

RESPONSE TO THE PUBLIC CONSULTATION ON THE DRAFT GUIDANCE ON TERMINATION OF PREGNANCY IN NORTHERN IRELAND

Introduction

- 1. The Northern Ireland Human Rights Commission (the NIHRC or the Commission) pursuant to Section 69 (1) of the Northern Ireland Act 1998 reviews the adequacy and effectiveness of law and practice relating to the protection of Human Rights. In accordance with this function the following statutory advice is submitted to the Department of Health, Social Services and Public Safety (the Department) in response to the consultation on the Draft Guidance on Termination of Pregnancy in Northern Ireland (the draft Guidance).
- 2. The NIHRC bases its position on the full range of internationally accepted human rights standards, including the European Convention on Human Rights as incorporated by the Human Rights Act 1998 (HRA) and the treaty obligations of the Council of Europe and United Nations (UN) systems. The relevant international treaties in this context include:
 - The European Convention on Human Rights, 1950 (ECHR) [UK ratification 1951];
 - The International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) [UK ratification 1976];
 - The International Covenant on Civil and Political Rights (ICCPR) [UK ratification 1976];
 - The United Nations Convention on the Elimination of Discrimination Against Women (CEDAW)[UK ratification 1986];

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¹ Northern Ireland Act 1998, S.69(1).

- The United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) [UK ratification 1988];
- The United Nations Convention on the Rights of the Child (CRC) [UK ratification 1991];
- The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)[UK ratification 2009].
- 3. The Northern Ireland (NI) Executive is subject to the obligations contained within these international treaties by virtue of the United Kingdom's ratification. In addition, Section 26 (1) of the Northern Ireland Act 1998 provides that "If the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations... he may by order direct that the proposed action shall not be taken."
- 4. The NIHRC further recalls that Section 24 (1) of the Northern Ireland Act 1998 states that "A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act (a) is incompatible with any of the Convention rights".

The Legal and Procedural Framework Governing Termination of Pregnancy in Northern Ireland

- 5. Article 8 of the ECHR protects the right to respect for private and family life; "[e]veryone has the right to respect for his private and family life, his home and his correspondence." Similar protections of the right to privacy are found in Article 17 of the ICCPR. Restrictions on the right to private and family life must; be prescribed by law, pursue a legitimate aim, be necessary in a democratic society and be proportionate.²
- 6. The European Court of Human Rights (ECt.HR) has found that the prohibition of abortion falls for review within the scope of the right to respect for one's private life, and accordingly, of Article 8.³ The

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² Article 8 (2).

³ P. and S. v. Poland, ECt.HR, no. 57375/08, 30 January 2013, §96. See also, A, B and C v. Ireland, ECt.HR, [GC], no. 25579/05, 16 December 2010, §214. The ECt.HR has further held that "the notion of private life within the meaning of Article 8 applies to both the decision to become and not to become a parent." P. and S. v. Poland, ECt.HR, no. 57375/08, 30 January 2013, §111. Citing, Evans v. United Kingdom [GC], no. 6339/05 §71, ECHR 2007-1; R.R. v. Poland, ECt.HR, no. 27617/04, 26 May 2011, §180. See also, A, B and C v. Ireland, ECt.HR, [GC], no. 25579/05, 16 December 2010, §212.

UN Human Rights Committee has also considered the prohibition of termination in the context of the right to privacy protected under the ICCPR.⁴

- 7. Article 8 has been found to contain certain duties, which the State must fulfil in order to comply with its obligations under the ECHR and the Human Rights Act. The ECt.HR has determined that "the State's obligations include both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individual's rights, and the implementation, where appropriate, of specific measures."⁵
- 8. The ECt.HR has made clear that:

While a broad margin of appreciation is accorded to the State as to the decision about the circumstances in which an abortion will be permitted in a State..., once that decision is taken the legal framework devised for this purpose should be 'shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations derived from the Convention'...⁶

- 9. The Court has held that "the absence of such preventive procedures in the domestic law can be said to amount to the failure of the State to comply with its positive obligations under Article 8 of the Convention."
- 10. In 2009 Lord Justice Girvan recognised that despite differences between the law regarding abortion in Ireland and in Northern Ireland "[t]he outcome of the [A, B and C v. Ireland] case may well have implications for Northern Ireland".8
- 11. In light of developments in the case law of the ECt.HR since the Northern Ireland Court of Appeal's decision in 2004,⁹ **the**

⁴ K.L. v. Peru, UN Human Rights Committee, CCPR/C/85/D/1153/2003, 22 November 2005, Para 6.4.

⁵ P. and S. v. Poland, ECt.HR, no. 57375/08, 30 January 2013, §96. See also, Tysiąc v. Poland, ECt.HR, no. 5410/03, 20 March 2007, §110; A, B and C v. Ireland, ECt.HR, [GC], no. 25579/05, 16 December 2010, §245; R.R. v. Poland, ECt.HR, no. 27617/04, 26 May 2011, §184.

⁶ A, B and C v. Ireland, ECt.HR, [GC], no. 25579/05, 16 December 2010, §249. See also, P. and S. v. Poland, ECt.HR, no. 57375/08, 30 January 2013, §99; Tysiąc v. Poland, ECt.HR, no. 5410/03, 20 March 2007, §116-124; R.R. v. Poland, ECt.HR, no. 27617/04, 26 May 2011, §200.

⁷ Tysiac v. Poland, ECt.HR, no. 5410/03, 20 March 2007, §118.

⁸ Society for the Protection of Unborn Children's Application [2009] NIQB 92, at 4. ⁹ Family Planning Association of Northern Ireland v. The Minister for Health, Social Services and Public Safety [2004] NICA 39.

Commission advises that the legal and procedural framework governing termination of pregnancy would likely be held not to meet the requirements of the ECHR for the following reasons.

1. Differences of Opinion

12. The Commission recalls *Tysiąc v. Poland* wherein the ECt.HR highlighted that

[a] need for such safeguards becomes all the more relevant in a situation where a disagreement arises as to whether the preconditions for a legal abortion are satisfied in a given case, either between the pregnant woman and her doctors, or between the doctors themselves. In the Court's view, in such situations the applicable legal provisions must, first and foremost, ensure clarity of the pregnant woman's legal position.¹⁰

13. The Commission further notes consideration given to access to lawful abortion in Ireland, where the ECt.HR found that

there is no framework whereby any difference of opinion between the woman and her doctor or between different doctors consulted, or whereby an understandable hesitancy on the part of a woman or doctor, could be examined and resolved through a decision which would establish as a matter of law whether a particular case presented a qualifying risk to a woman's life such that a lawful abortion might be performed.¹¹

14. The ECt.HR noted that the relevant Ordinance in Poland,

[did] not distinguish between situations in which there is full agreement between the pregnant woman and the doctors – where [the procedure adopted by the Ordinance] is clearly practicable – and cases where disagreement arises between the pregnant woman and her doctors, or between the doctors themselves. The Ordinance does not provide for any particular procedural framework to address and resolve such controversies.¹²

15. The Commission notes that procedures outlined in the draft Guidance make no provision for circumstances when there may be a

¹² Tysiąc v. Poland, ECt.HR, no. 5410/03, 20 March 2007, §121.

¹⁰ Tysiąc v. Poland, ECt.HR, no. 5410/03, 20 March 2007, §116.

¹¹ A, B and C v. Ireland, ECt.HR, [GC], no. 25579/05, 16 December 2010, §253.

difference of opinion between a woman and her doctor or between medical practitioners who are treating a pregnant woman.

16. The Commission advises that in order to comply with the ECHR the framework governing termination of pregnancy must provide for a mechanism to address such differences of opinion. It is therefore necessary that the current draft Guidance include reference as to how differences of opinion between a woman and her doctor and between medical practitioners are to be addressed.

2. The Right to be Heard

17. The ECt.HR has held that

in the context of access to abortion the relevant procedure should guarantee to a pregnant woman at least the possibility to be heard in person and to have her views considered. The competent body or person should also issue written grounds for its decision.¹³

18. The Commission advises that the regulatory framework must provide a timely opportunity for the woman to be heard and information must be provided to women to allow them to access this mechanism. This is not addressed in the current draft Guidance.

3. The Right to Conscientious Objection

- 19. Human rights principles in relation to conscientious objection are twofold. First, practitioners have rights to conscientious objection (although these are not absolute). Second, the exercise of a conscientious objection must not prevent patients from accessing services to which they are legally entitled.
- 20. The Commission notes the protection of the right to conscientious objection, a component of the right to freedom of thought, conscience and religion, which is protected under Article 9 of the ECHR and Article 18 of the ICCPR.
- 21. The Commission further notes that the ECt.HR has held that

States are obliged to organize their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health

¹³ P. and S. v. Poland, ECt.HR, no. 57375/08, 30 January 2013, §99. See also, Tysiac v. Poland, ECt.HR, no. 5410/03, 20 March 2007, §117.

professionals in a professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.¹⁴

- 22. The UN Committee on the Elimination of Discrimination Against Women has similarly stated that "if health service providers refuse to perform [certain reproductive health] services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers." 15
- 23. In the 2004 case regarding the issuance of guidance Sheil LJ stated that the guidelines should

state clearly the right of those in the medical profession and associated services, who have a conscientious objection to carrying out termination of pregnancy, not to do so and state the appropriate procedure to be adopted in that situation by way of referring the patient to a list of those members of the profession and associated services who do not have such conscientious objections.¹⁶

Similarly Campbell LJ noted that "Patients should also be made aware that if their medical practitioner has a conscientious objection to abortion they are entitled to ask to be referred to another practitioner." ¹⁷

24. The Commission advises that the provisions in the draft Guidance regarding conscientious objection are not in compliance with the requirements of human rights law as the right is framed too broadly¹⁸ and no provision is made to

¹⁴ P. and S. v. Poland, ECt.HR, no. 57375/08, 30 January 2013, §106. See also, R.R. v. Poland, ECt.HR, no. 27617/04, 26 May 2011, §206.

¹⁵ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 24, Article 12: Women and Health, 1999, para. 11. *See also*, CEDAW, Concluding Observations regarding Hungary, CEDAW/C/HUN/CO/7-8, 26 March 2013, para 31: "The Committee urges the State party to: (d) Establish an adequate regulatory framework and a mechanism for monitoring of the practice of conscientious objection by health professionals and ensure that conscientious objection is accompanied by information to women about existing alternatives and that it remains a personal choice rather than an institutionalized practice."; UN Human Rights Committee, Concluding Observations regarding Poland, CCPR/C/POL/CO/6, 15 November 2010, para. 12. ¹⁶ Family Planning Association of Northern Ireland v. The Minister for Health,

Social Services and Public Safety [2004] NICA 37, at 10.

17 Family Planning Association of Northern Ireland v. The Minister for Health, Social Services and Public Safety [2004] NICA 38, at 18.

¹⁸ Pichon and Sajous v. France (dec.), ECt.HR, no. 49853/99: "in safeguarding this personal domain, Article 9 of the Convention does not always guarantee the right to behave in public in a manner governed by [the individual's religion or

ensure that women are referred to alternative medical practitioners. The Commission recommends that this section of the draft Guidance should be amended.

4. The Right to Receive and Impart Information

- 25. International human rights law provides for the right of access to information regarding health issues. Article 10 of the ECHR and Article 19 of the ICCPR protect the right to freedom of expression. This right "requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers." 19
- 26. Article 8 of the ECHR includes the right of "individuals facing risks to their health to have access to information" regarding those risks. 20 Article 12 of the ICESCR protects "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The State is obliged to ensure the accessibility of this right, including "Information accessibility" which "includes the right to seek, receive and impart information and ideas concerning health issues." 21
- 27. With respect to termination of pregnancy, the ECt.HR has stated that it "is of the view that effective access to reliable information on the conditions for the availability of lawful abortion, and the relevant procedures to be followed, is directly relevant for the exercise of personal autonomy."²²
- 28. The Commission notes in this regard that in the *Open Door* case, which considered the receipt and provision of information regarding abortion services available outside Ireland, the ECt.HR found that the relevant restriction in that case

limited the freedom to receive and impart information with respect to services which are lawful in other

belief]. The word 'practice' used in Article 9 § 1 does not denote each and every act or form of behavior motivated or inspired by a religion or a belief." See also, P. and S. v. Poland, ECt.HR, no. 57375/08, 30 January 2013, §106; R.R. v. Poland, ECt.HR, no. 27617/04, 26 May 2011, §206.

¹⁹ UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, 2011, para 11.

²⁰ Csoma v. Romania, ECt.HR, no. 8759/05, 15 April 2013, §42.

²¹ UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2000, paras. 12(b)(iv), 14 and 21. *See also, P. and S. v. Poland*, ECt.HR, no. 57375/08, 30 January 2013, §167; CEDAW, General Recommendation No. 24, Article 12: Women and Health, 1999, paras. 13, 20, 22, 31(e).

²² P. and S. v. Poland, ECt.HR, no. 57375/08, 30 January 2013, §111.

Convention countries and may be crucial to a woman's health and well-being. Limitations on information concerning activities which, notwithstanding their moral implications, have been and continue to be tolerated by national authorities, call for careful scrutiny by the Convention institutions as to their conformity with the tenets of a democratic society.²³

- 29. The Commission further notes that the statement in the draft Guidance that "Counsellors should understand that they must also keep within the law of Northern Ireland when any counselling includes the provision of information relating to termination of pregnancy services lawfully available outside Northern Ireland" may be read so as to imply that there are restrictions in the law of Northern Ireland regarding the provision of such information.²⁴
- 30. The Commission advises that blanket restrictions on the receipt and provision of information regarding available options for termination of pregnancy outside Northern Ireland are not permissible under Article 10 of the ECHR and the draft Guidance should be revised to explicitly clarify the right of women to access such information.

5. Possible Restriction in Domestic law

31. The ECt.HR has explained that

the expression "prescribed by law", within the meaning of Article 10 § 2, requires firstly that the impugned measure should have some basis in domestic law; however, it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences, and that it should be compatible with the rule of law... According to the Court's established case-law, a rule is "foreseeable" if it is formulated with sufficient precision to enable any

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²³ Open Door and Well Woman v. Ireland, ECt.HR, no. 14234/88, 14235/88, 29 October 1992, §72. In finding that the restraint imposed on the applicants violated the rights protected under Article 10 the Court noted evidence that suggested that the restriction "created a risk to the health of those women who are now seeking abortions at a later stage in their pregnancy, due to lack of proper counselling, and who are not availing themselves of customary medical supervision after the abortion has taken place... Moreover, the injunction may have had more adverse effects on women who were not sufficiently resourceful or had not the necessary level of education to have access to alternative sources of information..." at §77.

²⁴ Para 5.11.

individual – if need be with appropriate advice – to regulate his conduct...²⁵

32. The Commission notes that Para 5.12 of the draft Guidance states

The question of whether it would be lawful in Northern Ireland to advocate or promote, to a pregnant woman in Northern Ireland, the termination of her pregnancy outside Northern Ireland, where that termination of pregnancy would be lawful in the place where it was to be carried out, but would not be lawful if it was being carried out in Northern Ireland, has never been considered by the courts. This is a 'grey area' in which, pending clarification by the courts, the lawfulness of such conduct would have to be regarded as uncertain.

33. The Commission notes that the Department has stated that the draft Guidance "cannot, and does not, make any change to the law of Northern Ireland". The Commission advises that in light of the continuing uncertainty as to whether "it would be lawful in Northern Ireland to advocate or promote, to a pregnant woman in Northern Ireland, the termination of her pregnancy outside Northern Ireland" a restriction that exists in this regard is not adequately "foreseeable" and thus would likely be found in violation of the ECHR's requirement that it be "prescribed by law".

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²⁵ Yildirim v. Turkey, ECt.HR, no. 3111/10, 18 December 2012, §57.

²⁶ Para. 1.9

²⁷ See, Society for the Protection of Unborn Children's Application [2009] NIQB 92, at 37.