The Rt Hon Boris Johnson MP
Prime Minister

5th March 2020

Dear Prime Minister,

The expert legal opinion of the leading Northern Ireland constitutional lawyer, David Scoffield QC, demonstrates that the proposals in the Northern Ireland Office consultation on abortion, published on 4th November 2019, go beyond what Parliament actually requires in Section 9 of the Executive Formation Act 2019.

A key Conservative commitment is to constitutional due process and, mindful of this, the Government was always clear in the run up to the vote on 9th July 2019 that Parliament should not trespass on this devolved matter.

It is our understanding that DUP Members of Parliament have written a letter to yourself calling for the Government to repeal Section 9 all together so that this matter could be once again devolved to the Northern Ireland Assembly for it to settle.

As far as the Creasy amendment is concerned, the Government cannot be blamed for the fact that many Members of Parliament ignored its advice, thus making it a legal requirement that the Government must implement an abortion framework in Northern Ireland before 31st March, but, while the 4th November NIO proposals don't go beyond what is permitted by Section 9, it would surely be wrong to undermine devolution more than Parliament actually required. We feel confident that you will agree that would not be a wise position for a Conservative Government to adopt.

The three grounds for expanded access to abortion in paragraphs 85 and 86 of the CEDAW opinion engaged by Section 9 are:

1) In cases of rape and incest;
2) Threat to a woman's health including where the threat is not long term or permanent; and
3) Disability where this does not perpetuate negative stereotypes

The NIO consultation of 4th November proposes addressing cases of rape and incest by allowing abortion on demand for any reason up to 12 weeks – the rationale is that a woman should not have to disclose if she has been raped. This is politically unsustainable for two reasons. Firstly, it is completely contrary to current government precedent. For example, if a woman is to receive benefits for a child conceived through rape, they must disclose this to the DWP and go through a limited and sensitive verification procedure to avoid someone falsely claiming that they have been raped in order to get benefits. Secondly, it will create a situation in which around 98% of the abortions taking place on that ground would be for reasons other than rape and incest. To that extent it would involve the Government undermining devolution 98% more than Parliament has required. This would be constitutionally unthinkable and particularly inappropriate now that Stormont is functioning again.

The NIO consultation of 4th November proposes expanding grounds for abortion on the basis of a threat to women's health, by inexplicably exporting the ground for abortion in the 1967 Abortion Act – which is not referenced in any way by paragraphs 85 and 86 of the CEDAW opinion – under which 98% of abortions in England and Wales are conducted, thereby effectively permitting abortion on demand up to 24 weeks. If the Government proposed this, it would therefore once again involve the Government undermining devolution to a far greater extent than Parliament has required. Again, this would be particularly inappropriate given that Stormont has now been restored.

Over the years, UN Committees have made critical judgements on various policies from Conservative Governments. Giving this committee report undue weight would create a dangerous precedent, potentially opening up our party's record in Government to more criticism.

Finally, paragraphs 85 and 86 of the CEDAW opinion require expanded grounds for access to abortion on the basis of disability, with the crucial caveat *'without perpetuating stereotypes towards persons with disabilities and ensuring appropriate and ongoing support, social and financial, for women who decide to carry such pregnancies to term.'*

It would be entirely impossible to permit abortion in cases of disability without creating negative stereotyping unless the condition in question was such that someone could not grow to an age where they could comprehend that others with their condition were, on the basis of their condition, aborted. In practice, this effectively limits abortions to cases of disability where one could be confident that the disability was such that it would not be possible to live longer than around four years of age. This would be consistent with the recent Supreme Court judgment (*In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27) that while there is a human right to abortion in cases of fatal fetal abnormality, there is no such right beyond that.

Mindful of this we include draft regulations that make provision for abortion on the three bases above (using the precedent of the DWP legislation with respect to rape). These draft regulations fulfil what Parliament has required and avoid the embarrassment and scrutiny which would undoubtedly come should the Government be found to have needlessly further undermined devolution

It is particularly important that the Government does not seek to go beyond this given that the vote of 9th July last year, created a very difficult constitutional situation. All MPs who represent Northern Ireland, and take their seats, voted against the proposed change for Northern Ireland. The people of Northern Ireland were thereby disenfranchised, as the voices of their representatives were nullified on a Northern Ireland matter by the votes of English, Scottish and Welsh MPs.

This was a very difficult moment for our union and there was, contrary to what some MPs have argued, no human rights imperative for Parliament to act in this way as the CEDAW Convention – which defines the remit of the CEDAW Committee – does not even mention abortion. Moreover, the CEDAW Committee is a non-judicial, unelected body and has no standing to read in a right to abortion. As the expert legal opinion of Prof Mark Hill QC demonstrates, that right rests narrowly with the International Court of Justice.

In this context it is of supreme constitutional importance for our union going forward that the Government does not compound a very difficult situation in the way proposed by the NIO consultation. We commend the enclosed draft regulations as the appropriate way forward and strongly urge the Government to adopt them or something with a similar effect. If the Northern Ireland Assembly wishes to go beyond what these draft regulations provide, that is a matter for them to determine.

Yours,