

EQUALITY COMMISSION FOR NORTHERN IRELAND

Response to Northern Ireland Office's consultation on a Bill of Rights for Northern Ireland

February 2010

1.0 Introduction

- 1.1 The Equality Commission for Northern Ireland ('the Equality Commission') is an independent public body established under the Northern Ireland Act 1998. The Equality Commission is responsible for implementing the legislation on age, fair employment and treatment, sex discrimination and equal pay, race relations, sexual orientation and disability. The Equality Commission's remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998, and the disability duties under the Disability Discrimination Act 1995.
- 1.2 The Commission welcomes the opportunity to respond to the Northern Ireland Office's ('NIO') consultation on a Bill of Rights for Northern Ireland and, in this response, has concentrated on those questions and issues relevant to its specific remit as set out above.
- 1.3 The Commission recognises the considerable and important work done by the Northern Ireland Human Rights Commission over the period since its establishment to fulfil the remit set out for it in Paragraph 4 of the Human Rights section of the Belfast Agreement, referred to in section 69(7) of the Northern Ireland Act 1998 and recited in Paragraph 2.4 of the NIO consultation document.

1.4 The Commission also recognises that the context for discussion on a Bill of Rights for Northern Ireland now includes, in addition to the enactment of the Human Rights Act 1998, a UK wide consultation by Government on human rights protection and promotion¹; and changes arising from the Lisbon Treaty, with effect from 1 December 2009, regarding European Union provisions and in particular the EU Charter of Fundamental Rights. It is also clear that there has been a demographic shift in Northern Ireland over the period since the Belfast Agreement, with an increase in migrant workers and new residents in Northern Ireland.²

2.0 General comments

2.1 In general, the Commission supports the adoption of a Bill of Rights for Northern Ireland, reflecting the particular circumstances of Northern Ireland. We agree with the Government's assessment that a Bill of Rights which has the support of the people of Northern Ireland could play an important role in underpinning the peace, prosperity and political progress of Northern Ireland. We also believe that, in addition to reflecting 'the principles of mutual respect for the identity and ethos of both communities and parity of esteem',³ a Bill of Rights should go beyond that by recognising the increasing diversity of the population since 1998 and seeking to strengthen the protection of the human rights of all in Northern Ireland.

2.2 A Northern Ireland Bill of Rights can provide a clear statement of a society's commitment to certain values and can offer a legal framework for ensuring that those values are advanced by all of society's institutions. It has the potential to be an

¹ Green paper on Rights and Responsibilities: Developing our Constitutional framework (March 2009, Cmnd 7577)

² For example, statistics show that the estimated international net migration into Northern Ireland has risen from a loss of approximately 1,900 in 2000/01 to a gain of 4,000 people in 2007/08. Source: Long term International Migration Estimates for Northern Ireland (2007-8) NISRA, August 2009, www.nisra.gov.uk

³ Belfast Agreement, Rights, safeguards and equality of opportunity, Para 4

important opportunity to strengthen the human rights protection afforded to all, including the most vulnerable and marginalised people in Northern Ireland society, and to increase protection where existing law is inadequate.

- 2.3 We agree that if a Bill of Rights for Northern Ireland were to be introduced, it is important that no steps taken in the wider UK context should undermine or diminish its protections.
- 2.4 It is also essential that there should be a policy of ‘non-regression’ from current levels of protection under the Human Rights Act 1998 (‘HRA’) and other ratified human rights instruments. In addition, any provisions in a Bill of Rights relating to equality and good relations must not weaken or undermine existing levels of protection under current legislation.
- 2.5 In summary, we support the adoption of a Bill of Rights for Northern Ireland and the inclusion in it of a general statement on equality; we recognise the need for harmonisation and strengthening of equality legislation in a number of key areas and have made recommendations on this over the years since our establishment; we have concerns about increasing the numbers of grounds covered by the provisions of Section 75 of the Northern Ireland Act 1998 and are not entirely certain of the added value that would derive from additional duties on public authorities as part of Section 75 (2); we do not consider that amending Section 75 provisions is a substitute for a Bill of Rights for Northern Ireland; and we are emphatic that enacting a Bill of Rights should not set aside or diminish any obligations or entitlements currently contained in Section 75. Finally, the Commission proposes that consideration is given to inclusion in a Bill of Rights of a set of interpretative principles, with an obligation on Government to achieve the progressive realisation of rights.

3.0 Equality Clause

NIO Consultation Question A

Do you believe a Bill of Rights for Northern Ireland should contain a statement that everyone in Northern Ireland is equal before the law and has equal rights?

- 3.1 In general, the Commission supports the inclusion of a right to equality in a Northern Ireland Bill of Rights.
- 3.2 In particular, it supports, as recommended by the Northern Ireland Human Rights Commission ('NIHRC'), the inclusion of a general statement that everyone is equal before and under the law and has the right to equal protection and equal benefit of the law, including the full and equal enjoyment of all rights and freedoms. This general statement would underpin the Northern Ireland equality legislation which provides the detail in terms of respective equality rights and responsibilities.
- 3.3 The general principle of equality is a fundamental element of international human rights law. Equality is a human right recognised by many international human rights instruments; including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Rights of the Child (UNCRC), and the UN Convention on the Rights of Persons with Disabilities (UNCRPD)⁴.
- 3.4 An equality clause can achieve a number of things. First, it may provide the framework for more specific equality legislation

⁴ The right to equality before the law has also, for example, been recognised in the *Declaration of Principles on Equality* by the Equal Rights Trust (2008) and in the *Yogyakarta Principles* (2006) which reflect international human rights law in relation to sexual orientation and gender identity.

which can spell out in more detail the matrix of legal rights and duties necessary to give effect to a general equality guarantee. Such a clause can also provide protection against discriminatory actions, notably in the public sector, not specifically provided for in existing equality legislation.

- 3.5 In the Commission's view, it is essential that any provisions contained within an equality clause should comprise a coherent and workable set of provisions which, taken together, have a positive impact on human rights protection in this area. A failure to achieve this is likely to result in potential tensions both within a Bill of Rights and between it and existing statutory equality provisions.
- 3.6 It is also essential, in the Commission's view, that provisions to permit positive action should be contained within a general equality clause, to allow for proportionate measures to be taken to advance equality.

4. Extension of grounds

NIO Consultation Question B

Do you believe that any other 'protected characteristics', particular to Northern Ireland, should be added to the grounds presently protected from unlawful discrimination?

- 4.1 The Commission welcomes the Government's recognition of the potential scope for streamlining and updating the current equality system, which it states will have a bearing on the formulation of any new rights. We consider that there is an urgent need to amend Northern Ireland discrimination legislation in order to strengthen protection against unlawful discrimination and to keep pace with and reflect societal changes. It is also essential, in order to ensure that significant gaps do not open up in respect of protection against discrimination in Northern Ireland relative to Great Britain. This can and should be done, independently of progress made with enacting a Bill of Rights for Northern Ireland.

- 4.2 The Commission has called consistently for the harmonisation and simplification of discrimination law in Northern Ireland, as well as the strengthening of protection from discrimination across a number of grounds. Although the Commission supports the adoption of a Bill of Rights for Northern Ireland, it is important to recognise the significant contribution that updated and strengthened equality legislation could have on enhancing the protection of human rights in Northern Ireland.
- 4.3 In February 2009, the Commission put forward a set of proposals for legislative reform⁵, highlighting those areas where reform is most urgent. The Commission is currently awaiting concrete proposals from the Office of the First Minister and deputy First Minister (OFMdfM) in relation to the timescale and steps needed to address the Commission's recommendations.
- 4.4 The need for reform of Northern Ireland equality law is heightened by recent developments in Great Britain (GB); in particular, the GB Equality Bill which is currently nearing the end of its passage through Parliament. It is of note that the Joint Committee of Human Rights in its report on this Equality Bill has heralded the Bill as "one of the most significant human rights measures introduced into Parliament in recent years", indicating that "many of the measures it contains will enhance the protection of human rights in the UK".⁶
- 4.5 It is clear that if the GB Equality Bill is enacted, it will result in substantially increased protection against discrimination and harassment by public authorities and others for people in Great Britain; including disabled people, people from ethnic minorities, women, lesbian, gay, bisexual and transgendered people, carers and people of different ages and religions or beliefs. This increased protection against discrimination and harassment will not extend to similar groups in Northern Ireland.

⁵ Proposals for legislative reform, February 2009, ECNI

⁶ *Legislative Scrutiny: Equality Bill*, Human Rights Joint Committee, Nov 2009, www.publications.parliament.uk

- 4.6 As regards which additional grounds should be protected from unlawful discrimination, the NIO will be aware that currently public authorities in Northern Ireland must not discriminate when carrying out their public functions on the grounds of religious belief, political opinion, race, ethnic or national origin, disability, and sexual orientation.
- 4.7 In addition, Section 76 of the Northern Ireland Act 1998 contains a constitutional guarantee that certain public authorities must not discriminate when carrying out their functions on the grounds of religious belief or political opinion. Importantly, Section 76 makes it clear that subordinate legislation must not contain a provision which unlawfully discriminates on these grounds. These provisions are restricted to religious belief and political opinion only.
- 4.8 Public authorities (and other providers) are also prohibited from discriminating when providing goods, facilities and services on the grounds of religious belief, political opinion, race, ethnic or national origin, colour and nationality, disability, sex, gender reassignment, pregnancy and maternity and sexual orientation.
- 4.9 The Commission has recommended the extension of current Northern Ireland equality legislation so that public authorities are prohibited from discriminating on the grounds of sex, age, gender reassignment, pregnancy and maternity and colour and nationality⁷ when exercising their public functions; and from discriminating on the ground of age when providing goods, facilities and services. We consider this latter element should apply to the private sector also.⁸
- 4.10 In addition to the proposals for legislative reform we published in February 2009, we have over the period since we were established made recommendations for reform including in relation to the scope of coverage and grounds to be covered.

⁷ It will be noted that the Committee on the Elimination of Racial Discrimination in its concluding observations in relation to the UK recommended that the UK extends amending race regulations to cover discrimination on the grounds of colour and nationality.

⁸ Proposals for legislative reform, February 2009, ECNI

This includes in our response to the OFMdfM consultation paper on a Single Equality Bill for Northern Ireland in 2004⁹, and in relation to the current proposals in the GB Equality Bill. In this we have urged explicit prohibition of discrimination on grounds of marital and family status and the inclusion of an ‘other status’ ground in the anti-discrimination legislation. This would allow further grounds to be included, either through ministerial order or judicial interpretation. It will be noted that “other status” is included as a ground in Article 14 of the ECHR. As a result, other grounds not originally specified in Article 14, such as sexual orientation and disability are now covered under Article 14.

5.0 Extending Section 75 groups

NIO Consultation Question C

Do you believe public authorities should also have a duty to have due regard to the need to promote equality of opportunity in respect of other groups in addition to those currently covered by Section 75?

- 5.1 The NIO has sought views on whether public authorities should have a duty to have due regard to the need to promote equality of opportunity in respect of other groups in addition to those currently covered by Section 75.
- 5.2 The NIO will be aware that in November 2008 the Equality Commission published its report on its comprehensive review of the effectiveness of Section 75 of the Northern Ireland Act 1998.¹⁰
- 5.3 In this report, the Commission made it clear that, although it had made a series of conclusions and recommendations for change to redirect energies to the duties to promote equality of opportunity and good relations, it was of the view that the

⁹ Response to OFMDFM consultation paper, a Single Equality Bill for Northern Ireland, November 2004, ECNI

¹⁰ Effectiveness Review, Final report, November 2008, ECNI

changes proposed should be allowed to have effect before consideration is given to amending this relatively new piece of legislation.

- 5.4 In particular, the Commission considered the extension of the grounds covered by Section 75 and concluded that it would consider the extension of the equality of opportunity and good relations duties in the coming period of implementation of the duties.¹¹ In the context of our Effectiveness Review, the vast majority of consultees agreed that legislation should not be amended to extend Section 75 to other categories. However, our report on the Review indicated that some consultees felt that expansion to cover socio-economic categories and rurality should be considered in the coming period. As regards the former category, while it is clear that, at the root of many inequalities are persistent poverty and/or socio-economic disadvantage, our clearly expressed view is that such considerations must be taken into account in the framing of public policy or from the decision making of public authorities.
- 5.5 The fact that Government opens up the possibility of amending Section 75 in this consultation paper changes the context which existed when our Effectiveness Review was underway. Nevertheless, the Commission continues to have an apprehension that the extension of the grounds contained in the Section, especially if a wide range of characteristics are included, raises the risk of diluting the impact of Section 75 on policymaking and implementation. This is not to argue that recognising new entitlements diminishes those that already exist, rather it is to recognise a possible consequence.
- 5.6 That said, as indicated in our Effectiveness Review and in line with our statutory duty to keep the effectiveness of the legislation under review, we will keep this issue under review and continue to adopt an evidence-based approach to recommendations in this area. We will consider carefully any specific proposals which the Government may bring forward in respect of Section 75.

¹¹ Ibid, page 82

6. Other relevant questions

NIO Question K

Is there a need for existing obligations on public authorities to be consolidated into a Bill of Rights?

- 6.1 The NIO puts forward the view that some of the NIHRC recommendations are covered already by Section 75 and seeks views on consolidating into one or more provisions of the Bill of Rights the existing law in this area. The Commission considers that this has the potential to confuse what are essentially provisions to oblige the mainstreaming of equality of opportunity and good relations considerations by policy makers with the establishment of legal rights. Any proposal along these lines must be much clearer about the implications of incorporating such a provision in a Bill of Rights.
- 6.2 The Commission would also stress that it is strongly of the view that amending Section 75 is not a substitute for a Bill of Rights and that enacting a Bill of Rights, on the other hand, must not set aside or diminish any element of the obligations and entitlements currently contained in Section 75 and the associated Schedule 9.
- 6.3 The NIO has also sought views on whether:-
- a) an additional duty should be placed on public authorities to fully respect, on the basis of equality of treatment, the identity and ethos of both main communities in Northern Ireland (NIO Consultation Question L).
 - b) public authorities should be required to have regard to the desirability of promoting a spirit of tolerance, dialogue and mutual respect between people in Northern Ireland (NIO Consultation Question M).

- c) a positive duty should be placed on certain public authorities to take steps to combat sectarian violence and harassment (NIO Consultation Question P).
- 6.4 The first point to make in response to these questions is that as regards the three additional duties proposed, as made clear in the NIO consultation document, public authorities are already under a duty to have regard to the desirability of promoting good relations between persons of different religious belief and of different political opinion¹².
- 6.5 The Commission's Guide for public authorities on promoting good relations under Section 75 (2)¹³ makes it clear that Section 75 (2) already obliges public authorities to be proactive, recognising and acknowledging the legacy of the conflict and to challenge sectarianism. The Guide also states that promoting good relations, in addition to tackling sectarian incidents, means creating 'an ethos and culture of good relations'.
- 6.6 In addition, the Commission's revised Section 75 Guide, as submitted to the Secretary of State, recommends that public authorities take specific action measures to promote good relations (and equality of opportunity); action measures which are specific, measurable, linked to achievable outcomes, realistic and timely and which have a focus on impact and outcomes rather than simply outputs.
- 6.7 It is therefore not clear, in the light of the existing duty on designated public authorities under Section 75 (2), what the 'added value' of the additional duties outlined in the consultation document, would be.
- 6.8 As regards the NIO proposal to impose a new duty on public authorities to take steps to combat sectarian violence and harassment, it has indicated that it might be appropriate to limit such a duty to a smaller group of public authorities, such as those carrying out functions in relation to law and order or

¹² Promoting Good Relations: A Guide for Public Authorities, October 2007, ECNI

¹³ Ibid

schools or colleges who are in a position to take steps to combat sectarianism through education.

- 6.9 It should be noted that the duty under Section 75 (2) applies to all designated public authorities (and is not confined to certain limited public authorities) and, as stressed above, all designated public authorities are already under a duty to have regard to the desirability of promoting good relations on specified grounds. The NIO will also be aware that the hate crimes legislation in Northern Ireland makes it an offence to subject individuals to harassment not only on the grounds of their religious belief, political opinion and race (which are the grounds covered by Section 75(2)), but also on the grounds of sexual orientation and disability.
- 6.10 In addition, as regards a possible duty on schools raised in the consultation, the Commission recognises the significant contribution that schools can make to combating sectarianism by promoting an awareness of the value of a shared coherent community and by challenging sectarian attitudes and behaviour. It is currently working with schools to ensure that they embed the principles and practices of equality of opportunity and good relations into their core work. However, individual schools are not currently subject to the Section 75 duties and there is no indication in the consultation document as to any practical consideration given by NIO to the implications of such a change.
- 6.11 The Commission welcomes the recent announcement by the First Minister and the deputy First Minister that they have agreed a strategy on Cohesion, Sharing and Integration, which in due course will be subject to public consultation.¹⁴ The Commission considers that the implementation of such a strategy, provided it contains effective measures and is driven by Government departments and other public authorities showing strong visible commitment and leadership, will make a significant contribution to tackling sectarianism and will

¹⁴ OFMDFM News Release – Programme for Cohesion, Sharing and Integration, 23 February 2010.

encourage dialogue, mutual respect and respect for the identity and ethos of all communities in Northern Ireland.

- 6.12 It is also vital that the introduction of any supplementary provisions do not create confusion or misunderstanding amongst public authorities as regards their existing obligations under Section 75 or any obligations they may have in relation to any new provisions. Similarly the potential for any confusion on the part of those affected by the policies and actions of public authorities must be avoided.
- 6.13 Finally, it is essential that any changes introduced through a Bill of Rights (or otherwise) do not result in a regression from the existing duties on public authorities under either Section 75 (1) or (2).

7.0 Excluded Rights

- 7.1 The NIO consultation document indicates that Government's initial assessment is that over half of the rights proposed in the NIHRC's advice are equally as relevant to the people of England, Scotland and Wales as they are to the people of Northern Ireland and therefore fall to be considered for possible inclusion in a national Bill of Rights and Responsibilities.
- 7.2 We note that a number of the rights which the Government does not propose to consider in the context of a Northern Ireland Bill of Rights concern groups which currently have protection under equality law in Northern Ireland, such as older people, children, people with disabilities, and women. In addition, social and economic rights have also been excluded from consideration for a Northern Ireland Bill of Rights in the NIO's consultation paper.
- 7.3 The Equality Commission recognises that these rights should be included in a UK-wide Bill of Rights. There is, however, no guarantee that a UK-wide Bill of Rights will ultimately be agreed or that the level of protection within such a Bill will be sufficient in relation to these excluded rights. In the event that a Bill of

- Rights for the United Kingdom is not enacted within a specific timeframe, consideration might be given to a broader base for those rights to be embraced within a Bill of Rights for Northern Ireland.
- 7.4 In addition, and from the perspective of its broader remit, the Commission is of the view that it is at least arguable that some of the rights excluded for consideration by the NIO do have a particular significance in Northern Ireland and could be considered to relate to the particular circumstances of Northern Ireland. Much evidence has been put forward over the years on this and paying close attention to the arguments put forward on these issues would be important.
- 7.5 The Commission also considers that a public consultation by NIO on these issues would have been helpful, to allow the views of the wide range of interested stakeholders to be taken into account on this issue.
- 7.6 The Commission proposes as a way forward that consideration is given to inclusion in a Northern Ireland Bill of Rights of a set of interpretative principles which reflect human rights standards in international law and to which courts and public authorities must have regard, together with an obligation on Government to achieve the progressive realisation of the relevant rights. This would include specific reference to the particular instruments which set standards in the areas of civil and political rights; economic, social and cultural rights; discrimination against women; elimination of racial discrimination; children's rights; and the rights of persons with disabilities.
- 7.7 We note that the Joint Committee on Human Rights in its report on a Bill of Rights for the UK¹⁵, has called for the inclusion in a UK Bill of Rights of a duty on the Government to achieve the progressive realisation of economic and social rights, by legislative or other measures, within available resources and to

¹⁵ Joint Committee on Human Rights, *A Bill of Rights for the UK?*, August 2008, www.parliament.co.uk

report to Parliament on progress made. The Commission considers that this may be a fruitful avenue for consideration.

8.0 Impact and Equality Considerations

- 8.1 The Commission notes the inclusion in the consultation document of questions addressing equality considerations in respect of the impact of the proposals on any of the Section 75 categories and measures which might be implemented to mitigate against adverse impact.
- 8.2 The Commission expects that the information gathered from the responses to these questions will be used to inform the screening by the Northern Ireland Office of its further proposals for a draft Bill of Rights and we recommend that screening should take place at an early stage in the policy development process.
- 8.3 The Commission is aware of various views on the proposals set out in the consultation document which have already been expressed in the public domain by a number of interested parties representing equality constituencies.
- 8.4 In light of this debate, the Commission considers it is highly likely that screening will identify the potential for significant impact on those affected by the policy as well as opportunities to better promote equality of opportunity and good relations between people within the Section 75 equality categories. It therefore assumes that an Equality Impact Assessment by the Northern Ireland Office of further proposals for a draft Bill of Rights will be forthcoming.

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