



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Response on the Police (Northern Ireland) Act 2000: Review of Temporary Recruitment Provisions

Summary

The Commission takes the view that the 50:50 recruitment arrangements are compatible with human rights law, and cites relevant international standards. Procedures that depart from the norm of equality of opportunity need strict justification; where that exists, they do not constitute discrimination, but they must be periodically reviewed and discontinued as soon as they have served their purpose.

While the 50:50 process has increased the number of Catholics employed in the Police Service, it has not been as effective in respect of support staff. The scheme should be retained and consideration should also be given to putting forward alternative proposals to accelerate progress towards fair participation rates amongst support staff.

In respect of regular officers there is a need to monitor progress beyond the 30 per cent mark, and beyond the expiry of the renewed scheme, to ensure that the PSNI and its support staff are continuing to become more reflective of the population.

Introduction

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 rights³ 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 (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 welcomes the opportunity to contribute its views to the consultation on the proposed renewal of the temporary '50:50' recruitment provisions in place for the Police Service of Northern Ireland, which would otherwise expire on 28 March 2010.⁵ The proposal is to renew the provisions until, at the latest, 28 March 2011, with the option of revoking them earlier once the proportion of those regular officers whose community background is perceived as Catholic has reached 30 per cent.

Relevant human rights standards

3. The Commission has consistently taken the view that the 50:50 recruitment arrangements are compatible with international human rights law, under which measures to promote full and effective equality are not considered to constitute discrimination, provided that there is an objective and reasonable justification for those measures, such as that they meet a pressing social need, that they respect the principle of proportionality, and that they are discontinued as soon as they are no longer needed.

¹ Northern Ireland Act 1998, s.69(1).

² *Ibid*, s.69(3).

³ *Ibid*, s.69(4).

⁴ *Ibid*, s.69(6).

⁵ Police (Northern Ireland) Act 2000 (Renewal of Temporary Provisions) Order 2007.

4. The general framework for human rights-compatible measures of this kind was enunciated by the UN Human Rights Committee (the body overseeing the International Covenant on Civil and Political Rights), in its General Comment no. 18 (Non-discrimination), especially paragraph 10, which provides:

...the principle of equality sometimes requires States parties to take affirmative action. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation...

5. In specifically addressing “the right and the opportunity of citizens to have access on general terms of equality to public service positions”, the Human Rights Committee later said in General Comment 25:

... Affirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens.

6. In relation to the ‘sister’ Covenant, the International Covenant on Economic, Social and Cultural Rights, its supervisory Committee said as follows in its General Comment no. 20 (para. 9):

...States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved.

7. Several other international and regional human rights standards affirm that special measures taken to accelerate or achieve equality do not contravene the principle of non-discrimination. These include:
- International Convention on the Elimination of All Forms of Racial Discrimination (Article 1, paragraph 4)
 - Convention on the Elimination of All Forms of Discrimination against Women (Article 4, paragraph 1)
 - Framework Convention for the Protection of National Minorities (Article 4, paragraph 3)
 - Charter of Fundamental Rights of the European Union (Article 23)
 - Convention on the Rights of Persons with Disabilities (Article 5, paragraph 4)

- Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities (Article I 2(b))
 - 12th Protocol to the European Convention on Human Rights (third recital of the Preamble).
8. Additionally, there are several human rights instruments that positively encourage, and in some circumstances require, states to adopt measures of this nature, including:
- International Convention on the Elimination of All Forms of Racial Discrimination (Article 2, paragraph 2)
 - Framework Convention for the Protection of National Minorities (Article 4, paragraph 2)
 - Council of Europe Committee of Ministers Recommendation R(85)2.
9. Other relevant provisions in treaty law and other standards establishing firstly, the scope for differential treatment when (and for so long as) that is justified in terms of redressing historic under-representation, and secondly, in terms of securing the participation of, in particular, minorities in public services, include:
- International Labour Organisation Convention C111 (Convention concerning Discrimination in Respect of Employment and Occupation, especially Article 5)
 - ILO Convention C122 (Employment Policy Convention)
 - Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights
 - UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
 - Vienna Declaration and Programme of Action
 - European Charter for Regional or Minority Languages.

European equality law

10. While the Commission's focus is on the international human rights standards rather than the more specific field of equality law, equality is a core principle in the whole corpus of human rights law, and equality standards are generally established with close attention to conformity with human rights norms. Specifically, the European Union, as the main driver of equality legislation at regional level, has always sought to ensure that its equality law meets the human rights standards set by the Council of Europe and the other regional and international systems. It considered the compatibility of the 50:50 scheme in drafting Council Directive 2000/78/EC of 27

November 2000 (establishing a general framework for equal treatment in employment and occupation), and at the request of the UK Government addressed this precise issue as follows (Article 15(1)):

In order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland, differences in treatment regarding recruitment into that service, including its support staff, shall not constitute discrimination insofar as those differences in treatment are expressly authorised by national legislation.

11. In the context of gender inequalities, Directive 2006/54/EC of 5 July 2006 provided (Article 22):

In accordance with Article 141(4) of the Treaty, with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment does not prevent Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

12. The European Court of Human Rights has also addressed the scope for positive measures involving differential treatment that, in the absence of justification, could contravene Article 14 of the European Convention on Human Rights. As the Court stated in *Abdulaziz, Cabales and Balkandali v. UK* (1985): "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'". Subsequent caselaw has been consistent with that ruling.

Legitimacy, proportionality and effectiveness

13. The Northern Ireland Human Rights Commission is satisfied that the objective of securing equitable representation of the two main communities in Northern Ireland in employment with the PSNI is such a legitimate aim, and that the measures recommended by Patten and enacted in the 2000 Act are proportionate.
14. The legitimacy of the aim derives not only from the desirability *per se* of redressing an historic and severe under-representation of a large section of the community in the workforce of one of the largest public-sector employers,

funded through taxation that is applied on equal terms to the under-represented group. It derives also from the wider social good of having a police service that, by being more reflective of and connected to the community that it serves, is better able to deliver community policing, to know and respond to local needs, to secure acceptance and support across the community, and to receive the information, intelligence and co-operation that it needs to prevent and detect crime and to engage in other policing work that increases the safety, security and confidence of the people.

15. If the legitimacy of the original policy objective is established, it remains necessary to consider the legitimacy of its maintenance beyond March 2010. That requires consideration of its effectiveness in securing the desired outcome. In respect of recruitment of police officers, there is evidence of the effectiveness of the 50:50 recruitment process to date in increasing the proportion of Catholic applicants to a level approaching their participation in the overall workforce (averaging 36.9 per cent of applications in 2001-09), and also in increasing the proportion of Catholics actually employed in the Police Service. As of 1 November 2009, the proportion of Catholics (i.e. persons whose community background was perceived as Catholic) employed as regular officers in the PSNI, which had been of the order of 8 per cent in January 2001, had reached almost 27.6 per cent (70.1 per cent Protestant, 2.3 per cent not determined). The situation among support staff was quite different: only 17.6 per cent Catholic (78.5 per cent Protestant, 3.9 per cent not determined).⁶ It would thus appear that the 50:50 measure has been effective in respect of regular officers, but ineffective or insufficiently effective in respect of support staff.
16. The Commission is aware that the vast majority of those who undergo the PSNI selection procedure are not appointed for reasons other than the operation of the 50:50 rule. We are nevertheless sensitive to the disappointment of those qualified candidates, approximately 1 per cent of the total field of applicants, who have been denied employment solely as a result of their community background. The appointments that have been made are producing a police service that is, year by year, more representative of the population it serves, and that is an important and welcome development.

⁶ Available: www.psni.police.uk/index/updates/updates_statistics/updates_workforce_composition_figures.htm

17. It is important that any procedures that depart from the norm of equality of opportunity be kept under periodic review and that special measures be discontinued as soon as they have served their purpose. The objective set in introducing 50:50 recruitment was not to secure representation that fully matched the perceived community backgrounds in the whole population or in the workforce, which on recent intercensal estimates would entail a target of about 44 per cent Catholics in the PSNI, but rather, to secure 30 per cent Catholic participation. The current consultation proposes at most a one-year extension on the calculation that 30 per cent will be reached before 28 March 2011. The policy assumption was that 30 per cent was the sort of level representing a 'tipping point' at which prospective recruits from the Catholic population would feel so confident in the PSNI as an employer committed to achieving equal treatment that, over some years following the end of the 50:50 scheme, one might expect their level of representation to continue to increase towards pro rata equity with the overall workforce in Northern Ireland.
18. The Commission in this instance is asked to respond to a specific proposal to extend the scheme by at most one year, and its view is that this should be done. However, the Commission also has the statutory function of advising on measures that ought to be taken for the protection of human rights, whether or not on foot of a proposal from Government. In that context, the Commission notes the very significant under-representation of Catholics among PSNI support staff and, rather than simply discontinuing 50:50 recruitment for that staff group, would expect Government to maintain 50:50 and/or introduce additional measures to accelerate progress towards fair participation rates among that group. The consultation document does not offer any indication as to how Government intends to address the very low representation of Catholics among support staff, but the Commission is reluctant to conclude that this indicates satisfaction with that under-representation and an intention to do nothing to redress the imbalance. The consultation document explains the situation as follows (para. 35):

The increase in Catholic composition in support staff posts is not as advanced as that of regular officers as 50:50 only applies to those recruitment competitions where there are six or more vacancies of a similar nature to be filled at or about the same time.

19. If that is indeed the reason why such a relatively radical departure from equality law as 50:50 has failed to produce a representative workforce, alternative proposals should be put forward, possibly involving the removal of the 'six or more vacancies' rule, or the imposition of an even higher target than 50 per cent Catholic recruitment. In any case, Government must set out a rationale for disapplying special measures when so great and persistent an imbalance is evident.
20. In respect of regular officers, the Commission would stress the need to monitor progress beyond the 30 per cent mark, and beyond the expiry of the renewed scheme, to ensure that the PSNI and its support staff are continuing to become more reflective of the population. Should it become clear at any point that progress has slowed, or even that participation rates have regressed, the Commission may recommend the reintroduction of this or a similar special measure with perhaps a different target. In the interim the exception provided for in the EU Directive should be maintained.

Other under-represented groups

21. The Commission notes also the very substantial growth in female representation in the police service, from around 12 per cent in 2001 to what is now one of the world's highest rates – currently around 24 per cent, and expected to reach 30 per cent within five years. One area of historic under-representation remains of concern. Northern Ireland is becoming an increasingly diverse society, but at 1 July 2009, the PSNI had only 32 ethnic minority officers (0.4 per cent), only 10 more than in 2001. The proven effectiveness of special temporary measures in addressing the under-representation of one section of our society may indicate that consideration should be given to measures that might increase the representation of ethnic minorities within the Service, but the Commission is not at this stage calling for any particular approach that would require a further exception in EU or domestic equality legislation.

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**Northern Ireland Human Rights Commission
Temple Court, 39 North Street
Belfast BT1 1NA
Tel: (028) 9024 3987
Textphone: (028) 9024 9066**

SMS Text: 07786 202075
Fax: (028) 9024 7844
Email: information@nihrc.org
Website: www.nihrc.org