



NORTHERN IRELAND OFFICE

THE GOVERNMENT'S RESPONSE TO

**THE NORTHERN IRELAND
HUMAN RIGHTS COMMISSION'S**

**REVIEW OF POWERS
RECOMMENDATIONS**

A Paper for Consultation

May 2002

**GOVERNMENT RESPONSE
TO NIHRC'S REVIEW OF POWERS RECOMMENDATIONS
A Paper for Consultation**

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Chapter 1 Introduction

1. Section 69(2) of the Northern Ireland Act 1998 required the Northern Ireland Human Rights Commission to make recommendations to the Secretary of State, after its first two years of existence, on ways in which its effectiveness could be improved, including in relation to the powers and duties conferred on it by Part VII of the Act. The Commission's report, containing these recommendations, was received by the Secretary of State in March 2001.

Context

2. In assessing the Commission's recommendations, we have been mindful of the fact that the Commission has a pivotal role in safeguarding human rights for the people of Northern Ireland. However, it is operating within the context of the wider democratic institutions and principles within Northern Ireland, including those required by the Belfast Agreement. These provide important roles for others, both in the running of the country and the protection and promotion of human rights.

3. The Government itself – both directly and through the creation of an appropriately structured body of law and law enforcement agencies – also has an obligation to safeguard and protect the human rights of the people it serves. This, alongside the principle of Parliamentary sovereignty, which allows democratically elected politicians to hold the Government of the day to account and to take ultimate decisions on the law of the land, already creates the basic framework within which the Commission operates.

4. Throughout the UK and elsewhere, the police and the courts have a crucial role as the front line defenders of human rights. In Northern Ireland, there is a further range of institutions, set up with the object of helping both to build confidence in the integrity of the system and to hold it to account.

5. In addition, we have been mindful of the proposals of the Northern Ireland Executive to create a Commissioner for Children, with a broad remit to promote and protect children's rights and interests within Northern Ireland. The Commissioner will obviously have an important role to play in championing human rights and will become a significant new player in this field.

6. The duties and powers of the Commission need to be complementary to these other bodies (and the many others involved in protecting and promoting human rights) to avoid duplication if the system is to work effectively and to the benefit of the people of Northern Ireland. The Commission's recommendations have been considered in this context.

7. Another consideration has been the extent to which legislation is required to give effect to the Commission's recommendations. In many cases, the outcome could be achieved – or, indeed, has already been realised – without the need for primary legislation. This provides a quicker means of delivering what the Commission has asked for.

8. In light of this, the Government would particularly welcome comments, as part of this consultation, on whether the priority should be to deliver the *objective* of the Commission's recommendations or to enshrine – or clarify – them in legislation.

Consultation arrangements

9. This consultation paper represents the Government's draft response to the Commission's recommendations. We are proposing to accept many of the recommendations. In cases where we are proposing not to accept a recommendation, this is often because the proposal duplicates existing provisions allowing the Commission to act in a particular way.

10. Before we finalise our decisions and take action, where necessary, to give effect to these, we want to hear others' views on the subject. We would seek to bring forward

legislation, if it was needed to implement the response, subject, of course, to the availability of Parliamentary time. The precise wording of any legislation would be a matter for Parliamentary Counsel.

11. The purpose of this consultation is two-fold:

- (a) First, we are interested to hear others' views on the proposed response and the assessment of the Commission's recommendations.

- (b) Secondly, we wish to consult with interested groups on our screening of the proposals in this response for compliance with the statutory equality duty set out in section 75 of the Northern Ireland Act. The screening assessment is set out in Chapter 10 of this paper.

12. Comments on either of these issues should be sent, **by 16th August 2002** to:

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Chapter 2 Independence

13. We noted in the previous chapter of this document that the Commission was not the only body with responsibility for protecting and upholding the rights of the people of Northern Ireland.

14. The Government accepts the importance of the Commission retaining independence from other organisations, including Government itself. Only in this way will the Commission be seen by all sections of the community in Northern Ireland to be a worthy custodian of human rights for all. Clearly similar considerations also apply to, among others, organisations like the police, the Equality Commission, the Police Ombudsman and the Chief Electoral Officer. All of these bodies need operational independence in order for the public to have confidence in their impartiality and integrity.

Recommendation 1

In section 68(3) of the Northern Ireland Act 1998, the following underlined words should be inserted: “In making appointments under this section, the Secretary of State shall establish an independent selection process, complying with the requirements of section 75 of this Act and of the Principles Relating to the Status of National Institutions, approved by the General Assembly of the United Nations in Resolution 48/134 of 1993, and as far as practicable secure that the Commissioners, as a group, are representative of the community in Northern Ireland.”

15. The Government agrees that it is important for appointments to non-departmental public bodies to be made in a way that guarantees appointment on merit and in a manner free from political patronage. It also accepts the emphasis of the UN’s *Paris Principles* that it is important for the Commission’s membership to be as representative as possible of the community that it serves.

16. These important principles of independence and representativeness are achieved, at present, in the following ways:

(a) *Independence* At present, NIHRC appointments are made by the Secretary of State in accordance with the guidance issued by the Office of the Commissioner for Public Appointments (OCPA). This process provides for independent oversight of the appointments process throughout, by the inclusion of an OCPA-approved representative on the selection panel and applicants' right of appeal to the independent Commissioner for Public Appointments. Additionally, the Commissioners' mandate is established by legislation and their terms of office are set at the start of the appointment (subject to possible renewal), thus providing the stable mandate for Commissioners as recommended by the *Paris Principles* as being necessary for independence.

(b) *Representativeness* This is currently achieved by the requirement in s.68(3) of the Northern Ireland Act 1998, which requires the Secretary of State "so far as practicable [to] secure that the Commissioners, as a group, are representative of the community in Northern Ireland." Public appointments are, as mentioned above, also governed by the OCPA guidelines and the requirements of s.75 of the Northern Ireland Act 1998, which places a statutory duty on public authorities to promote equality of opportunity and good community relations across a range of groups.

17. The Government believes that this process, established under the Public Appointments Order in Council 1995, safeguards the independence of the appointments process and there is no need to legislate again to reinforce that position. However, we accept completely the importance of ensuring that appointments to the Commission are governed by legislation that guarantees independent oversight to the process and a representative outcome.

18. We have also had regard to the legislation governing appointments to other countries' human rights commissions. Legislation governing appointments in many other countries, including Ireland, is similar to that in Northern Ireland.

Recommendation 2

A new section 68(3A) should be inserted into the Northern Ireland Act 1998, which reads: “Each member of the Commission shall serve impartially and independently and shall exercise or perform his or her powers, duties and functions in good faith without fear, favour, bias or prejudice and subject only to the law.”

19. The Government agrees that it is important that the Commission acts – and is seen to act – in a way that is impartial and independent from other agencies. We therefore support the principle of this recommendation. The Commission is already governed by extensive legislative requirements providing that it should act impartially and without bias, including the provisions of sections 75 and 76 of the Northern Ireland Act. And, of course, Commissioners – like other citizens – are subject to the law. The proposal in recommendation 2 is already well covered by the legislation.

Recommendation 3

Paragraph 4(1) of Schedule 7 to the Northern Ireland Act 1998 [“The Commission may employ staff subject to the approval of the Secretary of State as to numbers and as to remuneration and other terms and conditions of employment”] should be deleted.

20. The provision is included in order to ensure proper accountability for public expenditure. This is an important principle to safeguard, and the framework set out in the Northern Ireland Act in respect of the Human Rights Commission is common across most of the public sector, including the Policing Board, the Police Ombudsman and the Equality Commission.

21. We agree, however, that the setting of the Commission’s overall budget and the retention of controls over remuneration and other terms and conditions of employment provide sufficient discipline and assurance in relation to the use of taxpayers’ money. Within that context, we are therefore content to remove the need for the Commission to seek Ministerial approval to the number of staff they employ.

Recommendation 4

A new paragraph 12 should be inserted into Schedule 7 to the Northern Ireland Act 1998, which reads “The Crown shall enter into a Memorandum of Understanding with the Commission in respect of all relevant matters

to ensure that the Commission's status as an independent human rights commission as set out in the Principles Relating to the Status of National Institutions, approved by the General Assembly of the United Nations in Resolution 48/134 of 1993 is guaranteed."

22. The Government agrees that it is important to establish, through an administrative agreement such as a Memorandum of Understanding, the relationship between it and the Commission. This is the normal procedure for managing, at a practical level, the relationship between a Non-Departmental Public Body (NDPB) and its sponsor Department.

23. The procedure is not normally covered by legislation but rather as an administrative arrangement between the organisations concerned. This is also the case in other countries. The legislation setting up human rights commissions in a range of other countries (for example, Australia, Canada, India, Ireland, New Zealand and South Africa) makes no specific provision for the sponsor department and the commission to enter into a formal memorandum of understanding of the type proposed in recommendation 3.

24. The Secretary of State for Northern Ireland and the Commission are in the process of agreeing a Memorandum of Understanding. It is the Government's intention that this would, among other things, clearly delineate the roles and inter-relationships of the Commission and the Northern Ireland Office, as its sponsoring Department, in order properly to preserve the Commission's independence and ensure appropriate procedures for accounting for, for example, public money.

25. The Government supports the principle of Recommendation 4 but is not persuaded that this process, which is essentially one of administrative procedure, needs to be prescribed by law. The Northern Ireland Office is committed to agreeing a Memorandum of Understanding with the Commission as soon as possible.

Chapter 3 Resources

26. The Commission makes a number of recommendations for ensuring it has access to greater resources than it has had to date. In considering these recommendations, the Government has had regard to the fact that there is a finite pool of public money available and, in each case where this is distributed to part of the public sector, there is a need to demonstrate value for money.

27. We have made clear from the Commission's inception that we are willing to consider sympathetically any bid for additional resources, supported by a properly costed business case. Indeed, the Commission's budget for the financial year 2001-02 was increased from £750,000 to £1.3 million. Like other NDPBs - and, indeed, Government Departments - the onus is on the Commission to demonstrate why the money is required.

Recommendation 5

A new section 68(3B) should be inserted into the Northern Ireland Act 1998 which reads "The Commission shall be provided with sufficient resources to ensure that it can carry out each of its functions effectively."

28. The Government is committed to ensuring that the Commission has appropriate funding to enable it to fulfil its role as set out in the Northern Ireland Act 1998 and envisaged by the Belfast Agreement. This desire needs to be set in the context of needing to ensure appropriate funding also for other public bodies and services. The Government has a duty to ensure that it achieves value for money in the way in which it allocates resources. It cannot allow any organisation to write itself a blank cheque.

29. The Act provides for the Secretary of State to make available funds for the Commission out of money voted by Parliament. That is the basis on which the Commission's initial annual baseline of £750,000 was set. It is also the norm for public bodies' funding, including, for example, the Policing Board and the Police Ombudsman as well as the Equality Commission (whose funding is set by the Office of the First Minister and Deputy First Minister, with approval from the Department of Finance &

Personnel). The position in other countries is similar, with responsibility for setting the budget generally falling to the Minister in charge of the sponsor department.

30. In setting this initial budget – which represented three times the budget of the Commission’s predecessor body, the Standing Advisory Commission on Human Rights (SACHR) – the Government made clear that it was prepared to consider sympathetically a bid for additional resources, supported by a business case demonstrating the added value in outcome terms that would accrue from the extra funding. Again, this is the norm for other public bodies.

31. During the course of this year, the Government has responded to a series of bids from the Commission, bringing the total available to the Commission for 2001-2002 to over £1.3m, an increase of 74% on its baseline. We have recently received the Commission’s bid for more long-term increases to its baseline, and are considering it carefully, taking account of other pressures on the public purse.

32. The existing arrangements put the Commission in the driving seat in terms of assessing what resources are necessary to fulfil its duties but also place an obligation on it to demonstrate the value for money justification for providing them. The Government believes that these remain the most appropriate means of ensuring that the Commission has access to adequate resources and that there is proper accountability for money paid out of the public purse.

Recommendation 6

A new paragraph 6A should be inserted into Schedule 7 to the Northern Ireland Act 1998 which reads: “Subject to the duties imposed by section 68(3A) [impartiality and independence of Commissioners], and in order to further its activities for the promotion and protection of human rights in Northern Ireland, the Commission may from time to time apply for or accept grants from lawfully constituted bodies or raise funds through the provision of services or other lawful activities.”

33. The Government agrees that the Commission should be able to accept funding from other sources. This is, in fact, already the case. However, in order to ensure value for

public money, the Commission is not entitled to receive money from outside sources for which it has already been allocated money by the Government. In other words, there should be no duplication of funding.

34. For this reason, the terms of the Commission's grant agreement require it to check first with the Northern Ireland Office, as its sponsor department, before applying for funding from an outside source. If the outside money is to cover activities additional to those for which the Commission has already received funding, there will be nothing to prevent the Commission accepting it. If, however, Government has already funded the activity for which the money is intended, the Commission would not be able to accept it.

35. All of this remains an important principle of funding of public bodies and an important tenet of the proper use of public money. As with the proposal in recommendation 3, this is primarily an administrative arrangement and would not normally be dealt with through primary legislation. That is the case in most other countries, although we note that the New Zealand legislation makes explicit provision for its human rights commission to accept funding from a variety of sources.

36. The Government will ensure that the arrangements under which the Commission may accept funding from outside sources are clearly set out in the Memorandum of Understanding discussed in relation to recommendation 3.

Recommendation 7

A new paragraph 2(2A) should be inserted into Schedule 7 to the Northern Ireland Act 1998, which reads: "The Chief Commission and two of the other Commissioners shall be appointed on a full-time basis." *The Commission does not, however, wish this recommendation to be implemented unless the necessary associated resources are made available to it for the payment of two extra full-time Commissioners.*

37. The Government recognises the increasing workload facing the Commission. In response to this, the Government agrees that some structural amendments to the Commission's composition are required to increase the membership resources

available to it. That is why the Secretary of State announced the appointment of four new members to the Commission last November.

38. We are not immediately persuaded that the answer is to create two full-time Commissioner posts – on top of that of the Chief Commissioner. While we want to strengthen the Commission to make it more able to function effectively, we need to balance this with the need to avoid making this into a large and unwieldy organisation. It is already relatively unusual within UK bodies to have a full-time Chair of a public body and creating, particularly on a statutory basis, three full time positions would be a further departure from the norm. There is a danger that this could create a two-tier system with the possibility of either the part-time Commissioners being marginalised or the burden of work falling disproportionately to the full-time members. We recognise, however, that some other countries specify the extent to which their commissioners should be appointed on a full-time basis.

39. A further consideration is that public appointments are meant to bring people from all walks of life into contact with the management of the public service. In the main, this is done on a part-time basis, in conjunction with other work, thus helping to ensure what the UN Paris Principles describe as ‘pluralist representation’. Much of that could be lost if all or some of these appointments became full-time. We would restrict considerably the field from which we could draw and this would be to the overall detriment of the public service, in this case the Commission.

40. An alternative model that might achieve some of the workload-sharing benefits desired by the Commission while not losing the important diversity of membership, might be to increase the Commission’s membership and create a position of Deputy Chief Commissioner. All of these positions could be filled on a part-time basis, and the Deputy Chief could be appointed from among the existing Commissioners. This would help to spread the workload as well as bringing a wider spectrum of experience to the Commission’s membership. The announcement of four new appointments last November already achieves the first element of this proposal.

41. As to amending the legislation to require certain positions to be filled on a part-time basis, the Government believes that, just as the overall size of the Commission is not prescribed by statute but is rather left flexible, it would be a mistake to prescribe in law the time-commitment to be expended by the Chief Commissioner and any other Commissioners. In doing so, this would remove flexibility for the future (for example, to make more posts full-time or more part-time) and potentially also reduce the pool of candidates interested in making themselves available for these important positions. That would not be in the Commission's - or Northern Ireland's - interests.

42. The Government therefore proposes to respond to the Commission's recommendation in the following way:

(a) increasing the Commission's current membership; and

(b) creating the position of Deputy Chief Commissioner

43. No legislative changes are required to increase the Commission's membership and this increase has already been effected. A Deputy Chief Commissioner can be appointed on an extra-statutory basis but the Government may choose to put the position on a statutory footing along with the other amendments to the Northern Ireland Act proposed by this document. This could be achieved with minor amendments to Section 68(2) and, in Schedule 7, paragraphs 2(3), 2(4), 3(2) and 8(2)(a).

44. The Government intends that the first Deputy Chief Commissioner should be appointed, from among the current group of Commissioners - all of whom have been appointed through an open and transparent process - in the spring of 2003, once the new appointees have had a chance to settle in and once the other Commissioners' second term of appointment has begun.

45. We will keep under review the desirability of increasing the number of full-time Commissioners and will consider changing the status quo if that appears to be appropriate. However, this could be achieved without legislation.

Chapter 4 Reviewing & Advisory Functions

46. The Commission's role in reviewing law and practice relating to the protection of human rights is particularly crucial. The Government welcomes the work that the Commission has done so far in this field and looks forward to further contributions to the debate on how best to ensure adequate protection of rights in future.

Recommendation 8

In section 69(1) of the Northern Ireland Act 1998, the following underlined word should be inserted: "The Commission shall keep under review the adequacy and effectiveness in Northern Ireland of law, policy and practice relating to the protection of human rights."

47. It is not clear what additional areas would be covered by this inclusion than are already covered by the reference to "law and practice". The Commission's report does not make this explicit. The position in other countries appears to be similar to that applying to the Northern Ireland Human Rights Commission at present.

48. We would welcome comments, as part of this consultation exercise, on the issues that are currently not covered by the legislative provision that might usefully be covered in future. Subject to the responses received, the Government will consider whether any gaps exist and, if so, how best to address them, whether through legislative or administrative means.

Recommendation 9

A new section 69(1A) should be inserted into the Northern Ireland Act 1998 which reads: "Without prejudice to subsection (1) the Commission shall keep under review the implementation in Northern Ireland of the Human Rights Act 1998 and of the Bill of Rights for Northern Ireland." *The Commission does not, however, wish this recommendation to be implemented unless the necessary associated resources are made available to it for the performance of this duty?*

49. A duty to keep under review the implementation of the Human Rights Act (HRA) and any Bill of Rights (BoR) for Northern Ireland is conferred on the Commission by s.69(1). The HRA is, and any BoR will be, the fundamental building blocks against

which other human rights protections are interpreted. Reviewing the implementation of these is, therefore, at the heart of the Commission's existing duties. As with other aspects of its work, it is open to the Commission to bid for increased resources to support its work on this duty.

Recommendation 10

A new section 69(2A) should be inserted into the Northern Ireland Act 1998 which reads: "The Commission shall, before the end of the period of three years beginning with the making of the recommendations required by section 69(2), report to the Secretary of State on the extent to which the recommendations made have been implemented, make such further recommendation for improving the Commission's effectiveness as it thinks fit and, for these purposes, obtain the assistance of independent assessors."

50. The Government agrees that the Commission should be able to make further recommendations on ways in which its effectiveness might be improved. We would like, however, to go further than what the Commission has proposed and avoid tying this process to a formal, time-bound arrangement, since this would potentially require another change of legislation in five years' time further to extend this duty. We also believe it is unnecessary to tie the Commission's hand to using external assessors to support this work; this should be a matter for the Commission to decide itself, rather than being bound to do so by the statute.

51. We therefore intend to bring forward a more open-ended amendment to the Commission's founding legislation, by amending the existing section 69(2) to make clear that the Commission may, from time to time, make further recommendations to the Secretary of State as it sees fit, without any specific time limits.

Recommendation 11

A new section 69(3A) should be inserted into the Northern Ireland Act 1998 which reads: "The Secretary of State and the Executive Committee shall refer to the Commission all draft laws and policies proposed for Northern Ireland as early as practicable and before they are introduced to Parliament or the Assembly or made available to the general public."

52. The Government endorses the principle that the Human Rights Commission should have the opportunity to comment on draft legislation and changes to existing practice as it relates to human rights protection. This is an important part of the Commission's work. The Commission's specific role in relation to Assembly legislation is set out in section 69(4) of the Northern Ireland Act, and the provisions of section 69(3) also establish the Commission's role in advising Government and the Executive on necessary human rights provisions.

53. However, the Commission is not the only organisation with expertise in human rights issue, nor is it the only body charged with proofing Westminster legislation to ensure compliance with the Convention Rights. The requirement in section 19 of the Human Rights Act, that the responsible Minister make a statement on its compatibility with the Convention Rights, is an important process and ensures that human rights standards are always considered as part of the development of policy and legislation. Departments are required to include an analysis of compatibility in the explanatory memorandum that accompanies a Bill and Parliament then has the opportunity to consider this.

54. The Joint Parliamentary Committee on Human Rights naturally takes a particularly active interest in the area of compatibility. In addition, plans are underway (set out in the Memorandum published last December by the House of Commons Modernisation Committee) to increase the opportunity for pre-legislative scrutiny *and* for consideration of draft legislation within Parliament. This will strengthen the existing procedures. The Commission will have the opportunity to alert the members of the standing and select committees set up to take forward this task to its views, and they will therefore be able to draw on that expertise, as required, in carrying out their work.

55. There may, of course, be occasions when it is not practicable to refer draft legislation to the Commission before it is introduced. To tie either the Government or the Executive to this process, given the opportunity *after* legislation is published for the Commission to comment, seems to us to be unnecessarily prescriptive. It is also the case that other interests – not just human rights considerations but, for example,

equality issues – have a legitimate interest in scrutinising new legislation and practice. To afford the Human Rights Commission a unique role in this regard would not be right.

56. The Government therefore does not propose to amend the Northern Ireland Act in this way. We have considered the position in other countries and believe this approach is in line with their governing legislation.

Recommendation 12

A new section 69(3B) should be inserted into the Northern Ireland Act 1998 which reads: “The Commission shall advise the Secretary of State on the desirability of the United Kingdom becoming bound by international instruments on human rights.”

57. The Government welcomes the Commission’s views on the desirability of the United Kingdom being bound by international instruments on human rights. Indeed, insofar as the needs of Northern Ireland are concerned, we consider this is within the Commission’s existing duties imposed by the requirements of s.69(1) – to keep under review the adequacy and effectiveness of law and practice relating to human rights – and, in particular, of s.69(3) – to advise the Secretary of State of legislative and other measures which ought to be taken to protect human rights in Northern Ireland. (*emphasis added*)

58. The power to give such advice clearly already exists within the Northern Ireland Act. The question here is whether this should be imposed as a specific *duty* on the Commission. This would remove the Commission’s discretion, something that we would not wish to do lightly. The Government would welcome views on whether this is a desirable change or whether it would be better to leave the position, as at present, to the discretion of the Commission.

Recommendation 13

A new section 69(4A) should be inserted into the Northern Ireland Act 1998 which reads: “The Secretary of State and the Executive Committee of the Assembly shall have due regard to the Commission’s advice.”

59. The Government agrees that it is important for the Commission's advice to be given appropriate weight in the consideration of law and practice affecting human rights issues.

60. In addition, the Government has ensured, through the way in which the Human Rights Act and Northern Ireland Act were framed, that there are a number of other safeguards to ensure that human rights considerations are at the heart of policy and law making:

- (a) The obligations on public authorities created by the Human Rights Act make clear that such bodies must act compatibly with the Convention Rights, unless statutorily barred from doing so, and Ministers must consider the implications for human rights before introducing legislation to Westminster.. Parliament will hear the Ministerial 'section 19' statement about the compatibility of the legislation and will take that into account when considering a Bill.
- (b) Within the Assembly, the Human Rights Commission has a formal role in advising on the compatibility of Bills on devolved matters.
- (c) The Human Rights Act gives the Courts strong powers to strike down, or declare incompatible, legislation that has not properly taken account of these rights and, of course, provides an opportunity for victims who believe their human rights have been denied or violated to take cases to the courts.

61. Given this framework, there is already an obligation on a par with that set out in s.75 of the Northern Ireland Act, referred to in the Commission's report, requiring public authorities, save in very particular circumstances, to act in accordance with the Convention Rights. Just as with the provisions of the s.75 statutory equality duties, this obligation goes beyond having regard - or due regard - for the views of any single organisation.

62. It will ultimately remain the responsibility of Government and Parliament to take decisions about how best to determine policy and frame legislation, within the context set by the Human Rights Act. The Commission has an important advisory role to play in that process, but it remains for Government to take its own decisions, based on advice from many quarters and with proper regard for the democratic principle, on the way to proceed. For the Commission's role to go beyond this – or for Government to be *bound* by the Commission's advice – could blur the proper distinctions between the role of Government and that of the Commission, compromising both the Commission's independence and Parliamentary sovereignty.

63. Within that context, the Government and the Executive will wish to avail of a variety of sources of advice in preparing legislation. In relation to human rights aspects of the legislation, these sources are likely to include – but not be confined to – the Human Rights Commission. The Government accepts the importance of ensuring that the Commission's advice is taken properly into account and, subject to the outcome of this consultation, we will seek to amend the Northern Ireland Act as necessary.

Chapter 5 Casework

64. Section 69(5), Section 70 and Section 71 set out the parameters within which the Commission may provide support to individuals bringing proceedings in relation to the protection of human rights and may bring proceedings in its own name.

65. As a general point in considering these recommendations, the Government has had regard to the discussions that took place at the time the Northern Ireland Act was going through Parliament and the advice to the Government at the time that certain powers – including the power to intervene as a third party or to be called as a friend of the court – would automatically be available to the Commission. The statement by Paul Murphy, then Minister of State at the Northern Ireland Office, cited by the Commission in its report, represents the genuine understanding of the Government at the time.

66. The Lord Chief Justice for Northern Ireland's ruling in 2000 that the Commission did not have these powers since they were not explicitly set out on the face of the Act clearly changes this position. The Government has no wish to frustrate the Commission from having access to the full powers that Parliament – and Government – understood it was conferring on it in 1998. It remains possible that the appeal that the Commission is now taking to the House of Lords will resolve the matter without the need for further legislation. But, if not, the Government will be willing to bring forward amendments to the Northern Ireland Act to make these powers explicit.

Recommendation 14

In section 69(5) of the Northern Ireland Act 1998 a new paragraph (c) should be inserted which reads “[The Commission may] give information and advice involving law, policy or practice relating to the protection of human rights.”

67. The Government believes that, implicit in its role in supporting individuals and promoting awareness of human rights issues, the Commission already has the power to give information and advice in this way. However, subject to the outcome of this

consultation and, in particular, the question raised about the definition of 'policy' in relation to recommendation 8, we would be happy to bring forward an amendment in response to this recommendation to remove any doubt that may exist.

Recommendation 15

In section 69(5) of the Northern Ireland Act 1998 a new paragraph (d) should be inserted which reads "[The Commission may] intervene as a third party on any matter or in any proceedings in any court, tribunal, inquest, hearing or adjudicative process involving law, policy or practice relating to the promotion or protection of human rights in Northern Ireland and the persons conducting the court, tribunal, inquest, hearing or adjudicative process shall have due regard to the points made by the Commission in its intervention."

Recommendation 16

In section 69(5) of the Northern Ireland Act 1998 a new paragraph (e) should be inserted which reads "[The Commission may] appear as *amicus curiae* on any matter or in any proceedings in any court, tribunal, inquest, hearing or adjudicative process involving law, policy or practice relating to the promotion or protection of human rights in Northern Ireland and the persons conducting the court, tribunal, inquest, hearing or adjudicative process shall have due regard to the points made by the Commission as *amicus curiae*."

68. As discussed above, it had been the understanding of the Government that the power to apply to intervene as a third party or be called as a 'friend of court' (*amicus curiae*) was implicit in the Commission's existing powers. Subject to the outcome of the Commission's current application to the House of Lords, the Government intends to bring forward an amendment that will allow the Commission to be called as *amicus curiae* or to apply to intervene as a third party in proceedings. Any intervention would, of course, be with the leave of the court concerned.

69. The courts are, of course, already obliged to have due regard to all the evidence placed before them in a particular case and the Commission's contribution would be no exception. In addition, under the terms of the Human Rights Act, the Courts are explicitly obliged to act in a way that is compatible with the Convention Rights, unless statutorily barred from doing so. That obligation exists irrespective of what intervention is made by the Commission. It will remain a matter for the individual

court to decide what weight to give to each piece of evidence or intervention put before it.

Recommendation 17

In section 71(1) of the Northern Ireland Act 1998, the reference to section 69(5)(b) of the same Act should be deleted – so that the Commission will then have the power to bring proceedings in its own name and when doing so rely on Convention rights.

70. The European Convention on Human Rights is explicit in Article 34 that it expects proceedings to be brought by victims, not by third parties. That principle was reflected in the wording of s.7 of the Human Rights Act, which restricts the ability to bring proceedings on the grounds that a public authority has acted unlawfully within the terms of the Human Rights Act to victims or those who could become victims as a result of the alleged denial of human rights. As the Northern Ireland Act makes clear, the creation of the Human Rights Commission here was not intended to disapply this rule.

71. This is not just a question of legal tradition, although it is worth noting that a proposal to allow courts to decide matters in the abstract, without a real case in front of them, would mean a major departure from the basis on which our justice system works. In reality, breaches of human rights affect individuals, and are therefore arguably best judged by their effect – or potential effect – on the individual.

72. If the Commission wishes to test a point in court, in which it wishes to rely on Convention Rights, it should not, in practice, be difficult for it to find someone who has been – or could be – adversely affected and can therefore be assisted to bring a test case. For these reasons, the Government is not persuaded that it would be appropriate to amend the Northern Ireland Act in the way proposed.

Chapter 6 Promotion and Education functions

Recommendation 18

A new section 69(6A) should be inserted into the Northern Ireland Act 1998 which reads “The Commission may express an opinion, as far as the position in Northern Ireland is concerned, on the reports which the United Kingdom is required to submit to United Nations bodies and committees, and to regional institutions, pursuant to its treaty obligations.”

73. The Commission has already made submissions to United Nations bodies and committees on the state of human rights in Northern Ireland. The Government welcomes the fact that it has done so and considers it appropriate that the Commission should be free to do this, subject to the reports being accepted by the United Nations bodies concerned.

74. There may be merit in expanding the Commission’s founding legislation to make clear that the Commission has the power to make such representations to the Secretary of State for Northern Ireland and, in principle, are willing to bring forward an amendment to this effect if the point cannot be adequately covered by our response to recommendation 25 (see below). We would welcome comments on whether this should be limited to clarifying the Commission’s *power* to do this or whether, as with recommendation 12, it should be made a formal *duty*.

75. It should be borne in mind that the periodic reports the United Kingdom is required to submit to the various international bodies are formal statements of the discharge of the UK’s discharge of its functions under international law. They cover the whole of the UK and other territories for which it is the High Contracting Party. The Commission’s expertise is, of course, confined to Northern Ireland, and any comments it makes on the reports would need to be limited to areas affecting Northern Ireland.

Recommendation 19

A new section 69(6B) should be inserted into the Northern Ireland Act 1998 which reads: “The Commission may consult with, and attend the meetings of, such national or international bodies or agencies having a knowledge or expertise in the field of human rights as it thinks fit.”

76. The Government accepts that the Commission should be able to consult with such bodies as it sees fit, subject to the need to ensure that the Commission continues to be and be seen as independent of outside influences and, of course, the rules of the bodies and agencies themselves.

77. The Commission argues that recommendation 19 is required to ensure that there is no doubt about the Commission's powers to act in this way. However, the rights of freedom of expression and of freedom of association contained in the European Convention on Human Rights, incorporated within UK domestic law under the terms set out in the Human Rights Act 1998, already confer these rights on the Commission. In addition, the power given to the Commission in section 69(6)(b) to conduct research would adequately cover research and association with a wide range of bodies and sources of expertise.

78. Subject to the comments received in response to this consultation the Government is content, in principle, to bring forward an amendment to clarify the position, possibly in conjunction with any amendment associated with recommendation 25 (discussed below). Clearly, there would continue to be a need for the Commission to prioritise work on this area within its own budget.

Recommendation 20

A new section 69(6C) should be inserted into the Northern Ireland Act 1998 which reads: "Statutory authorities with responsibility for education or training in Northern Ireland shall consult with the Commission when determining or reviewing the human rights aspects of the content or delivery of education (including the Northern Ireland curriculum)."

79. Bodies providing education and training within Northern Ireland will, for the most part, be public authorities for the purposes of the Human Rights Act and will therefore already be required to act compatibly with the Convention Rights, within the terms of section 6 of that Act. It seems likely that many of them will want to draw on the Commission's expertise in this regard and the Government supports this.

80. Responsibility for education and training lies with the devolved administration in Northern Ireland. It would be inappropriate for the Government to legislate on these matters without first consulting the Executive.

81. In parallel with this consultation exercise, therefore, Ministers have written to the Northern Ireland Executive to seek their views on the Commission's proposals. Subject to their views and to specific issues raised in response to this consultation, we are content in principle to bring forward an amendment to this effect.

82. This would not, however, oblige these authorities to follow the Commission's advice or absolve them of the need to seek their own legal advice as required.

Recommendation 21

A new section 69(6D) should be inserted into the Northern Ireland Act 1998 which reads "The Commission shall monitor the content and delivery of the Northern Ireland Curriculum from the point of view of the promotion and protection of human rights." *The Commission does not, however, wish this recommendation to be implemented unless the necessary associated resources are made available to it for the performance of this duty.*

83. The Government agrees that it is important for the Commission to be able to monitor all aspects of public life to assess the adequacy of work aimed at the promotion and protection of human rights. This includes, of course, the education sector. The provisions in section 69(1) of the existing legislation already provide the Commission with the power to fulfil this in relation to the Northern Ireland Curriculum as well as in relation to other areas of public life. The Act, however, does not make this explicit as a specific duty on the Commission.

84. However, as with recommendation 20 discussed earlier in this chapter, the area specifically covered by this recommendation falls within the responsibility of the Northern Ireland Executive. We are seeking the views of the Executive in parallel with this consultation exercise, including about the extent to which such a role might be played by the proposed Commissioner for Children.

85. Subject to their views and those expressed in response to this consultation, we are content in principle to bring forward an amendment to make this a specific duty on the Commission. As with all areas of the Commission's work, it remains open to the Commission to bid for additional resources to support this work. The Government is committed to considering sympathetically any such bid, supported by a properly costed business case, within overall public expenditure constraints.

Chapter 7 Investigation

86. The recommendations made by the Commission in relation to its investigatory powers create the greatest challenge, raising as they do a potential conflict or duplication with the role of the Commission and those of the courts and law enforcement authorities all of which have an important role to play in protecting and promoting human rights within the United Kingdom.

Recommendation 22

A new section 69(8A) should be inserted into the Northern Ireland Act 1998 which reads "The Commission shall, in order to assure itself that human rights are being protected or to investigate any alleged violation of human rights, have access to all places of detention in Northern Ireland and to all places where persons are in the care of a public authority or of a person or body exercising functions of a public nature.

87. The Government accepts that it is crucial for places of detention to be inspected to protect against abuses of human rights in them and to guard against unfounded allegations of abuse. In the interests of transparency, the Government does not want to prevent the Human Rights Commission from having the opportunity to assure itself that human rights are being appropriately protected in places of detention. The Northern Ireland Office specifically sought to facilitate the Commission's recent investigation into the juvenile justice centres, subject only to the need to ensure the individuals' (and, where appropriate, parental) consent.

88. However, it does not follow that the Human Rights Commission should necessarily be the lead body with responsibility in this area. Bodies like the Police Ombudsman, the HM Inspectorate of Prisons, the lay Visitors for both police stations and prisons, the Independent Commissioner for Detained Terrorist Suspects and the Social Services Inspectorate already have important statutory roles in protecting detainees from denial of their human rights. The Government believes that it would confuse the issue if the Commission were to seek to take on board or duplicate these functions. This position

is consistent, in relation to policing, with the concern raised by the Patten Commission (paragraph 6.23) that a “confused proliferation of scrutiny into the police service” was to be avoided, since it would undermine the role of the Ombudsman. Similar considerations apply to the prison service and other areas.

Recommendation 23

A new section 69(8B) should be inserted into the Northern Ireland Act 1998 which reads “For the purposes of conducting investigations under section 69(8), the Commission may apply *ex parte* to a magistrate for a warrant to authorise the Commission, subject to strict safeguards protecting the Convention rights of all persons in those premises, (a) to enter and search premises if it reasonably believes that a human rights violation has occurred or is occurring there and (b) to remove any article discovered in those premises if it reasonably believes that a human rights violation has occurred or is occurring there and (b) to remove any article discovered in those premises if it reasonably believes that the article provides evidence of a violation human rights.”

Recommendation 24

A new section 69(8C) should be inserted into the Northern Ireland Act 1998 which reads “For the purposes of conducting investigations under section 69(8), the Commission may require a person whom the Commission reasonably believes to be in possession or control of any information, document or thing that is relevant to an investigation being conducted by the Commission, (a) to furnish that information, document or thing to the Commission and (b), where appropriate, to attend before the Commission to answer fully and truthfully any question put to him or her by the Commission (other than a question the answer to which might incriminate the person) and (c) , if so requested by the Commission, to sign a declaration of the truth of his or her answers to any questions put to him or her under paragraph (b)”.

89. In both these cases, what is proposed would give the Commission powers akin to those of a court (including the powers of the police acting on behalf of the courts to investigate crimes). The Government believes that these would seriously muddy the waters between the role of the Commission and those of the courts and the police – and, in the case of alleged abuses by the police, the Police Ombudsman.

90. The role proposed by recommendations 23 and 24 would sit uncomfortably with the Commission’s significant and important power to assist complainants in the ordinary courts. They are quite different roles. The one would be, desirably,

supporting one particular side of the argument; the other inevitably more judicial and neutral.

91. In the first mode, the Commission would be the complainant's friend, helping to argue his or her case. In the second, it would be more like an inquisitorial tribunal in its own right. People giving evidence to it would have to be allowed legal representation. Issues such as applications for public interest immunity would have to be decided. There would therefore be a strong case for the Chief Commissioner and some of its members being judges, or at least lawyers. These may not always be the most suitable people for the other, more advisory functions and, in compliance with the UN's Paris Principles' requirement that commissioners should represent the pluralist nature of civil society, the Government does not wish to be overly prescriptive about the backgrounds from which members of the Commission should be drawn.

92. There could also be a conflict between these roles if the Commission were to be involved successively in both the initial investigation and any subsequent proceedings before an established court. For the Commission to operate in both modes in succession in the same case, using compulsory investigative powers to obtain evidence which then featured in a court case where it actively assisted the applicant could, arguably, itself be a breach of the defendant's Convention right to a fair trial.

93. The Government has made clear that it is prepared to be as open and co-operative as possible with the Commission in carrying out its work. If the Commission believes that a public authority has unreasonably withheld relevant information from it, it has the power to seek a judicial review of the decision. The courts – themselves public authorities for the purposes of the Human Rights Act – have the power to order disclosure if they see fit, once a case has been brought before them. This route has been available to the Commission since its inception.

94. We recognise that the Commission has argued that, to date, it has been dissatisfied with the access given to it, citing in particular its investigation into Juvenile Justice

Centres. In that case, the Government sought to ensure that the Commission had access to all relevant documentation to enable it to carry out its investigation.

95. Public authorities have a duty to ensure that they continue to protect the rights of those in their care – or of those on whom they hold data. It was for this reason that it was necessary to seek individual children’s consent before allowing the Commission access to them. It was the role of the juvenile justice centre management to ensure that the children had the opportunity to give this consent and, if they were not prepared to do so, to respect the children’s wishes. In a number of cases, the children did not wish to be interviewed by the Commission’s representatives. To have forced them to be interviewed would have a breach of their privacy.

96. In short, it is the Government’s view that there are conceptual and practical difficulties in the Commission having, on the one hand, the right to take cases in its own name in the ordinary courts and the power to assist litigants in such cases (both of which were specified in the Belfast Agreement); and, on the other hand, separate tribunal-like investigative power (which were not mentioned in the Agreement). .In addition, the option of judicial review is already available if the Commission is dissatisfied with the response from the organisation concerned.

97. The Government recognises that there are some human rights commissions in other countries, including Ireland, which, within a different legal framework, have powers arguably analogous to those requested here. But, for the reasons given, the Government believes that they would fundamentally change the nature of the Commission, create an unacceptable confusion of roles and have the potential to raise human rights difficulties of their own.

Chapter 8 Incidental functions

Recommendation 25

A new section 69(10A) should be inserted into the Northern Ireland Act 1998 which reads: "The Commission may do anything incidental or conducive to the performance of the functions set out in this section."

98. A number of other countries have a similar 'catch-all' clause in their human rights commission legislation to make clear that their commissions can do anything incidental to assist them in the conduct of their business. We are content to introduce a similar provision along with the other amendments proposed for the Northern Ireland Act in this paper.

99. The Government believes that such a provision might remove the need for specific legislative provision for some of the other recommendations made by the Commission, since these would be incidental to the Commission's primary functions rather than specific powers in themselves. This could apply, for instance, to recommendations 12, 14, 18 and 19, and could offer a more flexible way forward to the Commission. We would welcome comments on this point.

Chapter 9: Impact of the proposed “Commissioner for Children” legislation

100. The Government is aware of the Northern Ireland Executive’s plans to introduce legislation to the Assembly to provide for the creation of a Commissioner for Children. Such a person would, among other things, have a key role in promoting children’s rights and in reviewing law and practice in Northern Ireland relating to children’s rights.

101. There are clearly some similarities in the duties of the proposed Commissioner for Children and the Human Rights Commission. It is in the interests of everyone, particularly Northern Ireland’s children, that there should be no duplication of work between the two bodies and that, similarly, nothing should be able to fall between the two stools.

102. There will, of course, be a need for administrative agreements between the two bodies to minimise duplication. We believe, however, that there is a need to amend the Northern Ireland Act to permit the Human Rights Commission not to fulfil some of its specific duties in relation to children if it is satisfied that the work is being effectively carried out by the Commissioner for Children. We are in discussion with the Office of the First Minister and Deputy First Minister within the Northern Ireland Executive about the precise mechanism for effecting this within the relevant pieces of legislation.

Chapter 10 Equality Screening

103. All designated public authorities in Northern Ireland are required to comply with the statutory equality duty, set out in section 75 of the Northern Ireland Act, which requires them, in carrying out their functions to *“have due regard to the need to promote equality of opportunity –*

- (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;*
- (b) between men and women generally;*
- (c) between persons with a disability and persons without; and*
- (d) between persons with dependants and persons without.”*

In addition, and without prejudice to the above duty, public authorities are required to *“have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.”*

104. The Government has considered the recommendations – and its response – against the screening questions set out in the Northern Ireland Office’s Equality Scheme, approved by the Equality Commission in November 2001. The results of this exercise are set out in the attached annex.

105. For the most part, there is no specific differential impact. This reflects the fact that it is not so much the powers and duties awarded to the Commission that can have an impact on groups within the section 75 categories, but rather the manner in which the Commission carries out its work in response to these powers and duties. This will be a matter for the Commission to assess as part of the implementation of its duties under section 75. An impact assessment of the Government’s policy in this regard is therefore not recommended.

NORTHERN IRELAND OFFICE

EQUALITY SCHEME SCREENING FORM

Function ID: Powers to be awarded to the Northern Ireland Human Rights Commission in response to its recommendation on ways in which its effectiveness could be improved.

Screened By Human Rights & Equality Unit

Date : 27.11.01

Recommended Action -

Review Priority 1 []

Review Priority 2 []

Review Priority 3 []

No Current Action [✓]

Decisions Review Date / / (3 years)

Signed - Group Chairperson

Questionnaire

1A Does the function referred to above involve any action which is likely to have an adverse differential impact on a person¹ on the basis of their:

	YES	DON'T KNOW	NO
Gender	[]	[]	[✓]
Sexual Orientation	[]	[]	[✓]
Religion	[]	[]	[✓]
Political opinion	[]	[]	[✓]
Disability (physical, mental, learning)	[]	[]	[✓]
Race or ethnic origin (includes Travellers)	[]	[]	[✓]
Age	[]	[]	[✓]
Dependant Responsibilities / dependancy	[]	[]	[✓]
Marital status	[]	[]	[✓]

¹ Person includes all individuals or groups with whom the Department interacts - employees, the public, contractors, purchasers, etc.

1B If the answer to any of the above is YES please briefly describe the impact and the affected group

N/A

2A Does the function referred to omit any action, the addition of which would promote the equality of opportunity, social inclusion or welfare of any person^{2*} on the basis of:

	YES	DON'T KNOW	NO
Gender	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Sexual orientation	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Religion	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Political opinion	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Disability (physical, mental, learning)	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Race or ethnic origin (includes Travellers)	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Age	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Dependant Responsibilities / dependancy	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Marital status	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Other (please specify) _____	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

2B If the answer to any of the above is YES please identify briefly the suggested amendment and beneficial impact:

N/A

3A Is there any conflict between the rights of any one person^{3*} and those of any other person contained within the effects of this function?

YES	DON'T KNOW	NO
<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

3B If YES please specify

N/A

² Person includes all individuals or groups with whom the Department interacts - employees, the public, contractors, purchasers, etc.

³ Person includes all individuals or groups with whom the Department interacts - employees, the public, contractors, purchasers, etc.

4 If an adverse impact has been identified how would you categorise it:

Significant Impact – Must be addressed	<input type="checkbox"/>	Priority 1
Moderate / Low Impact – Readily addressed	<input type="checkbox"/>	Priority 1
Significant Impact – Difficult to address in current circumstances	<input type="checkbox"/>	Priority 2
Moderate Impact – Not readily addressed	<input type="checkbox"/>	Priority 2
Low Impact – Not readily addressed	<input type="checkbox"/>	Priority 3

5. SCREENING ANALYSIS

Screening aims to identify those policies, functions or duties which are likely to have the greatest impact on equality of opportunity and community relations.

5.1 Is there any evidence of higher or lower participation or uptake by different groups within any of the nine categories?

Please tick? YES DON'T KNOW NO

If yes, give details:

N/A

5.2 Is there any evidence that particular groups have different needs, experiences, issues and priorities in relation to the particular main policy area?

(please tick) YES DON'T KNOW NO

If yes, give details:

Although people may perceive that they have had different experiences of dealing with the Commission, altering the Commission's powers is unlikely to impact in a differential way on groups within any of these categories. It is for the Commission, in screening the policies it adopts to implement the powers and duties it has under its legislation, to ensure there is no adverse differential impact on any group within any of the nine section 75 categories.

5.3 Is there an opportunity to promote equality of opportunity or good relations by altering policy?

(please tick) YES [] DON'T KNOW [] NO [✓]

If yes, give details:

N/A

5.4 Have consultations in the past with relevant representative organisations or individuals within groups indicated that particular functions, policies or duties create problems that are specific to them?

(please tick) YES [] DON'T KNOW [] NO [✓]

If yes, give details:

Different groups and individuals have different views about the Commission's recommendations. These comments have, however, not been articulated in terms of a particular need for people from those groups.

6. If the answer to any of the questions in this section is YES or DON'T KNOW, proceed to consideration as to whether to submit the function, policy or duty to a full impact assessment.

If the answer to all the above question is NO a full impact assessment is not required.

IMPACT ASSESSMENT REQUIRED: YES [] ; NO [✓] ; DON'T KNOW []

NORTHERN IRELAND OFFICE
