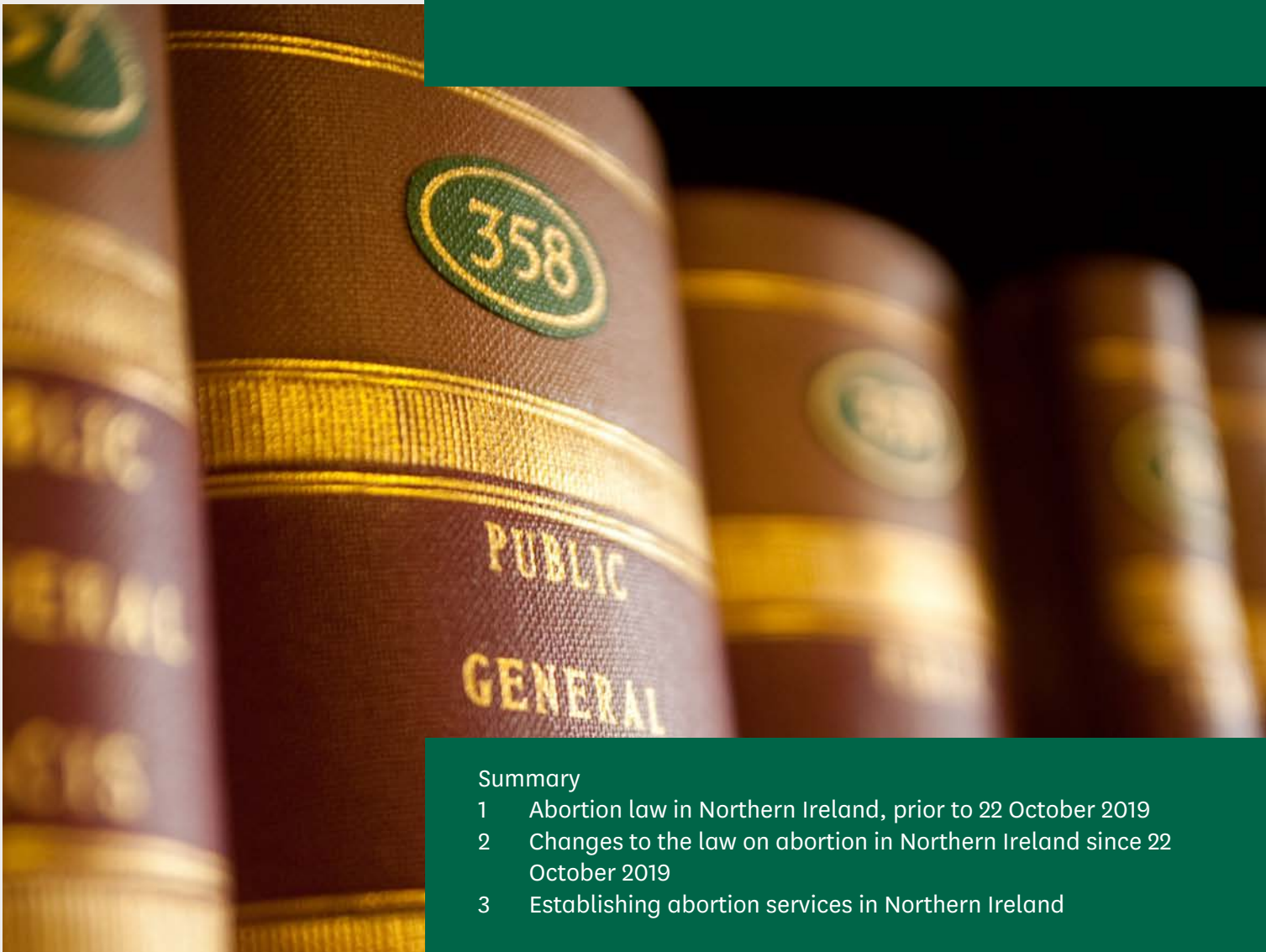


By Elizabeth Rough

8 December 2021

Abortion in Northern Ireland: recent changes to the legal framework



Summary

- 1 Abortion law in Northern Ireland, prior to 22 October 2019
- 2 Changes to the law on abortion in Northern Ireland since 22 October 2019
- 3 Establishing abortion services in Northern Ireland

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Summary

The purpose of this briefing is to provide an overview of how the law on abortion in Northern Ireland has changed in recent years. It does not comment on, or add to, the debate on the ethics of abortion.

Abortion is a medical intervention through which a pregnancy is ended. It is sometimes referred to as a ‘termination of a pregnancy’. A medical abortion involves taking 2 different medicines to end the pregnancy, usually 1 or 2 days apart, while a surgical abortion involves an operation to remove the pregnancy from the womb. There were 22 ‘[terminations of pregnancy](#)’ in hospitals in Northern Ireland in 2019-20, while 1,014 women travelled to England from Northern Ireland in 2019 for an abortion procedure under a scheme funded by the UK Government.

Legislation in 2019

Changes to the law on abortion in Northern Ireland were introduced by the UK Government through Section 9 of the [Northern Ireland \(Executive Formation etc\) Act 2019](#). The Act set out that Section 9 would come into force on 22 October 2019 if an Executive was not established by 21 October 2019. Since the Northern Ireland Executive was not in place by that date, the following changes to abortion law in Northern Ireland were made on 22 October 2019:

- sections 58 and 59 of the [Offences Against the Person Act 1861](#) in Northern Ireland (attempts to procure abortion) were immediately repealed;
- a moratorium on abortion-related criminal prosecutions came into effect;
- a duty was placed on the UK Government to introduce, by regulations, a new legal framework for abortion in Northern Ireland which ensured that the “recommendations in paragraphs 85 and 86 of the CEDAW report are implemented in respect of Northern Ireland” by 31 March 2020. The [CEDAW report](#) is the “Report of the Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women”.

A new legal framework

A new legal framework for abortion services in Northern Ireland was introduced, by regulation, by the UK Government on 25 March 2020 following a [6 week consultation](#). [The Abortion \(Northern Ireland\) Regulations 2020](#) allow access to abortions up to 12 weeks gestation (11 weeks + 6 days), without conditionality, to be certified by one medical professional that the

pregnancy has not exceeded its twelfth week. Abortions beyond 12 weeks gestation are lawful in specified instances, including when severe fetal impairment and fatal fetal abnormalities are detected.

The Regulations were subsequently re-made as the *Abortion (Northern Ireland) (No. 2) Regulations 2020* on 12 May 2020, correcting drafting errors identified by the Joint Committee on Statutory Instruments. The Regulations had to be approved by both Houses, within 28 days of being laid, to remain in force. The Lords approved the Regulations on 15 June 2020, with the Commons subsequently approving the Regulations on 17 June 2020.

A debate on the Regulations was held on 2 June 2020 in the Northern Ireland Assembly. The motion, tabled by the DUP MLA Joanne Bunting, stated that the Assembly rejected “the imposition of abortion legislation that extends to all non-fatal disabilities, including Down's syndrome”. The motion was carried (Ayes 46, Noes 40), though the vote was non-binding and does not alter the Regulations.

Commissioning of abortion services

Concerns have been repeatedly raised in Westminster, and beyond, that full commissioning of abortion services in Northern Ireland has not taken place. The Westminster Government has consistently responded that responsibility for commissioning services rests with the Northern Ireland Health Minister and associated Northern Ireland Departments. The Northern Ireland Health Minister has stated, however, that the 2020 regulations do not compel the NI Executive / Health and Social Care Board to provide abortion services.

Early in 2021, Northern Ireland Human Rights Commission (NIHRC) announced that it was taking legal action against the Secretary of State for Northern Ireland, on the grounds that he had failed to ensure that women are provided with abortion and post abortion care in public health facilities in Northern Ireland. In the same claim, the NIHRC also challenged that the Northern Ireland Executive Committee and NI Minister of Health had failed to agree to commission and fund abortion and post abortion care in Northern Ireland.

A judicial review, brought by the NIHRC, was heard at Belfast High Court in May 2021. Handing down the court's decision in October 2021, Mr Justice Colton said that the Northern Ireland Secretary had failed to comply with his duties, under section 9 of the Northern Ireland (Executive Formation etc) Act 2019, to “expeditiously” provide women with access to high quality abortion and post abortion care in all public health facilities in Northern Ireland. The NIHRC's claim for judicial review against the Minister of Health and the Northern Ireland Executive Committee was dismissed by Mr Justice Colton.

In March 2021, the UK Government laid the Abortion (Northern Ireland) Regulations 2021 to address the gaps in commissioning abortion services in Northern Ireland. The new regulations give the Secretary of State a power to “direct Northern Ireland Ministers and, departments or relevant agencies to implement all of the recommendations in paragraphs 85 and 86 of the CEDAW report, consistent with the conditions set out in the Abortion (Northern

Ireland) (No.2) Regulations 2020”. The 2021 Regulations were approved by both Houses of Parliament at the end of April 2021. In July 2021, the Secretary of State for Northern Ireland issued a direction to the Department of Health, the Minister of Health, the Health and Social Care Board, and to the First and deputy First Minister, to “commission and make abortion services available in Northern Ireland as soon as possible, and no later than 31 March 2022”. The 2021 Regulations and Directions are subject to a judicial review, brought by the Society for the Protection of Unborn Children. The case was heard at Belfast High Court in early October 2021 and judgement has been reserved.

Legislation in the Northern Ireland Assembly

Separately, a “non-executive bill” has also been introduced in the Northern Ireland Assembly on abortion in instances of severe fetal impairment. The Severe Fetal Impairment Abortion (Amendment) Bill (‘the SFIAA Bill’) was introduced on 16 February 2021 and, at the time of writing, had completed its Committee Stage. It seeks to remove the grounds for an abortion in cases of severe fetal impairment by amending the Abortion (Northern Ireland) (No. 2) Regulations 2020.

1 Abortion law in Northern Ireland, prior to 22 October 2019

1.1 Overview

Abortion is a medical intervention through which a pregnancy is ended. It is sometimes referred to as a ‘termination of a pregnancy’. A ‘medical abortion’ involves “taking 2 different medicines to end the pregnancy, usually 1 or 2 days apart”, while a ‘surgical abortion’ involves an operation to “remove the pregnancy from the womb”.¹

Prior to 22 October 2019, abortion was illegal in Northern Ireland under the [Offences Against the Person Act 1861](#), subject to very limited exceptions specified in the [Criminal Justice Act \(NI\) 1945](#) and application of case law (chiefly *R v Bourne* [1939] 1 KB 687).² The [Abortion Act 1967](#), which sets out the conditions under which a doctor may lawfully perform a termination in England, Wales and Scotland, was never extended to Northern Ireland.

There were 22 ‘terminations of pregnancy’ in hospitals in Northern Ireland in 2019-20, while 1,014 women travelled to England from Northern Ireland in 2019 for an abortion procedure under a scheme funded by the UK Government.³

1.2 The Offences against the Person Act 1861

Section 58 of the [Offences Against the Person Act 1861](#) (OAPA) establishes that it is a criminal offence, subject to a maximum penalty of life imprisonment:

- For any woman to act with intent to procure a miscarriage; or
- For any person to act with intent to procure a miscarriage of any woman.

Section 59 of the same Act establishes that it is a criminal offence to supply or procure any poison or instrument knowing that it will be used with intent to procure a miscarriage of any woman.

¹ National Institute for Health and Social Care Excellence, [Abortion before 14 weeks: choosing between medical or surgical abortion Decision aid](#), September 2019

² This case established that a doctor will be protected from prosecution if his clinical judgment is that continuance of the pregnancy carries a real and grave risk to the mother's physical or mental health.

³ Department of Health, Northern Ireland, [Northern Ireland Termination of Pregnancy Statistics, 2019/20](#), January 2021

The Act applies in England, Wales and Northern Ireland (though see section 2 below for reforms to this act in Northern Ireland in 2019).

1.3

Criminal Justice Act (NI) 1945

Section 58 of the OAPA was subsequently amended in England and Wales through the *Infant Life (Preservation) Act 1929*, and latterly in Northern Ireland through the [Criminal Justice Act \(NI\) 1945](#) (the 1945 Act). Both Acts sought to establish the principle that abortions that were for the sole purpose of preserving the life of the woman were no longer an offence.

Section 25(1) of the 1945 Act does this by including an offence of causing the death of a child capable of being born alive *except* where the purpose of the abortion is to preserve the life of the woman and has been undertaken 'in good faith'. In practice, this has meant that abortion has only been allowed in Northern Ireland under limited circumstances, namely where the pregnancy threatens the life of the woman or where it would seriously affect her physical or mental health in a way that is permanent or long term.

Abortion Act 1967

The law in England, Scotland and Wales was further amended through the [Abortion Act 1967](#). The Act permits abortion in Great Britain by registered practitioners subject to certain conditions. All abortions other than those performed as an emergency require approval by two registered medical practitioners and must be performed in facilities registered for this purpose.

The grounds for permitting abortions under Section 1 of the *Abortion Act 1967*, as amended, are:

- (a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or
- (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
- (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or
- (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.⁴

⁴ [The Abortion Act 1967](#)

Section 37 of the Human Fertilisation and Embryology Act 1990 made changes to the Abortion Act 1967. It introduced two different time limits on abortions:

- For abortions undertaken on ground (a) of the Act, the time limit is 24 weeks gestation;
- For those undertaken under grounds (b),(c) or (d), there is no time limit. Abortion can be may be performed up until the end of pregnancy.

The Act contains a ‘conscience clause’ which allows doctors and other healthcare professionals to override any contractual obligations and opt out of performing abortions.

Please note that the Abortion Act 1967 was never extended to Northern Ireland.

2 Changes to the law on abortion in Northern Ireland since 22 October 2019

2.1 The Northern Ireland (Executive Formation etc) Act 2019

Changes to the law on abortion in Northern Ireland were introduced through the [Northern Ireland \(Executive Formation etc\) Act 2019](#) (the 2019 Act). The original Bill was initially a short piece of legislation that amended Section 1 of the [Northern Ireland \(Executive Formation and Exercise of Functions\) Act 2018](#). This extended the period provided in the [Northern Ireland Act 1998](#) for Northern Ireland Ministers to be appointed to 21 October 2019, following the Assembly election held on 2 March 2017.

An overview of the Bill, as it was introduced, can be found in the Library Briefing Paper on the [Northern Ireland \(Executive Formation\) Bill 2017-19](#).

Amendments to the Northern Ireland (Executive Formation etc) Bill 2017-19

During the Committee Stage of the Bill (which in this instance was a [Committee of the whole House](#)), the Labour MP Stella Creasy tabled an amendment to change the law on abortion in Northern Ireland. The amendment, as drafted, gave effect to the recommendations of the report of the [Committee on the Elimination of Discrimination Against Women \(CEDAW\)](#) as follows:

International obligations in respect of CEDAW

(1) In accordance with the requirements of section 26 of the Northern Ireland Act 1998 regarding international obligations, the Secretary of State must make regulations by statutory instrument to give effect to the recommendations of the Report of the Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

(2) Regulations under this section must come into force by 21 October 2019, subject to subsections (3) and (4).

(3) A statutory instrument containing regulations under subsection (1)—

(a) must be laid before both Houses of Parliament;

(b) is subject to annulment in pursuance of a resolution of either House of Parliament.

(4) If a Northern Ireland Executive is formed before 21 October 2019, any extant obligations arising under subsection (1) shall cease to have effect.⁵

See Section 2.3 below for further details of the CEDAW report.

The Committee divided on whether New clause 10 should be added to the Bill, and agreed as follows: Ayes – 332, Noes – 99.⁶

New Clause 10 was subsequently amended in the House of Lords. The Liberal Democrat peer, Baroness Barker, tabled amendments to the Bill at Report Stage that were accepted by the Government. She noted that the wording of the amendment had been described as “deficient” and that there had been discussion on changing this:

An amendment was put forward, the substance of which was accepted by the Government—but it was said that the amendment was deficient. Since the addition to the Bill was made in the Commons, there has been a process of discussion between the Government and those who put forward that proposal about how the expressed will of the Commons should be carried forward—and, in particular, what regulation-making process should now be undertaken in Northern Ireland to implement that Bill. That has resulted in the amendments before your Lordships this evening: Amendment 12 and the consequential amendment.⁷

2.2

Section 9 of the 2019 Act

Measures related to abortion law are now in Section 9 of the 2019 Act and are detailed in Box 1. The Act provided that Section 9 would come into force on 22 October 2019 if an Executive was not established by 21 October 2019.

Since the Northern Ireland Executive was not in place by that date, the following changes to abortion law in Northern Ireland were made under Section 9 of the 2019 Act on 22 October 2019:

⁵ [HC Deb 9 July 2019, c163](#). The ‘CEDAW’ report is the “[Report of the Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women](#)” (CEDAW/C/OP.8/GBR/1) published on 6 March 2018

⁶ [HC Deb 9 July 2019 c232-234](#)

⁷ [HL Deb 17 July 2019 c289](#)

- sections 58 and 59 of the Offences Against the Person Act 1861 in Northern Ireland (attempts to procure abortion) were immediately repealed;
- a moratorium on abortion-related criminal prosecutions came into effect;
- a duty was placed on the UK Government to introduce, by regulations, a new legal framework for abortion in Northern Ireland which ensured that the “recommendations in paragraphs 85 and 86 of the CEDAW report are implemented in respect of Northern Ireland” ([Section 9, subsection 1 of the 2019 Act](#)). Subsection 4 was also clear that the regulations must come into force by 31 March 2020.

1 Section 9 of the Northern Ireland (Executive Formation etc) Act 2019

Abortion etc: implementation of CEDAW recommendations

1. The Secretary of State must ensure that the recommendations in paragraphs 85 and 86 of the CEDAW report are implemented in respect of Northern Ireland.
2. Sections 58 and 59 of the Offences Against the Person Act 1861 (attempts to procure abortion) are repealed under the law of Northern Ireland.
3. No investigation may be carried out, and no criminal proceedings may be brought or continued, in respect of an offence under those sections under the law of Northern Ireland (whenever committed).
4. The Secretary of State must by regulations make whatever other changes to the law of Northern Ireland appear to the Secretary of State to be necessary or appropriate for the purpose of complying with subsection (1).
5. Regulations under subsection (4) must, in particular, make provision for the purposes of regulating abortions in Northern Ireland, including provision as to the circumstances in which an abortion may take place.
6. Regulations under subsection (4) must be made so as to come into force by 31 March 2020 (but this does not in any way limit the re-exercise of the power).
7. The Secretary of State must carry out the duties imposed by this section expeditiously, recognising the importance of doing so for protecting the human rights of women in Northern Ireland.
8. The Secretary of State may by regulations make any provision that appears to the Secretary of State to be appropriate in view of subsection (2) or (3).

9. Regulations under this section may make any provision that could be made by an Act of the Northern Ireland Assembly.
10. In this section “the CEDAW report” means the Report of the Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/C/OP.8/GBR/1) published on 6 March 2018.

The changes made to the OAPA in Northern Ireland were not extended to other UK nations. In response to an [Urgent Question](#) on the decriminalisation of abortion on 23 July 2019, the then junior health minister, Jackie Doyle-Price, stated that “the Government currently have no plans to amend sections 58 and 59 of the 1861 Act in England and Wales”.⁸

2.3 The CEDAW Report

The [Convention on the Elimination of all forms of Discrimination Against Women](#) (CEDAW) is a global treaty on women’s rights. It was adopted by the UN General Assembly in 1979. The UK signed CEDAW in 1981 and ratified it in 1986. The Committee on the Elimination of Discrimination Against Women monitors the treaty. It is a body of 23 experts on women’s human rights that looks at how those binding rights are respected and applied in the domestic context. The UK has also signed up to the ‘Optional Protocol’ which gives individual women and groups the right to complain directly to that Committee.

In 2010, an application was made under the Optional Protocol to CEDAW by Alliance for Choice, the Family Planning Association and Northern Ireland Women’s European Platform (NIWEP) alleging that the UK was in violation of women and girls’ rights under the Convention owing to the restrictive access to abortion in Northern Ireland. This resulted in an inquiry by the CEDAW Committee and a [report](#) published in March 2018.⁹

[Section 9 of the Northern Ireland \(Executive Formation etc\) Act 2019](#) states that the Secretary of State “must ensure that the recommendations in paragraphs 85 and 86 of the CEDAW report are implemented in respect of Northern Ireland.” Paragraphs 85 and 86 of the 2018 CEDAW report are set out below:

85. The Committee recommends that the State party urgently:

⁸ [HC Deb 23 July 2019 c 1222](#)

⁹ [Report of the Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women](#), (CEDAW/C/OP.8/GBR/1), March 2018

- (a) Repeal sections 58 and 59 of the Offences against the Person Act, 1861 so that no criminal charges can be brought against women and girls who undergo abortion or against qualified health care professionals and all others who provide and assist in the abortion;
- (b) Adopt legislation to provide for expanded grounds to legalise abortion at least in the following cases:
 - (i) Threat to the pregnant woman’s physical or mental health without conditionality of “long-term or permanent” effects;
 - (ii) Rape and incest; and
 - (iii) Severe foetal impairment, including FFA, 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.
- (c) Introduce, as an interim measure, a moratorium on the application of criminal laws concerning abortion, and cease all related arrests, investigations and criminal prosecutions, including of women seeking post-abortion care and healthcare professionals;
- (d) Adopt evidence-based protocols for healthcare professionals on providing legal abortions particularly on the grounds of physical and mental health; and ensure continuous training on these protocols;
- (e) Establish a mechanism to advance women’s rights, including through monitoring authorities’ compliance with international standards concerning access to sexual and reproductive health including access to safe abortions; and ensure enhanced coordination between this mechanism with the Department of Health, Social Services and Public Safety (DHSSPS) and the Northern Ireland Human Rights Commission; and
- (f) Strengthen existing data collection and sharing systems between the DHSSPS and the PSNI to address the phenomenon of self-induced abortions.

B. Sexual and reproductive health rights and services

86. The Committee recommends that the State party:

- (a) Provide non-biased, scientifically sound and rights-based counselling and information on sexual and reproductive health services, including on all methods of contraception and access to abortion;
- (b) Ensure accessibility and affordability of sexual and reproductive health services and products, including on safe and modern contraception, including oral and emergency, long term or

permanent and adopt a protocol to facilitate access at pharmacies, clinics and hospitals;

(c) Provide women with access to high quality abortion and post-abortion care in all public health facilities, and adopt guidance on doctor-patient confidentiality in this area;

(d) Make age-appropriate, comprehensive and scientifically accurate education on sexual and reproductive health and rights a compulsory curriculum component for adolescents, covering early pregnancy prevention and access to abortion, and monitor its implementation;

(e) Intensify awareness-raising campaigns on sexual and reproductive health rights and services, including on access to modern contraception;

(f) Adopt a strategy to combat gender-based stereotypes regarding women's primary role as mothers; and

(g) Protect women from harassment by anti-abortion protestors by investigating complaints, prosecuting and punishing perpetrators.¹⁰

Detailed information on the findings of the Committee on the Elimination of Discrimination Against Women (CEDAW) regarding human rights breaches related to abortion law in Northern Ireland is set out in the April 2019 [Women and Equalities Committee report on Abortion law in Northern Ireland](#).¹¹

2.4 The Interim Period: 22 October 2019 to 31 March 2020

Ahead of the development and implementation of a new abortion framework in Northern Ireland, the Westminster Government published [Guidance For Healthcare Professionals In Northern Ireland On Abortion Law And Terminations Of Pregnancy](#). The document provided information regarding the provision of termination services in Northern Ireland during the 'interim period', between 22 October 2019 and 31 March 2020.

It clarified that no abortion services would be routinely available in Northern Ireland before the 31 March 2020 and that the Government had amended an existing scheme, which enabled women resident in Northern Ireland to travel to England to access abortion services, to improve its accessibility:

¹⁰ [Report of the Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women](#), (CEDAW/C/OP.8/GBR/1), March 2018

¹¹ Women and Equalities Committee, [Abortion law in Northern Ireland](#), April 2019, HC 1584

- Health professionals in Northern Ireland will be supplied with information about the funded services in England (summarised in Annex B) and, if approached by a woman considering a termination of pregnancy, they should provide her with the number for the Central Booking Service in England (0333 234 2184) or call the helpline on behalf of the woman. The CBS can arrange for advice, support and counselling to be made available for women who are uncertain or unsure of their decision. Those with a conscientious objection to abortion should direct women to where information about services is available including Gov.uk.
- From 22 October 2019, women should be informed that all travel, and where needed accommodation, will be funded and the current criteria in relation to low income or receipt of benefits will no longer be applied.¹²

The scheme in England would, according to the guidance, “remain in place after 31 March 2020 until [...] service provision in Northern Ireland is available to meet women’s needs”.¹³

The guidance also stated that, in the interim period, healthcare professionals with a conscientious objection to abortion should follow guidance from their professional body, such as the General Medical Council, and may wish to raise this with their employer.

Time limits on abortion

In both the [Infant Life \(Preservation\) Act 1929](#), and the [Criminal Justice Act \(NI\) 1945](#), a fetus is automatically deemed as being capable of being born alive at 28 weeks gestation.¹⁴ This does not, however, prevent evidence being provided of a fetus being shown to be capable of being born alive at an earlier gestational age. The Medical law book, *Medical Law and Ethics*, explains that under subsection (2) of the 1929 Act:

a foetus of twenty-eight weeks’ gestation or older is presumed to be capable of being born alive. This is only a presumption and could be rebutted if it could be shown that, for example, an older foetus was not actually capable of being born alive or that a younger one was.¹⁵

The issue of the definition of being ‘capable of being born alive’ has been looked at by the Courts. In 1987, in [C v S](#), the Court of Appeal held that to be

¹² Northern Ireland Office, [Guidance For Healthcare Professionals In Northern Ireland On Abortion Law And Terminations Of Pregnancy In The Period 22 October 2019 To 31 March 2020 In Relation To The Northern Ireland \(Executive Formation Etc\) Act 2019](#), October 2019. Please note that this document was withdrawn following the 2020 regulations being laid.

¹³ *ibid* p4-5

¹⁴ Section 25(2) of the [Criminal Justice \(NI\) Act 1945](#) & Section 1(2) of the [Infant Life Preservation Act 1929](#)

¹⁵ Herring, *Medical law and Ethics*, (7th Edition) 2018

‘capable of being born alive’, a fetus must be able, on delivery, to breathe either naturally or with mechanical aid.¹⁶

Section 37 of the [Human Fertilisation and Embryology Act 1990](#) amended the Abortion Act 1967 to introduce a time limit of 24 weeks for those abortions (in England and Wales) taking place under the grounds laid out in section 1(1)(a) of the 1967 Act. Terminations carried out on the following grounds, as set out in section 1(1)(b-d) of the 1967 Act, are permitted at any gestational age where:

- it is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
- there is a risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or
- there is substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

The Abortion Act 1967, however, does not apply in Northern Ireland.

The Government responded to questions about abortion time limits in Northern Ireland during the Report Stage of the Northern Ireland (Executive Formation) Bill in the House of Lords. The then junior Northern Ireland Minister, Lord Duncan, explained that the 1945 Act would remain in place after the repeal of sections 58 and 59 of the Offences Against the Person Act 1861 and while the new regime was implemented. This would mean it was a criminal offence to end the life of any “child capable of being born”:

It is important to stress that, although we are looking at the 1861 Act and the elements we shall remove from it, during this limbo period the Criminal Justice Act (Northern Ireland) 1945 will still apply. Section 25 will still apply; this makes it a criminal offence to destroy any life of a child capable of being born. That will apply during that limbo period, until we have got to the stage where we have the newly functioning regime.¹⁷

Lord Duncan went on to clarify that no abortions would be carried out over 24 weeks and that this would be an offence under the Criminal Justice (Northern Ireland) Act 1945. He also added that the Government was *not* seeking to introduce legislation that would allow later abortions than in England and Wales:

I was asked a question about abortions at 24 weeks. We can guarantee that no abortions will be carried out over 24 weeks. In this limbo period, it would be an offence under the 1945 Act as these would indeed be deemed to be

¹⁶ M Brazier, E Cave, *Medicines Patients and the Law*, 2016 (6th edition) (13.12); [C. v S.](#) Court of Appeal (Civil Division), 24 February 1987, 1987 WL 1455036

¹⁷ [Report Stage, Northern Ireland \(Executive Formation\) Bill, 17 July 2019 c310](#)

viable, and would be children. I say that in response to the noble Lord, Lord McCrea. After the new regime, we would not introduce legislation that allowed later abortions than are taken in England or Wales. We would seek harmony.¹⁸

¹⁸ [Report Stage, Northern Ireland \(Executive Formation\) Bill, 17 July 2019 c313](#)

3 Establishing abortion services in Northern Ireland

3.1 UK Government consultation

The UK Government published a consultation paper, [A legal framework for abortion services in Northern Ireland](#) on 4 November 2019, with the consultation running for six weeks, until 16 December 2019.¹⁹ The stated [aim of the consultation](#) was to:

inform a new framework for access to abortion services in Northern Ireland that is consistent with the recommendations of the 2018 United Nations Committee on the Elimination of Discrimination Against Women Report, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.²⁰

The consultation document set out a number of proposals that covered:

1. Early Terminations of pregnancy
2. Gestations beyond 12 or 14 weeks
3. Fetal Abnormality
4. Risk to the woman or girl's life or risk of grave permanent injury
5. Who can perform a termination of pregnancy
6. Where procedures can take place
7. Certificate of opinion and notification requirements
8. Conscientious objection

¹⁹ HM Government, [A new legal framework for abortion services in Northern Ireland, Implementation of the legal duty under section 9 of the Northern Ireland \(Executive Formation etc\) Act 2019](#), Government consultation, 4 November 2019

²⁰ A new legal framework for abortion services in Northern Ireland, "[Consultation description](#)", gov.uk, 4 November 2019

9. Exclusion zones²¹

In some instances, more than one proposal was put forward in the consultation (eg whether the gestational time limit for unrestricted early terminations of pregnancy should be up to 12 weeks, or up to 14 weeks). There was an opportunity for those answering the consultation questions using the *pro forma* to disagree with the proposal(s) and to set out an alternative approach.

On 16 January 2020, the Government was asked in a [Parliamentary Question](#) what steps it was “taking to ensure that the new abortion regulations for Northern Ireland do not go further than those laid out in section 9 of the Northern Ireland (Executive Formation etc) Act 2019”. The then Secretary of State for Northern Ireland, Julian Smith, replied that:

We have now finished a six-week consultation on the proposals for the new framework that would provide lawful access to abortion services in Northern Ireland, consistent with what is required under section 9 of the Northern Ireland (Executive Formation etc.) Act 2019 - and the recommendations of the 2018 UN CEDAW Report [...] We will now be carefully analysing the submissions received, and ensuring that the views received are reflected in the Government’s response, and inform the final framework that will be provided for in the regulations.²²

The [Government Response](#) to the Consultation, published on 25 March 2020, (discussed below), clarified that officials from the Northern Ireland Office had spoken to a range of stakeholders as part of the consultation, including:

the Northern Ireland Department of Health, healthcare professionals, Royal Colleges, the all-Ireland church leaders group, abortion service providers, trade unions and civil society organisations [as well as] individuals with lived experience.²³

Restoration of the Northern Ireland Executive and Assembly

In early January 2020, the Executive and Assembly in Northern Ireland were restored. The immediate priorities of the Executive were set out in the document [The New Decade, New Approach Deal](#). The document did not make an explicit reference to abortion law in Northern Ireland.

²¹ HM Government, [A new legal framework for abortion services in Northern Ireland. Implementation of the legal duty under section 9 of the Northern Ireland \(Executive Formation etc\) Act 2019](#), Government consultation, 4 November 2019

²² [PQ 4331](#) [Abortion: Northern Ireland] 21 January 2020

²³ HM Government, [A new legal framework for abortion services in Northern Ireland. Implementation of the legal duty under section 9 of the Northern Ireland \(Executive Formation etc\) Act 2019](#), UK Government consultation response, March 2020, p8

The restoration of the Executive and Assembly did not have any immediate impact on abortion law in Northern Ireland: sections 58 and 59 of the *Offences Against the Person Act 1861* remain repealed in Northern Ireland. The [UK Government](#) was also clear that it continued to have a legal duty under section 9 of the Northern Ireland (Executive Formation etc) Act 2019 to reform the law on abortion and to bring forward regulations to introduce a new legal framework for abortion in Northern Ireland by 31 March 2020.

Speaking in a [debate](#) on the Northern Ireland (Executive Formation etc) Act 2019 on 8 January 2020, the Northern Ireland Minister, Robin Walker, stated that:

We have to recognise that we are under a legal duty under section 9 of the Northern Ireland (Executive Formation) Act 2019, and we will be continuing to work to put in place the regulations by 31 March, providing access to abortion consistent with the CEDAW report.

The hon. Member for Rochdale asked what we could do if the Executive were restored. If that were to happen before 31 March, we would welcome discussions on the regulations that will be made, and questions on implementation, which of course will be taken forward by the Northern Ireland Department of Health.²⁴

Mr Walker also indicated that, once the law has been changed, the devolved institutions could choose to repeal or alter the law (since health and social services, equal opportunities, and justice and policing - which are relevant to the provision of abortion services - are devolved matters):

As these are devolved matters, any reform after March 2020 can of course be considered by the Executive and the Assembly, subject to such legislation complying with convention rights and the usual Assembly procedures. This is yet another of those issues where, if we want the concerns and views of people in Northern Ireland to be properly heard, we must ensure that the institutions are in place.²⁵

The Northern Ireland Assembly debated changes to the law on abortion in Northern Ireland, and specifically in relation to “non-fatal disabilities”, on 2 June 2020.²⁶ For further discussion see section 3.4. A ‘non-Executive’ (Private Members’) Bill – the [Severe Fetal Impairment Abortion \(Amendment\) Bill](#) (‘the SFIAA Bill’) – was also introduced in the Northern Ireland Assembly in February 2021, see section 3.8.

²⁴ [HC Deb, 8 Jan 2020, c 573](#)

²⁵ [HC Deb, 8 Jan 2020, c 573](#)

²⁶ Northern Ireland Assembly, [Abortion Legislation: Non-fatal Disabilities](#), 2 June 2020

3.2

Government response to the consultation

The Abortion (Northern Ireland) Regulations 2020

The Government published its [response](#) to the consultation on 25 March 2020; the same day as it laid [The Abortion \(Northern Ireland\) Regulations 2020](#). Under section 12, subsection 3 of the [Northern Ireland \(Executive Formation etc\) Act 2019](#), the regulations must be “laid before Parliament after being made”. This means that the regulations come into effect immediately but require subsequent approval to remain in force. In this instance, under subsection 4, they must be approved “by a resolution of each House of Parliament” within 28 days of being laid. The 28 days excludes those periods when the House was “dissolved or prorogued or during which both Houses are adjourned for more than four days”. The 28 days ended on 17 May 2020.²⁷ The Regulations were ‘re-made’, however, on 12 May 2020 (see section 3.4).

In its introduction to the new framework, the Government was clear that a “fundamental requirement” of the new measures was that they must be in accordance with the recommendations made in the CEDAW Report. It added that the Government had also taken into account the need to:

- ensure that the framework protects and promotes the health and safety of women and girls and provides clarity and certainty for the medical profession; and
- is responsive and sensitive to the Northern Ireland Executive and Assembly being back up and running.²⁸

The Government noted that the majority of the submissions it received in response to the consultation opposed changing the law on abortion in Northern Ireland:

Of all submissions received, 79% of those expressed a view registering their general opposition to any abortion provision in Northern Ireland beyond that which is currently permitted. These views were carefully assessed and noted, recognising the strength of feeling expressed by many. However, the Government remains under a legal obligation to introduce a framework in a way that implements the recommendations of the CEDAW Report.²⁹

²⁷ UK Parliament, Statutory Instruments, [Abortion \(Northern Ireland\) Regulations 2020, Statutory Instrument SI 2020/345](#), made on 25 March 2020, last accessed 27 April 2020

²⁸ HM Government, [A new legal framework for abortion services in Northern Ireland Implementation of the legal duty under section 9 of the Northern Ireland \(Executive Formation etc\) Act 2019](#), UK Government consultation response, March 2020, p10

²⁹ HM Government, [A new legal framework for abortion services in Northern Ireland Implementation of the legal duty under section 9 of the Northern Ireland \(Executive Formation etc\) Act 2019](#), UK Government consultation response, March 2020, p9

A high level overview of the new provisions is provided in chapter 2 of the Government Response, with extracts included in Box 2 below.

2 Overview of the new abortion framework for Northern Ireland

The regulations make provision for:

1. **Early termination of pregnancy** - access without conditionality to abortion services up to 12 weeks gestation (11 weeks + 6 days).
2. **Termination of pregnancy up to 24 weeks** - access to abortion services up to 24 weeks gestation (23 + 6 days) in cases where the continuance of the pregnancy would involve risk of injury to the physical or mental health of the pregnant woman or girl, greater than the risk of terminating the pregnancy.
3. **Fetal abnormality** - access to abortion services in cases of severe fetal impairment (SFI) and fatal fetal abnormalities (FFA) with no gestational time limit. This is where there is a substantial risk that the condition of the fetus is such that the death of the fetus is likely before, during or shortly after birth; or if the child were born, it would suffer from such physical or mental impairment as to be seriously disabled.
4. **Risk to the woman or girl's life or risk of grave permanent injury** - access to abortion services with no gestational time limit where there is a risk to the life of the woman or girl, greater than if the pregnancy were terminated, or where necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman or girl, including in cases of immediate necessity.³⁰

The Regulations place a duty on the medical professional to give notice of the termination and submit this with relevant data (as specified in the Regulations) to the Chief Medical Officer at the Northern Ireland Department of Health. The Department of Health in Northern Ireland is responsible for the annual publication of relevant data.³¹

The Regulations specify that procedures can be carried out in:

General Practitioners premises, clinics provided by a Health and Social Care (HSC) trust, and HSC hospitals, operating under the

³⁰ *ibid* p10

³¹ *ibid* p11

overall Northern Ireland HSC framework and women’s homes where the second stage of early medical terminations may be carried out.³²

There is also provision for the Northern Ireland Health Minister to approve additional places where abortions can be performed. The Department of Health in Northern Ireland is responsible for overseeing the commissioning of abortion services in Northern Ireland, consistent with the framework.³³

Conscientious Objection

Under [Part 7](#) of the Regulations, no person has a duty to “participate in any treatment authorised by the Regulations to which the person has a conscientious objection”. The only exception is where the participation in treatment “is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman or girl”. The consultation response stated that this approach mirrors the same statutory protection provided under the Abortion Act 1967.³⁴

3.3

Response to the new regulations

Responses to the new regulations were mixed. The [Belfast Telegraph](#) reported that the Health Committee of the Northern Ireland Assembly was looking into whether it was possible for the Assembly to challenge and review Northern Ireland’s new abortion laws. DUP MLA Alex Easton was reported as saying:

We want to see whether the Assembly can do something to challenge what Westminster are doing, what powers we have to change things now the law is in place.³⁵

In response to Mr Easton’s comments, Paula Bradshaw, Alliance Party health spokesperson, said:

access to safe abortion services is a requirement arising from legislation initially passed in the UK Parliament last summer, with the date of April 1 set in consequent regulations agreed by the UK Government three months ago. The requirement for services and information for pregnant women, particularly those enduring crisis

³² *ibid* p11

³³ Northern Ireland Office, [Changes to the law in Northern Ireland: updated information](#), 25 March 2020

³⁴ HM Government, [A new legal framework for abortion services in Northern Ireland Implementation of the legal duty under section 9 of the Northern Ireland \(Executive Formation etc\) Act 2019](#), UK Government consultation response, March 2020, p11

³⁵ [Health committee looks at possibility of challenging Northern Ireland's new laws on abortion](#), *The Belfast Telegraph*, 30 March 2020

pregnancies, has never been more profound than during the current health emergency in which pregnant women are an at-risk group.³⁶

House of Lords Secondary Legislation Scrutiny Committee

The House of Lords Secondary Legislation Scrutiny Committee published its report analysing the Abortion (Northern Ireland) Regulations 2020 on 23 April 2020. It raised several concerns about the Regulations including that:

- “interpretive guidance” was not yet available (in draft form or otherwise) alongside the Regulations;³⁷
- the reasons for specific policy choices made should have been “explained in more detail” in the Explanatory Memorandum, given the “overwhelmingly negative response to the consultation exercise”;³⁸
- the public consultation was open for six weeks which, the Committee stated, was “too short for so sensitive a topic”. It added that holding the Consultation during the General Election period, and “in the run up to Christmas”, did not conform with best practice.³⁹

In addition, the Committee concluded that it was:

regrettable that the Government chose to lay so controversial an instrument just as a recess started and, more importantly, so close to the implementation date set out in the 2019 Act, thereby denying Parliament an opportunity for scrutiny before the instrument came into effect.⁴⁰

The Committee identified three areas where the House may wish to ask the Minister for further information and / or clarification:

- Conscientious objection – namely the “scope of the [conscientious objection] policy and how it will be interpreted”;
- Disability – submissions to the Committee identified a “dichotomy” in the CEDAW recommendation which “requires the provision of termination for ‘severe foetal impairment’ but ‘without perpetuating stereotypes towards persons with disabilities’”. The Committee suggested that the “House

³⁶ [Health committee looks at possibility of challenging Northern Ireland's new laws on abortion](#), *The Belfast Telegraph*, 30 March 2020

³⁷ House of Lords, Secondary Legislation Scrutiny Committee, [Proposed Negative Statutory Instrument under the European Union \(Withdrawal\) Act 2018 Drawn to the special attention of the House: Abortion \(Northern Ireland\) Regulations 2020](#), 23 April 2020, HL Paper 49, 2019–21, para 33

³⁸ *ibid*, para 34

³⁹ *ibid*, para 43

⁴⁰ *ibid*, para 46

may wish to press the Minister about how these provisions will be interpreted”;⁴¹

- Sexual and reproductive health rights and services – the Committee notes that section 9(1) of the *Northern Ireland (Executive Formation etc) Act 2019* requires the Government to implement paragraph 86 of the CEDAW Report. This paragraph covers the provision of ‘sexual and reproductive health rights and services’ in Northern Ireland, including sex education and contraception which, the Committee states, are not “mentioned in these Regulations”.⁴² The Committee suggests that “The House may wish [...] to ask the Minister how the Government intend to comply with those requirements”.⁴³

Covid-19

Temporary measures to enable women and girls to take both pills for early medical abortion in their own homes, without the need to first attend a hospital or clinic (though with the same medical consultation requirements provided via video link, telephone conference or other electronic means), have been put in place in [England](#), [Scotland](#) and [Wales](#), by their respective Governments, during the Covid-19 outbreak.⁴⁴ No such measures have been put in place by the Northern Ireland Assembly or Executive. Under the new regulations, women in Northern Ireland must take the first pill in Health and Social Care premises. The second pill may be taken at home.⁴⁵ The Westminster Government has since run a consultation seeking views on whether to make this temporary measure relating to the [home use of both pills for early medical abortion](#) in England permanent. The consultation ran from 26 November 2020 to 26 February 2021. A Government Response has yet to be published.⁴⁶ Similar consultations have also taken place in Wales⁴⁷ and Scotland.⁴⁸

Concerns were raised in early April 2020, however, that since abortion services had yet to become operational in Northern Ireland, women continued to be reliant on the existing scheme of travelling to England to access such services. Information published by the Northern Ireland Office stated that this

⁴¹ *ibid*, para 34

⁴² *ibid*, para 36

⁴³ *ibid*, para 36

⁴⁴ Department of Health and Social Care, [Decision: Temporary approval of home use for both stages of early medical abortion](#), 30 March 2020; Letter from the Chief Medical Officer (Scotland), [Abortion – Covid-19 – Approval For Mifepristone To Be Taken At Home And Other Contingency Measures](#), 31 March 2020; Welsh Government, [Legislation: Temporary approval of home use for both stages of early medical abortion](#), 1 April 2020

⁴⁵ [Women in Northern Ireland ‘will be able to have early abortions’ amid coronavirus lockdown](#), *The Independent* [online], 15 April 2020

⁴⁶ Department of Health and Social Care, [Closed consultation: Home use of both pills for early medical abortion](#), 26 November 2020

⁴⁷ Welsh Government, [Consultation document, Termination of Pregnancy arrangements in Wales](#), 1 December 2020

⁴⁸ Scottish Government, [Early medical abortion at home: consultation](#), 30 September 2020

scheme would “remain in place after 31 March 2020” until it was “confident that service provision in Northern Ireland is available to meet women’s needs”.⁴⁹

The abortion provider and charity Marie Stopes UK welcomed the introduction of the regulations, but questioned when services in Northern Ireland would be in place, particularly since travel to England was restricted under the current social distancing measures:

We are extremely pleased to see the long-awaited legal framework for accessing abortion care in Northern Ireland - for too long, women in the region have been treated as second class citizens and this day would not have arrived were it not for brave and resilient abortion reform campaigners. However, while the legal framework is a significant step in the right direction, abortion care cannot be delivered without services in place, and with travel to Marie Stopes' clinics in England restricted due to the COVID-19 crisis, thousands of women and girls will be held in limbo, forced to continue an unwanted pregnancy or to buy abortion pills illegally online.⁵⁰

Richard Bentley, Managing Director of Marie Stopes UK, [advocated](#) for allowing “women in Northern Ireland to take both sets of early medical abortion pills at home, as is now the case in England”.⁵¹ Dr Edward Morris, President of the Royal College of Obstetricians and Gynaecologists (RCOG) similarly welcomed the regulations permitting abortion services in Northern Ireland. He also noted that the change had come in the middle of a pandemic which, he stated, increased the need:

to establish care for women in Northern Ireland to reduce the spread of COVID-19. The health minister must temporarily permit the home-use of mifepristone to ensure access to early medical abortion remotely. This is safe, effective and recognised best practice.⁵²

Commissioning abortion services in Northern Ireland

The Department of Health in Northern Ireland is responsible for overseeing the commissioning of abortion services in Northern Ireland, consistent with the regulations.⁵³ [BBC News Online](#) reported on 9 April 2020 that health trusts in Northern Ireland had been “stopped from carrying out early abortion services”⁵⁴ and specifically that the Belfast, South Eastern and Northern health trusts had “had been instructed not to proceed” with their “temporary

⁴⁹ Northern Ireland Office, [Changes to the law in Northern Ireland: updated information](#), 25 March 2020

⁵⁰ [New abortion regulations come into effect in Northern Ireland](#), Marie Stopes UK, 31 March 2020

⁵¹ [New abortion regulations come into effect in Northern Ireland](#), Marie Stopes UK, 31 March 2020

⁵² [RCOG/FSRH respond to new regulations on abortion care in Northern Ireland](#), Royal College of Obstetricians and Gynaecologists, 27 March 2020

⁵³ Northern Ireland Office, [Changes to the law in Northern Ireland: updated information](#), 25 March 2020

⁵⁴ [NI health trusts 'stopped from carrying out early abortions'](#), *BBC News Online*, 9 April 2020

plan to provide services in Northern Ireland”, “pending the issue being discussed by the Northern Ireland Executive”.⁵⁵

[The Guardian](#) subsequently reported that Department of Health in Northern Ireland had confirmed late on 9 April 2020 that, having received legal advice, “registered medical professionals in Northern Ireland may now terminate pregnancies lawfully” on Health and Social Care premises.⁵⁶ The news agency Reuters noted that the Department “did not provide details [in its statement] on where and how women could access abortion services” in Northern Ireland.⁵⁷ A response to a [PQ](#) on 13 May 2020 stated that some service provision in Northern Ireland had commenced:

through existing sexual and reproductive health services in the Belfast, Northern and Western Trust areas. Information on these services is available through the Informing Choices NI helpline and the Central Booking Service.⁵⁸

3.4 The Abortion (Northern Ireland) (No. 2) Regulations 2020

A motion to approve the Regulations was due to be considered on 12 May 2020 by the House of Commons and by the House of Lords on 13 May. This, however, did not occur. The Government gave two reasons as to why the Regulations had not been considered according to its original schedule; first that the “interest” in an ongoing General Debate on Covid-19 meant that the Government “had to make [...] changes to the business” for the week commencing 11 May 2020 to enable the General Debate to continue for a second day.⁵⁹

Second, the [Joint Committee on Statutory Instruments](#) (JCSI) identified drafting errors in the Regulations and reported them for “defective drafting”. Specifically, the JCSI highlighted “cross-referencing errors in paragraph 7 of the Schedule” so that:

a) in sub-paragraph (a), the reference to regulations 5 and 6 should be to regulations 4 and 5;

b) in sub-paragraph (b), the reference to regulation 7 should be to regulation 6; and

⁵⁵ [Abortions 'can now be carried out' in Northern Ireland](#), *BBC News Online*, 9 April 2020

⁵⁶ [Northern Ireland confirms abortions can now be carried out](#), *The Guardian*, 9 April 2020

⁵⁷ [Northern Ireland authorities give green light to abortion services](#), *Reuters*, 9 April 2020

⁵⁸ [PQ 902590](#) [on Abortion: Northern Ireland], 13 May 2020

⁵⁹ [HC Deb, 13 May 2020 c274](#)

c) in sub-paragraph(c), the reference to regulation 8 should be to regulation 7.⁶⁰

The Regulations were ‘re-made’ on 12 May 2020 to correct the drafting error and laid before both Houses on 13 May 2020 as [The Abortion \(Northern Ireland\) \(No. 2\) Regulations 2020](#). They came into force as law on 14 May 2020 and had to be approved by both Houses, within 28 days of being laid, to remain in force. The [Parliamentary Statutory Instrument Tracker](#) calculated that the approval period ended on 19 June 2020. The Northern Ireland Minister, Robin Walker, commented on the re-making of the Regulations in response to a PQ on 13 May:

The Abortion (Northern Ireland) Regulations 2020 which were laid in March have now been replaced with the Abortion (Northern Ireland) (No. 2) Regulations 2020, which were laid in the House today. These regulations come into effect on 14th May and revoke the earlier regulations. Their legal effect in supporting the provision of services remains consistent, with a small correction having been made to address the concerns of the JCSI, so services can continue on the same basis.⁶¹

Debate in the Northern Ireland Assembly on abortion legislation, 2 June 2020

On 2 June 2020, the Northern Ireland Assembly debated a motion tabled by Joanne Bunting MLA of the Democratic Unionist Party. The motion stated:

That this Assembly welcomes the important intervention of disability campaigner Heidi Crowter and rejects the imposition of abortion legislation that extends to all non-fatal disabilities, including Down's syndrome.⁶²

While the Belfast Telegraph reported that DUP motion “rejected the new regulations in their entirety”⁶³, Ms Bunting said the following about “what the motion means”:

You will be voting to say that Northern Ireland rejects abortion law that directly discriminates against a human being purely on the basis of disability. Only that group of viable humans can be aborted up to term. You will be saying that the Assembly does not agree that it is right that unborn children with Down's syndrome or a cleft palate can be aborted just because they have those conditions. You will be voting to reject the imposition of abortion legislation on

⁶⁰ Joint Committee on Statutory Instruments, [Tenth Report of Session 2019–21](#), HL 58, HC 75-x, published 8 May 2020, paras 4.1-4.4

⁶¹ [PQ 902590](#) [on Abortion: Northern Ireland], 13 May 2020

⁶² Northern Ireland Assembly, [Abortion Legislation: Non-fatal Disabilities](#), 2 June 2020

⁶³ [MLAs vote against ‘imposition’ of new abortion regulations in Northern Ireland](#), *Belfast Telegraph*, 2 June 2020

Northern Ireland. Abortion law is a devolved matter, and we are responsible for reflecting our society's values in this area, not Great Britain. You will be voting for life.⁶⁴

Emma Sheerin MLA, of Sinn Féin, moved the following amendment during the debate:

Leave out all after “rejects” and insert

“the specific legislative provision in the abortion legislation that goes beyond fatal foetal abnormalities to include non-fatal disabilities, including Down's syndrome.”⁶⁵

Ms Sheerin described the “DUP motion” as:

an attempt to undermine any and all abortion provision in the North. We in Sinn Féin oppose the DUP's attack on women's reproductive rights, and we oppose the DUP's attempt to undermine our right to modern healthcare. The amendment that we have tabled would see a refining of the law to offer abortion services in the North mirrored with the services that we already have in the Twenty-six Counties.⁶⁶

The amendment was defeated (Ayes 32, Noes 52) and the original motion tabled by Joanne Bunting was carried (Ayes 46, Noes 40). While the vote was non-binding, and does not alter the Regulations, it was viewed by some as an important opportunity to, as one MLA put it, “send a strong message to Westminster” that the Regulations were not supported by the majority of MLAs.⁶⁷

Urgent Question on abortion in Northern Ireland, 4 June 2020

Following the debate in Stormont, Sir Jeffrey Donaldson MP of the DUP asked an Urgent Question in the House of Commons on the abortion regulations for Northern Ireland. Sir Jeffrey questioned both the legal basis for the UK Government bringing forward regulations to change the law on abortion in Northern Ireland, as well as the content of the regulations:

I note the submissions of huge importance to the Secondary Legislation Scrutiny Committee from two QCs who also argue that the Secretary of State is under no obligation to press the regulations to a vote. To do so will fundamentally breach the devolution settlement and cause a constitutional predicament of the Government's own making.

⁶⁴ Northern Ireland Assembly, [Abortion Legislation: Non-fatal Disabilities](#), 2 June 2020

⁶⁵ Northern Ireland Assembly, [Abortion Legislation: Non-fatal Disabilities](#), 2 June 2020

⁶⁶ *ibid*

⁶⁷ *ibid*

The Secretary of State would also be well advised not to bring the regulations to a vote because they sanction abortion for non-fatal disability up to birth, something that around 75 Members of the Assembly this week voted against.⁶⁸

In his response, the Northern Ireland Minister, Robin Walker, emphasised that the UK Government was “under a statutory duty” to bring forward new regulations:

The Government were placed under a statutory duty to deliver abortion law for Northern Ireland by implementing the recommendations of the CEDAW report. That duty came into effect, given that the Executive was not restored by 21 October 2019. That followed many months, if not years, of the issues receiving ongoing attention at Westminster on human rights grounds, including parliamentary questions, Committee inquiries, amendments to other legislation requiring the Government to report, and so on, leading to this particular amendment being voted through with a significant majority.

The statutory duty in section 9 of the EF Act did not fall away with the restoration of the Executive, nor with the making of the initial regulations that came into force on 31 March 2020. That is why we have had to re-lay the new regulations. Even if the regulations had not been approved by Parliament in time, or the deadline had not been met, the Government would still be under a statutory duty to introduce new regulations.⁶⁹

The Minister also re-iterated that the Assembly could amend the regulations in the future, since abortion was a devolved issue, but that any amendments would need to be “human rights and convention-compliant”:

We hope that the regulations provide a solid framework for abortion services to be provided within Northern Ireland, although I appreciate that this remains a devolved issue and the Assembly can amend the regulations in future, subject to the usual Assembly and other procedures, including compliance with the European convention on human rights. Repealing section 9, which I know some in the right hon. Gentleman’s party have asked for, has never been a viable solution. This would have required primary legislation before Westminster, which would have been subject to a free vote on grounds of conscience, but we would still have a legal obligation to propose an alternative human rights-compliant model by 31 March to ensure we complied with convention rights.

Similarly, if the Executive and Assembly were to legislate for an alternative approach, it would still be required to be human rights and convention-compliant. I recognise that the Assembly did debate

⁶⁸ [HC Deb 4 June 2020 c1019](#)

⁶⁹ [HC Deb 4 June 2020 c1019](#)

one aspect of the regulations on Tuesday—severe foetal impairment—and passed a motion stating that it does not support the provision allowing for abortions in cases of severe foetal impairment without time limit. While I respect the Assembly’s right to state its position on this, it does not have any bearing on the legal obligations that have been placed on us by this Parliament. Unfortunately, the motion that the Assembly debated and backed proposed no solution that would deliver a CEDAW-compliant regime in this regard.⁷⁰

Delegated Legislation Committee, 8 June 2020

On the 8 June 2020, the Regulations were considered in a Delegated Legislation Committee. Several points were raised, including:

- the time available for debate on the matter and the fact that the debate was occurring in a DL Committee and not on the floor of the House;
- the legal basis for the UK Government to make the Regulations;
- the progress made by the Northern Ireland Department of Health to commission abortion services in Northern Ireland;
- where responsibility for monitoring the implementation of the regulations, and expanding training and medical facilities, lies;
- regulation 7 on ‘severe fetal impairment or fatal fetal abnormality’ and if it dealt with disability in a discriminatory way.⁷¹

Responding for the Government, the Minister for Northern Ireland, Robin Walker, re-iterated a number of the points he had made in response to the Urgent Question on 4 June 2020, including that he was “very confident that we [the UK Government] have the vires under the Northern Ireland (Executive Formation etc) Act 2019 to carry forward the legislation”.⁷² He added that abortion remained a devolved issue and that the UK Government was ready to support the Northern Ireland Department of Health in setting up abortion services:

the Assembly is able to legislate further on abortion, subject to the usual Assembly and other procedures, including compliance with the European Convention on Human Rights. The UK Government will continue to ensure that we abide by our domestic and international legal obligations. The Government stand ready to provide whatever support and guidance we can both to the Northern Ireland Minister of Health and the Department of Health, to assist them in

⁷⁰ [HC Deb 4 June 2020 c1020](#)

⁷¹ [Abortion \(Northern Ireland\) \(No. 2\) Regulations 2020](#), Delegated Legislation Committee, 8 June 2020

⁷² [Abortion \(Northern Ireland\) \(No. 2\) Regulations 2020](#), Delegated Legislation Committee, 8 June 2020, c8

progressing work to set up abortion services in line with our new legislative framework.⁷³

Regarding severe fetal impairment, the Minister emphasised that there was “nothing in this regulation that permits abortion for specific conditions”:

The regulation follows the law in England and Wales and the approach that we have taken to SFI [*severe fetal impairment*] in the rest of the United Kingdom. In that respect, it brings a consistent approach across the UK. Given the often late diagnosis and timing of follow-up scans and tests, women need to be given time to understand the nature and severity of the conditions that they might be dealing with. It is right that they should be able to make informed decisions based on their own health and wider circumstances and in consultation with doctors.⁷⁴

Following the Delegated Legislation Committee, the House of Commons subsequently voted on a motion, without debate, to approve the Regulations on 17 June 2020. The question was agreed to (Ayes 253, Noes: 136).⁷⁵

Debate in the House of Lords, 15 June 2020

On the 15 June 2020, the House of Lords considered a motion to approve the Regulations. Two amendments to the motion were moved, both of which stated that the Regulations promoted and perpetuated discrimination on the grounds of disability. The first was an amendment moved by Baroness O’Loan which declined to approve the Regulations on multiple grounds:

this House declines to approve the Regulations because they (1) have been rejected by the Northern Ireland Assembly, (2) are legally flawed by being in breach of section 6 of the Northern Ireland Act 1998, (3) do not prohibit abortion on the grounds of non-fatal disability, (4) perpetuate stereotypes towards persons with disabilities, including Down’s syndrome, and (5) do not prohibit abortion on the grounds of sex selection during the first twelve weeks of gestation, as is the case in Great Britain, and therefore perpetuate negative stereotypes and prejudices towards women.⁷⁶

The second was moved by Lord Shinkwin, though he emphasised he was not intending to move his amendment to a vote:

insert “this House declines to approve the Regulations because (1) they are drafted in such a way as to promote the stereotype that those with non-fatal disabilities are worthy of less protection in law than those who are not disabled; (2) to that extent they do not comply with the recommendation in paragraph 85 of the United

⁷³ [Ibid c12-13](#)

⁷⁴ [Ibid c42-43](#)

⁷⁵ [HC Deb 17 June 2020 c 921-924](#)

⁷⁶ [HL Deb 15 June 2020, c1978](#)

Nation’s Committee on the Elimination of Discrimination against Women’s report Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, published on 21 March 2018, in particular that legal grounds for abortion should be expanded ‘without perpetuating stereotypes towards persons with disabilities’; and (3) to that extent they are counter to the decision of the House on 17 July 2019 in amending the Northern Ireland (Executive Formation etc) Bill to implement the recommendations of paragraph 85 of that report.”⁷⁷

Responding for the Government, Viscount Younger of Leckie stressed that the Government “would never act to discriminate on the basis of disability”.⁷⁸ He added that the regulations were consistent with the rights under the United Nations Convention on the Rights of Persons with Disabilities and that they mirrored the law in the rest of the UK. On the point of the “constitutional propriety” of the Westminster Government, rather than the Northern Ireland Assembly, legislating on the matter, he pointed to section 9 of the Northern Ireland (Executive Formation etc) Act 2019 which, he said, “compelled the UK Government to ensure that the regulations were in force by 31 March 2020”.⁷⁹

Baroness O’Loan put her amendment to the vote. It was disagreed (Content: 112; Not Content: 388).⁸⁰ The Lords subsequently voted on the Government’s motion to approve the Regulations. It was agreed (Content: 355; Not Content: 77).⁸¹

The Abortion (Northern Ireland) (No. 2) Regulations 2020 were therefore agreed by both Houses and remain in force in Northern Ireland.

3.5

Ongoing issues concerning the commissioning of abortion services in Northern Ireland

Questions have been tabled in Westminster throughout 2020 regarding the commissioning of abortion services in Northern Ireland in line with the 2020 regulations, amid concern that provision is patchy and has ceased in certain areas. The Westminster Government has consistently responded that responsibility for commissioning services rests with the Northern Ireland Health Minister and associated Northern Ireland Departments. For example, the Northern Ireland Minister, Robin Walker, stated in December 2020:

My Department [the Northern Ireland Office] and I are continuing to engage and work with the Northern Ireland Health Minister and the

⁷⁷ [HL Deb 15 June 2020, c1981](#)

⁷⁸ [HL Deb 15 June 2020, c1996](#)

⁷⁹ [HL Deb 15 June 2020, c 1995-1996](#)

⁸⁰ [HL Deb 15 June 2020, c1999-2001](#)

⁸¹ [HL Deb 15 June 2020, c2003-2005](#)

relevant Northern Ireland departments, in implementing the remaining CEDAW recommendations on matters for which they are responsible, including the full commissioning of abortion services in line with the Regulations we made, at the earliest opportunity.⁸²

In January 2021, at Northern Ireland Questions, Labour MP Stella Creasy asked the Northern Ireland Minister what assessment he had made of “the adequacy of the provision of abortion services in Northern Ireland under section 9 of the Northern Ireland (Executive Formation etc) Act 2019”. Mr Walker responded that some service provision had been available since April 2020:

over 719 women and girls [had] been able to access services locally by mid-October last year. We take our moral and legal duties on this matter very seriously and remain disappointed that full abortion services remain to be commissioned by the Department of Health, which would be the most appropriate way to progress the matter. We continue to monitor the situation closely.

[...]

The Government continue to fund access to services in England, particularly where local access may not be available; even in the current circumstances, some women and girls have availed themselves of those services. We continue to monitor the situation closely and will consider further legislative action at Westminster at the appropriate time, should it be required.⁸³

Northern Ireland Human Rights Commission

Early in 2021, the Northern Ireland Human Rights Commission reported that the Department of Health (NI) had “not commissioned or funded termination services for the purposes of implementing the Abortion (Northern Ireland) (No 2) Regulations across Northern Ireland”. It added that the five NI health and social care trusts had, several months ago, made an “application seeking funding to meet the new legislative requirements for abortion services” but that the application was “not considered by the Health and Social Care Board”.⁸⁴ The Health Minister for Northern Ireland stated in response to a Written Question in December 2020 that, with regards to early medical abortion, the Northern Ireland Executive had not yet agreed to the Minister’s proposals for commissioning such services:

Initial consideration of a commissioning specification was paused due to the COVID-19 pandemic. In April of this year, I sought Executive agreement, as required by the Ministerial Code when an issue is cross cutting and controversial, to introduce an emergency

⁸² [PQ 121837](#) [on Abortion: Northern Ireland], 7 December 2020

⁸³ [HC Deb, 20 January 2021, c952](#)

⁸⁴ Northern Ireland Human Rights Commission, [2021 Fact Sheet: Human Rights Commission Legal Action on Lack of Abortion Services in NI](#), January 2021, p2

early medical abortion service for the duration of the pandemic. The Executive has yet to agree my proposal. I am therefore unable to give a timescale for the introduction of services.⁸⁵

The Northern Ireland Human Rights Commission has also described how the Northern, and the South East Health and Social Care Trusts had ceased providing services due to staff and resource pressures linked to Covid-19. It similarly noted that other Trusts were “not providing abortions for between 10 and 12 weeks due to lack of resources”.⁸⁶ According to the Commission, the lack of a consistent service across Northern Ireland has:

created a disparity in accessing termination services within Northern Ireland. It has also meant that many, depending on their circumstances and where they live in Northern Ireland, continue to have to travel to other parts of the UK and Ireland or to use unregulated services.⁸⁷

Consequently, the Commission announced that it was taking legal action against the Secretary of State, the NI Executive and Department of Health for Northern Ireland for failing to commission and fund abortion services in Northern Ireland on the grounds that it “breaches the European Convention on Human Rights”, specifically Article 8 on the right to private and family life. It stated:

The Secretary of State for Northern Ireland has a statutory requirement under the NI (Executive Formation) Act 2019 to ensure that the recommendations of the Convention of the Elimination of Discrimination against Women committee are implemented, namely that women have access to free and safe abortions in Northern Ireland.

The Commission wants the Department to be permitted to commission and fund the abortion services provided for in the Abortion (Northern Ireland) (No 2) Regulations 2020; and expects the Secretary of State to take such legislative action as is necessary to meet his legal duty to ensure this happens, including if necessary to take legislative action.⁸⁸

The judicial review was [heard](#) at Belfast High Court on the 26, 27 and 28 May 2021 and judgement was reserved. Handing down the court’s decision in October 2021, Mr Justice Colton said that the Secretary of State for Northern Ireland had failed to comply with his duties, under section 9 of the Northern Ireland (Executive Formation etc) Act 2019, to “expeditiously” provide women

⁸⁵ Written Answer, NI Assembly, [AQW 10646/17-22](#), answered on 17/12/2020

⁸⁶ [Northern Ireland Human Rights Commission Takes Legal Action on Lack of Abortion Services in NI](#), 11 January 2021

⁸⁷ Northern Ireland Human Rights Commission, [2021 Fact Sheet: Human Rights Commission Legal Action on Lack of Abortion Services in NI](#), January 2021

⁸⁸ [Human Rights Commission Takes Legal Action on Lack of Abortion Services in NI](#), Northern Ireland Human Rights Commission, 11 January 2021)

with access to high quality abortion and post abortion care in all public health facilities in Northern Ireland. Mr Justice Colton declined, however, to issue an order (known as an ‘order of mandamus’) compelling the Secretary of State to set out a timetable for the provision of abortion and post abortion care. This was on the grounds that he did not think it “proper or of any utility” for the court to issue an order when the Secretary of State accepts that he has a statutory duty to implement the 2019 Act.⁸⁹

The claim for judicial review against the NI Minister of Health and the Northern Ireland Executive Committee was dismissed. In its ‘[Order 53 statement](#)’ (which sets out the relief sought by the applicant, and the grounds on which it is sought) the NIHRC sought:

- a declaration that the Executive Committee and Minister of Health had failed to make provision for abortion and post abortion care for women in Northern Ireland in all public health facilities, and;
- an Order requiring the Executive Committee and Minister of Health to agree on, commission and fund services for abortion and post abortion care in Northern Ireland.

In his verdict, Mr Justice Colton stated that the Executive Committee had not yet been asked to consider proposals for the fully commissioned services referred to in the 2020 regulations. He stated that the proposals the Executive Committee considered (and did not reach a decision on) in April 2020 concerned the provision of a limited, interim provision of early medical abortion services in the wake of the pandemic.⁹⁰ He thus concluded that the stage had “not been reached where [the Executive Committee] has refused to agree a proposal for the commissioning of abortion services as envisaged in the Order 53 Statement”.⁹¹

The Judge also noted that the NI Department of Health had confirmed its commitment to commissioning abortion services, in line with the 2020 Regulations. He added that the pause in Commissioning services was “justified in the very exceptional and particular circumstances surrounding the Covid-19 pandemic” and thus he was “satisfied that the Department [had] acted in accordance with its obligations to commission services in accordance with the 2020 Regulations”.⁹²

The Northern Ireland Health Minister has previously stated in June 2020 that the 2020 regulations do not compel the NI Executive / Health and Social Care Board to provide abortion services:

There is no legislative obligation for the provision of abortion services. Abortion, within the confines of The Abortion (Northern Ireland) (No. 2) Regulations 2020, can legally be provided. The

⁸⁹ [\[2021\] NIQB 91](#) at 34

⁹⁰ [\[2021\] NIQB 91](#) at 29

⁹¹ *ibid*

⁹² [\[2021\] NIQB 91](#) at 35

extent to which an abortion service is delivered, as with any other service, is a matter Trusts must consider within the context of other service developments competing for investment within the available budget.⁹³

The Secretary of State for Northern Ireland, Brandon Lewis, was quoted as saying that he was “disappointed” with the verdict, adding that the Northern Ireland “Executive and Department of Health are continuing to seem to wilfully neglect the welfare and rights of women and girls in NI”.⁹⁴ In its response, the Northern Ireland Department of Health said it was taking the “necessary time to consider [the] court ruling in detail”. Regarding next steps, it stated that the “Department and Minister have received clear legal advice that NI Executive approval is required on the commissioning of abortion services” and cited the following from Mr Justice Colton’s verdict:

It [the Department of Health] will further be constrained by the fact that ultimately the Executive Committee will have to agree to the commissioning proposals [for abortion services] when complete. This is because the introduction of any new service would require Executive approval, in accordance with sections 20 and 28A of the Northern Ireland Act 1998 and the Ministerial Code contained in the Act.⁹⁵

The NIHRC welcomed the judgement, stating that it had brought the case “because of the unacceptable delay in the provision of adequate services”. It remained concerned, however, that while the judgement had “not displaced the obligation to provide those [abortion] services”, there was a “likelihood of further delay continuing”.⁹⁶

3.6

Abortion (Northern Ireland) Regulations 2021

Almost a year after [The Abortion \(Northern Ireland\) Regulations 2020 were introduced](#), the Westminster Government laid the [Abortion \(Northern Ireland\) Regulations 2021](#) to address the gaps in commissioning abortion services in Northern Ireland. A Written Statement explained that the new regulations give the Northern Ireland Secretary a power to:

direct Northern Ireland Ministers and, departments or relevant agencies to implement all of the recommendations in paragraphs 85 and 86 of the CEDAW report, consistent with the conditions set out in the Abortion (Northern Ireland) (No.2) Regulations 2020.⁹⁷

⁹³ Written Answer, NI Assembly, [AQW 4218/17-22](#), answered on 08/06/2020

⁹⁴ [Northern Ireland secretary failed to comply with abortion duty, judge rules](#), The Guardian, 14 October 2021; [UK minister failed to 'expeditiously' provide N. Irish abortion services](#), Reuters, 14 October 2021

⁹⁵ [Department statement on High Court judgment](#), Department of Health (NI), 14 October 2021

⁹⁶ NIHRC, [NI Human Rights Commission Welcomes Abortion Services Challenge](#), 14 October 2021

⁹⁷ [Written Statement UIN HCWS875](#), The Abortion (Northern Ireland) Regulations 2021, 23 March 2021

The Secretary of State also explained why the regulations were, in the Government's view, necessary:

women and girls in Northern Ireland are still unable to access high-quality abortion and post-abortion care in Northern Ireland.

The Regulations have been made to ensure, as required by the Northern Ireland (Executive Formation etc) Act 2019, that all of the recommendations in paragraphs 85 and 86 of the 2018 UN Committee on the Elimination of Discrimination Against Women (CEDAW) report are implemented in Northern Ireland.⁹⁸

Further detail regarding the rationale behind the regulations is set out in the accompanying explanatory memorandum. It states that, while the Northern Ireland (Executive Formation etc) Act 2019, and the provisions of the associated Abortion Regulations, implemented several of the recommendations in the CEDAW Report:

the intention was for the remaining recommendations to be implemented through action taken by the Northern Ireland Department of Health, and other relevant Northern Ireland departments, including the full commissioning of abortion services in Northern Ireland.

[...]

From April 2020, some service provision was established by registered medical professionals across the Northern Ireland Health and Social Care Trusts, in line with the conditions and requirements set out in the Abortion Regulations [...] However, these services have not been commissioned or supported by the Northern Ireland Department of Health. Full abortion services, in all of the circumstances set out in the Abortion Regulations where access is now lawful, are not yet available in Northern Ireland.⁹⁹

The explanatory memorandum is clear that the Secretary of State will continue to engage with the Northern Ireland Executive, including the Northern Ireland Health Minister, to see if progress on commissioning abortion services can be made “ahead of any direction” being given by the Secretary of State.¹⁰⁰

An Urgent Question on the provision of abortion in Northern Ireland was subsequently asked on 25 March 2021. The Secretary of State emphasised that it was his legal duty to “ensure that the recommendations in a specific report by the Committee on the Elimination of Discrimination against Women are implemented in Northern Ireland” and that the new regulations were “about ensuring that the existing law is acted on and delivered”. He added that the

⁹⁸ [Written Statement UIN HCWS875](#), The Abortion (Northern Ireland) Regulations 2021, 23 March 2021

⁹⁹ [Explanatory memorandum to The Abortion \(Northern Ireland\) Regulations 2021](#), 23 March 2021, p3

¹⁰⁰ [Explanatory memorandum to The Abortion \(Northern Ireland\) Regulations 2021](#), 23 March 2021, p4

Government’s “strong preference is, and remains, for the Minister of Health and his Department to take responsibility for upholding these rights, commissioning services, and delivering on what the law now clearly allows”.¹⁰¹

The Regulations were made under the “made affirmative” procedure and came into force as law on 31 March 2021. Under Section 12 of the parent Act (the Northern Ireland (Executive Formation etc) Act 2019), the regulations must be “approved by a resolution of each House of Parliament”, within 28 days of having been made, in order to remain in effect. The regulations were considered by a Commons Delegated Legislation Committee on 26 April 2021. The Northern Ireland Minister, Robin Walker, emphasised that the purpose of the 2021 regulations was to “ensure implementation of the law that has been in place for over a year”, adding that, to date, “services have not been formally commissioned, supported or funded by the Northern Ireland Department of Health, and there has been no guidance issued or official support measures put in place”.¹⁰² He added that the Secretary of State “stands ready, if we do not see significant progress before the summer recess, to issue the direction empowered by these regulation”.¹⁰³

Following the Delegated Legislation Committee, the House of Commons subsequently voted on a motion, without debate, to approve the Regulations on 27 April 2021. The question was agreed to (Ayes 431, Noes: 89).¹⁰⁴

Debate in the House of Lords, 28 April 2021

On 28 April 2021, the House of Lords considered a motion to approve the 2021 regulations. Three amendments to the motion were moved to decline to approve the regulations. The first motion, moved by Baroness O’Loan (Crossbench), sought to decline approval on the following grounds:

(1) the Northern Ireland Assembly is now sitting and the matter is devolved to that legislature; (2) the Regulations raise “complex legal and constitutional questions” in the view of the Secondary Legislation Scrutiny Committee; (3) the Regulations go beyond the Abortion (Northern Ireland) (No. 2) Regulations 2020 in that they undermine the devolution settlement in respect of education as well as abortion policy; (4) there has been no public consultation on the Regulations; and (5) the Regulations were laid shortly before the parliamentary Easter recess, which prevented the House considering them before they took effect

The second was moved by Lord Morrow (DUP) which predominantly focused on declining approval on the grounds that the regulations undermined devolution and devolved policy competencies:

¹⁰¹ [HC Deb, 25 March 2021](#).

¹⁰² Delegated Legislation Committee, [Abortion \(Northern Ireland\) Regulations 2021](#), 26 April 2021, c1-4

¹⁰³ *Ibid* c5

¹⁰⁴ House of Commons, [Votes and Proceedings](#), 27 April 2021

(1) rather than expressing the reality of the union between the constituent parts of the United Kingdom, they place that union in jeopardy, depending as they do on the power in section 9 of the Northern Ireland (Executive Formation etc) Act 2019, which was passed despite all of the Members of Parliament representing seats in Northern Ireland who had taken their seats at Westminster voting against amending the Northern Ireland (Executive Formation etc) Bill on 9 July 2019 to require the Secretary of State to make regulations to give effect to the recommendations of the report of the Committee on the Elimination of all forms of Discrimination Against Women, published on 6 March 2018;

(2) abortion remains devolved and the Northern Ireland Assembly and Executive have now been restored for more than a year; (3) rather than welcoming the restoration of devolution, the draft Regulations undermine it to a greater extent than the Abortion (Northern Ireland) (No. 2) Regulations 2020 as they address devolved policy competencies beyond abortion, including education and health; and (4) the remit of everything in the Northern Ireland (Executive Formation etc) Act 2019 is defined in terms of moving towards the restoration of the Executive which has taken place, so rather than making new regulations as if Stormont was still suspended, and asking Parliament to pass them, Her Majesty's Government should instead be asking Parliament to repeal section 9.

Finally, Lord Shinkwin (Con) moved an amendment to decline to approve the regulations because, he said, they would perpetuate “negative stereotypes towards people with disabilities”:

this House declines to approve the Regulations laid before the House on 23 March because they give the Secretary of State the power actively to commission discrimination in Northern Ireland by denying unborn human beings with disabilities the same protections afforded non-disabled human beings between 24 weeks gestation and full term; and because such commissioning would implicate the Secretary of State, and by extension Her Majesty's Government, in the perpetuation of negative stereotypes towards people with disabilities, as it would provide that while unborn non-disabled human beings from 24 weeks' gestation are worthy of protection from termination, those who might be born with disabilities are not.

Responding for the Government, Viscount Younger of Leckie stated that the Government “would never act to discriminate on the basis of disability” and that the regulations were “consistent with the rights under the United Nations Convention on the Rights of Persons with Disabilities”.¹⁰⁵ On the question of abortion and devolution, Lord Younger emphasised that the statutory duty in Section 9 of the *Northern Ireland (Executive Formation etc) Act 2019* (ensuring that the recommendations in paragraphs 85 and 86 of the CEDAW report are implemented in respect of Northern Ireland – see section 2.3 of this briefing)

¹⁰⁵ [HL Deb, 28 April 2021, c2287](#)

“did not fall away” with the restoration of the Northern Ireland Assembly and Executive. He added that the 2021 regulations were “about ensuring compliance with the statutory duties Parliament imposed on the Secretary of State for Northern Ireland in mid-2019”.¹⁰⁶

All three amendments were put to a vote and each was defeated (Baroness O’Loan’s amendment – Content: 93, Not Content: 418; Lord Morrow’s amendment – Content 63, Not Content: 401; Lord Shinkwin’s amendment – Content 70, Not Content 409).¹⁰⁷

The Lords subsequently agreed to the Government’s motion to approve the Regulations without a vote.

The Abortion (Northern Ireland) Regulations 2021 were therefore agreed by both Houses and remain in force in Northern Ireland.

3.7

Abortion Services Directions 2021

On 22 July 2021, the Northern Ireland Secretary, Brandon Lewis, set out in a [Written Statement](#) that he had issued a direction to the Department of Health, the Minister of Health, the Health and Social Care Board, and to the First and deputy First Minister, to “commission and make abortion services available in Northern Ireland as soon as possible, and no later than 31 March 2022”:

I am now directing the Department of Health to secure the commissioning and availability of the relevant healthcare services. The direction also includes an immediate requirement for the Department of Health to continue to support the Central Access Point provided by Informing Choices NI (ICNI) who are key to providing Early Medical Abortion services. I have chosen to impose a deadline for the availability of commissioned services of 31 March 2022 to account for the Department of Health’s estimate that it would take 8-12 months to make fully commissioned CEDAW compliant services available.

I am also directing the Department of Health and the Regional Health and Social Care Board. The direction includes a requirement to commission, provide and fund abortion services so that they are available in all of the circumstances in which abortions are lawful. This includes access to services in cases of Fatal Fetal Abnormality and Severe Fetal Impairment in line with the Abortion (Northern Ireland) (No 2) Regulations 2020 in any service commissioned. It is for the Northern Ireland Executive to allocate all necessary funding

¹⁰⁶ Ibid c2288

¹⁰⁷ [HL Deb, 28 April 2021, c2291 - 2294; c2296 - 2298, c2299 - 2302](#)

for abortion services from its Barnett-based Block Grant or its own resources.

I am also directing the **First Minister and deputy First Minister** that once proposals are brought forward by the Department of Health, they must be included on the agenda at the next meeting of the Executive Committee.¹⁰⁸

The Secretary of State added that the situation had reached a “stalemate” since:

[...] full commissioning proposals have not yet been brought forward by the Department of Health and [...] the Executive has not an opportunity to discuss them.

This situation, he said, had left him with “no choice” but to issue a direction.¹⁰⁹

RTÉ (Ireland’s National Television and Radio Broadcaster) reported that there had been a “mixed reaction” to the issuing of the direction. The DUP, it stated, had described the move as undermining devolution, while Sinn Féin, the Alliance Party and Green Party were said to have welcomed the actions of the Secretary of State.¹¹⁰

Judicial Review of the 2021 Regulations and Directions

The Society for the Protection of Unborn Children (SPUC) was granted leave to bring judicial review proceedings against the Northern Ireland Secretary regarding the legality of both the Abortion (Northern Ireland) Regulations 2021 and Abortion Services Directions 2021. A summary of the case is set out in an NIHRC briefing on the [SPUC Legal challenge to Abortion Services in NI](#):

It is argued that the 2021 Regulations give the Secretary of State a greater power than he has under Section 26 of the Northern Ireland Act 1998 and that the Secretary of State’s powers are not exercisable when legislative and executive powers are being exercised by the NI Assembly. In addition, it is argued that the 2021 Regulations are unlawful in that they permit abortion on the grounds of disability.

SPUC has also launched a further challenge against both the Secretary of State and the Minister for Health in relation to directions issued by the Secretary of State for NI on 22 July 2021 entitled The Abortion Services Directions 2021.¹¹¹

¹⁰⁸ The Abortion Services Directions 2021, [Statement UIN HCWS238](#), 22 July 2021

¹⁰⁹ The Abortion Services Directions 2021, [Statement UIN HCWS238](#), 22 July 2021

¹¹⁰ [Mixed reaction in NI to abortion services direction](#), RTÉ, 22 July 2021

¹¹¹ NIHRC, [October 2021 Fact Sheet: Human Rights Commission intervene in SPUC Legal challenge to Abortion Services in NI](#), 19 August 2021

The case was heard on the 4 and 5 October 2021 at Belfast High Court and judgement was reserved (meaning the decision will be given at a later date). The BBC reported that counsel for SPUC “told the High Court that Stormont ministers had ‘no obligation’ to comply with the law, due to flaws in how the regulations were drafted”. The claim was rejected by counsel for the Northern Ireland Secretary.¹¹²

Further updates on commissioning services

The Northern Ireland Health Minister provided an update on the commissioning of abortion services to the NI Committee for Health, as part of its scrutiny of the Severe Fetal Impairment Abortion (Amendment) Bill 2021 (see section 3.8 below). He told the Committee that work on commissioning was underway and that the plans would be subject to approval by the Executive:

The Minister confirmed that preparatory scoping work to develop a commissioning model, which was paused as a result of the Department’s COVID-19 response work, resumed in June 2021. The Minister further confirmed that the recommended service model will be subject to prior approval by the Executive, under the terms of the Ministerial Code, as well as business case approval and public consultation, in due course.¹¹³

A parliamentary question was also tabled in Westminster, in November 2021, about the progress made to date on the commissioning of abortion services in Northern Ireland since the issuing of the Abortion Services Directions 2021. In response, the Secretary of State for Northern Ireland told MPs that he had “recently requested a timetable for the Health Minister’s bringing of proposals before the Executive Committee to commission abortion services”. He added that if progress was not forthcoming, or if the NI Department of Health or Executive were “blocking the issue”, then he would “take further steps to ensure that women and girls have access to abortion services as decided by Parliament, and to which they have a right”.¹¹⁴

3.8

Severe Fetal Impairment Abortion (Amendment) Bill 2021 (NIA Bill 15/17-22)

Prior to the [Abortion \(Northern Ireland\) Regulations 2021](#) being laid in Westminster, the [Severe Fetal Impairment Abortion \(Amendment\) Bill](#) (‘the SFIAA Bill’) was introduced to the Northern Ireland Assembly on 16 February 2021. It is a ‘non-Executive’ (Private Members’) Bill sponsored by MLA Paul

¹¹² [Westminster has ‘clear power’ to set up NI abortion services](#), BBC News Online, 5 October 2021

¹¹³ Northern Ireland Assembly, Committee for Health, [Report on the Severe Fetal Impairment Abortion \(Amendment\) Bill](#), Report: NIA 88/17-22, 11 November 2021, para 66

¹¹⁴ [PQ 71520](#) [on Abortion: Northern Ireland], 22 November 2021

Givan (DUP). The Bill seeks to remove the grounds for an abortion in cases of severe fetal impairment by amending the Abortion (Northern Ireland) (No. 2) Regulations 2020. Specifically, the Bill aims to omit the following provision from Regulation 7 in the 2020 regulations:

A registered medical professional may terminate a pregnancy where two registered medical professionals are of the opinion, formed in good faith, that there is a substantial risk that the condition of the fetus is such that—

[...]

(b) if the child were born, it would suffer from such physical or mental impairment as to be seriously disabled.

Under the 2020 Regulations, there is no gestational limit as to when a termination on the grounds of severe fetal impairment (as defined in Regulation 7) may take place. There is also currently no clinical or statutory guidance in Northern Ireland on how to define a ‘substantial risk’ of pregnancy resulting in the birth of a ‘seriously disabled’ child. The Explanatory Memorandum to the 2020 Regulations notes how:

determinations that there is a “substantial risk” of a child being “seriously disabled” under regulation 7 are subjective and it is the Government’s intention that the Regulations will protect medical professionals who make these difficult and often finely balanced decisions in good faith, based on their honest belief.¹¹⁵

Opening the debate, Mr Givan said that the purpose of the Bill was to:

tackle the disability discrimination that is so obvious in our current abortion regulations and right a wrong that the Assembly acknowledged in June last year. There is no way that you can allow abortion on the basis of a severe fetal impairment such as Down's syndrome without perpetuating stereotypes about people with disabilities.¹¹⁶

The Bill had its ‘Second Stage’ reading on 15 March 2021 and passed (48 Aye, 12 No).¹¹⁷ RTÉ (Ireland's National Television and Radio Broadcaster) reported that Sinn Féin vice president, Michelle O’Neill, had indicated that her party would abstain from the vote on the grounds that “the focus should be on commissioning the services which should already be in place”.¹¹⁸ BBC News

¹¹⁵ [Explanatory Memorandum to the Abortion \(Northern Ireland\) \(No. 2\) Regulations 2020](#), No. 503, legislation.gov.uk

¹¹⁶ Northern Ireland Assembly, [Severe Fetal Impairment Abortion \(Amendment\) Bill: Second Stage](#), 15 March 2021

¹¹⁷ Northern Ireland Assembly, [Motion, Second Stage: Severe Fetal Impairment Abortion \(Amendment\) Bill](#) (NIA Bill 15/17-22), 15 March 2021. It is also noted that “27 Members voted in both lobbies and are not included in the results”.

¹¹⁸ [Abortion amendment bill passes second stage in Stormont passes second stage in Stormont](#), RTÉ [online], 15 March 2021

Online reported that other parties – the Ulster Unionists, SDLP and Alliance – “allowed members to vote according to their conscience”.¹¹⁹

3 Severe Fetal Impairment Abortion (Amendment) Bill - As Introduced

The text of the SFIAA Bill, as it was introduced, is set out below. The Bill consists of two clauses:

A Bill to Amend the Abortion (Northern Ireland) (No. 2) Regulations 2020 to remove the ground for an abortion in cases of severe fetal impairment.

BE IT ENACTED by being passed by the Northern Ireland Assembly and assented to by Her Majesty as follows:

Amendment of abortion on the grounds of disability

1.—(1) Regulation 7 of the Abortion (Northern Ireland) (No. 2) Regulations 2020 (Severe fetal impairment or fatal fetal abnormality) is amended as follows.

(2) In the heading, omit “Severe fetal impairment or”.

(3) In paragraph (1)(a), omit the second “or”.

(4) Omit paragraph (1)(b).

Short title and commencement

2.—(1) This Act may be cited as the Severe Fetal Impairment Abortion (Amendment) Act (Northern Ireland) 2021.

(2) This Act comes into force on the day on which this Act receives Royal Assent.

Source: Northern Ireland Assembly, [Severe Fetal Impairment Abortion \(Amendment\) Bill - Bill As Introduced](#), 16 February 2021

The Bill was referred to the Committee for Health (NI) for scrutiny. The Committee published its report on 11 November 2021, after hearing from 22 organisations at 10 oral evidence sessions and receiving over 9000 written submissions. In its [final report on the SFIAA Bill](#), the Committee agreed that it was content with both Clauses of the Bill (as set out in Box 3 above). It also accepted an amendment to Clause 2, proposed by the Bill Sponsor, which aimed to provide clarity regarding the Bill’s commencement date. It is noted in the report that the “Clauses of the Bill were not supported by all Members of the Committee” and that the “decisions on the Clauses were reached by division”.¹²⁰ On Clauses 1 and 2, the Committee divided as follows: Ayes 3;

¹¹⁹ [Abortion: Assembly backs change in NI abortion law](#), BBC News Online, 16 March 2021

¹²⁰ Northern Ireland Assembly, Committee for Health, [Report on the Severe Fetal Impairment Abortion \(Amendment\) Bill](#), Report: NIA 88/17-22, 11 November 2021, para 128

Noes 2; Abstain 4.¹²¹ At the time of writing, a date for the ‘[Consideration Stage](#)’ of the Bill had not been set.

At its meeting on the 4 November 2021, the Health Committee also agreed, on division, that its final report on the SFIAA Bill should “call for the full implementation of commissioned services as set out in the Abortion (Northern Ireland) (No. 2) Regulations 2020” (Ayes 5; Noes 2; Abstain 2).¹²²

A detailed overview of the Bill has been provided by the Northern Ireland Assembly Research and Information Service (RaISe) see [Severe Fetal Impairment Abortion \(Amendment\) Bill NIAR 54-21](#) (5 March 2021).

¹²¹ Committee for Health (NI), [Minutes of Proceedings 21 October 2021](#), Item 12

¹²² Northern Ireland Assembly, Committee for Health, [Report on the Severe Fetal Impairment Abortion \(Amendment\) Bill](#), Report: NIA 88/17-22, 11 November 2021, para 67; Committee for Health (NI), [Minutes of Proceedings 4 November 2021](#), Item 8

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