From: Eilís McDaniel
Family and Children's Policy Directorate
10 October 2018

Richard Pengelly

SCORR/0842/2018 LETTER FROM LES ALLAMBY TO DOJ AND DOH FOLLOWING UP ON MEETING OF 21 SEPTEMBER 2018

Issue	Letter from Les Allamby, Chief Commissioner of the Northern Ireland Human Rights Commission, following up the main points of discussion from you and Peter May's joint meeting.
Timing	Routine – reply due 18 October 2018
Presentational issues	None
FOI implications	This letter is fully disclosable
Financial implications	None
Legislation implications	None
Recommendation	You are recommended to reply jointly along the lines of the attached draft. DoJ have provided input where appropriate.

Background

You and Peter May met Les Allamby on 21 September 2018 to discuss a number of issues around Termination of Pregnancy. Mr Allamby has now followed up the discussion by letter.

Supreme Court/Report on Fatal Fetal Abnormality

Following the recent Supreme Court obiter judgment, Mr Allamby recognises that DoJ cannot bring forward legislative change in the absence of a Minister. He states that the NIHRC has heard from doctors that the Departmental guidance lacks clarity and is causing difficulties. He mentions the FFA Report finding that the existing law places an unacceptable burden on women's health. In light of this, he has asked what steps are being taken to review the Departmental guidance.

As Mr Allamby acknowledges, in the absence of Ministers and a legislature, the Department of Justice cannot bring forward proposals to amend the law on abortion for fatal fetal abnormality or for rape and incest. The DoJ had, in 2014/15, consulted

fully on such reforms but legislative proposals failed to achieve Executive agreement. The Supreme Court judgment in June may have heightened the case for reform, but without a Minister there is no action on the law that DoJ can take.

The Department of Health has held the view that the Department's Guidance was intended to clarify the law as it now stands, and that, as the law had not changed, the guidance should not change. Certainly, there is nothing in the Court judgment or the FFA report that warrants a change to the guidance; the actions that can be taken by a health and social care professional are unchanged by the judgment or the report

In any event, the Department's legal advice is that as the guidance is a cross cutting and controversial matter, it cannot be amended except with Executive agreement

DOH is not aware that doctors have claimed that the guidance (as opposed to the law) lacks clarity.

During the meeting, Mr Allamby asked whether either of the two Departments had written to the Secretary of State to alert her of the FFA report findings and the Supreme Court judgment and the human rights implications. His letter urges us to write along these lines.

Mr Allamby was advised during the meeting that we had not written to the Secretary of State, but in the margins at the end of the meeting, Peter May mentioned that he would give the matter further consideration. He has now agreed to write to Jonathan Stephens at the NIO – you have agreed that this will be a joint letter if he so wishes. DoJ are leading on this and a draft is being developed.

Comment [PA1]: Letter sent today

Information provision on services in GB

On information and guidance, Mr Allamby notes the decision by GB jurisdictions to provide terminations of pregnancy free of charge to women with NI addresses and states that the British Pregnancy Advisory Service has provided information on the English service to every GP in Northern Ireland. He considers it essential that the Department of Health should provide advice to GPs on how to access the services in GB and has asked what engagement we have had with our counterparts in England, wales and Scotland.

The Department was not aware that BPAS has provided information to GPs here, and we will attempt to find out more about what was provided. We were made aware of several leaflets, including one which implied that doctors in Northern Ireland

could call the BPAS number on behalf of their patients, but we have no knowledge of their status or circulation.

Our engagement with GB jurisdictions has been limited. The decisions to enable women to access services in GB were made without input from Northern Ireland Departments.

Section 35 - Policy Development

The Commissioner refers to the proposed information leaflets being prepared by the PHA, and has asked to be kept up to date on their progress, whether they will include information on the services now available in GB, and for sight of a 2016 circular on aftercare following ToP.

The PHA has prepared a series of leaflets around ToP and, if the legal advice allows, we will ask the PHA to update them to include reference to the services in GB. Information prepared to date covers general aftercare services for all women who have had a termination (including a proposal for a specific 'signposting' service), as well as some material setting out the options available for women with a diagnosis of FFA. It is worth noting that CMO commissioned these materials some time ago, but their publication has been delayed by the succession of legislative proposals and legal challenges that have had the potential to change the law. The 2016 circular referred to is the covering letter from CMO issuing the 2016 departmental guidance.

Comment [PA3]: Really? What legislative proposals?

Future Planning

On future planning, the letter notes the possibility of legislative change to be driven by events at Westminster, and the legislation due to be introduced in the ROI. We are urged to remain aware of developments and to engage with ROI colleagues on their legislation.

During the meeting, you indicated that any proposals arising will take time to develop, and that we will engage as necessary when we see what is proposed. To date, there has been no engagement with Departments by either the Members of Parliament involved or by the Irish authorities. In any case, we have no political mandate to seek to influence policy in this area and our role would be to seek to deal

with the impact of whatever changes are made by others. As far as Westminster is concerned, we understand the intention is to repeal sections 58 and 59 of the Offences Against the Person Act 1861 and section 25 of the Criminal Justice Act (Northern Ireland) 1945. This would decriminalize abortion (across the UK), and it would be left for a devolved administration to establish a legal framework for provision of the service here.

Comment [PA4]: *The intention??*

The Irish authorities have indicated that they wish their proposed service to be available to women from Northern Ireland, but the draft Bill debated in the Oireachtas on 4 October 2018 made no mention of Northern Ireland (though Northern Ireland was mentioned in the debate). Nor is there any provision in EU law for the Irish authorities or an individual patient to charge the Department for provision of a service, to a patient from Northern Ireland, which is not legal here. It follows that any such provision provided in Ireland would be at the Irish Government's expense.

Committee Inquiries

Finally, in addition to the specific points above, the Commissioner's letter notes ongoing interest in the subject from the Committee on the Elimination of Discrimination against Women, the British Irish Parliamentary Assembly and the Women and Equalities Select Committee. He advises that the NIHRC will participate in these inquiries.

This point is noted in the draft reply.

Recommendation

You are recommended to reply jointly with Peter May along the lines of the attached draft. DoJ have provided input where appropriate.

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Sean Holland

CMO

David Lavery (DoJ)

Carol Beattie

Alasdair MacInnes

Amanda Patterson (DoJ)

Section 38 / Section 40.

Dear Les

Thank you for your letter of 27 September 2018, following our meeting on 21 September.

As you acknowledge, in the absence of Ministers and a legislature, the Department of Justice cannot bring forward proposals to amend the law on abortion for fatal fetal abnormality or for rape and incest. You are aware that the DoJ has consulted fully on such reforms but legislative proposals failed to achieve Executive agreement. The Supreme Court judgment in June may have heightened the case for reform, but without a Minister there is no action on the law that DoJ can take.

You have asked what steps are being taken to revise the current guidance. The Department of Health's 2016 Guidance was intended to clarify the current law ~~as it now stands. In fact, the Guidance was produced~~ because ~~it was found that~~ health and social care professionals were ~~not~~ unclear of their requirements and responsibilities ~~under the law~~. Neither the Supreme Court obiter judgment, nor the conclusions of the ~~two Departments'~~ working group's report on fFatal fFetal aAbnormality, change the actions that can be taken by a health and social care professional if they are treating a pregnant woman who, for whatever reason, wishes to terminate her pregnancy. As the law has not changed, it has beenis the DoH's view that the Guidance, which ultimately can only reflecting the law, does not need to change.

However, you did mention at our meeting that doctors have claimed that the guidance, as opposed to the law, lacks clarity. We have not been made aware of any such concerns, but we will certainly attempt to establish what the position is. If you have any further information you can offer on this issue it would be helpful.

In any event, the Department has received legal advice that as the guidance is a cross cutting and controversial matter, it cannot be amended except with Executive agreement.

Comment [PA5]: Do you have to say this in such a way? Does it add anything? Why talk about the reasons you aren't going to change the guidance if this is the bottom line?

~~As we advised during the meeting, neither of us has written to the Secretary of State highlighting the human rights issues raised by the Supreme Court. We have since given the matter further consideration and will write to Jonathan Stephens, Permanent Secretary at the NIO, summarising our discussion and ensuring that it is recognised in Whitehall that the law in Northern Ireland, in relation to FFA, has been found wanting by the highest court in the UK, and that health professionals have made it very clear that women with fatal fetal abnormalities in Northern Ireland continue to suffer as a result.~~

Turning to abortion services in other parts of the UK, you raised the question of whether ~~You consider it essential that the~~ DoH should provide guidance to GPs in Northern Ireland on how women can access the services now available free of charge ~~in GB~~elsewhere

Section 35 - Policy Development

Section 35 - Policy Development.

~~It follows that that our engagement with GB jurisdictions has been limited and for the most part has been officials from GB letting us know their intentions as a matter of courtesy. To date, we have not asked colleagues from England, Wales or Scotland about their plans to inform women here of how to access their services.~~

~~You mentioned that the British Pregnancy Advisory Service (BPAS) has provided information to GPs here. The DoH were made aware of two leaflets, we assume in draft, including one which implied that doctors in Northern Ireland could call the BPAS number on behalf of their patients. Our concern is that BPAS do not inadvertently encourage health professionals to take actions that may be unlawful. We are unaware of the status or circulation of the leaflets.~~

As you know, t~~T~~he PHA has prepared a series of leaflets around ToP and we are currently seeking legal advice on whether those leaflets ~~the information currently being prepared~~ can include reference to the services now available ~~free of charge~~ in GB. If the legal advice allows, we will ask the PHA to update and circulate them. Information prepared to date covers general aftercare services for all women who have had a termination (including a proposal for a specific 'signposting' service), as well as some material setting out the options available for women with a diagnosis of FFA.

Comment [PA6]: Do you need to include all this? It doesn't add anything except make the reader thing that DOH is making excuses for not doing anything.

Comment [PA7]: Delete – doesn't ass much?

You also ~~refer~~ ask in your letter for a copy of ~~to~~ a 2016 circular relating to the duty to provide post abortion care. The 2016 circular ~~referred~~ to which you refer, ~~to~~ is a ~~the covering~~ letter from the Chief Medical Officer ~~issuing~~ covering the 2016 departmental guidance. A copy is attached for your convenience.

You refer to ~~developments in Westminster, with the prospect of a Private Members Bill, and~~ the recent publication of Ireland's Bill following their referendum. ~~To date, there has been no engagement with Departments by either the Members of Parliament involved or by the Irish authorities. We have no political mandate to seek to influence policy in this area and our role would be to deal with the impact of whatever changes are made by others. As far as Westminster is concerned, we understand the intention is to repeal sections 58 and 59 of the Offences Against the Person Act 1861 and section 25 of the Criminal Justice Act (Northern Ireland) 1945. This would decriminalize abortion (across the UK), and it would be left for a devolved administration to establish a legal framework for provision of the service here.~~

The Irish authorities have indicated that they wish their proposed service to be available to women from Northern Ireland. We note though, that the draft Bill debated in the Oireachtas on 4 October 2018 makes no mention of Northern Ireland. ~~Nor is there any provision in EU law for the Irish authorities or an individual patient to charge the Department for provision of a service to a patient from Northern Ireland, which is not legal here.~~ As discussed during our meeting, we

We will continue to monitor developments ~~in both jurisdictions~~and be prepared to address any issues relating to health provision in this jurisdiction.

Finally, we note the Commission's intention to participate in the various Inquiries ongoing on this matter. There is an unprecedented level of attention being paid to abortion in Northern Ireland at present. As we have noted earlier, and you acknowledge, it is not within our power to offer resolution to the human rights issues identified by the Courts or these Inquiries.

As we advised during the meeting, neither of us has written to the Secretary of State highlighting the human rights issues raised by the Supreme Court. We have since given the matter further consideration and will write to Jonathan Stephens, Permanent Secretary at the NIO, summarising our discussion and ensuring that it is recognised in Whitehall that the law in Northern Ireland, in relation to FFA, has been found wanting by the highest court in the UK, and that health professionals have made it very clear that women with fatal fetal abnormalities in Northern Ireland continue to suffer as a result.