Northern Ireland Council
NICEM
FOR ETHNIC MINORITIES
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NICEM submission to the Health and Social Care Board on *Transforming Your Care*

January 2013

1. Introduction

The Northern Ireland Council for Ethnic Minorities (NICEM) is an independent non-governmental organisation. As an umbrella organisation[1] we represent the views and interests of black and minority ethnic (BME) communities.[2] Our mission is to work to bring about social change through partnership and alliance building, and to achieve equality of outcome and full participation in society.

Our vision is of a society in which equality and diversity are respected, valued and embraced, that is free from all forms of racism, sectarianism, discrimination and social exclusion, and where human rights are guaranteed.

NICEM welcomes the initiative to reform the way in which health and social care is provided to the general population in Northern Ireland. We believe this presents a great opportunity to ensure that we build a health system, which has human rights and equality as its cornerstones. We therefore welcome the opportunity to respond to this consultation and would like to draw the Board's attention NICEM's response to the Fit and Well consultation.[3]

In this submission, we will set out the relevant equality and human rights standards and then focus in more detail on how both equality and human rights have a role to play in the transformation of Northern Ireland's health and social care system. The submission will then highlight some issues in relation to the implementation of the plan as well as highlighting areas of specific concern relevant to BME communities.

2. Equality and Human Rights Context: equal access to the right to health

Mainstreaming equality and human rights into all policies must remain a key priority for all government departments. In this section, some of the key provisions in relation to equality and human rights, in terms of advancing race equality and respecting the rights of BME communities in the provision of health and social care, will be set out.

According to the Equality Commission's Revised Guidance (2005):

> "the main aim of section 75 is to ensure that equality opportunity is 'mainstreamed' by public authorities in their policy making, policy implementation and policy review."[4]

The Commission's 2012 Outline Guide highlights that:

> "the Section 75 statutory duties aim to encourage public authorities to address inequalities and demonstrate measureable positive impacts on the lives of people experiencing

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[1] Currently we have 27 affiliated BME groups as full members. This composition is representative of the majority of BME communities in Northern Ireland. Many of these organisations operate on an entirely voluntary basis.

[2] In this document "Black and Minority Ethnic Communities" or "Minority Ethnic Groups" or "Ethnic Minority" has an inclusive meaning to unite all minority communities. It refers to settled ethnic minorities (including Travellers, Roma and Gypsy), settled religious minorities, migrants (EU and non-EU), asylum seekers and refugees and people of other immigration status.

[3] http://nicem.org.uk/uploads/publications/NICEM_Response_to_Fit_Well_Consultation.pdf.

[4] See Chapter 1 of the Revised Guidance for discussion on mainstreaming equality, at page 1.

inequalities. Its effective implementation should improve the quality of life for all of the people of Northern Ireland."[5]

The Outline Guide goes on to consider the meaning of 'due regard' in the section 75 duty. According to the Guide, having 'due regard' and 'regard' means that the weight given to the need to promote equality of opportunity and good relations is proportionate to the relevance of a particular duty, to any function of a public authority. Therefore, having 'due regard' and 'regard' entails taking a proportionate approach in determining the relevance of equality opportunity and/ or good relations to a particular function or policy."[6] It is also noted that the second limb of the section 75 duty, i.e. the good relations, is also particularly relevant in the context of healthcare policy.

In this submission reference will be made to any potential adverse impacts on the race group as protected under section 75. NICEM would also like to draw the Health and Social Care Board's attention to the fact that persons affected by this strategy may have multiple identities and fall within two or more section 75 categories and may therefore be subject to multiple discrimination. While there is a section on "multiple identities" in the Board's screening document, NICEM is concerned that the Board has failed to consider the potential adverse impact of the TYC policy of on persons of multiple identities leading to multiple discrimination. This will be discussed in more detail in section 3 below.

In addition, the principles of equality and non-discrimination underpin human rights instruments as well as the EU legal order. Therefore, it is worthwhile to also sketch out some of the relevant equality requirements under international human rights and EU law in relation to the right to healthcare. While there are important provisions in all the core human rights instruments, focus will be placed on those relating to racial equality in this submission.

According to the UN Committee on Economic, Social and Cultural Rights (CESCR) that "non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights".[7] CESCR is the monitoring body of the International Covenant on Economic Social and Cultural Rights (ICESCR), which enshrines the right to the highest attainable standard of health is enshrined in Article 12 of the Covenant. CESCR has also set out a number of components that make up the right to health which include; availability, accessibility without discrimination (including non-discrimination, physical accessibility, affordability, information accessibility, acceptability and quality (including culturally appropriate healthcare).[8]

In addition, under Article 5 of the United Nations Convention on the Elimination of Racial Discrimination (CERD) States Parties are required to:

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[5] Section 75 of the Northern Ireland Act 1998: A Guide for Public Authorities - An Outline Guide, 2002, Equality Commission for Northern Ireland, available at: http://www.equalityni.org/archive/pdf/S75_Public_Authorities_Outline_Guide.pdf

[6] *Ibid.*

[7] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20 (non-discrimination in economic, social and cultural rights (art.2, para. 2 ICESCR),* UN Doc. E/C.12/GC/20, 2 July 2009, available at: http:// www2.ohchr.org/english/bodies/cescr/comments.htm.

[8] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14 (the right to the highest attainable standard of health (art.12, para. 2 ICESCR),* UN Doc. E/C.12/GC/2000/4, 11 August 2000, available at: http:// www2.ohchr.org/english/bodies/cescr/comments.htm., para. 12.

> "undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: …
> (e) Economic, social and cultural rights, in particular: …
> (iv) The right to public health, medical care, social security and social services;"

Although the European Convention on Human Rights (ECHR) (which has been incorporated into domestic law by the Human Rights Act 1998) does not explicitly recognise the right to health and social care, due to the fact that it focuses largely on civil and political rights, there are some relevant provisions within that instrument. For example, the right to life (article 2), the prohibition against torture and inhuman and degrading treatment (article 3) and the right to private and family life, home and correspondence (article 8). In addition, the concept of non-discrimination is enshrined in Article 14 of the Convention in terms of the enjoyment of other Convention rights. This will be discussed in more detail in section 4 below.

On the other hand, Article 35 of the EU Charter of Fundamental Rights explicitly recognises the right to healthcare. The general principle of non-discrimination is enshrined in Article 21. While the Charter only has legal effect when implementing EU law, it is highly relevant for EU migrant workers because they are exercising their EU Treaty right to free movement and therefore the Charter comes into effect.

Moreover, the Article 5(e) of the Racial Equality Directive 2000/43 prohibits discrimination on the grounds of racial or ethnic origin in the provision of healthcare. The concept of discrimination as defined in the Directive includes direct and indirect discrimination as well as harassment, which has been incorporated into domestic law in the Race Relations Order (Northern Ireland) 1997.

3. Focus on Human Rights: A rights-based approach to health and social care provision in Northern Ireland

In the Minister's foreward to the TYC consultation document he recognises that the proposals should "meet the needs of the population of Northern Ireland".[9] Regrettably, the right to health and social care is not mentioned in the foreword and equality and human rights are only mentioned at the end of the consultation document. However, in the screening document, the Board states that it has considered human rights implications relevant to TYC.

Nevertheless, in NICEM's view the entire strategy for the implementation of the TYC proposals should be underpinned by a human rights-based approach. Indeed, it is mentioned in the screening document that the Board is "considering best practice in relation to adopting and promoting a human rights-based approach".[10] While this is to be welcomed in principle, NICEM is concerned that human rights are only mentioned at the end of the consultation document in terms of complying with the Human Rights Act 1998, which wouldn't seem to indicate a human rights-based approach. Furthermore, before looking at practices, presumably from other countries, which have circumstances different to the particular circumstances of Northern Ireland given the post-conflict health needs of the population, it is suggested that the Board look to their international obligations first and foremost. As already mentioned above, the Committee on Economic, Social and Cultural Rights has elaborated on the content of Article 12 (the right to the

[9] HSBC, TYC: Vision to Action – a consultation document, 9 October 2012 – 15 January 2013.

[10] Health and Social Care Board, Screening of TYC, SIP, page 37.

highest attainable standard of health) in order to assist States parties' in their implementation of this right.

In the section relating to States parties obligations, CESCR outlines that State parties must respect, protect and fulfil the right to health[11]. Broadly speaking this means:

- The duty to *respect* a right: the state must not interfere with existing access to or enjoyment of a right and to take positive steps to maintain existing access.
- The duty to *protect* a right: the state must prevent third parties from interfering with equal and affordable access to that right.
- The duty to *fulfil* a right: the state must provide a way for people to exercise a right where they cannot do this independently.

In addition, CESCR reiterates that the right to health is subject to progressive realisation which means that "State parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realisation of article 12". However, certain elements of the right comprise minimum core obligations, which must be implemented with immediate effect. These include:

> "(a)to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalise groups …
> (e) to ensure equitable distribution of all health facilities, goods and services"[12]

Indeed, it is also recognised that resources are an issue in the implementation of the right to health care and budget restrictions have been alluded to throughout the TYC proposals. However, the Board must bear in mind that the obligation to progressively realise the right to the highest attainable standard of health applies even in a recession and State parties must make the maximum use of their available resources (both human and financial) as well as ensuring that no retrogressive measures are taken.[13]

Lastly, a human rights approach places a strong emphasis on monitoring, accountability, transparency and participation and this is underpinned by the principles of consistency and fairness. In the screening document, it was pointed out that Board intends to meet with the NI Human Rights Commission on an "on-going basis … to discuss and better understand how we can monitor and assess human rights impacts of changes in health and social care provision as a result of TYC".[14] Again, NICEM welcomes this intention and urges the Board to meet with the NIHRC in relation to this as soon as possible as the development of human rights indicators is a complex and time consuming exercise.

Nevertheless, as pointed out by CESCR certain guidance is already available from the World Health Organisation (WHO) and the UN Children's Fund (UNICEF). In addition, the Office of the Human Commissioner of Human Rights has also issued guidance on human rights indicators.[15] CESCR has also pointed out that the development of national benchmarks and indicators allow for improved

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[11] CESCR, *General Comment No. 20,* para. 33-37.

[12] CESCR, *General Comment No. 20,* para. 44.

[13] CESCR, *General Comment No. 20,* para. 30-32.

[14] Health and Social Care Board, Screening of TYC, SIP, page 37.

[15] OHCHR, *Human Rights Indicators: A guide to measurement and implementation,* 2012, available at: http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf.

accountability when State parties are required to report to CESCR on a periodic basis.[16] In relation to monitoring, we are aware of the problems faced by all public authorities in relation to data collection. However, we are also aware that data sets exist in a range of formats and there is a clear need for more joined-up governance when it comes to the collection of disaggregated monitoring data. Indeed, CESCR also notes "right to health indicators require disaggregation on the prohibited grounds of discrimination".[17]

Secondly, the screening document also states that "human rights awareness will be a core element of training for the TYC Programme Team members".[18] NICEM welcomes this and calls upon the Board to ensure that such training is taken as soon as possible and includes modules dealing with anti-discrimination and anti-racism training as it has been demonstrated above this is a key component of the human rights framework.

Thirdly, despite having identified relevant provisions of international human rights instruments in the screening document, the Health and Social Care Board has concluded that this policy would not have any impact on Convention (ECHR) rights. Given the outstanding issues affecting BME communities' access to healthcare, as will be outlined in section 5 below, in NICEM's view Convention rights are will be impacted by the TYC proposals and as a result we call on the Board to carry out a full human rights impact assessment of the TYC proposals.

Recommendation: NICEM calls on the HSC Board to immediately adopt a human rights-based approach to health and social care in Northern Ireland in line and to carry out a full human rights impact assessment on the TYC proposals.

4. Focus on Equality: Section 75 and Screening of TYC proposals

As already mentioned in the introduction, NICEM welcomes the move to review and reform the way in which health and social care is delivered in Northern Ireland. In addition, NICEM welcomes the fact that two of the key principles of the proposals are to "tackle inequalities" and "safeguarding the most vulnerable". Regrettably, however, those inequalities are not identified and the 'most vulnerable' is not defined in the consultation document. Nevertheless, in accordance with section 75, the TYC proposals underwent the screening process. NICEM has some concerns about the process itself as well as the content of the screening document with respect to the impact of TYC on BME communities which will be outlined in this section.

Firstly, the screening document was produced alongside the consultation document and both had the same deadline for submissions. This is not in line with the Equality Commission's guidance which states:

> Screening is more useful if it is introduced at an early stage when developing or reviewing a policy, or during successive stages of implementation (e.g. strategic review, options paper). To undertake screening after policy proposals have been developed may be inefficient in terms of time and may be ineffective if policy makers are reticent to make changes at a later stage.[19]

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[16] CESCR, *General Comment No. 20,* para. 57-58.

[17] CESCR, *General Comment No. 20,* para. 57.

[18] CESCR, *General Comment No. 20,* para. 57-58.

[19] ECNI, *Section 75 Guide for Public Authorities,* page 51.

Therefore, NICEM is concerned that equally impacts will not be fully reflected in the TYC approach and calls upon the Board to undertake screening earlier in the policy development process.

Secondly, in considering quantitative data, the Board states that the 2011 Census data had not been available at the time of writing. NICEM calls upon the Board to update both the screening document and the TYC proposals in light of the publication of the statistics in December, particularly the fact that there was an increase in black and minority ethnic groups living in Northern Ireland from 0.8% in 2001 to 1.8% (32,400) of the population. In addition, NICEM is concerned that the only school census information quoted dated back to 2008 and questions whether the Board can receive more up-to-date information which will be reflected in the final proposals. The screening document also highlights the fact that there are "gaps in the information base [relating to] non-Christian faiths and those with no faith".[20] However, no detail has been provided as to whether this gap will be filled. Given the calls from the CESCR to provide culturally appropriate healthcare, NICEM believes it is essential for the Board to seek out that information. NICEM does however, welcome the Board's use of statistics from the NI HSC Interpreting Services, but again expresses concern that the need for increased interpreting services has not been addressed in the TYC proposals. Indeed, in failing to collect relevant data it is submitted that the HSC Board has failed in its duties under section 75.

Recommendation: NICEM calls on the Board to ensure comprehensive, up-to-date and disaggregated data is used to inform the TYC approach as this is also an essential component of the section 75 duty.

Thirdly, in considering the qualitative data available the Board refers to 'national research', which suggests that there are differences between the needs of members of the black and ethnic minority community as well as different age groups within the community. NICEM would like to alert the Board that the interaction between age and race is the exact kind of multiple identity issue, which could give rise to multiple discrimination when considering the TYC proposals and this should be reflected in the section on multiple identities.

However, the concept of multiple identities and multiple discrimination appears to be somewhat confused in the screening document. For example, it is stated that "we are all constantly defining and redefining aspects of ourselves". NICEM is deeply concerned about this statement since it misrepresents the concept of multiple identities in equality law terms since discrimination grounds come from protected characteristics, such as race. Therefore, it is not simply a personal choice to redefine one's identity.

In addition, the HSCB goes on to place emphasis on geography in terms of areas of deprivation. While this is of course a very relevant consideration and should be taken into account, in NICEM's view, this information is misplaced under the heading of multiple identities and should be considered elsewhere.

Although multiple discrimination is not currently covered by the legal framework in Northern Ireland, it is a recognised equality law concept and the Board must remain cognisant of that fact. In addition, it is commonplace for claimants in the courts to argue on more than one ground of discrimination, but this is in the alternative since multiple discrimination is not a part of the legal framework in Northern Ireland.

[20] Page 14 & 18 screening.

Recommendation: NICEM calls on the HSC Board to reconsider the potential for TYC proposals to lead to multiple discrimiantion based on the equality law understanding of that term.

Fourthly, and crucially, specific adverse impacts of certain proposals are highlighted in relation to BME communities' access to health and social care. For example, it is stated in the screening document that the health services to be accessed through primary and community care settings may indicate a "disproportional impact on the category" on Travellers. This is also an issue that NICEM identified in a scoping study on BME health inequalities in 2010. Furthermore, the screening document also identifies that there is high rates of caring in the Pakistani, Bangladeshi and Indian communities and the new respite and support for carers will impact on this group. The document does not, however, specify whether this would be an adverse impact or not. This is particularly important since it was also identified that BME communities, in general terms, have a lack of knowledge about health and social care services, including respite services.

Despite having identified these equality impacts, particularly the adverse impact for the Traveller group and accepting that the TYC proposals represented a 'major' impact on the promotion of equality of opportunity, the HSC Board decided to screen the policy out and not to carry out a full equality impact assessment (EQIA). In providing reasons for this decision, the Board stated that many aspects of the TYC were not new and had been previously assessed or would be subjected to such assessments in the future. NICEM rejects the argument that there is no need to carry out an EQIA given that some proposals have already been implemented, since TYC represents a new strategic direction with particular vision, aims and priorities and thereby represents a fundamental shift in the delivery of all exisiting health and social care provision. NICEM also submits that this is not a sufficient response, particularly given the fact that the Equality Commission has issued guidance to the effect that if a policy will have a 'major' impact, an EQIA should be considered. In addition, the Equality Commission has also cautioned that "public authorities should take care in particular not to 'screen out' policies that have a procurement aspect if there is potential to promote equality of opportunity through the procurement of services".[21] Moreover, despite screening out the policy, the Board did not consider whether the equality impacts could be mitigated.

NICEM is deeply concerned that in the midst of this wholescale reform the needs and rights of BME communities in Northern Ireland may not be provided for. The identification of two equality impacts for BME communities indicates a piecemeal approach and only takes a snapshot of issues. NICEM has identified some other barriers to equal acccess to healthcare which will be discussed in the next section.

Recommendation: NICEM calls upon the HSC Board to undertake a full equality impact assessment of the TYC proposals given the fact that this policy change will have a major impact and in particuar adverse impacts for the Traveller community were identified in the screening document (and there may be other potential impacts as outlined below) as well as the fact that there is public procurement involved.

5. BME communities & TYC

Firstly, NICEM calls upon the HSC Board to remove references to "citizens" in the TYC proposals as this fails to recognise that there are many people living in Northern Ireland who are not either

[21] ECNI, *Section 75 Guide for Public Authorities,* page 53.

British/Irish citizens or indeed EU citizens. Again NICEM would refer the Board to the UN CESCR who states that all persons in the territory must have access to health and social care.

Seconldy, in the screening document there is a list of relevant strategies to which the TYC is linked.[22] Although the Racial Equality Strategy lapsed in 2010, the new and revised Strategy is due to be implemented in 2013 and NICEM believes the relevant provision should be both linked to and implemented in the TYC framework when it becomes available.

Thirdly, and as already mentioned, NICEM welcomes the fact that two of the key principles of the proposals are to "tackle inequalities" and "safeguarding the most vulnerable". NICEM has identified following needs/inequalities in health care provision:

- **Information, language and communication:** This remains a key inequality in the health system and has even been identified in the HSC Board's audit of inequalities. In addition, the screening document has identified that there is evidence of a lack of knowledge of services as well as the fact that there has continually been an increased demand on interpreting services. However, again there is no plan of action in the TYC proposals about how this will be addressed.
- **Affordability:** According to the consultation document, the TYC proposals are based on the principles of the NHS and core objective of Health and Social Care System is that they are generally free at the point of delivery.[23] In 2011, the NI Human Rights Commission published a research paper on migrants access to publicly funded medical care based on residency status in NI.[24] In addition, DHSSPS has recently (10 January 2013) launched a consultation in relation to when persons will be able to access free health care and the TYC proposals must clearly reflect on the responses to this consultation. In any event, two of the recommendations of the NIHRC report relate directly to the HSC Board and should be implemented as part of TYC:
    - "In providing the service on behalf of the HSC Board, BSO should exercise its power to seek records of refusals for GP registration by practices, and analyse the reasons for refusals by practices or by BSO itself.
    - The Board and Trusts, or BSO on their behalf, should have procedures for facilitating hospital care for persons present in the UK for an approved purpose (for example, cross-border workers)."
- **Access issues:** In addition to the consultation by DHSSPS, pilot studies have already been initiated by issuing forms to persons arriving in hospital and those forms contain a declaration which allows the health services to share information with UKBA. It is NICEM's view that this will have a chilling effect and will deter BME groups from accessing health care. There is also much anecdotal evidence in relation to difficulties in accessing GPs and dentists for BME communities, particularly the most vulnerable groups such as Travellers and Roma, who may not be able to register because of a lack of permanent address. It must be ensured that the TYC proposals do not create further barriers to accessing health and social care, particularly given the fact that many services, already accessed by BME communities in the hospital setting, will now be delivered in the community.
- **Culturally appropriate:** In the screening document, under the heading religion the HSC Board has stated that "once social need are accounted for religion does not have a significant independent influence on health status or uptake of services".[25] NICEM rejects

[22] Pages 9 and 10 of the Screening doc.

[23] Page 9 of TYC consultation document.

[24] NIHRC (2011), *Access Denied – or paying when you shouldn't.*

[25] Page 22 of screening document.

this view, since it does not take account of the needs of minority religions. For example, Jehovah's witnesses cannot accept blood transfusions in accordance with the religion. Indeed, as outlined above, the UN CESCR requires the provision of health and social care to be culturally appropriate and in that vein NICEM calls on the Board to make every effort to fill the gaps in their information about non-Christian faith as well as those who do not practise religion and take relevant measures to ensure that provision is culturally appropriate.

- **Protection of vulnerable groups:** There is a clear need to protect the most vulnerable and marginalised when it comes to access to health and social care. The All Ireland Traveller Health Study has shown that mortality is 3.5 times higher, life expectancy much lower, there is higher chronic diseases and suicide rates for Travellers than than in the general population. Similiar trends can be found in the Roma community. In addition, particular care needs to be taken to protect separated asylum seeking children who are very vulnerable. Therefore, the TYC proposals must include a plan of action as to how these health inequalities will be addressed for vulnerable groups.
- **Ageing BME population:** Particular attention needs to be paid to the fact that a number of BME communities in Northern Ireland have an ageing population, for example Chinese and Indian, and this presents new challenges for communities who did not previously have to engage with health care services at that age.
- **Long term conditions:** In the screening document, it is pointed out that BME communities have greater rates of certain diseases than other groupings in society. Often there is great stigma attached to certain long-term conditions such as HIV/AIDS and this can lead to discrimiantion against BME communities. NICEM calls on the HSC Board to address some of those issues in relation to long-term conditions.
- **Provision of bespoke mental health care services for BME communities:** The screening document identifies that there is an increased rate of mental health issues for the newly arrived in Northern Ireland as well as asylum seekers (particularly children). Regrettably, the particular needs of BME communities were not reflected in the Bamford Review and the Bamford Action Plan 2009-2011 merely states that the mental health needs of ethnic minority communities need. However, Northern Ireland is far behind practice in Great Britain in this and this is not addressed in TYC. It is essential that individuals have the opportunity to have access to mental health services in their own language as it is difficult to provide such services through an interpreter and therefore there is a need to employ bi-lingual workers.

6. TYC and moving to a model of community care: Some concerns

One of the most significant proposals in TYC is a 5% shift (approx. £83m) from hospital services to primary and community and social care services by 2014/15. While NICEM understands the intended rationale for this shift is to allow people to be cared for in their homes and communities, we are concerned about the legal implications in terms of upholding equality and human rights standards as well as accountability.

Under section 75 of the Northern Ireland Act 1998 public authorities, such as the Health and Social Care Board and the various Trusts, are required to actively promote equality of opportunity. We are concerned that when contracting out services this duty will not be implemented and there will not be any accountability mechanism to hold the service provider to account.

The potential lack of observance of human rights when contracting out was borne out in a recent High Court judgment of 5 July 2012, when SERCO, a private company that runs the Colnbrook

Immigration Removal Centre, was found in breach of Article 3 and Article 8 of ECHR.[26] The case concerned the unnecessary use of restraints; FGP was restrained continuously during nearly 9 days hospitalisation either by ratchet handcuffs or closet chains (handcuffs at either end of a chain 2.5 metres in length attached to security staff all times). This included being attached to security staff while showering and using the toilet, as well as during medical consultations and treatment and while asleep despite the fact that there was nothing in FGP's history to suggest he would abscond from custody.

According to a report in The Guardian, Serco is now on course to win yet another mulit-million pound public service contract despite this judgment as well as revelations that:

> "Its staff assisting border controls have been found to have missed security alerts and to have left their stations unmanned. The company was recently found by the health regulator to be failing to meet legal requirements to provide enough staff, to train them properly or monitor their performance in the out-of-hours GP service that it runs for the NHS in Cornwall."[27]

In NICEM's view this case is indicative of the broader deficiencies in the UK's public procurement law and practice and highlights issues around the privatisation of public services in the UK. Such instances of abuse have also been occurring in the social care services sector and have also been well documented in the media.[28] A report issued on 7 August 2012 into the abuse at this particular care home details hundreds of incidents of restraint and dozens of assaults on patients at the private hospital.[29]

Moreover, in an investigation by the Equality and Human Rights Commission, it was found that 84 per cent of publicly funded home care is now provided by private and voluntary organisations commissioned by local authorities. The report reveals that although public authorities claimed to take human rights into account, the authorities did not had a "patchy understanding of their own obligations in protecting and promoting these rights for older people".[30] As a result the EHRC recommended the mainstreaming of human rights into all levels of decision-making, which is something that NICEM consistently campaigns for.[31] Given the TYC proposals, NICEM is fearful that a similar situation might arise in Northern Ireland.

It is not only the EHRC that has called for the mainstreaming of human rights in public procurement processes. According to the European Commission's guidance on Socially Responsible Public Procurement ('SRPP') it is necessary to fight against "discrimination on other grounds (age,

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[26] *FGP Vs Serco Plc and Secretary of State for the Home Department* [2012] EWHC 1804.

[27] Daniel Boffey, 'Serco set to take charge of 'big society' initiative', The Guardian, 5 August 2012, available at: http://www.guardian.co.uk/society/2012/aug/05/serco-bid-national-citizen-service?INTCMP=SRCH.

[28] A Panorama documentary recently highlighted through an undercover investigation the physical abuse of an elderly lady with dementia. http://www.bbc.co.uk/news/uk-17810136.

[29] 'Care abuse detailed in shock report', Belfast Telegraph, 7 August 2012, available at: http://www.belfasttelegraph.co.uk/news/local-national/uk/call-for-action-on-care-home-abuse-16194614.html#ixzz22rOU8Fr4.

[30] Equality and Human Rights Commission, *Close to Home: An inquiry into older people and human rights in home care,* November 2011, available at: http://www.equalityhumanrights.com/uploaded_files/homecareFI/home_care_report.pdf.

[31] *Ibid.*

disability, race, religion and belief, sexual orientation, etc.)" and creating equal opportunities and "protecting against human rights abuse and encouraging respect for human rights". [32]

In addition, in 2011 the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, set out a number of principles on business and human rights. One of the principles is particularly relevant for this discussion;

> States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.

In the commentary following this principle, States are called upon to "clarify the State's expectations that these enterprises respect human rights".[33] The Ruggie Principles also set out the tenets of corporate social responsibility, which is very important but not directly relevant to this discussion as the focus here is on the obligations of the State. Nevertheless, these principles and the developments at the EU level clearly indicate that privatisation of services does not equate to an abdication of human rights duties.

This issue that has also awakened concern among some politicians. Members of the All Party Group on Ethnic Minority Communities, to which NICEM is the Secretariat, held a seminar on human rights and public procurement in November 2012. In addition, on 26 Apr 2012 Lisa Nandy (Wigan, Labour) asked the Secretary of State for Business, Innovation and Skills "what recent discussions representatives of his Department have had with the devolved assemblies on human rights and procurement". Francis Maude (Minister for the Cabinet Office; Horsham, Conservative) replied stating:

> Responsibility for public procurement is devolved to the national administrations but responsibility for overall UK public procurement policy rests with the Cabinet Office. My officials meet regularly with those from the relevant Departments in Northern Ireland, Scotland and Wales to discuss a range of matters related to public procurement. The Cabinet Office has no record of meetings that specifically discussed procurement and human rights.[34]

Therefore, there is a clear and well-evidenced need to ensure the effective and meaningful mainstreaming of human rights and equality in the privatisation of public services, particularly the building in of social clauses into all contracts.

Recommendation: NICEM calls upon the Board to ensure that the Ruggie Principles are complied with when deciding to contract out services as a result of TYC proposals.
The Equality Commission has also produced guidance on integrating equality of opportunity and sustainable development into public sector procurement, which NICEM calls upon the Board to follow.[35]

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[32] European Commission, *Buying Social - A Guide to Taking Account of Social Considerations in Public Procurement,* 28/01/2011.

[33] Human Rights Council, *Report the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,* 21 March 2011, UN Doc. A/HRC/17/31.

[34] Hansard Citation: HC Deb, 26 April 2012, c1018W.

[35] Equality Commission for Northern Ireland and the Central Procurement Directorate (May 2008), Equality of Opportunity and Sustainable Development in Public Sector Procurement.

7. Further Information

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