



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Northern Ireland Human Rights Commission submission to the Equality Commission for Northern Ireland's investigation into the Department for Social Development's compliance with the approved Equality Scheme

Introduction

1. The Northern Ireland Human Rights Commission (the Commission) pursuant to Section 69(1) of the Northern Ireland Act 1998 (1998 Act) is obligated to 'keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights'. Further, in accordance with the United Nations (UN) Paris Principles, paragraph 3(a), a national human rights institution, 'through the exercise of its power to hear a matter without higher referral', 'shall ... submit to the Government, Parliament and any other competent body' advice on the national situation with regard to human rights.¹ In consideration of these functions, the Commission makes the following submission to the Equality Commission for Northern Ireland (ECNI).
2. The Commission notes that the UN Committee on Economic, Social and Cultural Rights' (ICESCR Committee), General Comment 20, states that 'national legislation ... should provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights' and that 'domestic legal guarantees of equality and non-discrimination should be interpreted by these institutions in ways which facilitate and promote the full protection of economic, social and cultural rights'.²

¹ Adopted by UN GA Resolution 48/134 (20 December 1993).

² ICESCR Committee, General Comment 20: Non-discrimination in economic, social and cultural rights, para 40.

3. The Commission notes that the ECNI is mandated to carry out functions that accord with the provisions of General Comment 20. Pursuant to Schedule 9, paragraph 1 of the 1998 Act, the ECNI 'keep[s] under review the effectiveness of the duties imposed by section 75' and 'offer[s] advice to public authorities ... in connection with those duties'.
4. Section 75 places a statutory duty on public authorities³ when carrying out their functions to have 'due regard to the need to promote equality of opportunity' (paragraph 1) and to 'have regard to the desirability of promoting good relations' (paragraph 2) between, among others, persons of different religious belief and political opinion.
5. The Commission further notes that the ECNI has initiated a Schedule 9 investigation⁴ into the Department for Social Development (DSD) on whether it has 'failed to comply' with its 2001 approved Equality Scheme in four areas, namely the: (1) Facing the Future: Housing Strategy for Northern Ireland 2012-2017; (2) Facing the Future: Housing Strategy for Northern Ireland, Action Plan 2012-2017; (3) Social Housing Reform Programme; and (4) Building Successful Communities Initiative.
6. In June 2014, the Commission received a request from Sinn Féin to investigate the 'current and proposed policy on the provision of social housing and allocation of social housing by the DSD and the Northern Ireland Housing Executive (NIHE) with particular reference to the International Covenant on Economic, Social and Cultural Rights.' A principal basis of the complaint was alleged 'longer waiting times, higher levels of housing stress and greater homelessness within Catholic and nationalist communit[ies]'.⁵
7. On the 30 June 2014, the Commission considered Sinn Féin's request and decided to provide, as the national human rights institution, a submission to the ECNI investigation referring to the 'procedural requirements... [that] ... should be examined in determining whether discrimination has occurred and the protection of other relevant human rights standards ... cognisant of any possible overlap with the ECNI investigation.'⁶
8. In this regard, the Commission notes that the DSD has ultimate responsibility for the activities of the NIHE, an executive non-

³ 'Public authorities' to which the Section 75 duties apply are specified in Section 75(3) of the 1998 Act. The definition of a 'public authority' for the purposes of domestic human rights law is found in Section 6 of the Human Rights Act 1998.

⁴ Northern Ireland Act 1998, Schedule 9, paragraph 11. See also, letter from ECNI to Committee on the Administration of Justice, dated 14 May 2014.

⁵ Sinn Féin, 'Sinn Féin Submission to the Human Rights Commission, Re: Allocation of Social Housing' (June 2014). See also, F. McCann, 'DSD housing complaint lodged with Human Rights Commission' (11 June 2014), Available at, <http://www.sinnfein.ie/contents/30597>.

⁶ NIHRC, 161st Commission meeting.

departmental public body.⁷ Under the Housing (NI) Order 1981, the NIHE is responsible for identifying housing need, manages the social housing allocation scheme, and has powers relating to housing development, and acquisition and disposal of land.⁸ To fulfil its obligations, the NIHE works in partnership with housing providers paying housing association grants under the Housing (NI) Order 1992.⁹

9. The Commission bases its advice on the full range of internationally accepted human rights laws as set out within the treaties of the UN and Council of Europe (CoE). The relevant international treaties in this context include the,

- UN International Covenant on Economic, Social and Cultural Rights (ICESCR);¹⁰
- UN International Covenant on Civil and Political Rights (ICCPR);¹¹
- UN International Convention on the Elimination of All Forms of Racial Discrimination (CERD);¹²
- CoE European Convention on Human Rights (ECHR) (as incorporated into domestic law by the Human Rights Act 1998);¹³
- CoE European Social Charter 1961 (ESC);¹⁴ and,
- CoE Framework Convention on the Protection of National Minorities (FCNM).¹⁵

10. The Northern Ireland (NI) Executive is subject to the obligations contained within these international treaties by virtue of the United Kingdom (UK) Government's ratification.

11. In addition, Section 26(1) of the 1998, provides that 'if the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations... he may by order direct that the proposed action shall not be taken.' Section 26(2) of the 1998 Act provides that 'if the Secretary of State considers that any action capable of being taken by a Minister or Northern Ireland department is required for the purpose of giving effect to any international obligations ... he may by order direct that the action shall be taken'.

⁷ See, for example, Housing (NI) Order 1981, Articles 10 and 30. See also, Housing Executive, 'DSD Management Statement and Financial Memorandum Dossier of Controls' (April 2014), generally Part 1, and specifically, paras 1.2.1 and 1.4.1. See also, <http://www.dsdni.gov.uk/index/hsdiv-housing/nihe.htm>.

⁸ Housing (NI) Order 1981, Articles 6, 22, 31, 87 and 88.

⁹ Housing (NI) Order 1992, Article 33. See also, NI Assembly Official Report (Hansard), 31 March 2014 answer to NI Assembly Question, AQO 5895/11-15.

¹⁰ Ratified by the UK on 20 May 1976.

¹¹ Ratified by the UK on 20 May 1976.

¹² Ratified by the UK on 7 March 1969.

¹³ Ratified by the UK on 8 March 1951.

¹⁴ Ratified by the UK on 11 July 1962.

¹⁵ Ratified by the UK on 15 January 1998.

12. The Commission further recalls that Section 24(1) of the 1998 Act states that 'a Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act - (a) is incompatible with any of the [ECHR] rights'.
13. This advice also considers treaties to which the UK is a signatory but has not ratified; as such, the UK is not bound to the obligations contained within but has indicated its intent to comply.¹⁶ The relevant standards in this context include the,
 - CoE revised European Social Charter 1996 (rESC).¹⁷
14. In addition, there exists a body of 'soft law' developed by the UN and CoE. These declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context are:
 - UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities;
 - UN Human Rights Council Resolution 16/18 on combatting intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief;
 - UN Durban Declaration and Programme of Action; and,
 - UNESCO Declaration of Principles on Tolerance.

The right to housing

15. The ICESCR, Article 11(1) is the clearest articulation in the international human rights framework of a right to housing. It requires the DSD to respect, protect and fulfil the,

right of everyone to an adequate standard of living for himself and his family, including adequate ... housing
16. In accordance with the ICESCR, Article 2(1), the duty placed upon the DSD in regard to the right to adequate housing is one to,

take steps ... to the maximum of ... available resources, with a view to achieving progressively the full realization of the right

¹⁶ The UK Mission at Geneva has stated, 'The UK's approach to signing international treaties is that we only give our signature where we are fully prepared to follow up with ratification in a short time thereafter.' See, UK Mission at Geneva, 'Universal Periodic Review Mid-term Progress Update by the United Kingdom on its Implementation of Recommendations agreed in June 2008' (March 2010) on recommendation 22 (France).

¹⁷ Signed by the UK on 7 November 1997.

17. The ICESCR Committee has further stated that the notion of progressive realisation requires movement as 'expeditiously and effectively as possible towards [the] goal [of adequate housing]'.¹⁸
18. In order to assist in the progressive realisation of the right to adequate housing, the ICESCR Committee identifies within General Comment 4 procedural obligations for which the DSD can be held immediately accountable.
19. One such obligation requires 'effective monitoring' through 'whatever steps are necessary' of the housing situation in order to 'ascertain the full extent of ... inadequate housing'.¹⁹ Identified disadvantaged groups should then be accorded 'some degree of priority consideration in the housing sphere'.²⁰
20. In this regard, the Commission notes the concern expressed by the ICESCR Committee in 2009 about the 'chronic shortage of housing, in particular social housing for the most disadvantaged and marginalised individuals and groups, such as ... Catholics in Northern Belfast'.²¹
21. More recently, in 2013, the UN Special Rapporteur on adequate housing recommended that 'additional efforts [are made] to address challenges to overcome persistent inequalities in housing in North Belfast' and that,

for this purpose, active, free and meaningful participation of all decisions made about housing should be promoted, including in relation to the collection of official data, that should be disaggregated, open and accessible to all.²²
22. In 2013, the NIHE stated that in the North Belfast housing district, 'Catholic communities are characterised by higher waiting lists and longer waiting times for housing'.²³ The NIHE housing stress figures in 2011 identified 619 members of the Catholic community and 220 members of the Protestant community as being in housing stress in

¹⁸ ICESCR Committee, General Comment 3: The nature of States parties obligations (1990), para 9.

¹⁹ ICESCR Committee, General Comment 4: The right to adequate housing (13 December 1991), para 13.

²⁰ *Ibid.*, para 8(e). See also para 11 which obliges States to give 'due priority to those social groups living in unfavourable conditions by giving them particular consideration'. Further, both the UN Human Rights Committee and the ICESCR Committee have highlighted the need to tackle historically generated discrimination. For example, see UN Doc. CCPR/C/USA/CO/3, Human Rights Committee, 'Concluding Observations on the USA' (15 September 2006), para 22; and ICESCR Committee, General Comment 20: Non-discrimination in economic, social and cultural rights (2 July 2009) para 8.

²¹ UN Doc. E/C.12/GBR/CO/5, ICESCR Committee, 'Concluding Observations on the United Kingdom' (12 June 2009), para 29.

²² UN Doc. A/HRC/25/54/Add.2, 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context' (30 December 2013), para 80(i).

²³ NIHE, District Housing Plan & Local Housing Strategy 2013/2014, p 51.

North Belfast.²⁴ The Commission notes the differences in how data is presented in relation to the levels of housing stress in North Belfast.²⁵

23. The Commission notes that pursuant to Schedule 9, paragraph 4(2) of the 1998 Act, the DSD's Equality Scheme should detail the arrangements for,
 - (a) assessing its compliance with the duties under section 75
24. **The Commission advises the ECNI that the ICESCR, Article 11(1) requires any domestic assessment of equality to include a consideration of the provision of official data, disaggregated by religious background.**
25. General Comment 4 states that housing strategies which are 'almost invariably' required should 'reflect extensive genuine consultation with, and participation by, all those affected, including the ... inadequately housed and their representatives'.²⁶
26. 'Facing the Future' is the housing strategy for NI. Within 'Facing the Future', the DSD sets out how it intends to fulfil its role to 'provid[e] support for individuals and families to access housing, particularly the most vulnerable in society'.²⁷ The accompanying 'Action Plan' is designed to work towards the outcome of, among others, 'continued fairness for citizens, regardless of tenure and consistent with the need to support those who are most vulnerable'.²⁸
27. The Commission notes that pursuant to Schedule 9, paragraph 4(2) of the 1998 Act, the DSD's Equality Scheme should detail the arrangements for,
 - (b) assessing and consulting on the likely impact of policies adopted or proposed to be adopted ... on the promotion of equality of opportunity.
28. The Commission notes that the ECNI investigation may consider any screening documents such as equality impact assessments and consultation documents and responses related to both 'Facing the

²⁴ See, The Participation and the Practice of Rights (PPR) 'Equality Can't Wait' report, p 18, available at, <http://www.pprproject.org/sites/default/files/Equality%20Can't%20Wait.pdf>. PPR obtained the information from NIHE via a Freedom of Information request dated 15 March 2012. The religious affiliations identified are based on self-reported figures.

²⁵ Differences include whether or not the data should reflect the North Belfast constituency or the NIHE North Belfast housing district area, and whether or not the data should present religious background based on self-reported identity only or include an assessment of perceived identity. See, NI Assembly AQO 6188/11-15 and NI Assembly Hansard, 27 May 2014 (Mr Hamilton). See also, *ibid.*, PPR 'Equality Can't Wait' report, Chapter 3.

²⁶ ICESCR Committee, General Comment 4: The right to adequate housing (13 December 1991), para 12.

²⁷ Facing the Future: Housing Strategy for Northern Ireland 2012-2017, p 4.

²⁸ Facing the Future: Housing Strategy for Northern Ireland 2012-2017, Action Plan, p 3.

Future' and the 'Action Plan'.²⁹ The ECNI may also consider the DSD's desk audit advices and annual progress reports, as well as the views of relevant interest groups with particular expertise in the area.³⁰

29. **The Commission advises the ECNI that the ICESCR, Article 11(1) requires any domestic assessment of equality to consider whether or not 'Facing the Future' reflects extensive genuine consultation with persons inadequately housed and their representatives.**

30. The rESC, Article 31, a treaty and provision to which the UK has indicated its intent to comply, also details a comprehensive right to housing which uses General Comment 4 as a 'key source' of interpretation.³¹ Article 31 states,

[w]ith a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed ...

- 1 to promote access to housing of an adequate standard
- 2 to prevent and reduce homelessness with a view to its gradual elimination;
- 3 to make the price of housing accessible to those without adequate resources.

31. The European Committee of Social Rights (ECSR) has been keen to emphasise that the rESC will be interpreted 'fully in line' with its sister treaty, the ECHR.³² Using language common to the European Court of Human Rights (ECtHR), the ECSR has stated that the rights contained within the Charter must take a 'practical and effective, rather than purely theoretical form'.³³

32. Although Article 31(1) is recognised by the ECSR as imparting obligations of means and not results, the practical and effective realisation of these obligations is translated to mean that States must, among other things, 'undertake regular reviews of the impact of the strategies adopted' and 'pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable'.³⁴

²⁹ Information provided to the Commission by the ECNI during a meeting at the Commission on 23 June 2014.

³⁰ ECNI, 'Investigation Procedure under Paragraphs 10 and 11 of Schedule 9 of the Northern Ireland Act 1998' (January 2010), paragraph 6.4.

³¹ *FEANTSA v France*, ECSR, Complaint No. 39/2006 (5 December 2007), para 53.

³² *Ibid.*, paras 63-65.

³³ *Ibid.*, para 53. See also, *Moreno Gómez v Spain*, ECtHR, Application no. 4143/02 (16 November 2004), paragraph 61; *Case of Seyidzade v Azerbaijan*, ECtHR, Application no. 37700/05, (3 December 2009), paragraph 33.

³⁴ *FEANTSA v France*, ECSR, Complaint No. 39/2006 (5 December 2007), para 54.

33. The Commission notes that Schedule 9, paragraph 4(2)(c) of the 1998 Act requires the DSD's Equality Scheme to detail the arrangements for 'monitoring any adverse impact of policies ... on the promotion of equality of opportunity'.
34. **The Commission advises the ECNI that any domestic assessment of equality should consider to what extent the DSD undertakes regular reviews of 'Facing the Future', the 'Action Plan' and the 'Building Successful Communities' initiative and whether those reviews pay close attention to the impacts upon groups with protected characteristics. In addition, particular attention should be paid to groups recognised as disadvantaged.**

Non-discrimination and the promotion of equality

35. The ICCPR, Article 26 states that 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law'. This is an autonomous human right that,
- prohibits discrimination in law or in fact in any field regulated and protected by public authorities [and] is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof.³⁵
36. Discrimination for the purpose of Article 26 should be understood to imply,
- any distinction, exclusion, restriction or preference which is based on any ground such as ... religion [and] political opinion ... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.³⁶
37. As such, the concept of discrimination considers the 'effects' of provisions and will include policies or practices which appear neutral at face value but have a disproportionate impact on the exercise of a right or freedom, sometimes referred to as indirect discrimination.³⁷
38. The ICESCR, Article 2(2), the ECHR, Article 14, the preamble to the ESC and the rESC, Article E, all contain prohibitions upon discrimination but

³⁵ UN Human Rights Committee, General Comment 18: Non-discrimination, para 12.

³⁶ *Ibid.*, para 7.

³⁷ For additional reference, see ICESCR Committee, General Comment 20: Non-discrimination in economic, social and cultural rights, para 10(b).

unlike the ICCPR, Article 26, these are parasitic provisions which cannot be invoked unless one of the respective treaty rights is being exercised.³⁸

39. In the context of an alleged discrimination in the provision and allocation of social housing, the relevant rights to which the prohibition on discrimination may attach are, the: ICESCR, Article 11(1) (right to adequate housing); ECHR, Article 8 (right to respect for his private and family life, his home and correspondence) and Article 1 of Protocol 1 (peaceful enjoyment of possessions);³⁹ ESC, Article 16 (provision of family housing); and rESC, Article 31 (right to housing).⁴⁰
40. Concerning the ECHR, Article 14, the ECtHR has reasoned that a violation need not be found of the foundation right in order to find a violation of the prohibition on discrimination and it will be sufficient if the facts of the case fall within the ambit of the foundation right to engage Article 14.⁴¹
41. The Commission notes that Section 76(1) of the 1998 Act gives domestic effect to the prohibition on discrimination by making it unlawful for the DSD when 'carrying out [its] functions ... to discriminate, or to aid or incite another person to discriminate, against a person or class of person on the ground of religious belief or political opinion.' Furthermore, under Section 24(1)(c) of the 1998 Act, the DSD has no power to do any act that 'discriminates against a person or class of person on the ground of religious belief or political opinion' or 'aids or incites another person to discriminate ... on that ground'.
42. In addition to refraining from discrimination, the DSD in accordance with ICESCR, Article 2(2) and as stated in General Comment 20, has a

³⁸ ICESCR, Article 2(2) states, 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to ... religion, political or other opinion, national ... origin'; ECHR, Article 14 states, 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... religion, political or other opinion, national ... origin, association with a national minority'; the preamble to the ESC states, 'Considering that the enjoyment of social rights should be secured without discrimination on grounds of ... religion, political opinion, national extraction'; rESC, Article E states, 'The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as ... religion, political or other opinion, national extraction ... association with a national minority'.

³⁹ The ECHR does not contain an explicit right to adequate housing analogous to the ICESCR, Article 11(1). In certain contexts, however, social housing provision has been deemed to fall within Article 8 and Article 1 of Protocol 1: In, *R v Enfield LBC ex p. Bernard*, an English court found that the failure of a local council to provide a severely disabled woman and her family with suitably adapted accommodation 'made it virtually impossible for them to have any meaningful private or family life for the purposes of Article 8', see, *R v Enfield LBC ex p. Bernard* [2002] EWHC 2282, para 34; In *Teteriny v Russia*, the ECtHR found a violation of Article 1 of Protocol 1 where the State had failed for ten years due to a lack of resources to provide social housing to an individual where a legitimate expectation had been established via a court order, see, *Teteriny v Russia*, ECtHR, Appl. No 11931/03 (30 June 2005), para 51, see also, paras 45-47.

⁴⁰ The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 4 specifically highlights the need to ensure that persons belonging to national or religious 'minorities' enjoy 'all their human rights' without discrimination.

⁴¹ Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (*Merits*), ECtHR, Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (23 July 1968), 'Interpretation adopted by the Court' para 9; *Eweida and Others v United Kingdom*, ECtHR, (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) (15 January 2013), para 85.

positive obligation, to take 'concrete, deliberate and targeted measures to ensure discrimination ... is eliminated' during the exercise of the right to adequate housing.⁴² This includes discrimination in the private sphere.⁴³

43. This obligation requires the DSD to start by taking the 'necessary measures' to,

prevent ... the conditions and attitudes which cause ... substantive or de facto discrimination. For example, ensuring that all individuals have equal access to adequate housing.⁴⁴

44. **The Commission advises the ECNI that the ICESCR, Article 2(2) taken in conjunction with Article 11(1), requires any domestic assessment of equality to include a consideration of the arrangements put in place by the DSD to ensure that the conditions and attitudes which may cause discrimination in social housing are eliminated.**

45. The Commission notes that the right not to be discriminated against in the provision and allocation of social housing is not violated where there is a 'reasonable and objective' justification for a failure to treat differently persons whose situations are significantly different.⁴⁵

46. The ICESCR Committee directs that the concept of a 'reasonable and objective' justification will entail,

an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realised and the measures or omissions and their effects.⁴⁶

⁴² ICESCR Committee, General Comment 20: Non-discrimination in economic, social and cultural rights, para 36.

⁴³ *Ibid.*, para 11.

⁴⁴ *Ibid.*, para 8(b).

⁴⁵ ICESCR Committee, General Comment 20: Non-discrimination in economic, social and cultural rights, para 13, states: 'Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective'; rESC, appendix, Article E states: 'A differential treatment based on an objective and reasonable justification shall not be deemed discriminatory'; UN Human Rights Committee, General Comment 18, para 13 states: 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective'; and *Thlimmenos v Greece*, ECtHR, Application No. 34369/97 (6 April 2000), para 44 states 'The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'.

⁴⁶ *Ibid.* The ECtHR has similarly stated that an objective and reasonable justification means '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 realized'. See, *Eweida and Others v United Kingdom*, ECtHR, (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) (15 January 2013), para 88.

47. The Commission notes the impact of the legacy of the conflict and continuing community divisions on the operation of the housing system in NI, and in turn on the right to adequate housing.
48. According to a NIHE commissioned research report in 2009, 91% of Belfast NIHE estates are 'highly polarised' along religious background lines; meaning they have more than 80% of one community or less than 20% of another community.⁴⁷ In relation to North Belfast, the NIHE stated in 2013 that '[d]eep rooted sectarian divisions have created distinct social housing markets'.⁴⁸ Such segregation has fostered a climate of fear, hostility and violence that continues to be evidenced today through the existence of 44 interface barriers in North Belfast alone.⁴⁹
49. According to the NIHE's North Belfast Housing Strategy, in 2000, housing 'vacancies [were] concentrated in Protestant neighbourhoods'.⁵⁰ The NIHE reported that, 'the main pressure [was] for land to support new housing provision in Catholic neighbourhoods'.⁵¹
50. The Commission notes that the DSD may have grounds for not addressing this issue in pursuit of a legitimate aim. General Comment 4 states that, 'all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats'.⁵² As a consequence, the ICESCR Committee interprets Article 11(1) as containing a positive obligation, which requires the DSD to,

take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such

⁴⁷ See, NI Assembly Official Report (Hansard), 31 March 2014, answer to NI Assembly Question, AQO 5894/11-15.

⁴⁸ NIHE, District Housing Plan & Local Housing Strategy 2013/2014, p 51. The Commission notes that the provisions of the UN Convention on the Elimination of Racial Discrimination (CERD) and the Durban Declaration and Programme of Action could also be legitimately applied in the context of social housing in North Belfast. In 2011, the UN Committee on the Elimination of Racial Discrimination (CERD Committee) stated that 'the Committee is concerned that this situation, given the inter-sectionality between sectarianism and racism, is kept entirely outside the framework of protections against discrimination provided by the Convention and the Durban Programme of Action. The State party recognizes that sectarianism and racism in Northern Ireland are related, and that one cannot be tackled without the other (arts. 2 and 4)' and invited the UK to, 'examine whether the legislative and policy framework for dealing with the situation ... could not benefit by being underpinned by the standards, duties and actions prescribed by the [CERD] and the Durban Declaration and Programme of Action on inter-sectionality between ethnic origin, religion and other forms of discrimination', see UN Doc. CERD/C/GBR/CO/18-20, CERD Committee, 'Concluding Observations on the UK' (14 September 2011), para 20.

⁴⁹ See, <http://www.belfastinterfaceproject.org/interfaces-map-and-database-overview>; <http://www.belfastinterfaceproject.org/interfaces-map-and-database-overview>. See also, NIHE, North Belfast Housing Strategy: Tackling Housing Need, p 5; OFMDFM, 'Managing Disorder: Responding to Interface Violence in North Belfast' (2002), available at, <http://www.ofmdfmi.gov.uk/managingdisorder.pdf>.

⁵⁰ NIHE, North Belfast Housing Strategy: Tackling Housing Need, p 20.

⁵¹ Ibid.

⁵² ICESCR Committee, General Comment 4: The right to adequate housing (13 December 1991), para 8(a).

protection, in genuine consultation with affected persons and groups.⁵³

51. A question may arise as to whether or not the action(s) or inaction(s) of the DSD have a clear and reasonable relationship of proportionality to the aim of protecting persons from harassment and other threats.

52. In making this determination, the ECtHR will accord to Governments a degree of discretion, otherwise known as the margin of appreciation. The scope of the margin will vary 'according to the circumstances, the subject-matter and the background'.⁵⁴ In the context of economic or social strategies, the ECtHR has stated the margin of appreciation is wide. The Court identified its rationale as,

[b]ecause of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation"...⁵⁵

53. The Commission notes however, that although the margin of appreciation is likely to be wide in respect of social housing, it does not amount to a total discretion. When applying the proportionality principle in regard to Convention rights,⁵⁶ the ECtHR has noted that 'general, automatic and indiscriminate' measures must be seen as falling outside of any acceptable margin of appreciation 'however wide that margin might be'.⁵⁷

54. The Commission notes that Schedule 9, paragraph 9(1) of the 1998 Act requires that public authorities publish the results of equality assessments and give details of any consideration given to,

- (a) measures which might mitigate any adverse impact of that policy on the promotion of equality of opportunity; and
- (b) alternative policies which might better achieve the promotion of equality of opportunity.

55. Schedule 9, paragraph 9(2) of the 1998 Act requires that public authorities when making decisions in respect of policies or proposed

⁵³ Ibid.

⁵⁴ See, *Eweida and Others v United Kingdom*, ECtHR, (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) (15 January 2013), para 88.

⁵⁵ *Stummer v Austria*, ECtHR, Application no. 37452/02 (7 July 2011), para 89. See also, *Ruszkowska v Poland*, ECtHR, Application no. 6717/08 (1 July 2014), para 54.

⁵⁶ The ECtHR proportionality principle is most developed in regard to the qualified rights.

⁵⁷ *Hirst v UK (No. 2)*, ECtHR, Application no. 74025/01 (6 October 2005), para 82.

policies, 'take into account any ... assessment and consultation ... carried out in relation to the policy'.

56. In the current context, the Commission considers that the DSD must show how they have tried to mitigate the inequalities identified by assessments carried out in regard to 'Facing the Future', the Action Plan and the 'Building Successful Communities' initiative.

57. **The Commission advises the ECNI that the ICCPR, Article 26, the ICESCR, Article 2(2) taken in conjunction with Article 11(1), and the ECHR, Article 14 taken in conjunction with Articles 8 and Article 1 of Protocol 1 require any domestic assessment of equality to consider to what extent the DSD has sought to increase the provision of housing where demand from members of disadvantaged communities in housing stress is at its greatest.**

58. In the event of having identified any systemic discrimination, the ICESCR Committee requires the DSD to maintain an 'active approach' to its elimination:

[t]ackling such discrimination will usually require a comprehensive approach with a range of laws, policies and programmes, including temporary special measures.⁵⁸

59. The UN Human Rights Committee refers to the corresponding concept⁵⁹ of 'affirmative action' and defines it as,

granting for a time to a part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. ... [A]s long as such action is needed to correct discrimination in fact...⁶⁰

60. Persons or groups representing religious or political perspectives 'should be ensured the right to participate in decision-making processes' which determine the measures to be taken to eliminate discrimination.⁶¹

61. **The Commission advises the ECNI that the ICESCR, Article 2(2) taken in conjunction with Article 11(1), requires any domestic assessment of equality to consider what concrete, targeted and**

⁵⁸ ICESCR Committee, General Comment 20: Non-discrimination in economic, social and cultural rights, para 39. See also paras 38 and 36.

⁵⁹ For a general discussion on the different terminology, see the Committee on the Elimination of Discrimination against Women, General Recommendation 25: on temporary special measures, para 17.

⁶⁰ UN Human Rights Committee, General Comment 18: Non-discrimination, para 10; See also, ICESCR Committee, General Comment 20: Non-discrimination in economic, social and cultural rights, para 38.

⁶¹ ICESCR Committee, General Comment 20: Non-discrimination in economic, social and cultural rights, para 36.

deliberate measures, including temporary special measures, the DSD has taken to ensure the elimination of any identified discrimination in social housing within 'Facing the Future', the 'Action Plan' and the 'Building Successful Communities' initiative.

The promotion of mutual respect and understanding

62. The FCNM, Article 6, requires the DSD to take, effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ... religious identity.⁶²
63. The Advisory Committee on the FCNM has commented that regional strategies which focus on mutual accommodation rather than mutual respect and understanding would raise 'serious concerns'.⁶³ The Advisory Committee has stated that in NI 'the concept of "good relations" [has] apparently [developed] to substitute the concept of intercultural dialogue and integration of society.'⁶⁴
64. The Commission notes that Section 75(2) of the 1998 Act gives partial domestic force to this duty.
65. Crucially, the FCNM, Article 22 has however, made clear that, [n]othing in the [FCNM] shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a Party.
66. Similarly, the UNESCO Declaration of Principles on Tolerance, Article 1.2 states that 'in no circumstances can [the concept of tolerance] be used to justify infringements of [the universal human rights and fundamental freedoms]'

⁶² This should constitute one of the concrete, deliberate and targeted measures required to realise the right to adequate housing under ICESCR, Article 11(1). See, ICESCR Committee, General Comment 3: The nature of States parties obligations (1990), para 2. See also, UN Human Rights Council Resolution 16/18 on 'combatting intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief' which calls upon States to take a number of specific actions to 'foster a domestic environment of religious tolerance, peace and respect', para 5. See also, UNESCO Declaration of Principles on Tolerance, Article 1.3 states, 'Tolerance ... involves the rejection of dogmatism and absolutism and affirms the standards set out in international human rights instruments'.

⁶³ Advisory Committee on the FCNM, 'Third Opinion on the UK' (adopted 30 June 2011), para 125.

⁶⁴ Ibid., para 126.

67. In this regard the Commission emphasises the nature of the prohibition on discrimination as a fundamental human right in both the UN and CoE treaties ratified by the UK. For example, the ECtHR has stated that,

it is as though [the Article 14 prohibition on discrimination] formed an integral part of each of the articles laying down rights and freedoms. No distinctions should be made in this respect according to the nature of these rights and freedoms and of their correlative obligations.⁶⁵

68. **The Commission advises the ECNI that the prohibition on discrimination should be understood as a fundamental human right which coexists alongside, but must not be limited by the duty to promote mutual respect and understanding.**
69. **The Commission advises the ECNI that ICCPR, Article 26 and ECHR, Article 14 taken in conjunction with Article 8 and Article 1 of Protocol 1, require any domestic assessment of equality to consider whether 'Facing the Future', the 'Action Plan' and the 'Building Successful Communities' initiative preference action(s) or inaction(s) directed at Section 75(2) over Section 75(1) of the 1998 Act.**

⁶⁵ Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (Merits), ECtHR, Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (23 July 1968), 'Interpretation adopted by the Court' para 9. At the UN level, see ICCPR, Article 26.