

EXPLANATORY MEMORANDUM TO

THE ABORTION (NORTHERN IRELAND) REGULATIONS 2021

2021 No. 365

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 provide the Secretary of State for Northern Ireland with a power to direct a Northern Ireland Minister, a Northern Ireland department, the Health and Social Care Board and the Public Health Agency to take any action capable of being taken that is required for the purpose of implementing the recommendations in paragraphs 85 and 86 of the 2018 Report of the Committee on the Elimination of all forms of Discrimination Against Women, 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 (“the CEDAW Report”).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument confers on the Secretary of State the power to direct that certain public authorities take action. The instrument does not therefore impose duties on people that are significantly more onerous than before, or require them to adopt different patterns of behaviour, so commencement less than 21 days after making does not give rise to the usual concern about whether those affected have a reasonable chance to adapt their behaviour.
- 3.2 Section 9(9) of the Northern Ireland (Executive Formation etc) Act 2019 provides that regulations made under section 9 may make any provision that could be made by an Act of the Northern Ireland Assembly. A power of direction demonstrably is a provision which could be made by an Act of the Assembly; by way of example, see section 6(1) of the Health and Social Care (Reform) Act (Northern Ireland) 2009 which is a provision made by an Act of the Assembly enabling the Department of Health to direct certain bodies. The conferral of a function on the Secretary of State is a reserved matter, courtesy of paragraph 1 of Schedule 3 to the Northern Ireland Act 1998; reserved matters are within the legislative competence of the Assembly, notwithstanding that the Secretary of State’s consent would be required for an Act of the Assembly to make such provision.

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)

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

4. Extent and Territorial Application

- 4.1 The territorial application 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 Northern Ireland, Robin Walker MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Abortion (Northern Ireland) Regulations 2021 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Access to abortion services is a health policy which is a transferred matter for Northern Ireland under the Northern Ireland Act 1998 (c. 47). However, section 9(1) of the Northern Ireland (Executive Formation etc) Act 2019 (“the NIEF Act”), imposes on the Secretary of State a duty to ensure that the recommendations contained in paragraphs 85 and 86 of the CEDAW Report are implemented in respect of Northern Ireland.
- 6.2 Section 9(4) of the NIEF Act imposes a statutory duty on the Secretary of State to make by regulations whatever changes to the law of Northern Ireland as appear to the Secretary of State to be necessary or appropriate for the purpose of complying with the duty to ensure that the recommendations in paragraphs 85 and 86 of the CEDAW Report are implemented. Section 9(9) of the NIEF Act enables such regulations to make any provision that could be made by an Act of the Northern Ireland Assembly.
- 6.3 As required by section 9(6) of the NIEF Act, the Minister of State for Northern Ireland made the Abortion (Northern Ireland) Regulations 2020 on 25 March 2020 and the Regulations came into effect on 31 March 2020. These Regulations were revoked and replaced by the (materially identical) Abortion (Northern Ireland) (No. 2) Regulations 2020 (“the Abortion Regulations”).
- 6.4 The Abortion Regulations made provision for regulating abortions in Northern Ireland and set out the circumstances in which an abortion may lawfully take place. However, notwithstanding the making of those Regulations, the recommendations in paragraphs 85 and 86 of the CEDAW Report have not been fully implemented. In particular, the recommendations includes the recommendation that the state “Provide women with access to high-quality abortion and post-abortion care in all public health facilities...”.
- 6.5 This instrument therefore confers on the Secretary of State a power to direct a relevant Northern Ireland minister, Northern Ireland department, the Regional Health and Social Care Board, and the Regional Agency for Public Health and Social Well-being, to take relevant actions required to implement the recommendations in paragraphs 85 and 86 of the CEDAW Report.

7. Policy background

What is being done and why?

- 7.1 As detailed above, the Secretary of State is under a statutory obligation to ensure that the recommendations in paragraphs 85 and 86 of the CEDAW Report are implemented in Northern Ireland. This includes ensuring that women be provided

with access to high-quality abortion and post-abortion care in all public health facilities. Under section 9(7) of the NIEF Act, the Secretary of State must carry out this duty expeditiously, recognising the importance of doing so for protecting the human rights of women in Northern Ireland.

- 7.2 Following the making of the Abortion Regulations, the Secretary of State for Northern Ireland, together with the Minister of State for Northern Ireland and officials in the Northern Ireland Office, have continued to engage with the Northern Ireland Department of Health on the delivery of abortion service consistent with the Abortion Regulations.
- 7.3 The NIEF Act itself and the provisions of the 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. This reflects the devolution settlement and the fact that the various matters to which the remaining recommendations relate are transferred matters. It is appropriate that the Department of Health, and relevant health and social care bodies, in Northern Ireland, take commissioning of services forward formally to be able to normalise and embed these services within the wider health and social care framework and setting.
- 7.4 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. These services have allowed over 1,100 women and girls to access abortion services locally in Northern Ireland to date. 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. This has meant that some women have had to continue to travel to England to access abortion services under the Abortion Act 1967 rather than being able to access local healthcare.
- 7.5 While there may be some inevitable delay by the Department of Health in Northern Ireland in commissioning abortion services, given the unforeseen pressures of responding to the Covid pandemic, almost a year has passed since the Abortion Regulations came into effect, and progress should have been made by now. It is not sustainable for medical professionals to take forward service provision without any formal commissioning, support, relevant medical guidance, and funding. We have reached a point where it remains clear that the Department of Health will not move forward to make positive progress on this matter.
- 7.6 The Secretary of State has therefore carefully considered the options available to him, to ensure that the duty under section 9(1) of the NIEF Act is complied with, while respecting the devolution settlement and healthcare being a transferred matter in Northern Ireland. The Secretary of State has therefore made this instrument conferring on himself the power to direct that actions required to implement the recommendations in paragraphs 85 and 86 of the CEDAW Report are taken. This is a necessary and appropriate means of ensuring that those recommendations are in fact implemented.
- 7.7 The power conferred on the Secretary of State by this instrument is similar to the power conferred by section 26 of the Northern Ireland Act 1998. That power enables

the Secretary of State to direct a Minister or Northern Ireland department to take action that the Secretary of State considers is required for the purpose of giving effect to any international obligations, of safeguarding the interests of defence or national security or of protecting public safety or public order. The section 26 power cannot be relied on by the Secretary of State to ensure that the recommendations in paragraphs 85 and 86 of the CEDAW Report are implemented. In particular, those recommendations are not binding and do not constitute international obligations.

- 7.8 The approach we are seeking to take through this instrument is to ensure that the Secretary of State is interfering as little as possible in terms of service provision, leaving responsibility with the Department of Health in Northern Ireland, as is appropriate, while ensuring that necessary steps are taken.
- 7.9 Following the making of this instrument, the Secretary of State will continue to engage with the Minister and the Department of Health, as well as the Northern Ireland Executive, to see if progress can be made ahead of any direction. Should a direction be required, the Secretary of State will proceed, and will lay a copy of the direction and accompanying letter before Parliament, as well as publishing a copy on nio.gov.uk.

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 We have not consulted on this instrument. However, a six-week public consultation titled ‘A new legal framework for abortion services in Northern Ireland’ was conducted in advance of the making of the Abortion (Northern Ireland) Regulations 2020. The consultation provided an opportunity for people and organisations in Northern Ireland to provide input and views on the question of how the Government could best deliver a framework consistent with the requirements in section 9 of the NIEF Act, being the implementation of the recommendations contained in the CEDAW Report. 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 Abortion (Northern Ireland) (No. 2) Regulations 2020 established a legal framework for access to abortion services, following that consultation. This instrument is not giving effect to any new policies relating to the conditions in which abortions can be lawfully accessed and provided in Northern Ireland. Nor is this instrument dealing with the manner in which the recommendations in the CEDAW Report should be implemented. This instrument will simply give the Secretary of State the power to direct that action be taken, in order that the Secretary of State is able to comply with his existing statutory duty and ensure that the recommendations in paragraphs 85 and 86 of the CEDAW Report are implemented.

11. Guidance

- 11.1 The Department of Health in Northern Ireland will be responsible for updating the guidance on termination of pregnancy for medical professionals when abortion services are commissioned in Northern Ireland in the coming months.

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 The Secretary of State remains under a duty to ensure that the recommendations in paragraphs 85 and 86 of the CEDAW Report are implemented in respect of Northern Ireland. The Secretary of State will, as appropriate, keep under review his compliance with that duty, including whether the Abortion Regulations, this instrument, and any direction given under this instrument, are effective in ensuring the implementation of those recommendations. We will continue to engage with the Department of Health and the Northern Ireland Executive on these matters.

15. Contact

- 15.1 Raphaela Thynne at the Northern Ireland Office, Telephone: 07342064749 or email: raphaela.thynne@nio.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Holly Clark, Deputy Director for Constitution, Rights and Healthcare Policy Group, at the Northern Ireland Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Minister of State for Northern Ireland, Robin Walker MP, at the Northern Ireland Office can confirm that this Explanatory Memorandum meets the required standard.