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Dear Mr Doherty,

### **Independent Review of the Work Capability Assessment**

The Equality Commission for Northern Ireland (Commission) welcomes the opportunity to provide evidence for the Northern Ireland Review (the "Review") of the Work Capability Assessment by Professor Harrington as commissioned the Department for Social Development (the Department).

### **Welfare Reform**

The Commission has broadly welcomed the principles underpinning this, and the last, Government's proposals for welfare reform<sup>1</sup>. The Commission believes that for the vast majority of people work is beneficial, and that many disabled people or people with health conditions do want to work. In ratifying the United Nations Convention on the Rights of Persons with Disabilities (Convention), Government has an obligation to enable as many people as possible to take advantage of work while at the same time supporting those who cannot work.

As welfare reform has progressed, we have raised general concerns that some of the Government's proposals may have the effect of causing an adverse impact for those equality groups the

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<sup>1</sup> *Department for Work and Pensions Green Paper, 'No One Written off: Reforming Welfare to Reward Responsibility'*. Equality Commission for Northern Ireland. October 2008.

Government is actually trying to support. Specifically, the emphasis given to strengthening ‘a sanctions based regime’ as a model to encourage people into employment as opposed to the number of positive incentives to support people into the labour market<sup>2</sup>.

The Commission welcomes the Northern Ireland Review of the Work Capability Assessment. The Commission would encourage the Department to contextualise its findings and recommendations in light of all proposals for welfare reform as well as those from Harrington Report (2010)(the “Report”). In doing so, the Department needs to consider, from its own estimates, that over 184,500 people in Northern Ireland currently receive DLA. This represents 10.3 per cent of working age people in Northern Ireland and is approximately twice the level in Great Britain<sup>3</sup>. The Review will also need to consider the unique social and economic environment in Northern Ireland, and the employment inequalities in an economic downturn. The Department needs to consider the differences between Great Britain and Northern Ireland in respect to departmental responsibility for administering benefits and employment support. Therefore, both Government departments will need to ensure the progressive realisation of rights under the United Nations Convention on the Rights of Persons with Disabilities (Convention).

### **Employment Inequalities in an Economic Downturn**

While the United Kingdom is current experiencing low employment and high unemployment rates, the imposition of Work Capability Assessment, with tighter requirements for Employment Support Allowance, to encourage disabled people into the job market may place them at a significant disadvantage when competing for jobs. This is important, particularly as those who have recently lost their jobs, and who are actively seeking re-employment, may potentially have a greater range of work capacities than disabled people and other vulnerable groups who may have a more limited work history.

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<sup>2</sup> *Department for Work and Pensions Green Paper, ‘No One Written off: Reforming Welfare to Reward Responsibility’*. Equality Commission for Northern Ireland. October 2008.

<sup>3</sup> Disability Living Allowance Statistics – Summary of Statistics (August 2010) Department for Social Development. [http://www.dsdni.gov.uk/dla\\_publication\\_august\\_10.xls](http://www.dsdni.gov.uk/dla_publication_august_10.xls)

In July 2010, the Commission published “Employment Inequalities in an Economic Downturn” by Economic Research Institute at Napier University, Edinburgh<sup>4</sup>.

A key issue arising from the research was concern that the recession would have an impact on those already vulnerable in the labour market; in particular, the long term unemployed, disabled people, lone parents, young unemployed, older workers, ex-offenders and migrant workers.

The research highlighted that the newly unemployed, many of whom are relatively highly qualified and have extensive work experience, may push vulnerable groups further back in the ‘employment queue’ or even out to the active labour market. The research further stated that there is a risk that these groups may not receive the help and support they need to get back into work as there may be pressure to provide services to those more recently unemployed.

### **Work Capability Assessment – General Observations and Concerns**

The Commission is concerned that those claimants currently in receipt of Incapacity Benefit and Employment Support Allowance who are transferred to the Job Seekers Allowance may be placed in economic hardship as a result of their long-term unemployment resulting in the possible reality of being unable to find appropriate employment despite their transfer to Job Seekers Allowance. Safeguards should be considered within the context of this Review to ensure those claimants placed on Job Seekers Allowance are not disadvantaged by such a move. If a disabled claimant is transferred to Job Seekers Allowance, we are concerned that they may not be eligible for further support from disability related programmes and benefits that not only assist in obtaining and retaining employment but in day-to-day accessibility and independent living.

While the Government has given a commitment to support people considered fit for work, or periodic work, the related measures in this regard have not been clearly outlined. Account must be taken of the need to introduce comparable support measures to assist people to find employment which is the responsibility of the Department of Employment and Learning. These must work in

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<sup>4</sup> *Employment Inequalities in an Economic Downturn*. Economic Research Institute at Napier University, Edinburgh. Equality Commission for Northern Ireland. July 2010.

tandem with the benefit reform proposed, which is under the remit of the Department of Social Development.

We are concerned that those responsible for the administration of Job Seekers Allowance may lack the relevant knowledge and expertise in dealing with those claimants formerly in receipt of Incapacity Benefit and / or Employment Support Allowance.

We recommend that the findings and recommendations from a number of pilots of the Work Capability Assessment already being undertaken in Great Britain are not implemented without due consideration of the evidence obtained from the Northern Ireland Review.

### **Specific Commentary on Work Capability Assessment and Findings and Recommendations of Harrington Report (2010)**

The Commission strongly believes that the current programme of examining physical descriptors, as outlined in the Report, in the first year should be extended to include focus on fluctuating conditions; including claimants with mental health issues and learning disabilities. There should be consistency in approach for all disabled people to prevent many from being inappropriately assessed. Indeed, we note the acceptance within the Report that some descriptors used in the Atos Healthcare assessment may not assess adequately fluctuating conditions, such as mental health, impacts on work capability (page 10). The Centre for Social Justice reported that *“the majority of people claiming illness-related out of work benefits do so on account of mental and behavioural disorders...this demonstrates a significant and widespread problem in Northern Ireland given its comparatively small population”*<sup>5</sup>.

We note that the assessment of limited capability for work and limited capability for work related activity focuses on a claimant’s functional capability and scores points against a series of functional descriptors. These descriptors cover both physical and mental functions. If, as the Report suggests, these descriptors do not adequately reflect a range of fluctuating conditions, we recommend greater emphasis and primacy is given to the available medical evidence relating to the claimants assessment for work related activity; at least until this issue is adequately addressed.

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<sup>5</sup> Centre for Social Justice , *Breakthrough Northern Ireland*, September 2010 pg15

We agree with the Report that the Atos one-off assessments should only be considered as part of an overall body of evidence which determines claimants' eligibility for Employment Support Allowance. The views of claimants, other medical professionals with knowledge of the claimants medical history, and those with specialist knowledge and expertise, should also be included in any standard evidence gathering exercise. In our view, consideration of external evidence such as that referenced above, beyond the Atos assessment, should be compulsory. We are concerned that, to date, this type of evidence, on many occasions, may have been ignored. The Report states that forty percent of all Employment Support Allowance decisions being made on the basis of the Atos assessment alone are being overturned at the First-tier Tribunal of the Social Entitlement Chamber. The appeals process is often lengthy and is likely to cause unwanted stress and anxiety to the claimant. We are in agreement with the Report's recommendation that additional evidence should be used and that decision makers receive training so that they can give an appropriate weight to additional evidence.

To improve the transparency of the Atos assessment, claimants, guardians and / or advocates should have access to all the evidence used to inform the decision making process. We believe that the recommendation within the Report that sending claimants a summary copy of the decision maker's recommendations and a record summary of the claimant's views is insufficient. Claimants should have access to all the evidence considered in their respective case, to fully inform and assist them in regard to the next steps they may wish to take, including the right to appeal the initial decision.

### **United Nations Convention on the Rights of Persons with Disabilities**

We would remind the Department of its obligations under the United Nations Convention on the Rights of Persons with Disabilities (Convention). In particular, Article 4(2) of the Convention relates to the progressive realisation of the economic, social and cultural rights held within the Convention. Welfare reform may impact upon the realisation of many of the economic, social and cultural rights within the Convention. As part of the State Party, the Department in its development and implementation of legislation and policy relating to welfare reform, including its review of Work Capability Assessment, needs to

clearly show, as outlined in Article 4(2), that it undertakes to take measures within the maximum of its available resources, with a view to achieving progressively the full realisation of economic, social and cultural rights of the Convention.

The Convention contains provisions for the close consultation and active involvement of disabled people, and their representative organisations, in decision making, and policy formulation (Article 4(3)) and for promotion of effective and full participation in the conduct of public affairs (Article 29).

## **Public Sector Duties**

The full and effective implementation of public sector duties under Section 75<sup>6</sup> of the Northern Ireland Act 1998, together with the public sector disability duties under the Disability Discrimination Act 1995 (as amended)<sup>7</sup> will further assist the Department to further promote equality of opportunity for disabled people (Section 75), and to promote of positive attitudes towards disabled people and to encourage participation by disabled people in public life (DDA).

By highlighting and promoting the effective use of equality schemes, audits of inequalities, and Section 75 action plans (under Section 75) and disability action plans (under the DDA) Government and public authorities, including the Department, may further meet the provisions outlined within the Convention.

I trust the Department finds the Commission's submission of evidence to the Harrington Review for Northern Ireland helpful.

Yours sincerely,

Simon Hookham

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<sup>6</sup> Section 75 of the Northern Ireland Act 1998 places significant duties on public authorities regarding how they carry out their functions and deal with the general public. These duties relate to the promotion of equality of opportunity on a number of equality grounds including disability. These duties on public authorities include the production and review of Equality Schemes, conducting equality impact assessments and including consultation as an integral

<sup>7</sup> The Disability Discrimination (Northern Ireland) Order 2006 inserted section 49A and 49B into the Disability Discrimination Act 1995 to create the disability duties. These sections came into effect on 1 January 2007. Under Section 49A, public authorities when carrying out their functions must have due regard to the need to: promote positive attitudes towards disabled persons; and encourage the participation of disabled persons in public life. A Guide to the 'disability duties' is available at: <http://www.equalityni.org/archive/pdf/ECNIDisPlan.pdf>

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## Annex

The Commission is an independent public body established under the Northern Ireland Act 1998. The Commission is responsible for implementing the legislation on fair employment and treatment, sex discrimination and equal pay, race relations, age, sexual orientation and disability. The Commission's remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998 (Section 75) and the disability duties under the Disability Discrimination Act 1995.

The Commission's general duties include:

- working towards the elimination of discrimination;
- promoting equality of opportunity and encouraging good practice;
- promoting positive / affirmative action;
- promoting good relations between people of different racial groups;
- overseeing the implementation and effectiveness of the statutory duty on relevant public authorities; and
- keeping the legislation under review.

The Commission, along with the Northern Ireland Human Rights Commission, has been designated under the United Nations Convention on the Rights of Persons with Disabilities (Convention), as the independent mechanism tasked with promoting, protecting and monitoring implementation of the Convention in Northern Ireland.

The Independent Mechanism for Northern Ireland has clearly defined and separate roles and responsibilities, from those of the State Party and civil society, to promote, protect and monitor implementation of the Convention in Northern Ireland<sup>8</sup>.

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<sup>8</sup> United Nation Convention on the Rights of Persons with Disabilities. Convention on the Rights of Persons with Disabilities (CRPD) Joint Committee. Independent Mechanism for Northern Ireland: Roles & Responsibilities within the Framework of Article 33 [http://www.equalityni.org/archive/pdf/CRPD4\\_2aFrameworkPaper.pdf](http://www.equalityni.org/archive/pdf/CRPD4_2aFrameworkPaper.pdf)