



Convention on the Rights of Persons with Disabilities (CRPD) Joint Committee

November 2015

POLICY AND RESEARCH UPDATE

Purpose

1. This paper provides an update on the key policy and research work we have advanced in support of our remit to promote, protect and monitor the implementation of the Convention.
2. It includes policy consultations to which we have responded (setting out a summary of key points made relevant to the UNCRPD) and outlining broader policy issues relevant to IMNI's work. The paper also provides an overview of research being advanced in support of our remit
3. Copies of consultation responses and/or research can be provided to Commissioners upon request.

DHSSPS: The future support of Independent Living Fund Users in Northern Ireland (ECNI: December 2014)

4. In its response ECNI encouraged the Department to give consideration to the long-term future of the ILF in the interests of both existing and potential users who meet the current eligibility criteria of the existing ILF model, recommended that the Department's final decision fully reflect the views of ILF users and be implemented in a

timely manner to address the concerns users have about the future of the fund.

5. The response noted that the underlying theme of all of the options presented in the consultation paper was the eventual closure of the ILF. Any proposed future model concerned with the delivery of independent living resources was time bound, focused exclusively on the support requirements of existing ILF users only, rather than those individuals who may also benefit from this type of fund now, and in the future.
6. ECNI highlighted that the options presented in the paper would either preserve existing inequalities associated with the existing model, or exacerbate these existing inequalities by withdrawing support to existing ILF users it could not therefore endorse any of the options outlined in the consultation paper. The response pointed out that the eventual closure of the ILF, without any clear indication of the arrangements to succeed the scheme, will impact adversely on the rights of persons with disabilities under Article 19 of the CRPD 'Living independently and being included in the community'¹.
7. Furthermore, the response drew attention to the comments by the Joint Committee for Human Rights that, in its view, welfare reform, changes to eligibility criteria for adult social care and the closure of the Independent Living Fund (ILF) 'risk interacting in a particularly harmful way for disabled people. Some disabled people risk losing

¹ States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

Disability Living Allowance (DLA)...whilst not getting support from the ILF, all of which may force them to return to residential care'.²

8. The response concluded by asking the Department to take particular account of the preamble to the Convention, Article 4 'General obligations' and Article 19 the 'Living independently and being included in the community' in making the decisions about the future resourcing of Independent Living options.

DHSSPS: *Service Framework for Children and Young People* (ECNI: January 2015)

9. ECNI recommended the inclusion of a standard embedding equality in the Service Framework for Children and Young People.
10. The submission drew attention to the conclusion of IMNI's '*Jurisdictional Parallel Report on Implementation of the United Nations Convention on the Rights of Persons with Disabilities*'³ that children with disabilities are generally excluded from the decision making processes concerned with delivering government measures, policies and programmes concerned with their health, economic and social well being and that consequently children with disabilities face a range of barriers when accessing services, including the benefit of age appropriate services in areas such as health.
11. The submission pointed out that there is a clear need to effectively address equality issues in the Service Framework for Children and Young People.

² Joint Committee for Human Rights: 'Implementation of the Right of Disabled People to Independent Living', paragraph 161, Twenty Third Report, 6 February 2012.

<http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/257/25708.htm>

³ Available at: <http://www.equalityni.org/Delivering-Equality/Addressing-inequality/UNCRPD-Disability>

OFMDFM: Annual Disability Strategy Indicators (ECNI: February 2015)

12. ECNI highlighted the key overarching issue with the draft annual indicators is the lack of connection between the aims and actions associated with the Strategic Priorities. A full analysis of the adequacy and appropriateness of the proposed indicators was included in an Appendix.
13. The response highlighted that while the proposed indicators have been broadly drawn up to measure outcomes in relation to the aim of each Strategic Priority, actions linked to the strategic priorities, however, are not always relevant to the stated objectives. This is a critical flaw in that actions should produce change in areas associated with each Strategic Priority and the impact of these actions should then be measured by the use of indicators.
14. ECNI expressed concern that the Strategic Priorities had been allocated to actions which largely reflect pre-existing Programme for Government⁴ commitments or planned programmes produced by the Northern Ireland Executive. ECNI advised that rather than seek to fit the pre-existing Programme for Government priorities against the CRPD articles, that the Strategic Priorities outlined in the Disability Strategy are aligned correctly with appropriate articles and relevant indicators, which measure the extent to which these articles are realised, are put in place.
15. The preamble for the Strategy indicates that the “Strategy is developed on a rights based approach to fulfil the obligations provided for in the United Nations Convention on the Rights of Persons with Disabilities (CRPD)”⁵. However, recent research

⁴ OFMDFM (January 2013) Op. Cit. Appendix 1 of the document, which is entitled ‘Programme for Government Commitments, CRPD articles, Strategic Priorities and Key Performance Measures’ and seeks to relate the articles of the CRPD to the priorities of the Disability Strategy and Programme for Government 2011-2015 (PfG). The table includes a column which seeks to explain how each PfG commitment ‘will address the needs of people with disabilities’. See pages 33-53 op.cit.

⁵ OFMDFM (January 2013): Op.Cit., paragraph 1 page 6.

commissioned by the Equality Commission⁶ has identified a similar disconnect in the Disability Strategy between actions outlined in the 2011 – 2015 Programme for Government (PfG)⁷ and the articles of the CRPD. The research concluded that the articles of the CRPD have been assigned to existing or planned commitments and programmes “without any consideration of the actual obligations and rights contained in those articles”⁸ and that the connection between them was “weak, unclear or, in some cases, not actual”⁹.

16. Furthermore, the research noted the omission of priorities and commitments in the PfG 2011-2015 relating to Article 6 of the CRPD on *women with disabilities* and only a brief mention of Article 7 on *children with disabilities*¹⁰.
17. ECNI drew the attention of the Department to a comparative study on the successful implementation of the CRPD through disability strategies¹¹, which recommends that outcomes should be evaluated and measured at two levels:
 - in terms of implementation outcomes (that is, did it do what it said it was going to do); and
 - life outcomes for disabled people (what impact did it have on the lives of people with disabilities).

⁶ Byrne, B., Harper, C., Shea Irvine, R., Russell, H. and Fitzpatrick, B. (2014): *CRPD: Shortfalls in public policy and programme delivery in Northern Ireland relative to the Articles of the CRPD*, final paragraph, page 20 (ECNI: Belfast). Available at:

http://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/RES1314-05_UNCRPD_Final-Report-v1_-130614.pdf

⁷ OFMdFM (January 2013). Op. Cit., Appendix 1 of the document, which is entitled ‘Programme for Government Commitments, CRPD articles, Strategic Priorities and Key Performance Measures’ and seeks to relate the articles of the CRPD to the priorities of the Disability Strategy and Programme for Government 2011-2015 (PfG). The table includes a column which seeks to explain how each PfG commitment ‘will address the needs of people with disabilities’. See pages 33-53.

⁸ Byrne, B. et al (2014): Op. cit., first paragraph, page 21.

⁹ Ibid. See also paragraphs 2 and 3, page 21.

¹⁰ See CRPD text.

¹¹ Flynn, E., (2011): *From Rhetoric to Action – Implementing the UN Convention on Human Rights for Persons with Disabilities* - Chapter 4 ‘Critical Success Factors in Delivering A National Disability Strategy Lessons from International and Comparative Experience’, pages 197-286, (Centre for Disability Law, National University of Galway). Available at: <http://inspirasi.co/books/1410765858.pdf>

18. ECNI also pointed out that many of the proposed indicators do not identify the extent to which data will be disaggregated and therefore the degree with which the relevant indicators meet the requirements of Article 31 on *Statistics and Data Collection*¹².
19. This is of particular concern given that some indicators will be based on survey methodology with a limited sample of people with disabilities which may impact on the robustness of disaggregated data.
20. Although ECNI recognised that the arrangements to capture the data required to measure progress against the Strategic Priorities are not fully in place, it recommended that addressing this issue should be a key priority within the revised disability strategy from 2016 onwards.

DHSSPS: The Right Time, The Right Place – An expert examination of the application of health and social care governance arrangements for ensuring the quality of care provision in Northern Ireland (ECNI: April 2015)¹³

21. The Equality Commission noted the proposal to convene an international expert panel to recommend the future configuration of health and social care provision in Northern Ireland and urged that due account of equality and human rights considerations is taken prior to arrival at the recommended configuration.
22. The Commission sought assurance that any current disadvantages experienced by equality constituencies in the delivery of health and social care are not compounded, and new disadvantages are not created, resulting in the undermining of the right to adequate health and social care, as a consequence of the re-configuration of services and delivery arrangements.

¹² Under Article 31, information should be “disaggregated, as appropriate, and used to help assess the implementation of States Parties’ obligations”.

¹³ Available at: <http://www.equalityni.org/Delivering-Equality/Consultancy-responses/Consultation-Response-Files/2015/DHSSPS-The-Right-Time,-The-Right-Place-%E2%80%93-An-expert>

23. The Commission highlighted the obligation to prevent retrogression of rights as articulated by the United Nations Committee on Economic Social and Cultural Rights¹⁴.
24. Furthermore the Commission drew attention to the Committee's General Comment No 5, 'Persons with Disabilities', which maintains that, in order to promote "progressive realisation" of the relevant rights to the maximum of available resources, there is a clear requirement on public authorities and state funded agencies to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a disadvantaged group is to take positive action to reduce structural disadvantage and deliver appropriate preferential treatment to persons with disabilities to achieve the objectives of the relevant rights set out in the Convention¹⁵.
25. The Commission also highlighted the provisions of Article 25(c) of the UNCRPD which requires that health services be provided as close as possible to people's own communities, including in rural areas¹⁶.

NI Assembly Education Committee: Evidence on the SEND Bill 2015 (ECNI: April 2015)

26. The Commission welcomed many aspects of the Bill including:

¹⁴ 'Any deliberate retrogressive measures ... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'. Source: Committee on Economic, Social and Cultural Rights: *General Comment No. 3, The Nature of States Parties' Obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, paragraphs 9, 11 and 12. Available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGE C%2f4758&Lang=en

¹⁵ UN Committee on Social, Economic and Cultural Rights: *General Comment No. 5, Persons with Disabilities* (1994: 11th session), paragraph 9. Available at:

[http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/1_Global/E_1995_22\(SUPP\)_4760_E.doc](http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/1_Global/E_1995_22(SUPP)_4760_E.doc)

¹⁶ United Nations Convention on the Rights of Persons with Disabilities, Article 25 (c). Available at: <http://www.un.org/disabilities/convention/conventionfull.shtml>

- the duty of the Education Authority to have regard to the views of the child in line with Article 12 of the Convention on the Rights of the Child (CRC) and Article 7 of CRPD;
- the requirement to maintain a personal learning plan for each SEN student and ensuring that a teacher is designated as a learning support coordinator;
- the right of students aged 16 plus to appeal decisions at tribunal and to request a statutory assessment, as well as the right to bring a complaint of disability discrimination to a tribunal;
- a pilot scheme for students under 16 to have the right of appeal at tribunal.

27. The Commission asked Committee members to give further consideration to the following concerns and recommendations, *inter alia*:

- that the proposed Code of Practice should outline how students will be involved in the development of overall SEN provision;
- that the Bill does not specify reviews for students with a Statement/Co-ordinated Support Plan (CSP) at various transition points within their journey through education;
- that the Bill does not refer to children with SEN in pre-school settings;
- clarification was needed on the retention of SEN statements and what this means for the future use of CSPs;
- that the Code of Practice should outline training measures for teachers/Learning Support Co-ordinators (LSCs) and monitor the effectiveness/outcomes.
- that the Department of Education explore with the Department of Health and Social Services the possibility of a corresponding duty on Health and Social Care Bodies to assist the Education Authority in the delivery of SEN.

- that the proposed Code of Practice (CoP) include timescales as to how long the mediation process will operate and outline clearly the relationship it has with regard to the appeals process;
- that arrangements to monitor the effectiveness of the provisions within the Bill, including the collection of desegregated data, taking account of the multiple identities of disabled people, must be provided for in the CoP.

NI Assembly Education Committee: Further evidence on the SEND Bill 2015 (ECNI: August 2015)

28. The Commission welcomed the stronger emphasis given in the Bill to the rights of children but advised that adopting underpinning principles drawn from the United Nations Convention on the Rights of the Child (UNCRC)¹⁷ and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)¹⁸ should both shape and inform the future of the Special Education Needs (SEN) framework. We recommend that these principles:

- Voice of the child;
- Equality and non-discrimination; and
- Participation and inclusion

should be set out on the face of the legislation by way of a paragraph inserted into the Bill in order to provide interpretative guidance to the rights and entitlement laid out therein. The evidence set out the relevant Convention articles underpinning each of these principles.

29. The Commission also recommended that consideration be given to the inclusion of the following measures, inter alia, in the Bill:

¹⁷ Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

¹⁸ Available at: www.un.org/disabilities/documents/convention/convoptprot-e.pdf

Provision by health authorities

- A statutory duty on health authorities to provide for the health and social care related aspects of special educational need provision, which corresponds with the duty of the Education Authority in relation to the education aspects of Co-ordinated Support Plans (CSPs)/SEN Statements¹⁹.

Personal Learning Plan (PLP)

- an obligation on Boards of Governors to ensure that the plan must be accessible to parents and children and be informed by them at all stages;
- an obligation on Boards of Governors to ensure that that the plan should specify and quantify the level of support available to each child, including any reasonable adjustments.

Co-ordinated Support Plan (CSP)

- an obligation on Boards of Governors to ensure that the plan must be accessible to parents and children and informed by them at all stages;
- an obligation on Boards of Governors to ensure that the plan should specify and quantify the level of support available to each child, including any reasonable adjustments.

Pre-school settings

- the duties and obligations of the Education Authority to children with Special Education Needs in pre-school settings including with respect to transition arrangements.

The Regulations

30. The Commission recommended that the following issues, inter alia, be clearly set out in the regulations:

¹⁹ The Commission's recommendation is consistent with our response earlier this year to the consultation by OFMDFM on the Children's Services Co-operation Bill.

- the content of the Education Authority’s plans relating to special educational provision, including, inter alia:
 - steps taken to promote positive attitudes towards disabled students in line with the public authority ‘Disability Duties’²⁰ obligations;
 - measures to promote awareness of UNCRPD and UNCRC rights and disability equality legislation generally as it applies to schools and all SEN settings;
 - arrangements for oversight of disability equality and awareness training measures for teachers²¹ and others responsible for delivering frontline educational services;
 - arrangements for monitoring and review of the impact of the SEN plan;
 - a commitment to screening and, where appropriate, to equality impact assessment in line with equality scheme obligations;
 - arrangements for consultation on the plan.
- an obligation on the Education Authority to monitor the outcomes from PLPs and CSPs/Statements on an annual basis;
- an obligation on the Education Authority to assess the extent to which training needs of the learning support co-ordinators and teachers have been met;
- an obligation on Boards of Governors to make parents and students aware of the independent mediation service;
- an obligation on the Education Authority to set out the arrangements to assess the level of support required to enable a child or young person to make an appeal;

²⁰ Further details are available in: Equality Commission for Northern Ireland (2007): ‘A Guide for Public Authorities – Promoting Positive Attitudes towards disabled people and encouraging the participation of disabled people in public life’, (Belfast: Equality Commission NI). Available at:

<http://www.equalityni.org/Publications?subject=Disability&type=Guides&year=2007>

²¹ In accordance with Article 24.4 (Education) of the UNCRPD (Available at:

www.un.org/disabilities/documents/convention/convoptprot-e.pdf)

- an obligation on the Education Authority to collect, analyse and evaluate data on SEN disaggregated by disability type, age and gender;
- the prescribed role and qualifications necessary for a Learning Support Co-ordinator.

The Code of Practice

31. The Commission also recommended that the following issues, inter alia, should be clearly set out in the Code of Practice:
- the form and content of PLPs and CSPs;
 - arrangements for access to the independent mediation service, including timescales for trying to resolve cases and the arrangements for further appeal at SEN tribunal;
 - guidance on effective multi-disciplinary working between the Education and Skills Authority and health and social care bodies, including setting out good practice in partnership arrangements and the obligations of both education and health authorities in the delivery of SEN provision;
 - clear guidance as to how all students (i.e. those with and without SEN statements) will be involved in the development of their own PLPs or CSPs.

NI Executive: draft Childcare Strategy 2015- 2025 (ECNI: November 2015)

32. The Commission drew attention to a reference in the consultation document that “*economists advising on the development of the present Strategy identified the childcare needs of children with special needs or a disability as an emerging priority area*”²².
33. A key finding from the report *Childcare: Maximising the Economic Participation of Women* (2013) commissioned by the Commission, that childcare provision for disabled children was identified as very

²² See page 29 of consultation document. Available at: <http://www.ofmdfmi.gov.uk/childcare>

deficient, with not enough suitable facilities for them, was highlighted²³.

34. It was noted that the recent OFMDFM research (2014) indicated there is limited capacity and/or uptake within the formal (registered childcare) sector for provision for children with disabilities²⁴.
35. Attention was also drawn to research in Northern Ireland carried out by *Employers For Childcare* in 2011 also found that parents of disabled children find it difficult to identify appropriate childcare facilities for their child that ensures the child's development, and that as a result many parents rely on informal sources of care or are unable to take up employment²⁵.
36. Whilst the Commission welcomed the interventions designed to increase childcare services for disabled children that have already been taken under the first phase of the Childcare Strategy, we pointed out that the degree to which the childcare needs of children with a disability have to date been met is not clear as an evaluation of the first phase has not yet been completed.
37. Furthermore we highlighted that, whilst the stated aim "*to ensure that every child with a disability that requires a child care place and access provision appropriate to his/her needs*" is to be welcomed, the proposed intervention for childcare for children with a disability is less concrete.
38. The Commission also drew attention to the obligations of the UK Government under the UN Convention on the Rights of Persons with Disabilities (UNCRPD) towards disabled children (Article 7); in particular to take all necessary measures to ensure the full enjoyment

²³ *Childcare: Maximising the Economic Participation of Women, Full Report*, Employment Research Institute, Edinburgh Napier University commissioned by ECNI 2013.

²⁴ Less than half of providers (43% in rural areas and 43% in urban areas) stated that they had the capacity to cater for children with disabilities. Source: OFMDFM (2014): *Childcare Research* Final Report.

²⁵ Employers for Childcare (September 2011): *Childcare for All? Consulting Families of Children with Disabilities and/or Special Needs about Childcare and Employment Report*

of disabled children for human rights and fundamental freedoms on an equal basis with other children.

39. The Commission recommended that there are tangible commitments within the Strategy to address the clear priority childcare needs of disabled children, ensuring access to affordable childcare provision to meet the needs of all children – including disabled children.

DHSSPS: *Draft Northern Ireland Implementation Plan for Rare Diseases* (NIHRC: January 2015)

40. The NIHRC met with Departmental official responsible for the development of the draft NI Implementation Plan for Rare Diseases. At the meeting the NIHRC advised the official that the implementation plan should be viewed as one of many measures taken by the NI Executive to ensure implementation of the UNCRPD. Specific concerns were raised regarding the categorisation of those under 18 with rare diseases as adults. The NIHRC emphasised the need to ensure specialist services are easily and quickly accessible to sufferers of rare diseases in Northern Ireland. The NIHRC referred the official to its paper ‘The Human Rights of Carers’ and to particular challenges faced by carers of persons with rare diseases, such as increased likelihood of travel, multiple hospital appointments, and considerable excess costs.

DSD: *Welfare Reform Bill* (NIHRC: February 2015)

41. The NIHRC provided advice to the Speaker of the Northern Ireland Assembly on the compatibility of the Welfare Reform Bill with international human rights law. In the submission the Commission
- advised that a reduction on the maximum eligible rent for housing benefit may have a disproportionate impact on persons who require an additional bedroom as a result of disability, due to equipment or the need for an overnight carer;
 - that the impact of the sanctions regime on persons with disability requires consideration.

DHSSPS: *Consultation on the Draft Standards for Supported Lodgings for Young Adults (aged 16-21) in Northern Ireland* (NIHRC: January 2015)

42. The NIHRC advised that the absence of references to young people with disabilities in the Draft Standards was unacceptable and recommended the inclusion of an additional Standard that recognises the obligations on Service Providers in this regard.

NI Assembly: *Mental Capacity (NI) Bill* (NIHRC: July 2015)

43. The NIHRC made a submission to the NI Assembly Ad Hoc Committee on the Mental Capacity (NI) Bill. The Bill will fuse mental health and mental capacity law in NI, introducing a presumption of capacity in all persons over the age of 16.
44. The NIHRC provided advice to the DHSSPS and the DOJ in relation to the draft Bill.²⁶ This advice was to a degree reflected in the Bill as introduced. The Commission welcomed the increased emphasis placed in the Bill on ensuring respect for the autonomy of persons with fluctuating capacity and on the provision of support to such persons. The Commission advised that the Bill was compliant with the ECHR and was informed by guidance provided by the Council of Europe.²⁷ However, the Commission advised that a number of contradictions exist between the CRPD and the ECHR and proposed a number of amendments to ensure the Bill was more reflective of the CRPD.
45. The Commission advised that by continuing to make provision for substitute decision making the Bill runs contrary to the CRPD, Article 12, as interpreted by the CRPD Committee. The Commission did highlight that there is currently a lack of legal clarity regarding the implications of Article 12 and that legal practice in this area is

²⁶ See IMNI 'Response from IMNI to the Consultation on Proposals for New Mental Capacity Legislation' (September 2014).

²⁷ NIHRC 'Submission to the Ad Hoc Committee on the Mental Capacity (NI) Bill' (September 2015).

emerging. The Commission therefore recommended that a provision be included within the Bill for a systemic review of the implementation of the legislation to commence within three years of its operation.²⁸ By this time it is anticipated that the UK's initial report on compliance with the CRPD will have been examined by the Committee. Such a review should include consideration of laws governing mental capacity throughout the UK. The implementation review should take account of any recommendations from the CRPD Committee along with any developments in international law. In addition, by then it is anticipated that some clarity will have been provided regarding the contradictions between the CRPD and the ECHR²⁹.

46. The Mental Capacity (NI) Bill will introduce a presumption of capacity in all persons over the age of 16 only.³⁰ For under 16 year olds the DHSSPS had committed to review how the current legal framework, principally the Children (NI) Order 1995, reflects the emerging capacity of children in a health and welfare context. In its previous annual statement the Commission advised that a project plan with a clearly defined timetable for this project should be developed and made publicly available.³¹ However during the Second Stage debate on the Bill the Minister for Health stated that there are “simply no available resources and arguably no time to undertake such a wide-ranging project at this moment”³². The Commission raised the need to develop a legal framework governing decisions on mental capacity for children under 16 as soon as possible in its submissions to the UN CRC and the UN ICESCR Committees³³.

²⁸ Ibid, paras 14 – 21.

²⁹ Ibid.

³⁰ NIHRC: ‘The 2013 Annual Statement: Human Rights in NI ‘ (NIHRC, 2013) page 45.

³¹ NIHRC: ‘Submission to the Consultation on Proposals for New Mental Capacity Legislation for NI’ (September 2014) para 90.

³² Official Report: Tuesday 16 June 2015.

³³ NIHRC: ‘Submission to the UN Committee on the Rights of the Child on the United Kingdom’s Fifth Periodic Report on compliance with the UN Convention on the Rights of the Child’ (August 2015).

47. The Bill makes provision for a statutory definition of restraint in circumstances where a person lacks capacity³⁴. In its advice to the Ad Hoc Joint Committee, established to consider the Mental Capacity Bill, the Commission suggested a number of amendments to further ensure that restraint is applied only when it is a proportionate response to the risk of imminent harm in accordance with the recommendation of the Council of Europe³⁵.
48. The Bill, as introduced, proposes a new offence of ill treatment or wilful neglect of a person who lacks capacity³⁶. The proposed clause broadly reflects section 44 of the Mental Capacity Act 2005. The Commission has advised the NI Assembly that the House of Lords in its post legislative scrutiny of the 2005 Act raised concerns about the low number of prosecutions brought under section 44³⁷. The House of Lords noted that the “decision and time specific nature of capacity assessment, along with the presumption of capacity, are a defining feature of the Act, but appeared to create problems when applied to the question of capacity in section 44”³⁸.
49. The Commission notes that following a report by the National Advisory Committee on the Safety of Patients in England, the Westminster Parliament passed the Criminal Justice and Courts Act 2015 which at section 21 makes it an offence for an individual who has the care of another individual by virtue of being a care worker to ill-treat or wilfully neglect that individual³⁹. In addition section 22 creates a similar corporate offence were a care provider has committed a gross breach of a relevant duty of care.

³⁴ NIHRC: ‘Submission to the Ad Hoc Committee on the Mental Capacity (NI) Bill’ 2015.

³⁵ Council of Europe Recommendation (2004)10, Concerning the Protection of the Human Rights and Dignity of persons with Mental Disorder. NIHRC: ‘Submission to the Ad Hoc Committee on the Mental Capacity (NI) Bill’ 2015 paragraph 67.

³⁶ Mental Capacity (NI) Bill - Clause 256.

³⁷ House of Lords Mental Capacity Act 2005: post-legislative scrutiny - Select Committee on the Mental Capacity Act 2005 HL Paper 139.

³⁸ Ibid., para 304.

³⁹ Criminal Justice and Courts Act 2015 c. 2.

50. These offences were introduced as the Department of Health considered a lacuna existed in the law of England & Wales, the Department stated:

*It is entirely possible that a situation could arise where two patients, one with full capacity and one without, are being subjected to the same type of conduct, by the same person with the same intent, but a prosecution for ill-treatment or wilful neglect could only be brought in respect of the patient without capacity. Clearly, this is a situation we would want to avoid.*⁴⁰

51. The Commission has advised that two additional clauses modelled on sections 21 and 22 on the Criminal Justice and Courts Act 2015 should be included within the Bill⁴¹.

Research

Key Inequalities

52. The Equality Commission is working towards an update of its 2007 'Statement on Key Inequalities in Northern Ireland'⁴² through progressing a rolling programme of research to provide robust evidence to support the development of updated 'Statements' in key areas, those of: Employment; Education; Housing and Communities; Public Participation; Health and Social Care; and Prejudice and Social Attitudes. The work considers the inequalities in the above areas across each of equality grounds, including disability.
53. A draft ECNI statement on inequalities in education has been completed. Draft statements of inequalities are currently being prepared with respect to employment, housing, and participation in

⁴⁰ See proposals in England & Wales by Department of Health 'New offence of ill-treatment or wilful neglect Consultation document' (February 2014) para 15.

⁴¹ NIHRC 'Submission to the Ad Hoc Committee on the Mental Capacity (NI) Bill' 2015 page 34.

⁴² ECNI (2007): *Statement on Key Inequalities in Northern Ireland*, Available from: [http://www.equalityni.org/archive/pdf/Keyinequalities\(F\)1107.pdf](http://www.equalityni.org/archive/pdf/Keyinequalities(F)1107.pdf) .

public life. Consideration is also being given on how best to take forward research into health and social care.

Legal Capacity: Article 12

54. The NIHRC is represented on the University of Essex research cluster on the compliance of NI and Scottish capacity law with the UNCRPD. The Commission has contributed to papers examining the legal implications of the UNCRPD Article 12 and General Comment 1. In particular, the Commission has contributed to papers around undue influence and conflict of interest.

Accident and Emergency Inquiry (NIHRC: 2014/15)

55. In May 2015 the NIHRC published its report into emergency health care in NI.⁴³ It was the first human rights inquiry into this issue anywhere in the world.
56. The Commission adopted a participatory approach to ensure a full understanding of the patient journey. The inquiry involved eleven public hearings, taking statements from 139 witnesses, in addition the Commission received 185 written and telephone submissions.⁴⁴
57. The inquiry analysed in detail the arrangements put in place by the DHSSPS, the HSC Board and the HSC Trusts to deliver emergency health care and illustrated throughout the report issues identified during the course of the inquiry. Informed by the real life experiences of those who had visited accident and emergency the Commission assessed arrangements against international human rights standards, in particular the right to the highest attainable standard of health.
58. The NI Executive is required to provide quality facilities, goods and services that are accessible. Furthermore, the health system should meet the requirement of good governance through ensuring public involvement and participation in planning and delivery of services. The right of patients to participate in decisions regarding their health care should also be recognised.

⁴³ NIHRC (May 2015): 'Human Rights Inquiry: Emergency Health Care'.

⁴⁴ Ibid.

59. The inquiry report included over 100 key findings. On publication of the report the Chief Commissioner stated:

“The Commission considered quality, accountability and governance of the service. We visited emergency departments throughout Northern Ireland during the day and night. We heard from dedicated staff striving to maintain patient dignity in an often challenging and crowded environment. In such circumstances there were reported instances where patients did not receive assistance with personal care needs, no pain relief, and no access to food and fluids. Of particular concern were cases involving end of life care, the inappropriate transfer of older patients from nursing homes and the experiences of those presenting to A&E in mental health crisis, with dementia or disabilities.

The Commission heard individual cases which amounted to inhuman and degrading treatment but, did not discover evidence of systemic violations of human rights. The importance of human rights are most obvious when we are at our most vulnerable. The right to the highest attainable standard of health is a standard that must be strived for and the respect for dignity and other human rights principles must be adhered to.

The Inquiry also heard of good practices and experiences. Often the introduction of relatively simple measures significantly improved the human rights of patients. Many of these have been introduced with modest costs and there is a clear need to share good practices throughout the system on a more structured basis.

The report recognised that emergency care departments do not control who comes in through the doors or whether the services are in place to allow a patient to move elsewhere in the hospital or back home. The report examined how much money had been allocated to the transition to impending Transforming Your Care following the Compton report in 2011. It is clear that the money has gone on a number of important areas of care and service but, has not focussed on implementing the earlier review. The report recommends getting Transforming Your Care on track alongside other recommendations to improve the situation in emergency care departments. The report’s aim is to be constructive and

show that a human rights based approach can improve emergency care department services for both patients and staff.”⁴⁵

60. The inquiry found that the emergency care function of the NI health service is heavily dependent on and influenced by policy and practice elsewhere in the health and social care system.⁴⁶ During the inquiry many positive initiatives were identified. However, these had not been implemented in a systematic way. An absence of robust data collection to ensure the effective monitoring and reporting on performance was noted.⁴⁷
61. The inquiry found that Emergency Departments did not provide reasonable adjustments for persons with disabilities including those with mental health problems, in particular patients presenting with self-harm perceived the Emergency Department as a hostile environment.⁴⁸
62. The inquiry identified a need to strengthen the link between those shaping services and the local communities they serve. A further need to enhance the inspection framework was identified.⁴⁹
63. The Commission made 26 recommendations including a recommendation that the DHSSPS develop dedicated Emergency Department minimum care standards, rooted in human rights and providing a benchmark for patient experience within Emergency Departments. The standards should include criterion on, inter alia:
 - The promotion of dignity in Emergency Departments;
 - Participation by individuals, their family members and other carers in the care provided in the Emergency Department setting;
 - Measures covering staff behaviour and attitude, adequate facilities;
 - Accessible mechanisms to provide feedback of Emergency Department experiences including complaints;

⁴⁵ NIHRC Press Release ‘A&E Inquiry Findings Published’ (May 2015).

⁴⁶ NIHRC ‘Human Rights Inquiry: Emergency Health Care’ (May, 2015) page 123.

⁴⁷ Ibid, page 70.

⁴⁸ Ibid, page 62.

⁴⁹ Ibid, page 125.

- The policies and procedures each Emergency Departments should have including a hospital wide escalation policy to address overcrowding; and,
- Ways of helping to guarantee equality of access for particular groups of patients including older people, patients with dementia, rare diseases, sensory impairments and those presenting in mental health crisis.⁵⁰

64. The Commission is tracking the progress of the Report's recommendations and is working with the Belfast HSC Trust to develop a pilot project that will develop a human rights based approach to accident and emergency.

65. In November 2015 the Minister for Health, Social Services and Public Safety set out significant changes to the health and social care system in Northern Ireland, stating:

"We have too many layers in our system. I want to see the Department take firmer, strategic control of our Health and Social Care system with our Trusts responsible for the planning of care in their areas and the operational independence to deliver it.

*What I am signalling is an end to the current way we commission healthcare in Northern Ireland. It has not worked and arguably is never going to work well in a small region like ours. I propose that we close down the Health and Social Care Board.*⁵¹

**IMNI
November 2015**

⁵⁰ Ibid Recommendations.

⁵¹ DHSSPS Press Release 'Health Minister Simon Hamilton has today announced radical changes to the way health and social care in Northern Ireland is delivered', 4 November 2015 .