



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Response to the DHSSPS Consultation on Guidance on the Termination of Pregnancy in Northern Ireland

Summary

This is a response to the Department of Health Social Services and Public Safety (DHSSPS) consultation on new guidance which is to clarify the law on termination of pregnancy in Northern Ireland. In 2009, a court decided that two sections of the old guidance, on counselling and conscientious objection, were not sufficiently clear. The DHSSPS therefore had to re-write these two sections and consult on them, from July to October 2010. The guidance is for health service staff.

This is our response to the consultation. It covers the following areas:

- the importance of 'legal certainty', that is, the law on termination of pregnancy being clear
- legal rights to conscientious objection
- exceptions to the right to conscientious objection, and
- counselling involving information on termination services outside Northern Ireland.

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,¹ and advising on whether a Bill is compatible with human rights.² In all of that work, the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies.
2. The Commission welcomes the opportunity to comment on the consultation by the Department of Health Social Services and Public Safety (DHSSPS) on departmental guidance, revised in July 2010, to clarify the law on termination of pregnancy in Northern Ireland.

Importance of legal certainty

3. The Commission has consistently stressed the importance of 'legal certainty', that is, that there is sufficient clarity about what the law is. Individuals including health service users and medical professionals, have the right to know what they are, or are not, entitled to do. Legal certainty also requires that where there are entitlements there must be mechanisms in place for them to be accessed in practice. Legal certainty is a concept explicitly contained in rights in the European Convention on Human Rights which provides that any restriction on rights such as private and family life, manifesting religion and freedom of expression must be adequately set out in law.³
4. In 1993, the Standing Advisory Commission on Human Rights (SACHR) recognised the "conspicuous lack of legal clarity in relation to the circumstances in which abortion could be permitted". SACHR commissioned legal advice which indicated that the law on termination of pregnancy in Northern Ireland could not withstand a challenge at the European Court of Human Rights precisely because it was unclear and uncertain. SACHR acknowledged that the law

¹ Northern Ireland Act 1998, s.69(1).

² As above, s.69(4).

³ See ECHR Articles 10(2) 9 (2) and 8(2) respectively.

was not sufficiently accessible to individuals and questioned its compatibility with international standards.⁴

5. In 2007, the European Court of Human Rights found such a violation in relation to Polish law which did not contain an effective mechanism to determine whether the conditions for obtaining a lawful termination of pregnancy had been met. The case arose from a decision to refuse a termination to a woman who had been warned that she would suffer severe visual impairment if the pregnancy continued, as in fact happened. The Court found a violation of Article 8 (right to private and family life). It emphasised that where rights existed they should not be theoretical or illusory but practical and effective, and that in this instance where the law allowed a termination in the restricted circumstances when there was a threat to the woman's life or health, there were positive duties on public authorities to ensure that this could be accessed.⁵
6. The present consultation arises from guidance issued by the DHSSPS, in March 2009, to clarify the law on termination of pregnancy. This was in response to a judicial review in 2004 relating to the absence of legal certainty, in which the DHSSPS was ordered by the Court of Appeal to investigate the adequacy of termination of pregnancy services in Northern Ireland and issue appropriate guidance.⁶ The guidance itself was challenged on eight grounds in judicial review in 2009.⁷ Six of these grounds were dismissed, but two were upheld on the basis that the sections on conscientious objection and counselling lacked sufficient clarity. The DHSSPS had to withdraw the guidance and the present consultation relates to revised sections on these two issues. The Commission will therefore restrict its comments in this submission to those two areas rather than the whole guidance.

Conscientious objection

7. The judicial review of the guidance held that the section on conscientious objection should be amended to provide clarity on a number of issues, including:

⁴ *Eighteenth Report of the Standing Advisory Committee for Human Rights* (1992-1993) (London HSMO, 1993) page 62.

⁵ *Tysi c v Poland* (application number 5410/03) judgment of 20 March 2007.

⁶ *Family Planning Association of Northern Ireland v Minister for Health Social Services and Public Safety* [2004] NICA 39 (08 October 2004).

⁷ *Society for the Protection of the Unborn Childs (SPUC) application for Judicial Review* [2009] NIQB 92.

- whether there is a *legal* right to refuse to take part in a termination of pregnancy;
 - whether the exception to the right of conscientious objection only arose when the life of the mother was in danger, or when there would be a serious adverse long-term affect on the woman's health.
8. The human rights principles in relation to conscientious objection are twofold. First, practitioners have rights to conscientious objection (although these are not absolute). Second, when there is a legal entitlement to a termination, however limited, arrangements must be in place to ensure that the entitlement can be accessed. Therefore, when a practitioner has a conscientious objection, mechanisms must be in place to ensure a practitioner who does not have such an objection is available. Both of these matters should be adequately addressed in the guidance.
9. The Parliamentary Assembly of the Council of Europe is at present considering in detail the problems of unregulated use of conscientious objection in relation to women's access to lawful medical care.⁸ The Social, Health and Family Affairs Committee recently adopted a draft resolution on this matter, which will be put before the full Parliamentary Assembly.⁹ This recognises the right of an individual to conscientiously object, but expresses concern about the "increasing and largely unregulated occurrence of this practice, especially in the field of reproductive health care, in many Council of Europe member states". The draft resolution emphasises "the need to balance the right of conscientious objection of an individual not to perform a certain medical procedure with the responsibility of the profession and the right of each patient to access lawful medical care in a timely manner"; and suggests "a comprehensive and clear legal and policy framework governing the practice of conscientious objection by healthcare providers, coupled with an effective oversight and complaint mechanism" to address the matter.¹⁰ A report to

⁸ The Council of Europe is the regional (European) inter-state human rights body. With 47 member countries its aim is to develop throughout Europe common and democratic principles, it is the body which oversees the European Convention on Human Rights and other regional human rights instruments. The Council of Europe (and its Parliamentary Assembly) should not be confused with the entirely separate European Union (and its European Parliament).

⁹ Council of Europe (Parliamentary Assembly) *Women's access to lawful medical care: the problem of unregulated use of conscientious objection* Doc. 12347 20 July 2010.

¹⁰ At paras 1 and 2.

the Committee which led to the draft resolution contains up-to-date information as to international and regional standards in relation to conscientious objection. This emerging work is a source by which the DHSSPS can inform its own policy framework.

Legal rights to conscientious objection

10. The 2009 guidance stated that there was no legal right to refuse to take part in a termination of pregnancy (but did provide that conscientious objection should be respected and facilitated, except when the life of the woman was at risk).
11. The revised guidance complies with the judgment by removing the reference to there being no legal right to conscientious objection. However, there would be merit if, alternatively, a section on legal rights to conscientious objection was maintained and expanded on in a manner compatible with the judgment.
12. This could detail explicitly that, unlike Great Britain, there is no *statutory* right to conscientious objection within termination of pregnancy legislation in Northern Ireland.¹¹ This was the Department's original intention when stating there was no legal right in the March 2009 guidance.¹² It would appear compatible with the judgment to restate this so long as it is explicitly tied to a legal basis in the law on termination of pregnancy. The section could then outline where a legal basis is found; this includes any contractual basis, and the provisions of ECHR Article 9 (freedom of thought, conscience and religion). This would involve summarising the (limited) extent to which it has been determined that a right to conscientious objection in this matter is found in Article 9.
13. The judgment also stated that there would be a legal right not to take part in a termination when the procedure itself would be illegal. This is not an issue of conscientious objection, as participation in an unlawful termination carries broader liability. This matter appears best addressed by the guidance itself providing mechanisms for which legality can be determined. The revised guidance also states that no person having a conscientious objection will ordinarily be compelled to take a decision on the lawfulness of a termination.

¹¹ The provision for conscientious objection in Great Britain is contained in Section 4 of the Abortion Act 1967.

¹² SPUC Judicial Review 2009, para 41.

Exceptions to right to conscientious objection

14. The judgment argued that the 2009 guidance was not sufficiently clear as to whether the exception to the right to conscientious objection related “only to a situation in which the actual life of the mother is at stake or whether it extends to the situation where, in the absence of a termination, there will be serious adverse effects of a permanent or long term nature in relation to her physical or mental health”.¹³
15. The statutory right to conscientious objection in Great Britain is framed so as not to affect any duty to participate in treatment which is necessary to save the life, or to prevent grave permanent injury to the physical or mental health, of a pregnant woman.¹⁴
16. The present draft guidance sets out that the exception is that a practitioner may not refuse to participate in a termination when the “life of the woman is in danger and action by way of termination of her pregnancy needs to be taken without delay in order to save her life”. An exemption is provided only in the circumstances when another practitioner is immediately available.¹⁵ This section would therefore appear to be clear: when there is an objection from a practitioner (in non-life threatening circumstances), the right to see another doctor must be explained. The DHSSPS quotes General Medical Council (GMC) good practice guidance, the SPUC judicial review judgment (indicating that the GMC guidance accurately reflects practitioner obligations) and the Nursing and Midwifery Council Code of General Conduct. Consideration should also be given to referencing the provisions of ECHR case law such as those established in *Tysi c v Poland*, referenced above.
17. Paragraph 4.4 of the draft guidance states that the question of whether conscientious objection would afford a defence to manslaughter by gross negligence has never come before the UK courts. The Department concludes this is unlikely, and the Commission concurs, given the positive duties in Article 2 ECHR. In addition to domestic case law, the DHSSPS should also keep under review the treatment of any such issue in European Court of Human Rights jurisprudence.

¹³ At para 45.

¹⁴ Section 4(2) Abortion Act 1967.

¹⁵ At para 4.2 of the draft guidance.

Counselling

18. This section of the judgment sought greater clarity of the guidance in relation to termination of pregnancy services in Great Britain or elsewhere outside Northern Ireland.¹⁶
19. The issue of the provision of information relating to termination services outside a particular jurisdiction has come before the European Court of Human Rights. In *Open Door and Dublin Well Woman Centre v Ireland*, the Court found that the state preventing independent counsellors from providing information on termination of pregnancy facilities abroad violated Article 10 ECHR (freedom of expression – to receive and impart information).¹⁷ The Court did note in making its assessment that counsellors had “neither advocated nor encouraged abortion, but confined themselves to an explanation of the available options”.¹⁸ This confirmed the Court’s assessment that the restriction was disproportionate, although regardless of this the Court had already found the restriction not to be proportionate on another ground.¹⁹
20. The revised draft guidance deals with this issue in detail. Paragraph 5.13 states that the DHSSPS believes that providing factual information on termination services outside Northern Ireland will be lawful provided that counselling does not advocate or promote a termination. It is not clear, if this is meant to reflect the wording of the *Open Door* case, and, if so, why the term “promote” has been preferred to ‘encourage’ in which the former may have a broader interpretation.
21. Paragraph 5.13 ends by stating that this whole issue has not been tested before the Courts in Northern Ireland, and therefore such information is provided on an “own risk” basis by counsellors. It is unclear why it is necessary to make this reference as domestic Courts have to take into account judgments of the European Court of Human Rights, including

¹⁶ At paras 37 and 38.

¹⁷ *Open Door Counselling and Dublin Well Women Centre and others v Ireland* (application number 14234/88) judgment of 29 October 1992.

¹⁸ At para 75.

¹⁹ A violation of Article 10 on grounds of proportionality was also found in *Women on Waves and Others v Portugal* (application no. 31276/05) judgment of 3 February 2009, when Portuguese authorities had mobilised a warship to prevent the entry to territorial waters of a Dutch boat wanting to promote the decriminalisation of abortion.

the *Open Door* judgment. It may be over-cautious to add this to the paragraph, and it could have a chilling effect, deterring the provision of information that women have a right to receive.

22. Paragraph 5.14 then goes on to address the issue of advocating or promoting to a pregnant woman in Northern Ireland the lawful termination of her pregnancy elsewhere (where it would be illegal in Northern Ireland). The issue covered is not whether it is the professional role of counsellors to advocate or promote any course of action on any issue but rather that of legal liability. The DHSSPS states that this issue has never been considered before the Courts in Northern Ireland; there is consequently a legal grey area, and it “strongly advises” any counsellor to take specific legal advice before engaging in any such conduct. The DHSSPS adds that nothing in the guidance should be taken as encouragement or approval from the Department for such conduct. It is not clear whether the DHSSPS considers that there is a risk of criminal prosecution, or if the risk is of civil liability.
23. It would be helpful if the DHSSPS specified the laws under which it believes a counsellor could be held liable for engaging in such conduct. Sections 58 and 59 of the Offences against the Person Act 1861 make it an offence to *procure* an unlawful termination, or to supply equipment for the same. Section 25 of the Criminal Justice (Northern Ireland) Act 1945 (on the offence of child destruction) refers to any action which *causes* “a child to die before it has an existence independent of its mother”. Does the DHSSPS regard either “procuring” or “causing” as equating to “advocating” or “encouraging”, so that there would be potential liabilities under the 1861 or 1945 Acts? Alternatively, is there another legal basis whereby the DHSSPS considers there could be liabilities?²⁰ If there is no clear legal basis for preventing the “advocacy or promotion” of a lawful termination outside Northern Ireland, any action by a public authority to restrict freedom of expression on that matter should fail the ‘prescribed by law’ test that is applicable to any limitation of Article 10 rights.

²⁰ The issue of whether the civil injunction to prevent information provision on abortion abroad, issued by the Irish authorities, was sufficiently prescribed by law was dealt with in some detail in the *Open Door v Ireland* case. In this instance, the court determined the restriction was sufficiently set out in law, albeit relying upon the role of the state in protecting rights set out in the constitution, and a number of other statutes rather than just the 1861 Act (which remained part of Irish law). As referenced above, despite finding it had a basis in law the Court went on to find the restriction itself disproportionate and a violation of Article 10.

Chaplaincy services

24. Paragraph 5.17 states that Trusts should make women aware of chaplaincy services should they wish to avail of them. It would appear to be self evident that a Trust should make service users aware of the services that are available, and it is unclear why a specific reference to chaplaincy should be included in a section dealing with professional counselling. Paragraph 5.7 provides a definition of the counselling to be provided to women who want a termination, who wish to consider options including a termination, or who are in the aftermath of a termination. This, as set out in the following paragraph, is only to be provided by appropriately trained staff, such as those meeting the standards of the British Association of Counselling and Psychotherapy. Chaplaincy services and professional counselling functions are separate matters, and the reference here does not assist the clarity of the guidance.

Implementation

25. The present position during the consultation is that the guidance has been withdrawn, as instructed by the Court. This returns Northern Ireland to the unsatisfactory position of legal uncertainty before the guidance was issued. The Commission urges the DHSSPS to consider the responses to the consultation and reissue the revised guidance as quickly as possible.

September 2010

**Northern Ireland Human Rights Commission
Temple Court, 39 North Street
Belfast BT1 1NA
Telephone: (028) 9024 3987
Textphone: (028) 9024 9066
Fax: (028) 9024 7844
Email: information@nihrc.org
Website: www.nihrc.org**