

CHRISTIAN MEDICAL FELLOWSHIP submission to the  
SECONDARY LEGISLATION SCRUTINY COMMITTEE  
Abortion (Northern Ireland) (No. 2) Regulations 2020

Dear Lord Hodgson and Members of the Committee,

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

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

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

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

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 The UK Government could have repealed section 9 of the NI Act 2019 in order to allow the newly reformed NI Assembly to decide upon its own abortion framework, respecting their devolved competence.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

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

4. Section 9 of the 2019 Northern Ireland Act requires compliance with the CEDAW report.<sup>1</sup> The requirements of the CEDAW report do not call for 'abortion on request', for any reason, up to 12 weeks. Any reasonable reading of the CEDAW Report would not interpret it to recommend early abortion 'on demand', as permitted in the Regulations. The Report recommends expansion of the scope of abortion law only to include rape and incest, fatal/severe foetal abnormalities, and threat to the pregnant woman's physical or mental health.

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

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<sup>1</sup> <https://undocs.org/CEDAW/C/OP.8/GBR/1>, March 2018, paragraphs 85 and 86

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

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

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

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

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

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

We believe the Regulations run contrary to provisions of the UN Convention on the Rights of Persons with Disabilities (UNCRPD), to which the UK is legally bound and which state that abortion should not be available purely on the grounds of disability. We gather that the NIO has denied that the UNCRPD has the status of binding EU law and are grateful to the Attorney General for NI for legal clarification in the matter.<sup>2</sup>

In addition, we note that the Supreme Court, in its 2018 NI abortion judgement,<sup>3</sup> did not argue that there was a right to abortion in cases where the disability of the child would not

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<sup>2</sup> <https://committees.parliament.uk/publications/744/documents/7758/default/>

<sup>3</sup> <https://www.supremecourt.uk/cases/docs/uksc-2017-0131-judgment.pdf>

be fatal. A press summary of the judgment stated: 'A disabled child should be treated as having equal worth in human terms as a nondisabled child', referencing comments by Baroness Hale, Lord Mance and Lord Kerr.

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

6. CMF also has concerns about Regulation 12, that limits freedom of conscience. In our view Regulation 12 may be ultra vires in that it allows for discrimination on the grounds of political or religious belief in contravention of section 6(2) (e) of the Northern Ireland Act 1998. We suggest it also falls foul of Article 9 of the European Court of Human Rights (ECHR)<sup>4</sup> and the 2010 UK Equality Act<sup>5</sup> which prohibits both direct or indirect discrimination on the grounds of religion and belief. Regulation 12 (1) states that 'a person is not under a duty to participate in any treatment... to which the person has a conscientious objection.' The meaning of 'participation' for nurses and midwives has been tested in the courts<sup>6</sup> and refers to 'taking part in a "hands-on" capacity'. As such it clearly covers direct involvement in the process of termination. But does it also apply to the host of ancillary, administrative and managerial tasks performed in association with it? Again, we are indebted to John Larkin QC, Attorney General for Northern Ireland, for drawing attention to paragraph 24 of the Supreme Court ruling in *Doogan*, which states: 'But a state employer has also to respect his employees' Convention rights. And the Equality Act 2010 requires that any employer refrain from direct *or unjustified indirect* discrimination against his employees on the ground of their religion or belief' (emphasis added).<sup>7</sup> Many ancillary staff hold their beliefs as conscientiously as doctors and nurses and are as conflicted when asked to participate, even indirectly, with abortion. This will be even more true in NI where religious faith is owned by a higher percentage of the population than in other parts of the UK.

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

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

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<sup>4</sup> [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf), page 10

<sup>5</sup> [http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga\\_20100015\\_en.pdf](http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf)

<sup>6</sup> <https://www.supremecourt.uk/cases/uksc-2013-0124.html>

<sup>7</sup> <https://committees.parliament.uk/publications/744/documents/7758/default/>