Regional Policy on the use of Restrictive Practices in Health and Social Care Settings and regional operational procedure for the use of Seclusion Northern Ireland and Regional Operational Procedure for the use of Seclusion Northern Ireland

Children's Law Centre
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Introduction

The Children's Law Centre (CLC) is an independent charitable organisation which works towards a society where all children can participate, are valued, have their rights respected and guaranteed without discrimination and where every child can achieve their full potential.

We offer training and research on children's rights, we make submissions on law, policy and practice affecting children and young people and we run a free legal advice, information and representation service. We have a dedicated free phone legal advice line for children and young people and their parents and carers called CHALKY as well as a Live Chat service for young people through REE Rights Responder and a youth advisory group called Youth@clc. Within our policy, legal, advice and representation services we deal with a range of issues in relation to children and the law, including the law with regard to some of our most vulnerable children and young people, such as looked after children, children who come into conflict with the law, children with special educational needs, children living in poverty, children with disabilities, children with mental health problems and complex physical health needs and children and young people from ethnic minority backgrounds.

Our organisation is founded on the principles enshrined in the United Nations Convention on the Rights of the Child (UNCRC), in particular:

- Children shall not be discriminated against and shall have equal access to protection.
- All decisions taken which affect children's lives should be taken in the child's best interests.
- Children have the right to have their voices heard in all matters concerning them.

From its perspective as a children's rights organisation working with and on behalf of children, CLC is grateful for the opportunity to make a submission to the consultation on a Regional Policy on the use of Restrictive Practices in Health and Social Care

Settings and Regional Operational Procedure for the use of Seclusion in Northern Ireland.

International Human Rights Standards

The following articles of the UNCRC are relevant *inter alia* to the development of this policy.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 6

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.
2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application

is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall 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….

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures….
3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.
4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity…
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention….

Article 29

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations….

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of

the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

The UN Committee on the Rights of the Child has repeatedly raised concerns in relation to the use of restraint. In 2002[1], following an examination of the UK government's compliance of the Convention, stated in its Concluding Observations and Recommendations:

"The Committee urges the State party to review the use of restraints and solitary confinement in custody, education, health and welfare institutions throughout the State party to ensure compliance with the Convention, in particular articles 37 and 25."

In 2008, the Committee reiterated its concerns:

"The Committee notes that the State party has reviewed the use of physical restraint and solitary confinement to ensure that these measures are not used unless absolutely necessary and as a measure of last resort. However, the Committee remains concerned at the fact that, in practice, physical restraint on children is still used in places of deprivation of liberty.

The Committee urges the State party to ensure that restraint against children is used only as a last resort and exclusively to prevent harm to the child or others and that all methods of physical restraint for disciplinary purposes be abolished."

Again, in 2016[2], the Committee expressed concern about:

"…(c) The use of physical restraint on children to maintain good order and discipline in young offenders' institutions and of pain-inducing techniques on children in institutional settings in England, Wales and Scotland, and the lack of a comprehensive review of the use of restraint in institutional settings in Northern Ireland;

(d) The use of restraint and seclusion on children with psychosocial disabilities, including children with autism, in schools.

[1] CRC/C/15/Add.188
[2] CRC/C/CO/5 para 39

Therefore recommending: …

(b) Abolish all methods of restraint against children for disciplinary purposes in all institutional settings, both residential and non-residential, and ban the use of any technique designed to inflict pain on children;

(c) Ensure that restraint is used against children exclusively to prevent harm to the child or others and only as a last resort;

(d) Systematically and regularly collect and publish disaggregated data on the use of restraint and other restrictive interventions on children in order to monitor the appropriateness of discipline and behaviour management for children in all settings, including in education, custody, mental health, welfare and immigration settings."

The following articles of UN Convention on the Rights of Persons with Disabilities (UNCRPD) *inter alia* are also relevant:

Article 14 - Liberty and security of the person

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

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

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

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

Article 15 - Freedom from torture or cruel, inhuman or degrading treatment or punishment

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

The UNCRPD Concluding Observations in 2017 stated that:

"The Committee is concerned about the continued use of physical, mechanical and chemical restraint.... on persons with disabilities, which affects persons with psychosocial disabilities in prisons, the youth justice system, health-care and education settings, as well as practices of segregation and seclusion. The Committee is deeply concerned that these measures disproportionally affect black and other persons with disabilities belonging to ethnic minorities. It is also concerned about the absence of a unified strategy in the State party to review these practices….

37. The Committee recommends that the State party:

(a) Adopt appropriate measures to eradicate the use of restraint for reasons related to disability within all settings… against persons with disabilities, as well as practices of segregation and isolation that may amount to torture or inhuman or degrading treatment;

(b) Set up strategies, in collaboration with monitoring authorities and national human rights institutions, in order to identify and prevent the use of restraint for children and young persons with disabilities…."[3]

Articles 2, 3, 5 and 14 of the European Convention on Human Rights are also relevant in this context, in particular, Article 3, which states:

Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

This is a non-derogable right, a right so important it cannot be limited or suspended in any way. Article 3 of the ECHR is engaged in the context of the development and

[3] CRPD/C/GBR/CO/1

ultimately, the implementation of this policy. Furthermore, the European Court of Human Rights (ECtHR) is unequivocal in relation to Article 3 ECHR:

"In its report the Commission expressed the unanimous opinion that there had been a violation of Article 3 of the Convention. ***It considered that there was a positive obligation on the Government to protect children from treatment contrary to this provision.*** *The authorities had been aware of the serious ill-treatment and neglect suffered by the four children over a period of years at the hands of their parents and failed, despite the means reasonably available to them, to take any effective steps to bring it to an end [4]….*

The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic society. ***<u>It prohibits in absolute terms torture or inhuman or degrading treatment or punishment.</u>*** ***The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals*** *(see A. v. the United Kingdom, judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VI, p. 2699, § 22).* ***These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge*** *(see, mutatis mutandis, Osman v. the United Kingdom, judgment of 28 October 1998, Reports 1998-VIII, pp. 3159-60, § 116)."*[5] *(Our emphasis)*

Professor Juan E Méndez, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment speaking at the Children's Law Centre's Annual Lecture in 2014[6] highlighted the landmark ECtHR judgment of Tyrer v. UK (1978) which adopted a dynamic interpretation of article 3 and the ECHR in general:

[4] CASE OF Z AND OTHERS v. THE UNITED KINGDOM para 70
[5] Ibid para 73
[6] https://childrenslawcentre.org.uk/?mdocs-file=4085

"Referring to the European Convention as a "living instrument" that needed to be "interpreted in light of present-day conditions"….".

At the same lecture, Professor Méndez spoke in detail in relation to torture and ill-treatment framework in healthcare settings:

"Until recently, mistreatment in health-care settings (hospitals, public and private clinics, hospices and institutions) has received little specific attention from the perspective of my mandate, as denial of health-care has often been understood as essentially interfering with the "right to health". I have engaged this issue because there are practices in many States that are harmful to patients and, if they are under age, ***these practices are not in the "best interests of the child" and are in fact detrimental to both the mental development and physical health of juveniles. In some cases, they constitute ill-treatment and even amount to torture.***

My 2013 report to the Human Rights Council (A/HRC/22/53) focused on certain forms of abuse in health-care settings that may cross a threshold of mistreatment that is tantamount to torture or cruel, inhuman or degrading treatment or punishment. My report aimed to shed light on often undetected and unrecognized forms of abusive practices that occur under the guise of health-care practice. I emphasized how certain treatments run afoul of the prohibition on torture and ill-treatment. I examined the scope of the State's obligation to regulate, control and supervise health-care practices requiring strict medical or therapeutical necessity, absence of less painful alternatives, and free and informed consent. I called for the recognition of practices that violate those standards and for an absolute ban on them as well as for monitoring and accountability…..

The conceptualization of abuses in health-care settings as torture or ill-treatment is a relatively recent phenomenon. In my capacity as Special Rapporteur I must examine practices within this ongoing paradigm shift, which is applicable as well to various forms of abuse in health-care settings and brings them within the discourse on torture. While the prohibition of torture may have originally applied primarily in the context of interrogation, punishment or intimidation of a detainee, the international community has begun to recognize that torture may also occur in other contexts.

The Committee against Torture interprets State obligations to prevent torture as indivisible, interrelated, and interdependent with the obligation to prevent cruel,

inhuman, or degrading treatment or punishment because "conditions that give rise to ill-treatment frequently facilitate torture" *(General comment No. 2 (2007), para.3).* ***It has established that "each State party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm"*** *(General comment No. 2 (2007), para. 15).*

Indeed, the State's obligation to prevent torture applies not only to public officials, such as law enforcement agents, but also to doctors, health-care professionals and social workers, including those working in private hospitals, *other institutions and detention centres (A/63/175, para. 51). As underlined by the Committee against Torture, the prohibition of torture must be enforced in all types of institutions and States must exercise due diligence to prevent, investigate, prosecute and punish violations by non State officials or private actors (General comment No. 2, (2007) paras 15, 17 and 18.)"*

In relation to restraint, Professor Méndez outlined as follows:

"United Nations Rules for the Protection of Juveniles Deprived of their Liberty provide guidelines regarding limitations of physical restraint and the use of force and state in Rule 63 that recourse to instruments of restraint and to force for any purpose should be prohibited, except as set forth in Rule 64, which provides that: ***"Instruments of restraint and force can only be used in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorized and specified by law 18 and regulation. They should not cause humiliation or degradation, and should be used restrictively and only for the shortest possible period of time****. By order of the director of the administration, such instruments might be resorted to in order to prevent the juvenile from inflicting self-injury, injuries to others or serious destruction of property. In such instances, the director should at once consult medical and other relevant personnel and report to the higher administrative authority".*

The mandate has previously declared ***that there can be no therapeutic justification for the use of solitary confinement and prolonged restraint of persons with disabilities in psychiatric institutions; both prolonged seclusion and restraint constitute torture and ill-treatment.*** *In my report (A/66/88) I addressed the issue of solitary confinement and stated that its imposition, of any duration, on persons with mental disabilities is cruel, inhuman or degrading treatment.* ***Moreover, any restraint on people with mental disabilities for even a short period of time may constitute torture and ill-treatment. It is essential that an absolute ban on all coercive and non-consensual measures, including restraint and solitary confinement of people with psychological or intellectual disabilities****, should apply in all places of deprivation of liberty, including in psychiatric and social care institutions.*

Laws and regulations should allow for non-consensual measures only under conditions similar to Rule 64 of the UN Rules for the Protection of Juveniles Deprived of their Liberty, ***though I would argue that they should be limited to cases of serious risk of harm to self or others, and for the time and methods strictly required to prevent such harm.*** *The environment of patient powerlessness and abusive treatment of persons with disabilities, in which restraint and seclusion is used, can lead to other non-consensual treatment, such as forced medication and electroshock procedures." (Our emphasis)*

We strongly recommend that SR Méndez lecture, his 2013 report to the Human Rights Council (A/HRC/22/53) and his follow up report in 2015 (A/HRC/28/68) be considered in detail vis-à-vis the drafting of the Regional Policy on the use of Restrictive Practices in Health and Social Care Settings and regional operational procedure for the use of Seclusion Northern Ireland and Regional Operational Procedure for the use of Seclusion Northern Ireland as we believe the proposals engage and are at risk of breaching Article 3.

Equality Impact Assessment

The Children's Law Centre believe that the implementation of section 75 of the NI Act 1998 is one of the most significant developments in the promotion of equality in this jurisdiction.

Given the importance and complexity of the relevant issues in terms of human rights and equality duties, the Department's Equality Impact Assessment is wholly inadequate and has resulted in complete failure to identify the relevant issues.

Direct consultation with children and young people

Central to compliance with the statutory duties imposed under section 75 is the concept of increased participation in policy making and development. The Equality Commission's guidance[7] states that consultation must be meaningful and inclusive, in that all persons likely to be affected by a policy should have the opportunity to engage with the public authority. It also states that targeting consultation at those most affected by particular policies is also beneficial, in terms of identifying any adverse impact of policies or proposed policies at the earliest possible stage.[8]

Under the DOH Equality Scheme, the Department have a duty to consult directly with children and young people in respect of the development of these proposals:

"The Department will consider the accessibility and format of every method of consultation used in order to remove barriers to the consultation process. Specific consideration will be given as to how best to communicate with children and young people….

The Department will liaise with organisations representing hard to reach groups such as children and young people, people with sensory or learning disabilities, and black and minority ethnic communities. Where appropriate the Department will also be mindful of multiple identify issues such as the particular needs of traveller children."[9]

CLC would therefore welcome details of any direct consultation with children and young people that the Department of Health has carried out, or intends to carry out on the *'Regional Policy on the Use of Restrictive Practices in Health and Social Care Settings and Regional Operational Procedure for the Use of Seclusion'* consultation in

[7] 'Section 75 of the Northern Ireland Act 1998 – A Guide for Public Authorities' Equality Commission for Northern Ireland, April 2010, p.14

[8] Section 75 of the Northern Ireland Act 1998 – A Guide for Public Authorities' Equality Commission for Northern Ireland, April 2010 p. 38 and 39

[9] Equality scheme for the Department of Health | Department of Health (health-ni.gov.uk)

compliance with its equality scheme and fulfilment of its statutory duty. CLC would also ask for copies of the child friendly consultation documents to be forwarded as soon as possible.

Failing to consult directly with children and young people, not only breaches the statutory equality duty, but also deprives policy makers of the opportunity to be fully informed when developing proposals.

Such consultation is essential not only in ensuring compliance with section 75, but also in ensuring the Government's compliance with Article 12 of the UNCRC (respect for the views of the child). In examining the government's compliance with Article 12, the UN Committee on the Rights of the Child recommended that the government:

"Establish structures for the active and meaningful participation of children and give due weight to their views in designing laws, policies, programmes and services at the local and national levels, including in relation to discrimination, violence, sexual exploitation and abuse, harmful practices, alternative care, sexual and reproductive education, leisure and play. Particular attention should be paid to involving children and children in vulnerable situations, such as children with disabilities…. [and] ensure that children are not only heard but also listened to and their views given due weight by all professionals working with children."[10]

Use of data in Equality Screening

There is virtually no relevant quantitative or qualitative disaggregated data provided about children generally, or children with disabilities in particular, in the Equality Impact Assessment. A duty to collect disaggregated data has been in place since 1998.

It is stated on p19 of the Equality Impact Assessment that *"people subject to restrictive practices are almost exclusively disabled"* and that the policy *"is therefore expected to have a significant impact on people with a disability".*

The Department anticipates that older people with dementia and people with learning disabilities will be most impacted. We note here that no data is provided to substantiate

[10] CRC/C/GBR/CO/5 para 31 (a) and (d)

this statement and we have concerns about restrictive interventions that have not been reported. We are particularly concerned that young people, such as young people with autism, are not the focus of the data and evidence underpinning this draft policy.

It is likely in CLC's view that this policy will potentially disproportionately impact disabled children and other vulnerable groups such as children looked after and unaccompanied children who are asylum seekers. It is therefore imperative that the Department carries out a full and proper equality impact assessment, gathering relevant disaggregated data and evidence about children and young people upon which to base the policy and that to do this. It is also essential that the Department consults affected parties including children, young people, their parents and carers in order to gather relevant data and identify the relevant issues along with any necessary mitigations.

The EQIA states that (on page 20 in relation to persons with a disability) that *"no negative impacts have been identified and therefore no mitigating actions have been taken*". It is impossible to say that there will be no negative impact without considering the potential impacts of the policy using disaggregated data for protected groups of children, which the Department has totally failed to do in relation to these policies.

Given the nature of the actions proposed in the consultation, including DOLs which we believe engages Art3, and the fact that on p19 of the Equality Impact Assessment the Department states that *"people subject to restrictive practices are almost exclusively disabled"* and that the policy *"is therefore expected to have a significant impact on people with a disability"* this assertion needs a strong evidential premise which is not available in the consultation document.

It is in breach of the equality scheme to make an equality screening decision without using data including independent disaggregated data to provide evidence for the decision. To ensure that appropriate services are available for children and young people, it will be necessary for a detailed quantitative and qualitative study to be carried out to properly determine the scale and scope of the impact.

The Equality Impact Assessment contain a series of repeated generalised assertions to the effect that the draft policy will provide a positive impact or that the policy will

apply to everyone regardless of Section 75 characteristics. Such generalised positive assertions demonstrate a fundamental misunderstanding of the Department's Section 75 duties and its Equality Scheme. **Intention is irrelevant for the purposes of compliance with Section 75, with rather the potential for differential adverse impact being the issue engaged.**

The Equality Commission examined this issue in its decision on a complaint taken to the Commission by the Children's Law Centre and nine other organisations under Schedule 9 of the Northern Ireland Act, stating that the NIO, upon introducing the ASBO legislation, did not discharge its Section 75 obligations correctly. The Equality Commission, in its decision approved on 27th April 2005, found that while adverse impact may not be the intention of a public authority, in order to comply with its approved Equality Scheme public authorities must undertake an Equality Impact Assessment where there is the ***potential*** for adverse impact on children and young people.

In order to comply with its statutory equality obligations under Section 75 and its Equality Scheme the Department must identify and address the potential adverse impacts which clearly exist in relation to the draft policy and carry out a full, proper and comprehensive EQIA, including direct consultation with children and young people.

Mitigations

No specific mitigations have been identified by the Department in relation to children and young people or in relation to people with disabilities. It is stated at paragraph 72 of the Equality Impact Assessment, in relation to disability, that *"no negative impacts have been identified and therefore no mitigating actions have been taken."* We again reference that on p19 of the Equality Impact Assessment the Department states that *"people subject to restrictive practices are almost exclusively disabled"* and that the policy *"is therefore expected to have a significant impact on people with a disability".* In the light of this admission on the part of the Department, it is inconceivable that mitigations are not required.

These conclusions are likely a result of failure to consult affected groups of children and their families when formulating the policy and a failure to gather disaggregated data. This failure has resulted in the Department misdirecting itself.

In order to comply with Section 75 and its Equality Scheme, the Department is under a statutory obligation to address the inequalities which are identified through mitigation or by the adoption of alternative policies.

The Equality Commission's Guide for public authorities on implementing Section 75 states that,

"The promotion of equality of opportunity entails more than the elimination of discrimination. It requires proactive measures to be taken to facilitate the promotion of equality of opportunity between the categories identified in Section 75 (1). The equality duty should not deter a public authority from taking action to address disadvantage among particular sections of society – indeed such action may be an appropriate response to addressing inequalities."

We are concerned that more than 23 years after the Section 75 Equality Duty was legislated for the Department does not appear to collect or hold the relevant disaggregated data about children and young people. The Department should take urgent steps to secure the necessary data, including from sources in the voluntary and community sector and then carry out a full and proper evidence-based EQIA to enable assessment, followed by any necessary measures/mitigations to address adverse impacts and to promote equality of opportunity.

CLC strongly disagrees with the conclusions reached by the Department in its Equality Impact Assessment. A proper EQIA in full compliance with the Department's Equality Scheme is urgently required and the policy should not be progressed when the Department is in breach of its scheme and statutory duty. The EQIA should be informed by child specific data across all s 75 categories and should include consultation with children and young people, their parents and carers.

Children's Rights Screening

The Child Rights Screening carried out by the Department, in the absence of any obvious co-operation from other relevant Departments, is wholly inadequate and indeed extremely naïve, failing totally to identify relevant children's rights issues or provide any meaningful analysis whatsoever. While, for example, the

ECHR, UNCRPD and UNCRC are mentioned in the CRIA, there is no detail or analysis in terms of which articles are engaged.

It is stated in the Children's Rights Screening at point 5, in the absence of any coherent data or children's rights analysis whatsoever, that the policy "will have a positive impact on children's rights".

We have provided clear reference to human rights standards against which this policy should be measured. Even a cursory consideration would identify non-compliance with children's rights. The fact that there is a clear potential for breach of Art 3 ECHR, a non-derogable right, should provide sufficient evidence that this policy cannot *"have a positive impact on children's rights".* In the absence of any evidence or data, it is impossible to arrive at this conclusion and as stated above, CLC believe the policy will potentially have major negative adverse equality and human rights impacts upon children and young people including those with learning disability, special educational needs and disability (SEND) and mental ill health, who spend a large proportion of their daily lives in care and in care settings.

Key Concerns

One of CLC's key concern with Department of Health's draft Regional Policy is that Article 3 ECHR is engaged here. As outlined above, this right is non-derogable and as outlined by the European Court of Human Rights in **Z and Others v The United Kingdom**, ***"Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment…. Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment…. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have knowledge."***

There is no indication that the Department has taken any cognisance of their duties under Art 3. **This draft policy risks leaving children with less protection than adults regarding some of the most draconian and potentially traumatic and harmful measures available to decision-makers, which amount to interference**

with fundamental human rights, including Art 3 Torture, Inhuman and Degrading treatments and the right to liberty under Article 5, ECHR.

In CLC's view, the draft policy will not provide sufficient or indeed any significant protection for children and young people from harmful, poorly monitored restrictive practices.

CLC are also concerned it is **not a cross-departmental strategy** and is focused upon practices in health and social care settings, which fails to take account of the protection of children and young people from potentially unlawful use of restrictive practices and seclusion across **all settings.**

The Department will be aware that parents and organisations, such as CLC, have been publicly raising concerns about potentially unlawful restrictive practices within education settings. Such practices have been visited upon the most vulnerable children with SEND, including physical and chemical restraint, seclusion, and continuous supervision and control within locked-door education facilities. The issue crosses not only health and social care settings but also education settings staffed by teaching and education support staff in mainstream and special school settings, EOTAS centres, hospital schools, Lakewood, Woodlands JJC and the independent education sector.

The Department of Education has been undertaking a review of restraint and seclusion in education settings, with CLC being part of a Department of Education Reference Group in this matter. NICCY have also been undertaking a rights-based review of restraint and seclusion in education settings, with CLC as a member of its Advisory Group. The Education Committee has also held evidence sessions on restraint and seclusion in education settings over this past year and will undoubtedly wish to follow progress of all relevant government departments regarding the protection of children and young people from unwarranted, unmonitored and potentially unlawful use of restrictive interventions within the education system.

CLC believe that legislative change will be required in the education sphere, not least because "reasonable force" provisions and related guidance are a residual problem left behind from the days when corporal punishment was abolished in schools in Northern Ireland, so that the law continues to enable force to be applied to a child for reasons other than protection from harm.

This can be clearly seen in the relevant part of the **Education (NI) Order 1998** which provides that:

Power of member of staff to restrain pupils

4.—*(1) A member of the staff of a grant-aided school may use, in relation to any pupil at the school, such force as is reasonable in the circumstances for the purpose of preventing the pupil from doing (or continuing to do) any of the following, namely*

(a) committing any offence

(b) causing personal injury to, or damage to the property of, any person (including the pupil himself); or

(c)engaging in any behaviour prejudicial to the maintenance of good order and discipline at the school....

…but it does not authorise anything to be done in relation to a pupil which constitutes the giving of corporal punishment...."

It would be entirely wrong that children should have lesser protection under this regional policy in school than they would when attending a short break at a respite facility or care and treatment in a mental health facility or indeed when in custody within the justice system. It is also incongruous that vulnerable children would have lesser protections than vulnerable adults and older people in our community. In our view that the use of seclusion and restraint across a range of settings, including within education, health, justice and others, should be considered together. In order to avoid leaving children's services providers at risk of legal liability under Articles 3 and 5, ECHR, it is essential that the Department of Health collaborate effectively and share expertise with the Department of Education and other relevant departments, such as the Department of Justice, in working through these issues cooperatively, including by producing a coherent cross-departmental regional policy which reflects best practice and is compatible with children's human rights.

In light of this, it is of critical importance that the Department, in seeking to roll out a regional policy on restrictive practices, works in cooperation with all other relevant Departments, Children's Authorities and Children's Services Providers in discharge of its legal duty under **s2 of the Children's Services Cooperation Act (NI) 2015** in order

to improve the wellbeing of children and young people, which in this legislation is aligned with the legal rights standards enshrined within the UNCRC.

It follows that in considering the out-workings of this draft policy, that the Department ensures the standards it rightly wishes to set in place regarding minimising the use of restrictive practices and seclusion, are applied across all settings where children are, so that protection is equal and standards are consistent regardless of setting.

It is also imperative that this policy reflects that all children, regardless of background or status and including disabled and non-disabled children, should have equal protection of their human rights, regardless of setting through cooperative inter-departmental arrangements.

Human rights protections apply equally across all settings where a child might be at any given time. It follows that a Regional Policy on the use of Restrictive Practices which aims to eliminate and minimise their usage, should cover all settings across health, social care, education, justice and the family home. The absence of appropriate legislative or policy protections and safeguards for children by government departments will not protect decision makers and children's services providers from being liable for human rights breaches.

This point was neatly underlined recently in the case of **ML –v- SENDIST and EA [2021] NIFam 15** regarding a young person aged 17 who, it was proposed, would be educated in a modular unit at school with a locked door and keypad and a surrounding fence whilst under intense individual supervision. Despite the fact the Mental Capacity Act (NI) 2016 and related guidance make no overt reference to education settings, the topic of protecting children in these settings having been intentionally avoided in the drafting of the legislation, the Court held that in order to be lawful a deprivation of liberty of a young person in an education setting (in this case a special school), must be authorised by the Review Tribunal or by the High Court by way of declaratory order. **It was particularly noted that Article 5 ECHR rights are operational in any event, in addition to any other domestic provisions and that public authorities are aware of this fact.**

Mrs Justice Keegan (as she then was) adjudged that:

"*It is clear that Article 5 may be engaged in these cases. Since the Supreme Court decided the case of Surrey County Council v P and Cheshire West and Chester Council v P [2014] UKSC 19 there is a greater appreciation of this..."*

"... this judgment in no way detracts from the positive obligation imposed upon State authorities under Article 5. All public authorities need to be aware of this and even if the special educational provision is deemed to be appropriate there is a lawfulness issue if it is thought to be a deprivation of liberty and not authorised. I am quite confident that the public authorities who have engaged in this case are well aware of this obligation. ***This judgment should be shared with all relevant authorities as the matter needs urgent attention in terms of guidance and protocols****...*".

While this case related to an educational setting its relevance to this consultation is clear. CLC understands that the Departments of Health and Education are working to produce a joint protocol on DoLs. It seems entirely rational to suggest that a regional policy which sets critically important standards on the operation of restrictive practices and seclusion ought to, in light of this landmark judgment, apply to all people, including all children, and all restrictive interventions, rather than having a piecemeal, siloed approach with limited application based on the type of restriction, the type of setting or the employing/managing authority. This will fail to ensure compliance with Articles 3 and 5, ECHR and will fail to account for the judicial guidance in ***ML***, which clearly espouses a multi-disciplinary approach.

It is clear to CLC that the issue of deprivation of liberty authorisations across settings which fall within the remit of different government departments and the matters of restrictive practices more generally and of seclusion, as a most draconian step, are not matters that can be easily separated and should not be regulated in a piecemeal way as a tick-box exercise, but should, due to the gravity and seriousness of the issues at hand, be dealt with urgently, coherently and comprehensively in a joined up human rights compliant manner for children and young people. Such an approach is enabled and in fact required by virtue of the **Children's Services Cooperation Act (NI) 2015**.

The Department of Education, having responsibility for the Children's Strategy which seeks to ensure that all children live in a society which respects their rights and having notice of the above judgment, should be in our view be jointly responsible with the Department of Health for leading on the regional policy on

restrictive practices and use of seclusion, which should be urgently redrafted in line with children's human rights standards under the UNCRC and UNCRPD and with particular regard to Articles 3 and 5 ECHR, to enable protection in all settings where children are and ensuring systemised cooperation across all relevant Departments, such as the Department of Justice and the Department for Communities.

We note also that the Department will need to ensure that those working within this policy are aware of the binding implications of the judgment in the case of **Re D (a Child) [2019] UKSC** where the Supreme Court has held that it is not possible for those with parental responsibility to consent to the deprivation of liberty of a person aged 16 or 17. The judgment has further implications for under 16s, to whom deprivation of liberty safeguards do not currently apply, but where parental consent is being relied upon to restrict a child's liberty.

It is critical that in formulating policy such as this, the Department complies with its human rights obligations and adheres to binding precedent set by the courts.

Some of the Issues CLC are aware of through casework and policy work:

- Research[11] (covering the UK and Ireland) has highlighted the poor treatment of children and young people with learning disabilities and/or autism, including the use of restrictive interventions such as restraint and seclusion, in inpatient hospital settings. The Joint Committee on Human Rights has also published the findings of their inquiry *"The detention of children and young people with learning disabilities and/or autism"*[12] which provides some harrowing reading in terms of children and young people repeatedly being restrained and secluded in mental health hospitals, assessment units, residential special schools, supporting living settings and in detention/ custodial settings;
- A recent secret inspection report of Lakewood secure care centre has raised "serious concerns" about staff's treatment of the young people who reside there, including young people being sent to confinement and staff members' poor record keeping of major incidents such as when they physically restrained the young people. The inspection also resulted in the **fourth** time an area for

[11] https://www.challengingbehaviour.org.uk/wp-content/uploads/2019/01/rireportfinal.pdf
[12] https://publications.parliament.uk/pa/jt201919/jtselect/jtrights/121/121.pdf

improvement, regarding the use of restrictive practices, was issued to Lakewood, with concerns about their use becoming “common and standard”;[13]

- A child physically held in place to force him to stay in a group by an adult in a mainstream classroom;
- A young primary school child with ASD physically held in place to force him to stay in a group by an adult assistant in a mainstream classroom;
- Children subject to prone restraint by several adults;
- Children sent to isolation/seclusion rooms;
- Children closed into rooms in school with the door held shut during episodes of challenging behaviour while staff remain outside the room;
- Children educated in locked door units, including those aged 16+ who lack capacity to consent to a deprivation of liberty;
- Children taught in classrooms away from peers under close adult supervision in mainstream and special schools;
- Restrictive practices may be used in education settings as disciplinary measures or to protect property, or maintain order and discipline, in the absence of risk of harm to any person which is contrary to best practice and is not human rights compliant;
- Chemical restraint in family homes of distressed children and young people in the absence of service provision - notably increased during lockdowns;
- Repeated episodes of restraints potentially amounting to unauthorised deprivations of liberty; and
- Absence of accountability mechanisms through recording, reporting, monitoring and governance arrangements regarding restrictive practices and seclusion used on children and young people. Parents have not been informed of restraints.

CLC calls for the draft policy to be redrafted to provide for the following matters:

- Collection of s75 disaggregated data about the application of restrictive practices across ALL settings;

[13] https://www.thedetail.tv/articles/distressing-physical-restraint-and-confinement-of-teenagers-in-bangor-care-facility

- Full and comprehensive EQIA and implementation of necessary changes to the policy and mitigations where required;
- Full and comprehensive CRIA;
- Conversion of the policy to a cross-departmental policy to ensure children are protected equally across all children's services settings and wherever they reside;
- Clarity around interface of this policy with Deprivation of Liberty Safeguards for 16 and 17 year olds;
- Clarity around protection of children under 16 from unwarranted use of restrictive practices;
- Standard definitions of restrictive practices across ALL settings where children may be;
- Mechanisms for recording, reporting and monitoring restrictive interventions consistently across ALL settings;
- Consistency of application of deprivation of liberty safeguards across ALL settings;
- Independent appeal and other suitable challenge mechanisms for vulnerable children subjected to restrictive practices, regardless of setting and age; and
- Consistent training across ALL settings including health, social care, education and justice; and consistency in terms of the level of training and accreditation required by a person to enable then to lawfully apply a restrictive intervention against a child in any setting.

Conclusion

CLC is grateful for the opportunity to respond to this consultation. We hope you find our comments constructive, we look forward to receiving the information requested and we look forward to further engaging with Departmental officials in relation to the issues raised in this response