NORTHERN IRELAND HUMAN RIGHTS COMMISSION

30 July 2009

Rt Hon Shaun Woodward MP
Secretary of State
Northern Ireland Office
11 Millbank
LONDON SW1P 4PN

[by e-mail and letter]

Dear Secretary of State

Review of NIHRC powers under the Northern Ireland Act 1998, as amended by the Justice and Security (Northern Ireland) Act 2007

Section 19 of the Justice and Security (Northern Ireland) Act 2007 ('the 2007 Act') requires the Northern Ireland Human Rights Commission to make to you, before 1 August 2009, such recommendations as it thinks fit in relation to the amendments made in respect of its investigative and legal functions by ss.14-18 of the 2007 Act, amending the relevant provisions of the Northern Ireland Act 1998 ('the 1998 Act').

In respect of s.14 of the 2007 Act (power to take cases in own name), the Commission has not yet had occasion to test the powers, and has considered doing so in only one matter (the compatibility of aspects of the Inquiries Act 2005 with Convention rights). We therefore do not propose to make any comments at this time. The rest of this submission relates to our investigative function.

When the Justice and Security (NI) Bill was published this Commission conveyed a number of concerns in relation to the powers and this Commission's effectiveness. They remain in two areas:

- restrictions on the use of evidential powers, including 'national security' exclusions;
- fettering of access to places of detention.

I enclose a separate, more detailed briefing on these matters and bring to your attention some key developments and issues below.

Since the enactment of the 2007 Act, the Commission has conducted one investigation into homelessness provision for non-UK nationals with no recourse to public funds (report to be published in September 2009 as *No Home from Home*). It has also published *Our Hidden Borders: The UK Border Agency's Powers of Detention*, the report of an investigation which was concluded after the commencement of the 2007 Act. Our experience of those two investigations, one conducted with and one largely without the new powers, informs this submission to you.

The Commission did not have to instigate court proceedings for compliance with its notice of the *No Home from Home* investigation, thanks to the speedy response of the relevant agencies in terms of making personnel, documents and other evidence available for the purposes of conducting the investigation. We believe that our having the statutory powers conferred by the 2007 Act was largely responsible for this improved degree of co-operation, which contrasted with our experience in the earlier investigation of working with agencies such as the UK Border Agency when the Commission had no statutory powers in this area.

It was, of course, never the desire of the Commission to have to initiate legal proceedings against government agencies for not complying with notices compelling evidence or witnesses for the purposes of an investigation. However, the experience of our most recent investigation shows clearly the positive impact of having access to statutory powers.

During the Parliamentary debates around the 2007 Act, there were suggestions that this Commission would use its powers unnecessarily or even irresponsibly, placing and unnecessary burden on government agencies. Indeed, such a misapprehension may be reflected in the cautious wording of the legislation in terms of notice requirements, judicial oversight and other restrictions. It was never going to be the case that we would use these powers

indiscriminately or oppressively, and the two investigations referred to demonstrate that the Commission chooses its subjects with great care and that the investigative process ultimately benefits the agencies under investigation. You may be aware that the Regional Head of the UK Border Agency, Mr Phil Taylor, referred to *Our Hidden Borders* as a "goldmine of free advice" at our recent 10th Anniversary Conference. Furthermore, given the tragic situation of the Roma families intimidated out of their homes in Belfast in June, our most recent investigation, *No Home from Home*, will certainly be a valuable aid to the agencies tasked with dealing with such situations.

Moreover, since the enactment of the 2007 Act, this Commission has been designated by Government as part of the UK's independent monitoring mechanism under Article 33(3) of the UN Convention on the Rights of Persons with Disabilities (UNCRPD). In addition, in its Interim Consultative Report, the Strategic Review of Parading recommended a specific monitoring role for this Commission. In order to fulfil the requirements of the former and possibly the latter, this Commission must be in a position to inquire into and investigate Government's human rights compliance speedily and thoroughly without the prospect of being challenged on such broad, ambiguous and unnecessary grounds as those contained in section 69A of the Northern Ireland Act 1998 (inserted by s.15 of the 2007 Act).

The Commission would therefore ask you to review the relevant provisions and bring appropriate amendments to Parliament in the coming Parliamentary session, substantially reducing the onerous requirements that currently apply in respect of our investigative role.

I am of course aware that this Commission is expecting a great deal from Government in terms of legislative provisions from November 2009, but as a former member of the Parliamentary Joint Committee on Human Rights, I am sure that you will be committed to ensuring the necessary legislation is in place for ensuring stronger human rights compliance and protections in Northern Ireland.

Yours sincerely

Professor Monica McWilliams
Chief Commissioner

NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Review of NIHRC Powers under section 69 Northern Ireland Act 1998 (as amended)

1. This paper outlines the Commission's concerns in relation to its power to conduct investigations under the Northern Ireland Act 1998 as amended by the Justice and Security (NI) Act 2007.

2. These issues were raised directly with Government at the time the Justice and Security (NI) Bill was passing through Parliament, with the Joint Committee on Human Rights and Parliamentarians. Despite the concerns raised by this Commission and by the Joint Committee on Human Rights,[1] it is unfortunate that the Bill was not amended accordingly. The Commission reiterates these concerns and, given the experience and developments of the last two years, hopes that Government will be prepared to respond positively.

Restrictions and exclusions

3. Section 69A provides for the power to compel evidence. It obliges the Commission to consider whether, and conclude that, the matter that it proposes to investigate has not been investigated sufficiently by another person; section 69(c) makes similar provision in relation to places of detention.

4. This creates the scope for a person seeking to obstruct an investigation, or block access, on the basis of an inspection having been conducted by a regulatory body some time previously.

5. The Commission avoids duplication of work with other oversight and regulatory bodies through Memoranda of Understanding, other protocols and regular formal and informal contact. The Commission bases its work on the

[1] Joint Committee on Human Rights, Fifth Report.

international human rights standards and therefore brings a new perspective to situations, matters and institutions already investigated by bodies with a different focus. The legitimate activities of other oversight bodies with distinct remits should not create a ground to object to an investigation by the Commission from its specialist human rights perspective.

6. The Commission is amenable to judicial review, and has no desire to except itself from the legitimate scrutiny of the courts. However, it is not apparent that the specific roles that the Act gives the county court, in sections 69A and 69C of the Northern Ireland Act 1998, add to the protection of human rights. Notwithstanding the contrary view taken by the Joint Committee on Human Rights, we maintain our view that notices should not require to be ratified, or be able to be overturned, at county court level. In particular, the ability of a county court to cancel an order (s.69A(5)), to prevent or restrict access, or to interfere with the terms of reference of an investigation (s.69C(6)) limits the independence of the Commission, and independence is a key characteristic of any effective national human rights institution.

7. The UN Paris Principles (the "Principles relating to the status and functioning of national institutions for protection and promotion of human rights") refer to the capacity of an institution to "freely consider any questions falling within its competence" and to "hear any person and obtain any information and any documents necessary for assessing situations falling within its competence". The ability of a statutory human rights institution to take action, within the functions entrusted to it by Parliament, should be respected, subject to the responsible use of its powers as determined against the ordinary threshold for judicial review.

8. If subsections 5 to 8 inclusive of section 69C were entirely removed, the Human Rights Commission would of course still be open to judicial review in the High Court, which is the appropriate mechanism for so serious an issue as adjudicating any dispute over (for example) the rationality and lawfulness of an investigation by an independent human rights agency. In the alternative, consideration might be given to substituting references to the county court with the High Court. In either case, the Commission would not encourage any suggestion that this jurisdictional issue is at all a matter of the Commission's prestige; rather it is a matter of finding the best means of ensuring the protection of human rights,

especially those of persons in the care and custody of the state.

National security

9. Section 69B severely limits the capacity of the Commission to investigate anything connected with national security. It takes no real account of the particular circumstances of Northern Ireland, as a society emerging from a prolonged conflict in which human rights issues frequently arose in relation to the activities of the intelligence services, and those of the police in relation to national security matters.

10. For example, alleged collusion between state agencies and illegal armed groups is precisely the sort of issue that a national human rights institution ought to be able to address. Section 69B(1) could in practice forbid any disclosure to the Commission of information that could be relevant to that matter, whether relating to past, present or future activity.

11. Prior to the Justice and Security (NI) Act 2007, there was no restriction in the Northern Ireland Act 1998 on the ability of the Commission to investigate national security issues, so s69B(5) has the effect of reducing, rather than enhancing, the Commission's powers. The exclusion of intelligence matters is not limited to the applicability of the proposed new powers. *Any* investigation by the Commission, whether or not it seeks to compel evidence, is prohibited from considering *any* matter concerning human rights in relation to the Security Service, the Secret Intelligence Service and GCHQ.

12. The Commission completely accepts that national security must be protected. It accepts the need to protect the capacity of the intelligence services and the police to defend national security within the rule of law, and it understands that this may, in particular circumstances, justify a refusal to disclose certain information and/or controls on how the Commission receives, handles and acts upon such information. It is one thing to prevent sensitive information coming into the public domain. It is entirely another thing to prevent questions about the human rights implications of national security matters even being raised.

13. The scope of proposed s69B places virtually every aspect of intelligence activities, past, present and future, beyond the investigative capacity of a statutory human rights agency. It severely restricts the scope of any investigation, and the

particular provision forbidding the Commission from any investigation into anything concerning human rights in relation an intelligence service is bound to not only to diminish the Commission's effectiveness in protecting human rights, but to undermine public confidence in the compliance of the intelligence services with human rights. The present oversight arrangements for security and intelligence agencies have not secured that necessary degree of independence and effectiveness, and this is a matter that we have highlighted in, for example, our submission on the admissibility of intercept evidence.

14. It is precisely where national security concerns are raised that human rights oversight must be at its most attentive to prevent abuse. If the exercise of power becomes unquestioned, then it becomes unaccountable and most likely to be taken advantage of. If the Commission cannot even consider whether or not intelligence activities are breaching human rights, it will not have the opportunity to have the question of what evidence it can look at be adjudicated.

15. Bearing in mind that virtually the same provisions were made in Schedule 2 to the Equality Act 2006, the Commission would still insist that the particular circumstances of Northern Ireland justify a different approach. It would also point out that the Irish Human Rights Commission does not have this limitation in its statute. Under section 8(11) of the Human Rights Commission Act 2000, the IHRC cannot demand evidence from a person if that evidence is subject to legal professional privilege. There is however no mention in that Act of national security overrides. The principle of working towards equivalence of human rights protections in the two jurisdictions on the island of Ireland is enshrined in the Belfast (Good Friday) Agreement, and in this instance the 2007 Act works against that trend.

Access to places of detention

16. Section 69C of the Northern Ireland Act 1998 allows the Commission to enter a place of detention only during and for the purposes of a formal, time-bound investigation established under s69(8). For any other purpose, however serious or urgent, the Commission would need to secure the permission of the relevant authorities.

17. The Commission needs to have the option of visiting places of detention as a means of fulfilling its statutory functions under

s69(5), (6) and (8) of the Northern Ireland Act 1998, i.e. in relation to legal proceedings, research, investigations or educational activities. The Commission may from time to time be made aware of a particular situation pertaining in a prison or holding centre which requires immediate attention, and to which the relevant authorities may not wish the Commission to have access. The Commission may also wish to review the operation of such a centre without the centre's staff having the benefit of preparing for the visit in advance. We have, of course, recently done so (the visit to the Antrim PSNI custody suite, on which we have reported to you), and although on that occasion we were afforded an exemplary degree of co-operation, we should not always be confident that this will be the case.

18. The Commission would therefore wish to have a right of access to places of detention for the exercise of any of its statutory functions, and protection against any inappropriate use of this power is available through judicial review.

19. The Commission has conducted extensive research in prisons and juvenile justice establishments since it was created in 1999; it has dealt with numerous complaints and inquiries from prisoners and from prison staff; it has advised Government and the Prison Service on numerous matters connected with prison conditions and policies; and staff and Commissioners have undertaken an extensive series of visits to many places of detention, not all in the prison estate. The Commission needs to be able to enter places of detention for a variety of purposes falling within its remit, not just for formal investigations. On a number of occasions in the past, its access has been obstructed and delayed to the extent that judicial review proceedings have had to be instigated.

20. It should also be noted that the powers of inquiry of the Scottish Human Rights Commission (SHRC) far exceed those available to this Commission.[2] In particular giving the SHRC appropriate statutory powers, including the power to enter places of detention unannounced, has meant that Government has felt able to designate it as a national preventive mechanism (NPM) under the Optional Protocol to the UN Convention Against Torture (OP-CAT). That has created an anomalous situation in the UK whereby the oldest statutory organisation with substantial experience of and expertise in monitoring human rights compliance in places of detention has not been designated under this key human rights

[2] The Scottish Commission for Human Rights Act 2006.

commitment. The Commission has sought and would still wish to be designated as part of the UK NPM, and will in any case continue to monitor compliance with the CAT and to make parallel reports to the UN Committee Against Torture.

21. Another point of reference should be the powers available to the Council of Europe's Committee for the Prevention of Torture (CPT), which has by treaty "unlimited access to any place where persons are deprived of their liberty" anywhere in the United Kingdom. It would be illogical and anomalous for a body established by Parliament, with a permanent local presence and a broad mandate for the protection of human rights, to be denied powers available to a European agency that has a narrower remit and, in practice, can only visit once every few years. The Human Rights Commission does not in any way wish to supplant the role of the CPT – in fact, it has co-operated with it and actively encourages it to visit. The CPT met with this Commission as recently as November 2008 and relied to a significant degree on our expertise and knowledge, but the brief and infrequent visits of the CPT are not enough to ensure the effective protection of the human rights of all detained persons.

22. In the interests of efficiency, the Commission would as a general rule prefer to arrange a mutually convenient time for any visit to a place of detention, all things being equal. However, to be effective as a means of discouraging or uncovering human rights violations, the power of access to places of detention must allow for unannounced visits. As drafted, s.69C imposes a minimum delay of 15 days' notice between the Commission deciding to investigate, and gaining the right of entry. Subsection 5 makes no provision for emergencies, and subsection 6 further delays access by allowing for application to the county court. The county court is able not only to prevent or restrict access, but to dictate alterations to the terms of reference decided by the Commission and communicated by it to all interested parties. This is an entirely unsatisfactory arrangement in relation to the international standards of best practice in relation to monitoring human rights compliance in places of detention.

23. In light of the issues outlined above, the Commission urges Government to review and amend the legislation.

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