

# Explanatory Notes to Accompany Proposed Legislative Text

## For New Regulatory Framework for Abortion Law in NI

### Part 1: Introductory

1. **Article 1** sets out the **title of the Order** and that it will come into effect on 31 March 2020
2. **Article 2** sets out **definitions** that apply across the Order, including what is meant by 12 weeks of pregnancy, which is in line with the ROI's definition in section 12(5) of the [Health \(Regulation of Termination of Pregnancy\) Act 2018](#). Note that such a definition of the number of weeks of pregnancy does not exist in the Abortion Act 1967.
3. Article 2 does not contain a definition of a foetus, as there is no similar definition used in the Abortion Act 1967 nor the Human Fertilisation and Embryology Act 1990 even though the term foetus is used in both of those pieces of legislation. The ROI abortion law does define a foetus and termination of pregnancy.

### Part 2: Provision of Abortion

4. **Article 3** sets out that the **conditions under which an abortion may be carried out**. That is, if, in the opinion, formed in good faith, of two doctors (registered medical practitioner), one of five conditions is met.
5. The five conditions under which a lawful abortion may take place are
  - a. First condition: The gestation is less than 12 weeks. The pregnant woman has made a statement of an alleged rape or incest to an approved person and that approved person has confirmed to the two practitioners that the statement is consistent with the allegation of rape or incest. (Paragraph (2)(a))
  - b. Second condition: The gestation is less than 12 weeks. There is a threat to the woman's physical or mental health in continuing the pregnancy. (Paragraph (2)(b))
  - c. Third condition: There is a diagnosis that there is a substantial risk that the condition of the foetus is likely to cause death either before birth or, during birth; or in the early period after birth. Can be up to birth. (Paragraph 3)
  - d. Fourth condition: that it is necessary to preserve the life of the woman. This wording is the same as the law in NI prior to repeal of sections 58 and 59 of the Offences Against the Persons Act 1861. Can be up to birth. (Paragraph 4)
  - e. Fifth condition: there is a risk of real and serious adverse effect to the pregnant woman's physical or mental health, which is either long term or permanent if the pregnancy

continues. This wording is the same as the law in NI prior to repeal of sections 58 and 59 of the Offences Against the Persons Act 1861.<sup>1</sup> Can be up to birth. (Paragraph 5)

6. The wording for the first condition of abortion on the grounds of rape and incest is based on the wording in [Regulation 2](#) of the The Social Security (Restrictions on Amounts for Children and Qualifying Young Persons) (Amendment) Regulations (Northern Ireland) 2017, which itself amends the [Universal Credit Regulations \(Northern Ireland\) 2016](#). The wording is taken from paragraph 5 of new Schedule 12 which allows an exception for the two child benefit policy in cases where the third child is conceived as a result of non-consensual sexual intercourse. To claim the benefit, the woman has to provide “*evidence from an approved person which demonstrates that...[her] circumstances are consistent with*” the claim that the pregnancy was so conceived (paragraphs 5(1)(b)(i) and (3)(a)). An “approved person” is defined in paragraph 5(8) as a person of a description specified on a list approved by the Department for the purposes of sub-paragraph (3)(a) and acting in their capacity as such.
7. The exact details of how this benefit exception is claimed are not set out in detail in the Regulations but guidance on the internet states that to claim this benefit the woman has to attest that the child was conceived in such circumstances using [form NCC1NI\(IS\)](#) but is not required to give the name of the father. The approved person has to tick a box on the [NCC1N1\(IS\) form](#) to “confirm” that “*The claimant’s circumstances are consistent with the statements with it being likely that the claimant conceived through an act by another person to which the claimant did not agree by choice*”. Note that there is [no obligation](#) of the approved person to “*seek any further documentation or evidence to confirm the circumstances*”. In NI, a healthcare professional, a registered social worker or personnel from either Belfast and Lisburn Women’s Aid or Foyle Women’s Aid [are considered “approved persons”](#) (referred to as third parties on the forms and guidance). They can assist a woman to complete the form.
8. **Article 4** sets out that **additional provisions and interpretation related to Article 3**.
9. With respect to the provision on abortion in the cases of rape/incest, **Article 4(2)(a)** requires the Department for Health to determine the manner of an approved person confirming the statement of the pregnant woman. **Article 4(2)(b)** requires the Attorney General to issue guidance for these cases (pursuant to [Section 8](#) of the Justice (Northern Ireland) Act 2004) to ensure that neither the pregnant women, approved person nor the doctor are subject to prosecution under [section 5](#) of the Criminal Law Act (Northern Ireland) 1967, which creates a duty to report a relevant offence, ie the committing of the rape/incest, with a penalty of up to two years imprisonment for failing to do so. Similar [advice](#) under [statutory rules](#) has been published for the non-prosecution for claiming benefits on the grounds of rape.

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<sup>1</sup> See page 5 of “Guidance for Health and Social Care Professionals on Termination of Pregnancy in Northern Ireland”, March 2016 which states, “In Northern Ireland it is lawful to perform a termination of pregnancy only if: it is necessary to preserve the life of the woman, or there is a risk of real and serious adverse effect on her physical or mental health, which is either long term or permanent.” <https://www.health-ni.gov.uk/sites/default/files/publications/dhssps/guidance-termination-pregnancy.pdf>

10. **Article 4(3)** states that the opinion of only one doctor is required if an abortion is immediately necessary to save the life of the mother or prevent long term injury (ie the fourth and fifth conditions).
11. **Article 4(4)** set out definitions, including early period after birth, suitably qualified and threat.
12. There are also definitions of what is meant by the terms “rape” “incest” and “activity”.

Term	Relevant offences
Rape	<a href="#">Article 5</a> , Rape <a href="#">Article 12</a> , Rape of a child under 13
Incest	<a href="#">Article 32</a> , Sexual activity with a child family member <a href="#">Article 68</a> , Sex with an adult relative: penetration <a href="#">Article 69</a> , Sex with an adult relative: consenting penetration

13. **Article 5** sets out that Article 3 does not allow for abortions **on the grounds of the gender of the foetus**, except where there are reasonable grounds to believe that the foetus will suffer from a genetic disorder that is more likely to occur in one gender than another. The text is based on the text in section 13 of the IOM [Abortion Reform Act 2019](#).
14. **Article 6(1)** would **require an abortion in a place approved by the Department**.
15. **Article 6(2)** allows an abortion to take place outside of an approved place if the abortion is immediately necessary and either Articles 3(4) or 3(5) applies.
16. **Article 6(3)** allows the Department to add different classes of places to the approved places.
17. **Article 7(1)** sets out that no offence is committed under **section 25 of the Criminal Justice Act (Northern Ireland) 1945** if the abortion is carried out under the Order. This would only apply to abortions under conditions 5 and 6.
18. **Articles 7(2) and 7(3)** amends the gestation limit in section 25 of the Criminal Justice Act (Northern Ireland) 1945 from 28 weeks to 22 weeks, recognising the changes in when a foetus is considered viable. **le it brings in a lower limit than the rest of GB.**

#### Information, support and care

19. It is essential that every woman who is faced with considering an abortion is able to decide on a termination or to continue the pregnancy **based on informed consent**. **Article 8** sets out that a woman should be offered counselling which is financially independent of any abortion provider (paragraph (a)(i)) and full information on the alternatives available

(paragraph (a)(ii)). This does not require a woman to have counselling but that it should be offered. Note: this Article does not state who should give the counselling. The wording is based on IOM Act 2019 section 6(14)(c).

20. **Article 8(a)(iii)** requires that, where appropriate, information should be given on emergency contraception.<sup>2</sup> Depending upon the type of emergency contraception, it should be taken no later than 3-5 days after unprotected sex. Therefore, it would not be appropriate for all women who might be considering an abortion. Emergency contraception is widely available in Northern Ireland.<sup>3</sup> There does not appear to be a network of rape crisis centres similar to the network in ROI, but there are various sexual assault referral centres: the Rowan<sup>4</sup> and Nexus NI.<sup>5</sup> (In 2018, Women's Aid announced they would open the first specialist rape crisis centre in Northern Ireland but there does not seem to be further details of its launch).<sup>6</sup>
21. If the woman has received a diagnosis which means that her child will die before birth or, during birth; or in the early period after birth she should receive the information and support set out in **Article 8(b)**.
22. **Article 8(c)** prevents a private organisation providing either abortions or adoptions from providing counselling if there is a financial conflict of interest.
23. **Article 9** requires the Department to provide **post-abortion counselling and support**.

### Part 3: Additional Requirements

24. **Article 10(1)** requires a **certificate of opinion** that an abortion meets the requirements set out in Article 3.
25. **Articles 10(2)** and **10(4)** sets out what the certificate must include; the latter applies if the abortion is required immediately (ie Article 4(7) applies). It is based on Regulation 3 in [The Abortion Regulations 1991](#) taking into account the updates on what is required in Regulation 3 of [The Abortion \(Amendment\)\(England\) Regulations 2002](#).
26. **Articles 10(3)** and **10(5)** state that the certificate must be given before the termination takes place. If that is not medically possible where an abortion is needed immediately, it should be given within 24 hours.
27. **Articles 10(6)** and **10(7)** cover record management.

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<sup>2</sup> Note that the term "emergency contraception" is used in English regulations. See Regulation 2(b) <http://www.legislation.gov.uk/ukSI/2019/1137/regulation/2/made>

<sup>3</sup> <https://www.sexualhealthni.info/emergency-contraception>

<sup>4</sup> Jointly funded by the Department of Health, Social Services and Public Safety (DHSSPS) and the Police Service for Northern Ireland (PSNI). <http://therowan.net/>

<sup>5</sup> <https://nexusni.org/>

<sup>6</sup> <https://www.womensaidni.org/womens-aid-announces-rape-crisis-service/>  
<https://www.theguardian.com/society/2018/jun/06/why-no-rape-crisis-centres-northern-ireland-belfast>

28. **Article 11** requires **notice of a termination** to be supplied to the NI Chief Medical Officer<sup>7</sup> within 14 days of the termination. The details of the information that must be supplied is set out in Schedule 1. The list is based on the Schedule in of [The Abortion \(Amendment\)\(England\) Regulations 2002](#) with suitable adjustments and some additions, including the rape/incest requirements.
29. **Article 12** requires **data that is collected under Article 11 to be published annually** but for information that could identify a doctor or woman to be excluded. *Note* that while the 1967 Act requires data to be collected, there is no statutory requirement to publish the data. The 1967 Act also sets out requirements for non-disclosure of information (section 2(1)(c)) and Regulation 5 of [The Abortion Regulations 1991](#). Such a detailed non-disclosure does not apply in the ROI. This Article reflects the restrictions on identification in section 20 of the ROI legislation.
30. **Article 13** amends the [Independent Health Care Regulations \(Northern Ireland\) 2005](#) so that private clinics have to **register with the Regulation and Quality Improvement Authority (RQIA)**. At the moment there is no requirement to register 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.<sup>8</sup> **Article 13(2) and (3)** amend the regulations that provision of abortion is a listed service.
31. **Article 13(1)** also requires any person providing abortions and subject to the 2005 regulations to **meet the requirements set out in Schedule 2**. These are the same requirements placed on clinics in England under [Regulation 20 of the CQC Regulations 2009](#). Schedule 2 refers to patients rather than ‘service users’ as the former term is used in the 2005 Regs (see [Regulation 2](#)), although ‘service users’ is a term used in the associated The Regulation and Improvement Authority (Registration) Regulations (Northern Ireland) 2005 (see [Regulation 2](#)). *Note* too that the CQC regulations do not apply to a NHS facility. The requirement here does not exclude an NHS facility and it appears that the RQIA does inspect Health and Social Care Trust facilities.

#### Part 4: Offences

32. **Article 14** makes it an offence to provide a person to prescribe, administer, supply or procure any drug, substance, instrument, apparatus or other thing knowing that it is intended to be used or employed with intent to end the life of a foetus, other than in accordance with the provisions of the Order. This is based on section 23(2) of the ROI law.

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<sup>7</sup> <https://www.health-ni.gov.uk/dhssps-chief-medical-officer>

<sup>8</sup> Official Report, Committee for Justice, 10 January 2013: Marie Stopes International: Compliance with Criminal Law on Abortion in Northern Ireland, page 2  
[http://www.niassembly.gov.uk/globalassets/documents/official-reports/justice/2012-2013/130110\\_mariestopesinternationalcompliancewithcriminalawonabortioninnorthernireland.pdf](http://www.niassembly.gov.uk/globalassets/documents/official-reports/justice/2012-2013/130110_mariestopesinternationalcompliancewithcriminalawonabortioninnorthernireland.pdf)

33. **Article 14(2)** states that **no offence is committed by the pregnant woman** under Article 14(1).
34. **Article 14(3)** sets out the **penalty** for the offence under Article 14(1) of 14 years. This is the penalty in the ROI and IOM
35. **Article 15** sets out a specific offence of **coercing someone into an abortion** with a penalty of life imprisonment. The actions that are considered an offence under this Article are using force or the threat of force; psychological or emotional abuse; controlling or coercive behaviour; or administering any substance capable of causing abortion with the intention of causing an abortion without the informed consent of the pregnant women. This offence relies on proving intent.
36. **Article 16** makes it an offence not to comply with the requirements on certification and notification in Articles 11 and 12.

#### Part 5: Conscientious Objection

37. **Article 17** provides a **right to conscientious objection (CO)**. The wording reflects that in [section 38](#) of the Human Fertilisation and Embryology Act 1990 which states that *“No person who has a conscientious objection to participating in any activity governed by this Act shall be under any duty however arising, to do so.”*
38. The wording ensures that freedom of conscience would apply to general practitioners and any other person who might see a pregnant woman who wishes to consider an abortion by defining what is meant by activity in Article 2.
39. **Article 17(2)** ensures that doctors must act in cases where the life of the pregnant woman is at risk or to prevent permanent or serious long-term injury to the physical or mental health of the pregnant woman. The wording reflects the wording in Article 3.
40. **Article 17(3)** requires a person who wishes to claim freedom of conscience to do so in writing.
41. **Article 17(4)** requires a medical practitioner with a CO to give a patient enough information to find another medical practitioner in line with the General Medical Council (GMC) guidance. The GMC provides for conscientious objection for all doctors and states that doctors must *“make sure that the patient has enough information to arrange to see another doctor who does not hold the same objection as you”*,<sup>9</sup> unless the mother’s life is threatened. This paragraph is limited to doctors as they decide and perform abortions and will be the ones who have to provide relevant information to the pregnant woman.

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<sup>9</sup> Paragraphs 12 and 13 of GMC Guidance *Personal Beliefs and Medical Practice*, In effect from April 2013, [http://www.gmc-uk.org/static/documents/content/Personal\\_beliefs-web.pdf](http://www.gmc-uk.org/static/documents/content/Personal_beliefs-web.pdf)

42. **Article 18** sets out **employment protections** for those who want to exercise a freedom of conscience.