



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

EVIDENCE TO THE JOINT COMMITTEE ON HUMAN RIGHTS

UN Convention on the Rights of Persons with Disabilities: proposed reservations and interpretative declaration

1. The Northern Ireland Human Rights Commission (the Commission) was created by Parliament to exercise the functions of a national human rights institution, which include advising on measures which ought to be taken to protect human rights, and engaging with the UN and regional human rights systems. In that context it is responding to the JCHR's call for evidence on the text of the reservations and interpretative declaration proposed in the Explanatory Memorandum issued by Government to begin the parliamentary process for ratification of the Convention on the Rights of Persons with Disabilities.¹
2. The Commission welcomes the reduction in the proposed number of reservations, but regards three of the remaining four, and the proposed interpretative declaration, as undesirable. They have the potential to undermine the international consensus achieved at the time of drafting the Convention.² The impact of such a range of reservations will be felt well beyond the UK, principally by disabled people; they could encourage other states to restrict access to rights guaranteed by the Convention, and inhibit the interpretation of those rights by the treaty body, the UN Committee on the Rights of Persons with Disabilities.

¹ The Explanatory Memorandum of 3 March 2009, and associated documents, are available at: <http://www.officefordisability.gov.uk/working/theunconvention.asp>.

² The NIHRC regrets that despite a number of requests that it be consulted as to the plans in respect of ratification, not least because of its designated role under Article 33(2), its first opportunity to consider the content of the reservations was upon publication of the Explanatory Memorandum.

Education (Article 24)

3. Under Article 24, the UK is proposing both a reservation and an interpretative declaration.³ To deal first with the interpretative declaration, it appears to the Commission to be quite unnecessary. The Article sets out a progressively realisable right, not an immediate entitlement. The interpretative declaration has the potential to be incompatible with the Convention's object and purpose,⁴ if the intention or effect is to dilute the requirement on the state to strive progressively to ensure an inclusive education system.⁵ The interpretative declaration appears to have the opposite effect to the UK's stated aim in the Explanatory Memorandum:

The United Kingdom is committed to continuing to develop an inclusive system where parents of disabled children have increasing access to mainstream schools and staff, which have the capacity to meet the needs of disabled children.⁶

³ Interpretative Declaration: "The General Education System in the UK includes mainstream, and special schools, which the UK Government understands is allowed under the Convention." Reservation: "The United Kingdom reserves the right for disabled children to be educated outside of their local community where more appropriate education is available elsewhere. Nevertheless, parents of disabled children have the same opportunity as other parents to state a preference for the school at which they wish their child to be educated."

⁴ Article 46(1) of the Convention, restating the rule from Article 19 of the Vienna Convention on the Law of Treaties, states: "Reservations incompatible with the object and purpose of the present Convention shall not be permitted." In addition, "Where the effect of a declarative statement relating to a Convention is to exclude or modify the legal effect of the obligations in the Convention, it is considered to be a reservation, regardless of the label adopted by the state" (see *JCHR Report on the UN Convention on the Rights of Persons with Disabilities*, 4 January 2009, footnote 5). The Joint Committee earlier found that one of the UK reservations to the Convention on the Rights of the Child - the immigration reservation - "read literally would allow the Government to disapply the CRC rights so far as they relate to people who are subject to immigration control. In our view, that would be incompatible with the object and purposes of the CRC, and so would not constitute a valid reservation" (*Seventeenth Report of the JCHR on the Nationality, Immigration and Asylum Bill* at para 17, 21 June 2002). This reservation has now been removed, see note 15 below.

⁵ Article 24 of the Convention states: "In realising this right, states parties shall ensure that... [p]ersons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability; [p]ersons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live."

⁶ This policy commitment also has a legislative basis; see e.g. the Special Educational Needs and Disability (Northern Ireland) Order 2005 (SENDO). It increased the rights of children with special educational needs to attend mainstream schools and introduced disability discrimination laws for the whole

4. Since the aim stated in the Explanatory Memorandum appears to accord with the requirements of Article 24 in respect of the progressively realisable right to inclusive education, the interpretative declaration is not needed in order to uphold the principle of parental choice in respect of the education of the child. Without the continued development of an inclusive mainstream sector, to which the state is apparently already committed, the parents of a disabled child are likely to find their 'choice' to be more, rather than less, limited.
5. The Explanatory Memorandum states that the Convention "covers some matters which, under the UK's devolution settlements, are devolved, and the Devolved Administrations have an interest...".⁷ Education is one of these devolved matters. In addition, the Equality Impact Assessment accompanying the Explanatory Memorandum states:

All Government Departments and the Devolved Administrations have had to consider whether their existing legislation, policies, practices and procedures are compliant with the requirements of the Convention...⁸
6. The Commission understands from discussions with the Minister for Education for Northern Ireland that she did not consider any such interpretative declaration necessary in Northern Ireland and that the Minister did not endorse its application here. This calls into question the extent to which appropriate weight has been given to the outcome of consultation with the devolved administrations in respect of such devolved matters.⁹ The JCHR will wish to satisfy itself as to whether the Explanatory Memorandum properly reflects the views of the devolved administrations.

education system in Northern Ireland for the first time. The SENDO presumption is for attendance at mainstream school subject to parental wishes and the efficient education of other pupils. The interpretative declaration tends to undermine that approach and calls into question the long-term policy commitment under SENDO.

⁷ See para 6.

⁸ See para 12, Equality Impact Statement. The Explanatory Memorandum also states: "In working towards ratification, Departments and the [devolved administrations] have examined their legislation, policies, practices and procedures, notwithstanding the fact that the UK already has robust anti-discrimination and human rights legislation, to ensure that the UK is compliant" (para 12).

⁹ The Minister for Disabled People told the JCHR on 18 November 2008: "It is for Departments to determine, just in the same way it is for devolved administrations to determine whether or not they have reservations"; see response to Q 38.

7. The interpretative declaration is likely to result in considerable criticism of the UK when its first report is examined by the UN Committee on the Rights of Persons with Disabilities two years after ratification. The need for inclusion of disabled children is already the subject of recommendations to the UK from another treaty body. The Committee on the Rights of the Child recommended in September 2008 that the UK –

...invest considerable additional resources in order to ensure the right of all children to a truly inclusive education which ensures the full enjoyment to children from all disadvantaged, marginalised and school-distant groups.¹⁰

8. The proposed reservation is equally unnecessary.¹¹ Article 24(c) makes it clear that only “reasonable accommodation of the individual’s requirements” must be provided, and therefore this does not give rise to an absolute right to specific provision at the local level for every individual irrespective of cost. Nevertheless, there is an onus on the state to demonstrate the steps it is taking to work towards full compliance with this progressively realisable right.
9. There are specific Northern Ireland concerns with regard to this reservation. The relatively small, and relatively dispersed, population in the region makes it less likely that the incidence of certain specific disabilities will be sufficient to result in specialist provision in close proximity to every child in need. This may, at times, mean that certain children currently have no option but to access specialist provision well outside of their locality, and that can mean greater difficulty and expense than would be the case in other parts of the UK. Local provision is the aim under the Convention, and there are human rights implications in distant provision (notably concerning ECHR Article 8 rights in relation to respect for

¹⁰ At para 67(b). The Committee also expressed concern that “there is no comprehensive national strategy for the inclusion of children with disabilities into society” (para 52(a)).

¹¹ The terms of the reservation are unusual and the language is inappropriate: “The United Kingdom reserves **the right for disabled children** [emphasis added] to be educated outside of their local community where more appropriate education is available elsewhere. Nevertheless, parents of disabled children have the same opportunity as other parents to state a preference for the school at which they wish their child to be educated.” The Government is here reserving a position to itself, not granting a right to disabled children. In addition, the opportunity for parents to state a preference in relation to the school they wish their child to attend already exists, independently of any treaty, and does not need to be affirmed least of all by way of a reservation.

family life); however, so long as reasonable adjustments are made for individual families to mitigate the impact, and so long as the overall momentum towards progressive realisation of local provision is maintained, these cases are not irreconcilable with the Convention right.

Armed forces (Article 27)

10. The Commission does not support a reservation in respect of employment in the armed forces,¹² and would like to see a review of the exemption in respect of the armed forces under the Disability Discrimination Act. Removal of the exemption would still permit the state to employ objective and necessary job criteria in respect of service in the armed forces, and to maintain its present practice of seeking where possible to recruit or retain people with disabilities by making reasonable adjustments.

Immigration (Article 18)

11. Government proposes to review this reservation twelve months after ratification to assess whether or not there is a continuing need for it in practice. Having had several years to develop its position as the Convention was in gestation, there is no need for Government to postpone the matter for a further year: it is already apparent that no reservation is required.¹³
12. The Explanatory Memorandum does not adequately explain the aim of this reservation.¹⁴ It refers to the possible need to introduce wider health screening “particularly in the event of a global health emergency” if this is considered necessary for

¹² The armed forces reservation is set out as follows in the Explanatory Memorandum: “The United Kingdom ratification is without prejudice to provisions in Community law that Member States may provide that the principle of equal treatment in employment and occupation, in so far as it relates to discrimination on the grounds of disability, shall not apply to the armed forces. The United Kingdom accepts the provisions of the Convention, subject to the understanding that its obligations relating to employment and occupation, shall not apply to the admission into or service in any of the naval, military or air forces of the Crown.”

¹³ The immigration reservation is set out as follows: “The United Kingdom reserves the right to apply such legislation, insofar as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, as it may deem necessary from time to time.”

¹⁴ This is despite the fact that the Minister for Disabled People told the JCHR on 18 November 2008: “When we publish the explanatory memorandum the Home Office Department will be able to provide the detail”; see para 68, at <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/9/0907.htm>.

the protection of public health. That appears to confuse issues relating to health and those pertaining to disability, whereas it is obvious that global health emergencies affect people with and people without disabilities. The UK already has considerable powers under immigration rules to conduct health screening of those seeking to enter the UK in relation to communicable diseases and the protection of public health.

13. This proposed reservation appears to be out of step with the recent removal of the similar immigration reservation under the Convention on the Rights of the Child.¹⁵
14. No broader human rights impact assessment is provided in respect of this reservation, and its potential adverse impact in relation to ECHR Article 8 with regard to family members seeking to join those already in the UK.

Equal recognition before the law (Article 12.4)

15. The Commission is content for this reservation to be maintained, for the shortest possible period. It welcomes the fact that the compatibility exercise identified the absence of a review system for benefit appointees, and Government's commitment to establish such a review system in order to ensure compatibility with Article 12.4. The Commission looks forward to this reservation being lifted in the very near future.

Equality impact assessment

16. The Equality Impact Assessment which accompanies the Explanatory Memorandum states, in relation to the proposed reservations and interpretative declaration, that "the relevant Departments are responsible for carrying out their own

¹⁵ The reservation under Article 22 of the Convention on the Rights of the Child was withdrawn just after the examination of the third and fourth UK periodic reports in September 2008. It was in very similar terms to that proposed under the Disability Convention, as follows: "The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time." The redundancy of such reservations was pointed out by the NGO Justice some years ago in a review of UK reservations to international human rights instruments: "...reservations to human rights treaties are not necessary as human rights do not confer a right to immigration per se, they confer rights to have applications assessed fairly and to be treated properly in accordance with human rights principles" (<http://www.liberty-human-rights.org.uk/pdfs/policy02/interventions-dec-2002.pdf>).

equality impact assessments to support their policies".¹⁶ The Commission considers that equality impact assessments ought to be conducted and published by the Departments and devolved administrations in respect of each of the four proposed reservations and the interpretative declaration.

Impact assessment and resources

17. The NIHRC is one of the organisations to be designated as an independent mechanism under Article 33 of the Convention. The Commission has made it clear in all of its discussions with Government that it cannot adequately discharge this additional role without additional resources. The Commission is therefore dismayed at the statement in the Explanatory Memorandum that any costs arising from ratification will be covered within existing funding.¹⁷ This is repeated in the Impact Assessment: the expectation is "that any costs incurred will be met from their existing funding".¹⁸
18. The Commission's funding, resources and functions have not been subjected by Government to any audit or analysis to ascertain the feasibility of absorbing the extra workload. The Commission cannot meet this new task within existing resources without that impacting negatively on the rest of its work to protect human rights in Northern Ireland, especially given the requirement, which the Commission welcomes, to engage directly with disabled people in carrying out its Article 33 role. Obliging the Commission to set aside other priorities to fulfil this new role is an interference with its independence. **The Commission would welcome a statement from the JCHR on the resourcing of the NIHRC to carry out its Article 33 role.**¹⁹

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¹⁶ See para 21.

¹⁷ See para 14.

¹⁸ Office for Disability Issues: *Impact Assessment on ratifying the UN Convention on the Rights of Persons with Disabilities*, 23 February 2009 (accompanying the Explanatory Memorandum of 3 March 2009), bullet point 4, p 4.

¹⁹ See *UN Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities* which states at chapter 7: "National Human Rights Institutions which already exist should be given the human and financial resources needed so that they can effectively monitor the Convention"; <http://www.un.org/disabilities/default.asp?id=245>.

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