RESPONSE TO THE PUBLIC CONSULTATION ON THE FUTURE OF THE EDUCATION MAINTENANCE ALLOWANCE SCHEME

Executive Summary

A. The NIHRC welcomes the provision of Educational Maintenance Allowance (EMA) as a progressive measure to promote the right to education for all young people on an equal basis. The NIHRC is concerned that changes to the EMA scheme will place considerable restrictions on the economic eligibility criteria for provision of financial assistance.

B. The NIHRC advises that any changes to the EMA scheme that could have a retrogressive impact on the right to education can only be undertaken where they are justifiable under the grounds outlined by the Committee on Economic, Social and Cultural Rights. This includes an evidence-based evaluation of the alternatives, clear opportunities for promoting rights through the reinvestment of funds, and a full analysis of the evidence regarding the best use of resources.

C. The NIHRC advises the consideration of more flexible mechanisms within the EMA scheme that will reduce any potential discrimination in provision, such as addressing the barriers faced by young people with learning difficulties or disabilities in meeting the eligibility criteria, and considering the vulnerabilities of young people with dependents.
Introduction

1. The Northern Ireland Human Rights Commission (the NIHRC) pursuant to Section 69 (1) of the Northern Ireland Act 1998 reviews the adequacy and effectiveness of law and practice relating to the protection of Human Rights. In accordance with this function the following statutory advice is submitted to the Department of Employment and Learning (DEL) and the Department of Education (DE) in response to the joint consultation on the future of the Educational Maintenance Allowance (EMA) scheme.

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

- The European Convention on Human Rights, 1950 (ECHR) [UK ratification 1951];
- The International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) [UK ratification 1976];
- The United Nations Convention on the Elimination of all forms of Discrimination Against Women, 1975 (CEDAW) [UK ratification 1986];

3. The Northern Ireland Executive is subject to the obligations contained within these international treaties by virtue of the United Kingdom’s ratification. The NIHRC, therefore, advises that any changes to the EMA scheme must be fully compliant with the rights contained in these international human rights standards.

The right to education

4. Article 2 of the First Protocol to the ECHR requires that “no person shall be denied the right to education”. Article 14 of the ECHR also

---

1 Northern Ireland Act 1998, S.69(1).
2 European Convention on Human Rights (1950) Protocol 1, Article 2
prohibits any direct or indirect discrimination in the exercise of Convention rights, including the right to education.³

5. When considering the right to education enshrined in the ECHR, the jurisprudence of the European Court (ECtHR) has determined this to mean the right to an effective education, in that “the individual who is the beneficiary should have the possibility of drawing profit from the education received.”⁴

6. Article 13 of the ICESCR and Article 28 of the UNCRC require that secondary education should be “available and accessible”⁵ to all through the use of “every appropriate means”⁶, including the “progressive introduction of free education”⁷ and, as outlined in the UNCRC, “offering financial assistance in case of need.”⁸

7. Article 28 of the UNCRC also places a duty on the government to take “measures to encourage regular attendance at schools and the reduction of drop-out rates”.⁹

8. The UN Committee for Economic, Social and Cultural Rights has identified “accessibility”¹⁰ as a core dimension of the right to education, with this aspect further defined in terms of economic accessibility, physical accessibility and non-discrimination.

**Economic Accessibility**

9. The NI Executive is obligated to respect, protect and fulfill the right to education. The obligation to fulfill incorporates both a duty to facilitate and a duty to provide. This requires the DEL and DE to “take positive measures that enable and assist individuals and communities to enjoy the right to education”.¹¹ In addition, the DEL and DE are required to provide for individuals who “for reasons

³ Ibid, Article 14
⁴ European Court of Human Rights, Belgian Linguistic Case No.1 (1967), Series A, No.5 (1979-80) 1 EHRR 241; and No.2 (1968), Series A, No.6 (1979-80) 1 EHRR 252.
⁵ United Nations Convention on the Rights of the Child 1989, Article 28, 1(b) and International Covenant on Economic, Social and Cultural Rights 1966, Article 13, 2(b)
⁶ Ibid.
⁷ Ibid.
⁸ United Nations Convention on the Rights of the Child 1989, Article 28, 1(b)
⁹ Ibid, Article 28, 1(e)
¹⁰ United Nations Committee on Economic, Social and Cultural Rights, General Comment 13 on The Right to Education (1999) Para. 6(b)
¹¹ UN Committee on Economic, Social and Cultural Rights, General Comment No. 13 on The right to Education (1999) para. 46
beyond their control” are unable to “realise the right themselves by the means at their disposal.”

10. The Committee on the Rights of the Child has, in its Concluding Observations in 2008, recommended that there is a need to:

“(a) Continue and strengthen its efforts to reduce the effects of the social background of children on their achievement in school;
(b) Invest considerable additional resources in order to ensure the right of all children to a truly inclusive education which ensures the full enjoyment to children from all disadvantaged, marginalized and school-distant groups;”

11. The NIHRC welcomes the continued provision of EMA as a measure aimed at progressively improving access to secondary education for young people facing economic barriers.

Non-retrogression

12. The UN Committee for Economic, Social and Cultural Rights, has stated that “States parties have a specific and continuing obligation “to move as expeditiously and effectively as possible towards full realization of Article 13” and that, “there is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education.”


14. The grounds for justification of deliberately retrogressive measures are defined by the Committee on Economic, Social and Cultural

---

12 Ibid, para. 47
13 UN Committee on the Rights of the Child, Concluding Observations: The United Kingdom of Great Britain and Northern Ireland (2008) Para. 67 (a) and (b)
14 DEL A Review of the Educational Maintenance Allowance (EMA) Scheme, (2010) para. 1.4
16 Ibid, para. 45
17 United Nations General Assembly, 66th Session, The right to education (2011) para. 8
18 Ibid, para. 11
Rights as being permissible only “after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party’s maximum available resources.” 19

15. The NIHRC notes with concern that all of the options provided in the consultation document involve removing financial assistance from considerable numbers of young people, with almost a third fewer recipients projected by 2014/15 under Options 3-5. 20

16. The NIHRC further notes that Option 2 and Option 4 presented in the consultation provide little or no opportunity for reinvestment of resources to promote the right to education of marginalised young people.

17. Data from the DEL/DE review of EMA has been included in the consultation as evidence that the current scheme is not making the best use of resources as “the effectiveness of the scheme in incentivising participation and engagement in education is limited.” 21 The NIHRC is concerned that the views of only 7.5% of young people currently receiving EMA were represented in the findings of the review. 22 Of those respondents, 90% were attending schools and 10% were attending college. 23

18. The review contains no information on the impact of EMA on attainment levels and therefore provides no evidence with regard to how changes to the EMA scheme could impact the right to access an effective education. This is an absence that the NIHRC advises the DEL and DE to address.

19. The NIHRC recalls that any changes to the EMA scheme should be underpinned by a broad evidence base that takes into account the full range of information within the DEL/DE review, as well as the

20 See consultation document Fig 1.2: 31,519 recipients in 2014/15 under current scheme, Fig 1.10: 22,207 recipients in 2014/15 under Options 3-5
21 Consultation document, para. 6.1
22 DEL/DE A Review of the Educational Maintenance Allowance (EMA) Scheme, (2010) Fig. 2.5: 1810 respondents, Fig. 3.6: 23,974 total recipients of EMA
23 Ibid, Fig. 2.8
24 Eg. Considerable weight has been given to a single finding in the review, namely that 64% of learners disagreed with the statement “If I had not received EMA I would have left school at 16”. However, over 50% of learners surveyed also stated that EMA had a positive impact on their attendance and participation. DEL/DE A Review of the Educational Maintenance Allowance (EMA) Scheme, (2010)
findings in other independent studies not currently referenced in the review.²⁵

20. The NIHRC welcomes the intention of the review to ensure that financial assistance is “directed toward those that need it most and where it will ultimately have the most meaningful impact”.²⁶ However, the NIHRC is concerned that the options proposed by the DEL and DE for the future provision of EMA may represent retrogression in the provision of access to education under Article 13 of the ICESCR and Article 28 of the UNCRC, and therefore may not be compliant with the NI Executive’s duty to protect and fulfill the right to education.

21. The NIHRC advises that any reduction in the provision of EMA is only that which is permissible under the conditions outlined by the Committee on Economic, Social and Cultural Rights.²⁷

**Non-discrimination**

22. The requirement to ensure non-discrimination with regard to the right to education is set out through the interaction of Article 14 of the ECHR with Protocol 1 Article 2.²⁸ It is also protected in Article 2 of the UNCRC, as well as Article 24 which requires the right to education be realized “on the basis of equal opportunity”²⁹.

23. The UNCRPD also protects education as a right that must be provided for without discrimination and where necessary, with “reasonable accommodation of the individual’s requirements”.³⁰ It must also be noted that under Article 5(4) of the UNCRPD, that “specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention”.³¹

24. The NIHRC notes that the current consultation document indicates a “small proportion” of participants in the review raised concerns over the impact of guided learning hours on students with learning

---
²⁶ See Consultation document para. 6.9
²⁸ *European Convention on Human Rights* (1950) Article 14 and Protocol 1, Article 2
³⁰ *UN Convention on the Rights of Persons with Disabilities* (2006) Article 24 (c)
³¹ Ibid, Article 5 (4)
difficulties or disabilities. This appears inconsistent however with evidence within the DEL/DE review of EMA which states that the inability of some students with learning difficulties or disabilities to meet the eligibility criteria was “the main area of concern for stakeholders”.

25. The NIHRC advises that the guided learning criteria be evaluated and reviewed to ensure that young people with learning difficulties or disabilities are able to meet the eligibility criteria on an equal basis with other students, as required by the ECHR under Article 14 read in conjunction with Protocol 1 Article 2 which prohibits discrimination in the enjoyment of the right to education.

26. Article 10 of the CEDAW requires the NI executive to take measures to ensure “the reduction of female student drop out rates” in order to achieve equal access to education for women and men. Further to this, the Committee on the Rights of the Child in its concluding observations of 2008 expressed concerns that the “majority...of teenage mothers do not attain basic qualifications.”

27. The NIHRC advises that the DEL and DE consider the need for increased flexibility in the provision of EMA for students with dependents in order to improve both participation and attainment, such as that provided within the Scottish EMA scheme which extends provision to four years for teenage parents.

November 2012

Northern Ireland Human Rights Commission
Temple Court, 39 North Street,
Belfast BT1 1NA
Telephone: (028) 9024 3987
Textphone: (028) 9024 9066
Fax: (028) 9024 7844

32 See P.17 consultation document
34 European Convention on Human Rights (1950) Article 14 and Protocol 1, Article 2
35 UN Convention on the Elimination of all forms of Discrimination Against Women (1979) Article 10 (f)
36 UN Committee on the Rights of the Child Concluding Observations: The United Kingdom of Great Britain and Northern Ireland (2008) para. 47
Email: information@nihrc.org
Website: www.nihrc.org