

**SPUC –v- Dept of Health**  
**Pre-action correspondence**

**Our Ref:** PG/AD – Belfast Office  
**E-Mail:** philip.gilpin@hewittandgilpin.co.uk  
**Your Ref:**  
**Date:** 22 April 2009

Michael McGimpsey MLA  
Minister for Health, Social Services and Public Safety  
Room C5.10, Castle Buildings  
Stormont Estate  
BELFAST BT4 3SQ

Dear Minister

**Re: Our client – *Society for the Protection of Unborn Children*  
Publication of guidance on the termination of pregnancy in Northern Ireland**

We have been consulted by the Society for the Protection of Unborn Children (SPUC) in relation to the recent publication by the Department of Health, Social Services and Public Safety ('the Department') of a document entitled *Guidance on the Termination of Pregnancy: The Law and Clinical Practice in Northern Ireland* ('the Guidance').

SPUC takes issue with a number of matters set out in the Guidance. The purpose of this correspondence is to put you on notice of our client's intention to apply to the High Court for leave to apply for judicial review unless the Department agrees to withdraw the Guidance or amend it to rectify the matters identified below.

This letter is sent in compliance with the High Court's Judicial Review Pre-Action Protocol issued on 30 September 2008.

**1. Proposed claim for judicial review**

To: The Department of Health, Social Services and Public Safety  
care of the Minister for Health, Social Services and Public Safety  
Room C5.10, Castle Buildings  
Stormont Estate  
BELFAST BT4 3SQ

**2. The applicant**

The applicant is the Society for the Protection of Unborn Children, whose address is 3 Whitacre Mews, Stannary Street, London, SE11 4AB.

**3. Reference details**

We are unaware of any reference details the Department has in relation to the issues which are raised in this correspondence but believe that the matter is such that you will be well aware of the issues.

#### **4. The details of the matter being challenged**

Our client wishes to challenge:

- (i) The decision by the Department to issue the Guidance in its present form.
- (ii) The terms of the Guidance itself.

#### **5. The issue**

The core of our client's complaint is that the Guidance which has been issued by the Department:

- (i) Is based on a misleading premise (that "each Health & Social Care Trust must ensure that its patients have access to termination of pregnancy services" – see paragraph 2.3 of the Guidance);
- (ii) Fails to identify the crucial distinction between 'direct' abortion (where there is an intention to take the life of the unborn child) and 'indirect' abortion (where there is no such intention);
- (iii) Does not accurately reflect the law in Northern Ireland and is accordingly misleading and liable to lead to the commission of offences; and
- (iv) Does not properly address the issues raised by the Court of Appeal in its decision in *Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety* [2004] NICA 37-39; [2005] NI 188 ('the *Family Planning* case');
- (v) Was issued because the Department was advised that it was under an obligation to issue guidance and that such guidance was erroneous in the light of the decision of the House of Lords in *R v HM Attorney General ex parte Rusbridger and another* [2003] UKHL 38

The Department issued a consultation paper in July 2008 in relation to the proposed publication of the Guidance. SPUC responded to this consultation in detail by way of a submission dated 22 September 2008. This submission, in turn, referred to and relied upon a briefing paper prepared for the Assembly's All Party Pro-Life Group by Mrs Johanna Higgins LLB. The matters of concern raised in those papers have plainly not been addressed adequately in the present terms of the Guidance. Rather than set them out again extensively, we enclose a further copy of each of the submissions referred to above for your convenience.

As you will also be aware, the Assembly Committee for Health, Social Services and Public Safety ('the Committee') responded to the Draft Guidance on 10 November 2008 and, consistent with our client's position, recommended that "the starting point for the Guidance should have been a clear statement that abortion is illegal in Northern Ireland...", along with a recognition of the reason for this, namely the protection of the unborn child. This crucial recommendation, along with the additional recommendation that the rights of the unborn child ought to be referred to in the Guidance, has not been given effect by the Department. This is – additionally – a failure to have regard to the Preamble to the UN Convention on the Rights of the Child.

Some (by no means all) concrete instances of the way in which the presumptively criminal nature of abortion in Northern Ireland is ignored in the Guidance are:

1. the failure to set out the potential criminal liability of those who act in secondary roles in the carrying out of abortions;
2. the failure to acknowledge (cf. paragraph 4.1 of the Guidance) that there is a legal right to refuse to take part in the termination of pregnancy;
3. the provision of ‘non-judgmental’ counselling (cf. paragraph 5.9) is inconsistent with the limited criminal law defences to abortion – if there is a choice then the abortion is criminal.
4. there is no warning that a patient who seeks an abortion when one is not permitted under the law of Northern Ireland may have thereby attempted to commit the offence of abortion or solicited the commission of that offence.
5. In the circumstances covered by 4. above there is no guidance about the resulting duties of Trust staff under the criminal law.

The obligation on the Department to publish guidance which arises under article 4 of the Health and Personal Social Services (Northern Ireland) Order 1972 is an obligation not merely to publish such guidance but to be clear as to what the law is and to publish guidance which clearly and accurately reflects it (see, for instance, paragraphs 76, 95, 181 and 185 of the *Family Planning* case). We trust the Department will not dissent from this proposition. However, SPUC contends that the Department has failed to meet this obligation and has accordingly acted unlawfully.

**6. The details of the action that the respondent is expected to take**

In light of the foregoing the Department is expected to withdraw the Guidance which it has recently published and issue fresh guidance in an amended form which meets our client’s objections.

Further, it will be the responsibility of the Department to bring this correspondence to the attention of the Executive committee and the Department will fail in its duties additionally if it does not do so.

**7. The details of the legal advisers, if any, dealing with this claim**

The legal adviser dealing with this claim on SPUC’s behalf is Mr Philip Gilpin at Hewitt & Gilpin, Solicitors, who is contactable at the address shown above.

**8. The details of any interested parties**

We consider that there may be a number of other parties who are interested in any proceedings resulting from the Department’s failure to take the action requested at section 6 above. Broadly speaking, these are likely to be the same organisations or interest groups who participated in the *Family Planning* case.

**9. The details of information sought**

In the event that you decline to agree to the course requested at section 6 above, we seek a full explanation of the reasons for that decision and a full explanation of the reasons why the Guidance has been issued in the form in which it has, notwithstanding the submissions made by SPUC and the All-Party Pro-Life Group in the course of the Department’s consultation process.

**10. The details of any documents that are considered relevant and necessary**

We also seek disclosure of any documents relating to the Department’s consideration of the submissions made by SPUC and the All-Party Pro-Life Group and the recommendations

made by the Committee, including minutes of any meetings at which the Draft Guidance was discussed and previous drafts of the Guidance.

**11. The address for reply and service of court documents**

The address for reply and the service of any court documents on our client is the address set out above in the heading of this letter.

**12. Proposed reply date**

We would be grateful if you could reply to this correspondence within fourteen days of the date hereof.

We look forward to hearing from you.

Yours faithfully,

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**HEWITT & GILPIN**