

Devolution and abortion law reform in Northern Ireland

Briefing note from Dr. Claire Pierson (University of Liverpool), Dr. Kathryn McNeilly Queen's University), Dr. Fiona Bloomer (Ulster University) (Reproductive Health Law and Policy Advisory Group)¹
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The Offences Against the Person Act 1861 (OAPA) applies in England, Wales and Northern Ireland. Repeal of sections 58-59 would decriminalise abortion in these parts of the UK. Devolution of criminal justice to the Northern Ireland Assembly however raises issues with regard to the ability of the Westminster Parliament to repeal this legislation outside of England and Wales while the Northern Ireland Assembly retains competency although has not functioned since January 2017.

Here we attempt to answer some of the most pertinent questions with regard to devolution and repeal of the OAPA.

1. What are the specifics of the Good Friday Agreement that might allow for Westminster to intervene in Northern Ireland?

Section 5(6) of the Northern Ireland Act 1998 provides that devolution does “not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland”. However, this is subject to the Sewel Convention by which the Westminster Parliament will not normally legislate in areas of devolved competence without the consent of the Northern Ireland Assembly.

The Sewel Convention, as applies in Northern Ireland, has not been written into law, but it has been written into a Memorandum of Understanding on intergovernmental relations in terms that make it clear that, ‘The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power’. However, the Memorandum of Understanding also acknowledges that ‘Parliament’s decision to devolve certain matters [means] that Parliament itself will in future be more restricted in its field of operation.’ (The Convention, as applies in Scotland and Wales, has been written into statute law.)

Alternatively, section 4 of the Northern Ireland Act allows the Secretary of State for Northern Ireland to take back an element of devolved powers so that it becomes reserved to Parliament at Westminster.

2. What does this mean in practice for the decriminalisation of abortion?

In practice, if the amendment to the OAPA is drafted to include Northern Ireland, this will probably be flagged as a Sewel issue (for the Speaker to decide). In order for Westminster to amend the legislation the Northern Ireland Assembly would normally be required to vote and give consent to this.

If the Northern Ireland Assembly were suspended when the amendment is raised then legislation for Northern Ireland could be made at Westminster (by way of Order of Council).

¹ <https://reproductivehealthlawpolicy.wordpress.com>

It may also be possible, although politically contentious, for the Secretary of State to operate under section 4 of the Northern Ireland Act to render the relevant area of law reserved. This would have the effect of allowing Westminster to legislate in this area given the absence of a functioning Assembly.

Alternately clauses proposed to the emergency legislation Northern Ireland (Executive Formation and Exercise of Function) Bill would see the Secretary of State held accountable for the failure to ensure their human rights are upheld in regard to abortion rights (and same sex marriage).

3. What does this mean from a human rights perspective?

The Committee for the Elimination of Discrimination Against Women found in 2018 that the UK breached their commitments under the Convention for Elimination of Discrimination Against Women with regard to Northern Ireland's abortion law and recommended repeal of sections 58-59 of OAPA. Therefore, repeal of the legislation would begin to ensure human rights compliance of the UK government either through the enactment of abortion law by the Northern Ireland Assembly or allowing abortion to be regulated under ordinary healthcare governance.

4. Can Scottish MP's vote on repeal of the OAPA?

Whilst the OAPA does not apply in Scotland, the vote may therefore be subject to the 'English Votes for English Laws' procedure (designated by the speaker of the house). These are a set of procedures of the House of Commons whereby legislation which affects only England (or England and Wales) requires the support of a majority of MPs representing English (or English and Welsh) constituencies.

However, the OAPA does affect Scotland and women living in Scotland. The Scottish Parliament put in place regulations (The Functions of Health Boards (Scotland) Amendment Order 2017) in November 2017 that allow women living in Northern Ireland to access abortion for free in Scotland. In addition, Scotland's abortion services only provide abortion up until 18 weeks gestation. This results in women having to travel to England to access abortions beyond this time period. Data from the Department of Health indicates that in 2017 187 abortions were provided to women from Scotland.

In conclusion, the vote does have an impact on Scotland and its abortion provision.

Summary

- There is provision in the Northern Ireland Act that would allow Westminster to intervene to repeal of sections 58-59 of the OAPA.
- The suspension of the Northern Ireland Assembly provides grounds for the Secretary of State to give consent via an Order of Council.
- Alternately clauses proposed to the emergency legislation Northern Ireland (Executive Formation and Exercise of Function) Bill would see the Secretary of State held accountable for the failure to ensure their human rights are upheld in regard to abortion rights (and same sex marriage).
- Repeal of the legislation would begin to ensure human rights compliance of the UK government either allowing abortion law to be enacted by the Northern Ireland Assembly or allowing abortion to be governed under ordinary healthcare governance.
- Scottish MPs could vote for repeal of sections 58-59 of the OAPA as the legislation does affect Scotland and women living in Scotland.