NORTHERN IRELAND HUMAN RIGHTS COMMISSION

RESPONSE TO THE REPORT OF THE INDEPENDENT COMMISSION ON POLICING IN NORTHERN IRELAND (THE PATTEN REPORT)

NOVEMBER 1999

Introduction

1. The Northern Ireland Human Rights Commission (NIHRC) is a body set up under the Northern Ireland Act 1998 to promote and protect human rights in Northern Ireland. It consists of one full-time Chief Commissioner and nine part-time Commissioners and in appointing these persons the Secretary of State was under a statutory duty to secure, as far as practicable, that the group was representative of the community in Northern Ireland.

2. The NIHRC was established on1 March 1999. It replaced the Standing Advisory Commission on Human Rights (SACHR), which had been set up under the Northern Ireland Constitution Act 1973 and which made a submission to the Independent Commission on Policing in September 1998.[1] Shortly after its creation the NIHRC discussed whether to make its own submission to the Patten Commission but decided not to do so. As members of a new body which was still finding its feet, we felt that we could not formulate an agreed submission in time. Instead we ensured that the Patten Commission was made aware of all the international human rights standards which impact on policing and we undertook to examine the report of the Patten Commission with those standards in mind. In the interim we also agreed to meet with the RUC's Human Rights Act Implementation Working Group.

The Report's foundations

3. We acknowledge the Patten Report's foundations in the preamble to the Belfast Agreement of 10 April 1998. The Report is correct in pointing out that in Northern Ireland "[p]olicing has been contentious, victim and participant in past tragedies, precisely because the polity itself has been contentious. The consent

[1] This is printed as Annex J to the 1998-99 Report of SACHR (HC 265). It contains a total of 56 recommendations.

required right across the community in any liberal democracy for effective policing has been absent" (para.1.3). One of the questions thrown up by the need to eliminate the contentiousness of policing is, indeed, "How should human rights standards and obligations be reflected in the delivery of policing on the streets?" (para.1.5). The Belfast Agreement itself, when setting out the ingredients for a new beginning to policing in Northern Ireland, states that new arrangements "should be based on principles of protection of human rights and professional integrity". Although the actual terms of reference of the Patten Commission did not specifically mention human rights, the values inherent in that concept are reflected at many points. Thus, for example, the terms of reference called on the Patten Commission to make proposals which are designed to ensure that "the legislative and constitutional framework requires the impartial discharge of policing functions and conforms with internationally accepted norms in relation to policing standards" and that "the police operate within a clear framework of accountability to the law and the community they serve". We therefore believe it was in every sense appropriate for the Patten Commission to use as two of the five tests applied to each of its proposals the questions "Does it provide for accountability, both to the law and to the community" and "Does it protect and vindicate the human rights and human dignity of all?" We would reiterate ourselves that adherence by the police to the rule of law is absolutely crucial to a healthy, democratic society.

Putting human rights at the centre of policing

4. We agree wholeheartedly with the Patten Commission's proposition that "the fundamental purpose of policing should be, in the words of the Agreement, the protection and vindication of the human rights of all" (para.4.1). We also agree that "[b]ad application or promiscuous use of powers to limit a person's human rights…can lead to bad police relations with entire neighbourhoods" (para.4.3). It is regrettable, in the light of these assertions, that the Patten Commission does not go on to make recommendations concerning the place (if any) for human rights

5. It is to be welcomed that the Patten Report recommends a comprehensive programme of action to focus policing in Northern Ireland on a human rights-based approach (para. 4.6). However, although there are further recommendations which supplement this proposal, and which we address at paras. 32-34 below, we feel that the Report could have spelled out in more detail what exactly a human rights-based approach entails. We would have preferred to see references to specific provisions not just of the European Convention on Human Rights but also of the many United Nations documents on human rights, those which are binding (*e.g.* the Convention on the Rights of the Child) as well as those which, because they are in the form of "Guidelines" or "Codes" rather than treaties, are not. The new oath is a good idea (para. 4.7), but why does it oblige police officers to uphold only "fundamental" human rights (there being considerable disagreement among lawyers as to what rights are "fundamental")? The proposed Code of Ethics is also to be applauded (para. 4.8), but why does it not say that police

6. The NIHRC is pleased that the importance of training police officers in the fundamental principles and standards of human rights, and in the practical implications of these principles and standards for policing, has been recognised (para. 4.9). We also like the suggestion that awareness of and respect for human rights should be part of police officers' appraisal system (para. 4.10), although unless the appraisal system is tied to promotion or pay scales there is a risk that the reference to human rights standards may not mean very much in this context. We hope that the police will rely upon human rights experts outside the police to help them with their training, appraisals and promotion decisions. We are not sure that the proposed Policing Board will be sufficiently expert in the requirements of human rights law and practice to be able to monitor the performance of the police service as a whole in respect of human rights (para. 4.12), therefore there should be places reserved on that Board for one or more human rights experts (as indeed is intimated in para. 6.12 of the Report). If such expert help is deemed necessary by Patten Commission whenever decisions are being made about proposed policing operations which raise human rights considerations (para. 4.11), it is surely also necessary at the training, appraisal and monitoring stages.

Equality duties

7. One of the most disappointing aspects of the Patten Report is its complete failure to address the question of whether or not the police in Northern Ireland should be obliged, along with most other public authorities in Northern Ireland, to comply with the equality duties (to promote equality of opportunity and good relations) set out in section 75 of the Northern Ireland Act 1998. At present that Act is worded in such a way as to exclude the police from being bound by those duties – unless the Secretary of State formally designates the police as being a public authority for this purpose. The NIHRC fully expected the Patten Report to

Legal accountability arrangements

8. The Patten Commission is right to draw a distinction between the legal accountability and the democratic accountability of the police. Whether the arrangements for legal accountability are adequate depends to a large extent on whether the rules, principles, procedures and institutions of the law are sufficiently rigorous to ensure that justice is achieved in each and every instance. The NIHRC acknowledges that by creating the office of a Police Ombudsman the Police (NI) Act 1998 has gone some considerable way towards ensuring that complaints of serious misconduct by the police are investigated by independent investigators (presuming that the Ombudsman's staff are not to be permitted to have a history of employment in the RUC and that the office is adequately resourced to perform its statutory functions effectively). This Commission enthusiastically endorses all of the recommendations made in para. 6.41 of the Patten Report concerning the powers of the Police Ombudsman. To avoid any doubt arising, we recommend that the Police Ombudsman should not just be *empowered* to call in any matter for investigation even if no complaint has been received from a member of the public but also *obliged* to investigate *any* allegation that a police officer has committed an arrestable offence. The NIHRC believes that *all* accusations that a police officer has committed a serious criminal offence *must* be investigated by persons who are *not* police officers. No police

9. We believe there are other changes which could be made to the legal system to ensure that the police are properly accountable under the law. It is essential that the standard of proof required to demonstrate that a police officer has breached the Code of Discipline should be reduced from that of "beyond a reasonable doubt" to that of "on the balance of probabilities". We do not understand why this reform has still not been introduced, despite support for it from a wide variety of sources, not least the Home Affairs Select Committee. It is essential, also, that it be made a breach of the Code of Discipline for one officer not to disclose information in his or her possession about human rights abuses committed by another police officer; in many countries, including the Republic of Ireland, it is a breach of discipline for an officer not to co-operate with an internal inquiry. Within the complaints system it should also be easier for the complainant to get access to the report of the investigator, and arrangements should be made for such investigations to be pursued separately from any civil or criminal proceedings which may be taking place against the complainant. We also believe that the concept of operational independence, which apparently inheres in each police officer as part of his or her status as a constable, should be legally constrained so as not to permit operations which breach human rights. We would add that past and future reports into alleged violations of human rights allegedly committed by police officers (such as the Stalker-Sampson Report and the Stevens Report) should be made public.

Democratic accountability arrangements

10. In general we welcome the recommendation that there be a new Policing Board and District Policing Partnership Boards in Northern Ireland. We agree that it is appropriate to lessen the control of central government – exercised through the Secretary of State – over the police in Northern Ireland and that it is necessary to

11. We hope it is an oversight that, in the paragraph outlining how the DPPBs would be composed (para. 6.26), no mention is made of the role which voluntary organisations and community groups might play, whereas this sector is specifically mentioned in relation to membership of the Policing Board (para. 6.12). Section 75 and Schedule 9 of the Northern Ireland Act 1998 require attention to be paid to the needs of a number of different sectors of society in Northern Ireland and civic society has potentially a very important role to play in the governance of the area. The views of children and young people also need to be heard in this context. Indeed it is desirable that there be as great a degree of participation as possible in the District Boards if they are properly to perform their envisaged functions of representing the consumer, voicing the concerns of citizens and monitoring the performance of the police and other protective agencies in their districts (para. 6.29).

12. As far as we can judge, the current Community and Police Liaison Committees, of which there are now about 140, do not all operate satisfactorily. The Patten

13. Regardless of now the Policing Boards are to be composed, we feel it is important that they be given a specific statutory responsibility to monitor the police's adherence to human rights standards. Obviously this Commission will itself have a very keen interest in that matter and it would therefore be necessary for a Memorandum of Understanding to be drawn up in order to demarcate the respective responsibilities of ourselves and the Policing Boards. The Policing Boards should be directed by statute to have particular regard to specified human rights documents (*e.g.* the UN Code of Conduct for Law Enforcement Officials) when assessing the performance of the police.

14. We also feel it is important that the main Policing Board be given the statutory responsibility of ensuring that policing standards are applied at a uniformly high level throughout Northern Ireland. With responsibility for policing being devolved to some extent to district council level, it is important to guard against inconsistencies in policing practices.

15. We agree with the recommendations concerning improved financial accountability (paras. 6.46 and 6.47). While there is danger that the Policing Board could face a conflict of interest if it is both watchdog and paymaster, this can be guarded against by delineating carefully the specific responsibilities of the Board in each respect.

16. Without commenting in detail on the Patten Report recommendations concerning community policing, we would endorse the proposal that all police officers should wear their names and local headquarters displayed clearly on their uniforms. It is always important that persons who wish to complain about the actions of a particular police officer are able to identify those officers, and in the improved security situation there ought to be no difficulty in requiring police officers to lose their anonymity.

Covert law enforcement

17. We welcome the Patten Report's recommendation that the planned legislation to ensure that covert law enforcement techniques comply with the European Convention on Human Rights should apply in Northern Ireland as well as in Great Britain (para. 6.43). We are conscious that the reporting system on surveillance techniques has not, up to now, operated uniformly throughout the United Kingdom (*e.g.* information has never been published on the number of telephone interceptions in Northern Ireland) and it is time that it did. Notwithstanding this, we welcome the suggestion that a more locally based commissioner should be appointed to oversee covert law enforcement in Northern Ireland, although we do not believe this should be a serving judge. There is always the potential for a conflict of interest to arise if such a judicial figure were to be trying a case where covert law enforcement had been involved in the incident forming the basis for the trial. Whoever is appointed, he or she should of course be independent of the police and adequately resourced to be able to carry out the function effectively.

18. We also welcome the Patten Report's recommendation (in para. 12.12) that in Northern Ireland the Special Branch and the Crime Branch should operate under a unified command, although in view of the dubious record of the Special Branch in the human rights field it may be appropriate to disperse existing members of that branch amongst other parts of the service. We assume that the activities of the Special Branch, or whatever its new name is to be, will be subject to the oversight

Emergency laws

19. The NIHRC is disappointed that, in its very brief discussion of the impact of emergency legislation on policing (paras. 8.13 and 8.14), the Patten Commission made no recommendation concerning the repeal of the Prevention of Terrorism and Emergency Provisions Acts. In its response to the Government's consultation paper on "Legislation Against Terrorism" the NIHRC called for the immediate repeal of the vast majority of the provisions in those Acts and proposed that the Government should in future adopt a three-level approach to anti-terrorist laws. In a later meeting with the then Secretary of State the NIHRC pointed out that, at least on the surface, there was a contradiction between maintaining, on the one hand, that the cease-fires in Northern Ireland are holding but that, on that other, there is still an emergency justifying the retention of special anti-terrorist laws. We pointed out our fundamental opposition to the idea that emergency laws should be retained merely because it was politically expedient to do so. Our position is that violations of human rights should never be tolerated just because it is politically inexpedient to prevent them. We also argued to the Secretary of State, endorsing the views of the official reviewer of the emergency legislation, Mr John Rowe QC, that in several respects the legislation may be contrary to the requirements of the European Convention on Human Rights, which of course will be part of the law of all parts of the United Kingdom from October 2000. In recent days we have submitted a paper to the current Secretary of State detailing the reasons for this view and at present we are actively considering how to

20. The NIHRC believes that a great deal could be done to pave the way for policing reform if, immediately, the emergency laws ceased to be applied. This could occur through the Secretary of State presenting for Parliament's approval an order causing particular provisions in the legislation to lapse. We are of the belief that ordinary criminal laws and procedures are adequate to deal with current law and order problems. Of course, while it is desirable that any other laws should be removed from the statute book, it would still be progress if those other laws were simply not enforced. There would, to our mind, be no diminution in police effectiveness as a result. The much more preferable course of action, however, would be to repeal the unnecessary provisions straightaway.

21. The Patten Report's own recommendation, supporting that of the Independent Commissioner for the Holding Centres (and, though not mentioned by Patten, that of the UN Committee Against Torture and the European Committee on the Prevention of Torture), that the three holding centres in Northern Ireland should be closed forthwith, is another indication that normal policing procedures can and should be adopted in Northern Ireland. In any event, of course, there is not now, and never has been, any statutory basis for the existence of the holding centres. We agree that video recording should be introduced into the PACE custody suites and that lay visitors should be empowered not only to inspect the conditions of detention but also to observe interviews on camera. If juvenile justice centres are to continue to hold children under the PACE Order then they too should be places which lay visitors have the right to visit at any time. We believe, moreover, that video and audio recording of interviews with detainees should be synchronised through use of one recording machine.

22. We regret that the Patten Report does not make recommendations concerning the rights of detainees to have access to solicitors while being questioned by the

The use of force

23. The NIHRC welcomes the recommendation (para. 8.11) that the role of the army in Northern Ireland should continue to be reduced, and we accept that in exceptional circumstances it should be available to come to the aid of the police (para. 8.12). We do propose, however, that the relationship between the army and the police should be put on a statutory footing rather than left in the realm of policy.

24. We appreciate and support the thinking behind the recommendation in para. 8.14 that records should be kept of all stops and searches. We believe, moreover, that a record of the stop and search should be made available to each person who is stopped, even persons in vehicles stopped at check points.

25. In its section on firearms (paras. 8.17 to 8.20) the Patten Report does not, unfortunately, make mention of the relevant UN's Basic Principles on the Use of Force and Firearms. The NIHRC firmly believes that, if any police officers in Northern Ireland are to be armed in future, they should be obliged by law to adhere to the standards set down by the United Nations. Para. 8.18 also contains a most unfortunate inaccuracy: there have been at least two cases of the RUC shooting someone dead since 1991.

26. There is a further regrettable inaccuracy in para. 9.12, in the discussion of plastic baton rounds: a total of 17 people have been killed by plastic and rubber bullets, not 16 as stated. The NIHRC notes, as did SACHR, that various authoritative United Nations bodies, such as the Human Rights Committee, the Committee Against Torture and the Committee on the Rights of the Child, have expressed deep concerns about the use of plastic baton rounds in Northern Ireland. The NIHRC itself is still in the process of conducting its own research into their use; we are interested in determining, for example, how frequently the guidelines applying to their use are breached. On the evidence we have examined to date it appears that this occurs very often. We are also currently looking at the "cost" of their use, not just in terms of the injuries suffered but also in terms of the amounts of compensation paid to victims.

27. At present, some Commissioners are of the view that the Patten Report conclusion – that plastic baton rounds can be tolerated so long as they are used in strictly limited circumstances – is acceptable pending further examination of the issue. Some other Commissioners disagree with the Patten Report conclusion, being of the view that a plastic baton round is an inherently lethal weapon – one which tends to behave unpredictably whatever care is exercised in its firing. They think that at least two of the constraints mentioned in para.9.17 – the prior authorisation of the district commander and the video recording of the incident requiring the firing – may be unrealisable in what is often a very urgent situation. The Commission as a whole is not yet in a position to present a collective view on plastic bullets but some Commissioners are *at present* minded to call for their withdrawal from use.

Maintaining public order

28. The NIHRC acknowledges that the policing of actual or potential public disorder can give rise to difficult balancing acts as far as the human rights of participants in the event in question are concerned. When exactly a demonstrator's right to

Information technology

29. It is important that, whatever new arrangements are put in place to improve the police service's information technology, these do not infringe the rights of individuals (both within and without the police service) to privacy. The impact of Article 8 of the European Convention on Human Rights, of the Data Protection Acts and of the imminent Freedom of Information legislation will need to be borne in mind in this context.

The composition of the police service

30. The NIHRC naturally agrees that it is right that a police service should by and large be representative of the society it polices. This is already a goal recognised by the United Nations.[2] As the Patten Report says (in para. 14.4), "it is the imbalance between the number of Catholics/Nationalists and Protestants/ Unionists which is the most striking problem in the composition of the RUC". We

[2] *UN General Assembly Resolution 34/169 (17 December 1979):* "…like all agencies of the criminal justice system, every law enforcement agency should be representative of and responsive to the community as a whole".

are therefore supportive of the range of recommendations on recruitment contained in Chapter 15 of the Report (*e.g.* that pilot cadet schemes should be set up, that there should be lay involvement in the recruitment process, that all candidates should be required to reach a specified standard of merit in the selection procedure and that lateral entry and secondments from other organisations should be encouraged). On two specific issues – appointing equal numbers of Protestants and Catholics, and setting eligibility criteria – we have rather more to say.

31. We do not, in the end, have difficulty with the proposal (in para. 15.10) that for the first 10 years an equal number of Protestants and Catholics should be drawn from the pool of qualified candidates. The Patten Report itself acknowledges that such a policy would require an alteration to the Fair Employment Acts, a step which both SACHR and, it seems, the Fair Employment Commission, have been prepared to contemplate in the past. Of course religious affiliation is not necessarily a good guide to political opinion, but it is reliable enough for present purposes in Northern Ireland. The NIHRC is of the view that the kind of positive discrimination recommended by the Patten Report is the only viable option at this time: an approach which merely encourages those likely to be of a nationalist political opinion to apply to join the police, through imaginative advertising techniques, careful drafting of selection criteria and strategic organising of pilot cadet schemes, would simply not be effective in quickly redressing the imbalance in the religious make-up of the service. In a lengthy annex to this submission (see page 25) the NIHRC examines relevant international and national laws to assess the acceptability of the Patten proposal. Our conclusion is that it passes muster.

32. In addition, a lot more could be done to increase the number of women recruited to the police service. It is to be regretted that the Patten Report contains no targets or timetables in this context, unlike in the context of religious belief. The NIHRC recommends that, consistent with European Community law, steps should be taken by the police to make employment in the service a much more attractive

Past crimes and human rights abuses

33. As regards eligibility criteria, the NIHRC is concerned that in para. 15.13 of the Report reference is curtly made to the ineligibility of "people with serious criminal or terrorist backgrounds". For a start, this statement ignores the provisions of the Rehabilitation of Offenders (NI) Order 1978, which allows the convictions of some offenders (*i.e.* those sentenced to less than 30 months in prison) to be, in effect, expunged from the record after a certain time has elapsed. The policy underlying such legislation, which also exists in England and Wales and in many other jurisdictions, is that those individuals who have served their time for wrongs they have committed should be given the opportunity to rehabilitate themselves through becoming equal with every other member of society. Just as importantly, the statement fails to grasp that if there is to be a new beginning to policing in Northern Ireland there must be a recognition that past attitudes to the police will not necessarily determine a person's present attitude.

34. Para. 15.13 also fails to suggest any mechanism for addressing past human rights abuses committed by serving RUC officers who want to become members of the new Northern Ireland Police Service. The Report does not address the fact that the RUC has been the object of numerous and very serious allegations of human

[3] and does not acknowledge the failure of the RUC and of the criminal justice system to deal with some officers who have broken the law – as evidenced by the substantial sums of money which have been paid to civilians by way of compensation. At the heart of the concept of the rule of law is the idea that no one is above the law. The NIHRC believes that, where it is known to have occurred, any and every such violation of the rule of law by any officer must be acknowledged and that any new policing system must seek strenuously to avoid any such recurrences. Failure to do so would seriously undermine the aim of the Patten Report to create a police service where the human rights of all are valued and protected.

35. The fact that in many people's eyes there has been disparity of treatment within the criminal justice system - between those accused of crimes who were police officers and those who were not - leads the NIHRC to suggest that there are just two approaches which could be adopted to considering the eligibility of *any* such persons for the new police service. One approach would be to say that no one should be barred from serving in the police, provided only that he or she meets the entrance requirements and takes the oath. This approach would draw a complete line under the past for everyone. People convicted of serious crimes in the past, as well as those who committed such crimes but were not convicted of them, would be eligible for the service (although if the new complaints system operates properly any future misconduct would lead to severe sanctions). Another approach would be to say that all aspiring members of the new service, including officers currently serving in the RUC, should have to undergo rigorous testing to determine whether they have been responsible for human rights abuses. For serving officers, internal disciplinary reports, material relating to civil actions and files from the DPP's office would all be pertinent evidence. For non-serving

[3] See *Submission to the UN Committee Against Torture*, Committee on the Administration of Justice, Belfast, 1991; *United Kingdom: Allegations of ill-treatment in Northern Ireland*, Amnesty International, London, 1991; *Children in Northern Ireland: Abused by Security Forces and Paramilitaries*, Helsinki Watch, USA, 1992; *Broken Covenants: Violations of International Law in Northern Ireland*, Liberty, London, 1993; *Political Killings in Northern Ireland*, Amnesty International, London, 1994; *United*

officers analogous documents would need to be referred to. The degree of evidence required to demonstrate responsibility would be a matter for further discussion. While being careful not to subject anyone to double jeopardy, it may not be unreasonable to reject those applicants (including currently serving officers) who appear on the balance of probabilities to have been to blame for a serious human rights abuse. Such a testing process, of course, comes close to what might be involved in a "truth process", where the truth about all abuses of human rights by all parties to the conflict is examined. The time may yet come when a mechanism for allowing such a process to begin needs to be devised.

36. Deciding between the two approaches just outlined is difficult. There are obstacles associated with each of them. But whichever one is adopted it should be applied equally to both existing police officers who want to join the new service *and* to persons not currently in the police who want to join. With regard to the first approach, we acknowledge that some would have great difficulty in countenacing the presence in the new police service of persons who have been responsible for terrible misdeeds in the past, even if they have already served a prison sentence for those misdeeds and are now demonstrably remorseful. With regard to the second approach, we acknowledge that some would say that it is not possible to determine who has been "responsible" for alleged misdeeds in the absence of full-blown civil or criminal trials examining their actions. But all members of the NIHRC are of the clear view that to a very great extent it is possible to assess a person's suitability for a certain employment by testing his or her commitment to the ethos of the employer in question. In the case of those police officers or civilians who have been tried for offences but acquitted for lack of evidence, or police officers whose service record reveals that they have been the object of a number of complaints, it will be reasonable and sensible to require them to undergo this kind of assessment. The NIHRC itself requires the staff it recruits, naturally enough, to display a commitment to human rights. A new

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Kingdom Report on Human Rights Practices for 1996, US Department of State, Bureau of Democracy, Human Rights and Labor, 1997 (esp. p.1).

police service, the fundamental purpose of which is to be the protection and vindication of the human rights of all, should require no less.

Membership of organisations

37. On the issue of whether police officers should be permitted to belong to other organisations, we agree with the analysis of the Patten Report in paras. 15.14 to 15.16 but we believe that the Register in question should be open to public inspection and that failure to declare relevant information on the Register should be a disciplinary offence which carries the sanction of dismissal from the service. We think that such a position strikes the appropriate balance between protecting the right of police officers to a private life and ensuring that those involved in policing are both open and objective. While the views expressed on this point in SACHR's submission (that membership of organisations such as the Loyal Orders, the Freemasons and the Ancient Order of Hibernians should be prohibited for police officers) are well argued, as indeed they require to be if an officer's rights under the European Convention are to be limited, this Commission prefers the view that if there is to be a new beginning to policing in Northern Ireland it ought to be one where even-handedness can be expected and obtained from a police officer *regardless* of his or her private activities. So long as an officer's affiliations are openly acknowledged through a compulsory registration system, as is the case, say, with the interests of members of our own Commission, the public should have nothing to fear. Besides, merely preventing an officer from joining a particular organisation is no guarantee that he or she will desist from supporting the aims and ethos of that organisation: the only thing that can stop that support from affecting the officer's policing activities is thorough training and sound monitoring. We would wish this aspect of training to be highlighted in any new training regime. We would also want managers within the police service, and officers themselves, to take appropriate steps to avoid the possibility of a conflict of interests arising during policing operations. If this means not permitting police officers who are members of a Loyal Order to police a demonstration by that

Training, education and development

38. The NIHRC agrees with the Patten Report that the training, education and development of police officers and civilian staff will be critical to the success of the transformation of the policing service in Northern Ireland (para. 16.1). For that reason we are supportive of the general thrust of the recommendations contained in Chapter 16 of the Report. In particular we strongly endorse the recommendations that a strategic approach be adopted to training, that the strategy should address both new recruits and serving officers at all levels, that there should be a high degree of civilian input into the training programmes, that scenario exercises be widely used as training tools, that community awareness training should be enhanced, and that tutor officers should be selected (paras. 16.4 to 16.18). We also approve of the suggestions that the training curricula should be made public and that some training sessions should be open to members of the public (paras. 16.25 and 16.26). We believe, moreover, that failure to undertake on-going training on human rights issues should be a disciplinary offence and that the responsibility for training should be placed under *civilian* control.

39. Most of all, of course, we agree completely that *as a matter of priority* all police officers should be instructed in the implications of the Human Rights Act 1998 and of the Universal Declaration of Human Rights (para. 16.21). Most of the other recommendations made by the Patten Report would come to nothing unless this recommendation were fully implemented. This Commission intends to spread awareness of national and international human rights standards to whoever is responsible for policing in Northern Ireland. That will mean that reference will be made to many other international documents than the two mentioned in para. 16.21 of the Patten Report. We were disappointed that the Report limited itself in this way (in particular the UN Convention on the Rights of the Child should have

40. While the NIHRC is prepared to accept the need for a new purpose-built police college to be constructed (para. 16.6), we consider it to be important that police training does not take place in isolation from other educational activities and we see no reason why on some matters there should not be joint training with, for example, social workers, lawyers, psychologists and community workers. Ideally it should be possible for police officers to serve periods of secondment in other organisations, and *vice versa*. We note, for instance, that staff from Amnesty International and other human rights NGOs now have the opportunity to serve secondments in various UK Government Departments. As a matter of principle we would like to see as much civilian involvement as possible in the running of the police college; in particular, the director of the college should be a civilian. This could be the best way of ensuring that a human rights approach to policing is firmly embedded in the mindsets of recruits and trainees.

Culture, ethos and symbols

41. The NIHRC notes that the Patten Report recommends a change to the name of the RUC, as well as new signs and symbols. The NIHRC's focus on international human rights law leads us to affirm that substantive change which would ensure human rights protections in the future is much more important than symbolic change. However, symbolic change should not be dismissed as being unimportant to human rights and the rule of law. Emblems, signs and names can all be relevant to perceptions of ownership and neutrality. Indeed, we feel that both support for the name change *and opposition to it* illustrate this.

42. Models of good practice for policing in other divided societies have also addressed this issue. In South Africa, new symbols, emblems and names were important signifiers of a police service which would operate under a new human rights regime. In Bosnia-Herzegovina, too, changes were made to help build a human rights ethos for the future, even though, unlike in South Africa, there was no question of having to provide a break from an undesirable past, since human rights abuses had taken place primarily during a war fought by armies rather than during interactions between citizens and the police. To implement the peace agreement in Bosnia-Herzegovina the UN-appointed Office of the High Representative issued an order requiring "immediate display and use of common insignia and symbols of a neutral or inoffensive nature, including but not limited to uniform badges, patches, belt buckles, flags, coast-of-arms and administrative seals and stamps. Thus, while neutral symbols, emblems and names are not internationally mandated, it is suggested that they constitute good practice in implementing the mandated requirements of impartiality and non-discrimination.

43. The NIHRC therefore agrees with the Patten Report that a new badge and a special flag should be adopted to symbolise the new beginning to policing in Northern Ireland, which is what the Belfast Agreement called for. We also acknowledge the importance of a neutral working environment in an organisation as vital as the police service. We agree with the proposal in para.17.8 that existing memorials to police officers who have lost their lives while in police service should be retained. We would add that the families of those officers who have been killed, and the police officers themselves who have survived but with disabilities, should be accorded full recognition as victims along with the very many other people whose lives have been shattered by the troubles in Northern Ireland since 1968.

Overseeing change

44. The NIHRC considers it sensible that the Patten Report recommends the appointment of an eminent person from outside these islands to oversee the implementation of the Report's other recommendations. Naturally organisations such as our own will want to keep a close eye on how matters develop, but it would greatly enhance the credibility of any transformation process if it could be independently monitored by someone who has had experience of such change in a comparable organisation elsewhere. The NIHRC pledges to give any assistance that may be required on human rights issues to any such person appointed.

Conclusion

45. Generally speaking the NIHRC is impressed by the Patten Report. Not only is the Report admirably concise and readable, it also insists on adopting a holistic approach to the subject. We are particularly heartened to see the concept of human rights given such prominence. While we are under no illusions that that concept can be a difficult one to apply in practice, especially as many situations require two or more rights to be set off against each other, we believe that adherence to the values underpinning human rights standards (both those affecting the substance of the rights and those informing the permitted limitations to those rights) is certain to make for a more peaceful and harmonious society than Northern Ireland has been in the past. We look forward to seeing the bulk of the recommendations implemented and we pledge that we ourselves, as a statutory body charged with upholding human rights, will monitor the implementation process closely, whether or not an external overseer is appointed.

ANNEX

The legitimacy under international human rights standards of the Patten Report's recommendation on recruitment (see para. 30)

The assessment of the legitimacy of the Patten Report's recommendations in respect of the recruitment of more Catholics to the RUC should clearly be based on international human rights standards. The difficulty is that there is no clear rule as to what is and what is not permitted by way of affirmative or positive action to deal with an imbalance which can be attributed either to past discrimination or to a more pervasive 'chill factor'. The position can best be explained by dealing first with the related concepts of 'equality of opportunity' and 'the merit principle', and then outlining the kind of affirmative or positive action which is countenanced in international anti-discrimination conventions and which has been adopted in other jurisdictions.

Equality of opportunity

The ideal of equality before the law and the prohibition of discrimination, whether direct or indirect, are closely associated with the concept of equality of opportunity. The underlying idea is that all people have the same inherent ability and potential and that equality is therefore effectively achieved when each individual has an equal opportunity to realise that potential. This concept does not appear in any of the international human rights conventions. But it was expressly built into the initial legislation on private sector discrimination in Northern Ireland, the Fair Employment (Northern Ireland) Act 1976, which defined it somewhat unhelpfully as having the same opportunity as another person, due allowance being made for any material difference in their suitability.

The problem, of course, is that in practice people from disadvantaged educational and social backgrounds do not have the same effective ability to realise their potential as those from more advantaged social and educational backgrounds and that in divided societies this kind of disadvantage is closely associated with racial or ethnic or communal identity. The disadvantage is then typically made worse by the tendency for factual disadvantages to be increased by differential communal attitudes and expectations. This problem, it should be noted, is distinct from the more general fact that individuals within every society have different abilities and potentials and are therefore under any social or political system likely to achieve different levels of success.

One obvious response to this problem of inequality of opportunity is to adopt special measures designed to eliminate the disadvantage, whether real or psychological. This may involve, for example, the development of special educational or training programmes designed to increase the potential of individuals who have been disadvantaged or the encouragement of advertisements and other incentives for them to apply for employment in spheres in which they might not otherwise feel they have a real

chance of success. Formal provision for both these purposes, sometimes referred to as outreach measures, has been made in discrimination legislation in respect of race and sex in Britain and sex, religion and race in Northern Ireland. But these provisions too have had relatively limited impact. In Northern Ireland in particular they have often been offset by what is known as the 'chill factor' - a mixture of fear and reluctance felt by members of a hitherto excluded group to join an enterprise in which the workforce is predominantly made up of members of the 'other' community.

The merit principle

In Northern Ireland, as in some other jurisdictions, the concept of equality of opportunity has at times become entangled with what is known as the merit principle - the idea that all appointments and promotions and other relevant decisions should be made exclusively on the relative merits of those involved. This is a superficially attractive idea which has frequently been relied on by the government in connection with debates on fair employment legislation. But like equality of opportunity it does not appear in international human rights conventions and it may in some circumstances stand in the way of promoting equality. The idea that seeking the 'the best person for the job' can be equated with some measure of the ability or qualifications of those being considered is inherently problematic. Though in some cases it may be appropriate to rank candidates in order of ability, experience or qualifications, in others it may be more appropriate to make the selection on the basis of balance within a class or workforce. For example, where the objective is to achieve a better spread of representation or experience or greater integration, notably in making appointments to public bodies or in selecting teachers or pupils for integrated schools, it is the nature of the group or body for which the selection is being made rather than the merits of those from whom the selection is to be made which counts. In cases of this kind selection on the basis of some objective criteria of individual merit may be less acceptable than what might in a technical sense be regarded as discrimination on the basis of race, sex or religion. In formal legal terms this problem may be avoided by a general exemption in respect of the nature of the employment or by exempting specific categories of appointment or selection. There is clearly a good deal of scope for debate on issues of this kind. In Northern Ireland, for example, there is a generally accepted exemption in respect of all job-related requirements and a specific exemption in respect of all appointments of teachers in schools, which is not so widely accepted. The general point is that the merit principle is not enshrined in international human rights law and should not be regarded as sacrosanct in national legislation.

Fair participation and employment equity

In jurisdictions where there has been a long standing practice of discrimination or where there has been a significant ‘chill factor’ in certain spheres of employment, there has often been greater emphasis on the objective of fair participation or employment equity than on those of strict equality of opportunity or the merit principle. The significance of this shift is that it is no longer the treatment of a particular individual or individuals which is at issue, as in complaints of discrimination or the denial of equal opportunity,

but the treatment of a communal group. This can be illustrated by a more detailed account of some of the recent legislative provisions in Northern Ireland and in Canada.

The concept of fair participation is indirectly defined in the Fair Employment (Northern Ireland) Act 1989 through the obligation imposed on all relevant employers to review the composition of their workforce and their employment practices 'for the purpose of determining whether members of each community are enjoying, and are likely too continue to enjoy, fair participation in employment in the concern.' In practice this is assessed by comparing the actual composition of the workforce with the distribution of the population in a notional catchment area for the type of employee in question. If the Fair Employment Commission - now the Equality Commission - finds a significant difference, the employer can be required to take appropriate affirmative action to remedy the disparity, though what is permitted by way of such action is currently somewhat limited. The success of this action is then judged against 'goals and timetables' for moving towards fairer participation in the individual body or enterprise.

A similar approach has recently been adopted under the amended Employment Equity Act introduced in Canada in 1995. This imposes a duty on public sector employers to 'implement employment equity' not only by eliminating employment barriers against disadvantaged groups but also by 'instituting such positive policies and practices and making such reasonable accommodations as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation' in the Canadian workforce or a relevant segment of it. Though, as in the case of fair participation in Northern Ireland, the measures which are authorised for this purpose are strictly limited, the underlying thrust of the legislation is to achieve equality on a group basis rather than individual equality of opportunity. And to assist in this process all employers are required to analyse the composition of their workforces to ascertain the degree of under-representation of designated groups.

Affirmative action: permissible and impermissible actions

The imposition of a statutory duty to achieve communal balance rather than merely to eliminate discriminatory practices raises a number of difficult issues.
The most important is what kinds of affirmative or other action is to be allowed or required to assist employers to achieve a better balance in their workforce, and in particular how far employers are to be encouraged or allowed to discriminate against individuals in the interests of the group. Or in popular terms how far is positive or reverse discrimination to be permitted or required ?

International human rights law is not particularly helpful on this issue. The early formulations on equality and discrimination in the Universal Declaration, the European Convention and the International Covenant make no reference at all to positive or affirmative action of any kind. Some of the more recent specific covenants address the issue, but in rather general terms. The International Convention on the Elimination of all forms of Racial Discrimination of 1965 provides that:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment of human rights or fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved. (Art. 1.4)

The equivalent provision in the Convention on the Elimination of All Forms of Discrimination against Women of 1979 is as follows:

> Adoption by States parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination ... but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved. (Art. 4(1))

These formulations make it clear that some affirmative action which might otherwise be considered discriminatory is permissible, provided that it is temporary. But it is far from clear what the limitation to measures which do not maintain 'separate rights' or 'unequal or separate standards' means in practice. And there is no further guidance as to what kind of special temporary measures states may adopt.

In the absence of any internal constitutional provisions on equality the adoption of such measures in Britain and Northern Ireland has been approached more on a pragmatic basis than as an issue of principle. But there has been a consistent rejection by successive governments of any form of reverse discrimination at the point of selection or appointment. All the anti-discrimination statutes now make express provision for certain outreach measures designed to increase the pool of applicants, notably provision for advertisements stating that applications from disadvantaged groups will be especially welcome and for training programmes designed to increase the qualifications or experience of applicants from these groups, though any such programme must be open to all potential applicants. Neither of these measures could be regarded as in any way discriminatory. In addition there is now statutory authorisation for the revision of last-in first-out agreements in respect of redundancy so that any improvements in the communal balance of a workforce is not immediately lost if redundancies are subsequently required. But this too could be regarded as the removal of an indirectly discriminatory practice rather than as positive discrimination.

There may, however, be some justification in certain circumstances for adopting special measures to authorise stronger forms of affirmative action, which would permit employers to move more quickly to correct any imbalance in their workforce. One possibility is to permit employers to give preference in recruitment to the unemployed, which would in most cases constitute indirect discrimination in favour of Catholics.

Another is to permit deliberate preference to be given to members of under-represented groups where there are a number of equally qualified candidates - an approach generally referred to as the 'tie-breaker' - which would clearly constitute direct discrimination

In Canada there is a similarly strong legislative commitment to the achievement of communal and gender balance in employment but a greater willingness to accept some forms of positive discrimination which would assist employers in achieving that balance. The Canadian Constitution expressly exempts from the constitutional guarantee of equality 'any law, program or activity which has as its objective the amelioration of conditions of disadvantages individuals or groups' (s. 15(2)). And the new Employment Equity Act of 1995 expressly requires employers in or working for Federal Government to adopt positive policies and practices, which may ultimately be enforced by the Canadian Human Rights Commission, provided that they do not involve either any form of numerical quota, or the appointment or promotion of unqualified persons, or in designated posts in the public sector the hiring or promotion of person otherwise than on merit. This appears to envisage the acceptance of indirectly discriminatory practices, such as giving preference to the unemployed, and perhaps also of the 'tie-breaker' where they are necessary to the achievement of a better balance in relevant bodies or enterprises.

It is in the United States that the arguments for and against affirmative action have been most fully developed. There have been numerous Supreme Court cases on the legitimacy of various forms of affirmative action, from redundancy programmes which give express preference to disadvantaged groups to direct preferences for members of specified groups in both public and private sector employment. It is not practical to attempt a detailed review of the complex interrelationships of affirmative action under federal executive orders in respect of government contracts and affirmative action ordered by the courts under the Civil Rights Acts and the decisions on their constitutionality under the due process clause of the Fifth Amendment and the guarantee of equal protection of the laws under the Fourteenth Amendment. But there has clearly been a shift in the attitude of the Supreme Court in recent years. In the 1970s programmes giving explicit preference to disadvantaged racial groups in respect of hiring, promotion and redundancy programmes were regularly held constitutional provided they were flexible (in that they affect only a proportion of relevant decisions) and time-limited (in that they persist only while there is continuing imbalance in the workforce). In the 1990s any such programmes which subordinate the legitimate interests of individuals in previously advantaged groups in keeping their jobs or winning contracts to those of members of previously disadvantaged groups who have not themselves suffered discrimination are more likely to be ruled unconstitutional, as in the recent decision in *Aderand Construction Co v Pena* (1995). In this sense the demands of equal treatment of individuals on a racially neutral basis have increasingly been given greater weight than the achievement of balance in the workforce. The provision of the Civil Rights Act of 1964 which expressly prohibits the courts from ordering affirmative action which involves preferential treatment designed only to correct a racial imbalance thus been reinforced. It would appear, however, that it is only direct or automatic preferences on an explicitly racial basis that have been affected by this

change in emphasis and than indirect or discretionary preferences and the setting of goals and timetables remain lawful and constitutional.

There has been a similarly firm rejection of affirmative action involving direct preference for disadvantaged or under-represented gender groups in the recent decision of the European Court of Justice in *Kalanke v City of Bremen* (1995). The case involved a local law which required preferences to be given to equally qualified women in appointments and promotions in sections of the public service in which women were underrepresented. Though this form of 'tie-breaker' was held to be constitutional under German law, it was ruled unlawful under the law of the European Union, despite a provision in the Equal Treatment Directive of 1984 expressly exempting 'measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities'.

In the subsequent case of *Marschall v Nordrhein Westfalen* (1997), however, the European Court of Justice accepted that a statutory preference for the promotion of a female teacher who had equal suitability, competence and professional performance as male candidates where there were fewer women in the relevant grade was lawful, provided that the preference could be overriden if there were specific reasons which tilted the balance in favour of the male candidate.

These cases indicate the strength both under national bills of rights and international human rights law of the principle of individual equality and the reluctance of judges to subordinate the interests of individuals to those of a group. If these various precedents are regarded as binding, affirmative action designed to remedy past discrimination in any jurisdiction should generally be carefully tailored to meet a particular problem, should where possible rely on indirect rather than direct preferences, and where that is not considered sufficient should not provide for automatic preference regardless of the particular characteristics of the candidates; they should also be explicitly limited in time to the achievement of some reasonable concept of balance.

Anticipated European Directives and the Draft Protocol No. 12 to the European Convention on Human Rights

It should be noted that, following the adoption of the Amsterdam Treaty the new Article 13 of the Treaty of European Union provides for the introduction of measures to deal with discrimination based on ‘sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’ as opposed to the previous measures based only on gender. It has been proposed that a new Framework Directive for Equal Treatment in Employment and Occupation should be adopted along the lines of the existing Equal Treatment Directive in respect of sex discrimination. It is anticipated that this will authorise positive measures of the kind envisaged as lawful in the *Kalanke* and *Marschall* cases. An additional Directive on Equal Treatment between People of Different Racial or Ethnic Origin covering social security, education and the supply of goods and services is also proposed. Even if these Directives applied to the recruitment of police, which is

uncertain, neither as presently envisaged would rule out the kind of measures proposed in the Patten Report.

It is less clear whether the Draft Protocol No. 12 to the European Convention on Human Rights would cause any difficulties in this respect. The Protocol, if adopted, would extend the protection against discrimination under the Convention from the rights and freedoms guaranteed under the Convention to 'the enjoyment of any right set forth by law' and would also include a general prohibition of discrimination by any public authority. There is as yet no established rule under the Convention in respect of positive action to remedy serious under-representation of relevant groups in public or private employment. But it seems unlikely that a different approach would be adopted from that which has been developed under the law of the European Union.

Communal representation

National and international standards in respect of discrimination and positive action must also be considered in conjunction with those in respect of communal representation. It is generally accepted that appointments to many official bodies and institutions, both at a national and international level, should be made so as to achieve a reasonable representation of all sections of the population or community or all participating states. There is an underlying acceptance of the principle that all those appointed should be competent to carry out the tasks involved. But the objective of achieving reasonable representation is given preference over the strict application of the merit principle or equality of opportunity.

This approach has been formally adopted in respect of policing in the United Nations General Assembly Resolution (Resolution 34/169 of 17 December 1979) adopting the *Code of Conduct for Law Enforcement Officials:*

> … like all agencies of the criminal justice system, every law enforcement agency should be representative of and responsive and accountable to the community as a whole.

It is implicit in this statement that it is legitimate for the communal affiliation of candidates for recruitment to the police to be taken into account, provided that any necessary levels of competence have been met.

Implications for the Patten Report

It may perhaps be reasonable to conclude that there is nothing in international human rights law to prevent the Government from adopting the recommendation in the Patten Report on the recruitment of Catholics to the RUC, provided that it is made clear that any relaxation of the strict merit principle would be permitted only while a substantial communal imbalance in the police service remains, that only properly qualified applicants could be appointed and that an element of discretion in deciding individual cases is reserved in the implementation of any preference for Catholics. The fact that

most human rights instruments in respect of policing stress the need for all police services to be representative of the communities which they serve strengthens this argument. One obvious possibility would be to provide an exemption from the requirements of the Fair Employment Acts, similar to that for teachers, in respect of the recruitment of police officers for a strictly limited period. Another would be to introduce a more limited statutory authorisation for the kind of preference envisaged as lawful in the decisions of the European Court of Justice.