



Northern
Ireland
Office

Consultation Paper

**THE POWERS OF THE
NORTHERN IRELAND
HUMAN RIGHTS
COMMISSION**

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Contents

Introduction	2
The Government's response to the recommendations of the Northern Ireland Human Rights Commission	4
Equality	27
Regulatory Impact Assessment	28
How to respond to the consultation paper	31
The Consultation Criteria	33

Introduction

The Government believes strongly in the importance of human rights. It underpins our vision of a modern society, based on opportunity and fairness for all. The issue of human rights is constantly developing and Northern Ireland has been at the forefront of the evolving human rights agenda. The establishment of the Northern Ireland Human Rights Commission ('the Commission') in 1999 was a significant step. The Commission is an important element of the Belfast Agreement and it plays a major role in the continuing protection of human rights in Northern Ireland. In addition, the Government has also established a range of other bodies and mechanisms to ensure that human rights are protected and developed.

The Northern Ireland Act 1998 provided for the creation of the Commission. The Act sets out the functions, remit and powers of the Commission. Section 69(2) of the Act required the Commission to make recommendations regarding its effectiveness to the Secretary of State for Northern Ireland within the first two years of its existence. The Commission submitted 25 recommendations to the Secretary of State in March 2001. In May 2002, the Government issued a consultation paper, which outlined the initial response to all of the recommendations. It concluded that for a number of the recommendations, the Commission already possessed the powers in question.

Following the NIO's May 2002 consultation paper, a legal ruling of the House of Lords brought a new perspective to some of the Commission's recommendations. The Commission had called for clarification in legislation of a number of incidental and ancillary powers that had not been expressly conferred by the Northern Ireland Act 1998. In June 2002, the House of Lords ruled (*In re: Northern Ireland Human Rights Commission* [2002] UKHL 25) that the Commission did have one of these powers; the power to intervene as a third party and act as *amicus curiae* (friend of court).

In August 2002, the Commission responded to the Government's consultation paper. In that response it determined that the House of Lords ruling made it unnecessary to continue to argue for the express clarification of incidental powers and it therefore withdrew certain recommendations. In April 2004, the Commission submitted a supplementary report containing four additional recommendations and confirming that it had withdrawn recommendations 8, 9, 12, 14, 15, 16, 18 and 19.

The Government has considered the developments outlined above. We have also considered changes in other jurisdictions. Most importantly, we have considered the particular circumstances that relate to human rights in Northern Ireland.

We believe that it is right that the Commission is given appropriate powers. This paper outlines our proposals for ensuring that the Commission is provided with the right powers to enable it to carry out its duties effectively, while taking into account those safeguards that already exist and taking care to ensure that the work of the Commission does not duplicate work that is already properly carried out by other bodies. Given the significant changes that have taken place since May 2002, we also believe that the public should be consulted on the Government's updated response to the Commission's recommendations.

Following this consultation, we will produce a summary of those responses received. We will consider our proposals in the light of those responses and we then intend to legislate to enact proposals, where necessary, when parliamentary time allows. It should be noted that this consultation paper only applies to Northern Ireland.

The Government's response to the recommendations of the Northern Ireland Human Rights Commission

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".

1. The Government believes that as the Secretary of State makes appointments to the Commission in accordance with guidance issued by the Office of the Commissioner for Public Appointments (OCPA), there is already a sound basis for independent oversight and so there is no need for additional legislation to reinforce this position.

2. OCPA was established by Order in Council under the Public Appointments Order in Council 1995 (subsequently replaced by the 2002 Order). OCPA's guidance requires that appointments 'should be governed by the overriding principle of selection based on merit'. It also includes some important safeguards and requires, for instance, that there should be independent scrutiny throughout the appointment process by an independent assessor. In fact, in the recent round of appointments to the Commission, three of the four interview panel members were independent of Government and one was an international human rights expert. The Commissioner for Public Appointments can also investigate complaints and audit the process. Finally, the Secretary of State is accountable to Parliament for his decisions.

3. This method of appointment is typical for other non-departmental public bodies and is the proposed approach for the new Commission for Equality and Human Rights in Great Britain.

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 and without fear, favour, bias or prejudice and subject only to the law".

4. The Government does not believe that it is necessary to amend the Northern Ireland Act 1998 as proposed. However, we will ensure that a reference to these values is made in future letters of appointment for Commissioners.

5. 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 subject to legislative requirements providing that it should act impartially and without bias, including the provisions of sections 75 and 76 of the Northern Ireland Act 1998. 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.

6. The Government does not believe that the important safeguard at paragraph 4(1) of Schedule 7 should be removed. But we do believe that an appropriate balance can be found between necessary oversight of the staffing of the Commission and the need for the Commission to operate effectively.

7. The Government, as set out under recommendation 5 below, has a duty to achieve value in the use of taxpayers' money. This is an important principle and the provision at paragraph 4(1) of Schedule 7 is included to ensure this. The framework set out in the Northern Ireland Act 1998 in respect of the Commission applies to a number of other public bodies. However, we do want the Commission to have as much flexibility in this area as appropriate and will ensure that we work closely with

the Commission so that the requirements of this provision can be fulfilled without undue difficulties.

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 fully guaranteed".

8. The Government supports the principle of Recommendation 4 and agrees that it is important to establish the relationship between it and the Commission through a Memorandum of Understanding, but is not persuaded that this process, which is essentially one of administrative procedure, needs to be prescribed by law.

9. A Memorandum of Understanding is part of the standard framework for managing, at a practical level, the relationship between a Non-Departmental Public Body (NDPB) and its sponsor Department. At the time that the Commission prepared its recommendations, a Memorandum of Understanding was not in place. However, such a document was agreed in 2003. Officials in the Northern Ireland Office and in the Commission will keep the arrangements in the Memorandum under review.

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".

10. The Government believes that the existing arrangements remain the most appropriate means of ensuring that the Commission has access to adequate resources while ensuring that there is due regard for the need to achieve value for money paid out of the public purse.

11. The Northern Ireland Act 1998 provides for the Secretary of State to make funds available for the Commission out of money voted by Parliament. That is the basis on which the Commission's initial annual budget of £750,000 was set. It is also the normal procedure for funding many other public bodies. At the time that these recommendations were put forward, the Commission was concerned that its budget was not sufficient. Since that time, its budget has increased to £1.35 million.

12. Recommendation 5 would, effectively, allow the Commission to set its own budget. While 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 commitment must be set alongside the need to ensure appropriate funding for all other public bodies and services. The Government has a duty to the taxpayer to ensure that it achieves value for money in the way in which it allocates resources.

13. The Government is prepared to consider sympathetically bids for additional resources, supported by a business case demonstrating the added benefits that would result from the extra funding. This arrangement puts the Commission in the driving seat in terms of assessing what resources are necessary to fulfil its duties but also places an obligation on it to demonstrate the value for money justification for providing them. As with other NDPBs funded by Government, the onus is on the Commission to demonstrate why the money is required.

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."

14. As with the proposal in recommendation 4, this is primarily an administrative arrangement and would not normally be dealt with through primary legislation. In fact, to legislate in this case could put in place new constraints because we would need to

define in statute the sort of bodies from which the Commission could accept money and the range of activities the Commission could pursue to raise funds.

15. 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.

16. The Financial Memorandum agreed by the Commission and the Northern Ireland Office already sets out the circumstances in which the Commission can accept and raise funds from other sources. We will work with the Commission to ensure that procedures in place are adequate to allow appropriate fund-raising activities and external grants to be considered and accepted.

Recommendation 7

A new paragraph 2(2A) should be inserted into Schedule 7 to the Northern Ireland Act 1998 which reads: "The Chief Commissioner 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.)

17. The Northern Ireland Act 1998 does not prescribe for the size of the Commission or the time commitment that each Commissioner should make and so additional Commissioners can be appointed and time commitment determined without legislative change. To legislate as recommendation 7 suggests would actually be to remove flexibility for the future and so the Government does not believe that it is necessary to amend the Act as proposed.

18. The Secretary of State for Northern Ireland has recently appointed a new full-time Chief Commissioner and seven part-time Commissioners, in addition to the two Commissioners already in post. The Secretary of State is confident that these appointments have provided for a body with a good balance of skills and experience without being unwieldy.

19. The Government accepts that the burden of work may vary and will keep the size of the Commission under review. However, while it is already possible to appoint two more full-time Commissioners, the Government does not believe that this is appropriate. It is already relatively unusual within the UK 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.

20. 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 Commission and the community it serves.

21. One alternative model that would achieve some of the workload-sharing benefits desired by the Commission while not losing the important diversity of membership might be to create a position of Deputy Chief Commissioner. The Government will consider whether the creation of a Deputy Chief Commissioner is appropriate. We will also keep under review the optimum size of the Commission, in dialogue with the Chief Commissioner and make changes as appropriate.

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".

22. This was withdrawn by the Commission in August 2002.

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.)

23. This was withdrawn by the Commission in August 2002.

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 recommendations for improving the Commission's effectiveness as it thinks fit and, for these purposes, obtain the assistance of independent assessors".

24. The Commission has, through its supplementary review of 2004, already shown that it can make recommendations on an ongoing basis. The Government is not convinced, therefore, that legislation is necessary for this recommendation. However, we would welcome views on whether the Commission should make recommendations from time to time or at specified points in time and whether this should be set out in legislation.

25. The Government agrees that the Commission should be able to make further recommendations on ways in which its effectiveness might be improved. The three year period envisaged by the Commission in recommendation 10 has now passed. In any event, we believe that it would be more appropriate for the Commission to consider its effectiveness on an ongoing basis. 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.

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 of the Assembly shall refer to the Commission all draft laws and policies proposed for Northern Ireland as early as practicable before they are introduced to Parliament or the Assembly or made available to the general public".

26. The Government believes that the present position already strikes the appropriate balance between affording the Commission the opportunity to ensure that it can promote human rights considerations in the development of policy and legislation and the proper role of elected representatives in formulating and deciding on policy.

27. Section 69 of the Northern Ireland Act 1998 sets out the Commission's role in reviewing the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights. This is an important part of the Commission's work. We agree that it is important for Government and the devolved administration to consult with the Commission early in the policy-making process when relevant issues arise.

28. However, the Government does not believe that it would be appropriate to implement this recommendation, for the following reasons:

- To refer to the Commission 'all draft laws and policies' would be unworkable. New policies are formulated constantly across Government and its agencies and most will not touch on rights issues. The Commission would be overwhelmed by the volume of unrelated proposals.
- The Commission is not the only organisation with expertise in human rights issues, nor is it the only body charged with scrutinising legislation for compatibility with human rights. The Joint Parliamentary Committee on Human Rights naturally takes a particularly active interest in the area of compatibility. In addition, there are already legal requirements on Government to consider human rights compatibility in policy making. The requirement in section 19 of the Human Rights Act 1998 that, before the Second Reading of a Bill, the responsible Minister must make a statement on its compatibility with the European Convention on Human Rights ('the Convention') is another important process and ensures that human rights standards

must always be considered as part of the development of policy and legislation. Departments are required to include an analysis of compatibility in the explanatory notes that accompany a Bill and Parliament then has the opportunity to consider this.

- It is also the case that other interests – not just human rights considerations but, for example, equality must be taken into account in the development of new legislation and practice. To afford the Commission a unique role in this regard would not be appropriate.
- Many laws are already published in draft form for public consultation and the Government encourages this approach. There may 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 devolved administration to this process, given the opportunity *after* legislation is published, but before it is debated or enabled, for the Commission to comment, seems to us to be unnecessarily prescriptive.

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".

29. This was withdrawn by the Commission in August 2002.

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".

30. In the May 2002 consultation paper, we indicated that we would amend the Northern Ireland Act 1998 as necessary to ensure that the Commission's advice is properly taken into account. We are now concerned that in situations where the Government has to enact legislation at great speed, a requirement to have due regard to the Commission's advice could mean that the process was put on hold while that advice was awaited. The Government believes that the spirit of this

requirement is already fulfilled by virtue of the need to act compatibly with Convention rights and we continue to regard the Commission as an important source of advice.

31. 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.

32. In addition, the Government has ensured, through the way in which the Human Rights Act 1998 and Northern Ireland Act 1998 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:

- Section 6 of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right, and Ministers must consider the implications for human rights before introducing legislation to Westminster. Parliament will receive the Ministerial 'section 19' statement (as described under recommendation 11) about the compatibility of the legislation and will take that into account when considering a Bill.
- The Northern Ireland Act 1998 gives the Commission a formal role in advising the Northern Ireland Assembly on the compatibility of Bills with Human Rights.
- The Human Rights Act 1998 gives the Courts strong powers to declare primary legislation incompatible or strike down secondary legislation if it cannot be interpreted compatibly with the Convention and, of course, provides an opportunity for victims who believe their human rights have been denied or violated to take cases to the courts.

33. 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 1998. 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.

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”.

34. This was withdrawn by the Commission in August 2002.

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”.

35. This was withdrawn by the Commission in August 2002.

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*”.

36. This was withdrawn by the Commission in August 2002.

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.

37. The Government is content that Convention rights are adequately protected by allowing victims to take cases and therefore is not persuaded that it would be appropriate to amend the Northern Ireland Act 1998 in the way proposed.

38. The Convention is explicit in Article 34 that it permits the court to receive applications from victims. That principle was reflected in the wording of Section 7 of the Human Rights Act 1998, which provides that a person can only bring proceedings against a public authority for acting incompatibly with a Convention right or rely on Convention rights in other proceedings involving a public authority if he or she is a victim. As the Northern Ireland Act 1998 makes clear, the creation of the Commission here was not intended to disapply this rule.

39. However, we are aware that some stakeholders believe strongly that the Commission should have this power. The Government is also aware that a future Bill of Rights for Northern Ireland may change the legal environment in Northern Ireland and it may be appropriate to consider this issue again, in the context of such a Bill of Rights.

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".

40. This recommendation was withdrawn by the Commission in August 2002, because, following the House of Lords ruling of June 2002, the Commission was content that it did have this power. The Government agrees that the Commission already holds the power expressed in this recommendation and it is therefore not necessary to legislate to provide it.

41. 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 bodies concerned. The Commission's expertise and statutory focus is, of course, confined to Northern Ireland, and any comments it makes on reports should be limited to issues 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".

42. As with recommendation 18, the Government believes that the Commission already holds the power to consult with, and attend the meetings of, other bodies and it is therefore not necessary to legislate to provide it.

43. 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.

44. The power given to the Commission in section 69(6)(a) to conduct research would adequately cover consultation and association with a wide range of bodies and sources of expertise. However, in its original report of February 2001, the Commission argued that recommendation 19 is required to ensure that there is no doubt about the Commission's powers to act in this way. This recommendation was, like recommendation 18, withdrawn by the Commission in August 2002, following the House of Lords ruling of June 2002.

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) or training".

45. The Government believes that public bodies with responsibility for education and training should be encouraged to consult with the Commission on human rights issues and given their duties under the Human Rights Act 1998, they will want to do so. However, consultation should not be a binding duty set out in statute.

46. The Government agrees that co-operation between authorities responsible for education and training and the Commission is important and must be encouraged.

47. However, if a statutory duty to consult was introduced, in accordance with recommendation 20, it could create a huge volume of work for the Commission. In order to ensure compliance with the law, education bodies could find themselves having to refer decisions where there was even a remote chance of a human rights dimension.

48. Bodies providing education and training within Northern Ireland will, for the most part, be public authorities for the purposes of the Human Rights Act 1998 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.

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.)

49. If the monitoring and delivery of the curriculum were made a binding duty, it could put a very significant burden on the Commission. The legislation as it stands allows the Commission very wide flexibility as to how it carries out its work and on how it decides to prioritise. We do not propose to remove this flexibility by legislating.

50. 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 Northern Ireland Act 1998 does not make this explicit as a specific duty on the Commission. However, 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.

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".

51. The Government agrees that it is crucial for places of detention to be inspected to protect against abuses of human rights and to guard against unfounded allegations of abuse. Northern Ireland already has a range of inspection and oversight bodies with powers of access, which perform very important work in this area. However, the Government accepts that there will be times when the Commission can add value to the work of other agencies. As a consequence, the Government agrees that it is right to amend the Northern Ireland Act 1998 to give the

Commission the power to access places of detention to assure itself that human rights are being protected or to investigate an alleged violation of human rights.

52. The Government has listened to the views – many of them strongly held – both for and against additional investigative powers for the Commission, as set out in recommendations 22 – 24. It has also considered developments in Great Britain, where a Commission for Equality and Human Rights is being established; in Scotland, where a Human Rights Commission is being created; and looked at the position in other jurisdictions.

53. Given that there are other bodies, such as the Prisoner Ombudsman, Lay Visitors, the Criminal Justice Inspectorate and the Police Ombudsman, which have well established responsibilities in this area, the Government will need to ensure that there is a co-operative relationship between the Commission and other agencies. It is right that the Commission should carry out investigations into matters in the field of human rights that have not otherwise been properly addressed. It would not be right for the Commission to duplicate the work of other bodies, or to cause undue disruption of the services these bodies provide or to the places of detention they inspect and oversee. We will create appropriate mechanisms to make sure that there is a collaborative approach between the Commission and other bodies.

54. The recommendation is couched in very broad terms; the phrase ‘in the care of a public authority or of a person or body exercising functions of a public nature’ leaves open to interpretation the exact places to which the Commission will have access. The Government believes that there should be clarity about the scope of this power and is giving consideration as to how best to define in legislation the places, or types of place, to which the Commission will have access.

55. This is an important power and the legislation will need to include provisions to ensure that the Commission uses it appropriately. The Government would welcome views on what safeguards will be needed. The Commission could, for instance, be required to set out the terms of reference for any investigation, and allow those who manage the place to which they require access to comment on the terms of reference. The Commission could also be required to give a certain period of notice of a visit to the place to which it requires access. Another possible safeguard would be for those who manage a place to which access is required to be able to

apply to a court to cancel the request on the grounds that it is unnecessary for the investigation or otherwise unreasonable.

56. The Government would welcome views on these proposals, particularly on how to ensure co-operation between the Commission and other bodies; how to define the places to which the Commission should have access; and how to ensure that there are appropriate safeguards in place.

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 the article provides evidence of a violation of human rights".

57. The Government is confident that the power to require the production of information, as set out under recommendation 24 below, can be adequately enforced without the need for a power to search and seize.

58. The Commission originally proposed this recommendation in February 2001. It was provisionally withdrawn in August 2002, as the Commission believed that were they to be given this power they would need significant additional resources to train existing staff or to appoint new staff.

59. The Government agrees that any body exercising such a power would require very specific skills to a high level. There would also be significant legal difficulties. This power is akin to those that the police possess and there would be extremely significant difficulties to consider in granting police-type powers to any non-police body: for example, how to ensure that all parties to such an investigation are properly protected and have access to an adequate complaints procedure (in much the same way as people can complain to the Police Ombudsman if they believe the police have

abused their powers in entering and searching premises). We would need also to consider what sanctions should be available if the power was improperly used.

60. The Commission subsequently decided to continue to press for this power in its supplementary review of 2004. However, the Government believes that, in legislating to give the Commission the power to require the production of information, more proportionate means of enforcing this power can be developed.

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)".

61. We agree that it is important that the Commission can carry out its investigations effectively. In normal circumstances, we would hope that the Commission will always receive co-operation from those it believes are in possession of relevant information. However, we accept that there may be times when information is not forthcoming and that consequently it is necessary for the Commission to be given the power to require that information be produced.

62. In giving such a power we will need to provide safeguards to ensure its use only in appropriate circumstances and in a proportionate and reasonable manner. We will also need to consider how it could be enforced.

63. It will be important to get the safeguards right. The Government would welcome views on what form the safeguards might take. The Commission could, for instance, be required to set out the terms of reference for its investigation, and allow anyone involved to comment on the terms of reference before giving notice to a

person requiring them to provide information in their possession. Another possible safeguard would be for a person given a notice to be able to apply to a court to cancel the request on the grounds that it is unnecessary for the investigation or otherwise unreasonable.

64. There are certain areas, such as national security matters, in which it will be necessary to protect sensitive information, in the public interest. The Government wants to ensure that as far as possible, the Commission can access the information it needs to carry out its functions, consistent with protecting the public interest, and so it will be important that these areas are clearly defined.

65. The Government would welcome views on these proposals, particularly on how this power should be enforced; whether additional or alternate powers and safeguards to those set out above would be needed; and on whether certain categories of information should be exempt from this power, in the public interest.

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".

66. The House of Lords ruling of June 2002 clarified that the Commission does have such powers as may fairly be regarded as incidental to or consequential upon those things which the legislature has authorised. As a consequence, the Commission already has the power set out in recommendation 25 and there is no need to legislate for it.

The Commission's supplementary review of powers, April 2004

Recommendation 26

To guard against improper interference in the Commission's work an additional provision should be inserted into the Northern Ireland Act 1998 (section 68(3B)) to read as follows: "When a Commissioner resigns from the Commission the Secretary of State shall as soon as practicable secure that the vacancy is filled by one or more new Commissioners selected in accordance with sub-section (3) above."

67. The Government is committed to ensuring that as far as practicable, the Commission has an appropriate number of Commissioners at all times but we do not believe it is appropriate to create a binding duty to run an appointment process on the resignation of a Commissioner.

68. The Government understands that in some circumstances, the resignation of a Commissioner can inhibit the operation of the Commission. However, there are also circumstances where a Commissioner may resign and then be reinstated, for example if they run unsuccessfully for political office.

69. Appointment processes can take many months to complete and they may face unexpected difficulties. Each appointment process is also resource intensive and it would be an inefficient use of resources to begin an appointment process if a wider process is due to be held at a point in the near future.

Recommendation 27

A further provision should be inserted into the Northern Ireland Act 1998 (section 68(3C)) to read as follows: "The independence of the Northern Ireland Human Rights Commission from the Government is guaranteed and the relationship between the Commission and the Government shall be regulated by a Memorandum of Understanding, including a Financial Memorandum, which shall be annually reviewed."

70. These points are substantially covered by recommendations 2 and 4. The Government believes that there are already sufficient legislative requirements that

the Commission acts impartially and without bias but we additionally intend to make reference to these values in letters of appointment for Commissioners.

71. As we said in response to recommendation 4, the Government agrees that it is important that there is a Memorandum of Understanding between it and the Commission. Both a Memorandum of Understanding and a Financial Memorandum have now been agreed and are open to amendment, by consent, at any time by either the Commission or Government. This is an administrative matter and it is not necessary to legislate to achieve this.

Recommendation 28

Section 70(1) should be repealed and replaced with the following sub-section:

“This section applies to –

proceedings involving law or practice relating to the protection of human rights in Northern Ireland which a person has commenced, or wishes to commence; or

other proceedings in the course of which a person relies or wishes to rely on law or practice relating to the protection of human rights in Northern Ireland.”

72. The Government believes that the current provisions of the Northern Ireland Act 1998 have served and continue to serve their intended purpose.

73. In its supplementary review of powers, the Commission stated its concern that the Northern Ireland Act 1998 as it stands only allows the Commission to assist a person who is in Northern Ireland when they commence, or wish to commence legal proceedings. In addition, the Commission stated its concern that this excluded those people who did not commence legal proceedings but rather were defendants or respondents to legal proceedings. We are not aware that the Commission has been unable to provide assistance because of the current provisions and we are therefore not convinced of the need to amend the Northern Ireland Act 1998 in this way.

Recommendation 29

In section 69(5) of the Northern Ireland Act 1998 a new paragraph (c) should be inserted to read as below:

“(5) The Commission may –

- (a) give assistance to individuals in accordance with section 70;**
- (b) bring proceedings involving law or practice relating to the protection of human rights; and**
- (c) resolve any dispute by mediation, conciliation or negotiation.”**

74. There are already a number of bodies that provide mediation for a variety of dispute situations. Given that there are already opportunities to access mediation services, the Government accepts that the Commission should be able to recommend mediation but we do not think formal powers in this area are justified.

75. It seems logical that if a dispute seems to the Commission to be capable of resolution without recourse to formal proceedings, it should be open to the Commission at least to suggest this approach. On the other hand, in the context of human rights in Northern Ireland (or indeed elsewhere), any given dispute may well be highly charged or politically contentious. Resolving such disputes may require specialist skills of a very high order. In some forms of alternative dispute resolution, the neutrality of the mediator is essential to successful outcomes. Because the Commission is also an advisory body with a set of statutory functions which include the promotion and protection of human rights, it might be difficult for it not to take a view on the matter in hand.

Equality

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 1998, 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 beliefs, political opinion, racial group, age, marital status or orientation;*
- (b) between men and women more 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.'*

The proposals in this paper are intended to provide the Commission with the right powers to enable it to carry out its duties effectively. The Northern Ireland Office has conducted an Equality Screening Assessment on these proposals. The screening is designed to indicate whether there is any likelihood that a policy will have a significant differential impact on any of the section 75 categories.

We do not believe that there are any significant differential impacts. The powers which the Government are considering will not themselves impact on groups within the section 75 categories. Any impact will come from the manner in which the Commission decides to use these new powers. This will be a matter for the Commission to assess as part of its own section 75 duty. An impact assessment of the Government's policy in this regard is therefore not recommended. However, as part of this consultation exercise we would welcome your views in this area, particularly in relation to the following questions:

Do you believe that any of the Government's proposals will have an adverse impact on individuals within the scope of section 75?

If so, are there any measures that should be implemented to mitigate against adverse impact on people in the section 75 equality groups?

Regulatory Impact Assessment

A Regulatory Impact Assessment is a framework for analysis of the likely impacts of a policy change and the range of options for implementing it. A partial assessment has been carried out on the proposals contained within this paper. While this assessment will be developed following the consultation and as proposals are developed, the current assessment indicates that these proposals are likely to have a low regulatory impact. The partial assessment is set out below. We would welcome your views on this.

1. Title

The powers of the Northern Ireland Human Rights Commission.

2. Purpose and intended effect

Objective - The Government's aim is, in response to the recommendations of the Commission, to make proposals which will ensure that the Commission has the right powers to enable it to carry out its duties effectively.

Background - The Northern Ireland Human Rights Commission was established by the Northern Ireland Act 1998. Section 69 (2) of the Northern Ireland Act 1998 provides that the Northern Ireland Human Rights Commission shall, before the end of the two years beginning with the commencement of the section, make to the Secretary of State such recommendations as it thinks fit for improving – (a) its effectiveness; (b) the adequacy and effectiveness of the functions conferred on it by this Part; and (c) the adequacy and effectiveness of the provisions of this Part relating to it.

The Commission submitted its recommendations in 2001 and in May 2002 the Government issued a consultation paper on its initial response to the recommendations. The Commission in turn responded to this paper in August 2002. It submitted a supplementary set of recommendations in April 2004. The Government is now consulting on a revised list of recommendations before making any necessary legislative changes. This policy only covers Northern Ireland.

Rationale for government intervention - The Commission has recommended that it needs additional powers to carry out its functions effectively. If the Government does

not intervene and propose new legislative powers then the Commission's powers would remain the same as they currently are.

3. Consultation

In May 2002, the Northern Ireland Office carried out a three month public consultation on its initial response to the Commission's recommendations. The NIO has also consulted widely across Government. This document is subject to a further three month public consultation.

4. Options

Three options have been considered for dealing with these issues:

Option 1 - to do nothing. The Northern Ireland Human Rights Commission would continue to operate the functions granted to it under the Northern Ireland Act 1998.

Option 2 - to issue a government response to the Northern Ireland Human Rights Commission's recommendations and to agree to make administrative changes only. This option would provide the Commission with some means with which to improve their efficiency. Whilst the government would seek to make any possible administrative changes, it would not propose any legislative changes to increase the Commission's powers.

Option 3 - to issue a consultation paper on the recommendations of the Northern Ireland Human Rights Commission, followed by legislation to provide the Commission with additional powers.

5. Costs and benefits

Sectors and groups affected - there are no specific sectors affected by this policy. Any additional powers granted to the Northern Ireland Human Rights Commission would be applicable to all sectors and groups within Northern Ireland.

Benefits - the scope of the policy means that there are no economic or environmental benefits. However, in terms of social benefits, option 3 will provide the Commission with additional powers to promote and protect human rights in Northern Ireland.

Costs - the scope of the policy means that there are no environmental or social costs. The changes proposed in recommendations 22 and 24 above will grant the

Commission additional powers. However, these powers are designed to allow the Commission to carry out its existing duties more effectively. The powers should not, therefore realise additional costs.

6. Small Firms Impact Test

This policy will not have any direct statutory effect on business. Accordingly, there are no direct compliance requirements.

7. Competition assessment

Due to the nature of the powers proposed, this policy will not have an effect on competition.

8. Enforcement, sanctions and monitoring

It is possible that any future legislative changes made as a result of this consultation, could require enforcement. Arrangements for enforcement, sanctions and monitoring, will if necessary be included in the final Regulatory Impact Assessment.

How to respond to the consultation paper

We welcome your responses and comments on any aspect of this document. The deadline for responses is 8 February 2006. A response can be submitted by letter, e-mail or fax to:

Syed Hussain
Human Rights and Equality Unit
Northern Ireland Office
11 Millbank
London
SW1P 4PN

tel: 020 7210 0209

fax: 020 7210 0248

email: hreu@nio.x.gsi.gov.uk

Please ensure that responses are clearly marked as 'a response to the consultation on the powers of the Northern Ireland Human Rights Commission'. Additional copies of the paper can be obtained by contacting Syed Hussain at the address above or from the Northern Ireland Office website: www.nio.gov.uk.

After the Consultation Period

We will analyse the responses to the consultation and produce a summary of responses after the end of the consultation period.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you

regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances; this will mean that your personal data will not be disclosed to third parties.

The Consultation Criteria

The Government has adopted a set of criteria for consultations, which apply to all UK public consultations by government departments. These are set out below.

- 1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.**
- 2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.**
- 3. Ensure that your consultation is clear, concise and widely accessible.**
- 4. Give feedback regarding the responses received and how the consultation process influenced the policy.**
- 5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.**
- 6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.**

The code does not have legal force but is regarded as binding on UK departments and their agencies unless Ministers conclude that exceptional circumstances requires a departure from it. The full consultation code may be viewed at:

<http://www.cabinetoffice.gov.uk/regulation/consultation/index.asp>

If you have any concerns or complaints about this consultation, or you have any other observations about ways of improving the consultation process, then please contact the Northern Ireland Office's consultation co-ordinator, Dr Jim Alford, at:

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