COPNI Commissioner for Older People for Northern Ireland

22 August 2024

Public Health Bill Team,
Castle Buildings,
Stormont,
Belfast,
BT4 3SQ

By email: phbt@health-ni.gov.uk

Dear Sir/Madam,

Re: Policy underpinning the Public Health Bill (Northern Ireland) consultation

I am writing to you regarding the 'policy underpinning the Public Health Bill (Northern Ireland)' consultation.

The consultation document is primarily based on the recommendations included in the Final Report of the review of the Public Health Act (Northern Ireland) 1967 commissioned by the Department of Health, Social Services and Public Safety (DHSSPS) in October 2013 and completed in March 2016[1]. This review is, unquestionably, an excellent resource that provides highly relevant advice, which will contribute to the development of vastly improved legislation. However, since the publication of the recommendations in the Final Report in 2016, we have had first-hand experience of an unprecedented health emergency. It is only natural that, in light of the experience of the COVID-19 pandemic, the recommendations of the aforementioned report are supplemented with the lessons learned in the pandemic.

As stated in the consultation document, the Public Health Act (Northern Ireland) 1967[2] needs to be reviewed, as it may not be compatible with the Human Rights Act 1998[3] and 'is not consistent with World Health Organisation (WHO) International Health Regulations 2005 (IHR 2005), to which the UK is a signatory'.[4] The legislation in place in England[5] and Scotland[6], as well as the IHR 2005,[7] have been developed without the first-hand experience that we now have. Therefore, the revision of the Public Health Act gives Northern Ireland the opportunity to propose groundbreaking changes that result from the lessons learned during the COVID-19 pandemic to make the Public Health Act more compliant with individual freedom and with protections offered to

[1] Review of the Public Health Act (NI) 1967 - Final report March 2016.

[2] Public Health Act (Northern Ireland) 1967.

[3] Human Rights Act 1998.

[4] Department of Health (2024) Policy underpinning the Public Health Bill (Northern Ireland). A Consultation Document, p. 5. See also World Health Organisation (2016) International health regulations (2005) - 3rd ed.

[5] Public Health (Control of Disease) Act 1984.

[6] Public Health etc. (Scotland) Act 2008.

[7] World Health Organisation (2016) International health regulations (2005) - 3rd ed.

vulnerable groups. Some of those changes are already apparent in the consultation document, and I commend the department for it.

My office does not have the knowledge and experience to advise on the all-hazards approach and other technical aspects of the proposed Bill. Rather, this response will address the issue of the responsibilities of public authorities in protecting individuals against the disproportionate impact of the regulations developed during health emergencies on specific groups, especially on older people. Above all, this response is shaped by my office's experience as an independent advisory body during the COVID-19 pandemic.

COVID-19 lessons

As Commissioner for Older People for Northern Ireland, I am greatly interested in the legislative framework that regulates the response provided by public authorities to health emergencies. This is of special importance for my office considering that during the COVID-19 pandemic, the public health responses to the health emergency were more damaging for older people.

During the COVID-19 pandemic, Non-Pharmaceutical Interventions (NPI) affected older people disproportionately. Even though these interventions were universally implemented (that is to say, everybody had the same obligations), they had different consequences depending on socioeconomic characteristics. In a wide range of issues, older people were put at greater risk by NPIs, including the reliance on online shopping and online communications (older people are less likely to use internet[8]) or loneliness (older people are more likely to live alone, and those living in care homes were separated from their families[9]) as a result of lockdowns. A higher proportion of older people were also affected by the cessation of non-urgent routine medical treatments, since morbidity and disability are higher in old age.[10]

However, more concerning than the indirect effects of NPIs were the direct effects of policy and regulations on older people's health and safety during the pandemic. The COVID-19 inquiry has revealed that in Northern Ireland, as well as in the other three jurisdictions of the UK,[11] the decisions made by public authorities had unintended consequences which, in some cases, contributed to harming older people disproportionately. Some of these decisions included discharging patients into care homes without

[8] See Ofcom (2022) Digital exclusion. A review of Ofcom's research on digital exclusion among adults in the UK.

[9] Only 11% of people aged 16-64 live alone in Northern Ireland, compared to 29% of people older than 65 (see Census 2021, Flexible table builder, Age - 7 Categories A by Household Composition - 4 Categories).

[10] In Northern Ireland, 56% of people older than 65 have a long-term condition that limits their day-to-day activities. See Census 2021, Custom table, Health Problem or Disability (Long-term) - 2 Categories by Age - 4 Categories.

[11] The British Geriatrics Society has highlighted that evidence from the COVID-19 Inquiry indicates that during the pandemic, younger people were prioritised over older people. Examples of this include, services supporting older people being among the last to receive personal protective equipment (PPE), and care home residents being prematurely discharged from hospitals causing outbreaks in care homes, even though this outcome was predictable (see British Geriatrics Society (2023) BGS responds to ongoing UK COVID Inquiry)

testing,[12] prioritising other groups of people when testing capacity was low,[13] the likely existence of an admission criterion to hospitals that was indirectly discriminatory towards older people,[14] the lack of distribution of PPEs in care homes,[15] and an alarming lack of communication of the government with stakeholders and independent advice organisations.[16] All of these were areas which COPNI and other stakeholders highlighted during the pandemic, but our recommendations, which could have contributed to a more positive outcome for older people (and particularly for care home residents), were rarely heard during the first wave of the pandemic.

Protecting vulnerable groups and having regard to the advice of independent rights institutions

It is clear that the department acknowledges that a response to a health emergency requires protections to individuals' rights, and I commend the department's efforts to guarantee them.

Although the topic of the protection of individuals permeates all sections of the consultation document, these protections are independently stated in Theme 4.[17] These protections are necessary to ensure the respect of individual human rights in situations in which the powers of public authorities expand beyond what would be considered normal and acceptable levels in daily life.

However, the protections offered to individuals regarding personal liberty described in Theme 4 seem to focus solely on aspects of negative freedom, that is, on the duty of public authorities not to interfere in people's lives beyond the necessary, and to protect people's right to defend themselves against abusive intervention by the state. Yet, these protections do not contemplate aspects of positive freedom, or the unintended

[12] According to a letter sent on the 3 April 2020 by the Health and Social Care Board via the Regulation and Quality Improvement Authority, care home providers should have "no expectation that patients are being tested for COVID-19 before discharged from hospital to a care home". See Flanagan, E. (2022, April 28) Covid-19: NI care home relatives call for answers on Covid tests, BBC News.

[13] Plans for universal testing in care homes were only announced by the Health Minister on the 18th of May [see Deeney, N (2020 May 18) Coronavirus: Care home testing a 'major breakthrough', NewsLetter]. By that time, universal testing of care homes in the Republic of Ireland, for instance, had already been completed [see BBC News (2020 May 8) Coronavirus in care homes: Michelle O'Neill calls for 'universal testing'].

[14] The NICE COVID-19 rapid guideline: critical care in adults published on the 20th of March also stated that admission criteria to critical care should, among other things, take into account if the person is 'frail', 'there is uncertainty regarding the likely benefit of critical care', 'take into account the impact of underlying pathologies, comorbidities and severity of acute illness on the likelihood of critical care treatment achieving the desired outcome' and 'base decisions on admission of individual adults to critical care on the likelihood of their recovery'. By the 29th of May 2020, only 17% of care home residents who had died of COVID-19, had done it in a hospital. By that same date, 87% non-residents of care homes who had died of COVID-19, had done it in a hospital. This huge disproportion indicates that an 'admission criteria' (perhaps not written or explicit) operated, and that care home residents may have been discriminated against in accessing critical care. See NISRA (2021) Weekly Deaths Statistics in Northern Ireland 2020.

[15] See Connolly, M-L. and McKeown, L. A. (2020 May 12) Coronavirus: NI care homes 'felt forgotten about' as virus hit, BBC News.

[16] See COVID-19 Inquiry Witness Statement of the Commissioner for Older People for Northern Ireland.

[17] Department of Health (2024) Policy underpinning the Public Health Bill (Northern Ireland). A Consultation Document, pp. 67-69.

consequences of measures implemented during emergencies. Therefore, the health proposed protections may be insufficient to protect the dignity and safety of vulnerable groups.

In the evidence that I shared during the COVID-19 Inquiry, I stressed that in the first months of the pandemic, my office and other stakeholders experienced a lack of communication from public authorities.[18] Stakeholders did not know about the real situation that was faced by the government and, consequently, were unable to collaborate with departments in proposing better practice. Moreover, when stakeholders like COPNI gave advice to defend the rights of people (they have the statutory duty to protect), this advice was ignored.

For this reason, I welcome the department's effort to improve its legal obligation to have regard to the advice of stakeholders during health emergencies. In this respect, I welcome enthusiastically the commitment of the department in paragraphs 208 and 209 to accept the recommendation of the Bingham report[19] that

> *proposes that ministers should have a statutory duty to have regard to any relevant advice produced by National Human Rights Institutions in their jurisdiction when making or continuing a declaration of an urgent health situation and when laying or continuing public health regulations. This duty might also usefully be extended to other independent rights institutions that represent groups likely to be affected by public health interventions, such as the Children's Commissioners.*[20]

I expect the Bill to fully implement this recommendation, to extend the duty to "other independent rights institutions", and to include a list of such bodies with powers to offer relevant advice of which ministers should have regard. I firmly believe that this provision should include the Commissioner for Older People. This is especially important as Northern Ireland still lacks specific age discrimination legislation on Goods, Facilities and Services. In the current landscape, there is no legal obligation to provide services equally to all persons of all ages. This lack of age discrimination legislation has had consequences on the provision of health services for older people, which have been acknowledged by the department in the past.[21] It is therefore important that, while such legislation is still lacking, the department commits to guaranteeing the equality and safeguarding of older people by acknowledging the relevant advice of independent bodies during health emergencies.

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[18] See COVID-19 Inquiry Witness Statement of the Commissioner for Older People for Northern Ireland.

[19] The Bingham Centre (2024) Independent Commission on UK Public Health Emergency Powers.

[20] Department of Health (2024) Policy underpinning the Public Health Bill (Northern Ireland). A Consultation Document, p. 66.

[21] For instance, the Mental Health Strategy 2021-2031 issued by the DoH, acknowledges the need for improving the services provided to older people, and admits that older people have been treated differently to the rest of the population when trying to access mental health services. The Equality Impact Assessment of the Strategy points out that: 'Stakeholders have pointed out that mental health services have traditionally been configured by age with a lack of services for those over 65. In particular, concern has been expressed that there is a lack of community interventions and psychological therapies for people in this age group'. See Department of Health (2021) Mental Health Strategy 2021-2031. Equality Impact Assessment.

The Bill could also strengthen its commitment to protecting vulnerable groups through including statements of principles, or best practice declarations that departments with powers to develop regulations (as stated in paragraphs 186-190[22]) would be compelled to observe. The Bill could include a powerful commitment to ensure that consideration is given to protect vulnerable groups against the effects produced by regulations developed in health emergencies through an analysis of their equality implications.

Conclusion

Paragraph 111 of the consultation document states that 'the review of the 1967 Act recommended that the new Public Health Bill aims to strike an appropriate balance between the state's responsibility to protect the public's health and the autonomy, rights and dignity of the individual'.[23]

Northern Ireland has the chance to develop groundbreaking legislation that uses positively the knowledge acquired from the COVID-19 experience. In the consultation document, very positive steps have been proposed to improve Public Health legislation to offer more protections to vulnerable people, and I expect the final drafting of the Bill to expand on those protections.

I commend the approach by the department, but based on the experience of COVID-19, I would expect the inclusion, in the final drafting of the Bill, of a reasonable commitment to the protection of vulnerable groups. This should include a duty to consider the effects of regulations on vulnerable people by authorities, the duty to consider positive interventions by departments to minimise impacts of health emergencies on vulnerable groups, and obligations for proactive engagement with independent advice bodies.

I would welcome any further discussion on this issue.

Yours sincerely,

Eddie Lynch
within the office of Commissioner for Older People for Northern Ireland

[22] Department of Health (2024) Policy underpinning the Public Health Bill (Northern Ireland). A Consultation Document, p. 58-59.

[23] Department of Health (2024) Policy underpinning the Public Health Bill (Northern Ireland). A Consultation Document, p. 35.