Submissions to the Secondary Legislation Scrutiny Committee on the Abortion (Northern Ireland) (No. 2) Regulations 2020 (SI 2020/503)

Lord Alton of Liverpool

This submission concerns the Abortion (Northern Ireland) (No. 2) Regulations 2020, laid before Parliament on the 13th May. The points I raise are relevant to the Committee's terms of reference: 4 (a) 'that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House' because the regulations introduces new forms of discrimination in Northern Ireland; and 4 (d) that 'it may imperfectly achieve its policy objectives' because the regulations promote discrimination. Many of the points I make reiterate those made in my submission to you concerning the earlier Abortion (Northern Ireland) Regulations 2020 because these new Regulations replicate the former in most respects. **However, I include comments which reflect the new political situation in which these amended Regulations have been laid which impacts upon their political significance, and I also draw attention to further relevant material which I have become aware of**.

My comments concern Regulations 3 and 12

As I expressed in my submission on the former regulations, Regulation 3 has a significant omission because it does not contain provisions that make sex-selective abortions generally illegal. **I add that, as recently as January this year, the Government reiterated that abortion on the basis of gender alone was illegal (in GB) because the only basis for accessing abortion is on one of the grounds specified in the 1967 Act and none of those grounds is that the baby is of the 'wrong' sex. Fiona Bruce MP tabled the following Written Question: 'To ask the Secretary of State for Health and Social Care, whether his Department is taking steps to ensure that gender-selective abortions are not carried out in UK.' In response the Minister Caroline Dinenage stated on: 28 January 2020. 'Sex selection is not one of the lawful grounds for termination of pregnancy. It is illegal for a practitioner to carry out an abortion for that reason alone, unless the certifying practitioners consider that an abortion was justified in relation to at least one of the grounds in the Abortion Act 1967 such as a sex-linked inherited medical condition.'**[1] The issue of sex selective abortion now arises in these Regulations because they propose that up until 12 weeks gestation, abortion should be available for any reason without having to meet a specified ground, unlike in GB. Therefore, abortion on the basis of gender alone is now legal in NI. This is particularly concerning given previous comments made on behalf of the Government calling sex-selective abortion an 'abhorrent practice', and promising to monitor the efficacy of the law to ensure that the restrictions provided in the GB context by the selective legalisation of abortion through the 1967 Act prevented sex selective abortions.[2] I also bring to the attention of the Committee that sex selective abortions are frequently cited in international human rights statements as an outworking of discrimination against women and girls.[3]

---

1 https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-01-21/6069/

2 The Parliamentary Under-Secretary of State for Health (Jane Ellison), Hansard, 23 Feb 2015: Column 120-1

3 See UN Commission on Human Rights Resolution 1996/49; the 1998 UN General Assembly Resolution 52/106; The International Conference on Population and Development Programme of Action 1994 and The Beijing Platform for Action 1995

Mindful of these concerns, which the Government has been made aware of, it is deeply troubling that Ministers should have signed off a second time on regulations which plainly open the door to sex selection in NI. The Government clearly could not - on the basis of its recent responses when challenged about sex selection in Westminster - countenance this in England and Wales, so why in Northern Ireland? To make matters worse, in what must be regarded as a supreme irony, the Northern Ireland CEDAW Report, which was cited as the main justification for introducing Section 9(1) of the 2019 Act, actually expresses in para 62 it "condemnation of sex-selective…abortions."[4] The Regulations' failings are of huge concern because NIPT testing – which is available in Northern Ireland - means it is possible to determine the sex of the fetus from 10 weeks and will soon be possible to determine the sex of the fetus from just 7 weeks.[5] When the Government made its comments about the practice being "abhorrent", identification of the baby's gender did not happen until 18 weeks. [6]

The Government's failings with respect to the absence of a ban on sex selection, are also stark in the context of the recent shift in abortion legislation in the Isle of Man: when they moved to a similar arrangement to that proposed for Northern Ireland they made it plain in Section 13 of its Abortion Reform Act 2019 that abortion on the basis of sex (unless linked to a sex related genetic disorder) is not legal, something these regulations could have done.

Sex discrimination at any level is a matter of huge political and legal importance. When a law, however, is framed in terms that actually opens the door for the lives of human beings to be terminated on the basis of their sex, even when in the womb, the sex discrimination is of the most serious kind. The fact that these Regulations do not contain the protections against sex selective abortion upon which the Government depended upon as recently at January this year, makes them (even if there was no other difficulty associated with them) of huge political and legal importance. They must be drawn to the urgent attention of the House on this ground alone.

With regard to regulation 12, a number of concerns have been expressed that the conscience provision is not sufficiently broad as to prevent discrimination against a category of persons on the basis of their religious belief. The NIO has said they believe the provision is proportionate and amounts only to indirect, rather than direct discrimination, and thus is not prohibited by legislation preventing the assembly and thus the Secretary of State, from making legislation that "*treats that person or that class less favourably in any circumstances than other persons are treated in those circumstances by the law.*" (See Section 6(2)(e) of the

---

4 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, CEDAW/C/OP.8/GBR/1

5 "The introduction of non-invasive prenatal testing (NIPT) has the potential to make the practice of sex-selective termination of pregnancy (TOP) an even more pressing issue. NIPT can determine the sex of the fetus very accurately and very early in the pregnancy. It is increasingly accurate from 7 weeks' gestation. This is earlier than when other techniques that can determine sex, such as ultrasound or chorionic villus sampling (CVS), are generally performed." Bowman-Smart H, Savulescu J, Gyngell C, Mand C, Delatycki MB. Sex selection and non-invasive prenatal testing: A review of current practices, evidence, and ethical issues. Prenatal Diagnosis. 2019;1-10. https://obgyn.onlinelibrary.wiley.com/doi/full/10.1002/pd.5555

6 "the sex of the foetus is routinely identified at the second scan, at around 18 to 21 weeks' gestation", The Parliamentary Under-Secretary of State for Health (Jane Ellison), Hansard, 23 Feb 2015: Column 122

Northern Ireland Act 1998, and section 98(4) of the same Act.) **However, in agreement with the Attorney General's further correspondence to the Committee, I believe excluding ancillary, administrative, or managerial staff and others who may be required to be involved in abortion provision (but who do not themselves perform terminations), from conscience protections, does in fact result in *direct* discrimination against those persons. This legislation puts them in a position where they may be disadvantaged in their employment opportunities because of their belief that abortion is morally repugnant.**

In addition, the NIO in the Explanatory Memorandum to the current and previous Regulations state that people providing abortion ancillary roles "*do not have the same right to conscientious objection*" as medical staff.[7] This assertion, however, as the Attorney General for Northern Ireland has pointed out is not based on an engagement with ECHR Rights but rather with the Doogan judgment.[8] However, the Supreme Court "*approached its [Doogan] judgment as 'a pure question of statutory construction'*"[9] – ie what the Abortion Act says - and not a wider determination of whether a right to conscience existed. Baroness Hale said, "*So, even if not protected by the conscience clause in section 4, the petitioners may still claim that, either under the Human Rights Act or under the Equality Act, their employers should have made reasonable adjustments to the requirements of the job in order to cater for their religious beliefs.*"[10]

The Attorney General, in his submission to the SLSC, said: "*The Supreme Court does not tell us whether or not an employer, in order to act compatibly with the Convention, might still need to accommodate conscience beyond the limits of the statutory right under the 1967 Act. In my view, it is disproportionate in the Northern Irish context (and therefore contrary to article 9 of the Convention) to require those who undertake ancillary, administrative and managerial tasks to act contrary to their conscience for service maintenance reasons as set out in the consultation response (particularly when the anticipated impact could be avoided through commissioning a dedicated service). Providing for broader conscience protection in regulation 12 would have been possible and would have assisted with Convention compliance by Health and Social Care Trusts.*"[11]

The judgement said: "*There would remain difficult questions of whether the restrictions placed by the employers upon the exercise of that right were a proportionate means of pursuing a legitimate aim. The answers would be context specific…*"[12] Therefore, the NIO must provide evidence that a narrower conscience provision is a proportionate means of providing abortion services.

---

7 Explanatory Memorandum, paragraph 7.40, page 13

8 Attorney General for Northern Ireland to the SLSC, 29 April 2020, pages 3-4

9 Neal M, When Conscience Isn't Clear: *Greater Glasgow Health Board V Doogan And Another* [2014] UKSC 668, *Medical Law Review*, Volume 23, Issue 4, Autumn 2015, pages 668–682

10 [2014] UKSC 68, paragraph 24

11 Submissions to the Secondary Legislation Scrutiny Committee, page 9

12 [2014] UKSC 68, paragraph 23

In the consultation response, the Government expresses concern that a wider conscience provision may adversely impact on service delivery, however they do not provide any evidence to demonstrate that this concern has merit. On the contrary, in response to a query from your committee the NIO said: "*We have been engaging with the Department of Health in Northern Ireland and medical practitioners, including royal medical colleges, for many months, including during the period of public consultation, and understand that there would be sufficient staffing levels across doctors, nurses and midwives, to be able to commission and provide services, consistent with the Regulations*." Whilst this assessment does not directly consider those who may be engaged in administrative or other tasks who are not medical professionals, it does not suggest significant concern about staffing. Whilst the NIO does cite the NIHRC's judgement that this would be proportionate, neither body provides evidence to substantiate this claim. The NIO also fail to demonstrate that they have explored any other measures that could mitigate against staffing shortages without discriminating against dedicated professionals, e.g. creating dedicated abortion clinics.[13] One cannot adjudicate on whether this narrow conscience provision is proportionate without examining the other options available which could avoid the need for even indirect discrimination entirely.

In a context where staff in facilities listed in Regulation 8 have not had to provide abortions until the end of March, the more relevant concern in terms of capacity means the NHS should accommodate the wider conscience, in order to avoid a loss of capacity which would follow if staff with conscientious objections left the profession, something the NI NHS could ill-afford. Echoing the comments of this Committee on the earlier Regulations, in light of the sensitivity of the issues pertaining to conscientious objection, the Government ought to have embarked on more thorough consideration of the scope of policy and how it will be interpreted, and sought to build a greater consensus rather than simply reintroducing these highly contentious and flawed Regulations.

For all the above reasons, Regulation 12 is of fundamental political and legal consequence and I would urge the Committee to strongly draw the attention of the House to the serious concerns with this particular Regulation under its terms of reference 4 a) and 4 b).

[13] UK Government consultation response, A new legal framework for abortion services in Northern Ireland, March 2020, page 34. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875380/FINAL_Government_response_-_Northern_Ireland_abortion_framework.pdf

Both Lives Matter

Both Lives Matter is a movement of organisations and individuals from across the political spectrum in Northern Ireland. We see value and dignity in both women and unborn children and are working to reframe the abortion debate, advocate for best care services and help create laws and a culture where every human life is valued.

We respectfully submit a few of our many concerns with the Abortion (NI) Regulations (No. 2), following an error in those laid on 25 March 2020, and following consultation on section 9 of the Northern Ireland (Executive Formation) Act 2019. Both Lives Matter responded to the Northern Ireland Office consultation and to the March regulations. Our concerns remain and have increased in light of your own Report and recent statements made by the Attorney General for NI:

No provision for alternative support services

Rather than abortion being provided as a rare medical option to preserve the human life of the woman, abortion is presented in these regulations as the solution to any unwanted pregnancy at any stage. We make this point because it seems difficult to foresee a situation under these regulations where an abortion would not be permitted at any stage for any reason, so vague is the medical and legal terminology. There is no provision in the regulations for any alternative care or support services other than abortion. This is deeply disappointing and we ask the government to provide statutory support for counselling and practical services to allow every woman to continue with every pregnancy, independent from the abortion provider.

No meaningful engagement with the NI Assembly

In the five months since the consultation closed and the regulations have been published, there is now a Northern Irish Executive, Assembly, Health Minister and Committee in place. However they have all been bypassed in any meaningful way when it comes to scrutinising what remains a devolved issue. It is clear that there are serious issues with both the process and substance of these regulations.

Your 11th report of session 2019-21 drew particular attention to a number of areas of concern which had been similarly raised by ourselves and others previously;

- That there were*, "several instances where the Government's administrative process for bringing these Regulations forward appears suboptimal".*
- That the six week public consultation was in your view *"too short for so sensitive a topic",* did not *"conform(s) with best practice"* and was not supported by a majority of respondents as "*79% registered general opposition to any change to the established position in Northern Ireland."*

Regulation 3 – Abortion up to 12 weeks without conditionality

We are deeply concerned that within the first 12 weeks abortion will be permitted without conditionality. This is the period when up to 90% of abortions take place. Abortion has been argued as 'healthcare' and yet these abortions are not being carried out for any medical reason. There are no measures to capture the reasons for these abortions or to offer practical alternatives so as to meaningfully address the systemic reasons why a woman may choose to have an abortion that she does not really want to have, but sees no realistic alternative choice.

Furthermore, we are deeply concerned about the introduction of abortion by telemedicine in GB and would urge the committee to refrain from adding such provision to these regulations.

The government has stated that the health and safety of women and girls are at the forefront of its considerations. The apparent proclivity towards medical and at home abortions raise significant concerns for the health and safety of women and girls in NI, which these regulations do nothing to address. For example, this Finnish study of 42,600 women, found that women had four times as many serious complications after medical abortions than surgical abortions: 20% compared to 5.6%. Notwithstanding our objection to abortion without conditionality, we question the introduction of such a permissive law before a framework is in place to ensure its safe delivery.

https://pubmed.ncbi.nlm.nih.gov/19888037/

Regulation 3 – Abortion up to 12 weeks without conditionality

We are deeply concerned that within the first 12 weeks abortion will be permitted without conditionality. This is the period when up to 90% of abortions take place. Abortion has been argued as 'healthcare' and yet these abortions are not being carried out for any medical reason. There are no measures to capture the reasons for these abortions or to offer practical alternatives so as to meaningfully address the systemic reasons why a woman may choose to have an abortion that she does not really want to have, but sees no realistic alternative choice.

Furthermore, we are deeply concerned about the introduction of abortion by telemedicine in GB and would urge the committee to refrain from adding such provision to these regulations.

The government has stated that the health and safety of women and girls are at the forefront of its considerations. The apparent proclivity towards medical and at home abortions raise significant concerns for the health and safety of women and girls in NI, which these regulations do nothing to address. For example, this Finnish study of 42,600 women, found that women had four times as many serious complications after medical abortions than surgical abortions: 20% compared to 5.6%. Notwithstanding our objection to abortion without conditionality, we question the introduction of such a permissive law before a framework is in place to ensure its safe delivery.

https://pubmed.ncbi.nlm.nih.gov/19888037/

Regulation 12 - Conscience

Article 9 of the ECHR states that everyone has the right to 'freedom of thought, conscience and religion'.

We alongside others would submit that conscience should be protected for the entire course of the procedure, referrals and booking for abortions, administration of abortifacient medication, ancillary, administrative or managerial tasks. If managerial tasks are not specifically protected, a 'glass ceiling' will effectively be created when it comes to management and career progression for people with a conscientious objection. This in turn creates a 'chilling effect', dissuading people who conscientiously object to abortion from entering the profession. It could also amount to indirect or direct discrimination on the basis of religion or political belief under existing legislation in Northern Ireland.

In addition, in recent correspondence to Lord Hodgson Chair of the Secondary Legislation Scrutiny Committee, and in relation to the Abortion (Northern Ireland) Regulations 2020, John Larkin QC, Attorney General for Northern Ireland has said; *" It was open to the Secretary of State to depart, in making provision for conscientious objection, from the text of the 1967 Act; his failure to do so appears to have been based on a misunderstanding of the limited nature of the Supreme Court decision in Doogan."*

Regulation 13

The Criminal Justice 1945 act and the crime of 'child destruction' was not part of the CEDAW report or indeed the Northern Ireland (Executive Formation Act) 2019. This amendment weakens protections for the unborn child at late stages of pregnancy. It means that a women who 'destroys her child', days or moments before birth would no longer face any legal consequence. This profound change in the law has not been consulted upon and lies beyond the scope of these regulations.

Both Lives Matter would implore the committee to consider the points made here in view of the changed circumstances since the enactment, the reconvening of the Northern Ireland Assembly; the legal and political importance of the issue for the people who live and work here and the genuine concerns about the process and the substance of these regulations. These are not minor tweaks to the abortion law in Northern Ireland but significant changes which have been imposed around one of the most culturally sensitive issues.

Lord Brennan QC

1. I am writing to you regarding the above Regulations which were laid on 13th May. I do so in the light of my experience of engaging with the Isle of Man Abortion Reform Act 2019 raising points under your terms of reference ground 4 (a), 4 (b) and 4 (f). I gave oral evidence to the House of Keys on 13 February 2018 and sent a follow up letter on 22 February.

4 (a) Politically or legally important or gives rise to issues of public policy likely to be of interest to the House

2. It is extremely concerning that under Regulation 3, there is neither a prohibition on abortion on the basis of the sex of the baby, nor a requirement for an assessment that abortion is not being sought on the grounds of the sex of the baby.

3. The GMC will need to provide guidance to doctors in NI on the basis of guidance from the Department of Health.[14] In a statement from 2014, the GMC made clear that their role is to ensure that doctors practice "*within the law*" and at that time said that they would be working with England's Department of Health on guidance for doctors on sex selection abortions.[15] The Department went on to publish this statement *'Abortion on the grounds of gender alone is illegal. Gender is not itself a lawful ground under the Abortion Act (…the lawful grounds under Section 1(1))*."[16] However, this statement does not hold true under Regulation 3 where abortion is allowed without conditionality. The NI DH and the GMC will have to acknowledge that up to 12 weeks an abortion on the grounds of the gender of the child is legal.

4. This is a particularly stark failing because the Government argued in 2015 that there was no need to introduce an express offence of abortion on the basis sex in Great Britain because abortion was only legal for reasons set out in the 1967 Act, none of which is the sex of the fetus.[17] Moreover, the Government's response suggested that it supported this position, which one would expect given that Article 14 ECHR prohibits discrimination on the basis of sex. Why then has the Government proposed an approach to abortion that on the basis of its own logic opens the door to abortion on the basis of sex right up to 12 weeks gestation, when NIPT can tell you the sex of the baby from 10 and even 7 weeks?

5. Of particular importance is the fact that Section 9 (9) of the Executive Formation Act 2019, defines the Secretary of State's Regulation making powers as being constrained by the same constraints that apply to the competence of the Northern Ireland

---

14 https://www.gmc-uk.org/about/how-we-work/who-we-work-with/northern-ireland

15 Clarity and Compliance: Delivering abortion services within the law, General Medical Council, 4 May 2014 https://gmcuk.wordpress.com/2014/05/04/clarity-and-compliance-delivering-abortion-services-within-the-law

16 Guidance in Relation to Requirements of the Abortion Act 1967, Department of Health, May 2014, para 25 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/313459/20140509_-_Abortion_Guidance_Document.pdf

17 The Parliamentary Under-Secretary of State for Health (Jane Ellison), Hansard, 23 Feb 2015: Column 120-1

Assembly. Specifically, it states: '(9) Regulations under this section may make any provision that could be made by an Act of the Northern Ireland Assembly.' These constraints are defined by Section 6 of the NIA 1998. Section 6 (c states) 'it is incompatible with any of the Convention rights' Regulation 3 is, as currently drafted, obviously contrary to Article 14 ECHR which makes it deeply problematic. **The fact that these Regulations open the door for the first time anywhere in the UK to legal sex elective abortion makes them politically and legally important. These Regulations give rise to issues of public policy that are certain to be of interest to the House.**

6. There should also be a requirement to ensure that the women is seeking the abortion free from coercion. For example, the World Health Organization highlights the importance of being very sensitive to signs of the person being coerced into having the abortion against their will. There is extensive data suggesting a link between abortion and domestic abuse which should not be ignored.

7. In January 2019, the Government said in 'Transforming the Response to Domestic Abuse', that for a domestic offence, "Section 58 of the Offences Against the Person Act 1861 covers such behaviour".[18] In line with this, it is noticeable that whenever someone has placed abortifacients into the food or drink of a pregnant women without her consent, Section 58 has been the provision to protect her in subsequent court cases. Again, in the same document, the Government included a quote that ""Decriminalising abortion may require the creation of explicit new offences to cover forced or coerced abortion; to cover cases where abortion is not consensual, in the future."[19]

8. That certainly makes complete sense because the only offences apart from Section 58 Offences Against the Person Act 1861 that could conceivably be engaged in the event of someone slipping abortifacients into the food or drink of a pregnant woman without her consent, are Sections 23 and 24 of the Offences Against the Person Act and they provide the woman with less protection than Section 58.

9. As the expert legal opinion of Ian Wise QC states, and, as I agree with it, I quote:

'It is important to note that sections 23, 24 and 58 of the 1861 Act all make the administration of a 'noxious thing' a component of an offence. The context is however different, a difference that has been recognised by the courts. With respect to section 58 (which is of course specifically related to abortion) the courts have interpreted 'noxious thing' as being something that produces the effect mentioned in the statute, namely an abortion. The courts have however interpreted 'noxious thing' in relation to sections 23 and 24 as being related to the person to whom the 'noxious thing' is administered. For present purposes this means that a 'noxious thing' administered to a pregnant woman would have to cause harm to the woman to engage sections 23 and 24, the effect on the unborn child being irrelevant. The non-consensual administration of an anti-abortion pill to a pregnant woman, which

---

18 Transforming the Response to Domestic Abuse, Consultation Response and Draft Bill, Jan 2019, page 63-64. https://www.gov.uk/government/publications/domestic-abuse-consultation-response-and-draft-bill

19 Ibid.

causes an abortion but which does not harm the mother which may have given rise to a criminal liability under section 58 may not give rise to such a liability under section 24."[20]

10. Section 58 applies in England and Wales but no longer in Northern Ireland since it was repealed last October. Inexplicitly the Government has failed to use its Section 9 powers to create Abortion (Northern Ireland) Regulations with "explicit new offences to cover forced or coerced abortion".

11. The Secretary of State thus (in failing to prohibit coercive abortions) acted contrary to his obligations in Section 9 (7) '(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.' His actions in this regard have not assisted women's rights. Women are less well protected from coercive abortions in Northern Ireland today than anywhere else in the UK. Moreover, they are far from compliant with Article 39 of the Istanbul Convention which requires signatories to prohibit coercive abortion. **Again, the fact that these Regulations inexplicably do not deal properly with coercive abortion makes them politically and legally important. These Regulations consequently give rise to issues of public policy that are certain to be of interest to the House.**

12. The Isle of Man Abortion Reform Act expressly prohibits abortion on the basis of sex in Section 13 and requires checks against sex selective and coercive abortions in Section 17 (1) (c).[21]

Regulation 12 and Conscientious Objection

13. The Government have chosen to translate the conscientious objection provisions of the 1967 Act into Regulation 12, relying on the Supreme Court judgment in Doogan.[22] It is regrettable they did not choose to be clearer about who the Regulations pertains too, what is considered treatment (aside from the understanding under Doogan) and did not incorporate employment protections. The latter would have recognised the challenges of staffing in the healthcare system in NI and the deeply held beliefs on this issue in the Province.

14. Section 9 (9) of the Executive Formation Act 2019 which defines the Regulation making powers as being constrained by the same constraints that apply to the competence of the Northern Ireland Assembly. Specifically, it states: '(9) Regulations under this section may make any provision that could be made by an Act of the Northern Ireland Assembly.' These constraints are defined by Section 6 of the NIA 1998. Section 6 (e) states that no law can be made if 'it discriminates against any person or class of person on the ground of religious belief or political opinion.'

---

20 Ian Wise QC, 'In the Matter of the Northern Ireland (Executive Formation etc) Act 2019 and the Matter of Offences Concerning Procurement of Abortions' October 2019

21 https://legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/2019/2019-0001/AbortionReformAct2019_2.pdf

22 Greater Glasgow Health Board v Doogan and Another [2014] UKSC 68, https://www.supremecourt.uk/decided-cases/docs/UKSC_2013_0124_Judgment.pdf.

15. It is very clear that if someone cannot serve either in the performing an abortion procedure, or in facilitating abortions by rostering staff, ensuring all the equipment is provided for abortions and that women are booked in for abortions etc (functions that are necessary in order to facilitate abortion provision) without acting in violating of their faith identity, that the provisions afforded by Regulation 12 will discriminate against people certainly on grounds of religious belief.

16. People who find themselves in this position who have potentially worked in the NHS in Northern Ireland for a long time and never had to be involved at any level in abortion provision before, will find themselves confronted by the invidious choice of having to choose between either keeping their job and acting in violation of their faith identity, or remaining true to their faith identity and losing their livelihood. Such people would experience the full force of discrimination on the basis of their faith identity with very painful consequences.

17. I see from para 7.40 of the explanatory memorandum that the NIO first sought to argue that there was no need to have regard to the consciences of people providing abortion ancillary roles because their consciences were not engaged in the same way. The NIO when challenged on this by your Committee, then argued that the S 6 (e) NIA 1998 is only engaged in cases of direct discrimination so the ancillary workers were not relevant because their consciences were only engaged indirectly. That, however, is plainly absurd. A person serving in ancillary service provision would be subject to direct discrimination if their role changed under the new law and they were asked book women in for abortions, roster staff for abortions etc. These roles are all central to the provision of abortion because the abortion cannot happen without them. They would have to decide whether to keep their livelihood and act in violation of their faith identity in facilitating abortion provision or to act consistently with their faith and lose their job.

18. As such the Secretary of State has clearly exceeded his powers in making Regulation 12, which makes them both a matter for great legal and political importance that must be brought to the attention of the House.

<u>4 (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act</u>

19. Section 9 of the Executive Formation Act 2019 was passed at a time when there was no functioning Northern Ireland Assembly. Then and now, and for the future, the constitutional tension between Westminster and devolved democratic institutions are of fundamental significance. Hence in this area of the law it is for devolved functioning parliaments/assemblies to determine issues of abortion when they are devolved. Since the passing of the 2019 Executive Formation Act, the Northern Ireland Assembly has been reconstituted and is now functioning. The accord between the UK Government and the Republic of Ireland which led to the reestablishment of the assembly was clearly based on giving the assembly full legislative power on devolved matters. The present proposed regulations contravene that objective in a major way. Having served on the House of Lords Constitution Committee I am well aware of such tensions. Clarity of devolved issues and devolved democratic control must be provided and

upheld. Re-tabling these Regulations was completely unnecessary. When the Assembly was restored the Government should have asked the new Parliament, which cannot be bound by its successors, to repeal section 9 and given the job to forming a new abortion law to the Assembly. Indeed, it is worth remembering that even the mover of the amendment that became section 9, Stella Creasy told the House of Commons when moving her amendment: , 'I understand that, if it was not for the fact that we do not have an Assembly, this would absolutely not be the right way forward, but we do not have an Assembly and we will not have one any time soon.' (9th July 2019, col 183). The failure of the Government to ask Parliament to repeal section 9 before 31 March was most unfortunate. Its decision to re-table what are now the Abortion (Northern Ireland) Regulations (2) on 13 May, however, is much more problematic when seen from the perspective that: a) devolution now constitutes a quasi-entrenched part of our constitution and b) there are good grounds in law for arguing that Section 9 had been met.

20. Of great importance Parliament had chosen to place an explicit obligation of the Secretary of State to lay the Regulations so they came into force by 31st March (see S 9 (6)) but instead of placing a comparable obligation on him to then table a resolution in their favour and press for a vote, the Act instead, simply states that the Regulations will fall after a certain period of time unless a resolution is tabled and a vote passed (See S 12 (4). Crucially, while Parliament chose to place an explicit obligation on the Secretary of State to lay the Regulations so they come into force by 31 March, it chose to place no comparable obligation on him to table a resolution and seek a vote, but simply stated that if he does not do those things - something that is left to his discretion - the Regulations will fall. Thus, Parliament chose a formula whereby the law could be changed and implemented, and thus Section 9 met, for a short period of time without placing an obligation on the Secretary of State to then intervene to make the change for a longer period of time. When seen in the context of the accord between the UK and the ROI, the decision to re-table four months after the restoration of the Northern Ireland Assembly is constitutionally indefensible. The Government should not have re-tabled but should instead be asking parliament to repeal Section 9. **This again is a matter of fundamental legal and political importance that I would suggest must be brought to the attention of the House.**

<u>4 (f) that there appear to be inadequacies in the consultation process which relates to the instrument</u>

The consultation preceding the Regulations was on what was a deeply controversial subject in Northern Ireland and yet it only lasted 6 weeks and it took place almost completely in the context of a General Election campaign. 79% of respondents opposed the Government's proposals but this was ignored. This again is a matter of fundamental legal and political importance that I would suggest must be brought to the attention of the House.

Yours sincerely

Lord Brennan QC

Fiona Bruce MP

1. This submission will focus on section 4 (a) and 4(d) of the terms of reference of the Secondary Legislation Scrutiny Committee in drawing out why the Abortion (Northern Ireland) Regulations (No 2) Regulations 2020 are of significance to the House of Lords. I asked the Committee to consider the submission I made previously, which I am attaching at the end of this document, and which was published on pages 14-16 of your collection of submissions for the Abortion (Northern Ireland) Regulations [not attached as already published]. I wish to respond to several points that have come up since then and which have bearing on the Abortion (Northern Ireland) Regulations (No 2), especially the new Ana-Marie Tudor legal case on fetal sentience and informed consent.

   Regulation 7: Disability

2. I am aware of the argument made by the Northern Ireland Office (NIO) in paragraph 29 of your report on the Abortion (Northern Ireland) Regulations 2020 that: ". . . *the UNCRPD does not have the status of binding EU law...*" I believe this argument to be inaccurate. I do so on the basis of the authority of the Attorney General for Northern Ireland, who it must be remembered is the Chief Law Officer to the Northern Ireland Executive and should not be lightly dismissed. In his further letter of 29 April 2020 in response to the NIO comments, he points out that *"The Grand Chamber of the Court of Justice of the EU regards the UNCRPD as 'an integral part of the European Union legal order.' …The Secretary of State cannot act inconsistently with EU law in the provision he makes for abortion. The Grand Chamber's view aside, we are sure that the UNCRPD is EU law for the purposes of the competence limitation because it has been specified as an EU Treaty by way of the European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009."*[23] It may be convenient for the Northern Ireland Office to ignore the import of this argument, but it is untenable.

3. Consequently, it is my opinion that Regulation 7 directly contradicts Article 10 of the UNCRPD. Article 10 states "*that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.*" It is apparent to me that allowing for disabled fetuses to be aborted up to term purely on the basis of their disability, as is set out in Regulation 7 read in conjunction with Regulation 13, is not in accordance with this provision. Regulations 7 and 13 are consequently of great political and legal importance (see 4 a ToR) because they violates section 6(2)(d) of the Northern Ireland Act 1998 and this involves the Secretary of State exceeding his powers as defined by section 9(9) of the Northern Ireland (Executive Formation etc) Act 2019, the parent legislation.

4. In addition, there is nothing in the Regulations to meet the CEDAW requirement about the need for "*appropriate and ongoing support, social and financial, for women who decide to carry such pregnancies to term.*" (para 85(b)(iii)) This refers to mothers who choose to carry disabled fetuses to term. The NIO is leaving the Department of Health to implement "*counselling and other support services to support women and girls through these*

[23] https://committees.parliament.uk/publications/991/documents/7764/default/ p2

difficult decision",[24] which is legally problematic because the obligations in Section 9 relate to the Secretary of State, not the NI Health Minister. I am aware that the NIO indicated in response to the Committee's question regarding this matter that no further support is required *"because such a woman and her child would be eligible for the normal disability and/or carer's benefits."* (para 35). I would imagine the UN CEDAW Committee were cognisant of these benefits when they wrote this report, yet they still included this additional requirement. In addition, I would draw the Committee's attention to the NI Working Group on Fatal Fetal Abnormality which recommended changes to improve care because "*These women… experience a particularly stark inequality, compared to other expectant women, in relation to communication, locally accessible care, appropriate advice and support at a time when they are at their most vulnerable*".[25] This response from the NIO is wholly inadequate given the Working Group's recommendations and the experience of parents who gave evidence to the Parliamentary Inquiry into Abortion on the Grounds of Disability, which I chaired.[26]

Foetal pain

5. I also want to raise with the Committee the issue of foetal pain because of its political and legal importance in line with 4(a) of the Committee's Terms of Reference. It has become increasingly evident the scientific consensus on the point at which a fetus is able to feel pain in utero has been changing. In a recent article for the Journal of Medical Ethics, Stuart Derbyshire and John Bockmann reassess the current evidence around the question of fetal pain. They state in the article that "*current neuroscientific evidence supports the possibility of fetal pain before the "consensus" cut-off of 24 weeks*." They go on to argue that despite their differing views on the morality of abortion, "*both authors agree that it is reasonable to consider some form of fetal analgesia during later abortions*."[27]

6. There is an incongruity in terms of how fetuses at the same stage of development are treated in medical practice. In a wonderful recent scientific development, medical professionals can perform surgery in utero on fetuses found to have spina bifida. This surgery can take place between 20-26 weeks gestation. When this surgery is performed, the fetus is given pain relief.[28] However, a fetus which is being aborted during the same period will not be given pain relief.

7. The Regulations put forward by the NIO at no point address the issue of fetal pain. Despite legalising abortion up to term on the grounds of 'serious disability' and up to twenty-four weeks gestation functionally on request, no requirement is made to

---

24 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875380/FINAL_Government_response_-_Northern_Ireland_abortion_framework.pdf

25 Report of the Working Group on Fatal Fetal Abnormality, Healthcare and the Law on Termination of Pregnancy for Fatal Fetal Abnormality. Proposals to the Minister of Health and the Minister of Justice, 11 October 2016, para 5.4 https://www.health-ni.gov.uk/sites/default/files/publications/health/report-fatal-fetal-abnormality-April-2018.pdf

26 Independent Parliamentary Inquiry into Abortion on the Grounds of Disability, 2013, pages 32-34

27 Derbyshire SW, Bockmann JC, Reconsidering fetal pain, *Journal of Medical Ethics* 2020;46:3-6 https://jme.bmj.com/content/46/1/3

28 https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-01-30/214478/

provide pain relief for fetuses which are to be aborted. This is a significant omission on the part of the NIO, who in my estimation should have considered the most recent scientific evidence in this regard in their development of the Regulations.

8. I would draw the attention of the Committee to the case of Ana-Marie Tudor which has been reported in the Daily Mail since the first Abortion (Northern Ireland) Regulations were considered and which has very real bearing on the new Abortion (NI) Regulations No 2.[29] Ms Tudor has launched a judicial review against the guidelines produced by National Institute on Health and Care Excellence with regard to fetal pain following her own experience of undergoing an abortion. Ms Tudor sought an abortion at 23 weeks gestation but argues that she was not informed her fetus might feel pain at this point. If she had of been informed of this fact, she may not have gone through with the procedure. She argues that she could not provide informed consent without full knowledge of the impact of an abortion procedure on the fetus.

9. This case is of significance with regard to these Regulations because under the Abortion (Northern Ireland) (No 2) Regulations abortion can now be accessed in Northern Ireland up to term in cases where a 'serious disability' is identified and functionally up to 24 weeks gestation on request. The failure of these Regulations to address this matter is particularly stark given the fact that the Animal and Scientific Procedure Act 1986 provides statutory protection for vertebrate animals to ensure a 'humane death' if they are killed in the womb from two thirds gestation, see Section 2(7), Section 15A and Schedules 1 and 2 of the Act. It seems extraordinary that the Abortion (Northern Ireland) (No 2) Regulations should have been developed in 2020 in a context where: i) there is now real concern about the ability of unborn human beings to feel pain and ii) when statutory protection is provided in this regard for animals and yet provide no statutory protection for unborn human beings in this regard. This is a matter of considerable political and legal importance which should be brought to the attention of the House.

[29] https://www.dailymail.co.uk/news/article-8281321/Landmark-legal-bid-force-clinics-tell-women-truth-involved-abortion.html

Joanne Bunting CO

1. I want to raise a particular concern which arises from the Abortion (Northern Ireland) (No. 2) Regulations 2020 with regard to the lack of provision of inspections of places that will provide abortion clinics. In this submission I will focus first on grounds 4 (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House because it places the safety of women in jeopardy; and 4 (d) that it may imperfectly achieve its policy objectives because it places the safety of women in jeopardy.

2. I am fully aware of the fact the Committee produced a report on the Abortion (Northern Ireland) Regulations 2020 (1).Indeed, I want to express my gratitude to the Committee for considering my previous submission and raising a number of questions with the Northern Ireland Office (NIO) (paragraph 39). **Since the publication of the original report, important new information has come to light in reference to the inspection of abortion providers which will be very relevant as you consider the new Abortion (Northern Ireland) Regulations 2020 (2). I set out the new material in this submission.**

3. The NIO makes clear that the intention is for the provisions in the Regulations to mirror the provisions in England under the Abortion Act 1967 and yet they do not include similar provisions on inspections and requirements for abortions to be a registered service as under the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, whether that be an NHS facility or independent clinic.

4. In the Explanatory Memorandum accompanying the regulations, the NIO indicated that its overarching policy intention was to produce a framework which "(a) protects and promotes the health and safety of women and girls; (b) provides clarity and certainty for the medical profession; and (c) is responsive and sensitive to the Northern Ireland Executive and Assembly being restored." It is hard to see how the lack of provision for inspection of premises which provide abortions is in line with these objectives, a failing that engages ground 4 (d) directly.

5. Regulation 8 would be where you would expect provisions to be included referring to the inspection of the premises conducting abortions which are listed in Regulation 8(1)(a)-(c) – that is i) NHS providers at an HSC hospital or HSC clinic and a GP surgery - and ii) any future places approved under 8(d), such as private clinics. However, in reading Regulation 8 no reference is made to the inspection of premises with a specific focus on whether they provide abortions safely. This is a very unexpected omission in the use of the regulatory power with the result that I believe these regulations are not fit for purpose.

6. Indeed, I raised this in my last submission highlighting that in recent years it has become evident that the Regulation and Quality Improvement Authority (RQIA) in Northern Ireland does not currently have the requisite powers to fulfil the same function as the Care Quality Commission (CQC) in England in terms of the inspection of premises that carry out abortions, be they NHS or private. Given that there have been few abortions carried out in NI, this is not surprising. However, the failure of these new Regulations to do so is a gapingomission which means they are not fit for purpose.

7. The major focus of inspections in England by the CQC is on independent clinics because this is where the majority of abortions take place, but this will not be the case (certainly initially) in NI since Regulation 8 only allows abortions in specific places listed at paragraph 5 above and currently does not provide for abortions at independent clinics. However, crucially the Regulations give the Department of Health the power to designate private clinics an appropriate location for abortion at any time under Regulation 8(3). In England, independent clinics have specific regulations they have to fulfil. Recent inspections have highlighted concerns about safety procedures.

8. There is no doubt that should independent clinics open in NI in the future, there is no requirement to register with the RQIA to perform abortions per se, because abortion is not one of the listed services that have to be registered under Regulation 4 of the Independent Health Care Regulations (Northern Ireland) 2005. There is only a requirement to register if the doctor performing the abortions is not working in the NHS.

9. **This position has been confirmed since my submission on the first set of Regulations by the Northern Ireland Department of Health in response to a recent Parliamentary Question tabled by Mr Frew, which I provide in full here:**

"To ask the Minister of Health (i) to outline the powers of the Regulation and Quality Improvement Authority to inspect abortion providers, specifically on how they conduct abortions; (ii) how these powers differ to the Care Quality Commission in England; and (iii) whether he proposes to put new powers in place."

The Minister answered by stating the following:

"(i) There are currently no commissioned abortion services in Northern Ireland, though abortion is legal if carried out in accordance with the Abortion (Northern Ireland) Regulations 2020. RQIA's powers, including inspections, are set out in The Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003 http://www.legislation.gov.uk/nisi/2003/431/contents. **They do not have any powers specifically in relation to abortion providers as they are not a discrete category of provider required to register with, and be inspected by, RQIA.**

(ii) The Care Quality Commission (Registration) Regulations 2009 http://www.legislation.gov.uk/uksi/2009/3112/regulation/20/made set out specific requirements relating to the termination of pregnancies.

(iii) Until such time as I am in a position to commission services, I have made no assessment of the need for additional powers."

(Highlights added)

10. This response demonstrates how the Regulations are simply not fit for purpose because they make provision for abortion provision from 31 March/13 May without appropriate inspection.

Regulation 8 should have included these details on the proposed inspection arrangements for premises conducting abortion, regardless of whether they are run by the NHS or privately – those already allowed to do so under Regulation 8 and those in the future. The failure to do so leads the Regulations to have a significant statutory gap since it is not conducive to protecting and promoting the health and safety of women and girls to not have an effective inspection process in place. For women to have confidence this is the case, it is important that all abortion providers are subject to regular inspection to ensure they are providing abortions in line with abortion specific health and safety standards. In addition, for medical professionals, it is important they know they will be subject to inspection to ensure standards are kept high and so they can have confidence in their employers. If these Regulations are passed without making provision for a comparable inspection regime to that in England, they will involve the sanctioning of abortion provision without appropriate safety provisions in place. As far as safety is concerned this will involve Northern Irish women being treated as second, or third-class citizens in the UK.

11. I note the comments made by the Committee in paragraph 39 of the report on the Abortion (Northern Ireland) Regulations 2020 (1). The NIO indicated in response to my submission(the points of which I have raised in paragraphs above) that the duties of the Care Quality Commission (CQC) and the Regulation and Quality Improvement Authority (RQIA) are "*equivalent*", and the differences between the legal powers "*are a matter of choice in legal drafting*."

12. The answer to Mr Frew's Assembly Question, however,shows that this answer from the NIO is simply not credibleand fails to address the substantive lacuna which their new regulatory framework creates around the inspection of abortion clinics. It is manifestly evident from the answer to Mr Frew that the powers of inspection of the CQC and the RQIA are not equivalent. It is my understanding that abortions are currently being performed in Northern Ireland. However, the RQIA has no ability to inspect these abortion providers or to assess them to the same abortion specific standards applied by the CQC. Unless the NIO believe this answer on the part of the Northern Ireland Health Minister to be incorrect, they must address the point being made. I would urge the Committee to press the NIO on their reasoning behind why Northern Ireland is going to be treated differently from the other parts of the United Kingdom in terms of the inspection of abortion providers. Plainly, given that the Regulations provide for abortion provision from 31 March, it would be no answer for the NIO to say that the Assembly could subsequently introduce an inspection regime since that could not possibly come into effect for some considerable time because it would require changes to primary legislation. Moreover, if the reason for no comparable inspection regime during months or years of abortion provision it that inspection is being left to the Northern Ireland Assembly to provide, the presenting problem is that on this basis one should have left the Northern Ireland Assembly to develop its own legislation on this devolved matter. In my estimation, this gap in the law has no logical basis and renders the Regulations unfit for use.

13. I further note the comment of the committee that some of the issues "may be a matter for consideration by the Joint Committee on Statutory Instruments (JCSI)."

Disappointingly, I see no evidence that the JCSI has engaged with my submission. However, I think this is unquestionably also a matter for your Committee because engaging with the safety of women raises a fundamental question about women's safety which is both politically and legally important or gives rise to issues of public policy likely to be of interest to the House under your terms of reference 4 a).

14. I would request the Secondary Legislative Scrutiny Committee asks for a substantive engagement by the NIO on this issue as part of its remit in consideration of statutory instruments under its terms of reference 4 a) and 4 d) and that it draws the Regulations to the attention of the House under those terms of reference.

CARE Northern Ireland

1. CARE NI submitted evidence to the Committee on the Abortion (Northern Ireland) Regulations 2020,[30] which were the subject of the Committee's 11th Report.[31] Our previously submitted evidence applies equally to the (No 2) Regulations.[32] **This submission highlight issues that have come to light since our last correspondence with the Committee. It engages with your terms of reference 4 (a), (b) and (d).**

2. The Regulations originate from legislation that was passed prior to the restoration of the Assembly. Section 9 was passed at a time when there was no Assembly and so, appropriate for that time, it placed its obligations on the Secretary of State, not on the Northern Ireland Executive, but now the Northern Ireland Executive is restored this simply does not work because they are responsible for running the health service. Answers to Assembly and Parliamentary Questions asked by Gary Middleton MLA on 5 May and Sir Jeffrey Donaldson MP in March reveal that the Department of Health is not accepting financial responsibility for this matter, presumably because the obligation is directed at the Secretary of State, while the Northern Ireland Office is suggesting that this is the responsibility of the Executive.[33] **The truth is that changed circumstances since he passing of Section 9, namely the restoration of the Assembly, mean that it is no longer appropriate for the UK Parliament to direct the Secretary of State with respect to a devolved matter, see your terms of reference 4 b.** Parliament should welcome the restoration of the Assembly by repealing Section 9 (or at least amending it with respect to Regulations) so that the Assembly can be given space to develop its own abortion law and take full responsibility for it, as is appropriate in the context of the devolution settlement. **Please draw this to the attention of the House under your terms of reference 4 b.**

3. CARE NI believes that the CEDAW recommendations in paragraph 85(b)(iii) that there must be access to abortion in cases of "Severe fetal impairment, including fatal fetal abnormality, without perpetuating stereotypes towards persons with disabilities" are contrary to the stipulations on non-discrimination in the UN Convention on the Rights of Persons with Disabilities (UNCRPD). We note from paragraph 29 of your 11th Report that the NIO disputes the importance of the UNCRPD to Regulation 7. **We bring the Committee's attention to the further submission of the Attorney General dated 29 April where he points out that this is a position acknowledged by the Supreme Court.[34] Please draw this to the attention of the House under your terms of reference 4 (a) and 4 (d).**

---

30 Submissions to the Secondary Legislation Scrutiny Committee on the Abortion (Northern Ireland) Regulations 2020 (SI 2020/345), pages 19-22 https://committees.parliament.uk/publications/744/documents/7454/default/

31 11th Report, Published 23 April 2020, https://committees.parliament.uk/publications/744/documents/4395/default/

32 http://www.legislation.gov.uk/uksi/2020/503/contents/made

33 See: http://aims.niassembly.gov.uk/questions/printquestionsummary.aspx?docid=300775 https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-03-11/27958/

34 https://committees.parliament.uk/publications/744/documents/7758/default/

4. We would also draw attention to a report by the UN Special Rapporteur on Disability which was published last December and which we have come across since making our original submission. It further underlines the problems with Regulation 7 under your terms of reference 4 (a) and 4 (d):

5. *'48. Article 10 recognizes and protects the right to life of persons with disabilities on an equal basis with others, which is critical for contesting legislation, policies and practices whereby the lives of persons with disabilities have been put at risk because of perceived low quality of life. It reaffirms that every human being has the inherent right to life, which reflects the concern expressed in the Convention to consider the lives of persons with disabilities as being as valuable as those of any other human being. Article 10 calls on States to take "all necessary measures to ensure the effective enjoyment of the right to life by persons with disabilities on an equal basis with others". That entails a duty to protect the lives of persons with disabilities from all acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as ensuring respect, dignity and quality of life of persons with disabilities on an equal basis with others in all spheres and at all stages of life. The right to life includes the right to survive and develop on equal basis with others. Disability cannot be a justification for termination of life."*[35]

6. We submit Regulation 12 is ultra vires because it allows for discrimination on the grounds of political or religious belief in contravention of section 6(2)(e) of the Northern Ireland Act 1998 and Article 9 of the European Convention on Human Rights. While the NIO argues that the Regulations are in line with the Doogan judgment which concluded that there were narrow rights within the Abortion Act 1967 per se (paras 22 and 23 of your 11th Report), the NIO response does not address the wider issue of whether an individual's Convention rights could or should have been met by an alternative legal provision. **We bring the Committee's attention to the further submission of the Attorney General dated 29 April on this matter. Please draw this to the attention of the House under your terms of reference 4 (a) and 4 (d).**[36]

7. In addition, we are concerned about the issues that are excluded from the Regulations, which we raised in our last submission. There is no provision to prohibit abortions on the grounds of the sex of the baby despite it being the clear that new tests allow will parents to find out the sex of the baby before the 12 weeks in which it is possible to get an abortion for any reason under Regulation 3. Sex selection abortion is a practice the Government has previously described as **"abhorrent",** [37] and in relation to which it has stated there is no need to change the law because it is already illegal because the sex of the baby is not a ground for abortion. Since making our previous submission we have discovered that the Government defended this position as recently as **January this year** and yet it has now introduced Regulations for Northern Ireland which require no ground for abortion and which thus, on the basis of their own arguments, open the door to sex selective abortion up to 12 weeks gestation. Given that the sex of the feotus can be known between 7 and 10 weeks gestation, this is a matter of huge

35 https://undocs.org/pdf?symbol=en/A/HRC/43/41

36 https://committees.parliament.uk/publications/744/documents/7758/default/

37 See House of Commons, 23 Feb 2015, col 120-123

political and legal consequence. **Please draw this to the attention of the House under your terms of reference 4 (a) and 4 (d).**[38]

8. There is no provision established for inspections of premises to conduct abortions. A Northern Ireland Assembly Parliamentary question answered on 12 May confirmed that the relevant agency, the Regulation and Quality Improvement Authority (RQIA) "*do not have any powers specifically in relation to abortion providers as they are not a discrete category of provider required to register with, and be inspected by, RQIA.*"[39] **Paragraph 39 of your 11th Report suggest that the NIO believe that the RQIA can provide such inspections. It is deeply concerning, and very surprising, that the Regulations do not address this matter. This omission is clearly a significant matter for this Committee given the political and legal importance of upholding women's safety. Please draw this to the attention of the House under your terms of reference 4 (a) and 4 (d).**

38 https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-01-21/6069/

39 http://aims.niassembly.gov.uk/questions/printquestionsummary.aspx?docid=300716

Catholic Bishops of Northern Ireland

Preamble

As Catholic Bishops our opposition to the new Regulations is rooted in the Catholic Church's teaching concerning the dignity of every human life, regardless of age, ability, gender or background. This teaching prohibits the direct and deliberate intention to end the life of an unborn baby at any stage of his or her development. This right to life of the child is inextricably linked to the right to life and well-being of the mother.

At the same time, we recognise that the legislation passed into law by the Westminster Parliament stands now to be implemented. While we regard this to be an unjust law, which was imposed without the consent of the people of Northern Ireland, we are morally obliged, wherever possible, to do all we can to save the lives of unborn children, which could be lost through abortion, and to protect mothers from the pressures they might experience at the time of an unplanned pregnancy.

We would strongly advocate that the revised regulations are again drawn to the attention of the House, in accordance with the statutory remit of the Committee. It cannot be overstated that the Regulations introduce not just an abortion framework, which seeks to be consistent with the Abortion Act 1967, but one that is even more permissive in scope, despite the views of the people of Northern Ireland and the extraordinary sensitivities raised by this issue.

General Overview

Opposition to the introduction of widespread abortion has been constant in Northern Ireland over a disparate range of political and social opinion and yet for reasons, which are entirely unclear, the Northern Ireland Office appears to view the imposition of the Regulations as an opportunity to demonstrate that the life of the unborn child can be legislatively ignored.

In the report drawing the initial Regulations to the special attention of the House, the Scrutiny Committee noted that the NIO position on the overarching policy aim of the Regulations was to *"protect and promote the health and safety of women and girls; provide clarity and certainty for the medical profession; and (be) responsive and sensitive to the Northern Ireland Executive and Assembly being restored."*

It is remarkable that in seeking to be "sensitive" to the Northern Ireland Executive and Assembly, which had voted as recently as February 2016 to retain the existing law of abortion that the NIO thought it prudent to introduce a more permissive regime than both the Abortion Act 1967 and the CEDAW report. It is also concerning that no substantive changes have been made to the subsequent Regulations, despite the focused legal criticisms of the Northern Ireland Attorney General.

The Catholic Bishops reiterate below many of the points made to the Joint Committee on Statutory Instruments.

Specific Observations

i. **Regulation 7**[40] permits termination up to term, where the child if it were born would be seriously disabled. There is no definition within the Regulations of "seriously disabled", but in light of previous case law and the manner in which the courts and prosecuting authorities have interpreted[41] similar provisions in the Abortion Act 1967 the provision goes well beyond paragraph 85 of CEDAW.

ii. Section 6 and in particular sub section 2(d) of the Northern Ireland Act 1998 states that a provision is not law if it is outside the legislative competence of the Northern Ireland Assembly and as in this instance in breach of EU law.

iii. The UK has ratified the UN Convention on the Rights of Persons with Disabilities (UNCRPD) in 2009, which requires appropriate protection before as well as after birth for those born with a disability[42]

iv. The NIO initially responded to the Committee that the regulations are fully compliant with all the conventions, but noted that the UNCRPD does not have the status of binding EU law, as it is an unincorporated treaty, which does not form part of domestic law. On the extent to which the UNCPRD is to be treated as part of EU law by means of the European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009, the European Court of Justice held that the UNCPRD is not "unconditional and sufficiently precise" to have direct effect. As the Attorney General has pointed out the question of whether a particular UN Convention has direct effect is not the relevant question. The fact is that the Convention **is** a part of EU law and the Secretary of State must act consistently with that law[43].

v. People in Northern Ireland would be aghast to think that children suffering from a serious disability would be lawfully treated differently to a healthy child and that such discrimination would endure to the actual birth of the child. Mr Justice Horner highlighted this anomaly in the first decision involving the application by the Northern Ireland Human Rights [2015] NIQB 96 at [69]

---

40 ***7.— (1) 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—***
(a)the death of the fetus is likely before, during or shortly after birth; or
(b)if the child were born, it would suffer from such physical or mental impairment as to be seriously disabled.

41 In 2005 following leave to bring a judicial review by Joanna Jepson with regard to the failure to prosecute doctors who carried out an abortion of a child at 28 weeks gestation because of a cleft palate, the Crown Prosecution Service said it was satisfied that the doctors involved in the abortion had acted in good faith and there would be no prosecution.

42 The preamble at paragraph (g) recognises that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person. Article 10 of the Convention reaffirms that every human being has the inherent right to life and "*shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others*". Article 12 reaffirms that persons with disabilities have the right to recognition everywhere as persons before the law. The UN Convention on the Rights of the Child 1989 states in the preamble that a child "*needs special safeguard and care including appropriate legal protection before as well as after birth*".

43 See the decision of the Grand Chamber in Z v A Government Department [2014] 3 CMLR 20 at [71]. The UNCRPD is an 'integral part of the European Union legal order.'

"There is also surely an illogicality in calling for no discrimination against those children who are born suffering from disabilities such as Down's Syndrome or spina bifida on the basis that they should be entitled to enjoy a full life but then, permitting selective abortion so as to prevent those children with such disabilities being born in the first place. This smacks of eugenics".

vi. **Regulation 12** affords limited conscience protection only to those who have a duty to participate in an abortion. The equivalent provision in the Abortion Act 1967 has been interpreted narrowly by the UK Supreme Court in ***Greater Glasgow Health Board v Doogan [***2014] UKSC 68.

vii. This narrow definition of 'participation' and 'treatment' in Regulation 12 contrasts with the legal protection afforded on grounds of religious belief or political opinion pursuant to section 6 [2] (e) of the Northern Ireland Act 1998. Those individuals who object to any participation in any aspect of planning or treatment are directly discriminated against.

viii. The suggestion that confining conscience protection to 'participation' is a proportionate restriction on Article 9 of the ECHR is based on the independent assessment of the Northern Ireland Human Rights Commission and the Doogan case misses the point. Firstly, Doogan did not consider Article 9 and was confined to the statutory interpretation of the Abortion Act and secondly the NIHRC cannot reasonably be viewed as independent on this issue.

ix. Additionally and *inter alia* the Regulations omit to provide an appropriate inspection framework for abortions, sufficient conscience protection for all medical professionals and proper counselling provision for those considering an abortion

x. **Regulation 3** may not give rise to a *vires* question, but it certainly does engage the second limb of Article 2F of the Terms of Reference in that there has been an unusual or unexpected use of the statute. The Regulations were drafted to implement the provisions of section 9 of the Executive Formation (Northern Ireland) Act 2019.

xi. Section 9 refers to the implementation of the recommendations of paragraphs 85 and 86 of the CEDAW Report. The recommendations do not require or stipulate abortion for any reason up to a particular gestational limit.

xii. CEDAW does not require abortion for any reason up to 12 weeks as now permitted. The incorporation of the provisions of section 1 of the Abortion Act 1967 into the Regulations provides for *de facto* abortion in almost all circumstances up to 24 weeks. There is no gestational limit laid down by the CEDAW Report and the current 24 week time limit in England Wales and Scotland is among the most permissive in Europe.

xiii. In the particular context of Northern Ireland, where there is widespread opposition to abortion on demand and where the NI Assembly voted as recently as February 2016 to retain the existing law, it was especially incumbent on the Secretary of State to act in a measured fashion, conscious of the views of the NI Assembly. Regulations must be made which appear to the Secretary of State to be *necessary* and *appropriate.* The Regulations go far beyond what is *necessary*. Further, in the context that pertains, namely that section 9 concerned a devolved matter, the Regulations were *inappropriate* in exceeding what was strictly required.

Christian Medical Fellowship

1. This submission will focus on section 4, grounds (a), (b) and (d) of the terms of reference of the Secondary Legislation Select Committee (SLSC). We hope to show why the Abortion (Northern Ireland) (No.2) Regulations 2020 are of significance to the House of Lords; we focus particularly on Regulations 7 and 12.

4 (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House

2. The 2020 Regulations radically change the law on abortion in NI, where it has long been a sensitive issue. Implementation of the Regulations will clearly give rise to politically and legally important matters of public policy.

4 (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act

3. The 2020 Regulations result from the requirements of section 9 of the Northern Ireland (Executive Formation etc) Act 2019, introduced by the Westminster Parliament whilst the NI Assembly was suspended. The Assembly was restored to function in January 2020; policy matters in relation to abortion falls within the devolved competence of the Assembly. The UK Government could have repealed section 9 of the NI Act 2019 in order to allow the newly reformed NI Assembly to decide upon its own abortion framework, respecting their devolved competence. By pressing ahead to implement the 2020 Regulations we believe Parliament has undermined the right that devolved jurisdictions have, to choose different legal provisions and procedures within areas of devolved competence. In our view, the secondary legislation is inappropriate in view of changed circumstances – the restoration of a functioning Assembly.

4 (d) that it may imperfectly achieve its policy objectives

4. Section 9 of the 2019 Northern Ireland Act requires compliance with the CEDAW report.[44] The requirements of the CEDAW report do not call for 'abortion on request', for any reason, up to 12 weeks. Any reasonable reading of the CEDAW Report would not interpret it to recommend early abortion 'on demand', as permitted in the Regulations. The Report recommends expansion of the scope of abortion law only to include rape and incest, fatal/severe foetal abnormalities, and threat to the pregnant woman's physical or mental health.

   In their Eleventh Report, the Secondary Legislation Scrutiny Committee, responding to the Abortion (Northern Ireland) 2020 Regulations (No.1) (SI 2020/345), records 'the overwhelmingly negative response to the consultation exercise' (para 33). We suggest

[44] https://undocs.org/CEDAW/C/OP.8/GBR/1, March 2018, paragraphs 85 and 86

this reflects concern over the decision by Parliament to extend the scope of the 2020 Regulations well beyond the minimum requirements of the CEDAW report.

NI has had a 'conservative' policy on abortion for many years. As recently as 2016 the democratically elected NI Assembly rejected any change to their abortion law. Given this, and the fact that all the elected NI MP's who were present when Parliament made the decision to impose abortion legislation on NI voted against it, we suggest that the 2020 Regulations should reflect the minimum provision recommended by the CEDAW Report. Unamended, the regulations will usher in one of the most liberal policies on abortion to be found in any European jurisdiction. We believe this will stir unrest among many in NI and that, as a result, the new legislation will 'imperfectly achieve its policy objectives.'

We suggest the use of wording that we believe would clarify both the scope and intent of the CEDAW Report, allowing access to abortion 'where continuation of the pregnancy poses a threat of serious and substantial harm to the mental or physical health of the pregnant woman', or 'when the foetus is suffering from fatal or severe abnormalities.

5. CMF suggests that Regulation 7, as stated, fails to safeguard the CEDAW Report recommendations that if abortion is permitted in cases of 'severe foetal impairment, including fatal foetal abnormality, [this should occur] without perpetuating stereotypes towards persons with disabilities and ensuring appropriate and ongoing support, social and financial, for women or girls who decide to carry such pregnancies to term'.

   In our view, Regulation 7, by extending abortion provision in NI well beyond that recommended by the CEDAW Report, will perpetuate and accentuate negative stereotypes associated with disability. The Disability Rights Commission (now the Equality and Human Rights Commission) have said that Section 1(1)d of the UK Abortion Act, equivalent to Regulation 7(1)(b), 'is offensive to many people; it reinforces negative stereotypes of disability…[and] is incompatible with valuing disability and non-disability equally'. A recent letter from Heidi Crowter, a 24-year old with Down Syndrome, has urged Stormont to reject 'hurtful and offensive' laws allowing abortion up to the point of birth for disabilities, including cleft lip, club foot and Down Syndrome.

   The Regulations make no mention of statutory social and financial support (as required by paragraph 85(b) of the CEDAW Report) for women who decide to carry their pregnancies to term in the knowledge that their child may be disabled, and fail to make provision for any alternative care services other than abortion.

   We believe the Regulations run contrary to provisions of the UN Convention on the Rights of Persons with Disabilities (UNCRPD), to which the UK is legally bound and which state that abortion should not be available purely on the grounds of disability. We gather that the NIO has denied that the UNCRPD has the status of binding EU law and are grateful to the Attorney General for NI for legal clarification in the matter.[45]

[45] https://committees.parliament.uk/publications/744/documents/7758/default/

In addition, we note that the Supreme Court, in its 2018 NI abortion judgement,[46] did not argue that there was a right to abortion in cases where the disability of the child would not be fatal. A press summary of the judgment stated: 'A disabled child should be treated as having equal worth in human terms as a nondisabled child', referencing comments by Baroness Hale, Lord Mance and Lord Kerr.

Taken together, CMF believes there is reason to suggest that Regulation 7, as it stands, 'may imperfectly achieve its policy objectives.'

6. CMF also has concerns about Regulation 12, that limits freedom of conscience. In our view Regulation 12 may be ultra vires in that it allows for discrimination on the grounds of political or religious belief in contravention of section 6(2) (e) of the Northern Ireland Act 1998. We suggest it also falls foul of Article 9 of the European Court of Human Rights (ECHR)[47] and the 2010 UK Equality Act[48] which prohibits both direct or indirect discrimination on the grounds of religion and belief. Regulation 12 (1) states that 'a person is not under a duty to participate in any treatment… to which the person has a conscientious objection.' The meaning of 'participation' for nurses and midwives has been tested in the courts[49] and refers to 'taking part in a "hands-on" capacity'. As such it clearly covers direct involvement in the process of termination. But does it also apply to the host of ancillary, administrative and managerial tasks performed in association with it? Again, we are indebted to John Larkin QC, Attorney General for Northern Ireland, for drawing attention to paragraph 24 of the Supreme Court ruling in *Doogan,* which states: 'But a state employer has also to respect his employees' Convention rights. And the Equality Act 2010 requires that any employer refrain from direct *or unjustified indirect* discrimination against his employees on the ground of their religion or belief' (emphasis added).[50] Many ancillary staff hold their beliefs as conscientiously as doctors and nurses and are as conflicted when asked to participate, even indirectly, with abortion. This will be even more true in NI where religious faith is owned by a higher percentage of the population than in other parts of the UK.

   For this reason, we believe that Regulation 12 'may imperfectly achieve its policy objectives.' In our view, the Regulations should explicitly extend conscience protection to those indirectly involved in abortion, at least by reasonable accommodation procedures.

7. It is posited that the Committee draw these flaws to the attention of the House.

46 https://www.supremecourt.uk/cases/docs/uksc-2017-0131-judgment.pdf
47 http://www.echr.coe.int/Documents/Convention_ENG.pdf , page 10
48 http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf
49 https://www.supremecourt.uk/cases/uksc-2013-0124.html
50 https://committees.parliament.uk/publications/744/documents/7758/default/

The Rt Hon. Sir Jeffrey Donaldson MP

I would like to resubmit the text below which I sent you with respect to Abortion (Northern Ireland) Regulations 2020 (1). The points raised still stand with respect to the second set of Regulations. **I would, however, draw your attention to <u>some important additional points</u> that are 'legally and politically important', see your terms of reference 4 a), and that the instrument 'may be inappropriate in view of changed circumstances since the enactment of the parent Act;' see your terms of reference 4 b), which I would ask you to draw to the attention of the House.**

It was one thing to table the first set of Regulations more than two months after the restoration of devolution given the constitutional convention that Parliament does not vote of devolved matters. The act of tabling suggested that it was moving to ask Parliament to vote on a devolved matter three or four months after the restoration of devolution. The decision to withdraw the first set of Regulations but to then proceed immediately to re-table greatly compounds these difficulties for two reasons:

Firstly, this involves asking Parliament to vote on a devolved matter five months after the restoration of the Assembly.

Second, it involves making this deeply controversial request when there is a strong argument that it is in any event unnecessary. The Secretary of State had tabled the Regulations by 31 March, as required by section 9 (6) and doing so had the effect of causing the law to change for a month and a half, meaning that the Secretary of State's action have resulted in meeting his obligations under section 9 (1), (5) and (6) with respect to Regulations. Moreover, section 12 (4) is clear that there is no obligation on the Secretary of State to press the matter to a vote and that it is consequently acceptable to allow the Regulations to fall having been in force for a month and a half. Moreover, Section 9 (6) is clear that that having tabled once the option of re-tabling is thereafter a 'power' and not a duty: see 'but this does not in any way limit the re-exercise of the power'. Taking all these matters into consideration in the context of the constitutional convention that Westminster does not vote on devolved matters, and having regard to the fact that Parliament voted for the original provision in response to an argument from the mover that said that if the Assembly was not suspended that : '… this [asking Westminster to vote on a devolved matter] would absolutely not be the right way forward, but we do not have an Assembly and we will not have one any time soon' (9th July 2019, col 183), it seems to me to be quite wrong in the context of the restoration of devolution for the Government to re-table the regulations arguing that it is under a clear legal obligation to do so. The case is certainly not cut and dried, as the Government is suggesting it is, and it seems to me that there are stronger arguments that the Government is not under a legal obligation to re-table and seek a vote than that it is under such an obligation.[51]

[51] Consider these two statements to the House from the Leader of the House of Commons: "As regards the two SIs, there is no date for them at the moment, but the one relating to Northern Ireland has to be brought before the House in due course, because of the requirements of the Act under which it falls." HC Deb, 11 May 2020, c43 'I thank the hon. Gentleman for his question. He knows that we had to make the changes to the business this week because of the interest in the covid-19 debate. But he is also aware that there is a legal requirement to bring these regulations forward and have them debated. That

Moreover, the ignoring of the constitutional convention not to vote in a devolved matter is creating real tensions, with the Northern Ireland Assembly is set to vote today on a motion that, if passed, will make it clear that it is rejecting the Regulations. It would be particularly unwise for the Government to proceed to ask Parliament to vote on a devolved matter when the Assembly is sitting, let alone when it has already voted to make it clear that it rejects the Government's unamendable proposals. See:

Motion: Abortion Legislation: Non-Fatal Disabilities

Proposed:

That this Assembly welcomes the important intervention of disability campaigner Heidi Crowter

and rejects the imposition of abortion legislation which extends to all non-fatal disabilities,

including Down's syndrome.

I would strongly suggest that the Committee reviews today's debate and vote before producing its report on Thursday.

In this context, and mindful that we now have a different Parliament from that when the parent legislation was passed and that, while obligations from previous Parliament's stand to the extent that they actually stand (see the above questions), no Parliament can bind its successors, it seems to me that the appropriate constitutional way forward would be that rather that asking Parliament to vote on the Regulations 5 months after the restoration of devolution, the more appropriate and constitutionally responsible way forward would be for the Government to ask Parliament to welcome the fact that devolution has now been restored for nearly five months by voting to repeal or amend Section 9 to make it plain that there is no ongoing obligation on the Secretary of State to present the Westminster Parliament with Regulations on a devolved matter when the Northern Ireland Assembly is sitting.

I would, moreover, ask that the Committee urgently draws these Regulations to the attention of the House on the grounds that they are 'politically and legally important or gives rise to issues of public policy likely to be of interest to the House;' and perhaps most importantly that they are 'inappropriate in view of changed circumstances since the enactment of the parent Act.'

is of course not a legal requirement for them to be passed by the House, which would be a different matter, and the House cannot be bound in that regard. The Secretary of State for Northern Ireland was in the Chamber earlier. I would ask the hon. Gentleman to raise his questions with him directly, because what happens between this House and Stormont is going to be more a matter for him than for me.' HC Deb, 13 May 2020, c274.

Don't Screen Us Out

As noted in a previous submission to the Committee on the Abortion (Northern Ireland) Regulations, Don't Screen Us Out is a UK-wide group which was founded to challenge outdated structures around Down's syndrome.

The Abortion (Northern Ireland) Regulations 2020[52] (version 2 updated to account for drafting errors, laid on 13 May 2020) still transgresses these duties as the regulations remain discriminatory toward those with disabilities, including Down's Syndrome. As such, we would like to comment, and respond to some concerning statements made by the Northern Ireland Office (NIO) in response to the Secondary Legislation Scrutiny Committee 11th Report of Session 2019–21 (SLSC Report).

Discrimination against those with disabilities

The SLSC Report restates Regulation 7 of the Abortion Regulations laid down "a termination may be authorised if (a) the death of the foetus is likely before, during or shortly after birth or (b) "if the child were born, it would suffer from such physical or mental impairment as to be seriously disabled". It is clear that the regulations cover those anomalies where a baby will die shortly after birth right up to those who can live long, fulfilled lives, hence under the Abortion (Northern Ireland) Regulations 2020, there is a real possibility that a viable unborn baby could be aborted up to birth for simply having Down's syndrome, even though the vast majority of people with Down's syndrome live happy and prosperous lives.

With regard to the NIO response that 'the UNCRPD does not have the status of binding EU law'. We are disappointed that the spirit of the convention, which has no conflict with the rights of women, was not one of the central considerations of the legislature. Furthermore, we still believe that the regulations as relaid are ultra vires as the Secretary of State's powers to make these regulations are constrained through Section 9(9) of the Executive Formation Act[53] by the same constraints that apply to the Northern Ireland Assembly, which cannot make law that is incompatible with any of the Convention rights or with EU law (see Section 6 of the Northern Ireland Act 1998[54]). With this as background, we believe regulations 7 and 13 are ultra vires for two reasons. First the UN Convention on the Rights of Persons with Disabilities, asserts: "States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others."[55] Second, the

52 https://www.legislation.gov.uk/uksi/2020/503/made

53 http://www.legislation.gov.uk/ukpga/2019/22/section/9

54 http://www.legislation.gov.uk/ukpga/1998/47/section/6

55 https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#10. *Notably the Convention also states, in Article three, the principles of the Convention shall include … (b) Non-discrimination; (c) Full and effective participation and inclusion in society; (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; (e) Equality of opportunity;" and "(h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities."*

UN Convention on the Rights of Persons with Disabilities has been incorporated into EU law.[56]

We understand the NIO argues that allowing for abortions without any gestational time limit where there is severe foetal impairment complies with the CEDAW recommendations.[57] We disagree; given the above and that the term "severe foetal impairment" lacks an agreed upon definition. Indeed, as we noted, many diagnosed with disabilities in the womb can and do live happy and prosperous lives (not "severely impaired"). We also note the NIO " responded that the instrument is fully compliant with all the conventions but commented that the UNCRPD does not have the status of binding EU law. It is an unincorporated treaty which does not form part of domestic law."[58] We do not understand how the NIO reached this conclusion, for the *The European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009* states "The United Nations Convention on the Rights of Persons with Disabilities signed in New York by the European Community and by the United Kingdom on 30 March 2007(2) is to be regarded as one of the Community Treaties as defined in section 1(2) of the European Communities Act 1972."[59] Finally to this point, we believe the Attorney General for Northern Ireland summarised the issue well by quoting Lord Kerr and Lord Wilson, who stated: "**"The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is one of the treaties specified as an EU treaty under the EC (Definition of Treaties) (UNCRPD) Order 2009. Section 6(2)(d) of the NIA forbids the Northern Ireland Assembly from making laws contrary to UNCRPD.** That circumstance alone would not, of course, preclude a finding of incompatibility but, as Horner J pointed out, UNCRPD is based on the premise that **if abortion is permissible, there should be no discrimination on the basis that the foetus, because of a defect, will result in a child being born with a physical or mental disability.**"[60]

On both bases therefore Regulations 7 and 13 (*also explained more in previous submission*) remain ultra vires. Having a different abortion time-limit for unborn babies without disabilities as compared to those with disabilities thus appears to be illegal under EU law, which Northern Ireland must uphold. By introducing regulations which appear to break EU law, it suggests that the Secretary of State for Northern Ireland went beyond the powers granted to him by Parliament in July 2019.

In point 35 of the SLSC Report "Fiona Bruce MP comments that these Regulations make no provision in relation to paragraph 85 (b) of the CEDAW Report which requires 'appropriate and ongoing support, social and financial, for women who decide to carry such pregnancies to term'". The NIO responded that "a woman and her child would be eligible for the normal disability and/or carer's benefits and no additional legislation is required". This is not

56 http://www.legislation.gov.uk/uksi/2009/1181/article/2/made
57 6 https://committees.parliament.uk/publications/744/documents/7454/default/
58 Ibid. (Para. 29 of the Committee's 11th report).
59 http://www.legislation.gov.uk/uksi/2009/1181/contents/made
60 https://committees.parliament.uk/publications/744/documents/7758/default/

the case, women and their children 'need to meet all the eligibility requirements' to be paid benefits, as stated in NI Direct guidance.[61]

Welfare services take the approach of assessing the impact that the condition is having on everyday activity before deciding on eligibility, rather than making blanket assumptions about life with disability. This is an irony that hasn't escaped the notice of the Down's syndrome and the wider disability community. Therefore there may need to be further examination of this issue.

Before we go on, we would be remiss not to address the NIO's statement that ". . .The unborn do not enjoy rights under the Convention: see, for example, Re Northern Ireland Human Rights Commission's application for judicial review [2018] UKSC 27, [2019] 1 All ER 173 at para. 21 per Lady Hale. If Article 10 is to be read as suggested, then it would seem to suggest that abortion would never be lawful."[62] Yet as noted above, clearly there is disagreement on this point, and it would seem clear that there is a reason the regulations place the time limit for abortion at 24 weeks, *unless* the baby was diagnosed with a disability (or there is grave risk to the mother's health). If the unborn have no rights, why institute a time limit at all? Based on the consultation document, it is because "This decision means that the provision for Northern Ireland will be similar to the law in England and Wales under the Abortion Act 1967. We considered that if the gestational limit in Northern Ireland was set any lower than 24 weeks, women and girls would continue to travel to England for abortions. This decision is also consistent with the standard medical threshold of viability of the fetus, which is recognised as 24 weeks."[63] (Indeed, according to the NHS, "Babies are considered 'viable' at around 24 weeks of pregnancy".[64] Yet, allowing provision for abortion past 24 weeks based on disabilities is something England and Wales legalised pre- the 2010 Equalities Act and the UNCRPD. Rather than impose similar out-dated discriminatory legislation on Northern Ireland, England and Wales should change their law.

Given that a baby is viable 24 weeks as such, at the very least from 24 weeks onward, both unborn babies with disabilities and without should be provided the same protections - that is, the abortion provisions for each should be the same, to avoid even the appearance of discrimination.

Changed circumstances since the parent act

Recent efforts of self-advocate Heidi Crowter (who as we previously submitted, feels she is being discriminated against by these regulations) have led to the proposal of a motion at the Northern Ireland Assembly to be debated today, 2 June, "Motion: Abortion Legislation: Non-Fatal Disabilities That this Assembly welcomes the important intervention of disability campaigner Heidi Crowter and rejects the imposition of abortion legislation which extends to all non-fatal disabilities, including Down's syndrome", together with an Amendment for debate: "Leave out all after 'rejects' and insert: 'the specific legislative provision in the

61 https://www.nidirect.gov.uk/articles/disability-living-allowance-children

62 https://committees.parliament.uk/publications/744/documents/7454/default

63 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875380/FINAL_Government_response_-_Northern_Ireland_abortion_framework.pdf

64 https://www.nhs.uk/conditions/pregnancy-and-baby/premature-early-labour/

abortion legislation which goes beyond fatal foetal abnormalities to include non-fatal disabilities, including Down's syndrome."

This has significant political and legal implications (as per the Committee's terms of reference (4)(a)). This is also relevant in light of the committee's terms of reference point (4)(b), as this motion, her legal challenge and her recent news appearances have occurred since the parent Act.

Paul Givan MLA

1. I write to you as a member of the Northern Ireland Assembly for Lagan Valley.
2. I am cognisant of the fact that the Committee has already published a report on the Abortion (NI) Regulations 2020 No l. I am pleased to now make a submission on the Abortion (NI) (No 2) Regulations. I would like the Committee to once again take in to account the points I made in my initial submission,[65] **as well as some additional remarks which arise as a consequence of your initial report and the subsequent actions of the Northern Ireland Office (NIO).**
3. I will **firstly set out these additional points** before proceeding to reiterate the points I made in my initial submission.
4. I express my gratitude to the Committee for giving cognisance to the deeply flawed nature of the consultation exercise conducted by the NIO on the issue of abortion in your report on the Abortion (NI) Regulations 2020. It is welcome that the Committee noted "several instances where the Government's administrative process for bringing these Regulations forward appears suboptimal." These included the point that the consultation period was "too short for so sensitive a topic" and the decision to conduct the consultation during the course of a general election in the run-up to Christmas did not "conform with best practice." I want to record my support for the comments made by the Committee and I would ask you to reiterate these points in your report on the Abortion (Northern Ireland) (No 2) Regulations. I note that the NIO, to my knowledge, has provided no substantive comment in response to the Committee's points on this issue. I would urge the Committee to seek a response from the NIO on these points.
5. I would point out that the fact that the Government had to withdraw the regulations and re-table them also partly reflects the poor nature of the consultation process. If the Regulations had been published at the time of the consultation, the drafting error made by the NIO may have been avoided. I hope the NIO will learn from this in future.
6. The decision of the NIO to re-table Regulations on 13 May is particularly concerning because that means they are proposing to ask Westminster to legislate on a devolved matter in June, five months after the restoration of the devolved institutions. It is inconceivable that the Government would ever countenance treating Scotland and Northern Ireland in this way. This is not only a problem because when considered from the perspective that the Secretary of State has met his obligation to lay the Regulations by 31st March (see section 9 (6) Executive Formation Act), and his actions resulted in the Regulations becoming law for a month and a half, the more appropriate way to read Section 9 in a context where devolution has been restored, and there is no obligation on the Secretary of State to press for a vote on the Regulations (see Section 12 (4) Executive Formation Act), would be that the any Section 9 Regulations should be allowed to lapse. This is rather compounded by the fact that there are significant parts of paragraphs 85 and 86 of the CEDAW report in relation to which no Regulations have ever been advanced by the Secretary of State.

[65] https://committees.parliament.uk/publications/744/documents/7454/default/ p44-47

7. The decision to re-table is also a problem because of a difficulty that has come to light since mid-May.
If the Secretary of State determines that he will re-table Regulations for a vote five months after the restoration of the Assembly, and after his actions have already resulted in a change in law for a month and a half, this gives succour to the idea that the obligation in Section 9 (1), which states that it is the responsibility of the Secretary of State and not the Northern Ireland Executive and Northern Ireland Assembly to deliver Section 9, is ongoing notwithstanding the restoration of devolution. The difficulty is that you cannot govern as if in a direct rule situation if one is actually in a devolved situation. This, however, is what is being proposed through the laying of the Abortion (Northern Ireland) Regulations (2), and the resulting constitutional dysfunction is now beginning to make itself very apparent.

8. On May 5 2020, Gary Middleton MLA tabled this question: "To ask the Minister of Health for his assessment of the demand on the health system from implementing the Abortion (Northern Ireland) Regulations 2020; and how the resource needs will be met." In reply, the Health Minister Robin Swann MLA answered by saying "For the last full year for which statistics are available, 1,053 women from Northern Ireland chose to have an abortion in England or Wales. My Department would therefore anticipate at least this level of demand, and potentially higher, in Northern Ireland. I expect the UK Government to provide the resources necessary to put in place all the sexual and reproductive services, including abortion services, required by the Northern Ireland (Executive Formation etc) Act 2019."[66] However, in response to questions from Sir Jeffrey Donaldson MP at Westminster the Northern Ireland Office gives a very different impression. Sir Jeffrey tabled this question: "To ask the Secretary of State for Northern Ireland, what assessment he has made of the implications of his policies of the request made by the Department of Health in Northern Ireland for additional funding to implement changes to the law on abortion." In response, NIO Minister Robin Walker replied: "I recently met the Northern Ireland Health Minister, Robin Swann MLA, to discuss the abortion regulations which will be laid in Parliament shortly. Once the law comes into force on 31 March 2020 it will be for the Northern Ireland Deportment of Health to commission abortion services through the health and social care system. The Northern Ireland Department of Health is continuing to work to explore the full costs of commissioning and operating the new services."[67]

9. The Northern Ireland Department of Health has clearly taken the view that it will not be paying for a service that it is not its responsibility in law. The problem, however, is that the devolved institutions will have to deliver this if devolution continues and abortion is to be provided. The truth is that one way or another Section 9 cannot remain. These Regulations are deeply flawed because they are the product of primary legislation designed for a time when devolution was not functioning and yet now there is devolution. Rather than compounding constitutional dysfunction by continuing with these Regulations, the UK Government should instead acknowledge that Section 9 has been overtaken by the restoration of the Northern Ireland Assembly. Instead of asking

66 http://aims.niassembly.gov.uk/questions/printquestionsummary.aspx?docid=300775

67 https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-03-11/27958/

the Westminster Parliament to vote on these Regulations it should instead ask it to vote to repeal Section 9 so that the Northern Ireland Assembly can develop its own abortion legislation.

10. This constitutional dysfunction was never thought through, no doubt largely because the legislation in question was developed under 'accelerated procedure,' something the Government was seriously criticised for by the House of Lords Constitution Committee.[68] Instead of 'a mending' the Commons amendment, the Lords subjected it to a revolutionary change such that it was completely re-written. When it returned to the Commons its was only afforded 17 minutes debate, spread in multiple tiny fragments over one hour's debate dominated by Brexit. The constitutional dysfunction that the laying of these Regulations compounds rather than alleviates is a matter of great political and legal importance which I would ask you to draw to the attention of the House.

11. **Below you will find my submission to the consultation on the Abortion (N I) Regulations 2020 (I**). I would ask that these points be considered again in your deliberation on the Abortion (NI) (No 2) Regulations 2020.

Grounds 4 a) and 4 b)

12. In highlighting concerns that are politically important the grounds 4 a) and 4 b) overlap. As a political representative in the Northern Ireland Assembly, I am acutely aware of how abortion is a matter of great concern to many people living here and of how the process that resulted in these regulations has caused huge political concern, and of how, specifically that concern has been greatly exacerbated by changed circumstances since the enactment of the parent Ac t.

13. The vote that resulted in the creation of what is now Section 9 was highly controversial because it contravened devolution and in a context where the Assembly has voted as recently as 2016 not to change its abortion law. In making the case for taking the hugely controversial step of undermining devolution on a matter Northern Ireland had determined for itself since 1921 the MP advocating the change Stella Creasy MP said , ' *...if it* was *not* for *the fact that we do not have an Assembly, this would absolutely not be the right way forward, but we do not* have *an Assembly and we will not have one any time* soon.'[69] Since the passage of the Northern Ireland (Executive Formation etc) Act 2019, these facts have materially changed. The Northern Ireland Executive and Assembly have been restored since January, long before these Regulations were laid. Under the Northern Ireland Act 1998, the devolved institutions have legislative competence over law and policy on abortion. The NIO do not appear to have given cognizance to this reality. Given that the vote on 9 July involved 100% of Northern Ireland MPs who take their seats in Westminster voting against the provision, the new Parliament should have been given the opportunity to repeal Section 9 after the restoration of the Assembly, so the Assembly could develop the new legal framework, but no such vote was provided.

---

68 HOUSE OF LORDS Select Committee on the Constitution 26th Report of Session 2017-19 HL Paper 404

69 https://hansard.parliament.uk/Comrnons/2019-07-09/debates/87A66283-DF13-4CC8-9069-48974EA40346/NorthernIreland(ExecutiveFormation)Bill Col 183

14. As if that was not sufficient, the NIO then needlessly compounded the offence to Northern Ireland by drawing up for more radical regulations than those required by Section 9 of the Act. As the opinion of David Scoffield QC sets out the provision of abortion on request to 12weeks (something that is not provided in GB) goes "*well beyond*" what Parliament required.[70] Similarly , the decision to allow abortions to 24 weeks on the basis of "risk" rather than "threat" to health introduces a significantly lower threshold than required by the CEDAW Report's recommendations.[71]

15. In preparing the regulations, the NIO do not appear to have engaged in substantive or meaningful consultation with the restored Executive or Assembly. They could have formally sought the views of Assembly members and the Executive but they chose not to do so. Instead of seeking the views of elected members and reflecting the views of NI citizens individuals who responded to the consultation (79% of respondents, who were overwhelming from Northern Ireland, opposed any legislative change in this area according to the NIO consultation[72]), they have sought to ensure Northern Ireland "mirrors" the provision for abortion in Great Britain even though polling shows this is not w anted.[73] This cuts against the principle and purpose of devolution, which allows for different parts of the United Kingdom to adopt different approaches on matters of policy.

16. Indeed the handling of this issue, especially since the restoration of the Assembly, against the backdrop of 100% of Northern Ireland MPs who take their seats having voted "no" constitutes an even more damaging event for our constitution than the treatment of Wales with respect to the flooding of Treweryn, or the treatment of Scotland with respect to the poll tax. Both these are now regarded as black moments for our union that will never be repeated. Yet the Executive Formation Act constitutes an arguably even worse moment because it does not merely involve part of the union having a measure imposed on it against the wishes of the people elected to represent that part of the union, by representatives of other parts of the union, but because it happened in relation to a matter that was already devolved and about which many in Northern Ireland feel very deeply.

17. On the basis that NI MPs rejected Westminster taking devolved decisions last summer, the Assembly being restored, the lack of consultation with the Assembly and Executive, and the overriding of the views of NI citizens, I submit these regulations should be rejected and the decision over what the law and policy on abortion should be left to the Northern Ireland Assembly.

Grounds 4 (f)

18. In my view, the consultation process adopted by the NIO with regard to this instrument was deeply flawed for three reason s. Firstly, the consultation period

---

70 Legal Opinion David Scoffield QC In relation to the consultation by **HM** Government on a new legal framework for abortion services in Northern Ireland, December 2019.

71 https://undocs.org/CEDAW/C/OP.8/%20GBR/1, March 2018

72 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875380/FINAL_Government_response_-_Northern_Ireland_abortion_framework.pdf p9

73 https://www.liverpool.ac.uk/media/livacuk/research/heroimages/The-University-of-Liverpool-NI-General-Election-Survey-2019-March-20.pdf p23

provided for members of the public and relevant organisations to respond was far too short on a subject as complex as this. The consultation ran for just 6 weeks from November 4 until December 16, during which a General Election Campaign across the entire United Kingdom was taking place. The consultation should have been conducted over a longer period; or started earlier as soon as the Executive was not restored in October.

19. Secondly, significant aspects of the final regulations were not directly consulted on at all. This especially applies to regulation 13, which amends section 25 of the 1945 Criminal Justice (NI) Act 1945 to ensure that women who self-abort beyond the point at which an unborn child is "capable of being born alive" cannot be prosecuted for doing so. This is a significant substantive change which is not required in by section 9 of or by the CEDAW report which served as the basis for section 9. It is surely inappropriate to bring forward such a measure without adequate consultation.

20. Thirdly, the final consultation response document was deficient in a number of regards. Firstly, for reasons which are not explained, it did not provide a list of organisations who responded to the consultation process. This is anomalous for a Government consultation response. Secondly, in relation to decisions made around a number of the regulations there is a lack of detail on the basis on which the Regulations have been drafted. This applies not only to the consultation response document but also to the explanatory memorandum. For example with regard to allowing for abortion on the grounds of fetal impairment up to term, the NIO failed to engage with substantive arguments put to them outlining why allowing for abortion on this ground is not complaint with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).[74] Article 10 of the UNCRPD outlines the following: "States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others."[75] I particularly point to the fact that this Article provides protection to all human beings (which disabled unborn children unquestionably are) , not merely to 'persons'. Regulation 7 allows for unborn children in Northern Ireland to be aborted because they have serious fetal impairments. The UNCRPD is binding within EU law, which at the time of writing remains applicable, and the NIO should have considered that section 9(9) allows the Secretary of State to make Regulations that could be made by an Act of the Northern Ireland Assembly, but that also implies the Regulations that could not be made by the Assembly could not be made. Furthermore, the section 9(4) allows changes to NI law that are necessary or appropriate, but this should be within the parameters of the jurisprudence. I can see no evidence that these factors have been considered.

---

74 See p17-18 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875380/FINAL_Government_response_-_Northern_Ireland_abortion_framework.pdf

75 https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-10-right-to-life.html

The Rt Hon. Sir John Hayes MP

1. In this submission I will focus first on section 4 (a), 4(d) and 4 (f) of the terms of reference of the Secondary Legislation Scrutiny Committee and then on 4 (a) 4 (b).

4 (a), 4 (d) and 4 (f)

2. My submission focuses on Regulation 11 of the Abortion (Northern Ireland) Regulations 2020. Regulation 11 sets out that it is an offence to perform an abortion outside of the regulatory framework set out in Regulations 3 to 8. Regulation 11(3) sets out the penalty for performing an abortion. The maximum penalty which can be incurred is a level five fine of up to £5,000. The Northern Ireland Office (NIO) in its explanatory memorandum provided alongside the Regulations set out that a core policy aim of the framework they have introduced is to "protect and promote the health and safety of women and girls."[76] I submit to you that the penalties proposed in these regulations will not help to "protect and promote the health and safety of women and girls" and consequently this instrument "may imperfectly achieve its policy objectives."

3. The proposal that performing an abortion outside of the regulatory framework put forward should only incur a maximum level 5 fine is wholly disproportionate when compared with the equivalent offences in other jurisdictions, rendering these regulations a matter of great public policy interest. In the Republic of Ireland, the equivalent offence of performing an abortion outside of the legal framework set out is "a fine or imprisonment for a term not exceeding 14 years, or both."[77] Similarly, in the Isle of Man the equivalent offence leads to a fine or a prison term of up to 14 years.[78] In Great Britain, where sections 58 and 59 of the Offences Against the Person Act 1861 still applies, performing an abortion outside of the terms of the 1967 Abortion Act can lead to a term of life imprisonment under section 58 and five years imprisonment under section 59.

4. The explanatory memorandum provides no reasoning as to why the Northern Ireland Office determined that a level 5 fine would be an appropriate penalty for this offence.[79] The same is true of the consultation response document.[80]

5. The decision to opt for a Level 5 fine becomes even more baffling when you consider what other offences in Northern Ireland attract a level 5 fine. These offences include: the failure to report the theft or loss of a tachograph card by a lorry driver[81]; selling liquor in a premises not authorised by a licence and selling liquor outside of authorised

---

76 https://www.legislation.gov.uk/uksi/2020/345/pdfs/uksiem_20200345_en.pdf p4

77 See section 23(5) http://www.irishstatutebook.ie/eli/2018/act/31/section/23/enacted/en/html

78 See section 14(1) https://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/2019/2019-0001/AbortionReformAct2019_1.pdf

79 https://www.legislation.gov.uk/uksi/2020/345/pdfs/uksiem_20200345_en.pdf p10

80 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875380/FINAL_Government_response_-_Northern_Ireland_abortion_framework.pdf p37.

81 https://www.legislation.gov.uk/uksi/2006/1937/regulation/5

hours[82]; and the failure of a licenced club to prepare annual accounts.[83] It is difficult to understand how the NIO came to the view that conducting an illegal abortion, which can be very dangerous for women, is remotely comparable to these other offences which will lead to the same penalty.

6. One of the core purposes of criminal penalties is to act as a deterrent against individuals committing a criminal act. In this instance, the threat of a £5000 fine will have very little deterrent effect. It is difficult to see how providing such a weak penalty against illegal abortions serves to "protect the health and safety of women and girls." The idea that an abortion conducted on a fetus, including at 15 or 20 weeks, outside of the legal framework would only incur a maximum penalty of a level 5 fine is hugely problematic. In line with the considerations of other legislatures on these islands, it seems evident that a custodial sentence should be the relevant penalty for committing an offence which can be serious and highly dangerous for the woman concerned. Such a penalty would of course be determined by a judge and could in certain cases be a fine; but the maximum penalty should surely be higher.

7. The consultation process was deeply inadequate given the gravity of what was being considered. It lasted 6 weeks rather than 12 and the General Election campaign occupied all but four days of that period. To make matters worse, given the revolutionary approach to penalties, the consultation asked no questions about addressing penalties through fines.

4 (a) and 4 (b)

8. The parent legislation was subject to an accelerated procedure and was intended merely to change the date of the next N.I Assembly election. The clerks in the Commons advised the Speaker that the relevant amendment was not in scope and told MPs as much, but he selected it, allowing a hugely controversial law change, that should have been considered with care, to be debated in a wholly inappropriate way. The Commons then proceeded to vote for the measure even though: a) it was devolved and b) they knew that as recently as 2016 the Northern Ireland Assembly had voted not to change their law in any way, the most recent vote on the matter of any part of the Union. The vote in the House of Commons saw 100% of Northern Ireland MPs who took their seats voting against the measure, but it is now being imposed by the votes of English, Welsh and Scottish MPs. The people of Northern Ireland were thus effectively disenfranchised on this issue and the matter determined by representatives of other parts of the UK.

9. The constitutional problems have since been made much worse by two factors: First, rather than bringing forward regulations that did what was required (as opposed to allowed) by Section 9 of the Executive Formation Act, the Northern Ireland Office has produced regulations (see David Scoffied QC opinion) that go significantly beyond what was required; thus the executive has needlessly compounded the undermining of devolution. Secondly, instead of changing tack when Stormont was restored and giving

82 https://www.legislation.gov.uk/nia/2011/18/schedule/1
83 https://www.legislation.gov.uk/nia/2011/18/schedule/2

the Assembly the opportunity to define a new legislative framework, the Government ignored this, failing even to consult the Northern Ireland Executive. When the Assembly was restored, and the circumstance that was used to 'justify' contradicting devolution no longer applied (Stella Creasy MP who moved the amendment said: '…if it was not for the fact that we do not have an Assembly, this would absolutely not be the right way forward, but we do not have an Assembly and we will not have one any time soon') the Government should - respecting the fact no Parliament can bind its successors - have asked the new Parliament to repeal Section 9.

10. In recent British history there are two occasions that are now regarded as black moments for the Union, never to be repeated; first the flooding of the village of Treweryn in Wales in the 1960s, when all but one Welsh MP voted against this, and secondly the imposition of the poll tax on Scotland before the rest of the UK, against the wishes of the majority of Scotland's representatives. The relationship between Scotland and the Union has, arguably, not been the same since. In the current case, however, the situation is even worse because the matter is devolved and since January the Assembly has been formed and yet the actions of the Government have compounded rather than eased the problem. It is not possible for one part of the UK to be treated by the other parts in this way without fundamentally changing and damaging the Union.

The Rt Hon Sir Edward Leigh MP

As I have had more time to reflect on the regulations, and given certain things that have occurred since the first regulations were laid, I am making a further submission with new and more detailed points for consideration.

I still write to suggest that special attention of the House be drawn to the abortion regulations based on point 4(a) of your Terms of Reference, "that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House".[84]

Furthermore, the fact that Stormont has now been restored merits review under the Committees Terms of Reference 4 (b), "that it may be inappropriate in view of changed circumstances since the enactment of the parent Act". This is the case for several reasons, but I will focus on the discriminatory nature of these regulations as well as the fact that abortion is a devolved policy.

The Northern Ireland (Executive Formation etc.) Act 2019, whilst it required the Secretary of State for Northern Ireland to "ensure that the recommendations in paragraphs 85 and 86 of the CEDAW report are implemented in respect of Northern Ireland" (that is, expand abortion provision), limited the power granted to the Secretary, via section 9(9), to that of what the Northern Ireland Assembly itself would be able to implement.[85]

Section 6 of the Northern Ireland Act 1998 limits the scope of power of the Northern Irish Assembly, with section 6 (2) (d) making clear that 'A provision is outside that competence' if "it is incompatible with EU law".[86]

The Attorney General for Northern Ireland agrees, as noted in a submission he made to this committee, that

> *The Secretary of State cannot act inconsistently with EU law in the provision he makes for abortion. The Grand Chamber's view aside, we are sure that the UNCRPD is EU law for the purposes of the competence limitation because it has been specified as an EU Treaty by way of the European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009.*[87]

To build on the latter point made by the Attorney General, Article 10 of the United Nations Convention on the Rights of Persons with Disabilities states,

> *States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others".* [88]

---

84 https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny- committee/role/tofref/

85 http://www.legislation.gov.uk/ukpga/2019/22/enacted

86 http://www.legislation.gov.uk/ukpga/1998/47/section/6

87 https://committees.parliament.uk/publications/744/documents/7758/default

88 https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-10- right-to-life.html

Yet the Abortion (Northern Ireland) Regulations 2020 (7.) (1) (b) articulates that pregnancies can be terminated if there is a 'substantial risk' that "if the child were born, it would suffer from such physical or mental impairment as to be seriously disabled".[89]

Similar language in the Abortion Act 1967, "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",[90] has allowed abortions to be legally carried out after the diagnosis of Down's Syndrome, cleft lip, and club foot. This appears to violate the UNCRPD.

Whilst there has been an argument that said legislation only gives rights to humans who are born, this legislation should at the very least extend these rights to humans capable of being born alive. The Infant Life (Preservation) Act 1929 states that a baby is capable of being born alive at 28 weeks' gestation[91], and thanks to medical progress, the British Association of Prenatal Medicine updated their guidelines in October 2019 to advise doctors to give medical treatment to try and save the lives of babies born at 22 weeks' gestation.[92]

Considering that the regulations as they currently stand legally permit abortion up to birth after the diagnosis of Down's Syndrome, cleft lip, and clubfoot (and other disabilities), but do not permit abortion beyond 24 weeks for babies not diagnosed with disabilities (unless the mother's life is at risk or it is needed "to prevent grave permanent injury to the physical or mental health of the pregnant woman"[93]), these regulations appear discriminatory in nature. As this discrimination occurs at a gestation when unborn children could be born alive according to the guidance of the British Association of Prenatal Medicine (and thus I believe are indeed human beings), the UNCRPD should apply to them.

Indeed as a Member of Parliament for England, I find it incredibly distressing that the UK Government legally permits disability-selective abortion at a time period where the law recognises that babies are capable of being born alive. What makes this worse is that the UK Government is imposing a similar discriminatory law on Northern Ireland by amending Northern Irish legislation, the Criminal Justice (Northern Ireland) Act 1945, to make these discriminatory regulations legal.[94]

To the matter of devolution, notably when the New Clause 10 was being debated in the House of Commons, the Honourable Member for Walthamstow, Stella Creasy MP, who proposed the amendment, said:

> *I understand that, if it was not for the fact that we do not have an Assembly, this would absolutely not be the right way forward, but we do not have an Assembly and we will not have one any time soon.*[95]

The Honourable Member was correct when she said that this was not the right way forward if we do have a functioning Assembly, but for over five months now, we have had a functioning Assembly - a point that I believe should be brought to the attention of the full

89 http://www.legislation.gov.uk/uksi/2020/503/made
90 http://www.legislation.gov.uk/ukpga/1967/87/data.pdf
91 http://www.legislation.gov.uk/ukpga/Geo5/19-20/34/section/1
92 https://www.bbc.co.uk/news/health-50144741
93 http://www.legislation.gov.uk/uksi/2020/503/made
94 Ibid., see regulation 13.
95 https://hansard.parliament.uk/Commons/2019-07-09/debates/87A66283-DF13-4CC8-9069-48974EA40346/NorthernIreland(ExecutiveFormation)Bill

House under the Committees Terms of Reference (4)(b), as circumstances have change thus that even the originator of the legislation appears to agree it is no longer appropriate to go forward with the regulations.

I understand that HM Government was legally obliged to introduce abortion regulations in Northern Ireland, and ever since the restoration of the Northern Ireland there should have been attempts made to hand the issue back to the Northern Irish Assembly. At the very least, there should have been discussions with the Northern Irish Executive, including the Northern Irish Attorney General. Unfortunately, this appears not to have occurred (or led to any clear agreement), as John Larkin QC concluded that the Secretary of State for Northern Ireland went beyond the powers granted to him by the 2019 Act.[96]

It is clear this matter should be simply remitted back to the Northern Ireland Assembly, and indeed taking this all into consideration, I believe that the Statutory Instrument proposed by HM Government "is politically or legally important or gives rise to issues of public policy likely to be of interest to the House".[97]

When New Clause 10 was debated in the House, it was the expectation of the House that the abortion regulations for Northern Ireland would meet the requirements of the CEDAW report, that the Northern Irish Assembly would have a say in the regulations if it were restored, and that the scope of regulations implemented by HM Government would be limited under the conditions of the 1998 Act.

Sadly this expectation has proven to be wrong, with the abortion regulations going far beyond the requirements of the CEDAW report, giving the impression that the Northern Irish Assembly - including the Northern Irish Attorney General - has been sidelined from the process of preparing the regulations, as well as there being contention of the Government complying with the 1998 Act. It is for this reason, I urge the Committee to bring these regulations of the House under term 4 (a) of the committee's Terms of Reference.

96 https://www.expressandstar.com/news/uk-news/2020/04/26/northern-ireland-secretary-exceeded-powers-in-allowing-abortion/

97 https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/role/tofref

Ian Leist QC

I write to you regarding the Abortion (Northern Ireland) (No. 2) Regulations 2020, which were laid on 13th May. I suggest the Committee should express serious concerns about these Regulations to the House. I do so with special regard to your terms of reference, especially (a), (b), and (d).[98]

(a) Politically or legally important or gives rise to issues of public policy likely to be of interest to the House

Regulation 13

Amending of the Criminal Justice (Northern Ireland) Act 1945 (Regulation 13) is of great political and legal importance because it introduces a very significant change in criminal liability under the Criminal Justice (Northern Ireland) Act 1945. The requirement of section 9 of the Executive Formation Act is to implement paragraphs 85 and 86 of the CEDAW report which only mention sections 58 and 59 of the Offences Against the Person Act 1861. The report refers to the 1945 Act in the body of the text but not in its final recommendations. In this context the fact that Parliament only chose to place an obligation on the Secretary of State through reference to two paragraphs that do not mention the 1945 Act, when others do, is plainly important. Regulation 13 involves the Secretary of State making an important change to criminal law in the 1945 Act that Parliament has not given him the power to make.

Regulation 7

It is clear to me that Regulation 7 violates the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) because it allows for abortion on the grounds of disability and does so in a manner that does not provide equal treatment for babies after 24 weeks gestation if they have a diagnosed disability compared to those who do not. The Assembly cannot enact legislation that is contrary to EU law under section 6(d) of the Northern Ireland Act 1998. Section 9(9) of the Northern Ireland (Executive Formation etc) Act 2019 requires the Secretary of State to make Regulations that are within the competence of the Assembly. The EU ratified the UNCRPD in 2011 and it thereby became an integral part of EU law. The UK's own European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009 specifies the UNCRPD as one of the EU Treaties for the purposes of section 1(2) of the European Communities Act 1972.

Indeed, as the Attorney General of Northern Ireland stated in his letter to you on 29 April, the Supreme Court took this position in 2018 when Lord Kerr said, "*The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is one of the treaties specified as an EU treaty under the EC (Definition of Treaties) (UNCRPD) Order 2009.* ***Section 6(2)(d) of the NIA forbids the Northern Ireland Assembly from making laws contrary to UNCRPD.***"[99](Bold added) However, at paragraph 29 of your 11th Report, you state that

[98] https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/role/tofref/

[99] [2018] UKSC 27, Lord Kerr at paragraph 331 https://www.supremecourt.uk/cases/docs/uksc-2017-0131-judgment.pdf

the NIO has commented that, ". . . *the UNCRPD does not have the status of binding EU law. It is an unincorporated treaty which does not form part of domestic law. On the extent to which the UNCPRD is to be treated as part of EU law by means of the European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009, the European Court of Justice held that the UNCPRD is not "unconditional and sufficiently precise" to have direct effect."*

Given the facts stated above, it is difficult to see how the NIO argument that the UNCRPD does not come within EU law, and is thus not engaged under section 6 (e) Northern Ireland Act 1998 (which makes no reference to how binding the EU law is, simply that it must not conflict with EU law) can be upheld. Regulation 7 is, notwithstanding the attempted defence of the NIO, not within the competence of Section 9.

Regulation 12

In his submission to the SLSC on the first set of Regulations the Northern Ireland Attorney General (AG) was absolutely correct to note that the Explanatory Memorandum is inaccurate on conscientious objection (see paragraph 7.41 of that document, 7.40 of the revised Explanatory Memorandum).The AG said, "The explanatory note, quite wrongly, says that 'people carrying out the host of ancillary, administrative and managerial tasks... do not have the same right to conscientious objection" further noting this idea is likely drawn from the Supreme Court decision in Doogan, ie referring to an interpretation of a statutory right rather than a Convention right. However, as Larkin stated, this "ignores both the fundamental difference in starting point between the pre-regulation position in Northern Ireland and the claim in Doogan as well as the limited nature of the decision in that case. The approach which can be taken to conscientious objection in Northern Ireland is not constrained in any way by what was provided for in section 4(1) of the Abortion Act 1967 and the consequent interpretation of the term 'participate' in that Act in Doogan. The Supreme Court limited itself to interpreting the word 'participate' in the 1967 Act – it is correct that persons engaged in administrative tasks in Great Britain do not have the same statutory right of objection as those who participate'. The question of their Convention right to freedom of conscience was not determined by the Supreme Court nor (obviously) did that Court consider the position under section 6 (2) (e) of the Northern Ireland Act 1998. The Supreme Court does not tell us whether or not an employer, in order to act compatibly with the Convention, might still need to accommodate conscience beyond the limits of the statutory right under the 1967 Act."

In the NIO response, reported at paragraph 22 and 23 of the SLSC 11th Report, the Committee includes a direct quote which recognises that a significant group of people may suffer discrimination. The NIO defence is simply that they think the discrimination would be indirect and not direct. This is problematic for two reasons: In the first instance, they do not refute the idea that this law could have a discriminatory effect and cause some people to lose their jobs. This is arguably grounds enough for the Committee to draw these Regulations to the attention of the House. In the second instance, they argue that this discrimination would not matter because: a) the discrimination in question would only be indirect and b) that for the purpose of making a discriminatory effect ultra vires it must be

direct. However, the discrimination would be no less direct against someone required to book in people to have an abortion than it would against someone performing an abortion. The abortion cannot happen without either of these processes. If someone facilitates the abortion in either way their conscience is engaged and thus they are confronted with the choice about whether they comply and act against their conscience or leave their jobs and maintain their conscience – unless a protection for conscientious objection applies. It would also be problematic even if it only constituted indirect discrimination because it is not as clear as the NIO suggests that 6 (e) only engages direct and not indirect discrimination.

Furthermore, the following, S 98 (4) NIA 1998 suggests in any event that the NIO was wrong to suggest that S 6 (e) does not engage indirect discrimination. "For the purposes of this Act, a provision of an Act of the Assembly or of subordinate legislation discriminates against any person or class of persons if it treats that person or that class less favourably in any circumstances than other persons are treated in those circumstances by the law for the time being in force in Northern Ireland."

The Absence of a Requirement for Inspections for those who Provide Abortions

I note that at paragraph 39 of your report, the Committee raised questions about the inspection regime in Northern Ireland that Joanne Bunting MLA had included in her submission. The SLSC report says, '*The NIO responded that the duties are equivalent, and the differences are a matter of choice in legal drafting. As such, this may be a matter for consideration by the Joint Committee on Statutory Instruments.'* I hope the Committee will return to this point in its review of the No 2 Regulations, since the duties are most certainly not equivalent. **This was demonstrated by the answer to an Assembly Question that was answered <u>on 12 May</u>, where the Minister stated that the Regulation Quality and Improvement Authority (RQIA) "*do not have any powers specifically in relation to abortion providers as they are not a discrete category of provider required to register with, and be inspected by, RQIA*" and set out the legislation for inspection of abortion services in England.'**[100] While the drafting is most certainly a matter of choice, it is a choice that has very significant implications that are of great political and legal importance and must be drawn to the attention of the House. Extraordinary oversight took place despite the Government being warned about the matter last September. see Baroness O'Loan at Hansard, col 1384, 9 September 2019. The provision of legislation without an inspection regime constitutes an extraordinary failure of governance, of huge political and legal importance for the House.

(a) <u>that it may be inappropriate in view of changed circumstances since the enactment of the parent Act</u>

There are two circumstances I wish to bring to the Committee's attention.

Firstly, recently a young woman has taken the British Government to Court on the matter of disability abortion and the scope of the Abortion Act 1967 to allow abortion on the grounds of Down's Syndrome. Heidi Crowter, 24, who has Down syndrome, along with

100 http://aims.niassembly.gov.uk/questions/printquestionsummary.aspx?docid=300716

Cheryl Bilsborrow, the mother of a 2-year-old boy with the same syndrome are "taking the British government to court. Their goal: to change legislation which allows children with Down syndrome (among other conditions) to be aborted right up until birth."[101] Ms Crowter also recently wrote lawmakers in Northern Ireland requesting they reject the Regulations as they discriminate against people like her. She states: "I am asking all MLA's to reject Westminster's regulations – please don't vote for more discrimination against people like me. . .That's both hurtful and offensive. My life has as much value as anyone else's. . . Boris Johnson's Government did not have to introduce abortion for babies with Down's syndrome up to birth to Northern Ireland. They chose to do this."[102]

Secondly, and most importantly, given the constitutional circumstances have changed significantly from the passing of the original legislation to now with the restoration of the Assembly, it is my opinion that these Regulations and this matter should be remitted back to the Northern Ireland Assembly. While the Government was required by s9(6) of the Northern Ireland (Executive Formation etc.) Act 2019 to lay regulations by 31 March, there is nothing comparable requiring them to seek a vote and there is a good case in law that their obligations have in any event been met because a law responding to Section 9 came into effect on 31 March and has now been in place for a month and a half.

When all of this is considered in the context of the fact that when moving the initial provision Stella Creasy said to the 2017-19 Parliament (and no Parliament can bind its successors) when moving the provision that became Section 9, 'I understand that, if it was not for the fact that we do not have an Assembly, this would absolutely not be the right way forward, but we do not have an Assembly and we will not have one any time soon.' (9th July 2019, col 183), and the fact that the Assembly has now been restored for more than four months, the political and legal questions about the appropriateness of these Regulations should now be drawn to the attention of the House.

(d) Imperfectly achieve its policy objectives

The matter of conscientious objection also engages grounds (d). Although abortion provision has always been legal in Northern Ireland when a mother's life is in danger, views on abortion beyond this in the province differ markedly from the rest of the UK. In this context, in the event that the new law is properly given effect, it is likely that a not insignificant number of people will find themselves having to choose between acting against their conscience (in line with Section 6 e NIA 1998) and losing their jobs. This is of clear political and legal importance, as well as likely to be of interest to the House as, quite apart from the personal impact of being placed in this situation, possibly after many years of service, this will place a significant resource strain on the Health Service of Northern Ireland because of (quite apart from having to start providing abortions on an 'on demand' basis) the need to replace otherwise valued members of staff.

---

101 https://aleteia.org/2020/04/17/this-young-woman-with-down-syndrome-wants-to-change-uk-laws-on-abortion-of-children-with-disabilities/

102 www.belfasttelegraph.co.uk/news/northern-ireland/downs-syndrome-campaigner-urges-stormont-to-reject-hurtful-abortion-laws-39185076.html and www.newsletter.co.uk/health/downs-syndrome-campaigner-urges-stormont-reject-offensive-abortion-laws-2844228

Carla Lockhart MP

I write today to raise my concerns about The Abortion (Northern Ireland) (No 2) Regulations 2020, laid before Parliament on 13 May 2020. As the regulations have not changed in a materially substantial manner from the original version (laid 25 March 2020)[103], some of this submission repeats points made previously. In addition, however, and of importance, this submission contains new material because of developments since my first submission which have bearing on how one understands the legal and political importance of the Regulations and why I believe they should be drawn to the attention of the house. As the Committee reviews the Instrument according to the Terms of Reference, I would like to draw special attention to a few points based on points (4) (a), *that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House*; (4) (b) *that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;* and (4) (d) *that it may imperfectly achieve its policy objectives.* I would be thankful if the committee, upon considering the following points, brought them to the attention of the full House.

Specifically it is my view that regulations 7, 12 and 13 appear to go beyond the scope of the powers granted to the Secretary of State for Northern Ireland in Section 9 (4) and 9 (9) of the Northern Ireland (Executive Formation etc) Act 2019, 'the 2019 Act'.[104] The majority of my submission will focus on addressing regulation 7. I will also outline how the House may wish to consider the political importance of the Government imposing regulations beyond what it was legally required to do. There have also been further developments I will expound on.

As it pertains to regulation 7, the wording of the regulation itself[105] appears to allow for the provision of abortion on a basis that in the rest of the UK has been applied as meaning any disability right up till birth, allowing abortion to be performed for cleft lip, club foot and Down's Syndrome in England and Wales. This is discrimination based solely on disability, which appears to violate Article 10 of the United Nations Convention on the Rights of Persons with Disabilities.[106] I believe human being extends to those in the womb (notably, the term is more expansive than the term 'person' which some suggest does not cover those in the womb), and allowing abortion for disability clearly does not treat those in the womb with disabilities equally. As the UNCRPD is one of the Treaties that the Northern

---

103 As outlined by the Explanatory Note here: http://www.legislation.gov.uk/uksi/2020/503/made?mc_cid=2e79dcd529&mc_eid=8d1d36b6f7#f00002

104 Specifically Section 9 (9) notes that the Secretary of State can only make provisions the Northern Ireland Assembly itself could make (Northern Ireland (Executive Formation etc) Act 2019); that is, any regulation that is imposed that would be outside of this would be outside of the power provided to the Secretary of State. According to Section 6 (2) (2) of the Northern Ireland Act 1998, which the Assembly must follow, "A provision is outside that competence if any of the following paragraphs apply….(c)it is incompatible with any of the Convention rights; (d)it is incompatible with [F1EU] law; …" see: Northern Ireland Act 1998. Also of note, the UNCRPD is legally binding in the UK; see: The European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009.

105 See: https://www.legislation.gov.uk/uksi/2020/345/made

106 See: Convention on the Rights of Persons with Disabilities

Ireland Assembly must adhere to,[107] and therefore not even the Northern Ireland Assembly itself would legally be able to implement such a provision, it is therefore beyond the scope of the Secretary to implement such a regulation.

While the Northern Ireland Office (NIO) disagreed with this point, having noted "The unborn do not enjoy rights under the Convention,"[108] I posit that this argument would fail to pass muster in a court of law, or at least would face substantial challenges. Indeed, it seems clear that the term 'human being' would extend to the unborn if, were they born, they would survive outside the womb. Otherwise why would the regulations themselves allow for or acknowledge that there should be different rules for abortion at different gestations? Additionally of note, the unborn are capable of life outside the womb from 22 weeks according to the Guidance issued by British Association of Perinatal Medicine issued in October 2019.[109] Yet whether you agree or not that the unborn (at 22 or some other gestation) are human and thus should be provided protections under Article 10, what is clear is that if you do not agree they are human and deserve protections, then there is no reason to make distinctions based on disability. However if, you think some unborn humans are afforded protections - that is, they cannot be aborted if they do not have a disability - then to allow abortion for those who *do* have disabilities is discrimination.

Also of note, our own Attorney General in Northern Ireland, John Larkin QC, in his supplementary submission to the Committee on the NIO's comments, stated: "it appears that the Secretary of State has decided that Article 10 of the UNCRPD does not extend protection to those in the womb . . . and he is not constrained from making provision for abortion on the basis of disability. This view of what is within his competence is in contrast to not only my view, but that given by Lord Kerr and Lord Wilson in the application brought by the Northern Ireland Human Right's Commission. In the view of these Supreme Court Justices, those in the womb are protected from disability Discrimination: 'The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is one of the treaties specified as an EU treaty under the EC (Definition of Treaties) (UNCRPD) Order 2009. Section 6(2)(d) of the NIA forbids the Assembly from making laws contrary to UNCRPD."[110]

Furthermore, by perpetuating stereotypes, regulation 7 violates the CEDAW recommendation itself;[111] it also (again) seems to conflict with the United Kingdom's

---

107 See the Northern Ireland Act 1998 and the UNCRPD, which is legally binding in the UK: The European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009).

108 See: https://committees.parliament.uk/publications/744/documents/7454/default/

109 See: https://hubble-live-assets.s3.amazonaws.com/bapm/attachment/file/182/Extreme_Preterm_28-11-19_FINAL.pdf.

110 See https://committees.parliament.uk/publications/744/documents/7758/default/

111 Point iii of the CEDAW recommendations states to allow for abortion where there is a "*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"* - Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol

obligations under the UNCRPD.[112] Regarding fatal impairment, The Committee on the Rights of Persons with Disabilities noted: "*laws which explicitly allow for abortion on grounds of impairment violate the [CRPD] . . . Even if the condition is considered fatal, there is still a decision made on the basis of impairment. . .. Experience shows that assessments on impairment conditions are often false. Even if it is not false, the assessment perpetuates notions of stereotyping disability as incompatible with a good life.*"[113] [114]

Further to the point of stereotypes, since my prior submission, Ms Heidi Crowter, a 24-year old who herself has Down's Syndrome, has brought this matter into the public sphere by launching a case against the Government. She, and the mother of a 2-year old who also has Down's Syndrome, Cheryl Bilsborrow, are "taking the British government to court" with the goal of changing the law that currently "allows children with Down syndrome (among other conditions) to be aborted right up until birth."[115] She is also calling to account political leaders in Northern Ireland, having recently written to lawmakers stating: "I am asking all MLA's . . . to reject Westminster's regulations – please don't vote for more discrimination against people like me. . . My life has as much value as anyone else's. . ."[116] As an MP representing a Northern Ireland constituency, I found this particularly poignant. Again as this development has occurred in the time between the parent Act and these regulations being made, given that it seems of political significance, I would ask the Committee to bring this to the attention of the whole House.

In sum allowing disability abortion to birth violates the Section 9 (9) of the Northern Ireland (Executive Formation etc.) Act, which, legally, as per point (4) (a) of the Terms of Reference, is concerning. Furthermore on a political level, it seems that to adhere to this Committee report, we need to scale back the law in England and Wales to protect against discrimination - which should be of interest to the House - yet these regulations do the opposite by expanding a policy of discrimination. Again, this implies that these regulations have imperfectly implemented the policy objectives of the 2019 Act (point (4) (d) of the Terms of Reference).

As a member of Parliament for a constituency in Northern Ireland, I also would like to address what appears to be a politically unusual use of power. Specifically, even though the Northern Ireland Assembly was restored in the period between the law passing (that required an expansion of abortion services) and the regulations needing to be laid, the

---

112 Convention on the Rights of Persons with Disabilities.

113 On the right of persons with disabilities to equality and non-discrimination

114 In addition, in 2018 CEDAW's report to the United Kingdom, they noted: "...In cases of severe foetal impairment, the Committee aligns itself with the Committee on the Rights of Persons with Disabilities in the condemnation of sex-selective and disability-selective abortions, both stemming from the need to combat negative stereotypes and prejudices towards women and persons with disabilities. See: Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol.

115 https://aleteia.org/2020/04/17/this-young-woman-with-down-syndrome-wants-to-change-uk-laws-on-abortion-of-children-with-disabilities/

116 https://www.lifenews.com/2020/05/06/woman-with-down-syndrome-slams-abortions-on-babies-who-have-it-our-lives-have-value/

Government went ahead to implement regulations that go far beyond what they were required to do rather than limiting the regulations to the minimum requirements of the law.[117]

This is also relevant as it relates to the Committees terms of reference (4) (b), which make provision for the fact that in the time between Parliament passing a law to require a new Statutory Instrument and said Instrument coming into force, circumstances may change drastically so as to cause concern with the Statutory Instrument. That is the case in this instance, as the devolved institutions are now operational - and have been for almost five months. Thus in the time between the parent Act and laying these regulations, the Government has had much time to take into consideration the arguments made by myself and other colleagues, namely that this matter should be decided in Northern Ireland, by those representing Northern Ireland in the Assembly (including the opportunity to consider our prior submissions to this Committee[118]). Yet, another month has passed since the original regulations and these remade ones, with the Assembly up and running, with Westminster seemingly ignoring the request made by MPs to honour devolution, adding to the ire felt by many. This will likely have political consequences and thus be of interest to the House.

Going much further than what was strictly required by the 2019 Act changes the constitutional settlement in a way which is both politically and legally important, and of the interest of the House ((4)(a)), especially as the Northern Ireland Executive was restored after the passing of the 2019 Act ((4)(b)). Indeed, when the many examples of the Government stating they want to honour devolution are viewed alongside the above facts (Stormont is sitting and the Government still went beyond their legal requirements), it appears to compound the undermining of devolution, which seems: a) irresponsible and b) surprising, especially after the restoration of the Assembly.

While there are several examples of the Government noting they wished to honour devolution, I will highlight just a few (also see Appendix below): When the CEDAW committee first released their report expressing their concerns about the situation in Northern Ireland, Her Majesty's Government was adamant that the Northern Irish Assembly must be restored as *"some areas of the Convention will be subject to the restoration of the Northern Ireland Executive"*.[119] The Government confirmed in the same response that one of the areas which needed the 'restoration of the Northern Ireland Executive' was abortion. The Government said: *"The UK Government does not believe that the current situation in Northern Ireland should dislodge the principle that it is for the devolved administrations to ensure human rights compliance in relation to devolved matters"*.[120]

---

117 A legal opinion by David Scoffield QC states that if the Government moved forward to implement regulations along the lines the consultation suggested, which in several instances the Government did, said regulations would go beyond what they were required to do. *David A Scoffield QC, "BRIEF TO ADVISE", 9 December 2019.*

118 See: https://committees.parliament.uk/publications/744/documents/4395/default/

119 Opening Statement to CEDAW Committee

120 Ibid.

This evidence demonstrates that from the moment of the release of the CEDAW report, HM Government understood the importance of the devolution settlement. Even after the passing of the 2019 Act, HM Government continuously stated their preference for the Northern Ireland Executive to make decisions about abortion in Northern Ireland as it is a devolved issue, whilst realising they were bound by legislation to implement a framework. Within this context, it was clear the Government should have considered how the regulations they brought forward would have impacted the devolution settlement, both legally and politically, (point (4) (a) of The Terms of Reference) especially after the restoration of the Northern Ireland Assembly on 11 January 2020 (a changed circumstance, relevant under point (4) (d) of The Terms of Reference).

The Belfast Telegraph recently reported on this matter, quoting the Attorney General for Northern Ireland. This article provides a very precise summary of the main issues before the committee; specifically the Belfast Telegraph reports that "The Northern Ireland Secretary Brandon Lewis exceeded his powers in introducing abortion regulations, Stormont's chief legal adviser has said. It is doubtful whether the legislation gives adequate European Convention on Human Rights-based protection to the rights of those opposed on religious or philosophical grounds, attorney general John Larkin QC added. The lawyer wrote: 'This is of political and legal significance and, given that the relevant judgment call is best made by a local legislature, it may be inappropriate for the provision to have been so limited in light of the changed political context.'"[121] The fact that the Attorney General for Northern Ireland has voiced his dismay with these regulations, in my view, removes any doubt as to whether these regulations have significant political and legal repercussions that are 'likely to be of interest to the House'.

In summary, it seems clear that moving forward with an Instrument that goes beyond what the Secretary was legally allowed to, as well as goes beyond what the Government was required to implement, will most certainly be "*politically or legally important"* and *"gives rise to issues of public policy likely to be of interest to the House,"* especially in light of Stormont now sitting; a "*changed circumstances since the enactment of the parent Act"*. I would appreciate these matters being selected to bring attention before the whole House. Thank you for your consideration of these views.

Appendix: HM Government / Others noting the desire to honour devolution

Notably, Stella Creasy MP, who originally proposed the amendment to the Northern Ireland (Executive Formation etc.) Act 2019 to require these regulations, stated in regards to her amendment that, "I understand that, if it was not for the fact that we do not have an Assembly, this would absolutely not be the right way forward, but we do not have an Assembly and we will not have one any time soon."[122]

121 https://www.belfasttelegraph.co.uk/news/northern-ireland/northern-ireland-secretary-exceeded-powers-in-allowing-abortion-39157743.html

122 https://hansard.parliament.uk/Commons/2019-07-09/debates/87A66283-DF13-4CC8-9069-48974EA40346/NorthernIreland(ExecutiveFormation)Bill

On 4 September 2019, The Rt. Hon. Julian Smith MP (the then Secretary of State for Northern Ireland) confirmed in a written statement that *"The Government's preference remains that any change to law on either of these sensitive devolved issues (abortion & same-sex marriage) is taken forward by a restored Executive and functioning Assembly."*[123] At the release of the Government's consultation for abortion in Northern Ireland, The. Rt. Hon. Julian Smith MP confirmed once again that *"the best way of dealing with this issue* (abortion) *would be to form an Executive".*[124]

An opening statement in response to the CEDAW Committee report noted: *"The UK Government does not believe that the current situation in Northern Ireland should dislodge the principle that it is for the devolved administrations to ensure human rights compliance in relation to devolved matters. Progress in Northern Ireland on some areas of the Convention will be subject to the restoration of the Northern Ireland Executive. . ."* [125]

Lord Duncan of Springbank assured others during a Parliamentary Report on 'the 2019 Act' that the preference of HM Government was that Stormont deal with abortion matters: *"In addition to the reporting requirements, the Northern Ireland (Executive Formation etc) Act 2019 requires the UK Parliament to introduce laws on . . . abortion and victims' payments. I recognise that these are sensitive, devolved issues and this Government's preference is that they are taken forward by a restored Executive and functioning Assembly."* [126]

Former Secretary of State for Northern Ireland, Julian Smith MP, noted (in a foreword to the consultation) *"In considering these proposals, I remain acutely aware that the provision of abortion services are devolved to Northern Ireland . . . I am also deeply sympathetic to the fact that this is a highly sensitive and complex matter, with differing and strongly held views across society." . . . "I have made the case to party leaders in Northern Ireland that the best way of dealing with this issue would be to form an Executive that could take forward these commitments in the best interests in Northern Ireland - unfortunately, this has not been possible to achieve."*[127] This document also states the Government would not normally do this, noting while "*The UK Parliament however, retains the power to make laws for Northern Ireland," "it would not normally do so in respect of devolved matters without the consent of the Northern Ireland Assembly and Executive."* [128]

123 https://hansard.parliament.uk/Commons/2019-09-04/debates/19090466000011/NI(ExecutiveFormationAndExercise OfFunctionsAct)Report

124 A new legal framework for abortion services in Northern Ireland

125 https://www.gov.uk/government/news/opening-statement-to-cedaw-committee

126 http://bit.ly/300tZit

127 https://www.gov.uk/government/consultations/a-new-legal-framework-for-abortion-services-in-northern-ireland

128 https://www.gov.uk/government/consultations/a-new-legal-framework-for-abortion-services-in-northern-ireland

Dr Calum Miller

My name is Calum Miller, and I am a medical doctor and a researcher in abortion ethics and policy at the University of Oxford. I am writing to express my concern about the Abortion (Northern Ireland) Regulations 2020, based on my experience as a doctor, a researcher, and working with diplomats at the UN Human Rights Council.

The similarity between the Abortion (Northern Ireland) Regulations 2020 and the Abortion Act 1967 and the latter's jurisprudential interpretations renders the former highly likely to lead to clear human rights violations under international law, and hence is 'legally important'. There are at least three specific areas in which the regulations are in contravention of international law:

1) Forced abortion on disabled women by medical professionals.
2) Direct discrimination on the basis of disability.
3) Indirect discrimination on the basis of sex or gender.

While the Committee's previous comments held that there is a conflict between the CEDAW and UNCRPD conventions, the specific provisions I address here *are not required* by CEDAW, nor by the CEDAW Report, nor by the Northern Ireland (Executive Formation) Bill. Hence *there is no conflict* between conventions or other instruments in these respects: rather, there are straightforward violations of numerous international agreements which are not required by CEDAW or any derivative legislation. Hence, amendment of the present regulations to render them compliant with international law would not require a violation of CEDAW or any derivative legislation.

1 Forced abortion on disabled women by medical professionals

The proposed regulations do not prevent forced abortion on disabled women and thus again are in contravention of international human rights law and other international agreements. A recent case in Great Britain has highlighted this possibility, whereby on the grounds that a disabled woman is deemed not to have capacity, she may have an abortion forcibly performed on her, against her express will.

The SLSC previously considered the possibility of coerced abortion, noting that regulation 13 requires the woman's explicit consent. Regulation 13 does not mention a requirement for explicit consent. In any case, however, it is clear that any requirement for consent contained within the regulations does not prevent the possibility of forced abortion on *disabled women by medical professionals*.

The CRPD has held that forced abortion is a grave violation of their human rights as enshrined in the Convention. In their General Comment No. 6 on the right to equality and non-discrimination, they highlight forced abortion as a violation of disabled women's rights:

'Discrimination has occurred and continues to occur, including in *brutal forms such as* non-consensual and/or forced systematic sterilizations and medical or hormone-based interventions … *forced and coerced abortion*...'[129] (Italics mine)

Likewise, the European Parliament has passed resolution 2012/2712, which 'condemns the practice of forced abortions and sterilisations globally.'[130]

The Parliamentary Assembly of the Council of Europe has called on countries to criminalise forced abortions:

> 'the Assembly believes that the social and family pressure placed on women not to pursue their pregnancy because of the sex of the embryo/foetus is to be considered as a form of psychological violence and that the practice of forced abortions is to be criminalised.'[131]

Thus, it is clear that the possibility of state-mandated abortions on disabled women deemed 'incompetent' to make a decision regarding her pregnancy violate a number of international treaties ratified by the UK and domesticated in UK law – even in some cases amounting to torture. Indeed, the UN Special Rapporteur on the rights of persons with disabilities has found that the precise situation in question – disabled people who are given 'forced abortions' because they are deemed to be 'incompetent' – violates multiple international treaties, including the CRPD and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[132]

2 Direct discrimination on the basis of disability

The proposed regulations allow abortion at any point up until birth – and during birth – for serious disability. Our experience as medical professionals in the UK (and available in Department of Health statistics) is that this provision permits abortion on the grounds not only of fatal foetal anomaly, but of remediable conditions such as cleft palate, or non-fatal conditions where patients live perfectly happy lives, such as in Down Syndrome.[133] Given the 'good faith' clause, it is impossible to see how this broad interpretation of 'serious disability' would not be similarly used in Northern Ireland.

The Committee previously noted the NIO's defence of this provision, which held that those in the womb are not subject to the right to life as described in UNCRPD Article 10, since that would imply that abortion should never be legal. While there is a reasonable case to be

---

129 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/6&Lang=en

130 https://op.europa.eu/en/publication-detail/-/publication/d9a07301-5e5c-11e3-ab0f-01aa75ed71a1/language-en

131 http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0xODAyMCZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTE4MDIw

132 https://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/43/41

133 E.g., https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679028/Abortions_stats_England_Wales_2016.pdf

made that this would, indeed, be the correct way to interpret international law (see Appendix A), the illegality of disability-selective abortion does not, in fact, depend on this interpretation of Article 10.

Regardless of whether foetuses have a right to life under Article 10, it is widely agreed by the relevant authorities that disability-selective abortion is in contravention of the CRPD. The Committee on the Rights of Persons Disabilities, has explicitly condemned the United Kingdom of Great Britain and Northern Ireland (and other states in other documents) for the provision of the Abortion Act allowing abortion up to birth in the case of disability, while setting a 24 week limit otherwise. The CRPD write:

> '12. The Committee is concerned about perceptions in society that stigmatize persons with disabilities as living a life of less value than that of others and about the termination of pregnancy at any stage on the basis of fetal impairment.
>
> 13. The Committee recommends that the States party amend its abortion law accordingly. Women's rights to reproductive and sexual autonomy should be respected without legalizing selective abortion on the ground of fetal deficiency.'[134]

Importantly, this *does not depend* on treating those in the womb as persons subject to all rights within the Convention. The Committee held that UK abortion law – and hence the proposed regulations for Northern Ireland – are in contravention of Article 5 of the Convention, which says, *inter alia*:

> '2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.'

The former clause in this paragraph does not require foetuses to be considered persons, and the Committee does not consider them persons; the clause limits discrimination on the basis of disability *simpliciter*. But the Committee recognised that disabled persons *outside* the womb are discriminated against by disability-selective abortion, namely, by having their disability stigmatised and hence their person devalued. Hence, the Committee found that disability-selective abortion violates international law *regardless of whether foetuses have a right to life*.

It is worthy of note that at the time of writing, a legal case is being brought against the UK government on the grounds of allowing disability-selective abortion in the case of Down Syndrome. Northern Ireland faces the same prospect, as well as condemnation by the Committee on the Rights of Persons with Disabilities, and possible diplomatic ramifications in virtue of this clear violation of international law. Again, this violation of international law is not required by CEDAW or any derivative legislation, and so there is no legal obstacle to removing this provision from the regulations. This is perhaps seen by most clearly by the fact that the United Kingdom Supreme Court *obiter* remarks which formed part of the basis

---

134 https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhspCUnZhK1jU66fLQJyHIkqMIT3RDaLiqzhH8tVNxhro6S657eVNwuqIzu0xvsQUehREyYEQD%2BldQaLP31QDpRcmG35KYFtgGyAN%2BaB7cyky7; see also the same recommendation to Spain: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhslxq2MulDp%2fqMKQ6SGOn0%2fNZ5trZrfgNmKdTjE%2fScMKF96xMrtyzhDx7aguCpqdK4xQVGCY502yRGHBFyeVZXNw00SiVNraxD5auFDv%2fVv2m

CONTENTS

for legalisation of abortion in Northern Ireland *unanimously* agreed that a ban on abortion for serious, non-fatal disability was consistent with the European Convention on Human Rights. Numerous judges who were supportive of the right to abortion in some circumstances under the ECHR *nevertheless* held that a ban on disability-selective abortion was permissible, and perhaps even required by UNCRPD. Hence Lord Kerr and Lord Wilson, who went so far as to say that Northern Ireland's ban was *torture*, still held that:

> 'Section 6(2)(d) of the NIA forbids the Northern Ireland Assembly from making laws contrary to UNCRPD… UNCRPD is based on the premise that if abortion is permissible, there should be no discrimination on the basis that the foetus, because of a defect, will result in a child being born with a physical or mental disability… This is particularly so in the light of UNCRPD Committee's consistent criticism of any measure which provides for abortion in a way which distinguishes between the unborn on the basis of a physical or mental disability, relying on "general principles and obligations (articles 1-4)" and "equality and nondiscrimination (article 5)".[135]

3 Indirect discrimination on the basis of sex

Although the law in Northern Ireland does not make express provision for abortion on the grounds of foetal sex, it does so in effect, firstly by legalising abortion with no restriction as to the reason up to 12 weeks,[136] and secondly by allowing abortion for 'mental health' up to 24 weeks, which is known to permit sex-selective abortion in the UK.[137]

Since the law permits sex-selective abortion only by entailment rather than explicitly, it is possible the Treaty Monitoring Bodies may have a more favourable view of it than in the case of disability. Nevertheless, the international community is still in clear agreement that the law as it stands is in violation of international law, since international law requires clear prohibition of sex-selective abortion. The Parliamentary Assembly of the Council of Europe has passed resolutions condemning sex-selective abortion, including:

> 'The Parliamentary Assembly condemns the practice of prenatal sex selection as a phenomenon which finds its roots in a culture of gender inequality and reinforces a climate of violence against women, contrary to the values upheld by the Council of Europe…
>
> In view of these considerations, the Assembly calls on the member states to…
>
> 8.7. introduce legislation with a view to prohibiting sex selection in the context of assisted reproduction technologies and legal abortion, except when it is justified to avoid a serious hereditary disease' Resolution 1829 (2011)[138]

---

135 https://www.supremecourt.uk/cases/docs/uksc-2017-0131-judgment.pdf

136 It may be thought that sex-selective abortion could not happen before 12 weeks. However, introduction of new prenatal testing can determine the foetal sex from as early as 9 or 10 weeks, and so could facilitate sex-selective abortions under this clause.

137 See, for example, https://academic.oup.com/ojls/article-abstract/36/3/535/1752375

138 http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0xODAyMCZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTE4MDIw

Likewise, the two landmark UN conferences on women's rights and development, to which the UK has bound itself politically, condemn sex-selective abortion clearly. The Beijing Platform for Action holds that *governments* are mandated to:

> 'Eliminate all forms of discrimination against the girl child and the root causes of son preference, which result in harmful and unethical practices such as prenatal sex selection and female infanticide; this is often compounded by the increasing use of technologies to determine foetal sex, resulting in abortion of female foetuses'[139]

Similarly, the International Conference on Population and Development report cites as a key objective:

> 'To eliminate all forms of discrimination against the girl child and the root causes of son preference, which results in harmful and unethical practices regarding female infanticide and prenatal sex selection'[140]

Finally, an interagency statement by the OHCHR, UNFPA, UNICEF, UN Women and WHO cites this ICPD statement approvingly, and notes that:

> 'States therefore have an obligation to take active steps to counter discrimination and to uphold the rights of women. For example, CEDAW Article 5(a) requires states to modify social and cultural patterns of conduct:
>
> > "…with a view to achieving the elimination of prejudices and customary … practices which are based on the idea of inferiority or the superiority of either of the sexes'".[141]

The SLSC considered the possibility of sex-selective abortion in its previous report, but did not mention the obligation to ban sex-selective abortion as expressed in European legislation. Again, since CEDAW and its derivatives do not require legalised sex-selective abortion, there is no conflict here: there are only reasons in favour of withdrawing this provision.

Summary

Whether the European legislation or UN bodies, these authorities are universally supportive of abortion access in general. But there is nevertheless wide agreement that in these respects the proposed regulations for Northern Ireland are in contravention of multiple international treaties. Thus, they also contravene UK law insofar as adherence to those treaties has been enshrined in UK law. Again, these contraventions are not required by CEDAW or any derivative legislation, and they do not depend on the claim that the unborn child has a right to life. Regardless of this latter question, there is widespread consensus in international law that the regulations violate various UN conventions and European law by

139 https://www.un.org/en/events/pastevents/pdfs/Beijing_Declaration_and_Platform_for_Action.pdf

140 https://www.un.org/en/development/desa/population/events/pdf/expert/27/SupportingDocuments/A_CONF.171_13_Rev.1.pdf

141 https://www.ohchr.org/Documents/Issues/Women/GenderAndEquality/PreventingGenderBiasedSexSelection.pdf

allowing sex-selective abortion and disability sex-selective abortion, and the possibility of forced abortion on disabled women.

The Parliament of the United Kingdom can ignore human rights edicts if it wants to. However, the Northern Ireland Assembly has no such power[142] and hence must take these cases seriously. Since Section 9(9) of the Northern Ireland (Executive Formation) Act makes clear that the Secretary of State is constrained by the same legal constraints as the Northern Ireland, the Secretary of State does not have the legal power to violate these international treaties, even if the UK Parliament has that power. For all these reasons, these considerations are 'legally important' and hence fall within the scope of the Secondary Legislation Scrutiny Committee.

In order to avoid legal and diplomatic ramifications – and, most of all, to protect the rights of women and persons with disabilities – there is a duty for the government to withdraw and replace, or at the very least radically amend, the proposed regulations in order to be compliant with international human rights – and domestic – law. I trust that my country – a leader in human rights internationally – will take these violations seriously and work with due diligence to comply with their human rights commitments as a matter of urgency.

Thank you for reading my comments. I would be grateful if you could please bring these considerations forward to the whole house, given the legally and politically important issues they raise. I attach some further concerns in an appendix.

Appendix A: International law may plausibly confer a right to life on those in the womb

Article 10 of the ICPD says that 'every human being has the inherent right to life', following Article 6 of the ICCPR. It is uncontroversial within medical science that those in the womb are human beings[143] and so it is difficult to see why those in the womb should not be subject to the protections of these provisions.

More explicitly, however, the Convention on the Rights of the Child explicitly states that 'every child has the right to life' (Article 6). In the Preamble, childhood is defined as beginning before birth: 'the child… needs special safeguards and care, including appropriate legal protection, before as well as after birth'. According to the Vienna Convention on the law of treaties, the preamble to a treaty must be used in interpreting the treaty – and hence, it is clear that the Convention on the Rights of the Child confers the right to legal protection on children before birth, even if this is widely disregarded by UN member states.

Appendix B: Other concerns

I share here a few brief further concerns in light of developments since the enactment of the Northern Ireland (Executive Formation) Act. Most notably, of course, the Northern Ireland Assembly has been restored. Given that abortion is a devolved issue, this is extremely significant, especially given how controversial the regulations are.

---

142 See the Northern Ireland Act (1998): http://www.legislation.gov.uk/ukpga/1998/47/section/24

143 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3211703

The regulations go well beyond the requirements of the Act, which is extremely politically provocative given how controversial they are in Northern Ireland. Indeed, even in Great Britain, opinion polling shows that 89% of the population support an explicit ban on sex-selective abortion.[144] Given that pro-life sentiment in Northern Ireland is much stronger, it is likely an even more unanimous consensus exists there. Indeed, recent polling suggests that the overwhelming majority of the population rejects the regulations as proposed.[145] The Committee is already well aware that Northern Ireland's Westminster representation was unanimously against the Act, and that the majority of respondents to various consultations have opposed the regulations. For all these reasons, the regulations are politically inappropriate on such a divisive topic.

I understand the Committee will be reviewing the regulations for abortion provision in Northern Ireland as re-laid on 13th May 2020. I take note of the Committee's previous comments on this issue, wherein the Committee was critical of the way this has been handled by the government, particularly with reference to the undemocratic nature of the consultation. I share these concerns and wish to register further concerns relating to the political provocation and lack of compliance with international law entailed by these regulations.

The Committee is well aware of these inadequacies already, judging by the aforementioned comments. Likewise, the Committee is already aware of the inadequacies with the consultation process. I agree with the Committee's previous comments on this point.

Finally, the NIO claim that abortion 'without conditions' up to 12 weeks is the most appropriate policy way to comply with the legal obligation to allow access to abortions in cases of rape and incest as required by the CEDAW recommendation. I note here only that this, too, is highly doubtful. Indeed, a separate British jurisdiction which is attempting to legalise abortion for precisely the same reasons as in Northern Ireland (that is, on the grounds of rape, incest, and fatal foetal anomaly, due to the comments of CEDAW and the UKSC), and which has *more* political will to legalise abortion in these cases than the Northern Ireland Assembly, has not even gone so far as to legalise abortion without conditions. The Government of Gibraltar have been clear that legalising abortion on mental health grounds up to 12 weeks is entirely sufficient for their compliance with the recommendations of CEDAW and the UKSC.[146] Many countries all over the world allow abortion specifically for 'rape' without legalising abortion on demand,[147] and indeed even in Great Britain, which does not allow abortion on demand, there is no concern that rape victims are unable to access abortion. These regulations go far beyond any legal requirement, on a devolved issue in a jurisdiction whose Assembly is now meeting. To put forward such controversial regulations on a devolved issue and without any need is extremely politically insensitive and threatens devolution settlements on a wider range of issues in future.

144 http://www.comresglobal.com/wp-content/uploads/2017/05/Where-Do-They-Stand-Abortion-Survey-Data-Tables.pdf

145 https://righttolife.org.uk/news/poll-shows-majority-of-sinn-fein-and-dup-voters-reject-cons-governments-proposed-abortion-framework-for-northern-ireland/

146 https://www.gibraltarlaws.gov.gi/legislations/crimes-amendment-act-2019-4693

147 https://reproductiverights.org/worldabortionlaws?indications[299]=299

Lord Morrow

This submission addresses the Abortion (Northern Ireland) (No 2) Regulations 2020. These were laid before Parliament on 13 May[148] in view of the requirements of section 9 of the Northern Ireland (Executive Formation etc) Act 2019 (NIEFA).[149]

I want to draw the attention of the Committee to the legislation on grounds 4 (a) 'that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House' because it introduces a new form of discrimination in Northern Ireland; (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act; and 4 (d) that it may imperfectly achieve its policy objectives because it promotes discrimination. The focus of my submission is on Regulation 7 and Regulation 13.

I am aware the Committee produced a report on the Abortion (Northern Ireland) Regulations 2020 which sought to draw the attention of the House to those Regulations, citing Regulation 7. I would ask that the Committee again draws the attention of the House to the Abortion (Northern Ireland) (No 2) Regulations and would suggest that the grounds for doing so are now stronger on: a) account of responses to statements made since to statements from the NIO and b) account of the very serious problems with Regulation 13 which your previous report did not highlight.

1. Paragraphs 85 and 86 of the CEDAW report require that expanded grounds for legal abortion are made in three cases but with no stipulations on gestation limits. They also explicitly require the repeal of Sections 58 & 59 of the Offences Against the Person Act 1861 (OAPA).

2. The Regulations laid represent a response to the CEDAW requirements which proposes abortion up to birth in cases of disability (Regulation 7) and amending the Criminal Justice Act (Northern Ireland) 1945 (CJA), which is concerned with the protection of those unborn children capable of being born alive (Regulation 13).

3. The Government's consultation response states that amendments to the CJA are '*necessary to enable provision under the framework for later terminations, including in cases of [disability] or where there is a risk to the life of the woman or girl to prevent grave and permanent injury, where it may be argued that the fetus is capable of being born alive*.'[150]

4. This logic is flawed for two reasons. Firstly, Regulation 7 creates a provision that is **incompatible with EU law** because it discriminates on the basis of disability and perpetuates discriminatory attitudes towards persons with disabilities. This is also non-compliant with the CEDAW recommendation itself that provision for abortion must be made "without perpetuating stereotypes towards persons with disabilities."

5. The UNCRPD is incorporated in EU law, and section 6(2)(d) of the Northern Ireland 1998[151] prevents the Assembly passing legislation that is incompatible with EU law. In

148 https://www.legislation.gov.uk/uksi/2020/503/introduction/made

149 http://www.legislation.gov.uk/ukpga/2019/22/section/9

150 Page 37, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875380/FINAL_Government_response_-_Northern_Ireland_abortion_framework.pdf

151 http://www.legislation.gov.uk/ukpga/1998/47/section/6

particular, regulation 7 introduces provisions which may violate the following articles of the UNCRPD:

a. Article 3 highlights the importance of "*Respect for inherent dignity*", "*Non-discrimination*", *"Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity", "Equality of opportunity"*, *Respect for the evolving capacities of children with disabilities*".

b. Articles 4 and 5 outline obligations to "*prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds*"

c. Article 8, sets out obligations to "*combat stereotypes, prejudices…relating to persons with disabilities*".[152]

6. Introducing a provision for abortion solely based on the risk of the foetus having a given characteristic at birth, namely disability, inevitably perpetuates stereotypes, and discriminates against persons with disabilities, contra the stipulations of the UNCRPD. Section 9(9) of the NIEFA says *"Regulations under this section may make any provision that could be made by an Act of the Northern Ireland Assembly*." On the basis that the Assembly could not pass legislation allowing discrimination, the Secretary of State does not have the power to make Regulation 7, as currently drafted.

7. I am aware that in response to questions posed by your Committee recorded in your report on the Abortion (Northern Ireland) (No 2) Regulations, the NIO disagreed with this assessment of the status of the UNCRPD. As your report notes: *"The NIO responded that the instrument is fully compliant with all the conventions but commented that the UNCRPD does not have the status of binding EU law. It is an unincorporated treaty which does not form part of domestic law. On the extent to which the UNCPRD is to be treated as part of EU law by means of the European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009, the European Court of Justice held that the UNCPRD is not "unconditional and sufficiently precise" to have direct effect."* (para 29)

8. I do not accept this argument from the NIO. I would point the Committee to the additional submission made by the Attorney General for Northern Ireland John Larkin QC where he states the following: *"The Grand Chamber of the Court of Justice of the EU regards the UNCRPD as 'an integral part of the European Union legal order'. What the Grand Chamber decided however was that the provisions of the UNCRPD do not have direct effect in European Union law. This is of no relevance to the limitation placed on the competence of the Secretary of State in relation to the making of these regulations. The Secretary of State cannot act inconsistently with EU law in the provision he makes for abortion. The Grand Chamber's view aside, we are sure that the UNCRPD is EU law for the purposes of the competence limitation because it has been specified as an EU Treaty by way of the European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009."*

[152] http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf

9. Moreover this was reflected by the Supreme Court when Lord Kerr said, *"The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is one of the treaties specified as an EU treaty under the EC (Definition of Treaties) (UNCRPD) Order 2009. Section 6(2)(d) of the NIA forbids the Northern Ireland Assembly from making laws contrary to UNCRPD."*[153] As a result, I am of the view my argument remains valid and the NIO have failed to demonstrate Regulation 7 is in fact compatible with the UNCRPD.

10. Secondly, paras 85 and 85 only recommend expanded access to abortion on the basis of disability, **not disability abortion up to birth**. It is worth noting that the CEDAW references the 1945 Act in its text but not the final recommendations in paras 85 and 86, which are engaged by Section 9.[154] These only mention Sections 58 and 59 of the OAPA. This implies that CEDAW saw no requirement for amending Section 25 of the 1945 Act and therefore Regulation 13 is outside the scope of the recommendations; and hence outside the scope of the NIEFA.

11. Given the fact that the Secretary of State does not have the competence to make Regulation 7, when Regulation 13 is read with Regulation 7, the case for concluding that Regulation 13 is similarly flawed since its purpose is to facilitate a discriminatory practice that is not consistent with the remit of the Assembly also becomes apparent.

12. The Secretary of State might argue that Regulation 13 is necessary in the cases where an abortion is necessary to save the life of the mother under Regulations 5 and 6. However, such an amendment to Section 25 is unnecessary since abortion provision in Northern Ireland prior to the NIEFA *already* made provision for later terminations in cases of risk to life or to prevent grave and permanent injury.[155]

13. Regulation 13 also renders abortion law in Northern Ireland far more liberal than abortion law in the rest of the UK by amending the CJA such that a woman may not be prosecuted for self-aborting a very late term pregnancy. This is not the case in England and Wales where a small number of women have been prosecuted for procuring late term abortions. This does not appear to be either a necessary or appropriate use of the powers afforded by the NIEFA.

14. This evening there will be a vote in the Northern Ireland Assembly which may result in the Assembly passing a motion that rejects all or some of the Regulations which I think would be of great political and legal importance and also constitute a very significant development that makes the Regulations inappropriate given that they pertain to a devolved matter, the Assembly is now restored and would have voted to indicate that it does not support them. Obviously the outcome of the vote is unknown but is something the Committee would want to be cognisant of.

---

153 [2018] UKSC 27, Lord Kerr at paragraph 331 https://www.supremecourt.uk/cases/docs/uksc-2017-0131-judgment.pdf

154 https://undocs.org/CEDAW/C/OP.8/GBR/1, footnote 2, paragraphs 8 and 12

155 See the comments by the judge in R v Bourne on page 36 and the conditions for an abortion prior to 22 October 2019 on page 5, Guidance for Health and Social Care Professionals on Termination of Pregnancy in Northern Ireland,", March 2016 https://www.health-ni.gov.uk/sites/default/files/publications/dhssps/guidance-termination-pregnancy.pdf

Carol Nolan TD and Senator Rónán Mullen

We the undersigned are parliamentarians in the Republic of Ireland. We are writing to express grave concern about a particular and possibly unintended consequence that has emerged following the introduction of the Abortion (Northern Ireland) (No 2) Regulations 2020, which were laid before Parliament on May 13.

The basis on which our concern rests is that aspects of the Abortion (Northern Ireland) (No 2) Regulations 2020 places another jurisdiction, the Republic of Ireland, under pressure, in particular to view the rights of disabled people differently from the able bodied, and for its citizens to act contrary to the UN Convention on the Rights of Persons with Disabilities.

We want to draw Regulations 4 and 7 and 13 to your attention on the basis of your terms of reference:

4 (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

4 (d) that it may imperfectly achieve its policy objectives;

We will set out the central difficulty and then apply it to 4 (a) and 4 (d)

The stated rationale for the decision of the British Government to allow under Regulation 7 that abortion be made available on the basis of any disability, including Down Syndrome and cleft palette, right up to birth, using the same threshold as applies in Great Britain, is that this will remove any incentive for women to travel from Northern Ireland to Great Britain for abortions.

However, the provision of abortion up to birth for any disability within just a short car journey will effectively make abortion on the basis of any disability right up to birth available to women in the Republic.

It is also worth pointing out that the basis for abortion up to 24 weeks in the North in Regulation 4 has basically the same threshold as the 1967 Act and will thus facilitate abortion on demand in the North to 24 weeks.

That again stands in sharp contrast to the arrangements in the South where abortion provision between 13 weeks and viability is made available on the much more restricted basis that there has to be a serious threat to the health of the mother. Again, this will have a significant impact on the perception of unborn disabled children within the Republic of Ireland.

The above seems very relevant to your terms of reference that it is 'politically or legally important or gives rise to issues of public policy likely to be of interest to the House' in that they involve an arrangement that places another jurisdiction under pressure to view the rights of the disabled differently from the able bodied, and for its citizens to act contrary to the UN Convention on the Rights of Persons with Disabilities.

If people from the Republic can start to access abortion for Down Syndrome and cleft palette right up to birth as a result of a short car journey, this will inevitably impact the way in which people from the Republic view disabled people. It is plainly not possible for this to happen without inviting people to view those with disabilities as deserving of less protection than those without.

This is against:

i) The UN Convention on the Rights of Persons with Disabilities. In this regard it is worth considering the obligations under Article 3 which include the principles of "Respect for inherent dignity", "Non-discrimination", "Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity", "Equality of opportunity", Respect for the evolving capacities of children with disabilities"; the general obligations under Article 4; under Article 5 to "prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds" and under Article 8 to "combat stereotypes, prejudices…relating to persons with disabilities". We are aware of the comments made in the initial report the Committee produced in relation to the Abortion (Northern Ireland) Regulations 2020 by the Northern Ireland Office (NIO) with regard to the status of the UNCRPD in the law of the North. The NIO argue the "that the UNCRPD does not have the status of binding EU law" and go on to submit that Article 10 does not "extend protection to those in the womb". We disagree with the legal analysis adopted by the NIO. We would point the Committee to the second submission from the Attorney General for the North where he counters the argument of the NIO and cogently outlines why in fact the UNCRPD does apply in these cases. As he puts it, "The Grand Chamber of the Court of Justice of the EU regards the UNCRPD as 'an integral part of the European Union legal order'. What the Grand Chamber decided however was that the provisions of the UNCRPD do not have direct effect in European Union law. This is of no relevance to the limitation placed on the competence of the Secretary of State in relation to the making of these regulations. The Secretary of State cannot act inconsistently with EU law in the provision he makes for abortion. The Grand Chamber's view aside, we are sure that the UNCRPD is EU law for the purposes of the competence limitation because it has been specified as an EU Treaty by way of the European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009." We believe his legal analysis to be accurate and consequently that this argument stands.

ii) Statements by the relevant treaty monitoring body, the UN Committee on the Rights of Persons with Disabilities which have censured the UK for its discriminatory abortion law and called on it to amend this legislation.

The UK Initial Report on the CRPD noted disability rights organisation's worries with respect Article 10 UNCRPD that "concerns were expressed around the approach to abortion in the UK, where disabled people have suggested a bias towards termination of pregnancies if a child is likely to be disabled". In 2017 the Committee said of the United Kingdom: "The Committee is concerned about perceptions in society that stigmatize persons with disabilities as living a life of less value than that of others and about the termination of pregnancy at any stage on the basis of fetal impairment." The Committee called on that the UK to "amend its abortion law accordingly. Women's rights to reproductive and sexual autonomy should be respected without legalizing selective abortion on the ground of fetal deficiency."

Despite this the British Government is now proposing to extend this discrimination to another part of the UK without sufficient regard for the implications that this will have on

the perception of disabled unborn children in another sovereign jurisdiction, the Republic of Ireland.

It is extraordinary that it should have taken this step against the recommendation of one UN Committee in response to a recommendation from another UN Committee, the CEDAW Committee, especially given that the CEDAW Committee did not call for abortion on the basis of disability to birth.

Instead the CEDAW report recommended, expanding access to abortion on the basis of disability 'without perpetuating stereotype'. However, the Regulations have simply elected to do so on the most permissive basis imaginable and acted as if the crucial words 'without perpetuating stereotypes' do not exist. They consequently engage directly with your terms of reference 4 (d) because the regulations plainly 'imperfectly achieve their policy objectives' of not perpetuating stereotypes, with implications not only for the UK but also the Republic of Ireland, for all the reasons set out above.

We would urge you to draw these concerns from parliamentarians from a neighbouring jurisdiction to the attention of both the House of Commons and the House of Lords.

NI Voiceless

1. I am writing on behalf of NI Voiceless to express our concerns about the Abortion (Northern Ireland) (No.2) Regulations 2020 published on 12th May 2020. NI Voiceless is a non-party-political, cross-community movement of concerned citizens of all religions and none, which formed in 2019 in response to the proposed changes in abortion law in NI to raise awareness of the changes among the public and to facilitate peaceful public protest. Around 20,000 people assembled at Stormont behind our banner in the autumn of 2019 to express their concerns with the undemocratic imposition of these changes on NI from Westminster and the fact that the lives of unborn human individuals were disregarded by them. In this submission, we would like to highlight three issues with these Regulations in relation to the terms of reference of the Committee.
2. **Firstly**, with regards to point 4(f) in the terms of reference of the Committee, there were several flaws in the consultation process adopted around these Regulations. NI Voiceless encouraged individuals to respond to the consultation in the belief that it would be conducted fairly and equitably by a Government Department. Following the publication of the consultation response document, we believe the consultation was deficient for three main reasons.

    a. First, it was inappropriate that the consultation was only open for six weeks, between 4th November and 16th December 2019. This is a complex subject and responding was challenging for individuals who are unused to these kind of policy processes. Six weeks was simply not long enough. In addition, this consultation was conducted during a General Election period, which is not good practice.

    b. Second, the Government's response to the consultation does not take the form expected from similar documents. No rationale is provided for the position adopted in several of the Regulations. For example, in Regulation 11, no explanation is given for the maximum penalty of a level 5 fine for performing abortions outside the regulatory framework. This also applies to the explanatory memorandum provided by the NIO (also relevant to the Committee under its terms of reference). In addition, we would point out that the NIO did not provide a list of all organisations that replied to the consultation, which we understand is the norm. No explanation is given for this lack of transparency. We also believe that the failure to provide details as to how respondents answered each question (rather than a generic number for those who opposed a change to the law on abortion in general) skews the narrative of the document.

    c. Third, certain highly controversial proposals in the final regulations were not consulted on at all. Regulation 13 is a clear example. This Regulation, which functionally legalises self-administered abortions on the part of women beyond the threshold of viability and up to term, is in not required by the underlying statute, Section 9 of the Northern Ireland (Executive Formation etc) Act 2019. How can it be appropriate to bring forward such a consequential legal change

without any consultation with the people of Northern Ireland who are affected by it?

d. Fourth, in responding to submissions made to the committee in response to the earlier version of these regulations, the NIO states that, "where possible, this statutory framework mirrors the Abortion Act 1967 so that provision will be broadly consistent with the abortion services in the rest of the UK".[156]

3. **Secondly**, I would highlight our concern in relation to Regulation 7. We share the deep concerns expressed by disability rights campaigners, such as Heidi Crowter of the *Don't Screen Us Out* campaign, about this Regulation which, when coupled with Regulation 13, allows for abortion up to term on the following grounds: "if the child were born, it would suffer from such physical or mental impairment as to be seriously disabled."[157] In our view, this provision is contrary to the UN Convention on the Rights of Persons with Disabilities (UNCRPD), which is binding in EU law, and it is beyond the powers of the Secretary of State to introduce it.

4. Within the explanatory memorandum and the consultation response document, there is no evidence that the NIO considered the impact of the provisions of the UNCRPD with regard to this provision. Article 10 of the UNCRPD states that, "States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others."[158] This provision applies to all human beings, not merely those who are universally recognised as 'persons'. Regulation 7 allows for abortion of unborn human beings who will be "seriously disabled" purely on the basis of their disability. It is an indisputable scientific fact that each foetus is a genetically distinct, living human being. This is, therefore, direct discrimination against a category of human beings. We note, too, that the Attorney General for Northern Ireland, in his letter of 29 April 2020 to Lord Hodgson, asserts that the UNCRPD provisions are legally binding in the United Kingdom and that they protect unborn individuals against disability discrimination, implying that the Secretary of State has acted unlawfully in disregarding them.[159]

5. We would also point out that, even within the Government's policy objectives, Regulation 7 is hugely problematic. The CEDAW report, which served as the basis for Section 9 of the Northern Ireland (Executive Formation etc) Act, states that the regulations must, "avoid perpetuating stereotypes towards persons with disabilities". Yet, this is exactly what Regulation 7 does, by treating them as a separate category who can be aborted purely on the basis of their disability. Despite awareness of concerns raised about the earlier version of these Regulations, the NIO still has not engaged in any serious way with this point.

6. **Finally,** we are concerned with Regulation 12 in relation to point 2(f) of the terms of reference of the Committee. Within NI Voiceless, we have individuals and supporters

156 https://committees.parliament.uk/publications/744/documents/7454/default/ , para 48, page 11.
157 https://www.legislation.gov.uk/uksi/2020/345/regulation/7/made
158 https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-10-right-to-life.html
159 https://committees.parliament.uk/publications/744/documents/7758/default/

who are or have been medical professionals, including me. We believe medical professionals have been left in an undesirable position and the outworking of regulation 12 may have a deleterious impact on their careers.

We note that the British Medical Association, in its submission to the All-Party Parliamentary Pro-Life Group's 2016 Report on *Freedom of Conscience in Abortion Provision,* acknowledged evidence of employment discrimination for those who avail of conscientious objection provisions.[160] The report also documented experiences of healthcare professionals who had provided evidence that they would not be able to progress in their careers (e.g., to becoming a consultant in Obstetrics and Gynaecology) if they objected to abortions and others who reported direct discrimination.[161] Under 6(2)(e) of the Northern Ireland Act 1998, no law passed by the Northern Ireland Assembly can discriminate against individuals on the basis of their religious or political belief. As section 9(9) of the Northern Ireland (Executive Formation etc) Act only allows the Secretary of State to make regulations which could be legislated for by the Northern Ireland Assembly, the importance of this provision should have been considered. We again see no evidence in the explanatory memorandum or the consultation response document that this has been considered by the NIO. In our view, it can hardly be in accordance with the policy objective of these regulations to contravene the Northern Ireland Act 1998. Consequently, this flaw should be drawn to the attention of the House.

160 All Party Parliamentary Pro-Life Group, A Report into Freedom of Conscience in Abortion Provision, July 2016, page 1, http://www.conscienceinquiry.uk/wp-content/uploads/2016/12/Pro-Life-APPG-Freedom-of-Conscience-in-Abortion-Provision.pdf, para 77, page 26

161 *Ibid*, para 68, pages 23-24 and paras 75-76, page 26

Baroness O'Loan

1. I write to the Committee to outline my concerns about Regulation 12 (Conscientious objection to participation in treatment authorised by these Regulations) of the Abortion (Northern Ireland) Regulations (No 2) 2020 tabled by the Minister of State fro Northern Ireland under the Northern Ireland (Executive Formation etc) Act 2019. I do so with respect to 4 a) and 4 d) of your Committee's terms of reference. I would ask you to draw the attention of the House to these Regulations. **In doing so I repeat some points that I made in my submission in relation to the Abortion (Northern Ireland) Regulations (No 1) 2020 but also make some new points.**

2. Regulation 12 is **politically or legally important** because it sets out to provide legal protection for medical practitioners who for sincere and real reasons conscientiously object to abortion. This is an important legal principle which needs to be respected. I welcome the Committee's recognition of the difficulties with the Government's implementation of the right to conscience in the previous regulations,[162] and the same issues arise in these second set of regulations

3. As I said in my last submission, Regulation 12 s is, in my judgement, beyond the powers of the Secretary of State. Section 9(9) of the Northern Ireland (Executive Formation etc) Act 2019, the statute which granted the regulatory powers to the Secretary of State, outlines the following: "*Regulations under this section may make any provision that could be made by an Act of the Northern Ireland Assembly*." The Secretary of State must therefore act in accordance with the limitations placed on legislation which can be passed by the Northern Ireland Assembly. The Regulations, therefore, must not contravene the European Convention on Human Rights (ECHR) or the Northern Ireland Act 1998.

4. Regulation 12 is not consistent with the Northern Ireland Act and the ECHR. Firstly, section 6(1) of the Northern Ireland Act 1998 sets out that "A provision of an Act is not law if it is outside the legislative competence of the Assembly."[163] Section 6(2)(e) then states that "A provision is outside that competence if any of the following paragraphs apply— (e) it discriminates against any person or class of person on the ground of religious belief or political opinion." Regulation 12 discriminates against individuals on the grounds of their religious belief or political opinion. Secondly, Regulation 12 also needs to be considered in the context of Article 9 of the ECHR.[164] Article 9 of the ECHR provides for Freedom of Thought, Conscience and Religion. Regulation 12, as drafted, fails to give adequate protection to the rights of individuals to freedom of thought, conscience and religion.

5. Regulation 12 has to be considered also in the context of the narrow interpretation, in the context of the Abortion At 1967 which does not apply in Northern Ireland, of the UK Supreme Court in the case of Doogan,[165] of the term "participate", as it puts individuals whose actions fall outside that understanding of "participate" who have a

---

162 https://committees.parliament.uk/publications/744/documents/4395/default/ paragraphs 20-26

163 http://www.legislation.gov.uk/ukpga/1998/47/section/6

164 See https://www.echr.coe.int/Documents/Convention_ENG.pdf

165 Greater Glasgow Health Board (Appellant) v Doogan and another (Respondents) (Scotland) [2014] UKSC 68

sincere conscientious objection to abortion in an invidious position. They can be required, against their conscience, to take actions – ancillary, administrative or managerial tasks - which they believe are facilitating abortion. The practical effect of this is that it 'discriminates against people on grounds of their religious belief or political opinion.'

6. **I strongly disagree with the claim from the Northern Ireland Office in your report on the Abortion (Northern Ireland) Regulations 2020 that there is not direct discrimination against those who work in an administrative, ancillary or managerial capacity who hold a conscientious objection to abortion[166]. I agree with the Attorney General for Northern Ireland's position as set out in his further correspondence to your Committee of 29 April.[167] Let us take as an example a senior nurse who is charged with managing the nursing rota in a hospital. This would fall within the category of administrative, ancillary or managerial capacity. Previously, no issue would have arisen under the law as it stood in Northern Ireland. However, with this legislative change she/he is now required to roster nursing staff to assist in the performance of abortion. If this nurse reasonably outlined her/his conscientious objection to abortion but was refused reasonable accommodation, they would have no choice but to resign post, transfer to another job or face sanctions including potentially being removed from their job. It is manifestly obvious she/he is being directly discriminated against due to her/his moral belief that abortion is wrong. Simply asserting this is 'indirect discrimination' for the purposes of section 6(2)(e) of the Northern Ireland Act 1998 does not make it fact.**

7. **I also wish to draw the Committee's attention to the fact that, according to the Attorney General's letter of 29 April, the Northern Ireland Office have misunderstood the parameters of the Doogan judgment. This judgment did not consider the application of convention rights to conscientious objection generally. The Committee should press the Northern Ireland Office to outline whether they have more widely considered the impact of the European Convention on Human Rights on rights of conscientious objection per se; not simply the statutory rights under the Abortion Act 1967.**

8. The protection provided by Regulation 12(3) is limited by the fact that unlike in regulation 5 there is no requirement that abortion is required as a matter of "immediate necessity." This has the effect of leading to a wider range of abortions not being subject to conscientious objection than should be the case (ie abortions carried out under Regulations 6 which are not immediately necessary.).

9. Finally, I raise questions about whether Regulation 12 "may imperfectly achieve its policy objectives" since it could lead to staffing difficulties in parts of the NHS due to the lack of effective protection of conscientious objection for medical professionals and other staff. In November 2019, the think tank Pivotal said, "Staffing problems are growing at many levels of clinical care, such as GP surgeries and in various nursing

166 https://committees.parliament.uk/publications/744/documents/4395/default/ paragraphs 22-23.
167 https://committees.parliament.uk/publications/991/documents/7764/default/ page 3

sectors".[168] There is a real danger of causing further unnecessary harm to the health service by causing medical professionals to feel they cannot practice medicine in certain areas due to their sincere moral beliefs. I note the comments made by the Northern Ireland Office in response to the question of whether there would be enough staff to perform abortions in Northern Ireland: "*We have been engaging with the Department of Health in Northern Ireland and medical practitioners, including royal medical colleges, for many months, including during the period of public consultation, and understand that there would be sufficient staffing levels across doctors, nurses and midwives, to be able to commission and provide services, consistent with the Regulations*." (para 26). The Northern Ireland Office has not put forward evidence that to extend conscience rights would lead to any disruption in the provision of abortion in Northern Ireland. If such evidence cannot be adduced, then the logical conclusion must be that Regulation 12 is not proportionate or necessary.

[168] Moving forward – putting Northern Ireland on track for the future, Pivotal, November 2019, page 9, https://www.pivotalppf.org/cmsfiles/Publications/Moving-forward-report--printable-version.pdf

Presbyterian Church in Ireland

1. The Presbyterian Church in Ireland (PCI) has over 217,000 members belonging to 535 congregations across 19 Presbyteries throughout Ireland, north and south. Included in our membership are many medical and health professionals who are directly affected by the introduction of this new legal framework, along with families who have personal experience of the range of issues covered by the Abortion (Northern Ireland) Regulations 2020. The Council for Public Affairs is authorised by the General Assembly of the Presbyterian Church in Ireland to speak on behalf of PCI on matters of public policy, and following consultation with members made a submission to the Northern Ireland Office on its proposals for a new abortion framework for Northern Ireland.

2. The Council would like to take this opportunity to contribute to the House of Lords Secondary Legislation Scrutiny Committee consideration of these regulations and suggests that the special attention of the House should be drawn to the following:

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House

Abortion is a sensitive matter throughout the United Kingdom, but no more so than in Northern Ireland to which the Abortion Act 1967 has not been extended. The differences in the provision of abortion services throughout the jurisdiction have been a matter of discussion and debate across the Houses of Parliament for a number of years. This new legislation introduced to radically alter the framework for abortion services in Northern Ireland is a matter of public policy likely to be of interest to the House in that its provisions exceed those already available elsewhere in the UK. For example, section 3 of the regulations introduces abortion unconditionally to Northern Ireland where "the pregnancy has not exceeded its 12th week". This goes beyond any similar provision in the rest of the United Kingdom and could reasonably be considered an unusual or unexpected use of powers. This was recognised in this Committee's report[169] on the original regulations which were laid on 25th March 2020.

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act

The parent Act of this legislation, the Northern Ireland (Executive Formation etc) Act 2019 became law in October 2019. In the succeeding 6 months the impact of the COVID-19 global pandemic has dramatically changed every day life and work not only across the UK, but across the entire world. These regulations impose significant changes to the health and social care system in Northern Ireland which were already over-stretched and under-resourced. In these "unprecedented" times it would seem

169 https://publications.parliament.uk/pa/ld5801/ldselect/ldsecleg/49/4905.htm (paragraph 9)

reasonable to delay the introduction of this legislation which will placed an unnecessary added burden to the health service.

Secondly the parent Act was passed during a time when the devolved institutions remained in abeyance. The Northern Ireland Executive was restored in mid-January 2020, with the Northern Ireland Assembly also back up and running to provide transparency and legislative scrutiny. These regulations relate to matters that are ordinarily devolved to the Northern Ireland institutions and now that these are restored they should be given the opportunity to legislate.

This Committee's report on the original regulations recognises the questions raised about the implementation of the Northern Ireland (Executive Formation etc) Act 2019 and, although beyond its remit, suggests that these valid issues to raise with the Minister[170]

(c) *that it may imperfectly achieve its policy objectives*

The regulations are designed to implement the recommendations arising from the Report on 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 published in March 2018 (CEDAW).

The legislation as introduced implements a maximalist interpretation of this report whereas a more minimalist approach would more accurately reflect the particular circumstances of Northern Ireland on these issues.

Section 7 introduces abortion on the ground of severe fetal impairment or fatal fetal abnormality. This does not achieve the policy objective as required by the CEDAW that stereotypes towards persons with disabilities should not be perpetuated.

(d) *that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation*

The Explanatory Note accompanying the regulations states that "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".

In practice no regulatory impact assessment has been undertaken for this legislation, including estimates of how the service might be used and the associated financial cost. Undoubtedly some of this work has been undertaken but there has been no opportunity for public and transparent scrutiny. Therefore it is impossible to gain a clear understanding about the policy's intended implementation.

(e) *that there appears to be inadequacies in the consultation process which relates to the instrument*

[170] https://publications.parliament.uk/pa/ld5801/ldselect/ldsecleg/49/4905.htm (paragraphs 40 - 42)

The Northern Ireland Office itself has noted that nearly 80% of those responding to the consultation did not support the proposals. The Northern Ireland Assembly was restored during the period of the development of this legislation, and this was not considered in terms of delaying its introduction, or indeed formally receiving the views of the locally elected institutions. In its original report the Committee also acknowledges the significant issues regarding the consultation, describing the period for consultation as "too short for so sensitive a topic", and highlight that it did not conform with best practice[171]

3. The Council would like to thank the Committee for taking its comments into consideration when it scrutinised the original regulations tabled on 25th March 2020. That the Secretary of State had to withdraw those for technical reasons and re-table new regulations highlights the haste with which this legislation has been prepared and introduced.

171 https://publications.parliament.uk/pa/ld5801/ldselect/ldsecleg/49/4905.htm (paragraphs 40 - 42)

Right to Life

As new regulations[172] were laid by the Government in accordance with the Northern Ireland (Executive Formation etc.) Act (2019)[173] on 13 May 2020, and we understand the Committee will review the (updated) regulations, we write to underscore our previous arguments as well as, more importantly, highlight developments that have arisen since the review of the original regulations. First, however, we would like to thank the Committee for its previous report on the regulations, which outlines a number of issues that we agree with.

As the regulations have not changed materially[174], our previous arguments regarding the Abortion (Northern Ireland) Regulations remain unchanged. I will summarise them here (as I understand the Committee will still consider our previous points), to allow for new points to be raised. I request that you bring these issues to the attention of the whole House under the following Terms of Reference: *"(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;" "(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;" "(d) that it may imperfectly achieve its policy objectives,"* and that "*(f) there appear to be inadequacies in the consultation process which relates to the instrument."* In summary:

1. The Instrument goes beyond the limited provisions for expanded abortion services that were outlined in the Northern Ireland (Executive Formation etc.) Act 2019[175]; especially as abortion is a devolved issue, this has significant political and legal implications.
2. Specifically regulations 7, 12 and 13 appear to be explicitly outside the scope of the law, thus the Secretary of State appears to have exceeded his powers in making these regulations.
3. In review of other submissions to the SLSC, we would like to expand on the lack of clarity regarding protections for women against forced abortion, a point raised by Fiona Bruce MP.[176]

Pertaining to point 1, as abortion is a devolved power[177] (and the Government has repeatedly noted that in light of the Devolution Settlement they wanted to honour devolution as much as possible),[178] it seems unusual that the Government would legislate on

---

172 See: https://www.legislation.gov.uk/uksi/2020/503/made. We understand the regulations were only re-made due to technical drafting errors highlighted by the Joint Committee on Statutory Instruments; see: https://publications.parliament.uk/pa/jt5801/jtselect/jtstatin/58/5803.htm#_idTextAnchor012.

173 See: http://www.legislation.gov.uk/ukpga/2019/22/section/9.

174 See: https://www.legislation.gov.uk/uksi/2020/503/made. As noted the only changes are technical. Further, "Regulation 16 makes transitional provision to ensure that the revoking and replacement of the Abortion (Northern Ireland) Regulations 2020 does not have any practical consequences."

175 See: http://www.legislation.gov.uk/ukpga/2019/22/section/9

176 See: https://committees.parliament.uk/publications/744/documents/7454/default/.

177 See: https://www.gov.uk/guidance/devolution-settlement-northern-ireland#understanding-what-has-been-devolved. Note: Both health and justice are devolved to the Northern Irish Assembly which results in abortion being fully devolved.

178 For example, before becoming Prime Minister, The Rt. Hon. Boris Johnson MP argued, *"To risk sounding like a cracked record, I hope the government of Northern Ireland can be resumed as soon as possible so this issue [abortion] can be decided in the forum where it properly belongs, in other words at Stormont."* See: https://www.independent.co.uk/news/uk/politics/northern-ireland-abortion-ban- boris-johnson-same-sex-marriage-jeremy-hunt-tory-leadership-a8984866.html.

abortion at all, even though the 2019 Act was passed when Stormont was not sitting. With the restoration of Stormont, to best honour devolution, the UK Government should have laid regulations that would do only what the very limited requirements of the law set out (though the best thing would have been to hand the matter back to Stormont entirely).

Further, to point 2, notably Northern Ireland Attorney General John Larkin outlined that it is his view "regulations 7, 12 and 13 are ultra vires the powers afforded to the Secretary of State by sections 9 and 11 of the Northern Ireland (Executive Formation etc.) Act 2019, and so are politically and legally important."[179] We agree; indeed, the Northern Ireland (Executive Formation etc.) Act 2019 states that the Secretary of State can only enact regulations that "could be made by an Act of the Northern Ireland Assembly",[180] which itself is limited by the Northern Ireland Act 1998, section 6 (2). This section says they cannot pass any law that would violate "any of the Convention rights", nor can they contradict EU law.[181]

It is thus of political and legal importance that the UK Government chose to impose regulations which appear to do so.[182] Specifically, we believe this pertains to regulation 7, as we believe it is in clear violation of The United Nations Convention on the Rights of Persons with Disabilities, Article 10[183]. Of note, we believe the Northern Ireland Office's (NIO) comment on this matter, *"In relation to Article 10 of the CRPD, we do not agree that the provision extends protection to those in the womb. Article 10 of the CRPD, in our view, does no more than restate Article 2 to the European Convention on Human Rights (ECHR). The unborn do not enjoy rights under the Convention. . . If Article 10 is to be read as suggested, then it would seem to suggest that abortion would never be lawful",*[184] to be insufficient.

The Northern Ireland Attorney General's response on this was quite apt. He quotes Supreme Court Justices who state, *"in the application brought by the Northern Ireland Human Right's Commission"*, that *". . . as Horner J pointed out,* ***UNCRPD is based on the premise that if abortion is permissible, there should be no discrimination on the basis that the foetus, because of a defect, will result in a child being born with a physical or mental disability'****."*[185] This being the case, we would posit: If there is even a question of whether or not there is discrimination, would we not want to err on the side of avoiding it? In addition, if there is a question, we hope that is enough to merit drawing these regulations to the special attention of the House.

Also of note: Article 10 states, "States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others." The NIO alluded to the idea that an interpretation reading the Act to provide protection to those in the womb would mean abortion is never permissible. We would counter to say that if a protection was provided to

179 See: https://committees.parliament.uk/publications/744/documents/4395/default/

180 See: http://www.legislation.gov.uk/ukpga/2019/22/section/9

181 See: http://www.legislation.gov.uk/ukpga/1998/47/section/6

182 Furthermore, the Government was only required to allow for abortion in accordance with "recommendations in paragraphs 85 and 86 of the CEDAW report," http://www.legislation.gov.uk/ukpga/2019/22/section/9

183 See: https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx

184 See: https://committees.parliament.uk/publications/744/documents/7454/default/.

185 See https://committees.parliament.uk/publications/744/documents/7758/default/

unborn children in the womb *from conception,* who do not have disabilities, but those with disabilities could be aborted based solely on that reason, then yes - a protection should be provided to unborn children with disabilities from conception as well. However, as (sadly in our view) said protection for children in the womb does not begin until 24 weeks (barring a grave risk to the mother's health), then at the least, the same protections should apply to children at 24 weeks, with or without disabilities, to prevent discrimination.

On the matter of the 24-week limit, it is notable that the NIO itself placed a gestational limit on abortion for the unborn at that point of viability. While they noted in part it was to keep Northern Ireland in line with England and Wales (to help prevent travel back and forth between the isles for abortion purposes based on differing gestational limits), they also acknowledged that "the standard medical threshold of viability of the fetus . . . is recognised as 24 weeks"[186] (indeed, most acknowledge the point of viability as 22-24 weeks[187]). (Also we believe it would cause public outrage if abortion were allowed up to birth for any reason.) In sum, it clearly discriminates against those with disabilities to allow abortion in cases where an unborn child is diagnosed with a disability, but not if said child, of the same gestation, is non-disabled.

While again we understand in part this was done to mirror the law in the UK, we would like to reiterate that abortion is devolved, and thus Northern Ireland should be allowed to decide this for themselves. Furthermore, we and others believe the UK should change its law (to bring it up to date with the Disability Discrimination Act 1995, as well as the Equalities Act 2010). On that point, notably, in the time between the regulations being submitted and now, Fiona Bruce MP along with a cross-party group of MPs have taken the first steps in addressing this disability discrimination inherent in English and Welsh law; they are bringing forward legislation to clarify that a diagnosis of cleft lip, cleft palate and clubfoot would not be permissible as a primary grounds for abortion.[188] Furthermore of note, the UNCRPD (Committee) suggested the current law in England and Wales should change, stating *"The Committee recommends that the State party amend its abortion law accordingly. Women's rights to reproductive and sexual autonomy should be respected without legalizing selective abortion on the ground of fetal deficiency."*[189]

Turning to point 3, we note that Fiona Bruce MP has highlighted concerns around coercive abortion which we believe need to be addressed and are of political and legal importance. In particular, as she wrote, "*The Government has previously indicated they believe the United Kingdom as a whole is compliant with this aspect of the convention* [The Istanbul Convention].

---

186 See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875380/FINAL_Government_response_-_Northern_Ireland_abortion_framework.pdf

187 It is notable that in October 2019, the British Association of Perinatal Medicine Issued guidance on providing care to infants born alive, including from 22 weeks. See: https://www.bbc.co.uk/news/health-50144741 andhttps://hubble-live-assets.s3.amazonaws.com/bapm/attachment/file/182/Extreme_Preterm_28-11-19_FINAL.pdf.

188 See: https://www.thesun.co.uk/news/11696388/laws-pregnant-women-abortions-minor-disabilities/

189 See: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhspCUnZhK1jU66fLQJyHIkqMIT3RDaLiqzhH8tVNxhro6S657eVNwuqlzu0xvsQUehREyYEQD%2bldQaLP31QDpRcmG35KYFtgGyAN%2baB7cyky7

However, I am of the view this assertion is highly questionable in light of the repeal of section 58 of the Offences Against the Persons Act 1861 (OAPA) in Northern Ireland. The reasons for this are set out in the expert legal opinion of Ian Wise QC who argues that sections 23 and 24 of the OAPA do not make up the shortfall in the provision that was in place under sections 58 and 59 of the OAPA because these alternative sections fail to address the situation if a person intended to harm only the fetus and not the mother herself. . .The relevant section of Mr Wise's opinion states the following: ' . .. I am of the opinion that there are circumstances where neither section 24 of the 1861 Act nor section 25 of the 1945 Act outlaw nonconsensual or coercive abortions.' *This has implications for cases of physical or psychological coercion and in cases where a partner secretly inserts abortifacients into the food of a pregnant woman where it might not be possible to prosecute the partner if it was deemed that no harm had occurred to the women."*[190] While regulation 11 does state "A person who, by any means, intentionally terminates or procures the termination of the pregnancy of a woman otherwise than in accordance with regulations 3 to 8 of these Regulations commits an offence",[191] we posit that it is not clear if this provision would apply, or if sections 23 and 24 of the OAPA would apply in certain cases; and of note, the penalties are quite different. Given that some women may experience extreme trauma if they were forced into an abortion via being slipped an abortifacient, we believe how this crime would be prosecuted needs to be clarified.

Furthermore, since the parent Act, as formerly noted, Stormont has been restored, and yet another month has passed since the restoration of Stormont, allowing Peers and MPs who take their seat in Westminster to voice further dismay with these regulations (which they have done[192])); showing clearly that these regulations are politically important. Yet, the Government chose to only address technical issues in their re-making of said regulations. Indeed, the lack of engagement from the Government on this politically vital matter, after many Peers and MPs tried to engage on this topic, is notable, given the Government's staunch commitment to devolution, and unusual given Stormont was restored in January of this year. We believe this is "*likely to be of interest to the House,"* to quote the committee's terms of reference.

Finally and related to the above, we believe it is also notable that recently, an individual with Down's Syndrome, Heidi Crowter (who herself is a thriving young woman) is bringing a legal case forward, along with a mother who has a child with Down's Syndrome, to challenge the law on disability abortion in England and Wales. She also wrote to Northern Ireland officials, requesting they do not allow these new regulations to be passed as they are "both hurtful and offensive. My life has as much value as anyone else's. . ."[193] This is a new, changed circumstance since the passing of the parent Act, and as such, we believe it is worth bringing it to the attention of the House, based on the Committees terms of reference (4)(a), as it is something of political and legal interest.

---

190 See: https://committees.parliament.uk/publications/744/documents/4395/default/

191 See: https://www.legislation.gov.uk/uksi/2020/503/made

192 See: https://committees.parliament.uk/publications/744/documents/4395/default/

193 See: https://www.lifenews.com/2020/05/06/woman-with-down-syndrome-slams-abortions-on-babies-who-have-it-our-lives-have-value/ and https://aleteia.org/2020/04/17/this-young-woman-with-down-syndrome-wants-to-change-uk-laws-on-abortion-of-children-with-disabilities/

We do recognise the committee is now being asked to decide on different interpretations of the law, but hope, in summary, the above shows enough evidence to bring this matter to the attention of the House. Thank you for your consideration.