



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

JOINT COMMITTEE ON HUMAN RIGHTS REPORT ON THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Supplementary Briefing for House of Lords Grand Committee Debate 28 April 2009

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,¹ advising on legislative and other measures which ought to be taken to protect human rights,² advising on whether a Bill is compatible with human rights³ and promoting understanding and awareness of the importance of human rights in Northern Ireland.⁴ In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies.
2. The UK plans shortly to ratify the new UN Convention on the Rights of Persons with Disabilities. The Commission warmly welcomes the UK's plan to ratify the Convention. It also welcomes the UK's plan to ratify the Optional Protocol which will permit individual complaints from the UK to the UN Committee to be established under the Convention.

¹ Northern Ireland Act 1998, s.69(1).

² *Ibid.*, s.69(3).

³ *Ibid.*, s.69(4).

⁴ *Ibid.*, s.69(6).

3. The present briefing is prepared for the debate scheduled to take place on 28 April 2009 in the House of Lords, to consider the report on the Convention published on 17 April by the Joint Committee on Human Rights (JCHR). The JCHR had considered the Government's Explanatory Memorandum of 3 March which set out proposed reservations and an interpretative declaration which the Government intends to enter upon ratification of the UN Convention.
4. The Northern Ireland Human Rights Commission has a keen interest in the Convention as the first major international human rights treaty of the 21st century. It contributed to its drafting through involvement in the European Group of National Human Rights Institutions. The Commission is to be jointly designated in Northern Ireland with the Equality Commission as one of the domestic independent monitoring mechanisms under Article 33(2) of the Convention.
5. There are, however, three major limitations to the Government's commitment to full implementation of the Convention. In the Commission's opinion, these have significant potential to undermine the ability of the Convention to bring about the exciting changes it heralds in how disabled people are treated in our society. These are, first, the question of proposed reservations and interpretative declaration; second, the weight given to the consultation with the devolved administrations; and, third, the resourcing of the Article 33 National Implementation and Monitoring Mechanisms.

Reservations and interpretative declarations

6. The Commission is concerned at the range and breadth of the reservations the Government intends to enter upon ratification. The Commission can see no reason for the UK to do less than other states to protect the rights of disabled people.
7. The Explanatory Memorandum laid out by the Government sets out four areas of the Convention where the UK intends to reserve its position, that is, not to fully sign up to observing the Convention rights. These areas are:
 - Education
 - Immigration
 - Employment in the armed forces, and
 - Review of benefit appointees.

8. The Commission takes issue with three of these four areas, the exception being the review of benefit appointees. The detail of the Commission's concerns is set out in extracts, below, from its written evidence to the Joint Committee on Human Rights.
9. A possibility is expressly allowed for reservations under Article 46 of the Convention so long as they are "not incompatible with the objects and purpose of the Convention". A large number of reservations, such as those proposed by the UK could, however, undo the consensus achieved at the time of drafting particular provisions. Reservations undermine the process of reform that the Convention is supposed to generate and should be a matter of absolute last resort. The UK, as a comparatively wealthy country and with a raft of domestic disability equality laws in place, ought to be a leader in terms of compliance with the Convention. The impact of such a range of reservations will be felt well beyond the UK, principally by disabled people; these 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.
10. Until the publication of the Explanatory Memorandum there had been no detail in the public domain as to the Government's intended reservations. There was no prior consultation as to the detail of the proposed reservations and interpretative declaration despite many requests from this Commission and others. The Grand Committee debate is therefore particularly significant and offers an important opportunity for public engagement with the Government on this issue.

Education (Article 24)

11. Under Article 24, the UK is proposing both a reservation and an interpretative declaration.⁵ To deal first with the interpretative declaration, this appears to the Commission to be quite unnecessary. The Article sets out a progressively

⁵ 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".

realisable right, not an immediate entitlement. The interpretative declaration has the potential to be incompatible with the Convention's object and purpose,⁶ if the intention or effect is to dilute the requirement on the state to strive progressively to ensure an inclusive education system.⁷ 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.⁸

12. 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

⁶ 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.

⁷ 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."

⁸ 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 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.

committed, the parents of a disabled child are likely to find their 'choice' to be more, rather than less, limited.

13. 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...".⁹ 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...¹⁰

14. 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. The Minister for Education has since issued a public statement to this effect. This calls into question the extent to which appropriate weight is being given to the outcome of consultation with the devolved administrations in respect of such devolved matters.¹¹
15. 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

⁹ See para 6.

¹⁰ 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).

¹¹ 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.

ensures the full enjoyment to children from all disadvantaged, marginalised and school-distant groups.¹²

16. The proposed reservation is equally unnecessary.¹³ 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.
17. 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 this 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 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.

¹² 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)).

¹³ 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.

Armed forces (Article 27)

18. The Commission does not support a reservation in respect of employment in the armed forces,¹⁴ 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)

19. 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.¹⁵
20. The Explanatory Memorandum does not adequately explain the aim of this reservation.¹⁶ 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 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

¹⁴ 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".

¹⁵ 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".

¹⁶ 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>.

health screening of those seeking to enter the UK in relation to communicable diseases and the protection of public health.

21. 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.¹⁷
22. 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)

23. 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 the 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.

Weight given to consultation with the devolved administrations

24. The Commission's written evidence to the JCHR drew attention to the objection of the Northern Ireland Minister for Education to the Government's proposed reservation and interpretative declaration in respect of education. The Minister has since issued a public statement that she does not consider these necessary in Northern Ireland. The Commission welcomed the Minister's statement (press release of 27 March, at www.nihrc.org). It remains to be seen what

¹⁷ 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>).

action the Government will take in response to the Minister's statement.

25. While ratification of treaties is a reserved matter, education is of course devolved and peers may wish to raise concerns about the weight which has been accorded to the views of the Northern Ireland Education Minister in this regard. The Government may argue that even if it maintains the education reservation and interpretative declaration, it is open to Northern Ireland to voluntarily provide a "higher standard" or fully Convention-compliant model. The difficulty with this argument is that no individual in Northern Ireland would be able to plead the full Convention standard in domestic proceedings as part of the UK's international law commitments. Nor, indeed, would an individual from Northern Ireland be able to take an individual complaint under the Optional Protocol relying upon Article 24.

Resources

26. The Commission is to be designated jointly in Northern Ireland with the Equality Commission, as one of the independent mechanisms under Article 33(2) of the Convention, to promote, protect, and monitor the Convention. The Commission is enthusiastic about such a new role but is very concerned about the failure to date of the Government to allocate dedicated funding to facilitate this work.
27. 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. This is repeated in the Impact Assessment: the expectation is "that any costs incurred will be met from their existing funding".
28. 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 fulfill this new role is an interference with its independence.

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