

Final 20.7.98

**Notes and Proposed Amendments to the Northern Ireland Bill
Submitted by the
Northern Ireland Women's Coalition
20th July 1998**

1. Costs of HRC; EC

The Explanatory and Financial Memorandum suggests 'costs' of the Human Rights Commission and Equality Commission to be in the region of £750,000. This should be the amount for the HRC alone. The running costs for the Equality Commission should be £5.5m and reflect the consolidation, not dissolution of the existing agencies.

2. ~~Costs of Civic Forum~~

~~Is the £60,000 mooted for the Civic Forum envisaged to meet secretariat and accommodation costs as well as any work which members may wish to commission? For the Forum to be effective, the running costs should be £400,000 per annum.~~

3. Clause 15 (3)

Provision should be made for greater flexibility in the number of Ministers that may be appointed. There should be facility to make ministerial appointments outside Heads of Department.

4. Clause 23 (1)(c)

Delete, or, after 'for any other reason' add "related to the pledge of office". After '...period of' insert 'up to', so the clause reads: "...shall be excluded from holding office as Ministers for a period of up to twelve months beginning with the date of the resolution."

5. Clause 23

Subsections (2) and (3) are outwith the terms of the Belfast Agreement. Paragraph 25 in the Agreement makes reference to individuals only, not to parties. Thus 23(2) and 23(3) should be deleted.

6. Insert new Clause 22, and re-number accordingly:

22 - (1) A Minister or Northern Ireland Department may -

- (a) consult on any matter with any authority in Ireland;
- (b) enter into agreements or arrangements with any such authority in respect of any transferred matter.

(2) It is hereby declared that provision may be made by Measure for giving effect to any agreement or arrangement made under subsection (1) including provision-

- (a) for transferring to any authority designated by or constituted under the agreement or arrangement any function which would otherwise be exercisable by any Minister or Northern Ireland department; or

(b) for transferring to a Minister or Northern Ireland department any functions which would otherwise be exercisable by any authority elsewhere.

(3) Subsection (2) does not affect the operation of sections 6, 7 and 13 in relation to the enactment of any Measure.

7. Clause 54 (2)

Delete "appointed by the Secretary of State" and insert: "Her Majesty may by Letters Patent from time to time appoint persons to be chairman and members, and any person so appointed shall hold office during good behaviour."

The Commission should have a greater quasi-constitutional status and greater independence from the Northern Ireland Office than the Bill envisages, something closer to the Parliamentary Commissioner on Administration, from whose legislation this provision is borrowed. Consequential amendments will then need to be made to the rest of this clause, and Schedule 8.

8. Insert new Clause 54 (5):

"Any salary, pension or other benefit payable by virtue of this section shall be charged on and issued out of the Consolidated Fund. The expenses of the Commission under this Act, to such amount as may be sanctioned by the Treasury, shall be defrayed out of moneys provided by Parliament."

The Commission should have a greater degree of independence from the Northern Ireland Office than would be the case under the Bill as drafted. Again, the provision is taken from the legislation establishing the Parliamentary Commissioner for Administration. Consequential amendments will need to be made to Schedule 8.

It will be important for the Commission to be given a budget that is adequate to carrying out *all* the functions that it is given. It will be important that significant tasks, such as the consultation on a new Bill of Rights, and litigation, are not starved of adequate funding. Major expenditures such as these should not be subject to minute consultation *ad hoc* with the NIO, as has occurred in the past to the detriment of speedy decision-making. All its tasks should be fully funded right from the start. Nor should there be any restrictions as to the distribution of funding between functions; the Commission must be able to decide its own strategic goals, and the allocation of funds between functions is an important aspect of being able to operationalise a strategy. To do otherwise risks undermining its independence and credibility.

9. Clause 55 (3)

Delete all and insert:

"(3) The Assembly shall refer all proposed Measures to the Commission in draft. The Commission may advise the Assembly whether a proposed Measure is compatible with human rights as the Commission thinks appropriate. The Assembly shall receive any such advice, and take it into account when considering the proposed Measure."

The Bill should provide that the Assembly would refer all draft legislation *automatically* to the Commission, which would then have the *discretion* to choose on which pieces of legislation it would comment. For the Commission only to have scrutiny powers when the Assembly refers issues would be to reduce the effectiveness of the Commission. For the Commission to be required to comment properly on all pieces of legislation would be to overburden the Commission and disable it from acting strategically, concentrating on issues that it considered to be of primary importance. It is preferable also for the Assembly to be required to receive Commission reviews of draft legislation, and consider how best to respond to those reviews.

10. Clause 55 (8)(b)

After the second “rights” insert: “and all other international human rights standards which are relevant”.

The Agreement envisages that the Commission would draw as appropriate on international instruments and experience, in addition to the European Convention on Human Rights.

11. Clause 56 (1)(b):

After “Act”, insert:

“or (c) which an individual has commenced, or wishes to commence, under sections 62 or 63 of this Act,
or (d) which an individual has commenced, or wishes to commence by way of judicial review which raises relevant issues within the general remit of the Commission”

The Bill as drafted does not permit the Commission to assist complainants who wish to commence proceedings under the anti-discrimination provisions of the Bill. This amendment provides that the Commission would be able to do so. It will also be necessary to clarify whether the Commission will be able to assist litigants who wish to take judicial review in which these issues are raised.

12. Insert new Clause 56(5):

“(5) The Commission may, with the permission of the court, submit its opinion *amicus curiae* on the substance of the proceedings before the court, irrespective of whether the Commission is either a party to the proceedings, or has granted assistance in relation to proceedings under subsection (2).”

This amendment would clarify the position of the Commission in litigation in which it was neither a party, nor assisting a complainant, but in which issues were raised in which the Commission had an interest. The Commission should have the power to submit *amicus curiae* arguments to courts in which litigation takes place that is of relevance to the Commission’s mandates. The Commission should have the power to submit legal

arguments on the interpretation of legal issues that are before the court, even if the Commission is not a party to the litigation. This will enable the Commission to carry out the advisory and educational functions envisaged in the Agreement more effectively.

13. Add as 56(1) (c) and (d):

56(1)(c):

“Where the Commission considers that unless restrained a person is likely to engage in a persistent breach of the provisions of the Human Rights Act 1998, or sections 62 or 63 of this Act, the Commission may apply to the High Court for an injunction restraining him from doing so; and the court, if satisfied that the application is well founded, may grant the injunction in the terms applied for or in more limited terms.”

This would give the Commission powers to initiate litigation in its own name where it considers that there is a pattern of human rights violations. It would be in addition to the general standing that the Commission would have to take judicial review proceedings against public bodies for breach of human rights obligations as a body with “sufficient interest”

56(1)(d):

“(1) Where the Commission considers appropriate, it may conduct investigations to determine whether a breach of the Human Rights Act 1998, or sections 62 or 63 of this Act, has occurred, or may be occurring.

(2) Where the Commission proposes to conduct an investigation, it shall afford an opportunity to those with sufficient interest to comment on the desirability of conducting such an investigation.

(3) For the purposes of an investigation, the Commission may require any person who in its opinion is able to furnish information or produce documents relevant to the investigation to furnish any such information or produce any such document.

(4) For the purposes of any such investigation the Commission shall have the same powers as the Court in respect of the attendance and examination of witnesses and in respect of the production of documents.

(5) If any person without lawful excuse obstructs the Commission or any officer of the Commission in the performance of his functions under this Act, or is guilty of any act or omission in relation to any investigation under this Act which, if that investigation were a proceeding in the Court, would constitute contempt of court, the Commission may certify the offence to the Court.

(6) Where an offence is certified under this section, the Court may inquire into the matter and deal with him in any manner in which the Court could deal with him if he had committed the like offence in relation to the Court.

(7) If, after conducting an investigation under this Act, it appears to the Commission appropriate, it may lay before each House of Parliament and the Assembly a special report.”

For it to be effective, the Commission should have the power to investigate breaches of human rights, and such powers are envisaged by the United Nations-sponsored "Paris Principles". The crucial question is what powers should the Commission be given to make such investigations effective? The amendment provides that, like the Parliamentary Commission for Administration, the Commission should have a specific power to enable discovery of documents, and the power to be able to require witnesses to attend and testify before such an inquiry, together with adequate safeguards to ensure procedural fairness for witnesses.

14. Clause 57(2)

After "Ireland" insert

"the Equality Commission, the Human Rights Commission, any organisation with a legitimate interest"

This amendment is proposed in light of the broad public interest in preventing discrimination. The ability to challenge discrimination under these provisions should not be confined to those within government but should also be open to those named in the amendment.

15. Clauses 59 and 60

Note: The Belfast Agreement left a number of aspects of the White Paper, *Partnership for Equality* open for public consultation including whether the statutory duty on public authorities to promote equality of opportunity should be enforced by a new Equality Commission, with the amalgamation of the existing statutory equality commissions. This approach was substantially rejected by the bulk of those who responded to the consultations. An alternative model for the enforcement of the equality duty was put forward by many of those who responded. This would, in essence, provide for a strong internal mechanism within the Civil Service to ensure the implementation of this duty, coupled with a strong external mechanism to ensure the adequate participation of groups in decision-making affecting them in this area. Amalgamation of the Commissions would not take place at this time, and the issue would be referred to the new Human Rights Commission for consideration in the context of its investigation of the scope for a possible supplementary Bill of Rights for Northern Ireland.

16. Clause 61 (1)

Delete 61(1)(a) – (d) and insert:

"in relation to religion; political opinion; gender; race; disability; age; marital status; dependants, class and sexual orientation."

Whereas the Agreement refers to the "the need to promote equality of opportunity in relation to religion ..." the Bill as currently proposed provides for "the need to promote equality of opportunity between all persons regardless of (a) religious belief ...". Whereas the Belfast Agreement has a *group* dimension to it, the Settlement Bill is only

individualistic -- an important difference. This individualist interpretation is reinforced by the requirement that complaints need to be made by an individual directly affected.

17. Clause 61

Insert the following as new subsection 61(3) and re-number accordingly:

61(3) (a). It shall be the duty of every public authority to prepare a statement of any significant impact that any proposed action by it may have on its ability to fulfil its duty under section 61 ("impact statement").

(b) It shall be the duty of every public authority to include in every impact statement information on:

(1) the aims and purposes of the proposed action;

(2) any significant impact that in its view the proposed action may have on its ability to fulfil its duties under section 61;

(3) alternatives to the proposed action,

(a) which may achieve the aims and purposes of the proposed action but may be less likely to have an adverse effect on its ability to fulfil its duty under section 61, and

(b) which may achieve the aims and purposes of the proposed action but may be more likely to have the effect of enabling it to achieve better compliance with its duty under section 61;

(4) the justification for the rejection of any alternatives identified in subsection 3

(5) proposals to mitigate any unavoidable impact of the action which would be likely to have an adverse impact on its ability to fulfil its duty under section 61, by recourse to accompanying social and economic measures; and

(6) a description of mechanisms to monitor the impact of the action, following its introduction.

(c) The public authority shall ensure that an impact statement is made available to the public in good time to enable effective consultation to take place by the public authority with those directly affected by the proposed decision.

(d) The impact statement and the results of any consultations on it shall be taken into account by the public body in any subsequent decision whether to proceed with the proposed action.

(e) Following a decision to proceed with the relevant action, the public body shall publish the decision together with its reasons for doing so."

The Belfast Agreement provides that schemes to implement the equality of opportunity duty would cover arrangements for policy appraisal, including an assessment of impact on relevant categories, public consultation, public access to information and services, monitoring and timetables. In the Bill as drafted, however, there is no reference to impact, no provisions for public access to information (except access to the scheme itself). The provision with regard to timetables is that a scheme drawn up by a public authority shall "specify a timetable for measures proposed in the scheme". Public consultation is confined to a requirement on a public authority to consult "representatives of persons likely to be affected by the scheme" before a scheme is submitted to the Commission for approval, but not thereafter. The purpose of this new clause is to incorporate the provisions of the Belfast Agreement.

18. Clause 62(1):

After the first "discriminate", insert: "directly or indirectly".

After the second "of", insert "gender, race, disability, age, marital status, dependants, class, sexual orientation,"

The approach which the Bill takes to discrimination is problematic in three specific respects. First, it does not prohibit "indirect" discrimination. Second, for it to reflect the general approach of the Belfast Agreement, it should be inclusive in its approach to the grounds on which discrimination is prohibited; but the Bill is exclusive in prohibiting discrimination only on the grounds of religion and politics. These two aspects are dealt with by the proposed amendments to subclause (1).

19. Insert new Sub-Clause 62(2) and re-number accordingly:

62(2): Subsection (1) does not preclude any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of gender, race, disability, age, marital status, dependants, sexual orientation, religious belief, or political opinion."

The third problem with the approach that the Bill takes to discrimination is in its prohibition of affirmative action. It would, for example, prevent certain measures that might be taken to increase Catholic representation in the Royal Ulster Constabulary. The amendment seeks to permit such action. It is based on the provisions of Article 15(2) of the Canadian Charter of Rights and Freedoms.

20. Clause 79 (5)

Delete all.

The ability of the Secretary of State to certify conclusively that a discriminatory act was done for the purposes of national security should be removed. The Belfast Agreement provided that the equivalent provision in the Fair Employment legislation would be

reviewed. The Bill, rather than repealing the objectionable Fair Employment provision, introduces another one to the same effect. This has recently been shown to conflict with the European Convention on Human Rights in the Tinnelly case.

21. Schedule 9 (2) add new subsections (c), (d)

- (c) Of the members of the Commission, at least 40% shall be of either gender
- (d) In making appointments to the Commission the Secretary of State shall have regard to the principles of merit, independent scrutiny, openness, and transparency, equal opportunity and proportionality.
- (e) The appointments, as a whole, shall reflect expertise in each of the four areas currently dealt with by the bodies dissolved under this Act.

22. Schedule 9(5) (1)

Delete all and insert:

5 (1) The Commission shall as soon as reasonably practicable after the end of each year, make a report, or reports, to the Department of Economic Development on the performance of their functions during the year in all four scheduled areas, and other areas as appropriate.

22. Schedule 10 (3)

Insert after "public authority shall"

- (a) Consult, in accordance with any directions given by the commission, representatives of persons likely to be affected by the scheme
- (b) Pay due regard to the impact statement and the results of any such consultations in any subsequent decision whether to proceed with the proposed action.

Following a decision to proceed with the relevant action, the public body shall publish the decision together with its reasons for doing so.

23. Provisions in the Belfast Agreement not visible in the Bill.

There are a number of commitments in the Belfast Agreement which do not feature in the Bill. Will further legislation be produced to give legislative effect to the referendum result, or will they be effected elsewhere? Specifically we are concerned that the commitment to pursue policies which promote social inclusion "including in particular community development and the advancement of women in public life"¹

Further, there appears to be no provision in respect of the references to integrated or Irish language medium education, or mixed housing.

24. Gender specific language

We note that the generic 'he' is used throughout the Bill. Given the Agreement, and consequentially the Bill has an emphasis on equality of opportunity and treatment, a more inclusive term could be used which reflects the make-up of the population at large.

¹ Rights, Safeguards and Equality of Opportunity para. 1, p19