



RESPONSE FROM THE INDEPENDENT MECHANISM FOR NORTHERN IRELAND TO THE CONSULTATION ON PROPOSALS FOR NEW MENTAL CAPACITY LEGISLATION

1. The Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission jointly perform the role, under Article 33 (2) of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), of 'Independent Mechanism' in Northern Ireland (IMNI) to promote, protect and monitor the implementation the Convention.
2. The IMNI welcomes the opportunity to respond to the proposals by the Departments of Justice and Health, Social Services and Public Safety for significant reform of the law in Northern Ireland governing mental capacity and mental health in the areas of health, welfare and finance¹.
3. The Independent Mechanism submits this advice on compliance with the UNCRPD, in furtherance of its role under Article 33 (2). The IMNI bases its advice on the articles of the UNCRPD, the General Comments and concluding observations of the UNCRPD Committee.
4. The UNCRPD seeks to promote, protect and ensure full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their dignity. The Preamble recognises that: *"disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others"*.
5. The UNCRPD does not define disability. Instead Article 1 identifies a number of characteristics which members of the protected group may exhibit:

¹ Department for Health, Social Services and Public Safety (May 2014): 'Draft Mental Capacity Bill (NI) consultation document'. Available at: <http://www.dhsspsni.gov.uk/showconsultations?xtid=68523>

"Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

6. The characteristics identified are not defined, the description of disability included in the UNCRPD is therefore not exhaustive.
7. The IMNI notes that due to the wide ranging nature of the Bill it is likely to have an impact on the enjoyment of all rights enshrined within the UNCRPD. The Article of the UNCRPD of central relevance to the draft Bill is Article 12 on legal capacity and is itself central to the Convention and to the enjoyment of the rights enshrined therein. Article 12 states:

"1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property."

8. Further clarity as to the legal implications of the UNCRPD has been provided by way of the UNCRPD Committee's General comment on Article 12.² General comments are authoritative statements of expert members of the Committee setting out the Committee's interpretation of the Convention which the Committee will refer to when examining a state's compliance with its obligations under the UNCRPD.
9. In its General Comment 1 the UNCRPD Committee has emphasised that:
- "In order to fully recognize "universal legal capacity", whereby all persons, regardless of disability or decision-making skills, inherently possess legal capacity, States parties must abolish denials of legal capacity that are discriminatory on the basis of disability in purpose or effect."³*
10. The Committee has stated that State Parties have an obligation to replace substitute decision-making regimes with supported decision-making regimes.⁴ The Committee's General Comment states that:
- "Substitute decision-making regimes can take many different forms, including plenary guardianship, judicial interdiction and partial guardianship. However, these regimes have certain common characteristics: they can be defined as systems where (i) legal capacity is removed from a person, even if this is in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective "best interests" of the person concerned, as opposed to being based on the person's own will and preferences."⁵*
11. In addition the General Comment states that:
- "The "best interests" principle is not a safeguard which complies with article 12 in relation to adults. The "will and preferences" paradigm must replace the "best interests" paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others."⁶*

² UNCRPD Committee General comment No. 1 (2014) Article 12: Equal recognition before the law CRPD/C/GC/1

³ Ibid para 25

⁴ CRPD/C/AUT/CO/1 30 September 2013 para 28

⁵ Ibid para 27

⁶ Ibid Para 21

12. The IMNI notes that the proposed Bill does not differentiate in law between persons with disabilities and persons without. However in its application it will impact on persons with disabilities more than those without, due to the greater propensity for persons with disabilities to have impaired decision making skills. As acknowledged in the consultation document the proposed Bill, whilst making extensive provision for supported decision making, continues to make provision for substitute decision making.

Whilst noting that the Bill contains aspects which are broadly in compliance with the UNCRPD by continuing to make provision for substitute decision making, on the basis of the Committee's interpretation, the proposals are in breach of Article 12. Alongside the other UK Commissions the IMNI raised concerns with the UNCRPD Committee regarding the lack of clarity provided by the then draft General Comment 1.⁷ Noting that the draft General Comment did not fully consider regional human rights standards, in particular the ECHR, the Commissions advised the Committee to "consider and clearly articulate how Article 12 of the CRPD is to be read alongside regional international law and standards". The finalised General Comment unfortunately did not address this matter. The Department's proposals for recognition of capacity represent a substantial progress in developing greater adult capacity. The Commission acknowledges that supported decision making is an emerging area of law and practice, which makes the task of the Departments in ensuring compliance complex.

Deprivation of Liberty

13. The IMNI notes that the Bill makes provision for a person who lacks capacity to be deprived of his or her liberty.⁸

14. The UNCRPD, Article 14 states:

" 1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(a) Enjoy the right to liberty and security of person;

⁷ Joint submission from the Equality and Human Rights Commission, the Equality Commission for Northern Ireland, the Northern Ireland Human Rights Commission and the Scottish Human Rights Commission UN Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12 28 February 2014

⁸ Clause 22(3)

(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation. "

15. Through its General Comment on Article 12 the Committee has elaborated that:

"The denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, is an ongoing problem. This practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention."⁹

The IMNI advises that the draft deprivation of liberty clauses are incompatible with the UNCRPD, Article 12 on the basis of the Committee's interpretation. (See advice at paragraph 12)

Compulsory Treatment

16. The IMNI notes that the Bill makes provision for a person who lacks capacity to receive medical treatment without their consent.¹⁰
17. Numerous articles of the UNCRPD have implications for the provisions of the Bill relating to compulsory medical treatment. The UNCRPD Committee has stated:

"As has been stated by the Committee in several concluding observations, forced treatment by psychiatric and other health and medical professionals is a violation of the right to equal recognition before the law and an infringement of the rights to personal integrity (art. 17); freedom from torture (art. 15); and freedom from violence, exploitation and abuse (art. 16). This practice denies the legal capacity of a person to choose medical treatment and is therefore a violation of article 12 of the Convention. States parties must, instead, respect the legal capacity of persons with disabilities to make decisions at

⁹ Footnote 7, para 40

¹⁰ Clause 18(1)

all times, including in crisis situations; must ensure that accurate and accessible information is provided about service options and that non-medical approaches are made available; and must provide access to independent support.”¹¹

The Commission advises that on the basis of General Comment 1 any provision for persons to receive non-consensual treatment is a breach of Articles 12,15,16 and 17 of the UNCRPD. (See advice at paragraph 12)

Examination of Compliance

18. It is likely that UK will be examined by the UNCRPD Committee in 2015. At this time the Committee will consider the UK Initial Report which details law and policy relating to persons with disabilities, including mental capacity and mental health law. The UK Report does not contain information relating to the changes to mental capacity and mental health law in Northern Ireland.
19. The IMNI notes that there have been extensive discussions in England & Wales regarding the compliance of the Mental Capacity Act 2005 with the UNCRPD.¹²

The IMNI advises that to fully inform the UNCRPD Committee prior to the examination the Northern Ireland Executive should develop a further submission to inform the Committee of the proposals within the draft Bill and to set out measures taken to meet compliance with the UNCRPD, Article 12. In addition, as this is a developing area of law, the Commission advises that the Departments undertake to carry out a systemic review the implementation of the Bill/Act commencing within 2 years of its enactment. This review should take account of developments in international human rights law and assess compliance in light of established practice.

¹¹ Footnote 7, para 42

¹² A number of distinguished individuals, including Denzil Lush have expressed the view that the Act is not in compliance with the UNCRPD, in particular Article 12. The Arts and Humanities Research Council has funded the Essex Autonomy Project to review the compliance of the Mental Capacity Act 2005 with the UNCRPD and to advise the Ministry of Justice. Lush, D. (2013) Oral evidence to House of Lords Select Committee on the Mental Capacity Act. Evidence session 14 (26 November 2013). Available online at <http://www.parliament.uk/business/committees/committees-a-z/lords-select/mental-capacity-act-2005/publications/>. Essex Autonomy Project to advise Ministry of Justice on compliance with United Nations Convention
19/03/2014 <http://www.ahrc.ac.uk/News-and-Events/News/Pages/Essex-Autonomy-Project-to-advise-Ministry-of-Justice-on-compliance-with-United-Nations-Convention.aspx>