



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Submission on legislative options to inform the
development of an Adult Protection Bill in
Northern Ireland**

8 April 2021

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Summary of Recommendations

The Northern Ireland Human Rights Commission (NIHRC):

- 2.11** recommends that the scope of the definition of 'an adult at risk and in need of protection' be drafted broadly to ensure appropriate and effective safeguards to prevent abuse, neglect and exploitation, while respecting an individual's dignity and right to private life.
- 3.4** recommends that the human rights based framework operates in line with a human rights-based approach, adopting and benchmarking against the FREDA principles.
- 3.6** recommends that it is made explicit that the principles guiding the implementation of future legislation operate within a human rights based framework which incorporates the full range of international human rights standards ratified by the UK.
- 3.8** recommends that adequate resources are allocated to ensure that people with powers and duties under proposed adult protection legislation are trained so that they understand the human rights implications of their work and operate consistently within a human rights-based approach.
- 4.13** recommends that there is a statutory duty to report to the HSC Trust when there is reasonable cause to suspect that there is an adult in need of protection.
- 4.14** recommends that there is a statutory duty on the HSC Trust to make follow up enquiries where it has reasonable cause to suspect that an adult is at risk and in need of protection.
- 5.7** recommends that there should be a power of entry to interview an adult in private when a HSC professional has reasonable cause to suspect that an adult is at risk of harm from abuse, neglect or exploitation and is in need of protection. The exercise of the power should be based on an individual assessment adopting a human rights-based approach.
- 6.7** recommends that the Department draws on experiences from

England, Wales and Scotland in providing for an independent advocate in future adult protection legislation.

- 6.8 recommends that any independent advocacy provisions take account of the Mental Capacity Act (NI) 2016 to ensure that individuals with and without capacity are offered equivalent protections.**
- 7.4 recommends that an independent adult protection board be established, where one of its functions is to investigate serious cases. The board should ensure that its investigations are carried out in a manner consistent with Article 2 of the ECHR including that they are independent, prompt with reasonable expedition, and involve public scrutiny and the participation of the next-of-kin.**
- 8.6 recommends that any provisions relating to the cooperation, information sharing and power to access financial records are accompanied by effective safeguards circumscribing how the information can be retained and used in accordance with Article 8 ECHR. Any exercise of powers under these provisions should follow a human rights based approach.**
- 9.2 supports the introduction of new 'care worker' and 'care provider' offences of ill treatment and wilful neglect, to address this gap in the law so that individuals being cared for with capacity are also protected from ill-treatment and/or wilful neglect.**

1.0 Introduction

1.0 The Northern Ireland Human Rights Commission (the NIHRC), pursuant to Section 69(1) the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. In accordance with these functions, this submission is made in response to the Department of Health's consultation on Legislative options to inform the development of an Adult Protection Bill for Northern Ireland.

1.1 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN). The relevant regional and international treaties in this context include:

- European Convention on Human Rights (ECHR);¹
- UN International Covenant on Civil and Political Rights (UN ICCPR);²
- UN International Covenant on Economic, Social and Cultural Rights (UN ICESCR);³
- UN Convention against Torture (UN CAT);⁴ and
- UN Convention on the Rights of Persons with Disabilities (UN CRPD).⁵

1.2 In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding, but provide further guidance in respect of specific areas. The relevant standards in this context include:

- UN Committee on the Rights of Persons with Disabilities (UN CRPD Committee) 2017 Concluding Observations to the UK;⁶
- UN Madrid Plan of Action and its implementation on Ageing (2002)⁷

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

² Ratified by the UK in 1966.

³ Ratified by the UK in 1966.

⁴ Ratified by the UK in 1988.

⁵ Ratified by the UK in 2009.

⁶ CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI', 29 August 2017.

⁷ A/CONF.197/9 'Madrid International Plan of Action on Ageing', 23 May 2002.

- UN Principles for Older Persons;⁸
- UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care;⁹ and
- Recommendation CM/Rec(2014)2 of the Committee of Ministers to member States on the promotion of human rights of older persons.¹⁰

- 1.3 The NIHRC welcomes the opportunity to respond to the Department of Health's consultation on legislative options for an adult protection bill in Northern Ireland. The Commission welcomes the recognition that safeguarding activity must be grounded in a rights based approach. The NIHRC has sought to highlight relevant human rights standards and principles, where they may be of assistance in informing future adult protection legislation. The structure of this response is largely aligned to the structure of the consultation document, save where to avoid repetition, the issues have been grouped together.
- 1.4 The Commission recognises that new safeguarding arrangements must be accompanied by sufficient resources to ensure the aims of the new approach can be realised in practice. Moreover, commencement of the outstanding parts of the Mental Capacity Act (NI) 2016 is essential alongside dealing with the gap in legislation highlighted in the recent case of Belfast Health and Care Trust and RM – a case in which the Commission intervened through written submission.¹¹

2.0 Definition of an 'adult at risk and in need of protection'

- 2.1 The consultation document explains that the definition of an 'adult at risk and in need of protection' is important because of the implications it will have with respect to the powers and duties that may come into effect in future legislation.
- 2.2 The proposed powers and duties of new legislation could lead to interventions that challenge the autonomy of an individual to make their

⁸ A/RES/46/91 'United Nations Principles for Older Persons', 16 December 1991.

⁹ A/RES/46/119 'UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care', 17 December 1991.

¹⁰ Council of Europe 'Recommendation CM/Rec(2014)2 of the Committee of Ministers to member States on the promotion of human rights of older persons', 19 February 2014.

¹¹ *Belfast Health & Social Care Trust v RO (also known as M)* [2021] NIFAM 2020 No. 29.

own decisions. This may result in an interference with a person's right to private life, guaranteed under Article 8 of the European Convention on Human Rights (ECHR), which states that:

1) everyone has the right to respect for his private and family life, his home and his correspondence.

2) there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

2.3 In the case of *Pretty v the United Kingdom*, the European Court for Human Rights (ECtHR) recognised that "the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person."¹² Further, "although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees". With respect to self-autonomy, the Court would observe that the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned."¹³

2.4 The primary purpose of Article 8 ECHR is to protect against arbitrary interferences with private and family life, home, and correspondence by a public authority. Article 8 is a qualified right, which means that departure from the strict requirements may be permissible in certain limited circumstances.

2.5 Conditions upon which a State may interfere with the enjoyment of a protected right are set out in Article 8(2) of the ECHR. Limitations are allowed if they are "in accordance with the law" or "prescribed by law" and are "necessary in a democratic society" for the protection of one of the objectives set out in Article 8(2) of the ECHR.

2.6 Given that the exercise of these powers and duties, under the proposed

¹² *Pretty v The United Kingdom* (2002) ECHR 427, at para 61.

¹³ *Ibid*, at para 62.

Adult Protection Bill, is likely to interfere with an individual's right to private life, the definition of an 'adult at risk and in need of protection' and the corresponding duties and powers of any new legislation must be drafted in a manner that is compliant with Article 8 ECHR.

- 2.7 There is no universal definition of an 'adult at risk and in need of protection' in the international or European human rights framework. However, in 2017 the UN CRPD Committee recommended that the UK Government and NI Executive "establish measures to ensure equal access to justice and to safeguard persons with disabilities, particularly women, children, intersex people and elderly persons with disabilities from abuse, ill-treatment, sexual violence and/or exploitation."¹⁴
- 2.8 The development of adult protection policies necessitates the striking of a balance to ensure that there is adequate safeguarding, while respecting the dignity and autonomy of a person. Human dignity is a core tenet recognised in all international human treaties and in the context of the ECHR, the ECtHR has recognised that "the very essence of the Convention is respect for human dignity and human freedom."¹⁵ A core principle of the Convention on the Rights of Persons with Disabilities is "respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons".¹⁶
- 2.9 Recommendation CM/Rec(2014)2 of the Committee of Ministers to member States on the promotion of human rights of older persons recognises that: "Older persons have the right to respect for their inherent dignity. They are entitled to lead their lives independently, in a self-determined and autonomous manner. This encompasses, inter alia, the taking of independent decisions with regard to all issues which concern them, including those regarding their property, income, finances, place of residence, health, medical treatment or care, as well as funeral arrangements. Any limitations should be proportionate to the specific situation, and provided with appropriate and effective safeguards to prevent abuse and discrimination." It further recommends, "Member States should ensure that all measures that relate to decision making and the exercise of legal capacity of older persons, including possible restrictions which may be required for protection purposes, provide for

¹⁴ CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI', 29 August 2017, at para 39.

¹⁵ *Christine Goodwin v The United Kingdom* (2002) ECHR 588, at para 90.

¹⁶ Article 3(a), UN Convention on the Rights of Persons with Disabilities 2006.

appropriate and effective safeguards to prevent abuse. The safeguards should be proportionate to the degree to which such measures affect the older person's rights and interests."

2.10 The UN Principles for Older Persons recognise, "older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse"¹⁷ and that they "should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives."¹⁸ Further, the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care recognise that "all persons with a mental illness, or who are being treated as such persons, shall be treated with humanity and respect for the inherent dignity of the human person."¹⁹

2.11 The Commission recommends that the scope of the definition of 'an adult at risk and in need of protection' be drafted broadly to ensure appropriate and effective safeguards to prevent abuse, neglect and exploitation, while respecting an individual's dignity and right to private life.

3.0 Principles guiding the implementation of future legislation

3.1 The Commission supports the suggestions put forward by the Independent Review, and as set out in the consultation document, that "the principles shaping adult safeguarding practice should be set within a human rights based framework and emphasise dignity, fairness, equality, respect and autonomy".

3.2 While the consultation document refers to a human rights-based framework, it is silent on what this would entail. In this respect, the Commission recommends that the human rights-based framework encompasses the full range of internationally accepted human rights standards, which the UK has signed and ratified. This includes the ECHR,

¹⁷ Article 17, UN Principles for Older Persons 1991.

¹⁸ Article 14, UN Principles for Older Persons 1991.

¹⁹ Principle 1(2), UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care

as incorporated by the Human Rights Act 1998, and the treaty obligations of CoE and UN. Particularly relevant human rights standards in this respect include the UN ICCPR, UN ICESCR, UN CPRD and UN CAT. Guidance can also be found in 'soft law' non-binding declarations and recommendations from human rights bodies of the UN and CoE. Relevant guidance includes the UN CRPD Committee's 2017 Concluding Observations to the UK, the UN Madrid International Plan of Action on Ageing, UN Principles for Older Persons, and the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.

3.3 The Commission recommends that the human rights-based framework adopt a human rights-based approach. A human rights-based approach enables rights-holders to exercise and claim their rights and enhances the capacity of duty bearers who have a legal obligation to respect, protect, promote and fulfil human rights.²⁰ The FREDA principles helpfully demonstrate how a human rights based-approach can be applied in practice.²¹ They are comprised of the following elements:

- Fairness – individuals should have a say in matters which impact their human rights.
- Respect – an obligation to refrain from interfering or undermining a person's rights.
- Equality – all forms of discrimination should be eliminated and those that face the biggest barriers should be prioritised.
- Dignity – a person must be recognised, respected and protected as a rights holder and as a unique and valuable human being with an individual personality, distinct needs, interests and privacy.
- Autonomy – a person should be allowed to make free and informed decisions about how they wish to live their lives.

3.4 The Commission recommends that the human rights based framework operates in line with a human rights-based approach, adopting and benchmarking against the FREDA principles.

3.5 The Commission welcomes the proposed principles outlined at 2.24 of the consultation document, however, they are not explicitly being supported by a human rights based framework. The Commission recommends that

²⁰ OHCHR, 'Frequently Asked Questions about a Human Rights Based Approach to Development and Cooperation', 2006, at 15.

²¹ NI Public Services Ombudsman and the NI Human Rights Commission, 'Human Rights Manual', 2017.

this is made clear from the outset. Further, the Commission notes that the description alongside the proposed principle of “dignity” is “a rights based approach, promoting and respecting the dignity of adults”, without elaborating on what a rights based approach entails. This appears to depart from the Independent Review’s suggestions, which explicitly call for safeguarding practice to be set within a human rights based framework.

3.6 The Commission recommends that it is made explicit that the principles guiding the implementation of future legislation operate within a human rights based framework which incorporates the full range of international human rights standards ratified by the UK.

3.7 The adoption of these principles, whether in legislation or statutory guidance, should be accompanied by effective training to ensure that people exercising functions under the legislation act in accordance with the principles underpinning the legislation. This is in line with recommendations put forward in the Commissioner for Older People for Northern Ireland’s report, *Home Truths*, which argues that “human rights should be an essential component of practitioner dialogue” and that “all staff in care settings, commissioners of care, social care workers, and regulators must receive training on the implications of human rights for their work”.²² It is vital that appropriate funding is available to provide training on the practical application of these principles.

3.8 The Commission recommends that adequate resources are allocated to ensure that people with powers and duties under proposed adult protection legislation are trained so that they understand the human rights implications of their work and operate consistently within a human rights-based approach.

4.0 Duties to (i) report and (ii) make enquiries

4.1 The consultation document seeks views on whether the HSC Trusts, PSNI, HSC Board, Public Health Agency (PHA), RQIA and Independent providers commissioned/contracted to provide health and social care services (at both an organisational and individual level) should be under a mandatory duty to report cases to the relevant HSC Trust where they believe there is reasonable cause to suspect that an ‘adult is at risk and in need of

²² Commissioner for Older People for Northern Ireland ‘Home Truths’, June 2018, at 30.

protection'.²³

- 4.2 The definition of an 'adult at risk and in need of protection' set out in the consultation document focusses on protection of harm arising from 'abuse, neglect or exploitation'. Harm arising from abuse, neglect or exploitation is likely to constitute a serious offence, and there is already a statutory duty by virtue of section 5(1) of the Criminal Law Act 1967, whereby anyone who suspects the commission of a serious offence must report this to the police. Further, HSC Trusts, managers of independent hospitals, nursing homes or residential care homes and the Regulation and Quality Improvement Authority (RQIA) must notify the Office of Care and Protection of any person incapable by reason of mental disorder, of managing their property and affairs under the Mental Health (NI) Order 1986, if there are no arrangements in place to protect the person.²⁴ We note that public authorities have taken a proactive approach to safeguarding issues elsewhere, for example through the introduction of routine enquiries on domestic violence for all pregnant women across Northern Ireland.²⁵ Patients are asked on three occasions during their pregnancy – at booking in, postnatal and prior to discharge – whether or not they have experienced, or are currently experiencing, domestic violence.²⁶ This policy was introduced to address the increases in incidents of domestic violence which commences during pregnancy.²⁷
- 4.3 Notwithstanding these existing measures, there could be gaps in protection where, for instance, there is a concern that a crime is about to be committed which would cause harm to an adult at risk and in need of protection, or there is actual or potential harm occurring that does not reach the threshold of constituting a serious offence or a criminal act. In such cases, a statutory duty to report and a follow up duty to make enquiries may offer better routes for individuals to report concerns, as well as better protections for adults at risk and in need of protection than presently afforded.
- 4.4 Reporting that an adult is at risk and in need of protection, and the resulting follow up enquiries, could lead to an interference with their right

²³ Department of Health 'Legislative Options to inform the development of an Adult Protection Bill for Northern Ireland: Consultation Document', 17 December 2020, at paras 2.44 – 2.46.

²⁴ Section 107, Mental Health (NI) Order 1986.

²⁵ Department of Health, Social Services and Public Safety and Department of Justice 'Stopping Domestic and Sexual Violence and Abuse in Northern Ireland A Seven Year Strategy', March 2016, at para 2.95.

²⁶ Ibid.

²⁷ Ibid.

to a private life. This right is enshrined in Article 8 of the ECHR, which protects against arbitrary interferences with private and family life, home, and correspondence by a public authority. Follow up by authorities such as the HSC Trust, particularly if there is a statutory duty to make follow up enquiries, may lead to challenges over an individual's autonomy, dignity, and capacity to make their own decisions.

- 4.5 Interferences with an individual's private life must be justified by reference to the pursuit of a legitimate aim outlined in Article 8(2) of the ECHR. Such interferences must be in accordance with the law and must be "necessary in a democratic society, in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".
- 4.6 In order to determine whether a particular infringement of Article 8 ECHR is necessary in a democratic society, the ECtHR balances the interests of the State against the right of the applicant. The ECtHR has clarified that "necessary" in this context does not have the flexibility of such expressions as "useful", "reasonable", or "desirable", but implies the existence of a "pressing social need" for the interference in question.²⁸ In balancing these competing interests, of note is the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment's 2013 report to the Human Rights Council, which highlighted that in the health care context, "choices by people with disabilities are often overridden based on their supposed 'best interests,'" and "serious violations and discrimination against persons with disabilities may be masked as 'good intentions' of health professionals".²⁹
- 4.7 Article 2 of the ECHR enshrines the right to life, while Article 3 of the ECHR prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Combined with Article 1 of the ECHR, these articles impose an obligation on States to protect the right to life of those individuals within their jurisdiction, and ensure that they are not subject to torture, inhuman, degrading treatment or punishment.
- 4.8 The ECtHR has held that "article 2 of the ECHR may also imply in certain

²⁸ *The Sunday Times v United Kingdom* (1979) 2 ECHR 245.

²⁹ A/HRC/22/53 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez', 1 February 2013, at para 61.

well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual".³⁰ For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.³¹ To meet this threshold, an applicant needs to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.³²

4.9 The ECtHR has also held that Article 2 of the ECHR may impose a positive obligation on authorities in certain circumstances to take preventative actions to protect a person from themselves.³³ For a positive obligation to arise where the risk to a person derives from self-harm, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual and, if so, that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.³⁴ In order to establish whether the authorities knew or ought to have known that the life of a particular individual was subject to a real and immediate risk, triggering the duty to take appropriate preventive measures, the Court takes into account a number of factors, including: i) whether the person had a history of mental health problems; ii) the gravity of the mental condition; iii) previous attempts to commit suicide or self-harm; iv) suicidal thoughts or threats; and v) signs of physical or mental distress.³⁵

4.10 The ECtHR has held that "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

³⁰ *Osman v the United Kingdom* (2007) ECHR 770, at para 115; *Branko Tomašić and Others v Croatia* (2008) ECHR 1785, at para 50.

³¹ *Mastromatteo v Italy* (2002) ECHR 694, at para 68; *Paul and Audrey Edwards v the United Kingdom* (2009) ECHR 2275, at para 55.

³² *Osman v the United Kingdom* (2007) ECHR 770, at para 116.

³³ *Renolde v France* (2008) ECHR 1085, at para 81.

³⁴ *Younger v the United Kingdom* (2003) ECHR 706; *Fernandes de Oliveira v Portugal* (2019) ECHR 106, at para 110.

³⁵ *Fernandes de Oliveira v Portugal* (2019) ECHR 106, at para 115.

or degrading treatment, including such ill-treatment administered by private individuals".³⁶ Moreover, "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".³⁷

4.11 Under Article 8 of the ECHR, the State may also be under an obligation to take appropriate measures in cases of harm not meeting the high thresholds under Articles 2 and 3 of the ECHR. The ECtHR has held that "although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."³⁸

4.12 In order to assist the State in upholding its duty to secure respect for individuals' private lives, a duty to report and a subsequent duty to make enquiries may provide authorities with sufficient information to take necessary measures. This will be especially relevant where harm takes place in the private home and authorities rely on reports in order to be aware of the risk of harm taking place. Consistent with the requirements of Article 8(2) of the ECHR, any interference must be justified with reference to whether it "proportionate to the legitimate aim pursued".³⁹ The Commission therefore recognises the complexities that arise on this issue and has taken this into account when framing our recommendation.

4.13 The Commission recommends that there is a statutory duty to report to the HSC Trust when there is reasonable cause to suspect that there is an adult in need of protection.

4.14 The Commission recommends that there is a statutory duty on the HSC Trust to make follow up enquiries where it has reasonable cause to suspect that an adult is at risk and in need of protection.

³⁶ *Z v United Kingdom* (2001) ECHR 333, at para 73.

³⁷ *Ibid.*

³⁸ *X and Y v The Netherlands* (1985) ECHR 8978/80, at para 23.

³⁹ *Dudgeon v United Kingdom* (1981) ECHR 5, at para 53.

5.0 Power of entry to interview an adult in private

- 5.1 The consultation document proposes the introduction of a power of entry, to interview an adult in private when a HSC professional has reasonable cause to suspect that an adult is at risk of harm from abuse, neglect or exploitation and is in need of protection; and that professional is unable to gain entry to the adult's dwelling (or another premises) to speak with the adult in private to ascertain if they are making decisions freely.⁴⁰
- 5.2 Entering an individual's home using a power of entry is an interference with an individual's right to private life and family life, home and correspondence, as set out in Article 8(1) of the ECHR. Article 8 of the ECHR is a qualified right, which means that an individual's right to private life may be interfered with in certain circumstances. Any restriction to these rights must be for a legitimate aim, which can include public safety and protecting health. Any restriction must also be proportionate to the aim it is designed to meet and must be set out in legal rules that are accessible and reasonably clear.
- 5.3 On the other hand, the ECtHR has recognised that while the state is under a negative obligation to refrain from interfering with an individual's right to private life, it may also be under a positive obligation to ensure effective respect for private or family life. Accordingly, use of a power of entry to interview an adult in private in order to ascertain whether they are at risk of harm and in need of protection may be justified with reference to the obligation under Article 8 to ensure effective respect for private or family life.
- 5.4 The Commission recognises that a risk of harm may engage other rights, for example Articles 2 and 3 of the ECHR, which protect the right to life of those individuals within their jurisdiction, and ensure that they are not subject to torture, inhuman, degrading treatment or punishment. The ECtHR has held that these rights imply a positive obligation to take preventive operational measures to protect an individual whose life is at risk, or who is at the risk of suffering from torture, inhuman, degrading treatment or punishment.⁴¹ According to the Court, "children and other vulnerable individuals, in particular, are entitled to State protection, in the

⁴⁰ Department of Health 'Legislative Options to inform the development of an Adult Protection Bill for Northern Ireland: Consultation Document', 17 December 2020, at para 2.48.

⁴¹ *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* (2014) ECHR 972, at para 130; *Z v United Kingdom* (2001) ECHR 333; *A v United Kingdom* (1998), at para 22

form of effective deterrence, against such serious breaches of personal integrity.”⁴²

- 5.5 An investigative obligation also exists, under Articles 2 and 3 ECHR, which requires an effective, official investigation into allegations of harm.⁴³ A power of entry to interview an adult who is suspected to be in need of protection and at risk would be consistent in assisting the State to comply with its positive obligations.
- 5.6 The consultation document explains that before exercising a power of entry, the HSC professional will require a legal power to enter the premises, accompanied by the PSNI.⁴⁴ Whether a power of entry should be used to interview an adult who is suspected of being at risk and in need of protection must be based on an individual human rights-based assessment, balancing the rights of the individual concerned, and taking account of whether the same aims can be achieved by means less intrusive means in order to avoid arbitrary and unjustified interferences with an individual’s rights.
- 5.7 The Commission recommends that there should be a power of entry to interview an adult in private when a HSC professional has reasonable cause to suspect that an adult is at risk of harm from abuse, neglect or exploitation and is in need of protection. The exercise of the power should be based on an individual assessment adopting a human rights-based approach.**

6.0 Independent advocacy

- 6.1 In her 2017 report to the Human Rights Council, the Special Rapporteur on the Rights of Persons with Disabilities stated, “States must develop supported decision-making arrangements of varying types and intensity, including informal and formal support arrangements”.⁴⁵ Independent advocacy is included as an example of such arrangements.⁴⁶ The Special Rapporteur’s report details how States have introduced advocates to

⁴² *A v United Kingdom* (1998) ECHR 85, at para 22.

⁴³ *McCann v United Kingdom* (1995) 2008] ECHR 978, at para 161; *Ergi v Turkey* (1998) ECHR 59, at para 82; *ROD v Croatia* (2008) ECHR 1048, at Section 1.

⁴⁴ Department of Health ‘Legislative Options to inform the development of an Adult Protection Bill for Northern Ireland: Consultation Document’, 17 December 2020, at para 2.48.

⁴⁵ A/HRC/37/56 ‘Report of the Special Rapporteur on the Rights of Persons with Disabilities’, 12 December 2017, at para 27.

⁴⁶ *Ibid.*

support persons with disabilities to exercise their legal capacity, citing Sweden as an example, where independent advocates “conduct outreach and establish relationships of trust with persons with psychosocial disabilities, providing them support in different areas of life, including decision-making”.⁴⁷

- 6.2 The UN Committee on the Rights of Persons with Disabilities expressed concern over “the prevalence of substituted decision-making in legislation and in practice, and the lack of full recognition of the right to individualized supported decision-making that fully respects the autonomy, will and preferences of persons with disabilities” in the UK.⁴⁸ As a means of addressing this concern, it urged the UK to “step up efforts to foster research, data and good practices in the area of, and speed up the development of, supported decision-making regimes”.⁴⁹
- 6.3 Given the potential interferences to an individual’s right to private life through powers and duties that future legislation may contain, such as the power of entry and duty to report, an independent advocate may be of benefit in ensuring that the dignity and autonomy of an individual is respected. However, in adopting such an arrangement, it is crucial to ensure that the will and preferences of the individual concerned are respected and that they are protected from conflict of interest, undue influence and abuse.
- 6.4 The Special Rapporteur on the Rights of Persons with Disabilities’ report outlines safeguards that some States have incorporated to prevent abuse and undue influence. These include time limits, periodic review, requirements for being a supporter, liability, complaint and redress mechanisms, and monitoring.⁵⁰
- 6.5 The consultation document refers to the independent mental capacity advocate mechanism in the Mental Capacity Act (NI) 2016, in considering the inclusion of an independent advocate in future adult protection legislation. It is worthy to note that the Mental Capacity Act (NI) 2016 has not yet commenced, meaning it is difficult at this stage to infer how an independent advocacy provision would operate in conjunction in future

⁴⁷ Ibid, at para 46.

⁴⁸ CRPD/C/GBR/CO/1, ‘UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI’, 29 August 2017, at para 30.

⁴⁹ Ibid, at para 31.

⁵⁰ A/HRC/37/56 ‘Report of the Special Rapporteur on the Rights of Persons with Disabilities’, 12 December 2017, at para 47.

adult protection legislation. Moreover, the relevant provision in the Mental Capacity Act relates “to persons who lack capacity”, whereas future adult protection legislation is intended to protect those at risk of harm or abuse, rather than only individuals lacking in capacity.⁵¹

6.6 Nonetheless, there are likely to be benefits to independent advocacy, as outlined in the paragraphs above. It is important that any independent advocacy provision in future adult protection legislation does not create different levels of protection depending on an individual’s capacity.

6.7 The Commission recommends that the Department draws on experiences from England, Wales and Scotland in providing for an independent advocate in future adult protection legislation.

6.8 The Commission recommends that any independent advocacy provisions take account of the Mental Capacity Act (NI) 2016 to ensure that individuals with and without capacity are offered equivalent protections.

7.0 Independent Adult Protection Board for NI

7.1 The Department is proposing to establish an independent adult protection board in NI. One of the proposed functions of this independent board is to conduct serious case reviews to examine the circumstances surrounding the death of, or serious harm to, an adult at risk and in need of protection.

7.2 The ECtHR has underlined that the obligation to protect the right to life under Article 2 of the ECHR, requires an effective official investigation where an individual has sustained life-threatening injuries, died or has disappeared in violent or suspicious circumstances, irrespective of whether those allegedly responsible are State agents or private persons or are unknown or self-inflicted. The essential purpose of an investigation under Article 2 of the ECHR is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.⁵² For an investigation of this nature to be effective under Article 2 of the ECHR, it must be independent, prompt with

⁵¹ Section 35, Mental Capacity Act (NI) 2016.

⁵² *Hugh Jordan v United Kingdom* (2001) ECHR 327, at para 105.

reasonable expedition, and there must be public scrutiny with the participation of the next-of-kin.⁵³

7.3 The establishment of an independent adult protection board to investigate serious cases can assist in ensuring that the state's investigative obligations are met. However, such investigations would need to be compliant with the requirements of Article 2 ECHR in order to discharge this duty.

7.4 The Commission recommends that an independent adult protection board be established, where one of its functions is to investigate serious cases. The board should ensure that its investigations are carried out in a manner consistent with Article 2 of the ECHR including that they are independent, prompt with reasonable expedition, and involve public scrutiny and the participation of the next-of-kin.

8.0 Cooperation, information sharing, and power to access financial records

8.1 The consultation document proposes the introduction of a statutory duty for certain organisations to cooperate with the relevant HSC Trust where there is reasonable cause to suspect that an 'adult is at risk and in need of protection' and it does not conflict with the exercise of its functions.⁵⁴ The consultation document further queries whether there should be an additional power to access financial records where there is reasonable cause to suspect that an adult is at risk of financial abuse and in need of protection.⁵⁵

8.2 The sharing of personal information entails an interference with that individual's right to private life under Article 8 of the ECHR. An interference must therefore be justified in pursuit of legitimate aims that are necessary in a democratic society, consistent with Article 8(2) of the ECHR.

8.3 With respect to medical records, the ECtHR has recognised that "respecting the confidentiality of health data is a vital principle in the legal

⁵³ Ibid, at paras 105 – 109.

⁵⁴ Department of Health 'Legislative Options to inform the development of an Adult Protection Bill for Northern Ireland: Consultation Document', 17 December 2020, at para 2.80.

⁵⁵ Department of Health 'Legislative Options to inform the development of an Adult Protection Bill for Northern Ireland: Consultation Document', 17 December 2020, at para 2.82.

system of all the contracting parties to the Convention. It is crucial not only to respect the sense of privacy of the patient but also to preserve his or her confidence in the medical profession and in the health services in general.”⁵⁶

- 8.4 If a duty to cooperate and share information is introduced, such duty must be proportionate and set out in legal rules that are accessible and reasonably clear. Safeguards must be put in place so that it is clear what information may be shared, for what purposes, and for how long.
- 8.5 In the absence of proposed legislative wording, it would be more appropriate for the Commission to comment on the compatibility of a duty to cooperate, share information and power to access financial records with the international human rights framework at a later stage.
- 8.6 The Commission recommends that any provisions relating to the cooperation, information sharing and power to access financial records are accompanied by effective safeguards circumscribing how the information can be retained and used in accordance with Article 8 ECHR. Any exercise of powers under these provisions should follow a human rights based approach.**

9.0 Offences of ill-treatment and wilful neglect

- 9.1 Section 267 of the Mental Capacity (NI) Act 2016 makes it an offence to ill-treat, or wilfully neglect a person who lacks capacity. During the passage of the then Bill, the Commission advised that the Bill should provide a free standing offence where an individual, who has the care of another individual by virtue of being a care worker, ill-treats or wilfully neglects that individual.⁵⁷ This would have reflected provisions within the Criminal Justice and Courts Act 2015, which applies to England and Wales. However, the Bill was not amended to provide for a freestanding offence.
- 9.2 The Commission therefore supports the introduction of new ‘care worker’ and ‘care provider’ offences of ill treatment and wilful neglect, to address this gap in the law so that individuals being**

⁵⁶ *Z v Finland* (1997) ECHR 10, at para 95.

⁵⁷ NI Human Rights Commission, ‘Response to Public Consultation on the Draft Mental Capacity (NI) Bill’, September 2014, at paras 88–90; UK Independent Mechanism, ‘Disability rights in Northern Ireland: Supplementary submission to inform the CRPD List of Issues on the UK’, February 2017, at 17.

cared for with capacity are also protected from ill-treatment and/or wilful neglect.

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