

*Further information from the NIO*

### **1. What is a "direction" from the SofS; how is it issued? What form does it take?**

A “direction” is a document which sets out the actions that the relevant person is directed to take. The direction will be given to the recipient under cover of a letter from the Secretary of State for Northern Ireland. As set out in the Regulations, the direction will also be published and laid before Parliament.

We envisage that the direction will look quite similar to a statutory instrument - though format wise, attached to a letter. As an example, here is a direction given by the NI Department of Health under section 6(1) of the Health and Social Care (Reform) Act 2009: The Primary Medical Services (Clinical Priorities) Directions (Northern Ireland) 2018.

### **2. What happens if the NI authorities ignore that too either collectively or individually? What sanctions are the available to the SofS if they do?**

The effect of the Regulations is that the person directed must take the action they are directed to take. A failure to do so could be challenged by way of an application for judicial review.

### **3. How does a "direction" square with the freedom of conscience provisions in reg 12 of the original regulations?**

Regulation 12 of the Abortion (Northern Ireland) (No. 2) Regulations 2020 does not interact with the Abortion (Northern Ireland) Regulations 2021. The conscientious objection protection in the 2020 Regulations applies to medical professionals and others in the actual delivery of abortion services where they can opt-out of participation in treatment for abortion to which they have a conscientious objection. This protection does not relate to the Department of Health and relevant health bodies in terms of commissioning abortion services as that does not amount to ‘participation in treatment’.

As the Explanatory Memorandum to the 2020 Regulations notes, in terms of the scope of ‘participation in treatment’ to be able to avail of the protection:

The Supreme Court has held that the extent of conscientious objection is restricted to performing the tasks involved in the whole course of treatment bringing about the termination of the pregnancy, beginning with the administration of the drugs designed to induce labour and normally ending with the ending of the pregnancy by delivery of the fetus, placenta and membrane. People carrying out the host of ancillary, administrative and managerial tasks that might be associated with those acts do not have the same right to conscientious objection.

This will be an important matter for the Northern Ireland Department of Health to address in any guidance it produces and/or professional guidance it adopts on these matters.

The Abortion (Northern Ireland) Regulations 2021 would not allow a direction to be given requiring a particular person to participate in treatment leading to the termination of a pregnancy.

**4. You have curtailed the usual procedure to bring this SI into effect on the anniversary of the original (revoked) regs which implemented NIEF Act sec 9(6)- what is the reason for this?**

31 March 2021 was chosen as the commencement date for the Regulations as this is exactly a year later from the original Abortion (Northern Ireland) Regulations 2020 coming into force. This was a policy choice. While there may be some inevitable delay by the Department of Health in Northern Ireland in commissioning abortion services, given the unforeseen pressures of responding to the Covid pandemic, progress cannot continue to stall. As it remains clear that the Department of Health will not move forward to make positive progress on this matter, we have had to take this action.

As the Explanatory Memorandum notes, as the instrument does not impose duties on people that are significantly more onerous than before under the 2020 Regulations, or require them to adopt different patterns of behaviour, so commencement less than 21 days after making does not give rise to the usual concern about whether those affected have a reasonable chance to adapt their behaviour.

**5. Can you explain how the SofS still has a statutory obligation to implement CEDAW under the NIEF Act now that Stormont is back in action?**

Section 9(1) of the Northern Ireland (Executive Formation etc) Act 2019 ('NIEF Act') imposes on the Secretary of State a duty to ensure that the recommendations in the Committee on the Elimination of Discrimination Against Women (CEDAW) Report, Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW Report') are implemented in respect of Northern Ireland. The NIEF Act was passed when there was no Executive in Northern Ireland. This position is reflected in the commencement provision in section 13: section 9 only came into force because no Executive was formed before 21 October 2019.

The NIEF Act does not provide, however, that section 9 ceased to have effect when an Executive was formed. The statutory duty is unchanged. This reflects the overarching

constitutional position that Parliament remains sovereign and may legislate in respect of transferred (i.e. devolved) matters in Northern Ireland if it chooses.

**6. A BBC article states "The DUP, which opposed the changes to the abortion laws by Westminster, has proposed a piece of legislation at Stormont seeking to restrict abortions in cases of non-fatal disabilities. It passed its second reading last week with the support of a number of parties." What would be the position if that legislation is passed - which law would take precedence or would it be for the courts to decide?**

The Severe Fetal Impairment Abortion (Amendment) Bill ('SFI Bill') is currently before the Northern Ireland Assembly. Were that Bill to be passed and given Royal Assent it would not conflict with the Abortion (Northern Ireland) Regulations 2021.

However, the SFI Bill seeks to amend Regulation 7 of the Abortion (Northern Ireland) (Amendment) (No. 2) Regulations 2020 to remove access to abortions in cases of 'severe fetal impairment', but retains access to abortions in cases of fatal fetal abnormalities. This is contrary to what the CEDAW

recommendations require. The Secretary of State has an ongoing obligation to ensure the implementation of the recommendations in the CEDAW Report in Northern Ireland under section 9 of the NIEF Act. We are continuing to monitor progress on the Bill.

**7. A BBC news item said The Northern Ireland Human Rights Commission is challenging the UK government, the Northern Ireland Executive and NI's Department of Health for delaying the commissioning of all services. The case is due to be heard by Belfast High Court at the end of May. Can you give me any more details about the basics of the case?**

The Northern Ireland Human Rights Commission (NIHRC) are challenging the alleged failure of the Secretary of State to comply with section 9(1) of the NIEF Act and ensure that the CEDAW recommendations are implemented in Northern Ireland. The recommendations include that women are provided with access to high quality abortion and post-abortion care in all public health facilities as well as counselling and information on abortion.

The NIHRC are asking the court to make a declaration that the Secretary of State has acted unlawfully and a mandatory order requiring the Secretary of State to ensure that the recommendations are implemented, whether through the making of regulations or otherwise.

The NIHRC are also challenging the failure of the Northern Ireland Executive Committee and the Minister of Health's failure to agree and commission and fund abortion and post-abortion care. That failure is alleged to be in breach of Article 8 of the ECHR.

**8. What is the significance of "It is not sustainable for medical professionals to take forward service provision without any formal commissioning, support, relevant medical guidance, and funding?"**

Section 9 of the NIEF Act requires the implementation of the recommendations in the CEDAW Report in Northern Ireland. These recommendations cover a range of matters with respect to commissioning of abortion services:

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

- Adopt evidence-based protocols for healthcare professionals on providing legal abortions particularly on the grounds of physical and mental health; and ensure continuous training on these protocols.

- Ensure accessibility and affordability of sexual and reproductive health services and products, including on safe and modern contraception,

including oral and emergency, long term or permanent and adopt a protocol to facilitate access at pharmacies, clinics and hospitals.

- Provide non-biased, scientifically sound and rights-based counselling and information on sexual and reproductive health services, including on all methods of contraception and access to abortion.

- Intensify awareness-raising campaigns on sexual and reproductive health rights and services, including on access to modern contraception.

Following the Abortion (Northern Ireland) Regulations 2020 coming into effect on 31 March 2020 (later replaced and revoked by the Abortion (Northern Ireland) (No. 2) Regulations 2020), medical professionals in Northern Ireland commenced some abortion service provision within the scope of the Regulations, across the five Health and Social Care Trusts in Northern Ireland. However, these services have been susceptible to collapse - with both the Northern Trust and South Eastern Trust having to suspend their interim services for periods of time due to resourcing constraints.

The relevant Northern Ireland health bodies, being the Northern Ireland Department of Health, Health and Social Care Board, and the Public Health Agency, have not taken

any action to formally commission these services and support the Trusts and medical professionals directly. This means that there is no treatment for the termination of pregnancy available in all of the circumstances in which a termination may lawfully be carried out under the Abortion (Northern Ireland) (No. 2) Regulations 2020 on a consistent basis across the Trusts; no guidance available for medical professionals; no counselling services funded and supported through the health and social care system; and no provision of information about how to access the abortion services.

It is crucial that abortion services, as a fundamental healthcare service, is delivered and overseen locally by the Department of Health. This ensures that abortion can be delivered in a sustainable way, and become embedded into the health and social care system in Northern Ireland in the long-term.

### **9. What exactly are the authorities not doing?**

As outlined above, the Department of Health in Northern Ireland has not commissioned abortion services nor taken any responsibility for supporting in any way the services that medical professionals are taking forward across the five Health and Social Care Trusts in Northern Ireland.

### **10. Some abortions are happening - on what basis? Individual GPs or clinics? You say about 1100 have happened - are they in particular areas where views are more liberal or more scattered than that?**

Abortions are currently being provided across the five Northern Ireland Health Trusts through sexual and reproductive health clinics. The collection of notification forms under Regulation 10 of the 2020 Regulations is a matter for the Department of Health in Northern Ireland and we do not have a role in the collection or publication of data. However, stakeholders and medical professionals have been engaging with us throughout to provide updates.

The 1,100 figure has been disclosed by the Northern Ireland Minister of Health, Robin Swann MLA, through recent Assembly Questions on the matter. Further questions about the data and service provision on the ground in Northern Ireland would be a matter for the Northern Ireland Minister of Health.

### **11. What is the scale of the residual problem - what sort of numbers of abortions would you expect annually from a population the size of NI? What percentage of that is 1100? You say many women are still having to travel to the UK - any idea how many? And are they for particular reasons eg late terminations of fetuses with problems?**

We cannot make a prediction of this nature given abortion has been criminalised and only available in very limited cases in Northern Ireland, resulting in only 8 abortions being taken forward within the health system in 2018/19, prior to the change in the law. We know that in 2018 1,053 women travelled to England to access services under the Abortion Act 1967, and that in 2019 we saw 1,014 women travelling to England to access services; but this is not the full picture.

We have seen a reduction in the numbers of women or girls having to travel to England over the past 12 months, and while Covid has played a part in this, the change to the law in Northern Ireland and local access has also been key. However, the numbers of women travelling from Northern Ireland to England to access abortion services under the government-funded scheme during 2020 will be published by the Department of Health and Social Care in due course.

**12. Can you give an overview of what is working as it should, and characterise the nature of the problems that remain?**

The nature of the problem that remains is outlined as above in paragraph 8. While the fact that over 1,100 women and girls have been able to access abortion services locally in Northern Ireland since the 2020 Regulations came into effect is welcomed; that is not enough. The full commissioning of services and support and guidance measures are required to be delivered.

That is why the Secretary of State has made the Abortion (Northern Ireland) Regulations 2021: because women and girls are still unable to access high-quality abortion and post-abortion care in Northern Ireland as required by the CEDAW recommendations.

We want to deliver through the Department of Health in Northern Ireland. However, the statutory duty imposed on the Secretary of State by section 9 of the NIEF Act is such that until all of the recommendations in the CEDAW Report are implemented in Northern Ireland, he will not have complied with his statutory duties in full.

*NIO*

*7 April 2021*