Hon Fabian R Picardo QC MP,
Chief Minister of Gibraltar,
No. 6 Convent Place,
Gibraltar,
GX11 1AA.

27th June 2019

Dear Chief Minister,

We, the undersigned, a collection of international legal academics, are writing to you in relation to the "Crimes (Amendment) Act 2019", which proposes to introduce abortion for the first 12 weeks of pregnancy, and up to birth in certain circumstances including mental health risks.

You have publicly claimed that the Supreme Court decision in *In Re Northern Ireland Human Rights Commission's Application for Judicial Review*[1] requires abortion be introduced into the law of Gibraltar. We write with the unanimous opinion that this assertion is false and wholly misconceived. There is no such requirement in the Supreme Court decision in the abovementioned case. Moreover, contrary to your public statements, there is no human rights obligation whatsoever for Gibraltar to change its law on abortion.

The Supreme Court, declared, by the slimmest of majorities, and in non-binding comments, that *if* a case were brought to them with standing by an appropriate applicant, they would *probably* have judged that Northern Ireland's law is in violation of the European Convention on Human Rights ("ECHR").

This decision was non-binding on Northern Ireland for at least two reasons. First, the comments were *obiter dicta*, meaning they had no formal binding authority. Second, as Lady Hale noted, even if the Court had made a declaration that Northern Ireland's abortion laws were incompatible with the ECHR, Parliament has a number of options: "First, it may share the court's view and approve a "fast track" remedial order… Second, it may share our view and pass an Act of Parliament… Third, *it may do nothing*. This could be because it disagrees with court's view, and prefers to wait and see what view is eventually taken by the ECHR. Or it could be because it is inclined to leave matters as they are… It is at this point that the democratic will… rules the day."[2]

Moreover, even if the same case were brought by the appropriate applicant to the Supreme Court, there is every chance the Court would rule differently. In the case of rape, the Court was divided 4-3. One of those judges in the majority has left the Court already, and another is leaving shortly. Even by the most mundane of considerations, there is every chance that the new Court might decide differently.

A further consideration is the fact that even if the judgment required the authorities in Northern Ireland to do something, which it did not, the same decision would not automatically apply to Gibraltar. The judgment makes clear that the beginning of life is within the margin of appreciation afforded to parties to the ECHR. This is of particular relevance in light of the democratic decision of the citizens of Gibraltar to adopt a Constitution, which at Section 2 protects the right to life. For this reason, jurisdictions with pro-life laws protecting children from conception have always been vindicated at the European courts. This can be seen in regard to the law of the Republic of Ireland, which was tested at the European Court of Human Rights and was found not to be in breach of the ECHR.[3] The Irish law at that time was stricter than Gibraltar's law, in so far as it prohibited termination of pregnancy outside of very limited circumstances. There has never been any legal suggestion whatsoever that abortion in certain

[1] [2018] UKSC 27.
[2] Ibid at para. 39.
[3] See for example, A, B and C v Ireland, Application No. 25579/05 [Grand Chamber].

circumstances is, automatically and irrespective of contingent factors relating to particular countries, a right under article 8 of the ECHR or Section 7 of Gibraltar's Constitution. There is currently no decision of the Courts of Gibraltar holding that the prohibition of abortion in Section 161 of the Crimes Act 2011 is unconstitutional.

Turning again to the Supreme Court judgment being used to justify the introduction of abortion to Gibraltar, the judgment itself is clear that the laws of Northern Ireland are under consideration and that the case dealt with *specific facts* about Northern Ireland. It was explicitly *not* a judgment that any law like Northern Ireland's is automatically incompatible with the right to privacy and family life.

There are *at least* 3 differences between Gibraltar and Northern Ireland on relation to the central points that determined the Court's ruling in the Northern Ireland case. First, the Supreme Court commented on the lack of a functioning devolved government in Northern Ireland (para 299, *inter alia*). Such is not the case in Gibraltar. It was based secondly on the numerous consistent and clear opinion polls showing support for change in the law in the cases in question. Such is not the case in Gibraltar, where we have one highly ambiguous opinion poll at best, and which certainly does not support the abortion law in question, which does not even mention rape. It was based thirdly on the fact that women in Northern Ireland had to travel a significant distance overseas, paying for travel, accommodation and childcare, in order to access abortion. Such is not the case in Gibraltar. At least 3 central elements of the Northern Ireland judgment are therefore missing in the case of Gibraltar.

Finally, *even if* the judgment were binding on Gibraltar, the Bill goes *far* beyond the cases required by the Northern Ireland judgment, those of rape, incest, and fatal foetal anomaly. The Bill does not even mention rape or incest. It is difficult to see, therefore, how such a Bill could possibly be mandated by anything the Supreme Court or Privy Council has said or will say in the foreseeable future.

We conclude, therefore, that the single justification proposed by the government for this law is no justification whatsoever. It is flatly incorrect that Gibraltar's law would inevitably be declared unconstitutional or in violation of the ECHR. No Bill should, therefore, be passed on such clearly inadequate justification.

Yours sincerely,

Prof Richard Ekins

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Prof Robert P. George

McCormick Professor of Jurisprudence, Princeton University

Prof Adam MacLeod

Professor of Law, Faulkner University

Note: A copy of this letter has been circulated to Ministers for their information ahead of any potential upcoming vote.