NICCY Advice on Public Consultation on Regional Policy on the Use of Restrictive Practices in Health and Social Care Settings

Introduction

The Commissioner for Children and Young People (NICCY) was established in accordance with ‘The Commissioner for Children and Young People (Northern Ireland) Order’ (2003) to safeguard and promote the rights and best interests of children and young people in Northern Ireland. This legislation confers on NICCY a range of powers and duties including keeping under review the adequacy and effectiveness of law, practice and services, advising government, monitoring delivery, promoting an understanding of children’s rights and best interests and bringing, assisting or intervening in legal proceedings. The remit of the Office covers children up to 18 years, or 21 years of age if the young person has a disability or is care experienced.

NICCY welcomes the aim of this draft policy which is to provide a regional framework to eliminate or minimise use of restrictive practices by integrating best practice in the management of restrictive interventions, restraint and seclusion across all areas where health and social care is delivered in Northern Ireland.

The use of any form of restrictive practice engages individual human rights and therefore as the statutory body with responsibility for advising relevant authorities on children’s rights and best interests, we would like to take the opportunity to provide some reflections on the draft regional policy from a child rights perspective. In doing so we will refer to relevant articles of the UNCRC and Concluding Observations from the periodic reports produced by the Committee on the Rights of the Child.

The regional draft policy makes general reference to rights as being an important principle which underpins the policy, with direct mention given to the Human Rights Act 1998 which gives effect to the European Convention of Human Rights (ECHR). However, the United Nations Convention on the Rights of the Child (UNCRC) which is the main Human Rights Instrument applied in respect of children and young people, is only listed in the Appendix, without any detail provided in the body of the document as to how the policy is child rights compliant. Similarly, the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is only referenced in the Appendix without further detail on the specific child rights Articles engaged as a result of the implementation of this policy.

Children Rights

The ECHR, UNCRC and the UNCRPD are key Human Rights Treaties which outline the role of State Parties in ensuring that no one is subjected to torture or cruel, inhuman or degrading treatment or punishment.

The Committee on the Rights of the Child (Committee) is very clear that inappropriate use of restraint and seclusion is a breach of children’s rights which engages a number of articles of the UNCRC, particularly Articles 37, 25 and 19 as set out below:

**Article 37** sets out that States Parties shall ensure that:

1. No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

1. 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.
2. 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 take account of the needs of a person of his/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.
3. Every child deprived of his/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.

Article 25 sets out that States Parties recognise 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 19** states that:

(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

Furthermore, the four General Principles of the UNCRC are fundamental to the realisation of other rights and these must be embedded in all legislation, Government policy and practice. These are Articles 2 (non-discrimination), 3 (best interests as a primary consideration), 6 (right to life, survival and development) and 12 (right to be heard).

The UN Committee on the Rights of the Child (Committee) through its periodic reporting to the UK State Party (including Northern Ireland as a devolved jurisdiction) has repeatedly outlined steps that should be taken in order to prevent use of restrictive practices infringing on children’s rights. The Committee made the following Concluding Observations in its most recent periodic report in 2016, under para 39 (b-d)[[1]](#footnote-1), outlined in full below:

**Paragraph 39.**

(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 advice from the Committee was reflected in NICCYs most recent Statement on Child Rights in NI Report published in 2020. With respect to use of restraint and seclusion it made the following calls to Government:[[2]](#footnote-2)

In order to protect children’s rights, Governments must, as a matter of urgency:

1. Ban the use of restraint and seclusion for disciplinary purposes, and the use

of any technique designed to inflict pain on children;

2. Ensure that restraint and seclusion are only used as a measure of last resort,

to prevent harm to the child or others; and

3. Make reporting of the use of restraint and seclusion mandatory across all settings.

**General Comments**

**Status of the Policy**

We acknowledge and welcome the fact that the policy sets out the Departments ‘clear expectation’ that the policy ‘guidance is implemented in full’ (1.10), we also recognise that there are legal requirements for some restrictive practice, however, a lack of a statutory basis for the guidance as a whole may make operationalising it slower and more difficult. (Please also see NICCYs comments on legislative framework below)

The successful roll-out of this policy will require the necessary staffing levels, skills mix and specialisms to be in place. It will also require continuity of staff to ensure that training can be fully embedded into practice. Measures to recruit and retain staff must be taken forward to ensure children’s facilities are equipped to deliver safe and effective care.[[3]](#footnote-3) Furthermore, educating staff on the human rights implications of applying restrictive practices provides important underpinning principles and values, vital in guiding staff to make informed decisions about when and how to apply these.

NICCY firmly recommends that sufficient resource is provided to ensure that facilities where restrictive practices are applied to children have the required staffing levels, skills mix and training. Staff training on the appropriate use of restrictive practices must be mandatory and include a strong link to the protection and promotion of rights.

Child Rights Impact

NICCY welcomes the fact that the Department of Health has undertaken a partial Child Rights Impact Assessment process on this policy. While not a statutory requirement, it is good practice to conduct CRIAs on new policies in order to inform decision-makers on how the policy in question can be amended to deliver effectively on children’s rights. However, it is NICCY’s considered view that that the CRIA screening exercise did not sufficiently consider the impact of the policy proposals on children. More specifically it did not describe in sufficient detail, the aims of the policy proposals on children or the impact of the proposals on specific rights of children.

The CRIA screening document for the draft guidance states that a full CRIA exercise of the draft regional policy is not required because -

 *“it is cognisant of and compliant with international rights obligations of the ECHR, UNCRPD and UNCRC. As such, it will have a positive impact on children’s rights.”*

However, unless the detail of the policy proposals are assessed for their impact on children’s rights it is not possible to come to this conclusion.[[4]](#footnote-4)

In its General Comment No.14 on the Best Interests of the Child, the UN Committee on the Rights of the Child provides further detail about the different elements and procedures that need to be in place and followed as part of the CRIA process. The Committee advises that:

*“At a minimum, they must use the Convention and its Optional Protocols as a framework, in particular ensuring that the assessments are underpinned by the general principles and have special regard for the differentiated impact of the measure(s) under consideration on children.”[[5]](#footnote-5)*

We are confident that if a child rights impact assessment had been carried out as part of the early planning process for this guidance, it would have highlighted the need for a specific section focused on considerations for use of restrictive practice on children. NICCY is currently engaging with Departments and Agencies on child rights proofing processes to embed best practice in development of policies, strategies and legislation in order to ‘get things right from the outset’.

Furthermore, if the equality impact screening and assessment process had considered the potential for differential impacts in respect of the use of restrictive practices on persons of different age and persons with or without a disability, we would expect the draft policy to provide a section which outlines specific guidance for children’s services.

Guidance on Restraint and Seclusion in Health and Personal Social Services published by RQIA in 2004 by a human rights working group raised this important issue of the differential impact on policy proposals on the basis of age and / or disability: [[6]](#footnote-6)

*“specific areas of concern in relation to the issues of restraint and seclusion may arise for young people, older people and persons with a disability who are in a position of being cared for, whether in a residential setting or otherwise. It is therefore possible that these proposals could differentially impact on persons of different age and persons with or without a disability.”*

**The use of restrictive practices can in certain circumstances, amount to deprivation of liberty, one of the most serious breaches of an individual’s rights, for this reason NICCY strongly recommends that a full child rights impact assessment is carried out on these policy proposals.**

**Scope of the Policy**

We understand that this is a general policy which applies to all health and social care settings where restrictive practices occur. However, as already stated we would have expected a section focussing on age specific considerations for under 18s, and for children with complex needs, such as physical or neurodevelopmental disabilities. Where a best practice framework applies to children and young people it must be informed by and refer to a child specific evidence base. For example, we note with concern that one of the key sources referenced in this draft policy, the Regulation and Quality Improvement Authority (RQIA) report published in 2014 on use of restrictive practices in mental health and learning disability hospitals, did not include children’s services.[[7]](#footnote-7)

It is essential that staff have clear, and age-specific guidance on what is or is not appropriate when applying restrictive practices to children and young people. This is fundamental to ensuring that children’s best interests are a primary consideration in all decision making and that there is explicit clarity for all including for reporting purposes when the guidance has been adhered to or indeed if it has been breached.

The following bullet-points set out some of the areas we would have expected to see in this draft policy which are specific to use of restraint and seclusion on children and young people:

* Clearly defined and understood definition of ‘restrictive practices’ for children and young people. For example, both the Committee on the Rights of the Child and NICE guidelines state that restriction in access to parent / carer should never be used to manage behaviour.[[8]](#footnote-8) There is also the new dimension of social media access for children while in HSC facilities for care / treatment which needs to be understood in the context of behavioural management and safeguarding and of children rights and freedoms.[[9]](#footnote-9)
* Specific reference to age-related levels of physical, intellectual, emotional and psychological maturity which will necessitate modifications when considering and applying restrictive practices with children and young people.
* Child safeguarding considerations - we are aware of children’s facilities seeking assistance from the PSNI in situations where they are struggling to manage the behaviour of young people in their care. We do not see reference to use of external agencies and the agreed regional guidelines and best practice for this.
* Greater detail on the practical implications of the current evolving / dual legal framework which applied to children under and over 16 yrs of age which means that there are two legal frameworks in place for those under and over 16’.

**NICCY strongly recommends that a section of the regional policy sets out specific considerations regarding use of restrictive practices on children and young people. This includes where external agencies such as the PSNI are asked to assist.**

This regional policy does not include residential care homes, education or youth justice settings. Whilst we recognise that not all of these areas fall within the remit of the Department of Health, they may require cross-departmental and inter-agency co-operation in order to ensure children receive co-ordinated support. A recent court ruling included explicit comment on the need for the Department of Health and Department of Education to collaborate on the development of guidance on the use of restraint and seclusion in educational settings.[[10]](#footnote-10) Furthermore, the Children’s Services Co-operation (NI) Act 2015[[11]](#footnote-11) sets out a statutory requirement on all children’s authorities, which includes government departments and HSCTs to work together to further the wellbeing of children and young people.

**NICCY recommends that all protocols and guidance on the use of restrictive practices in health and social care settings take full account of statutory responsibilities to co-operate with other children’s authorities to further the wellbeing of children and young people.**

**Monitoring and Reporting**

The UN Committee had raised concerns about the lack of disaggregated data on the use of restrictive practices across services / settings during previous State Party examinations, and as outlined above, in the most recent examination they recommended a focus on the collection and publication of disaggregated data on the use of restraint and other restrictive interventions on children (39 (d).

We note reference to a monitoring and assurance process under Section 4 of the draft regional policy (Actions 7-12). In particular we note the role of the Health and Social Care Board (HSCB) (or its replacement) in supporting HSCTs to develop a standardised data collation template (Action 9) and establish a performance management process with ‘mandatory’ reporting (Action 10). These actions are very welcome, as they reflect previous advice by NICCY and others, however, it would be beneficial if further clarity could be provided on how and when the systems to deliver a monitoring and assurance process are expected to be in place.

**NICCY recommends that a robust, regionally standardised process of monitoring and mandatory reporting on use of restrictive practices on children in health and social care settings must be established without delay.**

**Legislative Framework**

There are a number of points which we would wish to make regarding the legislative framework around the use of restrictive practices on children and young people (pg 25-26).

The new mental capacity legislation in Northern Ireland provides a clearer legal definition of ‘deprivation of liberty’ and ‘restraint’ for those aged 16 and over.[[12]](#footnote-12) There will be a phased commencement of the provisions within the Mental Capacity Act (NI) 2016 (MCA), which means that the Mental Health Order 1986 (MHO) will continue to operate alongside the Act. Therefore, if any person can be detained under the MHO, then that framework must be applied. As there is no set date regarding the commencement of outstanding provisions within the MCA, it is important that the draft policy makes the practical implications very clear for health and social care services.

As it currently stands, even when the MCA does commence in all its parts, the MHO will remain the legislative framework for under 16s, however, the MHO does not reference restraint and seclusion. The Code of Practice, which accompanies the MHO, does, however, provide limited guidance on the use of restraint and seclusion generally. Section 5.33 requires every Unit of Management (i.e. HSCT) to have a policy on the use of all forms of physical restraint (physical restraint in the context of this guidance includes locked ward doors, time out and seclusion). Sections 5.32 – 5.53 of the Code of Practice gives guidance on restraint, locked doors on open wards, time out and seclusion, however, no specific reference is made to children and young people.[[13]](#footnote-13)

Paragraph 6.17 of the draft regional policy states that ‘an adult with parental responsibility can provide consent for a child’ (to use of restrictive practices) and highlights the relevant legislation, including the MCA and MHO. The policy should also be clear about the role of the State in the context of a looked after child. We also note that a recent judicial review (Re D)[[14]](#footnote-14) concluded that no one can consent to confinement on behalf of a young person aged 16 or 17. The young person must either consent (capacity allowing) or authorisation sought.

**NICCY recommends that the regional policy on use of restrictive practices sets out very clearly all practical implications of the mental health legislative framework for health and social care services with respect to those aged under 18, to include updates to the policy and procedural documents as legislation changes or provisions are commenced.**

**Role of independent advocate**

We note that 6.21 of the draft policy refers to the important role of independent advocates in ensuring that service users have a voice and that their best interests are a primary consideration, however, the policy states an advocate should be involved if they are available.

*“Organisations should involve an independent advocate in all “best interests” decision-making processes, particularly where a restrictive practice is proposed, if there is an advocate available.”*

NICCY is firmly of the view that advocates should always be involved where restrictive practice is proposed. In these circumstances an independent advocate is a necessary part of ensuring that the ‘best interests’ principle is adhered to.

**NICCY recommends that the regional guidance is strengthened to state that an independent advocate should always be involved in “best interests” decision-making processes, particularly where a restrictive practice is proposed.**

**Seclusion**

The draft policy also states that the-

*“only seclusion suites are at adult mental health and learning disability hospitals. This will limit the risk of children in health and social care settings being subject to seclusion.”*

It is our understanding that ‘seclusion’ does happen in child health and social care settings. They may not be described as ‘seclusion suites’ but the act of seclusion is carried out and this needs to be specifically addressed in the regional policy with respect to children’s services. We also note that the procedural information on use of seclusion (appendix 7) does not include the independent advocate as part of the process.

**NICCY recommends that the use of seclusion in children’s health and social care settings should be specifically addressed in the regional policy, including the role of independent advocates as part of decision making and oversight.**

Consultation

We welcome the breadth of engagement that was undertaken to inform this draft policy, in particular service user representation. However, we would have expected that discussion groups or 1-2-1 sessions would have been facilitated with children from Beechcroft Child and Adolescent Mental Health Unit and the Iveagh Centre, - the two regional inpatient facilities in Northern Ireland which assess and treat children with mental health and / or challenging behaviour. It is not clear from the draft document that this happened.

Meaningful participation is a fundamental right as articulated by the UNCRC, in particular, Articles 12, 17 and 3, which establish young people’s rights as active participants at every level of decision-making impacting on their lives, in accordance with their age and evolving capacity. Furthermore, the UN Committee on the Rights of the Child (CRC) reflects on the need to give children agency in decision making processes that are central to their care and protection in General Comment No. 13, which states that:

“Children’s rights to be heard and to have their views given due weight must be respected systematically in all decision-making processes, and their empowerment and participation should be central to child caregiving and protection strategies and programmes” [[15]](#footnote-15)

**NICCY recommends that this regional policy sets out a requirement for all HSC settings where restrictive practices may be used to make their policy accessible to children, to include setting out their rights and how to make a complaint or provide feedback.**

Furthermore, due to the implications on human rights from the use of restrictive practices, NICCY would have expected the project board and / or the project development steering group to have included representatives from equality and human rights organisations and the health regulatory body, RQIA.

**NICCY recommends the involvement of a wide breadth of stakeholders in finalising this policy going forward, and in monitoring its implementation and evaluating its impact, this should include children and young people, parents and carers, representatives from equality and human rights organisations and RQIA.**

**Conclusion**

The Commissioner welcomes the Department’s work to develop regional guidance on the appropriate use of restrictive practice in health and social care settings. With respect to children, it is vital that staff responsible for their care are fully informed and supported to comply with child rights standards - this is a legal requirement but also a necessary part of the delivery of safe and effective services which have child safeguarding and best interests at their core. NICCY would be happy to discuss this response in more detail if that would be helpful.

For your convenience, the recommendations set out in this advice paper are listed below:

1. NICCY firmly recommends that sufficient resource is provided to ensure that facilities where restrictive practices are applied to children have the required staffing levels, skills mix and training. Staff training on the appropriate use of restrictive practices must be mandatory and include a strong link to the protection and promotion of rights.
2. **The use of restrictive practices can in certain circumstances, amount to deprivation of liberty, one of the most serious breaches of an individual’s rights, for this reason NICCY strongly recommends that a full child rights impact assessment is carried out on these policy proposals.**
3. **NICCY strongly recommends that a section of the regional policy sets out specific considerations regarding the use of restrictive practices on children and young people. This includes where external agencies such as the PSNI are asked to assist.**
4. **NICCY recommends that all protocols and guidance on the use of restrictive practices in health and social care settings take full account of statutory responsibilities to co-operate with other children’s authorities to further the wellbeing of children and young people.**
5. **NICCY recommends that a robust, regionally standardised process of monitoring and mandatory reporting on use of restrictive practices on children in health and social care settings must be established without delay.**
6. **NICCY recommends that the regional policy on use of restrictive practices sets out very clearly all practical implications of the mental health legislative framework for health and social care services with respect to those aged under 18, to include updates to the policy and procedural documents as legislation changes or provisions are commenced.**
7. **NICCY recommends that the regional guidance is strengthened to state that an independent advocate should always be involved in “best interests” decision-making processes, particularly where a restrictive practice is proposed.**
8. **NICCY recommends that the use of seclusion in children’s health and social care settings should be specifically addressed in the regional policy, including the role of independent advocates as part of decision making and oversight.**
9. **NICCY recommends that this regional policy sets out a requirement for all HSC settings where restrictive practices may be used to make their policy accessible to children, to include setting out their rights and how to make a complaint or provide feedback.**
10. **NICCY recommends the involvement of a wide breadth of stakeholders in finalising this policy going forward, and in monitoring its implementation and evaluating its impact, this should include children and young people, parents and carers, representatives from equality and human rights organisations and RQIA.**
1. 129 Para 39, CRC/C/GBR/CO/5, 12 July 2016 [↑](#footnote-ref-1)
2. [niccy-socrni-2-main-report-web-nov-20.pdf](https://www.niccy.org/media/3691/niccy-socrni-2-main-report-web-nov-20.pdf) [↑](#footnote-ref-2)
3. [Youth detention: solitary confinement and restraint - Joint Committee on Human Rights - House of Commons (parliament.uk)](https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/994/99408.htm) para 25-26 [↑](#footnote-ref-3)
4. Common Framework of Reference on Child Rights Impact Assessment A Guide on How to carry out CRIA- November 2020, [ENOC-Common-Framework-of-Reference-FV.pdf](http://enoc.eu/wp-content/uploads/2020/12/ENOC-Common-Framework-of-Reference-FV.pdf) [↑](#footnote-ref-4)
5. [Microsoft Word - 2013044186\_142042.DOC (ohchr.org)](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf) [↑](#footnote-ref-5)
6. [Microsoft Word - Restraint and Seclusion August 2005.doc (rqia.org.uk)](https://www.rqia.org.uk/RQIA/media/RQIA/Resources/Providers%20Training%20Guidance/restraint_and_seclusion_august_2005.pdf) [↑](#footnote-ref-6)
7. [0547a7dd-be6f-4dc0-a29f-1fabfc595b71.pdf (rqia.org.uk)](https://www.rqia.org.uk/RQIA/files/05/0547a7dd-be6f-4dc0-a29f-1fabfc595b71.pdf) [↑](#footnote-ref-7)
8. UNCRC Article 37 (c); NICE Guidance [violence-and-aggression-managing-violence-and-aggression-in-children-and-young-people (1).pdf](file:///C%3A%5CUsers%5CChristine.Irvine%5CDownloads%5Cviolence-and-aggression-managing-violence-and-aggression-in-children-and-young-people%20%281%29.pdf) section 6, p5. [↑](#footnote-ref-8)
9. Council of Europe- Guidelines to respect, protect and fulfil the rights of the child in the digital environment [16808d881a (coe.int)](https://rm.coe.int/guidelines-to-respect-protect-and-fulfil-the-rights-of-the-child-in-th/16808d881a) [↑](#footnote-ref-9)
10. <https://www.judiciaryni.uk/sites/judiciary/files/decisions/ML%20and%20Special%20Needs%20and%20Disability%20Tribunal%20and%20Others.pdf> (para 41) [↑](#footnote-ref-10)
11. [Children’s Services Co-operation Act (Northern Ireland) 2015 (legislation.gov.uk)](https://www.legislation.gov.uk/nia/2015/10/contents/enacted) [↑](#footnote-ref-11)
12. NICCY has provided detailed advice on the MCA as it went through parliament scrutiny process. NICCYs position is that all ages should fall under the MCA and that the MHO should be repealed. [↑](#footnote-ref-12)
13. [Microsoft Word - Restraint and Seclusion August 2005.doc (rqia.org.uk)](https://www.rqia.org.uk/RQIA/media/RQIA/Resources/Providers%20Training%20Guidance/restraint_and_seclusion_august_2005.pdf) para: 4.44 [↑](#footnote-ref-13)
14. <https://www.supremecourt.uk/cases/uksc-2018-0064.html> [↑](#footnote-ref-14)
15. CRC/C/GC/13, available at: https://www.refworld.org/docid/4e6da4922.html  [↑](#footnote-ref-15)