



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Response to draft Public Assemblies, Parades and Protests (Northern Ireland) Bill – Code of Conduct

Summary

The Office of the First and deputy First Minister (OFMdFM) proposes to introduce a new system for making decisions on restrictions on parades and protests against parades. This would replace the Parades Commission. OFMdFM consulted on the proposed new law from May to July 2010. It has also proposed a new Code of Conduct for people organising or taking part in parades or protests. This response is to the consultation on the draft Code of Conduct, which ran from June to September 2010.

The Commission's response says:

- The Code of Conduct should be changed to take account of OFMdFM changing its proposals for the new law
- The Code of Conduct should use plain language
- The Code should be clearer in what it says about late notification, dialogue, the human rights framework for decisions, and sectarian harassment, and
- The Code of Conduct has to match the standards in the European Convention on Human Rights.

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 and advising on whether a Bill is compatible with human rights.² 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 (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies.
2. The Commission issued a preliminary response to the consultation on the draft Bill in May 2010, requesting further information from the Working Group on Parades. The Commission was pleased to have the opportunity to meet representatives of the Working Group during the course of the consultation, and now has some further detail on the intent behind a number of the proposals. The Commission submitted a final response to the consultation on the draft Bill before the deadline of 14 July 2010.
3. In its response, the Commission set out concerns that aspects of the draft Bill were potentially incompatible with the European Convention on Human Rights (ECHR), which would render the legislation outside the legislative competence of the Assembly.³ Subsequently, the First and deputy First Ministers stated on 12 August 2010 that in light of the responses to the consultation there would be significant changes to the Bill. This includes "the removal of all public meetings from the remit of the legislation" with the Bill now being "limited in application to parades and related protest meetings". It has also been made clear that the human rights references in the draft Bill will "indicate a framework based on the European Convention of Human Rights".⁴ The Commission has welcomed the proposed changes, and awaits the detail once the final Bill is published.

¹ Northern Ireland Act 1998, s.69(1).

² As above, s.69(4).

³ As above, s.6(2)(c).

⁴ 'Robinson and McGuinness set out changes to Parades Bill', OFMdfM Press Release, 12 August 2010. Available: <http://www.northernireland.gov.uk/news-ofmdfm.htm> [accessed 18 August 2010]; and 'Summary of Responses received on the consultation paper Public Assemblies, Parades and Protests', OFMdfM, 12 August 2010. Available: <http://www.ofmdfmi.gov.uk/equality/public-assemblies-parades-and-protests.htm> [accessed 18 August 2010].

4. The Commission is conscious that the draft Code of Conduct was published before the announcement of 12 August, and therefore reflects the draft Bill as issued for consultation and *not* the revised proposals. This means that a lot of the draft Code of Conduct will accordingly need to be re-drafted.
5. The Commission was not in favour of the extension of parades notification and related procedures to public meetings (static assemblies). The Code of Conduct, as it can lead to restrictions, needs to be compatible with Article 11 ECHR, which includes a test of proportionality. There may be measures which are justifiable for parades but would not be justifiable for many other types of assembly.⁵ The outcome of applying a Code of Conduct clearly designed around parades and counter-protests to other public assemblies could therefore have constituted a disproportionate restriction. As the intention not to proceed with the extension and application of the Code of Conduct to public meetings has now been announced, the rest of this submission should be read as commentary on the Code of Conduct if applied to parades and counter-protests only.

Introduction

6. Pages 5-10 comprise an introductory section giving background to the Hillsborough Agreement, etc. There then follows information on applicability, enforceability, definitions of terms and descriptions of organisations. It would appear that the latter part of this chapter only is intended to be included in the actual Code of Conduct. This could be clarified.

Plain language

7. A balance has to be struck between ensuring that the information is precise and accurate in accordance with the legislation, and its being written in plain language rather than 'legalese' in order to be accessible to those who will need to

⁵ For example, the draft code (following from the draft Bill) would have introduced a requirement on organisers to provide at least one "appropriately trained" steward for every 50 participants. While there may be an evidence base justifying the necessity of this for parades, such a requirement for public meetings may be unnecessary and impractical (take, for example, a spontaneous protest outside a workplace following news of redundancies).

use it. Take the very first paragraph of the Code, for example:

Application: The code applies to all organisers, participants (including third party participants) and non-participants involved in any form of public assembly excluding funeral processions or assemblies exempted from falling under the legislation by order of the First Minister and deputy First Minister acting jointly.

8. When this paragraph is redrafted to state that the code will now only apply to parades and counter protests, the opportunity should be taken to simplify the language. The latter half, for example, could simply state “Exemptions: funerals and...”, followed by the names of other exempted processions or organisations, rather than referring to the legislative process for making exemptions. This could be updated as and when the list of exemptions changes.
9. Some terms used in the Bill, which are replicated in the Code, seem to be unnecessarily confusing. In particular, it is not clear why the term “non-participants” is preferred to the more readily intelligible “supporters”, the term used in the present parades legislation to refer to those who are supporting but not participating in a parade.⁶
10. The document as a whole could benefit from plainer language. While in part this reflects the complexity of what is actually being proposed,⁷ it could clearly be improved.
11. The Code is a policy document reflecting procedures that must be followed and setting out behaviour that is unacceptable. This follows the legislation but provides more detail. Any breach in terms of procedure or behaviour can lead to sanctions. Legal certainty requires that the procedures and, therefore, what is permitted, or not, should be clear enough to reasonably allow a person to know what they may and may not do. The Commission therefore wishes to see the Code written in an accessible manner.

⁶ Public Processions (Northern Ireland) Act 1998 as amended.

⁷ As an example, the paragraph quoted above is misleading in relation to the requirements of the (then) draft Bill. It states that the Code applies to “any form of public assembly” but does not state that the draft Bill exempted a public meeting of 49 persons or less from the definition of “public assembly”. It is left to the reader to derive this from the definition of public assembly and cross-reference it with the definition of public meeting on subsequent pages.

Process

12. Pages 11-21 focus on the processes to be followed when notifying parades or counter-protests and the related processes of dialogue, mediation and adjudication. These naturally reflect provisions in the draft Bill. The Commission had raised a number of questions in relation to these processes in our submission to the consultation on the draft Bill. This included urging greater examination of the evidence base for the necessity of the extension of notification periods for parades and counter protests,⁸ ensuring the new decision-making bodies are independent from undue political interference and consideration of an appeal mechanism. There were also questions as to how a parade would be regulated where there was clear evidence that it engaged the rights of others but where no organised group exists to lodge objections, and whether there would be transitional arrangements to allow previous Parades Commission determinations to be considered. Addressing all of these matters would require amendment of the Bill, but they are reiterated here as they are reflected in the Code of Conduct.

Notification Procedures

13. The Commission also raised questions in relation to the late notification procedures. These would replace the current provision for late notification (which is permitted when notifying on time was not “reasonably practicable”) with a more complex two-stage arrangement for “late notification” and an “emergency procedure” within 72 hours of a parade.
14. The Commission raised the lack of certainty as to when the emergency procedure can be used, as it was referred to in the explanatory notes both as “only intended for extreme emergency situations” and as intended for “some unforeseen event”. Other than in the title, “emergency procedure”, the draft Code of Conduct does not qualify the procedure to “extreme emergencies” but rather to provide for responses to “an unforeseen/unanticipated event”. If this process remains

⁸ The draft Bill proposed the extension of the parades notification period from 28 to 37 days; and changing the 14-day counter-protest notification time to a two-stage process of detailed objections being lodged within seven days of the parade being notified and then a counter-protest being subsequently notified with 22 days’ notice.

in the final Bill, it could be clarified the qualification of “extreme emergencies” has been dropped.

15. In the draft Bill, late notification is dependent on it being “unavoidable” or considered “reasonable in light of unforeseen circumstances” in which case the notification would be accepted “as if it were on time”. The Commission highlighted that there was no clarity in the draft Bill as to the consequences when a late notification (including emergencies) was not accepted. There is no further information on this in the draft Code of Conduct, and it remains an area of uncertainty that should be addressed in the final Bill.
16. Clause 37 of the draft Bill contained criminal offences for organising or participating in an assembly for which notice had not given, or that turns out to be different from that which was notified. If the difference is not materially relevant, it is disregarded. Moreover, the explanatory notes state that the offence should not prevent prosecuting authorities “using discretion if for some unforeseen reason a reasonable adjustment is made”. The Commission voiced concern that wherever wide discretionary powers exist, there is the potential for them to be exercised in an arbitrary, unaccountable and discriminatory manner, beyond the purpose for which they may have been originally intended. The draft Code of Conduct, as the main source of policy guidance to organisers, does not elaborate as to what types of material changes are, or are not likely, to lead to prosecution.

Dialogue

17. The Commission welcomes the draft Code of Conduct’s encouragement of dialogue between parading organisations and residents at the earliest possible stage. This is rather than waiting for formal notification to take place, particularly as many parades are annual or otherwise organised considerably in advance.⁹ Some successful mediation or dialogue processes have taken place over a period of months prior to parades that take place annually or on another regular basis. These processes have taken place outside the notification period. Given this, the Commission reiterates the call for careful analysis of whether the additional days for notification of parades and counter-protest notification can be demonstrably justified.

⁹ Draft Code of Conduct, p11.

18. In relation to dialogue, it is important to reiterate that there is no basis in human rights law for the principle of 'consent', that is, that one party's freedom of assembly would be dependent on permission from another party. This does not, however, mean that dialogue, in particular intercultural dialogue, cannot have a positive role to play in human rights terms. In general, the existence of dialogue can also be an important indicator in determining the purpose and motivations for particular parades and attitudes of protagonists to one another. The draft Bill provides that refusal to enter into face-to-face dialogue will be taken into account by the Adjudication Body but will not be the main or key determining factor in the decision. This is reiterated in the draft Code of Conduct which adds "anyone who refuses to enter into face-to-face dialogue must justify the exceptional circumstances which prevent them from so engaging to the satisfaction of the adjudication body".¹⁰ Again, while this may be helpful in informing the evidence base for decisions, the consequences are not clearly set out. Namely, as per clause 25(5) of the draft Bill, the Adjudication Body will disregard the refusal of dialogue if it is justified by exceptional circumstances.

The human rights framework for decisions

19. The Commission welcomed the explicit inclusion of human rights considerations as, alongside the Code of Conduct, the basis for objections and adjudication decisions on parades. However, the Commission urged that the provision be more tightly drafted and the human rights framework itself outlined in the Bill. In this context, the Commission welcomes the announcement by OFMdFM that the final Bill will outline the framework around ECHR rights, and awaits the detail. At present, the Code does not further outline this framework and should be amended to do so.

Sectarian harassment

20. The Commission also sought further clarity on the inclusion of 'freedom from sectarian harassment' within the decision-making framework. The Hillsborough Agreement set out the inclusion of this right as an agreed key principle.

¹⁰ At p15.

However, the only reference in the draft Bill to this matter was that the Code of Conduct must:

...be designed to ensure that all parties take measures to prevent the sectarian harassment (meaning harassment on the grounds of religious belief or political opinion), or other harassment, of any person in the vicinity of a public assembly (whether or not the person is participating in the assembly)...

21. The Code of Conduct limits the guidance given to parade and counter-protest organisers on this issue to stating that they should “ensure that they take measures to prevent any harassment, including sectarian harassment, of any person in the vicinity of a public assembly; whether or not the person is participating in the assembly”.¹¹ Effectively, the clause in the draft Bill is repeated rather than being elaborated on in the Code of Conduct. It would be beneficial if the Code could provide further guidance as to the types of measures that are expected to be taken.
22. In relation to Participants and Supporters (‘non-participants’) in parades and protest meetings, the code of conduct lists among its requirements that they should:
 - not engage in conduct which amounts to or is capable of amounting to sectarian, racist, homophobic or disability harassment;
 - not use words and behaviour which could be reasonably perceived to be threatening, abusive, sectarian, obscene or racist;¹²
23. In the case of supporters, this requirement is restricted to “sensitive locations”.¹³ The Commission considers that the occurrence of racist (including sectarian) and other discriminatory expression is a key factor the Adjudication Body should consider when making decisions on conditions. Therefore, it is correct that measures for its prevention should be included within the Code of Conduct. Notwithstanding this, the Commission reiterates the need for concepts such as ‘harassment’ to be properly defined in the Bill.

¹¹ At p23.

¹² At pp31 and 35. There are also duties not to play unduly loud music, which do not also specify prohibitions on sectarian music. While this would in any case clearly fit into “words, conduct or behaviour”, it could also be explicitly included.

¹³ The prohibition on *participants* using such words or behaviour is repeated in the respective requirements for sensitive locations, but not the conduct provision. The reason for such distinctions is not clear.

24. Clause 29 of the draft Bill also introduces an offence of disruption for anyone preventing or disrupting a public assembly. It also introduces an offence to “harass” a person on a lawful public assembly. This is elaborated on as including behaving offensively or abusively or hindering, molesting, annoying or obstructing persons on a lawful public assembly or being disorderly towards them. The Commission will comment further on the compatibility of this clause with Article 10 ECHR if it is retained in the final Bill. No further guidance is given in relation the scope of this provision in the draft Code of Practice. It is simply stated that harassing persons on a lawful assembly will be an offence.¹⁴

Compliance with ECHR Article 11 and 10

25. Decisions by the new Adjudication Body (PAPPB) can take account of any relevant previous failures to comply with the Code of Conduct. The draft Bill provides that the Code will be enforceable through the imposition of binding conditions on public assemblies, which can include any element of the Code of Conduct. Breaching any of these binding conditions will be a criminal offence.
26. The provisions of the Code of Conduct can therefore constitute restrictions on the right to peaceful assembly under Article 11 and the related rights to freedom of expression in Article 10. The provisions must therefore be compatible with the limitation clause of these ECHR rights. The full text of Article 11, including the limitation clause Article 11(2) is:

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. (Article 11(1))

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

¹⁴ At p28.

27. Article 10 provides that everyone has the right to freedom of expression, including the right to impart information and ideas. Article 10(2) sets out a similar limitation clause to the above. There is a complex interface between protected freedom of expression and protection against advocacy of discrimination, hatred or harassment. Further discussion on this matter is in the Commissions submission to the draft Bill.¹⁵ However, it is also relevant to the Code of Conduct.
28. The Commission does not oppose standards that are aimed at ensuring compliance with matters set out in the limitation clause of Article 11(2), provided that all such measures must be necessary and proportionate to achieving this aim in the specific context of the assembly that is under deliberation.
29. Notably, the proportionality test for the measures within the Code will need to be more stringent as aspects of the Code of Conduct could now become binding conditions it would be an offence to breach. The Commission will comment further on this in general when the final Bill is published. If clause (26(5)) is maintained in its present form then *any* of the 'provisions' in the Code of Conduct could become a binding legal requirement which it would be an offence to breach. It would therefore be necessary to examine each one to ensure it would be proportionate for such a matter to be considered an offence and it is formulated with sufficient clarity for its boundaries to be understood.
30. At present it is not clear what is considered a 'provision' of the Code of Conduct. For example, if this concept covers all the broad matters set out for organisers in section 3. In relation to participants and supporters (non-participants), it would seem likely that it would be restricted to the matters set out in bullet point lists as requirements in sections 4 and 5 respectively. Further clarity could be provided on this matter.
31. Some of the items in the requirement lists are more general. For example, "fully adhere to all relevant legal requirements". If this is among the matters that can become additionally binding, legal requirements under the Bill, the original "legal requirement" could end up carrying a much more serious consequence than would usually be the case. In the case of requirements such as merely the failure to "cooperate" with PSNI, the sanctions envisaged in the legislation would appear disproportionate to the offence in the absence of any other

¹⁵ At paras 99-102.

factor such as a public order offence (which could be considered on its own merits).

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