

HOUSE OF LORDS

Select Committee on the Constitution

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23rd Report of Session 2019–21

# Abortion (Northern Ireland) Regulations 2021

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### *Committee staff*

The current staff of the committee are Michael Torrance (Clerk), Ava Mayer (Policy Analyst) and Dan Weedon (Committee Assistant). Professor Stephen Tierney and Professor Jeff King are the legal advisers to the Committee.

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# Abortion (Northern Ireland) Regulations 2021

## Introduction

1. The Abortion (Northern Ireland) Regulations 2021<sup>1</sup> (“the 2021 Regulations”) confer power on the Secretary of State to issue a “direction” to require the relevant authorities in Northern Ireland to take action to implement the recommendations in paragraphs 85 and 86 of a UN Report made under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>2</sup> The CEDAW recommendations concern the legalisation of abortion in Northern Ireland.
2. The Committee does not generally report on secondary legislation but does so in this instance because of the constitutional issues arising from the 2021 Regulations. The Committee does not adopt a position on the ethical issues regarding abortion.
3. The Secondary Legislation Scrutiny Committee (SLSC) drew the 2021 Regulations “to the special attention of the House on the ground that they are politically and legally important and give rise to issues of public policy likely to be of interest to the House.”<sup>3</sup>
4. The 2021 Regulations are subject to the ‘made affirmative’ procedure under section 12(3) of the Northern Ireland (Executive Formation etc) Act 2019<sup>4</sup> (“the 2019 Act”). They were made on 22 March 2021 and entered into force on 31 March 2021. They will cease to have effect after 28 days beginning with the day on which they were made unless approved by a resolution of each House of Parliament. This period does not include the Easter recess and the period of prorogation ahead of the State Opening of Parliament.

## Background

5. The Abortion Act 1967, which made abortion legal in Great Britain, did not extend to Northern Ireland.<sup>5</sup> Sections 58 and 59 of the Offences Against the Person Act 1861 made abortion illegal in Northern Ireland<sup>6</sup> until their repeal by the 2019 Act.<sup>7</sup> In 2010, abortion policy, as part of wider policing and justice powers, was devolved to the Northern Ireland Assembly.

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1 The Abortion (Northern Ireland) Regulations 2021 ([SI 2021/365](#))

2 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) 6 March 2018 : [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/GBR/INT\\_CEDAW\\_ITB\\_GBR\\_8637\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/GBR/INT_CEDAW_ITB_GBR_8637_E.pdf) [accessed 22 April 2021]

3 Secondary Legislation Scrutiny Committee, *Drawn to the special attention of the House: Abortion (Northern Ireland) Regulations 2021* (51st Report, Session 2019–21, HL Paper 264), paras 6-32

4 [Northern Ireland \(Executive Formation etc\) Act 2019](#)

5 [Abortion Act 1967](#)

6 Subject to limited exceptions specified in the [Criminal Justice Act \(Northern Ireland\) 1945](#) and in common law—primarily *R v Bourne* [1939] 1 KB 687

7 [Offences Against the Person Act 1861](#)

6. Given the continued suspension of the devolved institutions in 2019,<sup>8</sup> the 2019 Act extended the period for the resumption of the power-sharing Executive.<sup>9</sup> The Bill was amended in the House of Commons to include what became section 9, which imposed a duty on the Secretary of State to implement the CEDAW recommendations. The Committee reported on the Bill in July 2019.<sup>10</sup>
7. The 2019 Act provided that section 9 would enter into force on 22 October 2019 if the Northern Ireland Executive was not established by 21 October 2019. Since the devolved institutions were not restored until January 2020, section 9 duly entered into force on the designated date. Section 9 repealed sections 58 and 59 of the Offences Against the Person Act 1861, introduced a moratorium on abortion-related criminal prosecutions and placed a duty on the Secretary of State to introduce, by regulations no later than 31 March 2021, a new legal framework for abortion in Northern Ireland to implement the CEDAW report recommendations.
8. On 25 March 2020 the Abortion (Northern Ireland) Regulations 2020<sup>11</sup> (“the 2020 Regulations”) were made under sections 9(4) and 11(2) of the 2019 Act and entered into force on 31 March 2020. The 2020 Regulations were approved by both Houses in June 2020.<sup>12</sup>

### Constitutional issues

9. On 2 June 2020, the Northern Ireland Assembly agreed a non-binding motion rejecting the changes to the law made by the 2020 Regulations. Assembly members supporting the motion voiced concern that the views of the Assembly were being over-ridden by Westminster.<sup>13</sup>
10. On 4 June 2020, the Minister for Northern Ireland, Robin Walker MP, confirmed that the Assembly could amend the Regulations in the future, assuming it was re-established, since abortion was a devolved issue, but any amendments would need to comply with the UK’s human rights and convention obligations under international law.<sup>14</sup>
11. In January 2021, the Northern Ireland Human Rights Commission began legal proceedings in the High Court in Northern Ireland against the Secretary of State on the ground that the failure by the Northern Ireland Executive to commission and fund abortion services was a breach of article 8

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8 The devolved institutions, the Northern Ireland Executive and Northern Ireland Assembly, were suspended from January 2017 until January 2020.

9 In that respect the 2019 Act amended the [Northern Ireland \(Executive Formation and Exercise of Functions\) Act 2018](#). See Constitution Committee, *Northern Ireland (Executive Formation and Exercise of Functions) Bill* (15th Report, Session 2017–19, HL Paper 211)

10 Constitution Committee, *Northern Ireland (Executive Formation) Bill* (26th Report, Session 2017–19, HL Paper 404)

11 The Abortion (Northern Ireland) Regulations 2020 ([SI 2020/345](#)) were revoked and replaced by the Abortion (Northern Ireland) (No. 2) Regulations 2020 ([SI 2020/503](#)) to correct drafting errors.

12 HL Deb, 15 June 2020, cols [1975–2005](#), HC Deb, 17 June 2020, cols [921–24](#)

13 Northern Ireland Assembly, Abortion Legislation: Non-fatal Disabilities (Official Report, 2 June 2020): <http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2020/06/02&docID=301413>

14 HC Deb, 4 June 2020, [col 1020](#). Sir Jeffrey Donaldson, of the DUP, who asked the urgent question said that the 2020 Regulations would “fundamentally breach the devolution settlement and cause a constitutional predicament of the Government’s own making.” ([col 1019](#))

(the right to private and family life) of the European Convention of Human Rights (ECHR).<sup>15</sup> This case is due to be heard in late May 2021.

12. Prior to the 2021 Regulations being made, a private member's bill was introduced in the Assembly on 16 February 2021 seeking to remove the ground for abortion in instances of 'severe foetal impairment' by amending the 2020 Regulations ("the Assembly Bill").<sup>16</sup> The Assembly Bill passed its second stage reading on 15 March 2021 and is awaiting its committee stage. The Assembly Bill is arguably contrary to the CEDAW recommendation 85(b)(iii) and could potentially conflict with the Secretary of State's duties under section 9 of the 2019 Act to implement the CEDAW recommendations in full, although there is disagreement about the content of recommendation 85(b)(iii).<sup>17</sup>
13. In a written statement on 23 March 2021 the Government explained that the 2021 Regulations had been made to ensure all the CEDAW recommendations were implemented because "women and girls in Northern Ireland are still unable to access high-quality abortion and post-abortion care in Northern Ireland" and the devolution settlement did not absolve the Government of its responsibilities in that respect.<sup>18</sup> The Government has made it clear that the Secretary of State will continue to engage with the Northern Ireland Executive to see if progress on commissioning abortion services can be made "ahead of any direction" being given by the Secretary of State.<sup>19</sup> The SLSC reports that the Government's position is that, were the Assembly Bill to be passed, it would not conflict with the 2021 Regulations.<sup>20</sup>
14. **The 2021 Regulations raise an important issue concerning devolved competence. On the one hand the Secretary of State cites a statutory duty, arising from section 9 of the 2019 Act, to make the 2020 and 2021 Regulations, alongside a duty to ensure compliance with the UK's obligations under international law. On the other hand, one of the governing parties in the Northern Ireland Executive opposes the Regulations as an unwarranted interference with the devolution arrangements.**
15. Each of these arguments has weight but is also open to question. It is not clear that the UK's international obligations require the literal implementation in law of the CEDAW report's recommendations.<sup>21</sup> The current legal action by the Northern Ireland Human Rights Commission before the High Court in Northern Ireland may determine whether the Northern Ireland Executive is acting unlawfully in the context of the ECHR or other international obligations. The 2019 Act is clear as to the legal obligation on the UK Government. However, the 2019 Act was passed in the context of the devolved institutions in Northern Ireland being suspended. Since the

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15 Northern Ireland Human Rights Commission, 'Commission Takes Legal Action on Lack of Abortion Services in NI' (11 January 2021): <https://www.nihrc.org/news/detail/human-rights-commission-takes-legal-action-on-lack-of-abortion-services-in-ni>

16 Northern Ireland Assembly, *The Severe Fetal Impairment Abortion (Amendment) Bill*, Bill 15/17-22. The Bill is sponsored by Paul Givan, a DUP MLA. Sinn Féin is opposed to the Bill.

17 *Drawn to the special attention of the House: Abortion (Northern Ireland) Regulations 2021*, para 30

18 Written Statement, The Abortion (Northern Ireland) Regulations 2021, 23 March 2021, [HLWS866](#)

19 *Explanatory Memorandum to the Abortion (Northern Ireland) Regulations 2021*, p 4

20 *Drawn to the special attention of the House: Abortion (Northern Ireland) Regulations 2021*, para 30

21 Para 7.7 of the *Explanatory Memorandum to the Abortion (Northern Ireland) Regulations 2021* notes that recommendations 85 and 86 of the CEDAW report are "not binding and do not constitute international obligations."

devolved institutions were restored in January 2020 the issue of who can, or should, legislate on abortion policy becomes more complicated.

16. A further issue arising from the disagreement between the Northern Ireland Executive and the UK Government is the prospect of competing law in this area. A potential conflict could arise between the 2020 Regulations and the Assembly Bill. The Northern Ireland Act 1998 recognises the authority of both the UK Parliament and the Northern Ireland Assembly to legislate for Northern Ireland<sup>22</sup> and makes no provision that legislation passed or made at Westminster pre-empts the Northern Ireland Assembly from legislating on devolved matters.
17. Although the subject matter of the Bill is within the devolved competence of the Assembly, if its provisions are considered to go beyond devolved competence on, for example, ECHR grounds (see section 6(1)(c) of the Northern Ireland Act 1998), it could be subject to legal challenge. Insofar as it is within devolved competence, the Bill would supersede conflicting law previously enacted or made at Westminster.
18. **The prospect of different laws on abortion operating in Northern Ireland would cause substantial legal and political difficulties, and risk undermining the devolution arrangements. We urge the Government and the Northern Ireland Executive to adopt a more constructive approach to resolve this matter.**

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22 Northern Ireland Act 1998, [section 5\(6\)](#)



## APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

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### Members

Baroness Corston  
 Baroness Doocey  
 Baroness Drake  
 Lord Dunlop  
 Lord Faulks  
 Baroness Fookes  
 Lord Hennessy of Nympsfield  
 Lord Hope of Craighead  
 Lord Howarth of Newport  
 Lord Howell of Guildford  
 Lord Sherbourne of Didsbury  
 Baroness Suttie  
 Baroness Taylor of Bolton (Chair)  
 Lord Wallace of Tankerness

### Declarations of interest

Baroness Corston  
*No relevant interests*  
 Baroness Doocey  
*No relevant interests*  
 Baroness Drake  
*No relevant interests*  
 Lord Dunlop  
*No relevant interests*  
 Lord Faulks  
*No relevant interests*  
 Baroness Fookes  
*No relevant interests*  
 Lord Hennessy of Nympsfield  
*No relevant interests*  
 Lord Hope of Craighead  
*No relevant interests*  
 Lord Howarth of Newport  
*No relevant interests*  
 Lord Howell of Guildford  
*No relevant interests*  
 Lord Sherbourne of Didsbury  
*No relevant interests*  
 Baroness Suttie  
*Liberal Democrat Spokesperson on Northern Ireland*  
 Baroness Taylor of Bolton (Chair)  
*No relevant interests*  
 Lord Wallace of Tankerness  
*No relevant interests*

A full list of members' interests can be found in the Register of Lords' Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

Professor Jeff King, University College London, and Professor Stephen Tierney, University of Edinburgh, acted as legal advisers to the Committee. They both declared no relevant interests.