

EXPLANATORY MEMORANDUM TO
THE ABORTION (NORTHERN IRELAND) (NO. 2) REGULATIONS 2020

2020 No. 503

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Northern Ireland Office and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The purpose of these Regulations is to make provision for regulating abortions in Northern Ireland and to set out the circumstances in which an abortion may take place. These Regulations revoke the Abortion (Northern Ireland) Regulations 2020 for the reasons set out in paragraph 3.3-3.5.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument is made in accordance with a statutory duty on the Secretary of State to legislate to make provision for the purposes of regulating abortions in Northern Ireland (set out in detail in section 6).
- 3.2 The Abortion (Northern Ireland) Regulations 2020 were made and laid in Parliament on 25 March 2020 and came into force on 31 March 2020. This complied with the duty in section 9(6) of the Northern Ireland (Executive Formation etc) Act 2019 (c. 22) (NIEF Act) for regulations to come into force by that date.
- 3.3 The Abortion (Northern Ireland) Regulations 2020 were to be subject for approval by resolution of each House of Parliament within the period of 28 days beginning with the day on which the Regulations are made, subject to extension for periods of dissolution, prorogation or where both Houses are adjourned for more than four days. Given parliamentary recess dates, this meant that the Abortion (Northern Ireland) Regulations 2020 were to be debated by 17 May 2020 to remain in force as law.
- 3.4 However, the unprecedented situation created by Covid-19 has impacted on parliamentary processes and virtual voting systems are not yet fully implemented. While not presently ready, we do consider that the new systems will soon allow for proper parliamentary consideration of the Regulations following the approval debate, which is necessary given the nature of the policy and the Report by the Secondary Legislation Scrutiny Committee (see paragraph 3.6). We have therefore taken the decision to revoke the Abortion (Northern Ireland) Regulations 2020 and make this new instrument, thereby giving Parliament an additional 28 days to consider the

regulations and have the necessary approval debates, and to ensure that proper scrutiny and consideration is given to this instrument once the new parliamentary operating and voting procedures have been put in place in the coming days. Revoking and making a replacement instrument, rather than waiting until the Abortion (Northern Ireland) Regulations 2020 lapse before this instrument comes into force, ensures that the law on abortion in Northern Ireland continues to apply with no risk of a gap or legal uncertainty for service users or providers. That means women and medical practitioners can be reassured that abortion services can continue on the same legal basis in Northern Ireland as they are currently operating.

- 3.5 In addition, the JCSI drew the Abortion (Northern Ireland) Regulations 2020 to the special attention of both Houses in the Committee's Tenth Report of Session 2020-21. This was on the ground that they are defectively drafted in respect of a cross-referencing error in paragraph 7 of the Schedule to the Regulations. The Committee commented that '...it is not appropriate, where a statutory duty is imposed on a person backed by a criminal offence (as is the case here), to rely on that person doing something other than what the legislation requires because the provision is defectively drafted...' Therefore we are also taking this opportunity to correct this defect by making this new instrument. This is purely a technical change relating to cross-referencing and does not affect the policy effect or intended implementation of this instrument. This instrument does not contain any other substantive differences to the Abortion (Northern Ireland) Regulations 2020 and the Abortion (Northern Ireland) Regulations 2020 are revoked on the same day that this instrument comes into effect.
- 3.6 The Secondary Legislation Scrutiny Committee drew the Abortion (Northern Ireland) Regulations 2020 to the special attention of the House of Lords in its 11th Report of Session 2019-21 on the ground that they are politically or legally important and give rise to issues of public policy likely to be of interest to the House.
- 3.7 The legislation continues to impose the new duties on registered medical professionals providing abortion services as were introduced by the Abortion (Northern Ireland) Regulations 2020. However, prior to the Abortion (Northern Ireland) Regulations 2020 coming into force there were, and remain, virtually no abortion services being provided in Northern Ireland. There were 8 terminations carried out in 2018/19 in Northern Ireland based on the data published to date. As explained below in paragraph 6.12, whilst abortion has not been a criminal offence in Northern Ireland since 22 October 2019 (subject to the Criminal Justice Act (Northern Ireland) 1945), no services have been formally commissioned in Northern Ireland whilst waiting for the new legislation to come into force. This remains largely the case.
- 3.8 However, from early April 2020, we understand that some service provision, largely for early medical abortions, has commenced through existing sexual and reproductive health services in the Belfast, Northern and Western Trust areas.
- 3.9 Medical professionals in Northern Ireland who have been delivering these limited services since 31 March 2020 in accordance with the Abortion (Northern Ireland) Regulations 2020 will see no change to their duties under the law given that these

Regulations revoke and replace an almost identical instrument. The only difference is a correction to the cross-references to regulation numbers in paragraph 7 of the Schedule, which requires certain information to be notified. Medical professionals have been provided with forms for the purpose of complying with their notification and certification obligations under the Regulations and those forms already reflect what this instrument provides for in relation to the information to be provided.

- 3.10 In terms of longer-term full services under the Regulations, we understand that the intention is for service provision to continue to be gradually introduced so that registered medical professionals can receive appropriate training and will be aware of the requirements being imposed on them. We have worked closely with the Northern Ireland Department of Health and the key stakeholders currently involved with the provision of services in Northern Ireland so that they are fully aware of the new legislative requirements from the Abortion (Northern Ireland) Regulations 2020 and the impacts of this instrument.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.11 The territorial application of this instrument is limited to Northern Ireland.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is Northern Ireland.
- 4.2 The territorial application of this instrument is the same as the territorial extent.

5. European Convention on Human Rights

- 5.1 The Minister of State for the Northern Ireland Office, Robin Walker MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Abortion (Northern Ireland) Regulations (No. 2) 2020 are compatible with the Convention rights”.

6. Legislative Context

- 6.1 This instrument applies to health policy which is a transferred matter for Northern Ireland under the Northern Ireland Act 1998 (c. 47). Parliament determined, by legislating for section 9 of the NIEF Act, that in the ongoing absence of a restored Northern Ireland Executive by 21 October 2019, sections 58 and 59 of the Offences Against the Person Act 1861 (c. 100) (OAPA) would be repealed and the UK Government must provide a legal framework for abortion in Northern Ireland which implemented the recommendations contained in paragraphs 85 and 86 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* (CEDAW Report), on the basis that it is a human rights issue. The UK Government remained committed to restoring devolution

in Northern Ireland during this time and the Executive was restored on 13 January 2020.

- 6.2 Campaigners, including human rights bodies, have lobbied strongly for a number of years for changes to the law on abortion in Northern Ireland. Prior to 22 October 2019, abortion was only permitted in Northern Ireland if a woman's life was at risk or the pregnancy would adversely affect her physical or mental health in a manner that was 'real and serious' and 'permanent or long term'.¹ The Abortion Act 1967, which provides that a pregnancy terminated in accordance with its provisions is not an offence under sections 58 or 59 (attempts to procure abortion) of the OAPA in England, Wales and Scotland, does not extend to Northern Ireland.
- 6.3 In October 2014 the Department of Justice in Northern Ireland published a public consultation on proposals to amend the criminal law on abortion to allow for termination of pregnancy in cases of fatal fetal abnormality (FFA) and sought views on abortion when pregnancy was the result of a sexual crime. The Department of Justice published its summary of responses to the consultation and the final report in April 2018 (this report had been prepared for Ministers in October 2016, but had not been considered before the Northern Ireland Executive collapsed in January 2017). The last time the Northern Ireland Assembly voted on abortion was in February 2016, on amendments to a Justice Bill tabled by individual Members of the Legislative Assembly (MLAs) to extend medical termination of pregnancy in cases of FFA and rape or incest, but the amendments were voted against.
- 6.4 In June 2017 the UK Supreme Court (UKSC) rejected an appeal which challenged whether the NHS in England should fund abortions for women travelling from Northern Ireland. Subsequently, however, the UK Government made provision for women from Northern Ireland to be entitled to access abortions in England under a scheme established for this purpose. Means-tested assistance with travel and other costs of the procedure were also available from when the scheme's Central Booking System went live on 8 March 2018.
- 6.5 On 6 March 2018, the Committee on the Elimination of Discrimination against Women (CEDAW) published the CEDAW Report. The CEDAW Report made recommendations for the UK in respect of Northern Ireland only, including in particular that sections 58 and 59 of the OAPA should be repealed, and that legislation should be adopted to provide for expanded grounds to legalise abortion in Northern Ireland.
- 6.6 Following several years of litigation brought by the Northern Ireland Human Rights Commission (NIHRC), in June 2018 the UKSC heard the case on appeal, with the NIHRC arguing that the prohibition in Northern Ireland on abortion in cases of FFA and sexual crime was incompatible with human rights obligations, primarily based on the breach of Article 8 of the ECHR (right to respect for private and family life). The majority of the UKSC expressed the view that the abortion law in Northern Ireland

¹ This was determined by case law; R v Bourne [1939] 1 K.B. 687.

was incompatible with Article 8 ECHR in cases of FFA, rape and incest. However, the appeal was dismissed on the procedural issue that the NIHRC did not have the requisite legal standing to bring the appeal in its own name without an actual or perceived victim, and therefore no declaration of incompatibility or relief could be handed down.

- 6.7 Consequently, following on from the UKSC decision, a challenge was brought by Sarah Ewart, who had previously been refused a termination in Northern Ireland on grounds of FFA. In October 2019, the High Court in Belfast found that the law in Northern Ireland preventing access to termination of pregnancy in cases of FFA was incompatible with Article 8 ECHR. The question of relief remains outstanding.
- 6.8 When the then NIEF Bill was being considered by Parliament in July 2019, an opposition amendment added a provision to impose a requirement on the Secretary of State to give effect to the CEDAW recommendations in Northern Ireland through Regulations, which was further amended in the Lords, requiring the Regulations to be in force by 31 March 2020. Those provisions, now section 9 of the NIEF Act, came into force on 22 October 2019, as the Northern Ireland Executive was not restored by 21 October 2019.
- 6.9 Consequently, section 9(2) of the NIEF Act repealed sections 58 and 59 of the OAPA in Northern Ireland from 22 October 2019. This implemented the recommendation in paragraph 85(a) of the CEDAW Report.
- 6.10 Section 9(4) and (5) of the NIEF Act imposes a statutory duty on the Secretary of State to make provision for the purposes of regulating abortions in Northern Ireland, including provision as to the circumstances in which an abortion may take place, and ensure that the recommendations in paragraphs 85 and 86 of the CEDAW Report are implemented.
- 6.11 Section 9(8) of the NIEF Act enables the Regulations to make any provision which is appropriate in view of the repeal of section 58 and 59 of the OAPA, and section 9(9) of the NIEF Act enables the Regulations to make any provision that could be made by an Act of the Northern Ireland Assembly.
- 6.12 As a result of the repeal of sections 58 and 59 of the OAPA, abortion is no longer a criminal offence in Northern Ireland up to the point at which section 25 of the Criminal Justice Act (Northern Ireland) 1945 (the 1945 Act) applies. Section 25 of the 1945 Act makes it a criminal offence to cause a child to die before it has an existence independent of its mother if the child is capable of being born alive. Under that Act a termination of pregnancy would be lawful only where it was done in good faith for the sole purpose of preserving the life of the mother.

7. Policy background

What is being done and why?

- 7.1 As paragraph 6.2 explains, prior to the repeal of sections 58 and 59 of the OAPA, abortion was lawful in Northern Ireland in very limited circumstances. The

Government began providing support for women from Northern Ireland to travel to England to access services under the Abortion Act 1967 in March 2018 and during the first year of this provision there were 1,053 abortions provided in England for women from Northern Ireland.

- 7.2 This instrument is concerned with the regulation of abortion services in Northern Ireland. Successive UK Governments have not traditionally taken a policy position on abortion, and have treated it as a matter of conscience, allowing a free vote on any legislation passing through Parliament. The Government recognises the historical and political sensitivities surrounding the issue of access to abortion services in Northern Ireland. In relation to complying with the legal requirements under the NIEF Act, the overarching policy aims were to ensure that the framework:
- protects and promotes the health and safety of women and girls;
 - provides clarity and certainty for the medical profession; and
 - is responsive and sensitive to the Northern Ireland Executive and Assembly being restored.
- 7.3 From a starting point that abortion is not an offence in Northern Ireland up to the point at which the child is capable of being born alive, as a result of the repeal of sections 58 and 59 of the OAPA, the aim is to regulate abortion provision in a way which is necessary or appropriate by including safeguards, and providing certainty to medical professionals whilst also ensuring that the minimum requirements set out in the CEDAW Report are met.
- 7.4 The CEDAW Report and the recommendations in paragraph 85 require that the Government:
- ‘adopts legislation to provide for expanded grounds to legalise abortion in at least 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;
 - iii) Severe fatal impairment, including fatal fetal abnormality, 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.’
- 7.5 The Regulations (and this explanatory memorandum) refer to a “woman”. This is consistent with the references to “women and girls” in the CEDAW Report.
- 7.6 Termination of pregnancy in these Regulations is defined as the termination of pregnancy by surgical or medical (abortifacient drugs) means, as regards any fetus, where it is intended that that fetus will not be delivered alive. In the case of a multiple pregnancy, this includes circumstances where the abortion of all fetuses is intended to end the entire pregnancy or where it is intended that one or more (but not all) of the fetuses will be aborted. The latter case may occur in circumstances where one or more fetus (but not all) in a multiple pregnancy is affected by a severe fetal impairment or

fatal fetal abnormality or where selective reduction procedures are used in multiple pregnancies arising both naturally or as a result of fertility treatment.

- 7.7 Part 2 of the instrument provides for grounds for abortion with gestational limit. Part 3 provides for grounds for abortion with no gestational limit. The CEDAW Report does not recommend gestational time limits for legal abortion but leaves it open to the State to determine, premised on ensuring access to services for women and girls in at least the circumstances set out in paragraph 7.4.
- 7.8 Regulation 3 allows for a termination of a pregnancy up to the end of the 12th week of pregnancy (11 weeks and six days) without conditionality on the basis that 12 weeks gestation typically represents the end of the first trimester, and in England and Wales 90% of abortions are performed within this timeframe. A 12-week gestational limit is also consistent with provision without conditionality in the Republic of Ireland and many other countries worldwide. The treatment for either surgical or medical abortion must have commenced on or before 11 weeks and six day's gestation, but in the case of incomplete or failed abortion, the process can be completed after 12 weeks gestation without the need for a separate certification process to occur.
- 7.9 In line with the recommendations of the CEDAW Report, this will provide access to abortion services without any conditions up to 12 weeks gestation to allow victims of sexual crime (i.e. rape and incest) to access services while avoiding any requirements that could lead to further trauma or act as a barrier to access in Northern Ireland. This provision also allows access to services, as required, to comply with the CEDAW recommendation for women to have access to abortion where continuing with the pregnancy is a threat to the pregnant woman's physical or mental health, without conditionality of 'long-term or permanent' effects.
- 7.10 In part, this decision is also based on global evidence that termination rates are not higher when there are fewer legal restrictions. Introducing a framework which creates barriers to access is unlikely to reduce the rate of terminations, but would rather be likely to lead to women buying abortion pills online, with attendant health risks, rather than accessing safe services.
- 7.11 The framework for Northern Ireland will also allow for access to abortion services up to 24 weeks gestation (23 weeks and six 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 (regulation 4). This ground applies where two medical professionals are of the opinion, made in good faith (i.e. not dishonestly or negligently), that continuing with the pregnancy would involve risk to the physical or mental health of the pregnant woman greater than the risk of terminating the pregnancy. In forming an opinion as to the application of this ground, medical professionals may take into account a woman's wellbeing, and the woman's actual or reasonably foreseeable circumstances, including wider social circumstances. The threshold of risk to the physical or mental health of the woman is a matter for the opinion in good faith of each of the registered medical professionals involved. However, medical professionals should interpret the grounds in Northern

Ireland consistent with the rest of the UK, for example the risk to mental health is not required to relate to a specific or diagnosed mental health condition and does not require a mental health or psychiatric assessment before the abortion can be permitted.

- 7.12 The inclusion of this ground and gestational limit means that the provision for Northern Ireland will be consistent with the position in England and Wales under the Abortion Act 1967. We considered that failure to make provision on health grounds consistent with the law in England and Wales would result in women from Northern Ireland continuing to travel to the rest of the UK for abortions, which is contrary to the policy position taken to deliver access to abortion services locally on the ground in Northern Ireland.
- 7.13 It is considered that this approach ensures that the recommendation in the CEDAW Report to make abortion services available to women in cases where there is a threat to the pregnant woman's physical or mental health, without conditionality of "long-term or permanent" effects is met. This ground will also include victims of sexual crime who present later than 12 weeks gestation, if continuing the pregnancy would cause greater risk of injury to the physical or mental health of the woman than terminating it.
- 7.14 In practice, in England and Wales, 92% (182,695 of 200,608) of abortions are performed at 12 weeks gestation or earlier and we would anticipate the position to be similar in Northern Ireland.
- 7.15 The CEDAW Report requires legal abortion to be available in cases of severe fetal impairment (SFI), including fatal fetal abnormality (FFA). This implements the recommendation in paragraph 85(b)(iii) of the CEDAW Report (regulation 7). The CEDAW Report is silent on the question of gestational limit in such circumstances. Following consultation, this framework allows for terminations in cases of SFI and FFA without gestational limit. This mirrors provision of services in England, Scotland and Wales, where abortion for SFI and FFA is available without time limit under the Abortion Act 1967 on similar grounds, and is compliant with the international human rights framework.
- 7.16 The absence of abortion services in Northern Ireland in cases of FFA has been one of the driving forces for change to the law in Northern Ireland and has been found to be incompatible with Article 8 ECHR.² There have been harrowing cases of women having to travel in distressing circumstances to access abortion services. A failure to replicate the regime in England and Wales would result in women in desperate situations, often involving much wanted pregnancies, being forced to continue to travel and seek medical assistance elsewhere in the UK. Such a result would be contrary to providing for lawful access to abortion services locally on the ground in Northern Ireland.

² In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review [2018] UKSC 27.

- 7.17 Whilst the majority of terminations in England and Wales for SFI and FFA occur before 24 weeks (91.3% in 2018), allowing abortion on grounds of SFI without time limit also allows for situations where a diagnosis is made late in the pregnancy, if test results or screening have been delayed or further tests have been required. In addition, given that these are, in general, planned pregnancies, women and their families may need time to make what is likely to be a very difficult and distressing decision.
- 7.18 The Regulations set conditions for who may terminate a pregnancy and where treatment for terminations of pregnancy may be carried out. A termination of pregnancy may only be carried out by a ‘registered medical professional’. This is defined in regulation 2 to mean a registered medical practitioner (doctor), a registered nurse or a registered midwife. We preferred to use this specific term, as other terms can include a wider group of practitioners or healthcare professionals, for example, psychologists or pharmacists, and therefore the term “medical professional” was selected and defined in the Regulations to avoid any confusion. The intention is to ensure that only appropriately qualified and trained medical professionals can carry out terminations whilst allowing for a multi-disciplinary approach which reflects modern practice in respect of the provision of abortion services. In practice, later term abortions and surgical terminations will be carried out by registered medical practitioners only, however the Regulations leave open the possibility of nurses and midwives taking a greater role in provision of services as practice, training, qualifications and skills sets develop.
- 7.19 Part 4 of the Regulations provides for places where treatment for termination may be carried out. Regulation 8 lists places where treatment for abortion may be provided, to enable the Northern Ireland Health and Social Care Board (HSCB) to commission services from these places from the start date of the new legal framework. In practice, for abortions beyond 10 weeks gestation (nine weeks and six days) women will complete all their treatment within an appropriate medical facility which can provide safe access to surgical or medical procedures.
- 7.20 In line with practice in the rest of the UK³, the Regulations provide for women having treatment consisting of the drugs Mifepristone and Misoprostol, for early medical termination (up to the end of the 10th week of gestation (nine weeks and six days)), to have the option to take the second part of that treatment (Misoprostol) at home in Northern Ireland. Misoprostol is normally taken 24-48 hours after mifepristone, which would have been taken in a hospital, clinic or GP practice (depending on the commissioning model) following a medical consultation. This should improve access to services for women, by reducing waiting times, the need to attend hospital or another medical facility to take the second pill, and avoids the need for women to travel in discomfort. This may be particularly beneficial in terms of improving access

³ Abortion care NICE guideline [NG140] Published date: September 2019.

for women living in rural areas who may have some distance to travel, and for women from marginalised or disadvantaged groups.

- 7.21 The ultimate provision of services, however, will be determined by the HSCB and the Department of Health in Northern Ireland, in accordance with this framework.
- 7.22 Regulation 8(3) provides a power of approval for the Department of Health in Northern Ireland to approve the provision of abortion services in places other than those listed in regulation 8(1)(a)-(c) or for the use of specified medicines in a class of place. This will allow the Department of Health flexibility over the provision of services as they develop or in response to particular or unusual circumstances, for example by enabling the Department to approve treatment by independent abortion service providers, including the prescription by independent providers of Misoprostol or Mifepristone for home use, or to approve other places or classes of place for treatment or a particular manner of treatment, as appropriate. Provision of services by independent clinics in England and Wales is undertaken through an approval power in the Abortion Act 1967.
- 7.23 Part 5 of the Regulations puts in place a certification process for all terminations in Northern Ireland. In relation to terminations carried out with no conditionality before 12 weeks gestation or in a case of immediate necessity where there is a risk to the life of the woman or girl, the certificate must be signed by one medical professional certifying in good faith (i.e. not dishonestly or negligently) that the pregnancy has not exceeded 12 weeks gestation (regulation 3) or that the termination is immediately necessary (regulation 5).
- 7.24 For terminations on other grounds under the Regulations (regulations 4, 6, 7), the certificate must be signed by two medical professionals certifying in good faith that one of the grounds has been met. In recognition of the increasing role of multi-disciplinary teams in abortion care, the certification requirement may also be met by nurses and midwives, provided their level of skill and training enables them to meet the requirement to form an opinion in good faith.
- 7.25 The certification of opinion must be retained by the medical professional carrying out the abortion for 3 years. It may be retained electronically or in hardcopy.
- 7.26 This decision has been made on the basis that while the recommendations of the CEDAW Report do not mandate specific action in this regard, the Government considers that this type of certification requirement puts an additional operational and service delivery safeguard into the system, consistent with the position in England and Wales. The framework includes specific grounds that have to be met for terminations, other than those before 12 weeks gestation where only gestation must be confirmed, and there are sanctions for wilfully terminating a pregnancy otherwise than in accordance with those grounds. As such, a certification process is a formal means of recording the applicable grounds and is intended to provide confidence that proper consideration is being given by medical professionals to those grounds.

- 7.27 Medical professionals are required only to form an opinion in good faith that the ground for a lawful termination exists. They are not required to ascertain as a matter of fact whether those grounds exist. In forming that opinion, they may take account of the woman's wider social circumstances but there is no requirement to ascertain whether as a matter of fact a woman has, for example, financial, relationship or housing issues which impact on the continuance of the pregnancy. The medical professional can reach an opinion based on the information disclosed by the woman about her health and other circumstances. Therefore, there is no requirement for any diagnosis of a mental health condition.
- 7.28 Intentional failure to comply with the certification process will be an offence and if, following an investigation and prosecution a medical professional is convicted, that person would be subject to a level 4 fine (up to £2,500) in Northern Ireland.
- 7.29 Regulation 10 requires notification of and the provision of relevant information relating to the termination to be submitted to the Northern Ireland Chief Medical Officer at the Northern Ireland Department of Health. Collection of data is essential to enable scrutiny of services, in particular when a new service is being developed. In England and Wales such data has been used to support service improvement, particularly in relation to providing abortions at earlier gestations. We want to ensure similar data is available to monitor and provide transparency as the services develop in Northern Ireland. A notification system for abortion services will also implement the CEDAW Report recommendations requiring the UK to monitor compliance with international standards concerning access to these services, including access to safe abortion.
- 7.30 The Department of Health in Northern Ireland currently publishes data on the small number of terminations carried out each year by accessing patient activity data recorded by the HSC Trusts. However routine patient activity data does not include information needed to monitor the operation of the framework since this will be a new service.
- 7.31 Data collection will be an operational issue for the Department of Health in Northern Ireland who will be responsible for annual publication of relevant data.
- 7.32 Whilst the personal data required is limited to that which is essential for monitoring purposes, we recognise the sensitivity of the data being collected. Therefore, the Regulations impose restrictions on how the data can be used and disclosure otherwise than in accordance with the Regulations will be a criminal offence. The information to be provided in the notification is set out in the Schedule to the Regulations. Due to the importance of ensuring proper data collection and monitoring, wilful failure to comply with the requirement to notify under regulation 10 is an offence and liable upon conviction to a level 4 fine (up to £2500) in Northern Ireland.
- 7.33 The Regulations include offences for terminating a pregnancy otherwise than in accordance with the Regulations and for failing to comply with the requirements regarding certification and notification. The Government considered that because the

framework imposes requirements and conditions on medical professionals, it is appropriate to include sanctions for anyone intentionally breaching the new framework, particularly outside of commissioned abortion services (ie. where acting dishonestly or negligently). This would not apply where a termination was done in good faith for the purpose only of saving the woman's life or preventing grave permanent injury to the woman's physical or mental health. The offence in regulation 11 to carry out or procure an abortion otherwise than in accordance with regulations 3 to 8 is subject to up to a level 5 fine on summary conviction (up to £5000) in Northern Ireland.

- 7.34 The Regulations provide a safe and legal means for women to access abortions in Northern Ireland which removes the need for the acquiring of abortion pills from illegal suppliers, which we understand anecdotally many people previously resorted to. The new legal framework for accessing services aims to eliminate the need for people to resort to terminations in this way without medical supervision and care. Whilst it is an offence to supply unlawful pills to others, women who have taken pills will be able to seek medical treatment without fear of prosecution.
- 7.35 It is recognised that the individual circumstances in each case will need to be taken into account when considering whether prosecutions should be brought, but we consider these provisions are appropriate to protect women and ensure they receive high quality care.
- 7.36 By way of example, the sanctions under the Regulations will not apply to a medical professional who certifies in good faith, that is without any dishonesty or negligence, that a pregnancy has not exceeded 12 weeks gestation should that determination be challenged and it transpire that this was in fact not the case and that the pregnancy was 13 weeks or more.
- 7.37 It is recognised also that 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. Therefore, it is not intended that a medical professional should be prosecuted where a medical professional forms an opinion in good faith as to risk but makes a factual error. Similarly, in determining "serious disability", any prosecution would require proof beyond reasonable doubt that the medical professional did not act in good faith in determining that there is substantial risk of an abnormality that would amount to the child being seriously disabled.
- 7.38 On the other hand, intentional, reckless or persistent disregard for the requirements and conditions imposed by the Regulations may result in a prosecution. For example, a person who supplies abortion pills in an unauthorised facility outside of the health and social care system.
- 7.39 Notwithstanding the above examples and the stated intention as to the application of the offences, in imposing sanctions within this framework, the Government

acknowledges that the fear of prosecution under the previous abortion law in Northern Ireland had a chilling effect on doctors in providing abortion services. This new framework will be a significant change in relation to the provision of reproductive healthcare in Northern Ireland and medical professionals will be required to make decisions, diagnoses and prognoses which can be finely balanced. It is also recognised that these decisions are not without controversy given the moral and ethical nature of the subject of abortion and that there are differing views within the medical profession as well as among the wider population. In recognition of these factors and to provide medical professionals with confidence to treat women in accordance with the framework, basing decisions on their clinical judgment, and acting in good faith in the interest of their patient, proceedings may not be brought under regulation 9, 10 or 11 without the consent of the Northern Ireland Director of Public Prosecutions (DPP).

- 7.40 Regulation 12 puts in place statutory protection for conscientious objection in Northern Ireland, consistent with the approach taken across the rest of the UK (in section 4 of the Abortion Act 1967). This protection ensures that anyone can opt-out of participation in treatment for abortion to which they have a conscientious objection. The Supreme Court⁴ has held that the extent of conscientious objection is restricted to performing the tasks involved in the whole course of treatment bringing about the termination of the pregnancy, beginning with the administration of the drugs designed to induce labour and normally ending with the ending of the pregnancy by delivery of the fetus, placenta and membrane. People carrying out the host of ancillary, administrative and managerial tasks that might be associated with those acts do not have the same right to conscientious objection. The Government considered that broadening the scope beyond ‘participation in treatment’ would have consequences on a practical level and would therefore undermine the effective provision of abortion services in Northern Ireland. The Government is satisfied that the current scope of the conscientious objection provision in the Abortion Act 1967 works satisfactorily in practice, is human rights compliant, and therefore appropriate to apply in Northern Ireland to the provision of abortion services.
- 7.41 Regulation 13 makes consequential amendment to section 25 of the Criminal Justice Act (Northern Ireland) 1945. Section 25 of the 1945 Act makes it a criminal offence to cause a child to die before it has an existence independent of its mother if the child is capable of being born alive. This amendment is necessary to ensure that terminations carried out in accordance with the Regulations by the relevant medical professionals are not contrary to section 25 of the 1945 Act, and no woman or girl can be prosecuted with respect to ending her own pregnancy. This is similar to the position in England and Wales where the Abortion Act 1967 creates exceptions to sections 58 and 59 of the OAPA and the Infant Life Preservation Act 1929. Without this amendment, abortion “where the child is capable of being born alive” could potentially be an offence under section 25 of the 1945 Act. We recognise that decisions to terminate a pregnancy in these circumstances are extremely difficult for all involved. But these

⁴ Greater Glasgow Health Board v Doogan and another [2014] UKSC 68.

are individual clinical judgements, and where they are carried out in good faith in accordance with the Regulations there must be no risk of a criminal prosecution being brought. As such, and for the reasons explained in paragraph 7.39, proceedings under section 25 of the 1945 Act may only be brought by or with the consent of the DPP for Northern Ireland.

- 7.42 The CEDAW Report recommends removing any threat of prosecution from women and girls who undergo abortion. Therefore the amendment in regulation 13 also excludes from the scope of the section 25 offence anything done by a pregnant woman in relation to her own pregnancy.
- 7.43 Regulation 14 makes consequential amendment to the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 and to the 1945 Act, in light of the repeal of sections 58 and 59 of the OAPA.
- 7.44 Regulation 16 makes transitional provision to ensure that revoking and replacing the Abortion (Northern Ireland) Regulations 2020 does not have any impact on things done under those Regulations.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

- 9.1 There is no consolidation done by this instrument.

10. Consultation outcome

- 10.1 On 4 November 2019, the then Secretary of State for Northern Ireland, the Rt Hon Julian Smith MP, launched a six-week public consultation, '*A new legal framework for abortion services in Northern Ireland*'. The consultation provided an opportunity for people and organisations in Northern Ireland to provide input and views on the question of how the Government can best deliver a framework that is consistent with the legal requirements under section 9 of the NIEF Act, being the implementation of the recommendations contained in the CEDAW Report. The Government was clear that this consultation was on the question of how the reform could be delivered, not on whether the section 9 NIEF Act duty should be exercised. The consultation concluded on 16 December 2019 and over 21,000 responses were received. The Government used both quantitative and qualitative analysis to carefully consider each individual consultation submission.
- 10.2 The consultation sought views on a set of proposals for how the Government could best deliver a framework for access to abortion in Northern Ireland that is consistent with the legal requirements to implement the recommendations contained in the CEDAW Report. The framework set out in the consultation covered the elements set out in these Regulations (access to abortion at early gestations, on grounds of risk to physical or mental health, SFI and FFA, risk to life), where abortions could take place,

who could perform abortions, certification, notification, conscientious objection, as well as questions on exclusion zones. A questionnaire was included for respondents to consider when making their submissions, allowing them to answer ‘yes’ or ‘no’ to different legislative proposals – but narrative submissions via email or post were also accepted.

- 10.3 21,244 responses to the consultation were received in total. 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. Both quantitative and qualitative analysis was used to carefully analyse each individual submission, in line with Government best practice. Whilst the online consultation platform was able to generate numbers of yes/no responses to the questionnaire, each response was then manually analysed for qualitative views and key opinions that emerged were noted via a series of ‘tags’ corresponding to major themes set out in the consultation and emerging issues arising from stakeholder engagement. The Government response sets out the range of views expressed and evidence gathered through the consultation process under each element of the abortion framework, and the supporting rationale for the final decisions made. The Government response is available at www.gov.uk/nio.

11. Guidance

- 11.1 The Department of Health in Northern Ireland will update the guidance on termination of pregnancy for medical professionals when abortion services are commissioned in Northern Ireland in due course.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 An impact on the public sector is expected as the abortion services are commissioned by the Northern Ireland Health and Social Care Board through the Northern Ireland health system. The exact impact will depend on the model commissioned.
- 12.3 A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 There are no plans to review these Regulations. The approach to monitoring this legislation in terms of provision of abortion services on the ground will be a matter for the Department of Health in Northern Ireland. However, the Government will

continue to engage with the Northern Ireland Executive on this legislation when it comes into force, and monitor it as appropriate.

15. Contact

- 15.1 Raphaela Thynne at the Northern Ireland Office (telephone: 0207 210 0244 or email: raphaela.thynne@nio.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Holly Clark, Deputy Director for Constitutional Policy and Rights Group at the Northern Ireland Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Robin Walker, Minister of State at the Northern Ireland Office, can confirm that this Explanatory Memorandum meets the required standard.