



Adoption and Children (NI) Bill Consultation: Key Human Rights Aspects

## *Summary*

The Northern Ireland Human Rights Commission:

8. broadly welcomes the proposed reforms which follow on from the UN Convention on the Rights of the Child Committee's specific recommendation on adoption legislation. The NIHRC further welcomes the framing of key issues in terms of human rights standards and the commitment to place measures to improve human rights protections on a statutory footing.

13. welcomes the commitment to the fundamental principle of the best interests of the child in accordance with the UN Convention on the Rights of the Child and to its primary consideration at every stage of the adoption process.

15. advises that in all decisions relating to adoption, including arrangements for post adoption contact, the best interests of the child should be the paramount consideration and the primary duty of the relevant Trust should be to safeguard the child's best interests.

21. welcomes the consultation's commitment to enhance the child's participation and right to be heard within the adoption framework.

24. recommends that the Department undertake a full costings exercise, outlining the methods by which proposed measures are to be adequately funded. The NIHRC further recommends that the resources allocated should ensure that the reforms can be effectively implemented to meet the human rights standards and policy aims outlined in the consultation.

32. recommends that the consultation and proposed Bill outline in detail specific measures to be taken to ensure non-discrimination against same-sex couples and individuals in the adoption process. In light of the Court of Appeal ruling, the NIHRC recommends that clear and appropriate revised guidance be issued and effectively publicised by the Department outlining the current state of the law for the benefit of those involved in the adoption process, either as employees or as prospective adoptive parents.

35. welcomes measures to strengthen protections available to children subject to inter-country adoption and highlights that safeguards and standards for inter-country adoption should be equivalent to those existing in the case of national adoption

41. welcomes measures to establish an information system and

## *Introduction*

1. The Northern Ireland Human Rights Commission (NIHRC) pursuant to Section 69 (1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of Human Rights.<sup>1</sup> In accordance with this function the following statutory advice is submitted to the Department of Health in response to the consultation on legislative proposals in an Adoption and Children (Northern Ireland) Bill.

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

- European Convention on Human Rights (ECHR) [UK ratification 1951];
- The European Convention on the Adoption of Children (1967) [UK ratification 1967];
- The International Covenant on Civil and Political Rights (ICCPR) [UK ratification 1976];
- The International Covenant on Economic, Social and Cultural Rights (ICESCR) [UK ratification 1976];
- The UN Convention on the Rights of the Child (CRC) [UK ratification 1991];
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption [UK ratification 2003]; and
- The Convention on the Rights of Persons with Disabilities [UK ratification 2009].

3. The NI Executive is subject to the obligations contained within these international treaties by virtue of the United Kingdom's (UK) ratification.

4. Section 24 (1) of the Northern Ireland Act 1998 provides that "A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act – (a) is incompatible with any of the Convention [ECHR] rights."

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

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<sup>1</sup> Northern Ireland Act 1998, Section 69(1).

- The European Convention on the Adoption of Children [UK signature 2008]<sup>2</sup>
- UN Guidelines for the Alternative Care of Children, A/Res/64/142, 24 February, 2010

### *Rights-based approach*

6. The ministerial foreword to the Department of Health's consultation document on a proposed Adoption and Children's Bill (the consultation) notes that 'adoption legislation in the north of Ireland is almost 30 years old.'<sup>3</sup> In its most recent concluding observations on the United Kingdom, the UN Committee on the Rights of the Child (UN CRC Committee) noted that the 'adoption procedure in Northern Ireland [remains] outdated and not in line with the Convention [on the rights of the Child]'.<sup>4</sup> The UN CRC Committee recommended that the NI Executive '[e]xpeditiate the approval and enactment of the Adoption and Children Bill in Northern Ireland'.<sup>5</sup> The NIHRC recommended in its report on Alternative Care and Children's Rights in Northern Ireland that the Adoption and Children Bill 'should be expeditiously brought forward'<sup>6</sup>

7. The consultation's ministerial foreword further acknowledges that 'our key aim is to enhance the existing legal framework for adoption to make it more consistent with the principles and provisions of the Children (Northern Ireland) Order 1995 and international human rights requirements.'<sup>7</sup> The consultation responds to one of the UN CRC Committee's specific recommendations to update adoption legislation and frames key topics in the consultation within human rights contained within the Convention on the Rights of the Child.

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<sup>2</sup> The UK Mission at Geneva has stated, 'The UK's approach to signing international treaties is that we only give our signature where we are fully prepared to follow up with ratification in a short time thereafter.' See, UK Mission at Geneva, 'Universal Periodic Review Mid-term Progress Update by the United Kingdom on its Implementation of Recommendations agreed in June 2008' (March 2010) on recommendation 22 (France).

<sup>3</sup> Consultation, p. 3, Ministerial foreword.

<sup>4</sup> UN Committee on the Rights of the Child, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/5, 12 July 2016, para. 52(g).

<sup>5</sup> UN CRC Committee concluding observations 2016, para. 53(g).

<sup>6</sup> Alternative Care and Children's Rights in Northern Ireland (2015), p162

<sup>7</sup> Consultation, p. 4.

**8. The NIHRC broadly welcomes the proposed reforms which follow on from the UN Convention on the Rights of the Child Committee’s specific recommendation on adoption legislation. The NIHRC further welcomes the framing of key issues in terms of human rights standards and the commitment to place measures to improve human rights protections on a statutory footing.**

*Best interests of the child*

9. Article 21 of the CRC requires that the best interests of the child are at the core of decisions on adoption. In addition to the requirement to take decisions regarding adoption in the child’s best interests, UN CRC Committee General Comment No. 14 (2013) stated that in adoption cases, the child’s best interests are not only a primary consideration, but the paramount consideration, such that this is to be the determining factor above all others.<sup>8</sup>

10. The NIHRC highlighted in its report on Alternative Care and Children’s Rights measures to enhance protections for the best interest of the child, including through amendments to the family justice system. The NIHRC recommended that the Department should:<sup>9</sup>

(17) ensure that continuous child impact assessments and evaluations are carried out at all levels of government in legislation and policy development, as well as delivery, concerning children. These assessments and evaluations should consider the particular needs of children in care.

(18) take steps to improve the availability of appropriate placements for children in care, which should be based on the child’s best interests.

(19) collect and publish data regarding placement moves for children in care and the reasons for the moves, capturing the entire time a child spends in care. Based on an analysis of the information gathered the Department should identify patterns and trends and bring forward proposals to increase placement stability for children in care.

(20) lead and liaise with the DoJ to assess the adequacy of permanency planning at social services and court levels and consider necessary reforms to ensure timely permanence planning and better outcomes for children.

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<sup>8</sup> UN CRC Committee, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, CRC/C/GC/14, 29 May 2013, p. 6.

<sup>9</sup> The recommendations were addressed to the former Department of Health, Social Services and Public Safety

(21) consider the impact of changes of social workers on children in care, review the support roles as children move through the care system and bring forward proposals to achieve greater continuity of social workers for children in contact with children's services.<sup>10</sup>

11. The 2016 Concluding Observations of the UN CRC Committee on the UK recommended 'on the right of the child to have his or her best interests taken as a primary consideration [that the UK], in all parts of its territory:

(a) Ensure that this right is appropriately integrated and consistently interpreted and applied in all legislative, administrative and judicial proceedings and decisions and in all policies, programmes and projects that are relevant to and have an impact on children;

(b) Develop procedures and criteria to provide guidance to all relevant persons in authority for determining the best interests of the child in every area and for giving it due weight as a primary consideration.'<sup>11</sup>

12. One of the purposes of the Bill contained in the consultation is to 'make adoption law more child centred', ensuring that the child's welfare is 'the paramount consideration in all decisions relating to adoption'.<sup>12</sup> This is reflected in the proposed introduction of welfare checklists to be used by adoption authorities during the decision-making process and the introduction of a statutory principle stating that delay to adoption cases 'is likely to prejudice the child's welfare'.<sup>13</sup> The move towards consent rather than agreement to adoption and streamlining of exceptions to parental consent also improves the child-centred nature of the process. The consultation also aligns specific parts of the adoption procedure with this fundamental principle, including the creation of a special guardianship panel to determine whether special guardianship is in a child's best interests.<sup>14</sup> Considerations of a child's best interests are also intended to form a central part of decisions relating to 'dually approved carers', that

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<sup>10</sup> NIHR, Alternative Care and Children's Rights in Northern Ireland, Recommendations 17-21

<sup>11</sup> UN CRC Committee concluding observations 2016, para 27

<sup>12</sup> Consultation, p. 7.

<sup>13</sup> Consultation, para. 1.1.

<sup>14</sup> Consultation, para. 1.2.23.

is, foster carers who have also been approved to adopt, or prospective adopters who have also been approved to foster.<sup>15</sup>

**13. The NIHRC welcomes the commitment to the fundamental principle of the best interests of the child in accordance with the UN Convention on the Rights of the Child and to its primary consideration at every stage of the adoption process.**

14. The Department propose the introduction of two new post-adoption contact orders. As raised earlier the UN CRC Committee has emphasised that the best interests of the child should not simply to be 'a primary consideration' but 'the paramount consideration' in proceedings relating to adoption.<sup>16</sup> The NIHRC notes with concern that the Department report that 'inappropriate and potentially damaging contact arrangements' have previously been arranged.<sup>17</sup>

**15. The NIHRC advises that in all decisions relating to adoption, including arrangements for post adoption contact, the best interests of the child should be the paramount consideration and the primary duty of the relevant Trust should be to safeguard the child's best interests.**

*The right of the child to be heard and participate*

16. The right of the child to be heard and taken seriously is one of the four general principles of the UNCRC. It requires actions to be taken to 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.'<sup>18</sup> Specific requirements have been outlined to ensure fulfilment of these rights, including that the views of the child must be given 'due weight in accordance with the age and maturity of the child.'<sup>19</sup>

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<sup>15</sup> Consultation, para. 2.4.3 and 2.4.4.

<sup>16</sup> UN CRC Committee, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, CRC/C/GC/14, 29 May 2013, p. 6.

<sup>17</sup> Consultation, para 1.3.13

<sup>18</sup> UNCRC Committee, General Comment No 12 (2009) on the right of the child to be heard, paras 20-27

<sup>19</sup> UNCRC, Art. 12

17. Procedural rights developed in ECtHR jurisprudence on the right to family life include the right to participation.<sup>20</sup> The UN Guidelines for the Alternative Care of Children further note that the preparation, enforcement and evaluation of a protective measure for a child should be carried out, to the greatest extent possible, with the participation of his or her parents or legal guardians and potential foster carers and caregivers, with respect to his or her particular needs, convictions and wishes.<sup>21</sup>

18. The 2016 Concluding Observations of the UN CRC Committee on the UK recommended that the UK '[e]stablish 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 younger children and children in vulnerable situations, such as children with disabilities'.<sup>22</sup>

19. The NIHRC in its report on Alternative Care and Children's Rights in Northern Ireland recommended a review of 'the protection and fulfilment of children's right to be heard and the right to participate throughout the care and legal systems and bring forward proposals for necessary reforms'.<sup>23</sup>

20. The Consultation proposes an amendment of Article 18(4) of the Children (Northern Ireland) Order 1995 'to require authorities to ascertain the wishes and feelings of a child in need in relation to suitable services and to give such wishes and feelings due consideration'.<sup>24</sup>

**21. The NIHRC welcomes the consultation's commitment to enhance the child's participation and right to be heard within the adoption framework.**

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<sup>20</sup> *Ageyevy v. Russia*, ECtHR, Application No. 7075/10, 18 April 2013, para 128. See also, *Saviny v Ukraine*, ECtHR, Application No. 39948/06, 18 December 2008, para 51; *K and T v Finland*, ECtHR, Application No. 25702/94, 12 July 2001. (GC), para 173; *A.K. and L. v. Croatia*, ECtHR, Application No. 37956/11, 8 Jan 2013, para 63. See also, Guidelines for the Alternative Care of Children, A/Res/64/142, 24 February, 2010, para 66

<sup>21</sup> Guidelines for the Alternative Care of Children, A/Res/64/142, 24 February, 2010, para 65

<sup>22</sup> UN CRC Committee concluding observations 2016, para 31(a)

<sup>23</sup> NIHRC, Alternative Care and Children's Rights in Northern Ireland, Recommendation 16

<sup>24</sup> Consultation, p. 10.



### *Maximum available resources*

22. Article 4 of the CRC provides that in taking measures to protect the economic, social and cultural rights of children, 'States Parties shall undertake such measures to the maximum extent of their available resources'. In its General Comment No. 15, the UN CRC Committee noted that the best interests of the child must be placed at the centre of all decisions affecting their health and development, including the allocation of resources.<sup>25</sup> Where resources are demonstrably inadequate, 'States are still required to undertake targeted measures to move as expeditiously and effectively as possible towards the full realization' of children's rights and must not take 'any retrogressive steps that could hamper the enjoyment' of children's economic, social and cultural rights.<sup>26</sup> The UN CRC Committee has specifically recommended the UK 'allocate the maximum extent of available resources for the implementation of children's rights, with a special focus on eradicating child poverty and reducing inequalities within and across all jurisdictions'.<sup>27</sup>

23. The proposed Bill aims to reform the 1987 Order to provide for advocacy services for looked after children, former looked after children, special guardianship children or adopted children who wish to make representations about the discharge of any of the authority's functions under the relevant part of the Order.<sup>28</sup> This would require additional resources to ensure personnel and financial resources are available in order to ensure such a service is carried out to a high standard. Despite this, no indication is given in the consultation as to how such services might be funded. This is indicative of a broader concern that the consultation does not include financial allocations for important structural additions to the adoption framework including the NI Adoption and Children Act Register and any Independent Reviewing Officer (IRO). Notably, the Department has asked for views on the necessity of an IRO service. Any move to make review mechanisms more robust must ensure that sufficient resources are provided to ensure such functions can be carried out effectively and are used in the most appropriate and effective manner, minimising the possibility for inefficiency, overlap and delay.

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

<sup>26</sup> UN CRC Committee General Comment No. 15 (2013), p. 9.

<sup>27</sup> UN CRC Committee, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/5, 12 July 2016, para. 13.

<sup>28</sup> Consultation, p. 11.

**24. The NIHRC recommends that the Department undertake a full costings exercise, outlining the methods by which proposed measures are to be adequately funded. The NIHRC further recommends that the resources allocated should ensure that the reforms can be effectively implemented to meet the human rights standards and policy aims outlined in the consultation.**

*Same-sex adoption*

25. A number of international human rights treaties enshrine the right to freedom from discrimination on grounds of sexual orientation including Article 2, International Covenant on Civil and Political Rights (ICCPR), and Article 2, International Covenant on Economic, Social and Cultural Rights (ICESCR). This also extends to equality before the law and equal protection under the law as enshrined in Article 26, ICCPR. The UN Office of the High Commissioner for Human Rights and the Human Rights Committee have explicitly stated that these provisions also prohibit discrimination on the basis of sexual orientation and gender identity.<sup>29</sup> Specifically in regard to parents, discrimination is prohibited on this basis by Article 2 of the CRC. Indeed, the obligation to protect individuals from discrimination on the basis of sexual orientation extends to ensuring that married and unmarried same-sex couples are treated in the same way and entitled to the same benefits, which may extend to treatment within national adoption frameworks.<sup>30</sup>

26. The European Convention on Human Rights (ECHR) enshrines in Articles 8 and 14 the right to private and family life and freedom from discrimination. The European Court of Human Rights (ECtHR) has found a violation of the right to a private and family life, applying the best interests of the child principle, in the case where domestic authorities refused an application for adoption on the grounds of sexual orientation.<sup>31</sup> The ECtHR has further held that allowing unmarried heterosexual couples to adopt while denying same-sex couples this right amounts to discrimination.<sup>32</sup>

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<sup>29</sup> UN Office of the High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (2012), p. 38, <http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>; see, *Toonen*, CCPR/C/50/d/499/1992, para. 8.7; *Young v. Australia*, CCPR/C/78/d/941/2000, para. 10.4; *X v. Colombia*, CCPR/C/89/d/1361/2005, para. 9.

<sup>30</sup> *Born Free and Equal*, p. 53; *Young* (2000), para. 10.4.

<sup>31</sup> App. No. 00043546/02, 22 January 2008.

<sup>32</sup> App. No. 19010/07, 19 February 2013.

27. In addition to the provisions and jurisprudence emanating from the ECtHR, the Council of Europe has also adopted the European Convention on the Adoption of Children (2008) (ECAC) in order to update the European Convention on the Adoption of Children (1967). The ECAC enshrines various fundamental rights protecting children and parents, including the permissibility of same-sex adoption under Article 7.

28. By way of judicial review the NIHRC challenged Articles 14 and 15 of the Adoption (NI) Order 1987 on the grounds that the criteria to be fulfilled by a person seeking the making of an adoption order in respect of a child under the 1987 Order were unjustifiably discriminatory in relation to those in same sex relationships contrary to Articles 8 and 14 of the ECHR. The Northern Ireland High Court held that to prevent someone from being eligible to apply to adopt on the basis of their relationship status was discriminatory.<sup>33</sup> The court read down Articles 14 and 15 stating:

‘(a) Notwithstanding Articles 14 and 15 of the Adoption (Northern Ireland) Order 1987 it does not prevent couples who are not married, or in a Civil Partnership, from applying to adopt a child pursuant to the terms of that Order. All individuals and couples, regardless of marriage status or sexual orientation are eligible to be considered as an adoptive parent(s);  
(b) Any guidance published by the [the Department of Health] must accord with the declaration at (a) above.’<sup>34</sup>

29. The Northern Ireland High Court followed the House of Lords case in *Re P* [2008] where it was decided that being unmarried should not be a bar to applying to adopt a child in NI.<sup>35</sup> In dismissing an appeal made by the Department against the ruling of the Northern Ireland High Court, the Northern Ireland Court of Appeal commented on the nature of Departmental guidance for both social workers and the public:

Any Departmental guidance to those looking for advice or information about adoption eligibility criteria should state the law clearly and accurately and should take account of relevant case law... If it is to avoid being misleading Departmental guidance must take account of the effect of the law as it

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<sup>33</sup> *NIHRC’s Application* [2012] NIQB 77, 18 October 2012, para. 69.

<sup>34</sup> In the Matter of an Application by the Northern Ireland Human Rights Commission for Judicial Review, 26<sup>th</sup> October 2012, The Issue of Relief

<sup>35</sup> *Re P* [2008] UKHL 38, para. 135, per Lord Mance.

currently stands. It must thus take account of the outcome of the present appeal.<sup>36</sup>

30. The Department's guidance was amended following the court case although clearly establishing the position within statute is preferable and is in keeping with the rights based approach adopted in the consultation.

31. The consultation has as one of the proposed Bill's primary aims 'amending the eligibility to apply to adopt criteria to enable one person or a couple (who are married, civil partners or two persons, whether same sex or different sex, living as partners in an enduring family relationship) to apply to adopt'.<sup>37</sup> It thereby seeks to reform the 1987 Order to ensure compliance with international human rights standards. However, the consultation does not provide further detail or proposed measures to ensure the decision-making process for adoption embeds this equal treatment principle, nor provide further detail or proposed measures to improve training and information to be provided to authorities in making decisions regarding adoption. No mention is made of plans to update Departmental guidance for the benefit of social workers and the public.

**32. The NIHRC recommends that the consultation and proposed Bill outline in detail specific measures to be taken to ensure non-discrimination against same-sex couples and individuals in the adoption process. In light of the Court of Appeal ruling, the NIHRC recommends that clear and appropriate revised guidance be issued and effectively publicised by the Department outlining the current state of the law for the benefit of those involved in the adoption process, either as employees or as prospective adoptive parents.**

*Enhanced arrangements for inter-state adoption*

33. Articles 21 (b) – (d) of the CRC enshrines procedures and protections for inter-country adoption. These include that inter-country adoption may be considered as an alternative to adoption within the child's country of origin and that in such cases, inter-country adoption must enjoy 'safeguards and standards equivalent to those existing in the case of national adoption'. No financial gain must accrue to those in other countries engaged in inter-country adoption.

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<sup>36</sup> NIHRC's Application [2013] NIQB 37, para. 39.

<sup>37</sup> Consultation, p. 9.

34. The consultation introduces plans to 'strengthen restrictions on bringing children into the north of Ireland'.<sup>38</sup>

**35. The NIHRC welcomes measures to strengthen protections available to children subject to inter-country adoption and highlights that safeguards and standards for inter-country adoption should be equivalent to those existing in the case of national adoption**

*Collection of data, assessment, and learning lessons*

36. Article 31 of the CRPD obliges state parties to 'undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention'. General Comment No. 5 of the UN CRC Committee states that '[i]t is essential not merely to establish effective systems for data collection, but to ensure that the data collected are evaluated and used to assess progress in implementation, to identify problems and to inform all policy development for children.'<sup>39</sup>

37. The 2016 Concluding Observations of the UN CRC Committee on the UK recommended 'that the Government of Northern Ireland expedite the finalization of a child rights indicator framework, covering all areas of the Convention and taking into account the conceptual and methodological framework set out in the Office of the United Nations High Commissioner for Human Rights publication entitled "Human Rights Indicators: A Guide to Measurement and Implementation".'<sup>40</sup>

38. The consultation provides 'the necessary powers for the Department to make regulations requiring the HSC Board (or a designated/nominated organisation) to establish and maintain an information system to be known as the Northern Ireland Adoption and Children Act Register.'<sup>41</sup>

39. The NIHRC recommended in its report on Alternative Care and Children's Rights in Northern Ireland that:

'A comprehensive and reliable data collection and assessment system should be established for Northern Ireland. This should build

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<sup>38</sup> Consultation, p. 10.

<sup>39</sup> UN CRC Committee General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/C/2003/5, 27 November 2003, section F para 48

<sup>40</sup> UN CRC Committee concluding observations 2016, para 14

<sup>41</sup> Consultation, para 2.6.2

on existing data collection and ensure systematic monitoring and evaluation of systems (impact analyses), services, programmes and outcomes based on indicators aligned with universal standards, and adjusted for and guided by locally established goals and objectives.<sup>42</sup>

40. The NIHRC recognises that the Health and Social Care (Control of Data Processing) Act 2016 will enable the use of health and social care information for the benefit of health and social care research.

**41. The NIHRC welcomes measures to establish an information system and highlights the need for a holistic approach to data collection around children with existing measures.**

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<sup>42</sup> See NIHRC, *Alternative Care and Children's Rights in Northern Ireland*, Recommendations 10-15