Submissions to the Secondary Legislation Scrutiny Committee on the Abortion (Northern Ireland) Regulations 2020 (SI 2020/345)

Lord Alton of Liverpool

This submission concerns the Abortion (Northern Ireland) Regulations 2020, laid before Parliament on the 25th March. The points I raise are relevant to Committee 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.

My comments concern Regulations 3 and 12.

Regulation 3 has a significant omission because it does not contain provisions that make sex-selective abortions generally illegal. The issue of sex selective abortion arises because the regulations propose that up until 12 weeks gestation, abortion should be available, unlike in the GB, without having to meet a specified ground. The Government has set out their own view on the grounds on which an abortion can be carried out under the Abortion Act in the rest of the UK. They have said, "Abortion on the grounds of gender alone is illegal. Gender is not itself a lawful ground under the Abortion Act." Indeed when challenged on the lack of an explicit statement that abortion on the basis of sex was illegal in February 2015, rather than resisting this on the basis that they wanted to have an open door to sex selective abortion, the Government clarified their own opposition to this practice, explaining that the law already provides for such a ban. They made it clear that there was no need for any further legislation because the only basis for accessing abortion in GB 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. As further confirmation of their commitment they also promised to monitor the efficacy of the law to ensure that the prohibition prevented sex selective abortions.

Mindful of the above concern it is deeply troubling that Ministers should have signed off regulations which plainly open the door to sex selection since the law does not require anyone asking for an abortion to give any reason at all, which means permitting abortion for any reason, including sex selection. 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 where public opinion is so much more uneasy about abortion? 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." The Regulations' failings must be of huge concern because NIPT testing – which is available in Northern Ireland - means it is possible to determine the

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sex of the fetus from 10 weeks and will soon be possible to determine the sex of the fetus from just 7 weeks.

The Government's failings with respect to the absence of a ban on sex selection, are stark not only because it has recently set out its opposition to sex selective abortions in Great Britain on the basis of provisions it has completely left out of these NI regulations,but also because when the Isle of Man moved to a similar arrangement to that proposed for Northern Ireland it 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.

Given that Article 14 of the European Convention of Human Rights prohibits discrimination on the basis of sex, I would suggest to the Committee that Regulation 3, which opens the door to such discrimination, is contrary to Article 14. This is a problem in this particular context because Section 9(9) of the Northern Ireland (Executive Formation etc) Act 2019 says that "Regulations under this section may make any provision that could be made by an Act of the Northern Ireland Assembly" which means that any provision that could not be made by the Assembly cannot be made by the Secretary of State through the Regulations. In making this point 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.

I consider that Regulation 12 also contains provisions of great public policy importance that cannot be made within the legislative competence of the Northern Ireland Assembly. Mindful, once again, of the impact of the constraints on the Assembly's law-making abilities on the Secretary of State it must be understood that the Assembly cannot make provisions that discriminate against a category of persons solely on the basis of their religious belief or political opinion. See Section 6(2)(e) of the Northern Ireland Act 1998, and section 98(4) of the same Act which outlines the nature of discrimination: That "it treats that person or that class less favourably in any circumstances than other persons are treated in those circumstances by the law".

Regulation 12 only provides conscience protections for persons who 'participate' in abortion treatment as it reflects the wording in the Abortion Act 1967, which has been subject to legal challenge. The UK Supreme Court interpret 'participate' in the Doogan judgement narrowly, that is, only applying to those "actually taking part" in the treatment referred to, and thus not applying, as set out in the Explanatory Memorandum to "the host of ancillary, administrative and managerial tasks that might be associated with" abortions. This implies that those involved in abortions more broadly speaking, e.g. staff responsible for scheduling appointments, are not offered any conscience

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protection. Hence an administrative staff member who felt that scheduling abortions made her complicit in ending an innocent life would not have legal recourse, and would be put in the invidious position of having to choose between either acting in violation of her faith identity or losing her livelihood, putting herin a seriously unfavourable position compared with a person without their faith identity.

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, nor do they explore any other measures that could avoid such an issue without discriminating against dedicated professionals, e.g. creating dedicated abortion clinics. Moreover, in a context where many doctors in the Northern Ireland NHS strongly object to abortion, as witnessed by the letter sent to the Secretary of State by 700 healthcare workers, the more relevant concern in terms of capacity means the NHS should accommodate the wider conscience concerns of NHS, in order to avoid a loss of capacity which would follow is staff with conscientious objections left the profession, something the NI NHS could ill-afford.

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Attorney General for Northern Ireland – John F Larkin QC

I would be grateful if the Secondary Legislation Scrutiny Committee would consider the Abortion (Northern Ireland) Regulations 2020 which were laid on 25 March 2020, and, following consideration, thereafter draw the special attention of the House to them.

It is my view that 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.

You may also wish to consider whether, in making provision not *required* by the 2019 Act, these regulations may be inappropriate in view of circumstances that have come into being since the enactment of the 2019 Act, namely the restoration of a working Assembly and a functioning Executive Committee[1].

In particular, it may be doubted whether regulation 12 gives adequate ECHR based protection to the rights of those opposed on religious or philosophical grounds to abortion (given the content of Article 9 ECHR). This is of political and legal significance and, given that the relevant judgement 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

The limits on the regulation making power

There are two specific limitations in section 9 of the 2019 Act on the exercise of those powers. Section 11 of the Act will, as a matter of construction, be subject to the same limitations.

The first limitation consists of the confines on the positive conferral of power in section 9. Section 9 (4) provides that the Secretary must by regulations make whatever other changes to the law of Northern Ireland appear to the Secretary of State to be necessary or appropriate for the purpose of complying with subsection (1), that is, that paragraphs 85 and 86 of the CEDAW report are implemented in Northern Ireland. If the Secretary of State has misdirected himself in respect of these recommendations in making these Regulations, he would, to the extent that he has done so, exceed his powers.

Secondly, section 9 (9) of the 2019 Act contains a firm limit on the scope of regulations which can be made by the Secretary of State: he may make 'any provision that could be made by an Act of the

[1] See Terms of Reference 4 (a) and 4 (b).

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Northern Ireland Assembly'. This imports the legislative competence limits on the Northern Ireland Assembly imposed by section 6 of the Northern Ireland Act 1998 with the result that any regulations made by the Secretary of State which are inconsistent with what is required by EU law or the ECHR or discriminate on the ground of political opinion or religious belief are *ultra vires*.

Severe fetal impairment

In my view regulation 7, in so far as it applies to foetuses in category is clearly contrary to EU law and therefore *ultra vires* by virtue of section 6 (2) (d) of the Northern Ireland Act 1998. I am also of the view that those in category (a) are protected by EU law but accept that, at present, their legal position is more complex.

I appreciate that the section 9 (1) duty in the primary Act is to ensure that the recommendation in paragraph 85(b)(iii) of the CEDAW report (specifying severe foetal impairment as a ground for legal abortion) is implemented. The Secretary of State cannot fulfil this obligation by way of regulations made under section 9 or 11 in the way that he has purported to do given the EU law constraint.

The EU issue is one of disability discrimination: regulation 7 makes provision for the ending of the lives of unborn children *because of* their disability. Moreover, regulation 13 disapplies section 25 of the Criminal Justice Act (NI) 1945 Act (offence of child destruction) for pregnancies terminated in accordance with regulation 7. A combination of regulations 7 and 13 has the result that it is not child destruction under the 1945 Act to abort a child who has the prescribed (but ill-defined) level of disability.

The UN Convention on the Rights of Persons with Disabilities (UNCRPD) is designated as EU law[1] giving it binding status in contrast to other international human rights treaties. While the Court of Justice of the European Union has not yet been asked to rule on selective abortion on the ground of disability, my view is based on the text of the UNCRPD – in particular, article 10 which provides for equal protection in the right to life and extends protection to those in the womb by using 'human being' instead of 'person'.

[1] The UNCRPD is designated as one of the 'EU Treaties' for the purposes of the European Communities Act 1972: see the European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009.

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I am also conscious that the CRPD Committee characterises foetal impairment as disability. It includes conditions considered fatal in that analysis[2]. The CRPD Committee has been critical of abortion law in Great Britain, on which regulation 7 is based[3].

The Committee can be reassured that regulation 7 in its present form is not required by the UK's European Convention on Human Rights commitments[4]. The UK Supreme Court, dealing with the ECHR compatibility of abortion law in Northern Ireland, was not persuaded by the NI Human Rights Commission's argument that it is a breach of the Convention to criminalise abortion when the unborn child has a severe impairment (short of a fatal diagnosis). It is clear then that regulation 7 (1) (b) is not necessary to protect the Convention rights of pregnant women.

Conscientious objection

I am also of the view that regulation 12 is *ultra vires* by reason of section 6 (2) (e) of the Northern Ireland Act 1998. This deprives the Assembly (and consequently, the Secretary of State) of competence to enact any provision which discriminates (directly) against any person or class of person on the ground of religious belief or political opinion. Regulation 12 (3) and (4) and the limited meaning of 'participate in any treatment' fall foul of this constraint.

Section 98 (4) of the Northern Ireland Act 1998 sets out what is meant by 'discriminates' in section 6, "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."

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[2] CRPD Committee: Comments on the draft General Comment No36 of the Human Rights Committee on article 6 of the International Covenant on Civil and Political Rights: "laws which explicitly allow for abortion on grounds of impairment violate the Convention on the Rights of Persons with Disabilities (Art. 4, 5, 8). Even if the condition is considered fatal, there is still a decision made on the basis of impairment. Often it cannot be said if an impairment is fatal. 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."

[3] CRPD/C/GBR/CO/1, August 2017 "The Committee is concerned about perceptions in society stigmatizing persons with disabilities as living a life of less value and the termination of pregnancy at any stage on the basis of foetal impairment. The Committee recommends that the State party changes abortion law accordingly. Women's rights to reproductive and sexual autonomy should be respected without legalizing selective abortions on ground of foetus deficiency."

[4] To date, litigation has focused on the criminal law (as opposed to an empowering provision such as regulation 7).

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Against a background in which there is no positive provision for abortion in the law of Northern Ireland, regulation 12 addresses, and is coterminous with, those persons who object conscientiously to abortion on the ground of religious belief or political opinion. They are treated less favourably than the persons who do not so object.

Regulation 12 falls foul of section 6 (2) (e) in three ways.

Firstly, when taken in conjunction with both the rest of the Regulations and the interpretation of 'participate' by the UK Supreme Court (*Doogan* – a case taken by Scottish midwives), it exposes the category of persons who conscientiously object to abortion to violence to those beliefs by failing to protect *at all* persons who are not directly involved in 'treatment'. For example, those involved in ancillary or administration tasks.

Secondly, even when purporting to supply protection, this is limited by regulation 12 (3) in two ways: it is not limited to cases of immediate necessity (as provided for in regulation 5) and it imposes a detriment on a person who considers that unborn life should not be sacrificed to avoid injury to another person.

Thirdly, a burden is placed by Regulation 12 (4) on a person who claims the benefit of Regulation 12. These are not indirect detriments: they are coterminous with the category of persons to whom regulation 12 applies.

To elaborate a little on the first aspect of less favourable treatment, the protection for conscience contained in regulation 12 is unnecessarily limited by the deliberate use of 'participate' rather than, for example, 'facilitate, support or participate in any treatment authorised by these regulations'.

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'. This is, doubtless, imported from the decision of the Supreme Court in *Doogan* but 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*[5]. The Supreme Court limited itself to interpreting the word 'participate' in the

[5] UK Supreme Court in *Doogan and another v Greater Glasgow and Clyde Health Board* [2015] AC 640

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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[6] 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[7].

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.

Amendment of the Criminal Justice Act (Northern Ireland) 1945

Finally in terms of *vires*, I would draw your attention to regulation 13. Reducing the effectiveness of section 25 of the 1945 Act would appear *not* to be required by CEDAW (the recommendations do not refer at all to the 1945 Act) and may be considered, therefore, a misdirection by the Secretary of State (see the limited power afforded by section 9 (4) discussed above).

Regulation 13 disapplies the offence of child destruction for any abortions carried out in accordance with regulations 3 to 8. The 1945 Act, which is concerned with the protection of those unborn children capable of being born alive, already provides an exception for those who act in good faith to preserve the life of the mother (now read more broadly in light of *R v Bourne*). See section 25(1).

The most radical reach of regulation 13 is the attempt to reduce the protection of the Criminal Justice Act (Northern Ireland) 1945 by decriminalising any action a mother takes to end her own pregnancy from the point of viability up until birth. The explanatory note at 7.42 wrongly states that 'the CEDAW

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[6] The Court very deliberately did *not* explore how conscientious objection rights under article 9 ECHR or equality law might be handled, leaving that question for the employment tribunal, if necessary[6] - see paragraph 24 of the judgment.

[7] See case comment by Professor Richard Ekins: 'Abortion, conscience and interpretation' (Law Quarterly Review 2016).

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report recommends removing any threat of prosecution from women and girls who undergo abortion'.

The 2019 Act does not require the provision made in regulation 13. Nothing in the CEDAW recommendations at paragraph 85 or 86 call for an amendment to the offence of child destruction in the 1945 Act. In contrast, the Offences against the Person Act 1861 is specifically addressed at paragraph 85 (a): 'Repeal sections 58 and 59 of the Offences against the Person Act, 1861 so that no criminal charges can be brought against women and girls who undergo abortion or against qualified health care professionals and all others who provide and assist in the abortion'.

In my view, the regulation making powers in section 9 and 11 do not go so far as to enable the partial repeal of the 1945 Act when such a reform has been excluded from the recommendations adopted.

Conclusion

My view that three provisions within these regulations are not *intra vires* may be of interest to the Committee. I am happy to discuss this note should that be considered helpful.

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Both Lives Matter

Both Lives Matter is a movement of organisations and individuals from across the political and 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.

On 25 March 2020, new regulations on abortion in Northern Ireland were laid following a consultation on section 9 of the Northern Ireland (Executive Formation) Act 2019. Both Lives Matter responded to the Northern Ireland Office consultation and here, similarly to one of our founding partners Evangelical Alliance Northern Ireland, we highlight just a few of our many concerns with the regulations which have been laid:

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 three 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.

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 from refrain from adding such provision to these regulations.

Regulation 7 - Disability

This regulation allows for abortion up to birth in cases where it is not expected that the child will survive or if born would suffer from such '

This provision is contrary to the non-discrimination requirements in the UN Convention on the Rights of Persons with Disabilities (UNCRPD). In 2017, the Committee on the UNCRPD said of the Abortion Act 1967 "*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.*"

We would urge the committee to strongly reject the introduction of this regulation which only furthers an existing discrimination – the decision to end the life of a child because of an inherent characteristic or perceived weakness.

There is no mention of the involvement of pediatricians in the decision to comment about the health and life of the child, no mention of support services to help the child and it's family after birth, no mention of counselling or peer to peer support.

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.

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 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.

3 April 2020

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 2020 are of significance to the House of Lords.

2. At the time of writing, Northern Ireland remains subject to the law of the European Union. The UNCRPD (United Nations Convention on the Rights of Persons with Disabilities) has been ratified as an EU Treaty under the European Communities Act and is a binding part of EU law. This is of particular significance with regard to Regulation 7 of the Abortion (Northern Ireland) Regulations 2020, which outlines that abortion will be permissible in Northern Ireland up to birth in cases where "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." This provision allows for abortion up to term in such cases when read in conjunction with Regulation 13, which disapplies section 25 of the Criminal Justice (NI) Act 1945 for pregnancies ended under Regulation 7. The consequence of this regulation is that from March 31 2020 it will be permissible to abort disabled foetuses solely on the grounds they are disabled. These foetuses will be subject to differential treatment solely on the basis of their disability and no other reason.

3. It is my opinion that this provision 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 foetuses 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 legally binding provision.

4. This is a problem because the powers of the Secretary of State in making these regulations is constrained by Section 9(9) of the Northern Ireland (Executive Formation etc) Act 2019, which states, 'Regulations under this section may make any provision that could be made by an Act of the Northern Ireland Assembly.' Acting within the confines that confine the Assembly means that, like the Assembly, the Secretary of State must not initiate regulations that contravene existing European Union law, the European Convention on Human Rights (ECHR) or the Northern Ireland Act (NIA) 1998. On this basis Regulation 7 is in difficulty because it is outside of the competence of the Assembly and thus the Secretary of State, a fact which would be of great interest to the House.

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5. I would further note that Regulation 7 is not in accordance with the policy objective of the Government in this instrument. The recommendations of para 85 of the CEDAW report which Section 9 says should be implemented by the Secretary of State through regulation states that the legislation has to avoid "perpetuating stereotypes towards persons with disabilities." Regulation 7 introduces direct discrimination against unborn babies with non-fatal-disabilities; sending out a wider message to all individuals with a disability. The Disability Rights Commission (now the Equality and Human Rights Commission) have said the disability abortion provision in the Abortion Act 1967 "*is offensive to many people; it reinforces negative stereotypes of disability… [and] is incompatible with valuing disability and non-disability equally*".[1] The Regulations completely ignore this point and simple mandate abortion up to birth on the same expansive terms of the 1967 Abortion Act which has resulted in abortion for any kind of disability, including things that can easily be corrected like cleft pallete, right up to term.

6. 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 difficult decision*", [2] which is legally problematic because the obligations in Section 9 relate to the Secretary of State, not the NI Health Minister.

7. In a further point, I would posit that the failure of the NIO to introduce an offence of coercive abortion puts the Government at risk of failing to comply with Article 39 of the Istanbul Convention. It would naturally be contrary to the purpose of the instrument in question to see Northern Ireland in contravention of international law. Article 39 sets out the following: "Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised: (a) performing an abortion on a woman without her prior and informed consent; (b) performing surgery which has the purpose or effect of terminating a woman's capacity to naturally reproduce without her prior and informed consent or understanding of the procedure."[3]

8. The Government has previously indicated they believe the United Kingdom as a whole is compliant with this aspect of the convention.[4] 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

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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: '*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 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. It follows from the above that 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 non-consensual or coercive abortions*.'[5] 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.

9. The Committee should draw these flaws to the attention of the House.

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Joanne Bunting MLA

1. I want to raise a concern which arises from the Abortion (Northern Ireland) 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 section 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. The Northern Ireland Office (NIO) makes clear that the intention is for the provisions in the Regulations to mirror the provisions in England under the Abortion Act 1967, but do not include similar provisions on inspections and requirements for abortions to be a registered service as under the The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, whether that be an NHS facility or independent clinic.

3. 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.

4. 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 which is why I believe these regulations are not fit for purpose.

5. It has become evident in recent years 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. Given that there have been few abortions carried out in NI, this is not surprising. However, under the new Regulations, it is a significant omission not to ensure that abortion services can be inspected for safety procedures.

6. The major focus of inspections in England by the CQC is on independent clinics because this is where most abortions take place, but this will not be the case (certainly initially) in NI. Independent clinics have specific regulations they must fulfil. Recent inspections have highlighted concerns about safety procedures.

7. 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 a requirement to register if the doctor performing the abortions is not working in the NHS. Nothing in the regulations set out by the NIO has changed this situation in terms of the RQIA nor has an alternative body been put forward to inspect abortion clinics.

8. Regulation 8 should have included 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. If abortion is to be provided in Northern Ireland, which is a matter of moral and ethical debate, providers should be doing so safely. 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 doing so in line with health and safety standards and standards for abortion providers. 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.

9. To the extent that these regulations have emanated from Westminster against the wishes of the elected representatives of Northern Ireland (100% of Northern Ireland MPs who take their seats in Parliament voted against Section 9 of the Executive Formation Bill) ,it is quite extraordinary that not only should Westminster have imposed a significantly more permissive regime than applies in GB, when it is well know that Northern Ireland has such a high view of the unborn, but that they should have also imposed a significantly less safe regime. This suggests a lack of respect for Northern Ireland in London which is very damaging for the union.

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CARE Northern Ireland

1. On Wednesday 25th March the Abortion (Northern Ireland) Regulations 2020 were laid before Parliament[8] and came into effect on Tuesday 31st March. These Regulations are laid as a result of the requirements of section 9 of the Northern Ireland (Executive Formation etc) Act 2019.[9] Both Houses of Parliament must confirm their approval of the Regulations within 28 sitting days for them to remain in force.[10]

2. This submission sets out the views of CARE NI on the Regulations within the terms of reference of the Committee.

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

3. Abortion is a sensitive political issue and this has proven to be especially the case in Northern Ireland. This issue has been the subject of political debate for decades and is evidently politically and legally important for many citizens who live there. This regulation radically reshapes the law on abortion and gives rise to politically and legally important matters of public policy.

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

4. There has been a material change of circumstances since the passage of the Northern Ireland (Executive Formation etc) Act 2019 (referred to as "the 2019 Act"). In January 2020, the Northern Ireland Executive was restored and the Assembly came back in to operation. Law and policy pertaining to abortion is within the devolved competence of the Assembly. The UK Government could have asked Parliament to repeal section 9 of the 2019 Act so that Northern Ireland could have decided its own new abortion law framework. Instead, for key elements like Regulations 4 and 7 which implement the CEDAW recommendations, the Regulations for Northern Ireland "*mirror*" the provisions in the UK because the Government believes that to do otherwise would mean women from Northern Ireland would travel to the UK for abortions and

8 http://www.legislation.gov.uk/uksi/2020/345/contents/made
9 http://www.legislation.gov.uk/ukpga/2019/22/section/9
10 http://www.legislation.gov.uk/ukpga/2019/22/section/12

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that this would undermine local provision.[11] However, to reproduce the UK regime in NI for these key provisions **undermines the principle of devolution that different jurisdictions can choose different legal provisions and implement services differently** On the basis of the Government's logic, there would be no provision for devolution and difference with respect to any policy competence.

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

5. 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). Since the UNCRPD is part of EU law, and section 6(2)(d) of the Northern Ireland Act 1998 prevents the Assembly passing legislation that is incompatible with EU law, the CEDAW recommendation cannot be implemented within the legislative competence of the Assembly. Section 9(9) says "Regulations under this section may make any provision that could be made by an Act of the Northern Ireland Assembly." The corollary of this must be that the regulations cannot be outside of the provisions of the Assembly and therefore Regulation 7, which allows for abortion on the grounds of serious fetal impairment up to term, is ultra vires.

6. We submit regulation 12 is ultra vires. We submit this is the case 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. We posit that regulation 12 fails to protect individuals who conscientiously object to abortion on ethical grounds due to its narrow definition of "treatment" – i.e. it does not cover anyone outside of the medical professional involved in certifying and/or providing an abortion. It also fails in 12(3) to limit requirement to participate in abortion for medical professionals to those cases where an abortion is required as a matter of immediate necessity. We would also submit significant questions arise as to whether Regulation 12 is in line with article 9 of the European Convention on Human Rights.

7. We also submit regulation 13 is ultra vires. There is no requirement in the 2019 Act to introduce this provision. No consultation was conducted on the content of regulation 13 and it was not set out in the proposals put forward by the NIO. It is not required by the CEDAW report which

[11] *Ibid,* paras 7.11 and 7.12, 7.15 and 7.16, pages 6 and 7

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undergirds the statute. It allows women to self-abort after viability which is not the case anywhere within the United Kingdom, which we hold to be inappropriate.

8. We submit the penalties for conducting an abortion outside of the regulatory framework set out are not commensurate with the offence being committed. Under Regulation 11, the maximum penalty which can be incurred for conducting an abortion outside of the framework is a Level 5 fine of £5,000. Equivalent offences which lead to this penalty in Northern Ireland include include selling liquor outside of a licensed premises, contravening regulations as to the price of liquor and the failure to report the loss or theft of a tachograph card required for driving a lorry.[12] The equivalent offence in the Isle of Man and the Republic of Ireland is a maximum 14 year custodial sentence. We submit this penalty is inappropriate and will not serve as an effective deterrent against abortions being performed outside of the regulatory framework which is a policy objective of the NIO.

9. In addition, we are concerned about the issues that are excluded from the Regulations. Firstly, there is no provision to prohibit abortions on the grounds of the sex of the baby despite it being 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.[13] Secondly, there is no provision for an offence of providing a coerced abortion, which would previously have been prosecuted under section 58 of the Offences Against the Persons Act 1861. Thirdly, there is no provision established for how NHS bodies, GPs or future private clinics will be inspected to ensure they meet appropriate safety standard for carrying out abortions, unlike the situation in England.

Issue (f) that there appear to be inadequacies in the consultation process which relates to the instrument

10. The NIO conducted the consultation on a complicated subject over a six-week period during which a General Election was taking place. The NIO tabled the regulations only three full working days before this new regime came into effect. Given this is a substantial change in the ability of women to obtain an abortion between the regime that was in effect before repeals to

12 See http://www.legislation.gov.uk/nisi/1996/3158/schedule/10A/part/3 and http://www.legislation.gov.uk/uksi/2006/1937/regulation/5

13 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

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prior legislation came into effect on 22nd of October 2019 and the regime that has been in effect for the last 5 months, 3 days of notification for the public and professionals is unacceptable.

6 April 2020

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The Christian Institute

I am writing on behalf of The Christian Institute, about the Abortion (Northern Ireland) Regulations 2020 ("the Regulations").

The introduction of the Regulations is undoubtedly intended to bring fundamental and far-reaching change to the law in Northern Ireland. However, the Regulations go too far in relation to the requirements of their parent Act, and have been brought forward in an unsatisfactory manner. We believe the Regulations should be brought to the special attention of the House as they meet several of the criteria set out in the Committee's terms of reference:

1. Paragraph (4)(b) of the Committee's terms of reference says that a statutory instrument may be drawn to the special attention of the House if "it may be inappropriate in view of changed circumstances since the enactment of the parent Act". This is certainly true in the case of the Regulations. The Northern Ireland (Executive Formation etc) Act 2019 ("the 2019 Act") required regulations governing abortion in Northern Ireland to be made so as to come into force by 31 March 2020, unless a Stormont Executive was formed on or before 21 October 2019. A Government was not established in Northern Ireland in time, so plans were made for the Regulations to come in.

However, circumstances have changed, and there is now a functioning Executive in the Province. With the devolved Assembly now back up and running it is highly improper for the Regulations to be imposed by Westminster. Westminster has continued as if nothing has happened and is pressing ahead with the Regulations rather than leaving it to the devolved institution. This is all the more surprising given the enormous controversy surrounding abortion, especially in Northern Ireland where Catholics and Protestants alike oppose abortion as a matter of deep religious principle.

As recently as 2016 the Northern Ireland Assembly rejected an attempt to legalise abortion. We note that at the time the proposal was to do so only on the narrow grounds of sexual crime and foetal abnormality. The Regulations, which create the most liberal abortion regime in the UK, are out-of-step with how the democratically elected representatives of Northern Ireland have voted.

It may be that the newly reconstituted Assembly now has a majority in favour of abortion, but that has not been put to the test. It should be left to the elected representatives of the people of Northern Ireland to debate and vote on what kind of laws they want to have in place in relation to abortion. This will allow opportunity for amendments and multiple votes, whereas these Regulations do not permit any opportunity for amendment and will be subject to a perfunctory debate. The

Committee does not need reminding that Regulations are normally used for non-controversial matters. That we should be imposing a liberal abortion regime on an unwilling population using a statutory instrument is an affront to normal Parliamentary customs.

2. The Government's response to the consultation on the abortion framework was deeply unsatisfactory. We raise this point in relation to paragraph (4)(f) of the Committee's terms of reference. The Government's own consultation response admits that 79 per cent of the 21,244 submissions were against liberalising abortion law in Northern Ireland *in any way*. These responses have been overridden and ignored. Nothing in the consultation response attempts to explain the disconnect between the consultation process and the outcome. The Secretary of State has not just legalised abortion but has created the most liberal abortion regime in the UK. That he should do so without any meaningful attempt to engage with the strong opposition expressed in the consultation, or to amend the Regulations in response, makes a mockery of the process.

3. Furthermore, the Regulations imperfectly achieve the policy objective (paragraph (4)(d) of the Committee's terms of reference). They are fundamentally flawed in that they go far beyond the demands of the parent Act and beyond the provisions of the Abortion Act 1967 in force in the rest of the UK. The 2019 Act required the Secretary of State for Northern Ireland to introduce regulations to implement paragraphs 85 and 86 of the Committee on the Elimination of Discrimination Against Women (CEDAW) report on the UK from 2018. But nowhere do these paragraphs recommend such a radical regime as the Regulations introduce.

The CEDAW report recommends taking abortion out of the criminal sphere and legislating to make abortion legal for three reasons: risk to the mother's physical or mental health; sexual crime; and "severe foetal impairment". What the report does not do is call for abortion on demand, which is what the Regulations provide for. None of the three reasons are required for an abortion in the first twelve weeks of pregnancy under the Regulations. In fact, no reasons are required. The Regulations permit midwives and nurses to carry out and approve abortions at any stage of pregnancy, roles that are legally confined to doctors in the rest of the UK. In all these areas the Regulations go well beyond what is required by the CEDAW report.

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The CEDAW report at paragraph 85b says that in the making of new laws on abortion "stereotypes towards people with disabilities" should not be perpetuated. This surely cannot be achieved with the Regulations allowing disabled babies to be aborted up to birth. The implication of this is that disabled babies' lives are not worth as much as others. (We note that when the Northern Ireland Assembly voted in 2016 on allowing abortion in cases of 'fatal foetal abnormality', it was rejected by 59 votes to 40.)

The Regulations are not anchored in the provisions of the parent statute, nor constrained by the provisions of the Abortion Act 1967.

3 April 2020

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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. We hope to show why the Abortion (Northern Ireland) 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.[14] 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

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

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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.

5. 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.'

6. 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'. Regulation 7 fails to comply with CEDAW recommendations that legislation should do nothing to 'perpetuate negative stereotypes' and fails to give statutory support for women who decide to carry their pregnancies to term in the knowledge that their child may be disabled. Further, 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. In addition, we note that the Supreme Court, in its 2018 NI abortion judgement,[15] 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.'

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

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7. 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 might also fall foul of Article 9 of the European Court of Human Rights (ECHR)[16] and the 2010 UK Equality Act[17], which prohibit 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[18] and refers to 'taking part in a "hands-on" capacity'. As such it covers direct involvement in the process of termination but does not apply to the host of ancillary, administrative and managerial tasks performed in association with it. 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 extend conscience protection to those indirectly involved in abortion.

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

3 April 2020

16 http://www.echr.coe.int/Documents/Convention_ENG.pdf. page 10

17 http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf

18 https://www.supremecourt.uk/cases/uksc-2013-0124.html

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Liz Crowter

My name is Liz Crowter. I live in Coventry and am the proud mother of a 24 year-old daughter with Down's syndrome. She refuses to allow Down's syndrome to define her, adds joy and life to our family and is getting married soon. She truly enjoys life and desires to ensure all with Down's syndrome have an equal opportunity to enjoy life as she does, hence she is campaigning to see a change in the current law in England and Wales that permits abortion up to birth for babies with any form of disability, including Down's syndrome. She and I both believe the current abortion law in England and Wales is deeply offensive, and sadly, this same discriminatory law is now being introduced in Northern Ireland.

Indeed, it is deeply upsetting that in Great Britain even viable babies (from 24 weeks gestation onwards, who could survive outside the womb) are denied the opportunity of life simply because they are like my daughter and have Down's syndrome. Furthermore, the fact that the law affords less protection to people like my daughter in the early stages of life than the non-disabled sends out a deeply and profoundly discriminatory message that my daughter and those like her are worthy of less protection and therefore less valuable than the non-disabled, even when viable.

In this regard, one of my main concerns (which I base on The Committee's Terms of Reference points (4) (d) "*that it may imperfectly achieve its policy objectives"*) is that the regulations violate one of the very CEDAW recommendations they were meant to implement, which is to expand access to abortion on the basis of disability "without perpetuating stereotypes towards persons with disabilities". (Of note, this also falls under The Committee's Terms of Reference point (4) (a), as it is *"politically or legally important or gives rise to issues of public policy likely to be of interest to the House"*). Rather than writing a regulation that would have plainly adhered to this requirement, the Secretary of State has simply embraced what he knew was the most permissive threshold, that of Great Britain, under which abortion is made available for all kinds of disability up to birth. Specifically, under new regulation number 4, if the baby has no disabilities, and the mother's life is not in danger, the abortion time-limit is 24 weeks. By contrast abortion is allowed up to birth in regulation number 7 and 13 because of "severe foetal abnormality"[19] which as noted above, in England and Wales has resulted in abortions for all kinds of disability up to birth, including Down's syndrome and cleft palette.

[19] http://www.legislation.gov.uk/uksi/2020/345/made

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The regulations plainly perpetuate stereotypes by allowing the termination of viable human beings with forms of disability it is possible to live with to an age when the disabled peopleconcerned (like my daughter) can realise the significance of the fact that the law offers far more protection to viable non-disabled babies than it does to babies of the same age with their disability, simply because they have their disability. Viable human lives that are worthy of less protection in law are plainly subject to a stereotyping that says they are less valued by any society that entertains such legislation. Indeed, to the extent that the lesser protection makes the difference between being allowed to live or die, it is plain to see why disabled people must reach the conclusion that they are not only seen as worth less, but actually as worthless. As the mother of a grown adult with Down's syndrome, I find it deeply upsetting and offensive that somebody like my daughter can have their life ended in the womb because of her 'disability,' at a stage where a baby without a disability cannot be terminated. What is more important, my daughter finds it deeply upsetting because this practice tells her that as a human being, she is less valued than the non-disabled, and thus less fully human than the non-disabled.

As someone with a UK passport, Northern Ireland has always brought me hope - because it showed that part of the United Kingdom, my country, can treat those with Down's syndrome equally with the non-disabled. Sadly, the Abortion (Northern Ireland) Regulations propose that this should change and that the House of Commons and House of Lords should vote for abortion on the basis of disability up to birth for Northern Ireland, something that was not required by the CEDAW report (and in fact in part goes against it, as noted above) and is contrary to basic principles of equality.

Furthermore, I also think there is a further very serious intra vires question, in that the regulation making powers of the Secretary of State are limited in Section 9 (9) of the Executive Formation Act to the law making powers of the Northern Ireland Assembly, which are constrained so they cannot undermine Convention rights or conflict with EU law(see Section 6 of the Northern Ireland Act 1998). (This concern specifically falls under the Committee's Terms of Reference points 4 (a)). Regulations 7 and 13, however, conflict directly with the Convention on the Rights of Person with Disabilities, which is also part of EU law, and says: "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."2 In 2017, the UN Committee on the Convention on the Rights of Person with Disabilities, said of the UK "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."

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The Committee consequently said that the UK should "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" (and indeed we hope they do for, as noted above, my daughter is avidly promoting such change, with my full support).

Yet instead of listening to this, the Government is now proposing to make a bad situation worse through these regulations, and through a mechanism – one constrained by the powers of the Assembly – where it does not have the power to do so.

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

The UK has changed profoundly in the last thirty years. MPs and Peers voting for these unamendable regulations today do so in an entirely different environment than their MP and Peer counterparts who voted for discriminatory abortion for Great Britain in 1990. There was no Disability Discrimination Act or Equality Act then. It is quite extraordinary that Parliament could entertain a vote in 2020 for legislation that affords viable unborn babies, with disabilities like Down's syndrome, less protection in law than the non-disabled such that the former can be terminated while the latter cannot.

I am opposed to these changes because I feel that they discriminate against my family. They are offensive not only to me, but my daughter as well, who has noted, they make her feel less than human because viable unborn babies with her condition are not afforded the same protection as the non-disabled. I cannot tell you how painful it is as a mother to hear those words, but it makes me even more proud of her for the work she does to ensure others with 'disabilities' have a fair chance at life.

Also, of note, it is worth mentioning the Section 75 Equality Screening Form carried out by the Northern Ireland Office on the establishment of the abortion framework. This form did not take any account of the CEDAW Report that stated abortion must be carried out "without perpetuating stereotypes towards persons with disabilities." Failing to factor this in, and the negative impact the framework may have on persons with disabilities, it appears that they did not fulfill the legal obligations of the screening.

I understand that this Committee looks at the Government's use of power they are granted, and as noted, I believe the Government has gone beyond the powers they were granted, to implement something which discriminates against people like my daughter. With this in mind, I ask you to raise

attention to this discriminatory regulation under the Terms of Reference point 4 (a) and (d) to both Houses of Parliament.

17 April 2020

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Rt. Hon. Sir Jeffrey Donaldson MP

I write as the parliamentary leader of the biggest Party in Northern Ireland and ask the Committee to give careful consideration to the following submission before producing its report on the Abortion (Northern Ireland) Regulations 2020.

This submission concerns the Abortion (Northern Ireland) Regulations 2020. The points I raise engage 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'.

I should say by way of introduction that I am acutely aware that there are many other problems with the regulations other than those set out below, especially in relation to their conflict with the UN Convention on the Rights of Persons with Disabilities and their failure in relation to abide by Section 6 of the Northern Ireland Act 1998, opening the door to sex selective abortion, the failure to provide an abortion inspection regime etc. Please do not interpret my concerns narrowly, but in the space available I confine myself to the matters below.

The Regulations are of huge political and legal importance because they involve Parliament violating devolution and not in relation to a minor matter but in relation to a subject that is felt to be deeply important by many people in Northern Ireland. They overturn life affirming law that are an important part of our identity. Many agree with the Advertising Standards Authority that the claim that 100,000 people are alive in Northern Ireland today who would not be had we embraced the 1967 Act. In the vote on 9 July 100% of Northern Ireland MPs who take their seats in Parliament voted against the provision, but the voices of the people of Northern Ireland exercised through their representatives were silenced through the larger numbers of MPs who do not represent Northern Ireland. At that dark moment the people of Northern Ireland were effectively disenfranchised.

This only came about because of the ignoring of two constitutional conventions.

As A V Dicey notes in his seminal and authoritative text Introduction to *The Study of the Law of the Constitution,* which has served as something of a constitutional bible since its publication in 1885, constitutional conventions are of central importance to the functioning of our constitution. They are the 'constitutional morality of England'[20] and cannot be flouted without serious consequence.

The first convention that was flouted was the application of accelerated procedure to the Bill which resulted in the censure of the House of Lords Constitution Committee.

[20] As A V Dicey, Introduction to the Study of the Law of the Constitution, Liberty Fund Edition, p. 278.

The House of Lords Constitution Select Committee said in a general paper on legislative processes that, "*Fast-tracking bills relating to Northern Ireland reduces further the scrutiny these measures should receive. Routinely fast-tracking in this way is unacceptable, unsustainable and should only be used for urgent matters.*"[21]

The Committee went on to say about the Northern Ireland (Executive Formation) Bill, as it was then, that "*We reiterate our concern about the routine nature of fast-tracking legislation relating to Northern Ireland. It is constitutionally unacceptable save for exceptional and urgent circumstances."* [22]

The second and more serious convention that was flouted, especially given that it was known that the Bill was already subject to accelerated procedure, was that despite the clerks advising MPs than the amendment that became Section 9 was plainly out of the scope of a Bill, which was narrowly concerned with changing the date of an election, the amendment was nonetheless selected. This was no doubt because of the large number of co-signatories. The whole point of constitutional democracy, however, is that it is not crudely majoritarian, especially in a polity comprising different national units of different sizes, but that it is subject to constitutionals rules devised for the good of the polity as a whole. This constitutional rule, however, was ignored.

The initial text of the amendment that resulted in Section 9 of the Executive Formation (Northern Ireland) Act was completely changed by the House of Lords.

To feel it necessary to completely re-write a provision rather than simply amend it suggests just how problematic the initial proposal was, and yet - because of accelerated procedure - it was only subject to one debate in the House of Lords. Peers did not see the amendment until a few hours before and because of that the debate was cast very much at the level of general principles rather than detailed assessment of a complex change in the law. It is particularly striking that whilst the provision required the Government to implement paragraphs 84 and 85 of the CEDAW report that the scrutiny did not result in a speech in which a single parliamentarian quoted any part of these paragraphs to ask questions about what they mean.

In what constitutes a travesty of our constitution, the terms of the law, which had been completely re-written from the text debated on one occasion by the House of Commons, were then subject to a time limited debate by the democratically elected House in which the abortion provisions were

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21 House of Lords, Select Committee on the Constitution, *The Legislative Process: The Passage of Bills Through Parliament*, July 2019, HL Paper 393, para 39, page 16 https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/393/393.pdf

22 House of Lords, Select Committee on the Constitution, *Northern Ireland (Executive Formation) Bill* July 2019, HL Paper 404, para 9, https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/404/40403.htm

afforded just 17 minutes of discussion. There was no time to address anything other than general principles. Not a single line of the complicated amended was quoted and interrogated, let alone a single line of paragraphs 84 and 85 of the CEDAW report.

These regulations are politically and legally important because they are the result of a process of complete constitutional failure.

While it is debateable whether the decision to vote to undermine devolution constituted voting in violation of a constitutional convention or what might better be understood as a constitutional constraint, it is nonetheless apparent that it involved a vote in flagrant disregard of a constitutional constraint. Of course, technically Parliament has the power to do this (and no one stated this more clearly than V Dicey) but the constraint that it should not has good constitutional pedigree which arguably now applies at the current time to devolution. And a relevant comparator can again be found in Dicey, see AV Dicey and RS Rait, Thoughts on the Union Between England and Scotland, Macmillan, 1920 p. 253.

'…the enactment of laws which are described as unchallengeable immutable or the like, is not necessarily futile …A sovereign Parliament …although it cannot be logically bound to abstain from changing any given law, may, by the fact that when an Act when it was passed had been declared to be unchangeable, receive a warning that it cannot be changed without grave danger to the Constitution of the country.'

Moreover, great emphasis was also placed by the advocates of section 9 on a human rights constraint manifest in a report produced by the CEDAW Committee which said that the law in Northern Ireland should change. This, however, was self-evidently untrue because the remit of the CEDAW Committee is to comment on the CEDAW Convention which does not mention abortion. Moreover, the Committee is not a judicial Committee and does not have standing to 'read in' such a right. As if that is not enough it is widely recognised that there is no general right to abortion in international law.

As Prof Mark Hill QC noted in his expert legal opinion:

'The text of international treaties such as CEDAW are carefully crafted expressions of intent and belief. There is no reference to abortion in the text of CEDAW. There is nothing in the text of CEDAW which requires a state party to allow abortion on specified grounds and/or decriminalise abortion generally. The absence of such a provision in the formal text gives a clear indication that no such obligation exists. The International Court of Justice has not interpreted CEDAW in a manner which departs from the plain wording of the text so as to require a right to abortion or the decriminalisation of abortion to be "read in".

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The lack of a right to abortion in any international treaty was noted by the United Kingdom Supreme Court in R (A and B) v Secretary of State for Health [2017] 1 WLR 2492 per Lord Wilson at [35], with whom Lord Reed and Lord Hughes agreed:

The conventions and the covenant to which the UK is a party carefully stop short of calling upon national authorities to make abortion services generally available. Some of the committees go further down that path. But, as a matter of international law, the authority of their recommendations is slight: see Jones v Ministry of Interior of the Kingdom of Saudi Arabia [2006] UKHL 26, [2007] 1 AC 270, para 23, Lord Bingham of Cornhill.'[23]

Provisions resting on such a constitutionally flawed foundation cannot but have very serious implications for our politics and our union.

To make matters really problematic, however, the regulations proposed seek to impose a more permissive approach to abortion provision than applies in Great Britain. Like the 1967 it imposes abortion on demand to 24 weeks (using here the most elastic ground in the 1967 Act) and to birth in cases of any disability. Unlike the 1967 Act, however, it opens the door to sex selective abortion to 12 weeks, by allowing abortion for any reason, with the approval of just one nurse, one midwife or one doctor, rather than two doctors as in the rest of Great Britain and on a basis where operating outside the law just results in fine, whereas in Great Britain it is a serious offence that results in prison. The idea that the Westminster Parliament to undermine devolution and impose on Northern Ireland the 1967 Abortion Act given our history and heritage in that regard is unthinkable. The idea that they should vote for a package of laws that imposes on us a more permissive arrangement than applies to Great Britain is unconscionable.

21 April 2020

[23] Expert Legal Opinion, Prof Mark Hill QC, The CEDAW NI Report 2018

Don't Screen Us Out

As you may know, Don't Screen Us Out is a UK-wide group which was founded to challenge outdated structures which promote abortion of an unborn baby if it is found to have Down's syndrome. We call on administrations to follow the now well-developed set of principles around equality for minority groups, such as disability, which impose certain duties on our Governments, and we are happy to support efforts to do that.

We are highly concerned that the Abortion (Northern Ireland) Regulations 2020 transgresses these duties. We are therefore writing to the Secondary Legislation Scrutiny Committee to ask if you will consider bringing these regulations to the attention of both Houses under points (4)(a), (4)(b) and 4(d) of the committees *Terms of Reference.*[24] Specifically, the regulations on the whole can be reasonably viewed as politically and legally important, giving "rise to issues of public policy likely to be of interest to the House" (point (4)(a)). Similarly, some regulations can be reasonably viewed as imperfectly achieving the policy objectives of the Northern Ireland (Executive Formation etc) Act 2019, especially when taking into account the formation of the Northern Irish Executive after the 2019 Act was passed (point (4)(b) and (4)(d)).

Our greatest concern is that these Regulations; particularly regulations 4, 7, and 13 and their combined effect, will result in providing babies with disabilities less legal rights compared to babies without disabilities of the same age (again this is despite the Secretary of State for Northern Ireland not being legally bound to do this). Our submission will thus focus on these three regulations.

Part 3 of the Abortion (Northern Ireland) Regulations 2020 list the situations where abortion is permitted without any gestational limit.[25] Regulation 7 of Part 3 explicitly states that diagnosis of a "severe fetal impairment or fatal fetal abnormality" would be one of those situations.[26] Similar wording in the Abortion Act 1967, which Northern Ireland has consistently historically rejected, has resulted in terminations happening up to birth after a baby is found to have Down's syndrome.[27] The consequence of this is that 90% of pregnancies end in abortion if there is a prenatal diagnosis of Down's syndrome.[28] Furthermore under regulation 4, it would be illegal to terminate a baby post 24 weeks, the point of viability, gestation unless a disability had been detected, or, if there is a risk to

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

[25] https://www.legislation.gov.uk/uksi/2020/345/contents/made

[26] https://www.legislation.gov.uk/uksi/2020/345/regulation/7/made

[27] http://www.legislation.gov.uk/ukpga/1967/87/data.pdf

[28] Abortion-and-Disability-Report-17-7-13.pdf

the life of the pregnant mother, or a risk of grave permanent injury to the pregnant mother (see Part 3).[29][30] Hence under the Abortion (Northern Ireland) Regulations 2020, it is clear that 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.

We believe this imperfectly imposes the policy objectives of the 2019 Act for the following reasons:

The powers of the Secretary of State to make these regulations are constrained through Section 9(9) of the Executive Formation Act[31] 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[32]). Regulations 7 and 13 are ultra vires on this basis for two reasons. First the UN Convention on the Rights of Persons with Disabilities,[33] 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."[34] 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."[35]

Second, the UN Convention on the Rights of Persons with Disabilities has been incorporated into EU law.[36] On both bases therefore Regulations 7 and 13 are 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. Referring back to point (4)(a), is, we believe, something that is of legal and political importance that the House will have an interest in.

[29] https://www.legislation.gov.uk/uksi/2020/345/part/3/chapter/1/made
[30] https://www.legislation.gov.uk/uksi/2020/345/regulation/4/made
[31] http://www.legislation.gov.uk/ukpga/2019/22/section/9
[32] http://www.legislation.gov.uk/ukpga/1998/47/section/6
[33] http://www.legislation.gov.uk/uksi/2009/1181/article/2/made
[34] https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#10
[35] Ibid.
[36] http://www.legislation.gov.uk/uksi/2009/1181/article/2/made

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Furthermore, according to the NHS, "Babies are considered "viable" at around 24 weeks of pregnancy".[37] Under Regulations 7 of the Abortion (Northern Ireland) Regulations 2020, the rights of an unborn baby with Down's syndrome would not be equal to the rights of a baby without a disability.

To make matters worse, Regulation 13 of the Abortion (Northern Ireland) Regulations 2020 amends the Criminal Justice Act 1945. This act made it an offence in Northern Ireland to end the life of an unborn baby post 28 weeks gestation, unless it was to preserve the life of the mother. Regulation 13, however, amends this, to make it legal to end the life of an unborn baby post 28 weeks gestation if carried out by a medical professional. The consequence of Regulations 4 and 7 result in this law change mainly impacting unborn babies found to have disabilities (as well as to prevent grave risk of permanent physical or mental health injury to the woman). As the Secretary of State for Northern Ireland was not required to change the law to allow abortion up to birth after the diagnosis of disability, nor was he required to amend the Criminal Justice Act 1945, these changes were unnecessary. Also, and more importantly, they go beyond the powers granted to him by Parliament and treat unborn babies post 24 weeks gestation differently solely on the basis of disability, violating Northern Irish legislation. This again implies these regulations have imperfectly implemented what was required by the 2019 Act.

Moreover, the regulations appear to imperfectly implement the policy objectives of the 2019 Act because the responsibility of the Secretary of State was to introduce regulations to expand access to abortion in cases of disability (there was previously no access to abortion on the basis of disability at all) without perpetuating stereotypes. Specifically, the text was: "Severe foetal impairment, including FFA, without perpetuating stereotypes towards persons with disabilities."[38] Rather than engaging with this the Secretary of State has instead adopted a threshold which is similar to the rest of the UK which in no sense respects this key part of the recommendation about expanding access because, as noted above, it is interpreted as allowing abortion on a completely permissive basis, including correctable disabilities like cleft palette and disabilities in relation to which it is possible to live fulfilled lives, like Down'ssyndrome. If a person has a disability that is not incompatible with their becoming an adult, they will see as an adult that if the unborn with their condition are being aborted

[37] https://www.nhs.uk/conditions/pregnancy-and-baby/premature-early-labour/

[38] Para 85, CEDAW Committee, '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.'
https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/GBR/INT_CEDAW_ITB_GBR_8637_E.pdf

because of that condition - including after viability - whereas others are not being terminated specifically because they are non-disabled, that the law affords less protection to human beings with their condition. Confronted with this they will likely feel that people like them are less worthy of protection under the law than the non-disabled, and thus less worthy than the non-disabled, and likely feel the very considerable pressure of stereotyping.

Furthermore, it is clear that the Northern Ireland Office's Section 75 Equality Screening Form on the establishment of the abortion framework[39] is inexcusably deficient in that it fails to take into account the major detrimental impact that the framework will have on persons with disabilities, even though abortion on the grounds of disability was to be a focus of the Abortion (Northern Ireland) Regulations 2020. It further neglects to take account of the specific wording of the CEDAW Report, noted above, which states in relation to disability abortion, that it must be "without perpetuating stereotypes towards persons with disabilities." These aspects have received no acknowledgement in the Screening Form, and so it follows that the Northern Ireland Office has failed to properly discharge its legal obligations under the Northern Ireland Act in this regard.

Taking all of this into account, the Secretary of State went far beyond the powers granted to him by the 2019 Act. The Northern Irish Assembly was restored in January 2020. Historically, the Northern Irish Assembly has rejected attempts to extend the provision of abortion in Northern Ireland. Once the Assembly was restored, as a fundamental change to the situation, the UK Government should have taken this historical stance into consideration and simply implemented what was legally required. Yet, it appears the Secretary of State did not take into consideration "that it may be inappropriate" to implement such drastic changes "in view of changed circumstances since the enactment of the parent Act" (point (4)(b) of the Committee's Terms of Reference).

17 April 2020

[39] Northern Ireland's section 75 Equality Screening Form Establishment of a new legal framework for abortion services in Northern Ireland [implementation of section 9 of the Northern Ireland (Executive Formation etc) Act 2019
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/844395/NIO-Equality-S
creening-Form_-_Abortion_Consultation November_2019.pdf

Evangelical Alliance

On 25 March 2020, new regulations on abortion in Northern Ireland were laid pursuant to section 9 of the Northern Ireland (Executive Formation) Act 2019.

We responded comprehensively to the Northern Ireland Office consultation on the regulations which ended in December 2019. Our response can be viewed here[40].

A maximalist approach.

One of the key points we made, and wish to reiterate at this stage, is that the proposals and now regulations that have been laid down, go far beyond what is legally required in the Northern Ireland (Executive Formation) Act 2019. The consultation summary, published when the regulations were laid, showed that there were 21,224 responses received and that "79% expressed a view registering their general opposition to any abortion provision in Northern Ireland beyond that which is currently permitted". We would strongly argue that the level of opposition in the public response should be taken into consideration and evidenced in regulations which introduce only the most minimal of changes. Instead these regulations take a maximalist approach that is difficult to reconcile with the more limited circumstances outlined in the CEDAW report, the primary legislation, the cultural context of Northern Ireland and the public response.

No meaningful engagement with the NI Assembly

Added to this, in the three 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.

We will make brief comments on the following regulations:

40 https://static1.squarespace.com/static/599b0d48cf81e0d7a33d452a/t/5dfcbd78db60ee74b4c6bd41/1576844669934/NIO+FULL+RESPONSE+FINAL.pdf

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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 for any medical reason. In most cases this is not healthcare, but an ideology of the choice to end the life of a pre-born human being at will, assisted by medicine. The consequences for our society will be profound.

Regulation 7 - Disability

This regulation allows for abortion up to birth in cases where it is not expected that the child will survive or if born would suffer from such '

Annual statistics from around 8 million abortions over fifty years in England and Wales are substantial proof that provisions like this are interpreted very liberally to include minor disabilities. For instance a diagnosis of a cleft lip arguably has significant impact on the quality of life of a baby girl – would this constitute a serious disability and therefore grounds for abortion?

This provision is contrary to the non-discrimination requirements in the UN Convention on the Rights of Persons with Disabilities (UNCRPD). In 2017, the Committee on the UNCRPD said of the Abortion Act 1967 "*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.*"

We would urge the committee to strongly reject the introduction of this regulation which only furthers an existing discrimination.

Regulation 12 - Conscience

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

However conscientious protections are under threat across the Western world and in Sweden midwives are currently not permitted conscientious objection on the grounds of religious belief. We would contend that a great deal of weight should be given at this stage to Article 9 and the specific medical and religious culture of Northern Ireland so as to afford the greatest possible protections for those who conscientiously object.

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.

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.

We would implore the committee to consider the points made here 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.

3 April 2020

Paul Givan MLA

1. I write to you as a member of the Northern Ireland Assembly for Lagan Valley. My response speaks first to the grounds 4 a) and 4 b) of the Committee's terms of reference and then to 4 f).

Grounds 4 a) and 4 b)

2. 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 Act.

3. 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.*'[41] 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 Northern Ireland Office (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.

4. 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 12 weeks

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

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(something that is not provided in GB) goes "*well beyond*" what Parliament required.[42] 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.[43]

5. 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[44]), they have sought to ensure Northern Ireland "mirrors" the provision for abortion in Great Britain even though polling shows this is not wanted.[45] 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.

6. 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.

7. 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

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42 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.

43 https://undocs.org/CEDAW/C/OP.8/GBR/1, March 2018

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

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

decision over what the law and policy on abortion should be left to the Northern Ireland Assembly.

Grounds 4 (f)

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

9. 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 by section 9 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.

10. 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).[46] 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

[46] See p17-18 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/844394/Government_consultation_-_A_new_legal_framework_for_abortion_services_in_Northern_Ireland__November_2019_.pdf

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its effective enjoyment by persons with disabilities on an equal basis with others."[47] 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.

3 April 2020

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

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Sir Edward Leigh MP

As the Secondary Legislation Scrutiny Committee Terms of Reference note that the Committee will scrutinise instruments and the 'grounds on which an instrument...may be drawn to the special attention of the House' include, 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; and, 4(d) that it may imperfectly achieve its policy objectives*,[48] I write to suggest, under the aforementioned points, that special attention of the House should be drawn to the Abortion (Northern Ireland) Regulations 2020.

It is my conclusion that Regulation 7 contradicts EU law, and thus goes beyond the powers granted to the Secretary of State for Northern Ireland by the 2019 Act. The laws that the Assembly can make are legally constrained in ways that laws made by Westminster generally are not, unless via self-imposed constraint. An exception to that is located in the parent legislation defining the regulation making power of the Secretary of State in Section 9 (9).[49]

This is hugely significant because Section 6 (1) of the Northern Ireland Act 1998 states that "A provision of an Act is not law if it is outside the legislative competence of the Assembly".[50] Specifically, section 6 (2) (d) of the same act makes clear that 'A provision is outside that competence' if "it is incompatible with EU law".[51] The European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009 says, *"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 is to be regarded as one of the Community Treaties as defined in section 1(2) of the European Communities Act 1972."*[52] Article 10 of the United Nations Convention on the Rights of Persons with Disabilities says, *"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"*.[53] In particular, requirements under Article 3 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

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48 https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-commit tee/role/tofref/

49 http://www.legislation.gov.uk/ukpga/2019/22/section/9/enacted ; "(9)Regulations under this section may make any provision that could be made by an Act of the Northern Ireland Assembly. "

50 http://www.legislation.gov.uk/ukpga/1998/47/section/6/2019-03-01

51 Ibid.

52 http://www.legislation.gov.uk/uksi/2009/1181/article/2/made

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

humanity", and "Respect for the evolving capacities of children with disabilities."[54] Moreover the Convention "prohibit[s] all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds",[55] and under Article 8, it notes State Parties should "combat stereotypes, prejudices…relating to persons with disabilities".[56]

By contrast, and in violation of the above constraints, 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*".[57] 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"*,[58] has allowed abortions to be legally carried out after the diagnosis of Down's Syndrome, cleft lip, and club foot. Legally allowing abortions after the diagnosis of these disabilities in Northern Ireland appears to be in contradiction to Northern Ireland's commitment to the United Nations Convention on the Rights of Persons with Disabilities, which Northern Ireland Assembly is bound to follow through EU law. As the Regulations implement a change in law that it appears, legally, the Assembly should not, and by extension, that the Secretary of State should not have implemented via regulations, I believe this should be brought to the attention of the full House, as it has significant legal and political importance (using the Terms of Reference, it is "*politically or legally important"* and "*likely to be of interest to the House"*). This also demonstrates that these regulations are concerning under point (4) (d) of the Terms of Reference, as they imperfectly implement the policy objectives of the Northern Ireland (Executive Formation etc) Act 2019.

The problems with Regulation 7 are further underlined by the fact that in October 2017 the UN Convention monitoring Committee made a recommendation consistent with the Convention that the UK should "amend its abortion law accordingly. Women's rights to reproductive and sexual autonomy should be respected without legalising selective abortion on the ground of fetal

54 https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-3-general-principles.html
55 https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-5-e quality-and-non-discrimination.html
56 https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-8-awarene ss-raising.html
57 https://www.legislation.gov.uk/uksi/2020/345/regulation/7/made
58 http://www.legislation.gov.uk/ukpga/1967/87/data.pdf

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deficiency." Rather than moving to address this, these Regulations make matters worse, which is a legal and political matter that should be of the utmost importance, and interest, to the House.

Furthermore, Regulation 13 requires the attention of the House for the very same reasons. Section (25) of The Criminal Justice Act (Northern Ireland) 1945 says, *"any person who, with intent to destroy the life of a child then capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life".*[59] Section (25) (2) also confirms that any baby post 28 weeks gestation will be deemed capable of being born alive.[60] Part Three of The Abortion (Northern Ireland) Regulations 2020, however, lists where there is "grounds for termination: cases with no gestational limit".[61] Part Three is deemed compatible by HM Government as Regulation 13 of The Abortion (Northern Ireland) Regulations 2020 amends Section (25) to say that (25) (1) does not apply to 'the pregnant woman herself' or 'a registered medical professional...who terminates a pregnancy in accordance with regulations 3 to 8 of those Regulations.'[62]

Furthermore, there is an additional problem for Regulation 13. To meet the recommendations of the CEDAW report, no adjustments were required to Section (25) of The Criminal Justice Act (Northern Ireland) which they did with respect to the other statute that dealt with abortion, the Offences Against the Person Act. The omission of Section 25 of the Criminal Justice Act from the recommendations is significant because it is mentioned in other parts of the report, so the authors were well aware of its significance and yet did not recommend any changes with respect to it. HM Government amending legislation solely for Northern Ireland when the Northern Ireland Executive is functioning, and when not bound by Parliament, is a fundamental shift in the devolution settlement, which certainly is in the interest of the House; and, implies that these regulations have been implemented in a way which imperfectly matches the policy objectives.

Furthermore, the life of a child 'capable of being born alive', as stated still in Section (25) (b) of the Criminal Justice Act (Northern Ireland) 1945, could be ended legally through abortion (Regulation 13) on the grounds of disability (Regulation 7) due to The Abortion (Northern Ireland) Regulations. Regulation 4 lays out that an abortion is legal up to 24 weeks gestation if there is a 'risk to physical or mental health".[63]

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59 http://www.legislation.gov.uk/apni/1945/15/section/25
60 Ibid.
61 https://www.legislation.gov.uk/uksi/2020/345/part/3/made
62 https://www.legislation.gov.uk/uksi/2020/345/regulation/13/made
63 https://www.legislation.gov.uk/uksi/2020/345/regulation/4/made

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Taking into account the effects of Regulations 4, 7, and 13, it suggests that unborn babies with disabilities will be treated differently to unborn babies without disabilities. This appears to be a breach of Article 10 of the United Nations Convention on the Rights of Persons with Disabilities, which Northern Ireland is legally bound to through Section 6 of the Northern Ireland Act 1998, and again implies that these regulations have been laid imperfectly in comparison to the policy objectives, and is significantly concerning for legal and political reasons.

In conclusion, the way that the Secretary of State for Northern Ireland has used the powers granted to him by the Northern Ireland (Executive Formation etc) Act 2019 are in the interest of the House, both politically and legally as the Secretary of State appears to have implemented regulations that go far beyond the legal requirement imposed by the Parent Act (The Northern Ireland (Executive Formation etc.) Act 2019). The amending of legislation which only impacts Northern Ireland, which potentially breaches Northern Ireland's legal commitment to EU law, when there was no legal requirement to amend this law, suggests that these regulations have also been laid imperfectly. I ask the Secondary Legislation Scrutiny Committee to consider this, and the points made throughout this submission, with a view of determining if the special attention of the House is required.

3 April 2020

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Carla Lockhart MP

I write to you today to raise my concerns about The Abortion (Northern Ireland) Regulations 2020, laid 25 March 2020. 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 them, brought the following points to the attention of the full House.

Specifically it is my view that 7, 12 and 13 appear 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'.[64] The majority of my submission will focus on addressing regulation 7. I will also expand on how the House may wish to consider the political importance of the Government imposing regulations beyond what it was legally required to do, especially in light of the fact that Stormont is now sitting - a circumstance that has changed since the enactment of the parent Act - but I believe all the regulations I referenced should be carefully considered by the Secondary Legislation Scrutiny Committee with a view to drawing special attention to the House on grounds 4 (a), (b), and (d).

As it pertains to regulation 7, the wording of the regulation itself[65] 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 Downs Syndrome in England and Wales. This is discrimination based solely on disability, which violates Article 10 of the United Nations Convention on the Rights of Persons with Disabilities (Article 10 notes that State Parties should do all they can to ensure that 'every human being', including those with disabilities, are able to enjoy life on an equal basis.[66] Human being extends to those in the womb, and allowing abortion

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64 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.

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

66 See: Convention on the Rights of Persons with Disabilities

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for disability clearly does not treat those in the womb with disabilities, equally. If we allow abortion based solely on disability, we are not providing those human beings with disabilities the same right to enjoy life as those without disabilities, we are in fact saying they have less right to enjoy life solely because of disability.) As that is one of the Treaties that the Northern Ireland Assembly must adhere to,[67] and therefore not even the Northern Ireland Assembly itself would legally be able to implement such a provision, it is therefore also clearly beyond the scope of the Secretary to implement such a regulation. Even more than "imperfectly achieving" the policy objectives of the Northern Ireland (Executive Formation etc) 2019 Act (point (4) (d) of the terms of reference), this actually goes beyond what the Secretary, legally, was sanctioned to do. Concern about this falls under point (4) (a) of the Committee's Terms of Reference, that is, it is *"politically or legally important",* and again as such is of significant concern, and also an issue *"of public policy likely to be of interest to the House".* Indeed I think it is of interest to the House and hope it is brought to their attention.

Furthermore the wording of the regulation clearly perpetuates stereotypes against those with disabilities, suggesting for example that the lives of those with Down Syndrome (or other disabilities such as cleft lip and club foot) are less worthy of protection in the womb, because of Down Syndrome, than the able bodied are, on the basis that they are able bodied. The impact of the negative stereotyping of this on people with Down Syndrome is demonstrated all too clearly by the recent Heidi Crowther court case. This violates not only of the CEDAW recommendation itself,[68] but again seems to conflict with the United Kingdom's obligations under the UN Convention on the Rights of Persons with Disabilities.[69] This again suggests the regulations "imperfectly achieve" the policy objectives of the 2019 Act, as well as carries immense political and legal ramifications which should be of interest to the House (point (4) (a) of the Terms of Reference).

Furthermore, 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 Convention on the Rights of Persons with Disabilities (Art. 4, 5, 8). Even if the condition is considered fatal, there is still a decision made on the basis of impairment. Often it cannot be said if an impairment is fatal. Experience*

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67 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).

68 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

69 Convention on the Rights of Persons with Disabilities

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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."[70]

Finally, 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."*[71]

In sum allowing disability abortion to birth violates the Section 9 (9) of the Northern Ireland (Executive Formation etc.) Act, which, legally, (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 one who represents Northern Ireland, I also would like to address what appears to be a politically unusual use of power, which is that 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 Government went ahead to implement regulations that go beyond what they were required to do rather than limiting the regulations to the minimum requirements of the law (a legal opinion by David Scoffield QC[72]which makes note of the consultation, notes 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).

Again using the language from the Terms of Reference I believe this should be reviewed according to point (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*, and point (4) (b) *that it may be inappropriate in view of changed circumstances since the enactment of the parent Act.*

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

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

71 Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol

72 David A Scoffield QC, "BRIEF TO ADVISE", 9 December 2019

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((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".*[73] 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".*[74] Also 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. It remains the hope that devolved government can be restored at the earliest opportunity through the current talks process."*[75] 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".*[76]

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

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73 Opening Statement to CEDAW Committee

74 Ibid.

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

76 A new legal framework for abortion services in Northern Ireland

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).

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 1: HM Government noting its desire to honour devolution

Further examples of the Government seeking to Honour Devolution:

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, and therefore the UK Government view is that Northern Ireland needs its elected representatives back in Government at the earliest opportunity, with Ministers taking important decisions on a range of issues that affect the people of Northern Ireland."[77]

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 same-sex marriage and opposite-sex civil partnerships, 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."*[78]

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, including health and social services. 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*

77 https://www.gov.uk/government/news/opening-statement-to-cedaw-committee
78 http://bit.ly/300tZit

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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."[79]

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."* [80]

Earlier this year, Robin Walker, the then Parliamentary Under-Secretary of State for Northern Ireland, stated: *"The hon. Member for Rochdale asked what we could do if the Executive were restored. If that were to happen before 31 March, we would welcome discussions on the regulations that will be made, and questions on implementation, which of course will be taken forward by the Northern Ireland Department of Health. As these are devolved matters, any reform after March 2020 can of course be considered by the Executive and the Assembly, subject to such legislation complying with convention rights and the usual Assembly procedures. This is yet another of those issues where, if we want the concerns and views of people in Northern Ireland to be properly heard, we must ensure that the institutions are in place."*[81]

3 April 2020

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

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

81 http://bit.ly/2RexDjt

Lord Morrow of Clogher Valley

This submission addresses the Abortion (Northern Ireland) Regulations 2020. These were laid before Parliament on 25th March[82] in view of the requirements of section 9 of the Northern Ireland (Executive Formation etc) Act 201(NIFEA).[83]

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; 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.

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 an 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 proposes 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.'[84]
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."

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82 http://www.legislation.gov.uk/uksi/2020/345/contents/made

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

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

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5. The UNCRPD is incorporated in EU law, and section 6(2)(d) of the Northern Ireland 1998[85] prevents the Assembly passing legislation that is incompatible with EU law. In 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*".[86]

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, Secretary of State does not have the power to make Regulation 7.

7. 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.[87] 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.

8. 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.

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

86 http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf

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

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9. 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.[88] Therefore it is not *necessary* on this ground.

10. 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 even 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.

4 April 2020

[88] 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

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NI Church Leaders

We, as members of the Church Leaders Group in Northern Ireland are writing to you because we are very concerned about the content of the Abortion (Northern Ireland) Regulations 2020, laid in Parliament on 25th March 2020.

We have previously expressed our very significant disquiet about the way in which the Northern Ireland (Executive Formation etc.) Act 2019 was passed. One of the consequences of the way in which the legislation was passed is that there was no proper parliamentary scrutiny as it went through Parliament. The Act contains significant delegation of powers and yet, during the parliamentary process this was not considered by the Delegated Powers and Regulatory Reform Committee, or any other Committee in either House. While the Secretary of State for Northern Ireland did consult on his proposals for implementing the obligations placed on him by the Northern Ireland (Executive Formation etc) Act, the government's own report stated that 79% of the more than 21,000 respondents were opposed to the suggested framework.

The Act having passed, and Regulations having been signed into law, we are looking to you, as a Committee, to exercise your powers and draw to the attention of Parliament the grave defects in this legislation. We understand that both Houses of Parliament must confirm their approval within 28 sitting days for them to remain in force.

We have many concerns about these Regulations, some of which we know to be outside your Committee's Terms of Reference. We limit our comments to matters which we believe to be within your competence.

We believe that the Secretary of State for Northern Ireland has exceeded his powers and that at least three of the Regulations are *ultra vires* the powers given to the Secretary of State in the Act.

Regulation 7 provides for abortion of babies where serious disability is anticipated. We believe that this is not in compliance with existing obligations under EU law which prohibit disability discrimination, and so is *ultra vires* according to s.6(2)(d) of the Northern IrelandAct 1998.

In addition to this, Article 10 of the United Nations Convention on the Rights of Persons with Disabilities provided equal protection in the right to life including those in the womb. The Committee on that Convention has commented adversely on the provisions of the Abortion Act 1967 on which Reg 7 is based.

The Convention is part of EU law, and is binding on the UK. Regulation 7 (1) (b) exceeds what is

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required by law and is not necessary to protect the rights of pregnant women under the European Convention on Human Rights.

This also exceeds the requirements of the recommendations of the CEDAW Report on which the regulations are based, which specifically states that stereotypes towards persons with disabilities should not be perpetuated.

Regulation 12 is also inconsistent with s 6 (2)(e) of the Northern Ireland Act 1998 in that it discriminates against registered medical practitioners who have a conscientious objection on grounds of religious belief or political opinion to involvement, rather than the more limited "participation" in abortion, and who will not be protected if they are not directly involved in the actual abortion. They are therefore treated less favourably under the Regulations. The extent of the conscientious objection provision is so limited that it must be in breach of Article 9 of the European Convention on Human Rights. It would have been possible to provide rights of conscientious objection which are more extensive and we believe that this would have been a necessary and proportionate response given the numbers of members of our Churches, and indeed those of no religious belief, who have expressed their opposition to the extension of the law as it has now occurred.

Regulation 13 dis-applies the offence of child destruction under the Criminal justice (NI) Act 1945 for certain abortions. This is not required by the CEDAW recommendations, paragraphs 85 and 86. This therefore goes beyond the powers conferred in the Northern Ireland (Executive Formation etc) Act 2019.

We hope that your Committee will draw these matters to the attention of Parliament. We are of the view that this matter, which is devolved to the NI Assembly, should be dealt with by the NI Assembly, given that it is now sitting, and particularly given that 79% of those who responded to the NIO Consultation objected to the proposals contained in that consultation.

3 April 2020

NI Voiceless

1. I am writing to you on behalf of NI Voiceless to express our concerns about the Abortion (Northern Ireland) Regulations 2020 published on 25th March 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 in relation to Abortion (Northern Ireland) Regulations 2020 in line with 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 a number of 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 it is clear that this consultation was deficient for three main reasons.

    a. First, it was inappropriate that the consultation on this subject was only open for six weeks, between 4th November and 16th December 2019. This was a consultation on 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 and should be avoided if possible, for obvious reasons.

    b. Second, the Government's response to the consultation does not seem to take the expected form of similar documents. No rationale is provided for the position adopted in several of the Regulations. For example, Regulation 11, which pertains to penalties for performing abortions outside the regulatory framework, no explanation is given as to why the NIO adopted a maximum penalty of a level 5 fine. This also applies to the explanatory memorandum provided by the NIO (also relevant to the Committee under its terms of

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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 for consultation response documents. No explanation is given for this decision but, for the purpose of transparency, such a list should have been provided. 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 within 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 is in not required by the underlying statute, Section 9 of the Northern Ireland (Executive Formation etc) Act 2019. Yet this Regulation, which functionally legalises self-abortion on the part of women beyond the threshold of viability up to term, has been included. 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? Should the NIO not have consulted further if they wanted to bring forward additional provisions of this nature?

3. **Secondly**, I would highlight our concern in relation to Regulation 7. We are deeply concerned 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."[1] 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."[2] 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.

5. I would also point out that, even on the basis of the Government's own objectives in policy

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terms, 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. The NIO simply 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 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.

7. 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.[3] 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.[4] 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.

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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 2020 laid by the Minister of State for NI under the Northern Ireland (Executive Formation etc) Act 2019. I do so with respect to paragraphs 4 a), 4 d) and 4 f) of the Committee's terms of reference. It is the case that regulation 12 is 'politically or legally important and gives rise to issues of public policy likely to be of interest to the House' because it is both deeply controversial in Northern Ireland because of its implications for people, doctors, nurses and midwives, and because it is my submission that the Secretary of State has acted beyond his competence and the Regulations "imperfectly achieve the policy objective". It was also preceded by a flawed consultation process.

2. Regulation 12 has an important purpose. It provides limited legal protection for medical practitioners who for sincere and real reasons conscientiously object to abortion. Freedom of conscience is an important legal principle which must be respected in accordance with the law. The failure to include provision for conscientious objection in any form would have been hugely problematic.

3. However, the way in which Regulation 12 seeks to provide this protection 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, provides that: "*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 existing European Union Law; the European Convention on Human Rights (ECHR); or the Northern Ireland Act 1998.

4. It is my contention that the Regulations as drafted are not compliant with the Northern Ireland Act or the ECHR. Section 6(1) of the Northern Ireland Act 1998 states that "A provision of an Act is not law if it is outside the legislative competence of the Assembly."[89] 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

[89] http://www.legislation.gov.uk/ukpga/1998/47/section/6

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opinion." It is my further contention that Regulation 12 discriminates against individuals on the grounds of their religious belief or political opinion.

5. Regulation 12(3) and 12(4) and the narrow definition given to the term 'treatment' in the Regulation lead to direct discrimination against individuals who on the grounds of religious belief or political opinion conscientiously object to abortion.

6. Regulation 12 has to be considered in the context of the entire set of Regulations and the narrow interpretation given by the UK Supreme Court in the case of Doogan[90] of the term "participate", as it deprives individuals whose actions fall outside the understanding of "participate" and have a sincere conscientious objection to abortion of protection. 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.'

7. The protection provided by Regulation 12(3) is also 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 (i.e. abortions carried out under Regulation 6).

8. Article 9 of the ECHR provides for also needs to be considered with regard to regulation 12.[91] Article 9 of the ECHR provides for Freedom of Thought, Conscience and Religion. It is my contention that Regulation 12 fails to give adequate protection to the rights of individuals to freedom of thought, conscience and religion.

9. It is the case Regulation 12 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 sectors".[92] There is currently a very serious shortage of medical and nursing staff in NI. There is a real danger of causing further

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

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

92 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

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unnecessary harm to the NHS by placing medical and nursing professionals in a situation in which they cannot practice medicine nursing in certain areas, because of their sincere moral beliefs.

10. Legislating for abortion and freedom of conscience is a devolved matter. Even were one to accept that the absence of a functioning Assembly gave Westminster a moral right to legislate, the fact is that the Northern Ireland Assembly was restored in January, long before the regulations were laid. As Stella Creasy said when moving the initial amendment in the House of Commons on 9 July '…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 NIO did not engage in a meaningful consultation with the NI Executive or the Assembly more broadly on conscience. This was an affront to the people of Northern Ireland and wholly wrong.

11. The consultation that informed the decisions regarding conscience was deeply flawed. It only last 6 weeks rather than the 12 one would expect for a matter like this and to make matters worse was conducted during a General Election. The Government's response to the consultation, moreover, does not indicate what proportion of respondents supported tor opposed he Government's conscience proposals.

12. I have other concerns about the fact that some of these Regulations such as Regulations 7 and 13 are also ultra vires. Space does not permit me to deal with them in the same detail. However, I ask the Committee to draw to the attention of Parliament the grave flaws in these Regulations.

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Presbyterian Church in Ireland

8. 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.

9. 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, regulation 3 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.

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 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 restored to its legislative scrutiny role. These regulations relate to matters that are ordinarily devolved to the Northern Ireland institutions and they now should be given the opportunity to legislate.

d. *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.

Regulation 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.

e. *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.

f. that there appears to be inadequacies in the consultation process which relates to the instrument

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.

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Right to Life UK

By implementing regulations to expand abortion in Northern Ireland that go beyond the limited provisions that were required by the Northern Ireland (Executive Formation etc.) Act (2019)[93], Right to Life UK believes the Statutory Instrument that expanded abortion services in Northern Ireland[94] has significant political and legal implications. We also believe it imperfectly achieved the policy objectives of the 2019 Act, whilst ignoring significant changes that took place after the passing of the same Act. In addition, *"there appear to be inadequacies in the consultation process which relates to the instrument."*[95]

We are writing to highlight why we believe the above to be the case, and thus, request that you bring these issues with the Instrument 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, as noted above, "*(f) there appear to be inadequacies in the consultation process which relates to the instrument."*

Specifically, we base our submission of the following points:

1. The instrument as a whole is of political and legal importance that will likely be of interest to the whole House, given that abortion is a devolved matter and these decisions should rest with Northern Ireland
2. Regulations 2 and 4 appear to go beyond the power conferred by the statute
3. Regulations 7, 12 and 13 are explicitly outside the scope of the law
4. There were inadequacies with the consultation process

While all merit further explanation, for focus we draw the committee's attention to point 1, and regulations 2, 4, and 12. We will briefly address regulation 7 and point 4.

Regarding point 1, the Devolution Settlement states that abortion is a devolved power,[96] and the Government has repeatedly noted, ever since the Assembly ceased to function in 2017, that in light

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

94 https://www.legislation.gov.uk/uksi/2020/345/regulation/4/made

95 This is one of *"the grounds on which an instrument, draft or proposal may be drawn to the special attention of the House."*

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

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of the Devolution Settlement, they wanted to help restore the Assembly and honour devolution as much as possible.[97] Given the Government's own repeated sentiments along these lines, it seems both unusual and unexpected that HM Government would legislate on abortion at all, though we do note the 2019 Act was passed by Parliament when Stormont was not sitting. While we note limited regulations (legally) needed to be made, with the restoration of Stormont, the UK Government should have implemented regulations that would do only what the very limited requirements of the law set out. Going beyond this (details below) is odd as it seems to contradict their own repeated sentiments to honour devolution.

Regarding points 2 and 3, as a brief background, according to the Northern Ireland (Executive Formation etc.) Act (2019),[98] "The Secretary of State must ensure that the recommendations in paragraphs 85 and 86 of the CEDAW report are implemented in respect of Northern Ireland."[99] 7 In addition, it was made explicit via Section 9 (9) that the Secretary of State can only enact regulations that "could be made by an Act of the Northern Ireland Assembly'.[100] 8 *(In other words, laws or a provision that would violate the ECHR, EU law, or discriminate based on political belief or opinion, violate this).*

According to paragraph 85 of the CEDAW report, the Act only required legislation to be adopted to expand abortion for three limited reasons.[101] Specifically regarding point i, "threat to the woman's physical or mental health," the regulations (section 4 (1))[102] 10 allow for abortion if: "the continuance of the pregnancy would involve risk of injury to the physical or mental health of the pregnant woman which is greater than if the pregnancy were terminated." In this regulation, the word "risk" is unjustifiably more permissive than what CEDAW recommended ("threat"). There is no reason for the Government to go beyond what the CEDAW report recommended in this case, especially given that the same wording ("threat") in the 1967 Abortion Act is currently quite widely interpreted to allow for (in England and Wales) de-facto abortion for any reason. Furthermore, the

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97 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

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

99 Ibid.

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

101 These are: "*i. Threat to the pregnant woman's physical or mental health without conditionality of "long-term or permanent" effects; ii. Rape and incest; and iii. Severe foetal impairment, including FFA, without perpetuating stereotypes towards persons with disabilities."*

102 https://www.legislation.gov.uk/uksi/2020/345/regulation/4/made

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regulations allow abortion through to 24 weeks; yet there is no requirement in the CEDAW recommendations to introduce through to that late of a gestation.

Regarding point ii, to provide for abortion in cases of "Rape and incest;", the regulations made abortion legal for *any* reason up to 12 weeks, reasoning they do not want to implement a test to assess whether a woman has been raped. While we understand the reasoning and agree with the need to be sensitive, it is equally as important to protect women. There is already a test in England and Wales for women to receive extra welfare benefits for a third child, if the child was "conceived without [her] consent", and there is no reason to believe a similar test could not be implemented in Northern Ireland.[103] More importantly, we should confront sexual crime, not ignore it, and by implementing abortion this way we disempower women. Furthermore of note, this enables abhorrent practices such as sex-selection abortion, which violates the Equality Act 2010.[104]

Also of note, regulation 12 appears to go beyond the legal authority of the Assembly to implement, as, based on the Northern Ireland Act 1998 section 6 (2) (e), provisions which discriminate "against any person or class of person on the ground of religious belief or political opinion" would be outside of their "legislative competence".[105] The way regulation 12 is worded appears to discriminate, as it refers to those that "participate" in abortion, suggesting those who have administrative, managerial or ancillary tasks may not be given adequate conscientious objection protections. This also may violate Article 9 of the ECHR, which states "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."[106]

To regulation 7, it is in our view a clear violation of The United Nations Convention on the Rights of Persons with Disabilities, specifically Article 10.[107] As the wording of the regulation is nearly identical to the wording in the UK Abortion Act (1967), which has allowed for abortion up to birth for club foot, cleft lip and Down Syndrome, the regulation clearly discriminates against those with disablities. This is especially notable and concerning from a political and legal perspective, given that,

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103 https://www.gov.uk/government/publications/support-for-a-child-conceived-without-your-consent

104 http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf

105 http://www.legislation.gov.uk/ukpga/1998/47/body

106 https://www.echr.coe.int/Documents/Convention_ENG.pdf

107 Article 10 notes 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." See: https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx

according to Section 9 (9) of the Northern Ireland (Executive Formation etc.) Act, the Secretary may only implement regulations the Assembly itself could. Specifically, the Assembly is limited in the laws it can pass by the Northern Ireland Act 1998, section 6 (2) of which says they cannot pass any law that would violate "any of the Convention rights".[108] As this regulation does violate a Convention of Rights, the Secretary of State appears to have legislated outside the means of the law, which we believe should be brought to the attention of the full House, as it appears to be *ultra vires*. It is also notable that the UK has been the subject of scrutiny from the UN Committee on the Rights of Persons with Disabilities, as said Committee has reported that that portions of the Abortion Act (1967) should be amended.[109]

Finally, regarding the consultation process, we believe there were several issues, including the limited time frame it was given, being just six rather than twelve weeks. It was also done at a busy time, in the midst of a general election. The consultation analysis does not mention any Government engagement with disability groups, which is concerning as the Government has allowed for abortion up to birth for disability. Finally and most notably: The Government does not appear to have addressed the concerns and views of the vast majority of respondents who expressed a desire that there would be no change to the abortion laws in Northern Ireland.

While we understand the Government legally needed to implement some form of regulations, it is concerning, given "Of all submissions received, 79% of those expressed a view registering their general opposition to any abortion provision in Northern Ireland beyond that which is currently permitted," that the regulations go beyond the minimum legal requirements.[110]

The above demonstrates that the UK Government went far beyond what they were legally required to when laying these regulations, despite the restoration of the Northern Ireland Executive in January (a "changed circumstance" of note in light of the Terms of Reference 4 (b)). Combining the effects of Regulations 2, 4, 7, 12, and 13 (some of which are addressed in this submission) it shows that these regulations in and of themselves violate other portions of law which solely impact Northern Ireland. If the Northern Ireland Assembly passed these regulations, they would have been

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

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

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

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in breach of Section (6)(2)(d) of the Northern Ireland Act 1998. Given that the UK Government are laying these regulations, it is of utmost importance that regulations are brought to the attention of the House under Terms of Reference (4) (a), (b), (d) and (f).

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