

# COVID-19 PUBLIC INQUIRY

## Module 2C

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### **SUBMISSIONS ON BEHALF OF DISABLED PEOPLE’S ORGANISATIONS: DISABILITY ACTION (NORTHERN IRELAND) Preliminary Hearing – 29 March 2023**

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Further to the Submissions served on behalf of the DPO for the M2 Preliminary Hearing dated 24 February 2023 (the ‘M2 Preliminary Hearing Submission’) the following addresses [I] Context [II] Human Rights [III] Expertise and Experts [IV] Selecting and Questioning Witnesses and [V] Other Process Matters, all as they apply to M2C.

#### **I: CONTEXT**

- 1.1. COVID AND INEQUALITY: As in the rest of the United Kingdom, Disabled people in Northern Ireland were differentially affected by Covid 19 in three main areas: the increased risk of poor outcomes from the disease itself, reduced access to routine health care and rehabilitation, and the adverse social impacts of efforts to mitigate the pandemic. DISABILITY ACTION, as the sole DPO in this Module, anticipates from the terms of reference (TOR) that the Inquiry will examine the foresight, extent and the cause of those differential effects as they applied to Northern Ireland, and the political and administrative decision making in that jurisdiction as compared to the rest of the United Kingdom.
- 1.2. UNIQUE ASPECTS OF NI DEVOLUTION: In any comparative United Kingdom analysis the unique features of Northern Ireland as they apply to this Inquiry would include: (a) the suspension of devolved power from January 2017 to January 2020, (b) the resumption of devolved power in the first period of 2020 only to collapse again in February 2022, (c) the greater epidemiological connection with the Republic of Ireland as a whole island pandemic than with the rest of the British Isles, (d) the joint health and administrative structures both within Northern Ireland (combining health and care services) and across the whole of the island as provided for under the Good Friday Agreement and, (e) Northern Ireland’s discrete architecture and culture of human rights that is tied to its existence and wellbeing as a post-conflict society. All of these factors invariably impacted on the content and manner of government decision making that will be considered in M2C.

- 1.3. DISABLED PEOPLE’S SITUATION IN NORTHERN IRELAND: One in four of the people of Northern Ireland are Disabled, equating to 24% of the population.<sup>1</sup> As in the rest of the United Kingdom, the full impact of the Covid 19 pandemic and the political and administrative response to it upon Disabled people cannot be fully understood without some appreciation of their situation as of December 2019. Similar to the analysis in Britain conducted by the EHRC in its study of a “*Journey Less Equal*”,<sup>2</sup> the equality of opportunity for Disabled people in Northern Ireland is compromised by their overall lesser enjoyment of a range of metrics across health, education, income, employment, as well as regards safety and stigmatisation.<sup>3</sup> The abuse of children and adults with learning disabilities in Muckamore Abbey Hospital (uncovered in 2017), which itself is subject to a public inquiry deserves special mention.<sup>4</sup>
- 1.4. CONSEQUENCES OF THE COLLAPSE OF DEVOLVED GOVERNMENT: The effect on Disabled people of the 2017 collapse of devolved government was that issues that can take years to gain traction with a functioning government were now without anyone to properly engage with: “*Policy decisions relating to Disabled People’s lives in NI were...left in the hands of local civil servants (who, in the absence of Ministerial authorisation, often felt powerless to act). Meanwhile, politicians in Westminster grappling with Brexit and a myriad of other ‘bigger’ issues, seemed entirely removed from addressing the challenges disabled people and their families in NI were facing*”.<sup>5</sup> During the pandemic Disabled people’s situation continued to be complicated by such ‘bigger issues’, including that their fate still filtered through a range of political differences within the power sharing arrangements.<sup>6</sup> A direct consequence of collapse of the Executive in 2022 is that an ongoing commitment to produce a Disability Strategy as part of the Programme for Government that was contained in the renewed power sharing document ‘New Decade, New Approach’<sup>7</sup> agreed in January 2020 has not been realised despite the publication of a commissioned Expert Panel report advising how to do so. In all the circumstances, Geraldine McGahey as the Chief Commissioner of the Equality Commission for Northern Ireland warned in October 2021 that political disagreements and a fixation on “*orange and green issues*” has resulted in a two-decade

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<sup>1</sup> NISRA (2022) [Census 2021 main statistics for Northern Ireland \(phase 2\)](#)

<sup>2</sup> EHRC, ‘*Being Disabled in Britain – A Journey Less Equal*’ (March 2017) Executive Summary pp 7-15

<sup>3</sup> [Disability Strategy and Expert Advisory Panel: Report and Recommendations](#) (Dec. 2020) §2.7 pp 27-28, §3.3 pp 38-39, §5.3 pp 82, pp 90-2.

<sup>4</sup> [Progress Towards the Implementation of the UNCRPD in NI](#), pp 310-314; <https://www.mahinquiry.org.uk/>

<sup>5</sup> DISABILITY ACTION ‘*The Impact of Covid-19 on Disabled People in Northern Ireland*’ (Sep 2020) p. 14

<sup>6</sup> E.g. see the unlawful delay in instituting the Victims’ Pension: *Re McNern and Turley* [2020] NIQB 57

<sup>7</sup> [New Decade, New Approach \(Jan. 2020\) NIO](#) p. 27 §§4.1, 4.6 and 4.6.2.6

long failure to enhance legal protections for minority groups, and she consequently describes equality protection in this jurisdiction as comparatively in the “*dark ages*”.<sup>8</sup>

- 1.5. INTERNATIONAL CRITICISM: As the Inquiry is aware, prior to the Covid pandemic, the United Nations Committee on the Rights of Persons with Disabilities issued a report on the UK which criticised it especially for its lack of consultation with Disabled people contrary to Art. 4(3) of the UNCRPD (§§10-11), ill-preparedness to protect them in the event of emergency contrary to Article 11 (§§28-29), damage done by austerity measures contrary to Arts 19, 27 and 28 (§§58-59) and a lack of reliable data, including impairment specific and disaggregated intersectional data contrary to Art. 31 (§§64-65).<sup>9</sup> The DPO draw attention to those four criticisms as pertinent entry points to examining how the Covid response fared for Disabled people in Northern Ireland, and especially so in the light of no Devolved Government being in place for the relevant period when engagement with the UN Committee’s criticisms could have led to meaningful change.
- 1.6. AUSTERITY: In a separate Inquiry Report issued by the UN Committee under Article 6 of the Optional Protocol, that focussed especially on the impact of austerity measures, the Committee concluded that “*there is reliable evidence that the threshold of grave or systematic violations of the rights of persons with disabilities has been crossed in the State party*”<sup>10</sup> (§113). Of significance to Northern Ireland is that the administration of social security is a devolved matter.<sup>11</sup> Consequently as part of negotiated arrangements with the UK Government the NI Executive was able to delay the coming into force of the equivalent provisions of the Welfare Reform Act 2012 and in addition top up UK welfare provision in Northern Ireland by way of so-called “*welfare mitigation measures*”.<sup>12</sup> Nevertheless, the closure of the Independent Living Fund from June 2010 to any new applicants severely limited Disabled people’s choice and control and independence.<sup>13</sup> Likewise, Universal

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<sup>8</sup> [Northern Ireland ‘in dark ages’ in terms of equality laws – The Irish Times](#) 20 October 2021; [Northern Ireland Affairs Committee Oral evidence: The experience of minority ethnic and migrant people in Northern Ireland, HC 159, Wednesday 20 October 2021 p.10 Q101.](#)

<sup>9</sup> [Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland: CPRPD/C/GBR/CO/1 \(3 October 2017\)](#)

<sup>10</sup> [Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under article 6 of the Optional Protocol to the Convention CRPD/15/4 \(24 October 2017\)](#)

<sup>11</sup> [Northern Ireland Act 1998](#) s. 87 requires the Secretary of State with responsibility for social security and the Northern Ireland Minister for Communities to consult each other with a view to securing single systems of social security (otherwise known as the principle of ‘parity’).

<sup>12</sup> For a general account of the coming into force of the [Northern Ireland \(Welfare Reform\) Act 2015](#) see [In Re Lorraine Cox’s Application](#) [2020] NIQB 53 §§25-28: see also [Progress Towards the Implementation of the UNCRPD in NI](#) pp 502-506

<sup>13</sup> [Disability Strategy and Expert Advisory Panel: Report and Recommendations](#) (Dec. 2020) §3.2 p. 34

Credit, Personal Independence Payments (PIP) and other features of the reformed welfare system came into force in the run up to the pandemic.<sup>14</sup> While there was a mitigations package to limit the impact of some aspects of welfare reform, Disabled people in NI were still subject to PIP assessments and sanctions. In that respect Northern Ireland was increasingly at a parity with the rest of the UK’s social security system during the Covid response and its aftermath, with all the implications that would carry.

1.7. FAILURE OF HUMAN ACCOUNTING: Despite different approaches to austerity, prior to the pandemic Disabled people in Northern Ireland still experienced worse outcomes than non-disabled peers in many areas of life. As DISABILITY ACTION discovered in its survey of 404 people, including 1300 written submissions, the situation after March 2020 served “*to reveal the fragility of independence for disabled people and raise questions about the strength of disability rights in the face of such a crisis*”.<sup>15</sup> As highlighted in the M2 Preliminary Hearing Submissions (§1.5), a significant issue in the fusion of science and government that constructed Covid policy is that it was so disconnected from the views and experience of Disabled people and their DPOs. As DISABILITY ACTION put it in their September 2020 ‘Report on the Impact of Covid 19 on the People of Northern Ireland’ “*What became very clear, was the feeling of many disabled people that their voices were being lost in the noise or worse simply ignored in the confusion and panic that was unfolding*”<sup>16</sup> (see further §2.4 below). This intervention took place against statistics for Northern Ireland that between 1 March 2020 and 30 September 2020 Disabled people were 40% more likely to die of non-Covid causes and 48% more likely to die of Covid than non-disabled peers.<sup>17</sup> That Disabled people faced the triple jeopardy of increased fatal outcomes from Covid, reduced access to routine health care, and disproportionate adverse impact from the pandemic response was belatedly recognised by some in hindsight, but should have been appreciated in foresight. That is the basic failure of human accounting that the DPO want the Inquiry to investigate.

## II: HUMAN RIGHTS

2.1. HUMAN RIGHTS FOCUS: The special focus on human rights in Northern Ireland is contained in the section headed ‘Rights, Safeguards and Equality of Opportunity’ contained in the

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<sup>14</sup> [Disability Strategy and Expert Advisory Panel: Report and Recommendations](#) §3.3 p. 38-48

<sup>15</sup> [The Impact of Covid-19 on Disabled People in Northern Ireland](#) (September 2020) p. 36

<sup>16</sup> [The Impact of Covid-19 on Disabled People in Northern Ireland](#) (September 2020) p. 4

<sup>17</sup> [Northern Ireland Statistical Research Agency \(NISRA\) Covid-19 Deaths in Wave One: Analysis of Equality Group, Health and Socio-demographic Characteristics](#) (July 2021) pp 3 and 13-17

Good Friday Agreement 1998, which affirms commitment to “*the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity*” and commits to the creation of statutory duties and oversight mechanisms. Those commitments are realised in Part VII of the Northern Ireland Act 1998.<sup>18</sup> Their fundamental constitutional status to the people of Northern Ireland was re-emphasised in Article 2 of the Northern Ireland Protocol (December 2019) which commits the UK to (1) “*no diminution of rights, safeguards or equality of opportunity*”, as set out in the relevant parts of the Belfast Agreement and including features of EU law listed in the Annex to the Protocol<sup>19</sup> and (2) “*continued facilitation of the related work of the institutions and bodies set up pursuant to the 1998 Agreement..., including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards*”.<sup>20</sup> The NIO Outcome Delivery Plan 2021-2022 consequently includes as Outcome 6 of its Equality Objectives to “*Ensure compliance with UK Public Sector Equality Duty and Section 75 requirements of the Northern Ireland Act 1998; contribute to reserved human rights work including treaty body requirements; sponsor the Northern Ireland HRC; and ensure implementation and the “no diminution” of rights principle in the Northern Ireland Protocol*”.<sup>21</sup>

2.2. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD): We have previously commended the UNCRPD to the Inquiry for the tools it encompasses to assist in understanding what has happened to Disabled people during the Covid 19 pandemic and how to transition out of, and build back better.<sup>22</sup> We make the same commendation to transfer over to Module 2C. The criticism by local NI Human Rights and Equality bodies and NGOs as regards non-compliance with the UNCRPD is particularly stringent. In December 2020 the report of the Disability Strategy Expert Advisory Panel (commissioned

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<sup>18</sup> See ss 68-72 (NI Human Rights Commission), ss 73-74 (Equality Commission for NI), s. 75 (Public sector duty to promote equality of opportunity including “between persons with a disability and persons without”) and Sch. 9 (duty on public authorities to submit Equality Schemes to be reviewed by the ECNI)

<sup>19</sup> For example, The Equality Framework Directive 2000/78/EC – General Framework for Equality Treatment in Employment and Occupation that contains provisions regarding the elimination of discrimination against disabled people (Arts 1 and 2), reasonable adjustments and accommodations (Art. 5) and positive action measures on the integration of disabled people in employment and the requirement to provide (Art. 7)

<sup>20</sup> Protocol on Ireland/Northern Ireland (December 2019). In consequences there were amendments to the Northern Ireland Act 1998 ss 78A-D by virtue of the European Union (Withdrawal Agreement) Act 2020 Sch. 3 para. 7 to enable the NIHRC and ECNI to monitor compliance with Art. 2 of the Protocol and to bring judicial review in order to remedy claimed breaches

<sup>21</sup> Northern-Ireland-Office-outcome-delivery-plan-2021-to-2022 (July 2021)

<sup>22</sup> M2 Preliminary Hearing Submissions §§2.1-5

by the Department of Communities) concluded that “*Limited measures have been taken to give effect to the CRPD in Northern Ireland*”, in contrast to other jurisdictions in the UK, especially Scotland and Wales, who were beginning to explore how the CRPD can be given direct and legal effect.<sup>23</sup> In February 2022 the report prepared by DISABILITY ACTION for the Equality Commission of Northern Ireland found a persistent absence of concrete measures to incorporate the UNCRPD, coupled with a lack of indicators through which to evaluate progress.<sup>24</sup>

2.3. CONSULTATION AND CO-DESIGN: The obligation that Disabled people must be included in law and policy making - to collaborate in their co-design and co-production - is central to the UNCRPD.<sup>25</sup> Its most formal endorsement in Northern Ireland is in the framework document ‘New Decade, New Approach’ that reflected the settlement to return to Devolved Government in January 2020, in which by way of general application in relation to *all* civil society groups the parties committed to abiding by “*principles and practice of citizen and community engagement and co-design*”.<sup>26</sup> In the surveys conducted by DISABILITY ACTION during lockdown measures, it was clear that the Disabled community felt there was a failure to meaningfully involve them in policy making. It called upon the NI Executive “*to prioritise a co-production framework to underpin our journey towards recovery and resilience*” underscoring it to be essential that the framework “*fully engages with the expertise of disabled people and their carers*”.<sup>27</sup> Similarly the Disability Strategy Expert Advisory Panel found the efforts to involve d/Deaf and disabled people in law and policy design, implementation and monitoring “*often tokenistic, inaccessible, or exclude[ing] particularly marginalised groups, including sign language users, people with learning disabilities and people with experience of mental health services*”.<sup>28</sup> It added that “*The rich and diverse lived experiences of the disability community in Northern Ireland must be given voice in the development of responsive legislative and policy solutions and appropriate structures, services and infrastructure.*”<sup>29</sup> The Inquiry is asked to consider the extent to which these criticisms are justified, if so what is their cause in this context in Northern

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<sup>23</sup> [Disability Strategy and Expert Advisory Panel: Report and Recommendations](#) §2.1 p. 12

<sup>24</sup> [Progress Towards the Implementation of the UNCRPD in NI. Belfast: Equality Commission \(Feb 2022\)](#) p. 14

<sup>25</sup> [General comment No. 7 \(2018\) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention, CRPD/C/GC/7](#): see generally §§3-5, 11, 13, 15, 18-20, 27, 42. As to Article 11, see §78.

<sup>26</sup> [New Decade, New Approach \(Jan. 2020\) NIO](#) §§4.5-4.6

<sup>27</sup> [The Impact of Covid-19 on Disabled People in Northern Ireland](#) (September 2020) pp 58 and 59.

<sup>28</sup> [Disability Strategy and Expert Advisory Panel: Report and Recommendations](#) §2.2 p. 14

<sup>29</sup> *Ibid* §7 p. 129



Ireland, and going forward how can the United Kingdom’s international obligations to deliver effective co-design and co-production with Disabled people and their DPOs be realised?

2.4. APPLICATION OF THE SOCIAL MODEL: Unlike in Scotland<sup>30</sup> and Wales<sup>31</sup>, Northern Ireland along with England, does not officially endorse the Social Model. In terms of the submissions that have already been made in the Module 2 hearing and the assurances provided by the Chair and her counsel, it is noteworthy that structural discrimination is taken as a given as a matter of Scottish and Welsh Government policy, and the acceptance of its existence acts as the starting position for change, whereas the situation in Northern Ireland, as in England, remains more complex. In Northern Ireland, the Equality Commission (ECNI) functions to oversee executive action. With the Human Rights Commission (NIHRC) it constitutes the Independent Mechanism for Northern Ireland (IMNI) for the purposes of Art. 33(2) UNCRPD. IMNI has adopted a human rights model of disability, taking account of the social model of disability. As its Report on implementation of the UNCRPD commissioned from DISABILITY ACTION describes it:

*“The human rights model focuses on the inherent dignity of the human being and places the individual centre stage in all decisions. Most importantly, it recognises the role which society plays in disability. The social model of disability asserts that disability is a form of oppression and socially created disadvantage and marginalisation of people on the basis of disability or impairment. Disability is therefore considered as a socially produced injustice which is possible to challenge and address through social change. Both models recognise that the challenges of disability are societal factors which are external to the individual. The human rights model both builds on and complements the social model”.*<sup>32</sup>

2.5. PUBLIC SECTOR DISABILITY DUTIES: Equal opportunities and discrimination are ‘transferred matters’ under the Northern Ireland Act 1998, which is not the case with Wales and Scotland. As such, with a few exceptions the Equality Act 2010 does not form part of the law of Northern Ireland. Rather the Disability Discrimination Act 1995 (as amended) remains in force for Northern Ireland. The 1995 Act now includes a public sector “disability duty” which places statutory obligations on public authorities in section 49A of the legislation to “*promote positive attitudes towards disabled people*” and “*encourage their participation in public life.*” Section 49B requires public authorities to develop “*disability action plans*” to demonstrate how they will fulfil their statutory obligations in this regard.

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<sup>30</sup> Cf. DPO M2A PH Submission 14.3.23 §2.4

<sup>31</sup> Cf. DPO M2B PH Submission 22.3.23 §2.2

<sup>32</sup> [Progress Towards the Implementation of the UNCRPD in NI \(Feb 2022\)](#) p. 38

Unlike in Scotland<sup>33</sup> and Wales<sup>34</sup>, Northern Ireland therefore does not have the equivalent of section 1 of the Equality Act 2010 to bring into force, even if it wanted to.<sup>35</sup> Public authorities in Northern Ireland have to comply with equality and good relations duties under Section 75 of the Northern Ireland Act which requires them to have ‘due regard’ to the need to promote equality of opportunity between various groups, including those with and without disabilities.<sup>36</sup> There is an ongoing debate in Northern Ireland, seemingly blocked by repeated suspension of Devolved Government, as to whether these provisions should be replaced by a structure more akin to the Equality Act 2010 as applies to the rest of the UK.<sup>37</sup>

2.6. INTERSECTIONALITY: Further to the generic discussions during the Module 2 preliminary hearing and the ruling of the Chair dated 9 March 2023 on structural racism and other forms of discrimination, it is right to emphasise that the UNCRPD is the first international Treaty of its kind to recognise that discrimination can intersect across a range of characteristics, and for that reason it recognises discrete rights in relation to women and children and overriding context in relation to race and poverty.<sup>38</sup> However, one of the consequences of Northern Ireland not having a single Equality Act structure is that its thinking on intersectionality is relatively underdeveloped compared to the rest of the UK.<sup>39</sup>

2.7. RESPECT FOR HUMAN DIGNITY: As with all other human rights treaties, respect for the inherent dignity of the human being is the fulcrum value through which all other rights in the UNCRPD must be understood. That accords with recommendations made by the Expert Advisory Panel to the Department of Communities prior to the cessation of devolved Government in 2022, “*that all d/Deaf and disabled people in Northern Ireland – whether child or adult and irrespective of impairment or background - are, fundamentally, rights-holders, and should be treated on the basis of the principles of fairness, respect, dignity, equality and autonomy*”.<sup>40</sup> It was with that in mind, that the Panel based its

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<sup>33</sup> Cf. DPO M2A PH Submission 14.3.23 §2.6

<sup>34</sup> Cf. DPO M2B PH Submission 22.3.23 §2.5

<sup>35</sup> It requires public bodies to whom the duty applies, “*When making decisions of a strategic nature about how to exercise its functions, [to] have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage*”.

<sup>36</sup> For application of Northern Ireland Act 1998 s. 75, see *In re Toner* [2017] NIQB 49 §§133-140 and 153-166

<sup>37</sup> [Progress Towards the Implementation of the UNCRPD in NI](#) pp 135-136 and [The Equality Commission for NI’s ‘Strengthening Protection for Disabled People - Proposals for Reform’](#) (March 2012)

<sup>38</sup> UNCRPD, Preamble (p) - (t): see e.g. (p) “*Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status*”.

<sup>39</sup> [Disability Strategy and Expert Advisory Panel: Report and Recommendations](#) §6.1-6.6 pp 108-127

<sup>40</sup> [Disability Strategy and Expert Advisory Panel: Report and Recommendations](#) §7 p. 128



recommendations for the now long (and Covid Pandemic) awaited Disability Strategy for Northern Ireland on the provisions of the UNCRPD.

- 2.8. HUMAN DIVERSITY: The DPO repeat here that however much the calls to aid the ‘vulnerable’ during lockdowns may have been well meant, the discourse of vulnerability that was so central to Covid pandemic decision making and messaging on both sides of the border is problematic. It undermines the long-term aim of the DPO to mainstream societal understanding that impairment is not a tragic weakness requiring pity; still less should disability be understood as something that requires charity, welfare, special pleading, or ableist sacrifice, before the situation of Disabled people is granted recognition. The UNCRPD instead requires “*Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity*” (Art. 3(d)). The DPO question whether government and society in Northern Ireland has yet been able to do that and how it might fare better in the future. Preparation for Module 2C should bear that question in mind.

### **III: EXPERTISE AND EXPERTS**

- 3.1. PROBLEMS WITH EXPERTISE: As set out in the M2 Preliminary Hearing Submissions, dating back to the Phillips Inquiry on BSE (2000) there has been a range of identified issues on the use and misuse of experts in the formation of policy making, especially in times of crisis.<sup>41</sup> A recommendation of the BSE Report particularly relevant to this module was to ensure that (as then forthcoming) devolution did not compromise a sufficiently synchronised response to a UK wide risk.<sup>42</sup>
- 3.2. ABSENCE OF EXPERTISE: Regarding Covid’s implications for Disabled people, the principal problem with expertise is that for a long time there simply was none; and none of the experts within the available structure to provide scientific advice, or those in government who procured their advice, thought to point that out. The bulk of SAGE witness questionnaires have been disclosed but we are yet to see the results of a similar exercise with those who advised the newly re-established Northern Ireland Executive. For present purposes we know that there has been recognition across the rest of the United Kingdom of a relative lack of public health officials on the expert advisory mechanisms in the other nations and recommended increase of ‘on the ground’ public experts in key advisory roles to

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<sup>41</sup> [The Inquiry into BSE and variant CJD in the UK Vol. 1 Findings and Conclusions](#), Ch. 14 §§1275, 1278, 1282, 1290 and 1301: see also Report from Institute for Government, “*Science advice in a crisis*” (Dec. 2020) {INQ000075385}, HC Health and Social Care and Science and Technology Committee – ‘*Coronavirus : Lesson learned to date*’ (Sep 2021) {INQ000075336/42 §§97-161}

<sup>42</sup> [BSE Report](#), §§1280-1282

complement the expertise of academics, albeit little is acknowledged about working with Disabled people and their DPOs.<sup>43</sup> DISABILITY ACTION found consultation with DPOs in Northern Ireland Covid decision making to be minimal.<sup>44</sup> In the instruction of its own experts, and the questioning of others in due course, the Inquiry is asked to consider this failure of due regard.

- 3.3. DISABLED PEOPLE ARE EXPERTS: Part of the gap in expertise can now be filled with the DPO as core participants. DISABILITY ACTION and in particular the reports they have been commissioned to write or otherwise cited show that the absence of expert advice and consultation resulted in failures of foresight of some of the most isolating and resource impoverishing experiences of lockdown. They are well placed to explain what they have described as *“the tension in the approach of protecting vulnerable people during the Covid-19 crisis whilst at the same time removing services for vulnerable people which had a detrimental impact upon their physical and mental health”*.<sup>45</sup> They can also help the Inquiry understand the existing barriers to Government benefiting from Disabled expertise, which they summarise as *“Stigma, discrimination, limited financial opportunities, limited support and limited accessibility of physical infrastructure”*.<sup>46</sup>
- 3.4. OBSERVATIONS ON INSTRUCTED EXPERTS: The DPO have already made general observations on the instructed experts that are not repeated here,<sup>47</sup> save to add M2C specific matters.
- 3.5. SINGLE EPIDEMIOLOGICAL EVENT: A critical theme for M2 and likewise M2A-C is that across the four nations: *“epidemiologically, there was one epidemic”* although for present purposes *“Northern Ireland was different..., with a much closer epidemiological connection to Ireland. This created a number of problems in terms of understanding and providing evidence from the SPI-M-O viewpoint. A valuable outcome from the Inquiry would be a deeper understanding of the extent to which the differences were problematic, and potential mitigations”*.<sup>48</sup>
- 3.6. DATA COLLECTION & USE: The DPO have drawn the Inquiry’s attention to Art. 31 UNCRPD that requires disability data collection (including the acquisition of impairment specific and intersectional data). On this issue, the UK was criticised by the CRPD Committee in 2017,

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<sup>43</sup> DPO M2 Hearing Submission 24.2.23 §3.2, M2A Submission 14.03.23 §3.2, M2B Submission 22.3.23 §3.2

<sup>44</sup> [Progress Towards the Implementation of the UNCRPD in NI](#) pp 273-274 on the limited consultation concerning the Covid Recovery Plan in August 2021

<sup>45</sup> DISABILITY ACTION ‘Alternative Report on the Implementation of the UNCRPD’ Feb. 2022 p. 60

<sup>46</sup> Ibid p. 53

<sup>47</sup> DPO M2 Hearing Submission 24.02.23 §§3.4-3.10

<sup>48</sup> Professor Graham Medley {INQ000056535/10}

and the issue for M2C will be whether different arrangements and if so, of what quality and utility existed in Northern Ireland. For its part, DISABILITY ACTION was particularly concerned as of the end of 2020 that a “*major challenge facing Disabled people, the Third sector and Government is the limited, and often disparate data held in respect of disability specific to NI. Given the total population size of NI, we can and we should have a better understanding of those with a disability who make up 1 in 5 of the entire population*”.<sup>49</sup> Its position chimed with the Disability Strategy and Expert Advisory Panel that expressed concern “*at the lack of ongoing and robust disaggregated quantitative and qualitative data on (i) the lived experiences of d/Deaf and disabled people and (ii) on the implementation and evaluation of laws, policies and practices relating to d/ Deaf and disabled people across the life course*”.<sup>50</sup>

3.7. MACHINERY OF GOVERNMENT: For both Bruce Mann instructed to report for M1 and Alex Thomas instructed to report for M2, there are issues relating to how fit for purpose the UK’s disaster management system is, and the Inquiry is generally referred to the wholesale review of the situation contained in the “*National Preparedness Commission: An Independent Review of the Civil Contingencies Act and its supporting arrangement*” (March 2022) of which Bruce Mann is one of the authors.<sup>51</sup> As regards the co-operation between the UK Government and Northern Ireland Executive it would appear that the situation was particularly compromised by the cessation of Devolved Government in the three years prior to the pandemic and the subsequent issues arising from Brexit that dominated political attention in Northern Ireland for much of the period between 2020 and 2022.

3.8. DISABLED PEOPLE DURING EMERGENCIES: Although the DPO do not have Module 1 CP status, they see this issue as particularly pertinent and cross-cutting into M2C given the criticism made of the UK generally by the 2017 UNCRPD Committee report (§§28-29) coupled with the particular constitutional predicament that Northern Ireland has faced since 2017.<sup>52</sup> It raises the questions of whether the Civil Servants of the Northern Ireland Office during a period of suspended Executive Government approached the specific recommendations made by the UN Committee on emergency preparation for Disabled people in a manner that differed from the UK Government counterpart, if they approached them at all; and if not, why not? For its part the Disability Strategy and Expert Advisory

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<sup>49</sup> [The Impact of Covid-19 on Disabled People in Northern Ireland](#) (September 2020) p. 56

<sup>50</sup> [Disability Strategy and Expert Advisory Panel: Report and Recommendations](#) §2.6 p. 24

<sup>51</sup> [Independent Review of the 2004 Civil Contingencies Act 23 \(March 2022\)](#)

<sup>52</sup> See above §1.3

Panel found in December 2020 that “*Emergency Planning and preparedness measures for d/Deaf and disabled people in Northern Ireland are not formalised and mainstreamed, they thus fail to appropriately involve d/Deaf and disabled people and their organisations. The impacts of this both locally and globally during the COVID-19 pandemic have been wide and varied but the constant has been a feeling by many d/Deaf and disabled people that they are being forgotten about*”.<sup>53</sup> Writing for the ECNI, DISABILITY ACTION have described how the pandemic brought non-compliance with Article 11 UNCRPD to the fore.<sup>54</sup>

3.9. DEVOLVED GOVERNMENT:<sup>55</sup> In terms of reporting on the political structures for devolution within the UK and mechanisms for inter-governmental decision-making between the UK Government and the devolved administrations, the DPO particularly wish the Inquiry to examine how the responsibility to protect Disabled people’s rights and wellbeing during the pandemic differed between the four nations in terms of policy, structures and respective functioning. As outlined above Northern Ireland remains different to Scotland and Wales in that both its equality duties and social security are devolved powers. Conversely, and for a range of political and administrative reasons, it has been less active than either the Government of Scotland or Wales in developing Disability rights and strategies.

3.10. STRUCTURAL DISCRIMINATION: Further to the Chair’s M2 ruling of 9 March 2023 (§37) that in addition to the expert evidence to be obtained in relation to structural racism, the Inquiry will explore the possibility of obtaining a single report covering other issues, if necessary drafted by a (small) team of experts covering different specialisms, the DPO would refer to the submissions made in Module 2A at §3.10. In summary, the issue can be cumulatively investigated through (a) asking them and other witnesses, (b) asking instructed witnesses, (c) commissioning additional specialist reporting and (c) referring to core sources on the subject. For the purpose of M2C the Inquiry may wish to consider whether the post-conflict preoccupation of maintaining the political equality between the power sharing parties, especially in the context of Brexit, adversely affected the protection of minority groups during the course of Covid decision making, including (for the reasons introduced above) Disabled people.

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<sup>53</sup> [Disability Strategy and Expert Advisory Panel: Report and Recommendations](#) §5.8 p. 105

<sup>54</sup> [Progress Towards the Implementation of the UNCRPD in NI](#) pp 261-276

<sup>55</sup> As indicated in other M2 submissions, the production by the expert or CTI of a provisional note summarising the key differences in Covid pandemic regulations and key decisions across the four nations is likely to save time and expense.

## IV: SELECTING & QUESTIONING WITNESSES

- 4.1. INFORMED CONSULTATION ON SELECTION AND ISSUES: Further to the M2 Submissions and what was said at the hearing, it is not the DPO's understanding that the Inquiry or its legal team has already decided on issues or witnesses, but that it has reached a stage when such matters will need to be decided and it still wants to reflect and consult.<sup>56</sup> The approach of our DPO clients across the Modules, focussed as they are on the discrete issues of Disabled people's treatment and experience during the pandemic, is to be proactive in drawing attention to salient issues, critical lines of enquiry, and obviously relevant documents as soon as possible. Given time and expense constraints, it is hoped that this will prompt early consideration of the types of issues and documents that should be raised with witnesses in due course (see §§4.3-4.4 below).
- 4.2. CIVIL SOCIETY GROUP WITNESSES: There is good reason for the Inquiry to consider calling CP witnesses from the civil society groups, especially those involved in trying to influence administrative and political decision making in real time. They can provide understanding from the perspective of subjects of state decision making, including lived experience of it, and explain how they sought, or would reasonably have sought, to influence policy, including to do things differently then, as well as the recommendations they would make for the future. DISABILITY ACTION would fall into that category and in addition qualify as such for consideration for witnesses to be called on account of their authorship of the key report issued on behalf of the Equality Commission for the relevant period.
- 4.3. CO-DESIGN OF QUESTIONING: DISABILITY ACTION acknowledges the structure of Rule 10 of the Inquiry Rules 2006, including the default position that CTI and the Panel ask questions of witnesses (r. 10(1)), but that representatives of CPs can apply to the Chair for permission to ask questions themselves (r. 10(4) and (5)). Given the proposed timescale for the M2C hearings of approximately three weeks the DISABILITY ACTION would repeat the submissions made in Modules 2, 2A and 2B, namely: (1) Timescales for receiving and commenting on questioning proposals should not be too tight. (2) Pre-disclosed issues for witnesses should not be treated as inflexible documents that cannot evolve during the course of evidence as a result of answers given. (3) In the event that only CTI ask questions of a witness, the Chair could very usefully build in approximate 15-minute breaks at the end of CTI prepared questions of witnesses to examine with CPs whether there are additional

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<sup>56</sup> DPO M2 Hearing Submissions 24.02.23 §4.1 and repeated in Oral Submissions 01.03.23 {T/112/18 -113/1}

follow up questions based on the evidence that has been given. (4) Where it is possible to identify core issues and approaches with CTI prior to the production of proposed questions that should be done.

- 4.4. GENERIC TYPES OF QUESTIONING: At this stage the DPO do make a case for three types of generic lines of questioning that are particularly suited to the content of Module 2 and 2A-C and that CTI should ask and witnesses called to give oral evidence should be ready to answer.<sup>57</sup> They are (1) hypothetical questions, (2) questions as to the proportionality of measures (derived from human rights law but of much broader application) and (3) lessons learned questions.

## **V: OTHER PROCESS MATTERS**

- 5.1. OPENING AND CLOSING STATEMENTS: Further to the CTI Note §57 for those CPs who wish to exercise their rights to make written and oral opening and closing statements it is sensible to have page and time limits that apply multilaterally. What those are should be the subject of discussion prior to the next preparatory hearing.
- 5.2. DEADLINES: In the fixing of deadlines for the service of documents, the Chair and the Inquiry Team are asked to bear in mind that legal representatives will need to take instructions from clients who will provide their time for free while they do their day jobs, and who will require reasonable adjustments (a) to participate as representatives of Disabled people and (b) to ensure that their participation is as representative as possible by consulting others (albeit in accordance with confidentiality undertakings).
- 5.3. TIMETABLING: Everyone is conscious of wanting to balance rigour with expedition and is ultimately reliant on the Chair to resolve what will be an inescapable and continuing tension between the two. On this, it will help for requested time allocations for oral submissions to continue to be invited, and subject to their determination as acceptable to be published prior to hearings, with (if needs be) amendment of the allocations at the Chair's behest if there is an unexpected delay, or some other reason.
- 5.4 PARLIAMENTARY PRIVILEGE: Further to the CTI Note §§31-46 as to whether Article 9 of the Bill of Rights applies to statutory inquiries, the DPO regard it as unnecessary to decide the point until, and if, a concrete issue arises based on a disputed Rule 9 statement that is unequivocally inconsistent with a statement provided to Parliament. **DISABILITY ACTION**

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<sup>57</sup> DPO M2 Hearing Submissions 24.02.23 §§4.5-4.7



does, however, note the constitutional difference between the UK Parliament and Northern Ireland Assembly and if, and when, a concrete issue arises, the Inquiry should examine the matter with legal argument, not least because it could give rise to an Inquiry recommendation for law reform. Until then they will continue to refer to what was said in the UK Parliament as a matter of historical fact, for which there can be no opposition.<sup>58</sup> They will also use criticism made by Parliament as a means to engage the Inquiry's interest in the relevance of an issue which can then be pursued by other investigatory means.

5.5 REASONABLE ADJUSTMENTS: DISABILITY ACTION adopts the submissions made previously by the DPO in Modules 2 and 2A,<sup>59</sup> including that the absence of a British Sign Language interpreter on the screen during these preliminary hearings adversely impacts on their public nature. It is appreciated that the Inquiry will now wish to develop an overall approach to adjustments in a systematic manner.

5.6 EVERY STORY MATTERS: One of the real possibilities of the project is to collect accounts from across the four nations, including from Disabled people who live in all their parts, to reflect both national and UK experiences. The DPO hope that the event and progress of this and the other devolved Government modules will inspire participation in the project, especially (in this extant Module) from Northern Ireland. The Inquiry is asked to continue to consider adjustments, accessibility and ethics that will enable the project to be realised to its full potential. In particular, the DPO invite the Inquiry to ensure that it is possible to provide accounts to the listening exercise through BSL and International Sign Language, in order to ensure that the D/deaf community can tell their stories.

**DANNY FRIEDMAN KC**  
**ANITA DAVIES**

**SHAMIK DUTTA**  
**BHATT MURPHY**

**22 March 2023**

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<sup>58</sup> *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, p. 337C endorsed and analysed in *R (Heathrow Hub) v SST* [2020] EWCA Civ 213 §§158-172

<sup>59</sup> DPO M2 Hearing Submissions 24.02.23 §5.2, M2 Transcript 01.03.23 {T/116/12 -117/13}, DPO M2A Hearing Submissions 24.02.23 §5.4, M2A Transcript 21.03.22 {T/73/11-74/15}