



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**NIHRC Submission to Committee for Health on
the Adoption and Children Bill**

8 October 2021

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Summary

The NI Human Rights Commission (the Commission):

- 2.5 welcomes the proposed reforms which follow on from the UN Convention on the Rights Committee's specific recommendation to update adoption legislation in NI in accordance with international human rights obligations.**
- 3.5 continues to recommend that the Bill outlines in detail specific measures to be taken to ensure non-discrimination against same-sex couples and individuals in the adoption process. The Commission recommends that clear and comprehensive revised guidance be issued and effectively publicised by the Department outlining the current state of the law for the benefit of those involved in the adoption process, either as employees or as prospective adoptive parents.**
- 4.7 recommends that the Department of Health allocate appropriate resources to ensure the availability of short break services across all Trust areas. Statutory guidance should be developed to ensure consistency and promote accountability. Guidance should be produced in consultation with children with disabilities, their parents and guardians, carers and any other relevant stakeholders.**
- 5.4 recommends that the Committee requests a more detailed breakdown of resource allocation from the Department, which outlines the methods by which proposed measures are to be adequately funded to ensure that the reforms can be effectively implemented to meet the human rights standards and policy aims identified.**

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (NIHRC), pursuant to section 69(4) of the Northern Ireland Act 1998, advises the Assembly whether a Bill is compatible with human rights. The NIHRC, pursuant to section 78A(6) of the Northern Ireland Act 1998, must advise the Assembly (or a committee of the Assembly) whether a Bill is compatible with Article 2(1) of the Ireland/Northern Ireland Protocol. In accordance with these functions, the following advice is submitted to the Committee for Health on the Adoption and Children Bill.
- 1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN). The relevant regional and international treaties in this context include:
- European Convention on Human Rights (ECHR);¹
 - European Convention on the Adoption of Children 1967;²
 - International Covenant on Civil and Political Rights (ICCPR);³
 - International Covenant on Economic, Social and Cultural Rights (ICESCR);⁴
 - UN Convention on the Rights of the Child (CRC);⁵
 - The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993 (the Hague Convention);⁶
 - UN Convention on the Rights of Persons with Disabilities (CRPD).⁷
- 1.3 In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context include:
- UN Guidelines for the Alternative Care of Children (2010);⁸
 - Concluding Observations of the UN Committee on the Rights of the

¹ Ratified by the UK 1951. Further guidance is also taken from the body of case law from the European Court of Human Rights (ECtHR).

² Ratified by the UK in 1967.

³ Ratified by the UK in 1976.

⁴ Ratified by the UK in 1976.

⁵ Ratified by the UK in 1991.

⁶ Ratified by the UK in 2003.

⁷ Ratified by the UK in 2009.

⁸ A/Res/64/142, 24 February 2010

2.0 General Comments

- 2.1 The Commission welcomes the Committee for Health's Call for Evidence on the Adoption and Children Bill, which aims to reform adoption law in Northern Ireland. The Bill's Explanatory Memorandum notes that the Department of Health's key aim is to enhance the existing legal framework to make it more consistent with "the principles and provisions of the Children (Northern Ireland) Order 1995, and international human rights requirements, in particular the UN Convention on the Rights of the Child".¹⁰
- 2.2 In its 2016 Concluding Observations on the United Kingdom, the UN Committee on the Rights of the Child (UN CRC Committee) noted that the "adoption procedure in Northern Ireland [remains] outdated and not in line with the Convention [on the Rights of the Child]".¹¹ The UN CRC Committee recommended that the NI Executive "[e]xpeditate the approval and enactment of the Adoption and Children Bill in Northern Ireland".¹² The Commission has reiterated the UN CRC Committee's recommendation throughout a number of recent publications.¹³
- 2.3 Notably, the Commission broadly welcomed the Department of Health's previous consultation on proposals for the Adoption and Children Bill in 2017.¹⁴ In particular, the Commission supported the commitment to paramountcy of the best interests of the child,¹⁵ as reflected in Clause 1(2) of the Bill, and the strengthening of the child's participation and right to be heard within the adoption framework,¹⁶ as contained within Clause 120.
- 2.4 To avoid duplication of the Commission's previous response, this submission highlights relevant human rights standards in respect of any subsequent amendments to the draft Bill or to inform the development of further legislation or policy in this area. The Commission would encourage

⁹ CRC/C/GBR/CO/5, UN Committee on the Rights of the Child, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, 12 July 2016.

¹⁰ Explanatory and Financial Memorandum, Adoption and Children Bill, at para 26.

¹¹ Ibid at para. 52(g).

¹² Ibid at para. 53(g).

¹³ See: NIHRC Annual Statements 2016 – 2020, and; NIHRC, Submission to the UN Committee on the Rights of the Child 88th Session on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland on compliance with the UN Convention on the Rights of the Child List of Issues, November 2020, at para 10.8.

¹⁴ NIHRC, 'Adoption and Children (NI) Bill Consultation: Key Human Rights Aspects' (2017)

¹⁵ See: UN CRC, Article 21, and; CRC/C/GC/14, UN CRC Committee, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, 29 May 2013, para 6.

¹⁶ UN CRC, Article 12

the Committee to review its previous submission for further detail on any other relevant pre-existing clauses.

2.5 The Commission welcomes the proposed reforms which follow on from the UN Convention on the Rights of the Child Committee's specific recommendation to update adoption legislation in NI in accordance with international human rights obligations.

3.0 Clause 67 and 158: Same sex adoption

- 3.1 In 2012, by way of judicial review, the Commission challenged Articles 14 and 15 of the Adoption (NI) Order 1987 on the grounds that Article 14 represented a blanket ban on unmarried couples (whether same-sex, opposite sex, or those in a civil partnership) being able to apply to adopt as a couple. Article 15 was challenged as it presented a blanket ban on persons in a registered civil partnership being able to adopt either as individuals or as a couple. Accordingly, that Articles 14 and 15 of the 1987 Order were incompatible with the rights protected by Articles 8 and 14 of the ECHR.¹⁷ The High Court agreed and restated the primary importance of all decision-making being informed by the best interests of the child. It was held that to prevent someone from being eligible to apply to adopt on the basis of their relationship status was discriminatory.¹⁸ Mr Justice Treacy declared that all individuals and couples, regardless of marriage status or sexual orientation are eligible to be considered as an adoptive parent(s) and that any guidance issued must accord with that declaration.
- 3.2 This judgment was then upheld on appeal.¹⁹ The Court of Appeal referred back to the case of *Burden v UK* in which the ECtHR noted that "since the coming into force of the Civil Partnership Act in the United Kingdom a homosexual couple now also have the chance to enter into a legal relationship designed by Parliament to correspond so far as possible to marriage". If Article 15(1)(a) of the (NI) Order 1987 is to be interpreted as the Department of Health suggested, the discriminatory prohibition from adoption imposed on civil partners could not withstand challenge as an unjustified discriminatory provision when applied to homosexual civil partners, as compared to heterosexual married couples.

¹⁷ See also: *E.B. v France* (App. No. 00043546/02) 22 January 2008, and; *X and Others v. Austria* (App. No. 19010/07) 19 February 2013.

¹⁸ NIHRC's Application [2012] NIQB 77

¹⁹ NIHRC's Application [2013] NIQB 37

- 3.2 While Departmental guidance was amended following the Court of Appeal judgment, the Commission is pleased that the Bill aims to establish the position by consolidating statute. By reforming the 1987 Order and amending the eligibility for making adoption orders to enable one person or a couple (who are married, civil partners or two persons, whether same sex or different sex, living as partners in an enduring family relationship) to apply to adopt, the Bill will implement the judgement and accord with Articles 8 and 14 of the ECHR.
- 3.3 As stressed by the Court in the NIHRC's Application, for children who are in need of a family in NI, widening the pool of prospective parents is in keeping with the best interests of the child principle, as required by Article 3 of the UN CRC. To fully realise the best interests of the child in this context, the Commission repeats its advice that the equal treatment of married and unmarried same-sex couples must, as a matter of practice, be fully embedded in adoption procedures. That would be in accordance with international human rights obligations.²⁰
- 3.4 It is now eight years since the Court of Appeal's judgment, but the recent report by the Expert Panel appointed to develop the NI Executive's LGBTQI+ Social Inclusion Strategy suggests that not all of the practical and procedural progress has been made. The Panel makes a specific recommendation that "LGBTQI+ people have equal access to apply to adopt or foster".²¹ In respect of health and social care generally it advises, "[t]here has not been a dedicated focus on the wider health needs of LGBTQI+ people due to issues of invisibility, marginalisation and often this issue may be of low precedence".²² The Commission is therefore disappointed that neither the Bill nor the Department's consultation analysis document contains proposed measures to ensure that the equal treatment principle is embedded within decision-making across the adoption process and in access to support services. The Commission therefore repeats its advice as to the importance of training for adoption authorities and up to date Departmental guidance for the benefit of social workers and the public.²³

3.5 The Commission continues to recommend that the Bill outlines in

²⁰ This is explored further in NIHRC, 'Adoption and Children (NI) Bill Consultation: Key Human Rights Aspects' (2017) at paras. 25 – 32.

²¹ LGBTQI+ Strategy Expert Advisory Panel – Themes and Recommendations (DfC, March 2021) at page 16.

²² Ibid at page 15.

²³ NIHRC Submission (2015) at para 32.

detail specific measures to be taken to ensure non-discrimination against same-sex couples and individuals in the adoption process. The Commission recommends that clear and comprehensive revised guidance be issued and effectively publicised by the Department outlining the current state of the law for the benefit of those involved in the adoption process, either as employees or as prospective adoptive parents.

4.0 Clause 121: Provision of services to children in need

4.1 Article 19 of the UN CRPD requires State parties to take effective and appropriate measures to facilitate persons with disabilities to live independently and to participate fully in the community, including by ensuring that:

“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;”²⁴ and

“Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.”²⁵

4.2 Article 23 of the UN CRC requires State parties to recognise the right of children and young people with disabilities to special care which includes the extension of assistance to be provided,

“... free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.”²⁶

4.3 In 2017, the UN CRPD Committee stated that it was concerned at the lack of UK Government and NI Executive-led initiatives “aimed at assessing and sufficiently addressing the inclusion of and living conditions for persons

²⁴ UN CRPD, Article 19 (1) (b)

²⁵ UN CRPD, Article 19 (1) (c)

²⁶ UN CRC, Article 23(3)

with disabilities, particularly in NI and the overseas territories”.²⁷ As well as prohibiting interferences by the State, Article 8 ECHR can impose positive obligations to provide support which enables family life to continue.²⁸ In, for example, *McDonald v UK* the ECtHR held that the level of care provided to persons with disabilities fell within the scope of Article 8.²⁹

- 4.4 The Commission recognises that Article 18 of the Children (NI) Order 1995 is a general duty of authorities to provide personal social services appropriate to children in need in their area, including the provision of services for the family of the child where this would safeguard and promote the child’s welfare. In furtherance of that, the Commission particularly welcomes Clause 121 of the Bill, which proposes removing the restriction on making cash payments only in “exceptional” circumstances and inserts a new provision which promotes the provision of accommodation for “eligible children” across Trust areas.³⁰ The Explanatory Memorandum observes that such accommodation is to provide short breaks for children and carers as part of the range of services for families, without making the child a “looked after child”.
- 4.5 Lawful short break services can provide a positive experience for the child while allowing family or carers a break from caring responsibilities. The Commission notes that in England, the Breaks for Carers of Disabled Children Regulations 2011³¹ include the duty to and prescribe the manner in which local authorities make provision for short breaks in their area. In particular, the Commission commends the development of departmental guidance to assist local authorities’ understanding of how to fulfil their duties under the Children Act 1989 and the Breaks for Carers of Disabled Children Regulations 2011.³²
- 4.6 The Commission emphasises the importance of these services being accessible and to a consistent standard across all Trust areas in NI. To

²⁷ CRPD/C/GBR/CO/1, ‘UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI’, 29 August 2017, at paras 8 and 9.

²⁸ *Anufrijeva v Southwark* [2003] 3 FCR 673 at para 43

²⁹ *McDonald v UK* (2014) ECHR 141 at paras 46 to 47

³⁰ EFM, Adoption and Children Bill: “An eligible child is defined in new paragraph (6C)(a) as a child who is not being looked after by an authority and is disabled. New paragraph (6C)(b) also provides a power to prescribe further categories of children who may be considered as an eligible child.”

³¹ These Regulations are the first regulations to be made under paragraph 6 of Schedule 2 to the Children Act 1989. Paragraph 6(1)(c) and (2) of Schedule 2 to the Children Act 1989 were inserted by the Children and Young Persons Act 2008.

³² Department of Education (UK), ‘Short breaks for carers of disabled children: Departmental advice for local authorities’ (2011).

ensure that, the Commission suggest that regional guidance be issued. In this context, the Commission also draws attention to obligations under Article 4(3) of the UN CRPD, requiring State parties to “closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations” in the development and implementation of policies relevant to the implementation of the Convention.

4.7 The Commission recommends that the Department of Health allocate appropriate resources to ensure the availability of short break services across all Trust areas. Statutory guidance should be developed to ensure consistency and promote accountability. Guidance should be produced in consultation with children with disabilities, their parents and guardians, carers and any other relevant stakeholders.

5.0 Resources

- 5.1 In accordance with the UN CRC and the UN CRPD, the Commission reiterates its previous recommendation on the importance of ensuring the availability and adequacy of resources for implementing the new adoption framework proposed by the Bill. It is acknowledged that the Explanatory Memorandum contains current estimates for the overall implementation costs, however further detail on financial allocations will be required to ensure the range of reforms are carried out effectively and are used in the most appropriate and effective manner, minimising the possibility for inefficiency, overlap and delay.³³
- 5.2 Article 4 of the UN CRPD is explicit that, with regard to full enjoyment of economic, social and cultural rights, each State party must take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to progressive realisation.³⁴ Similarly, Article 4 of the CRC provides that in taking measures to protect the economic, social and cultural rights of children, “States Parties shall undertake such measures to the maximum extent of their available resources”.
- 5.3 In its General Comment No. 15, the UN CRC Committee noted that the best interests of the child must be placed at the centre of all decisions

³³ NIHRC Submission (2015) at para 23.

³⁴ Article 4, UN CRPD

affecting their health and development, including the allocation of resources.³⁵ Where resources are demonstrably inadequate, “States are still required to undertake targeted measures to move as expeditiously and effectively as possible towards the full realization” of children’s rights and must not take “any retrogressive steps that could hamper the enjoyment” of children’s economic, social and cultural rights.³⁶ The UN CRC Committee has specifically recommended the UK “allocate the maximum extent of available resources for the implementation of children’s rights, with a special focus on eradicating child poverty and reducing inequalities within and across all jurisdictions”.³⁷

5.4 The Commission recommends that the Committee requests a more detailed breakdown of resource allocation from the Department, which outlines the methods by which proposed measures are to be adequately funded to ensure that the reforms can be effectively implemented to meet the human rights standards and policy aims identified.

³⁵ CRC/C/GC/15, UN CRC Committee General Comment No. 15 (2013) on the right of the child to the 25 enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, para 3.

³⁶ Ibid at para 9.

³⁷ UN CRC Committee, Concluding Observations (2016) at para 13.

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