

NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Response to the UK Government's Consultation Paper on the Review of the Powers of the Northern Ireland Human Rights Commission

1. Introduction

In response to concerns expressed about the limited powers of the proposed Northern Ireland Human Rights Commission, the UK Government made provision in section 69(2) of the Northern Ireland Act 1998 for the newly appointed Commission to report on the effectiveness of its powers within two years of its creation.

Shortly before that report was submitted, in February 2001, the Northern Ireland High Court ruled, in December 2000, that the Commission had no power to intervene in court proceedings or to be a "friend of the court" (*amicus curiae*), despite the fact that the Government had indicated to Parliament that an express provision to that effect was unnecessary. In its report of February 2001 the Commission therefore recommended a large number of amendments to the Northern Ireland Act, not only to strengthen its powers of investigation but also to clarify the incidental and ancillary powers that had not been expressly conferred by the Act. This report is available on the Commission's website, at www.nihrc.org. In April 2001 the Northern Ireland Court of Appeal confirmed the High Court's ruling, thereby justifying the Commission's precautionary recommendations.

In May 2002 the Government finally published a consultation paper on its response to the Commission's report of February 2001, indicating that it intended to restore the position that had been generally thought to apply in respect of intervention in court proceedings but rejecting many of the other recommendations, including that the Commission's powers of investigation should be extended. The Government's paper is available on the website of the Northern Ireland Office, at www.nio.gov.uk/pdf/revpow.pdf. In June 2002 the House of Lords overruled the Northern Ireland Court of Appeal's restrictive interpretation of the Act and made it clear that the Commission did have the power to seek permission from the courts to intervene in proceedings in appropriate cases and to serve as an *amicus curiae*. It said these powers were reasonably incidental to those expressly conferred. The House of Lords judgment can be accessed through the House of Lords' website, www.publications.parliament.uk/pa/ld199697/ldjudgmt.

This response document clarifies the Commission's current thinking on its powers, particularly in the light of the recent House of Lords decision, and highlights those areas in which, in the Commission's present view, its powers still require extension and clarification to ensure full compliance with the United Nations' Principles on National Human Rights Institutions (the Paris Principles, 1993). For ease of reference the numbering of the recommendations in the Commission's initial report will be maintained (see the Appendix for a list of those recommendations).

2. The impact of the recent House of Lords decision

In the Commission's view the House of Lords ruling on the Commission's implied powers makes it unnecessary to continue to argue for a number of express clarifications recommended in the Commission's report of February 2001. The Government's consultation paper also suggests that the Government has no difficulty with the Commission exercising the powers and duties in question. The following recommendations are therefore being withdrawn:

- No. 8 (duty to review "policy" as well as law and practice)
- No. 9 (duty to review implementation of the Human Rights Act and Bill of Rights)
- No. 12 (duty to advise Secretary of State on international human rights instruments)
- No. 14 (power to give information and advice)
- No. 15 (power to intervene in court proceedings)
- No. 16 (power to appear as an *amicus curiae*)
- No. 18 (power to comment on UK periodic reports to international bodies) and
- No. 19 (power to consult national and international human rights bodies)

3. The Government's acceptance of some recommendations

In addition the Government's consultation paper already indicates its acceptance in principle of a number of the Commission's recommendations, notably:

- No. 3 (control over staffing)
- No.10 (further reports on implementation)
- No. 13 (regard being paid to the Commission's recommendations)
- Nos. 20-21 (consultation and monitoring of human rights education) and
- No. 25 (express provision on incidental powers).

Although the Commission will want to maintain pressure for these recommendations to be implemented satisfactorily, and will want to scrutinise carefully the precise wording of any proposed legislation giving effect to them, the positive response of the Government is for the time being welcomed.

4. Outstanding issues

The outstanding issues are therefore those in respect of the following recommendations:

- Nos. 22-24 (powers concerning investigations)
- Nos. 1-2 (guarantees of the Commission's independence,
- Nos. 5-6 (the Commission's resources), and
- Nos. 4, 7, 11 and 17 (operational matters).

The Commission's position on these recommendations is explained in the following paragraphs.

5. Powers concerning investigations

In its February 2001 report, the Commission recommended that it be given powers relating to access to places of detention (No. 22), search and seizure (No. 23) and the production of information (No. 24).

The powers relating to access to places of detention and the production of information (Nos. 22 and 24) are clearly required by the Paris Principles and the Commission therefore wishes strongly to stand by its original recommendations. As regards No. 24, the Government's suggestion that refusal to deliver documents could be contested by judicial review is in the Commission's view unsound – it would not be not “unreasonable” (in judicial review terms) for a government department or other body to refuse to hand over internal documents to a body that has no legal right to demand them. The Commission intends to test this point in the courts in the near future.

As regards the Commission's recommendation (No. 23) that it should be given the power to obtain warrants for search and seizure, we have carefully considered the arguments raised with us by friends and critics alike. Realising that, if the Commission were to be given this power it would need significant additional resources to ensure that it was able to exercise it effectively, either by training existing staff or by appointing new staff, we have provisionally decided to withdraw the recommendation at this time.

We are nevertheless still concerned to ensure that any power we might be given to compel the production of information should be effectively enforceable. We are therefore proposing that our original recommendation No. 24, which is based on sections 9(6) and 9(8) of the Republic of Ireland's Human Rights Commission Act 2000, should be amended by adding that, should a person fail to comply with a requirement imposed by the Commission in accordance with recommendation No. 24, the Commission may apply to a court for an order requiring that person to comply with the requirement. We are also proposing that failure to comply with the Commission's requirement should be a criminal offence. Both of these additional enforcement mechanisms would bring the position of the Northern Ireland Human Rights Commission further into line with that of the Irish Human Rights Commission, since the mechanisms in question are already provided for by sections 9(9) and 9(17) of Ireland's Human Rights Commission Act 2000.

6. Guarantees of the Commission's independence and the Commission's resources

The Commission recommended provisions for an independent selection system (No. 1), a duty of impartiality (No. 2), adequate resources (No. 5) and a power to accept grants (No. 6).

The most important of these, in the light of what we perceive to be increasingly detailed control over the Commission's annual supplementary budgets by the Northern Ireland Office, are Nos. 5 and 6. The Commission believes it is very important that its governing legislation should assert the principle that Government will not interfere in the Commission's spending once an adequate overall budget for the Commission has been agreed. The Commission's core budget of £774,000 for

2002-2003 covers only basic staffing and accommodation costs and as a result the Commission has been required to submit bids for supplementary funding, each item of which has been subject to detailed negotiation with the Northern Ireland Office. (This year the total awarded was £1,217,000.) The Commission considers this process to be an unacceptable interference with its independence and has repeatedly requested an increase in its core budget so that it can make its own decisions on priorities within the resources available to it. The Northern Ireland Office maintains that the Commission has not made out an adequate business case for an increased core budget but we would contest that. We would also point out that, as far as we know, no adequate business case was ever put forward by the Northern Ireland Office for initially fixing the Commission's core budget at £750,000.

The Commission also wishes to maintain its recommendation on the introduction of a more independent selection system (No. 1), especially in light of the continuing controversy over the initial and subsequent appointments to the Commission. The enactment of a formal duty of impartiality (No. 2), however, may be unnecessary, as the Government has argued, and the Commission does not, at present, wish to press for it.

7. Operational matters

The Government has rejected the recommendations that the Commission should have early access to plans for legislation (No. 11) and that the "victim requirement" for taking cases under the Human Rights Act should be removed (No. 17). The Commission wishes to maintain both these recommendations, even if other governments around the world are as reluctant as the UK Government to disclose plans for legislation in advance. We are happy to note that it seems likely that the Northern Ireland government departments will soon accept, through an agreed Protocol, that they should be granting early access to the Commission to their plans for legislation. We have not yet given up hope of reaching agreement on a similar Protocol with the Northern Ireland Office and other UK government departments as regards matters not yet transferred to the Northern Ireland departments.

The victim requirement is built into the European Convention on Human Rights but this does not mean that it also has to be included in respect of proceedings under the Human Rights Act. Member states of the Council of Europe have a discretion to go beyond what is strictly required by the European Convention on Human Rights where it is appropriate to do so. The Commission maintains, moreover, that if any exception is to be made to the victim requirement it should be when a statutory body has been set up to promote and protect the very rights enshrined in the Convention. An alternative approach in this respect would be to strengthen the Commission's power to refer potentially suspect legislation to the Privy Council or some other appropriate court, but in the Commission's view this would be very much a second best course of action to the one we are recommending.

The Government has rejected the Commission's recommendation for the appointment of two additional full-time Commissioners (No. 7) and instead proposes to appoint a Deputy Chief Commissioner.

The Commission accepts that it is difficult at the moment to produce strong arguments to support the need for a change in legislation in this respect. The issues cannot be effectively discussed without embarking on a detailed assessment of the Commission's internal structures and of the relevant aspects of the independent report on the effectiveness of its operations which the Commission has recently released (the Hosking report) and which it still has to discuss in detail. The Commission therefore maintains that a shift in the balance between full-time and part-time Commissioners is required but accepts that this may be able to be achieved on a non-statutory basis, at least on a temporary basis, as part of the response to the Hosking report.

8. Impact of the proposed Commissioner for Children Bill

The Government's consultation paper, in chapter 9, suggests that legislation is required to ensure that the Human Rights Commission is permitted not to fulfil some of its specific duties in relation to children if it is satisfied that the work is being effectively carried out by the Commissioner for Children. The Human Rights Commission is not persuaded that such legislation is necessary. We believe that any potential overlap of duties can be dealt with by a Memorandum of Understanding between ourselves and the Commissioner for Children. The logic of the Government's position is that similar legislation is needed to permit the Human Rights Commission not to fulfil some of its specific duties in relation (for example) to complaints against the police, alleged sex discrimination or the concerns of mentally ill patients if it is satisfied that the work is being effectively carried out by the Police Ombudsman, the Equality Commission or the Mental Health Commission.

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APPENDIX

EXTRACT FROM THE COMMISSION'S REPORT, FEBRUARY 2001

CHAPTER 11

SUMMARY OF RECOMMENDATIONS

The Commission's independence

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".
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".
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.
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".

The Commission's resources

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".
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

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.)

The Commission's reviewing functions

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".
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.)
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".

The Commission's advisory functions

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 and before they are introduced to Parliament or the Assembly or made available to the general public".
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".
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".

The Commission's casework functions

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”.
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”.
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*”.
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.

The Commission's promotional functions

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".
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".
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".
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

The Commission's investigative functions

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".
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".
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)".

The Commission's incidental functions

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".