsatisfactory, since it is unclear on what grounds abortion can legally be performed.

We could at any time be challenged from either side of the debate through the European Court of Human Rights. We intend to incorporate the European Convention on Human Rights into Northern Ireland law from the end of next year. It has been forcibly argued by the Standing Advisory Commission on Human Rights (SACHR) and others that the present state of the law here is inconsistent with the Convention. NIO legal advisers largely accept this argument.

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The risk of a successful legal challenge will increase after incorporation, which will allow a challenge to be made more easily, through the Northern Ireland courts. We must also anticipate that the proposed Northern Ireland Human Rights Commission will pick up the argument from SACHR and carry it forward with renewed force.

**The Proposed Review**

There is therefore a pressing need to review the law. I accordingly propose to establish an expert committee whose remit would be to inquire into issues raised by the current state of abortion law and practice in Northern Ireland and make recommendations. It would look not only at the law itself but also at related issues including sex education, counselling, and support services for pregnant women. The committee would have about 10 members, representing the various professional and women's interests, and a majority of them would be women. Lord Justice McDermott has agreed to chair the Committee. I would expect him to report within one year.

A reform of the law on abortion in Northern Ireland would fall, constitutionally, into the "reserved" category of legislative powers (both under the existing devolution legislation and our proposed Settlement Bill). The Northern Ireland Assembly would still be able to legislate, but only with the approval of both Houses of Parliament (by a form of negative resolution procedure).

In the light of this, it is my intention that the Committee's recommendations should be put to the Northern Ireland devolved administration in the first instance.

Westminster would of course still retain the power to legislate by Bill; and under our proposals I could also bring forward legislation on the matter by Order in Council. We might in particular want to do so to ensure compliance with national and international legal obligations. The Assembly would of course have no power to block any such changes.

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**Timing**

I am keen to commission the review without delay, both because we are vulnerable to challenge and for the sake of those doctors and women who continue to be adversely affected by the incoherence and imprecision of the present state of the law. This is a serious matter, but one which is in my view unlikely to receive the early attention of the incoming devolved administration. If the experts begin work now, they should be able to present firm recommendations to the devolved administration by summer 1999.

**Consultation**

I would propose to consult the First Minister and Deputy First Minister as soon as politically feasible and before making any public announcement.

**Conclusion**

I should be grateful for your agreement to proceed as outlined above.

I am copying this letter to Frank Dobson, Donald Dewar and Ron Davies.

**MARJORIE MOWLAM**

**Secretary of State for Northern Ireland**

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Jeffrey Donaldson MP  
38 Railway Street  
Lisburn  
BT28 1XP

June 1998

Thank you for your letter of 7 May about abortion law in Northern Ireland. I am sorry it has taken so long to reply,

In recent years Government has been pressed to clarify the law by a range of interests, including the Standing Advisory Commission on Human Rights, High Court Judges, gynaecologists and women's organisations. We have acknowledged that the current state of the law is unsatisfactory, since it is unclear on what grounds abortion can be legally performed in Northern Ireland.

This is not a position with which we as a responsible Government can be comfortable, and I can confirm that one option under consideration is the establishment of an expert committee to inquire into the legal, medical and social issues raised by the current law and practice, and to make recommendations.

You also asked whether abortion law would become a transferred matter to be devolved to the Northern Ireland Assembly. As you know, the criminal law is currently a reserved matter, and this includes the legislation governing abortion. We have no plans to change this categorisation.

However, we and our predecessors have consistently taken the view that if there is to be any change in the law, the preferable way for it to happen would be through Northern Ireland elected representatives. Accordingly, I envisage that any expert review would

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report in the first instance to the Northern Ireland Assembly and its Ministers who would have responsibility for the health and social aspects of abortion policy and authority to legislate in the reserved area, if necessary, subject to the comment of the Secretary of State and the approval (by negative resolution) of both Houses of Parliament.

**Marjorie Mowlam**

**Secretary of State for Northern Ireland**

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