NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Replacement Arrangements for the Diplock Court System

Response of the Northern Ireland Human Rights Commission to the Consultation by the Northern Ireland Office

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,[1] advising on legislative and other measures which ought to be taken to protect human rights,[2] advising on whether a Bill is compatible with human rights[3] and promoting understanding and awareness of the importance of human rights in Northern Ireland.[4] In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (EHCR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding or 'soft law' standards developed by the human rights bodies.

2. The Commission welcomes the opportunity to comment on the proposals for replacing Diplock courts in Northern Ireland. Over the years, the Commission has advocated a reform of the system in favour of the presumption of jury trial in all criminal cases. The consultation on the replacement

[1] Northern Ireland Act 1998, s.69(1).
[2] *Ibid.,* s.69(3).
[3] *Ibid*., s.69(4).
[4] *Ibid*., s.69(6).

arrangements for the Diplock courts should be used to design a system that permanently breaks with the duality of the criminal justice system.

3. The Commission is pleased to see that a number of its recommendations and comments made in the context of the Diplock Review of 2000, and periodically to Lord Carlile's review, have been reflected in the proposals for reform. Some concerns remain, however, and these are outlined below.

New system of non-jury trial

4. The Commission welcomes the statement that new arrangements will be based on the presumption for jury trial for all offences. We also welcome the proposal to move away from the system of scheduled offences, although we would like to see this commitment stated more clearly than it currently is in the consultation document.

5. We are concerned that the proposed system falls short of returning to one criminal justice model that allows only non-jury trial in *exceptional* cases, in that the proposed measures will run in parallel to the provision for non-jury trials in the Criminal Justice Act 2003. It is our view that provisions of section 44 of the 2003 Act should provide the sole basis for non-jury proceedings in criminal cases, with possible necessary modifications in relation to jury protection measures to take account of the particular circumstances of Northern Ireland.

6. In relation to the process of deciding on whether a case should be tried without a jury, the Commission favours the system envisaged by the 2003 Act to that proposed in the consultation of certification by the Director of Public Prosecutions. If the aim of the reform of the Diplock courts is to bring the administration of justice as close as possible to having one single system for all offences, then the decision-making procedure should follow the Criminal Justice Act model, particularly since the end result – that of conducting trial without a jury in certain limited circumstances – is exactly the same.

7. Accordingly, the Director of Public Prosecutions should be required to apply to a judge of the Crown Court for the trial to be conducted without a jury. The DPP should be required to give reasons for the application, setting out evidence of a real

and present danger of jury tampering or intimidation, and evidence that this danger remains regardless of steps that can reasonably be taken to prevent it. Reasons for the application should be made available to the defence to enable it to challenge the application in front of a judge who is not the trial judge in the case.

8. The Commission previously stated that we are not in favour of moving onto a 'scheduling-in' system.[5] We support Lord Carlile's view that there should not be a separate category of offences that would be tried in a non-jury court. We are concerned that the new statutory test on which certification is to depend contains an element of 'scheduling-in', namely the proposal for an exhaustive list of circumstances in which a certificate can be made.

9. The Commission favours a system where the decision to move to a non-jury trial in a specific case depends on a clear risk of interference with or perversion of the administration of justice. Such instances, and the ensuing trials, should represent a very small minority of criminal cases. Particular circumstances that would justify non-jury trial in Northern Ireland could be included in the legislation as examples of cases where there may be evidence of a real and present danger that jury tampering would take place (similar to section 44(6) of the Criminal Justice Act 2003).

Jury reform

10. The Commission submitted a number of comments on jury reform to the Diplock Review (2000) and therefore welcomes the proposals included in the consultation on measures designed to prevent jury tampering and intimidation.

11. We welcome the proposals on restriction of access to personal juror information in certain cases. However, the withdrawal of information from the defence only raises questions around equality in jury selection processes. The Commission supports the view of Lord Carlile that in cases where there is a possibility of jury tampering, the right of both the defence and the prosecution to access personal details should be restricted**.**

12. Consideration should also be given to devising systems of raising challenges by both the defence and the prosecution

[5] Northern Ireland Human Rights Commission, *Submission to Diplock Review* (2000).

without either of them discovering the identity of the juror. These methods of raising challenges should be available to either side of the trial to secure equality in jury selection processes. The proposed guidelines on circumstances in which additional jury checks may be carried out by the PSNI do not, on the face of it, secure such equality.

13. The Commission previously stated,[6] and continues to be of the view, that both the right of defence to "peremptory challenge" and that of prosecution to "stand-by" should be abolished. Jurors should only be prevented from being empanelled if good cause can be shown to the satisfaction of the judge.

14. The Commission restates its position expressed in our response to the Diplock Review (2000) that examples of what might amount to good cause (such as acquaintance with the defendant, or friendship with a victim of the crime in question) should be given in the legislation governing the matter.

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[6] *ibid*.