

EXPLANATORY MEMORANDUM TO

THE ABORTION (NORTHERN IRELAND) REGULATIONS 2022

2022 No. 554

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Northern Ireland Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The purpose of these Regulations is to ensure that high quality abortion and post-abortion care is available in Northern Ireland. This will enable the Secretary of State to comply with the duty to ensure the implementation of recommendations made in a report by the Committee on the Elimination of Discrimination against Women.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is limited to 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 Secretary of State for Northern Ireland, Brandon Lewis MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Abortion (Northern Ireland) Regulations 2022 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Section 9 of the Northern Ireland (Executive Formation etc) Act 2019 (“the NIEF Act”) deals with the implementation of the recommendations contained in paragraphs 85 and 86 of the CEDAW Report (“the CEDAW recommendations”). The CEDAW report means the 2018 Report of the Committee on the Elimination 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.
- 6.2 Subsection (1) imposes a duty on the Secretary of State to ensure the CEDAW recommendations are implemented in respect of Northern Ireland. Subsections (2) and (3) make changes to the law of Northern Ireland implementing some aspects of the CEDAW recommendations. Subsection (4) then imposes a duty 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 implementation. 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 CEDAW recommendations have not been fully implemented. In particular, the recommendations include the recommendation that the state “Provide women with access to high-quality abortion and post-abortion care in all public health facilities...”.
- 6.5 In a further attempt to ensure the implementation of the CEDAW recommendations, the Abortion (Northern Ireland) Regulations 2021 (“the 2021 Regulations”) were made on 22 March 2021. They came into force on 31 March 2021. The Regulations conferred on the Secretary of State a power to direct a 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 action that is required to implement CEDAW recommendations. Directions were given to the Department of Health (“DoH”) and the Regional Health and Social Care Board in exercise of this power on 22 July 2021.

7. Policy background

What is being done and why?

- 7.1 The approach that the Secretary of State has taken to ensuring the implementation of the CEDAW recommendations has respected the role of the devolved administration and the fact that health and social care are transferred matters. The Secretary of State made the Abortion (Northern Ireland) Regulations 2020, establishing a framework for lawful abortions in Northern Ireland, but trusted the implementation of abortion services to the DoH. Following inaction from the Northern Ireland Executive and DoH, the Secretary of State responded by making the 2021 Regulations and then giving directions to DoH requiring that relevant health care be commissioned and funded. A deadline of 31st March 2022 was set. That deadline has not been met.
- 7.2 The result is that, despite abortion having been decriminalised in October 2019, abortion healthcare services have yet to be commissioned or funded. The impact is that women and girls in Northern Ireland have limited access to abortion healthcare. Services are available in only four of five Regional Health and Social Care Trusts and are limited to only providing Early Medical Abortions up to a ten-week gestational limit. These services were set up as a temporary measure to provide some services while the DoH progressed commissioning. The services are not just limited, they are liable to collapse if they are not further funded.
- 7.3 Without further action from the Secretary of State, women and girls in Northern Ireland will not have access to the same services available in the rest of the UK. The Secretary of State must ensure services are available to meet his statutory duty, but also to prevent women and girls in Northern Ireland being placed in awful situations where they must travel (often alone) to access services, use unregulated services available in Northern Ireland or continue their pregnancy. This situation continues because DoH has failed to commission and fund services.

- 7.4 These Regulations take a dual approach to ensuring that the CEDAW recommendations are implemented. Firstly, the Regulations remove the need for agreement in the Executive Committee as a barrier to implementation.
- 7.5 The Regulations achieve this by amending the 2021 Regulations such that a direction given under those Regulations must be complied with irrespective of whether any matter has been brought to the attention of, or discussed and agreed by, the Executive Committee of the Assembly. This provision will not prevent matters from being brought to the attention of the Executive Committee. The effect is that directions must be complied with where there has been a failure to bring a matter to the attention of the Executive Committee, where a matter has been brought to the attention of the Executive Committee but not yet discussed, or where the matter has been discussed but not agreed to by the Executive Committee. This provision limits the application of section 28A(10) of the Northern Ireland Act 1998. In particular, it means section 28A(10) will not restrict a Minister's authority to decide to commission abortion services pursuant to a direction given by the Secretary of State under the 2021 Regulations.
- 7.6 In addition, the Regulations impose an obligation on the DoH to fund health and social care that implements the CEDAW recommendations when such health and social care has been commissioned. The Regulations provide that this obligation must be complied with irrespective of whether the matter has been brought to the attention of, or discussed and agreed by, the Executive Committee.
- 7.7 The second aspect of the dual approach is that the Regulations will provide the Secretary of State with the power to intervene directly. They do this by providing the Secretary of State with the powers to do anything that a Northern Ireland Minister or Northern Ireland department could do for the purpose of ensuring that the recommendations in paragraphs 85 and 86 of the CEDAW report are implemented in Northern Ireland. In addition, the Regulations will enable the Secretary of State to provide financial assistance to any person for the purpose of ensuring that the CEDAW recommendations in paragraphs 85 and 86 of the CEDAW report are implemented.

8. European Union Withdrawal and Future Relationship

- 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.
- 10.3 These Regulations will ensure that services are implemented in accordance with the framework of the 2020 Regulations.

11. Guidance

- 11.1 DoH has been directed by the Secretary of State to review, and endorse with any appropriate caveats, NICE guidelines relevant to the termination of pregnancy. DoH was also directed to issue guidance to medical professionals, to replace the guidance issued by DoH in March 2016 which was entitled “Guidance for Health and Social Care Professionals on termination of pregnancy in Northern Ireland”. These Regulations will allow the Secretary of State to ensure that the required guidance is in place for healthcare professionals.

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 will be provided by Northern Ireland Health and Social Care Trusts.
- 12.3 The exact impact will depend on decisions taken during the planning of commissioning. A full impact assessment will be produced at that stage.

13. Regulating small business

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

14. Monitoring and Review

- 14.1 The Secretary of State remains under a duty to ensure that the CEDAW recommendations are implemented in respect of Northern Ireland. The Secretary of State will, as appropriate, keep under review his compliance with that duty. The Northern Ireland Office will continue to engage with the Health and Social Care Trusts, DoH and the Executive Office on these matters.

15. Contact

- 15.1 William Durkin at the Northern Ireland Office, Telephone: 07973 748440 or email: william.durkin@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 Secretary of State for Northern Ireland, Brandon Lewis MP, at the Northern Ireland Office can confirm that this Explanatory Memorandum meets the required standard.