

CAJ's Submission no. S416

CAJ's response to the consultation on the Guidance on the Termination of Pregnancy: The Law and Clinical Practice in Northern Ireland

July 2013

About CAJ

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First (formerly the Lawyers Committee for Human Rights) and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights.

CAJ however would not be in a position to do any of this work, without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding). We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Hilda Mullen Foundation, Joseph Rowntree Charitable Trust, Oak Foundation and UNISON.

The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

CAJ response to the Consultation on the ‘Guidance on the Termination of Pregnancy: The Law and Clinical Practice in Northern Ireland’

Committee on the Administration of Justice (CAJ) is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.

The Committee on the Administration of Justice (CAJ) would like to respond with the following comments to the *‘Guidance on the Termination of Pregnancy: The Law and Clinical Practice in Northern Ireland.’*

The judicial reviews, referenced below, mean it is now well established that there is a requirement of legal certainty in relation to abortion law and policy in Northern Ireland. This means that the regulatory framework must be sufficiently clear as to the circumstances in which a termination is permitted and that a woman must not then face obstructions in accessing the services she is then entitled to but rather there must be effective and accessible procedures. This was again made clear in the European Court of Human Rights judgement in *ABC v Ireland* in 2010.¹ The domestic courts, in hearing judicial reviews on the matter, have also consistently held that clear guidelines are required to clarify the law and procedures in Northern Ireland.

Article 8 of the European Convention on Human Rights² (ECHR) protects the ‘right to respect for private and family life’; similar protections are found in Article 17 of the International Covenant on Civil and Political Rights³ (ICCPR). Under the ECHR restrictions on the right to a private and family life must be ‘in accordance with the law’ as well as pursuing one of a number of legitimate aims and be necessary in a democratic society. It is the ‘in accordance with the law’ provision which requires legal certainty. The European Court of Human Rights has stated that, to prevent the arbitrary use of powers this means ‘the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner

¹ A, B and C v. Ireland (Application no. [25579/05](#)) 16 December 2010.

² http://www.echr.coe.int/Documents/Convention_ENG.pdf

³ <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>

of its exercise.’⁴ The Court has also consistently found that the legal certainty requirement under Article 8 applies to provisions for termination of pregnancy.⁵

The original background to the present consultation on guidance by the DHSSPS is a successful legal challenge in 2004 on the application of the *Family Planning Association (FPA)*. The Court of Appeal then instructed the DHSSPS to investigate the adequacy of termination pregnancy services and issue appropriate guidance.⁶ After some delay the DHSSPS issued such guidance in March 2009 entitled ‘*Guidance on the Termination of Pregnancy: The Law and Clinical Practice in Northern Ireland*’.

This itself was also subject to successful judicial review on the application of the *Society for the Protection of the Unborn Child (SPUC)*.⁷ The Court in this instance did not uphold six of the grounds of challenge but did uphold two grounds, namely that the sections on conscientious objection and counselling lacked the requisite clarity. The lack of legal certainty, and the issues raised in the judgement, could therefore be remedied by appropriate amendments to these two sections. Revised guidance was then consulted upon by DHSSPS from July to October 2010.

This guidance was not however adopted and it was only following a further application for judicial review by the FPA that the DHSSPS put the current draft guidelines out for consultation in April 2013. The guidelines have now been renamed “*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.*”

The new guidance document does not simply provide amendments to the two aforementioned sections to ensure legal certainty but rather makes substantive changes to other aspects of the 2009 guidance. This may well make the document less likely to meet the requirements of legal certainty and more likely to be susceptible to litigation. For example, the new document introduces the term ‘unborn child’ as part of its guidance. However, we are not aware of any legal definition of an ‘unborn child.’

⁴ *Gillan & Quinton v United Kingdom*, Application no. 4158/05, judgment of 12 January 2010 [para 77]

⁵ See e.g. *Tysi c v. Poland* judgment (no. [5410/03](#)) and *ABC v Ireland*.

⁶ *Family Planning Association of Northern Ireland v Minister for Health Social Services and Public Safety* [2004] NICA 39 (08 October 2004).

⁷ *Society for the Protection of the Unborn Childs (SPUC) application for Judicial Review* [2009] NIQB 92

In relation to the ‘right to conscientious objection’ section, reference to the Nursing and Midwifery Council ‘Code of professional conduct, standards of conduct and, performance and ethics,’ which were included in the previous guidelines, have been taken out of the present draft as has reference to the General Medical Council’s ‘Good Medical Practice’. It would be helpful if the reasons for this were clarified, as the guidance from their professional associations may give further clarity to health practitioners as to how they are to act in particular circumstances.

In the 2008 Concluding Observations on the UK the UN Committee which oversees UK compliance with the UN Convention for the Elimination of all forms of Discrimination Against Women (CEDAW) raised concerns about the detrimental consequences for women’s health in relation to the situation of abortion law in Northern Ireland.⁸ At the recent examination of the UK’s compliance with CEDAW on the 17 July 2013 the draft guidance was discussed and concerns were raised by the UK Rapporteur, Ruth Halperin-Kaddari, that the current DHSSPS guidelines were ambiguous and restrictive.

In conclusion, CAJ notes the significant changes in the present document from the previous version - most of which had been held to be lawful by the Courts – and questions whether this further risks the guidelines being less likely to meet the requirements of legal certainty.

Committee on the Administration of Justice (CAJ) Ltd

⁸ CEDAW UN Doc A/63/38, page 142, para 288.

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fUK%2fCO%2f6&Lang=en