

From: Dermot Nesbitt

CC: Mr Les Allamby, NIHRC  
 Prof. Brice Dickson  
 Prof. Tom Hadden  
 Dr David Russell, NIHRC  
 Dr Robin Wilson

To: Ms Emma Sherrin  
 Chairperson  
 Ad Hoc Committee on a Bill of Rights

12 April 2021

Emma,

### Commentary on Submission by the NIHRC

#### A. Northern Ireland Human Rights Commission

1. Having read the Submission by the NIHRC, together with associated Minutes of Evidence, and reflected, it is with genuine regret that I feel compelled to write to you. I request that this commentary is forwarded to Committee members for their consideration.

2. The following quotation from the NIHRC's submission reflects my concerns:

In 2008, the Commission published its advice to the Secretary of State for NI on a proposed Bill of Rights, as mandated by the Belfast (Good Friday) Agreement and pursuant to Section 69(7) of the Northern Ireland Act 1998. The Commission stands over the recommendations contained in that advice...What constitutes the particular circumstances of NI is an ongoing dispute of competing narratives. It would be unreasonable to expect the Committee to resolve this conflict and the Commission advises that attempting to do so would be best avoided.

3. In essence, the NIHRC remains unmoved and while others are willing to try and reach an agreed way forward, it appears unwilling. In addition, the NIHRC advocates avoiding consideration of 'particular circumstances': an unacceptable position. Whereas, this issue can be easily resolved by reference to appropriate international law. To ground a bill of rights in international law replaces the local contentious narrative with the widely agreed international narrative.

4. I stated in my oral evidence to the Committee that while the NIHRC, "*...did not subscribe to the law as written in the Belfast Agreement*", I recognised, along with others, that a compromise is required from all involved. The NIHRC, regrettably, seems unmoved.

5. Consider briefly the NIHRC's 2008 submission to Government. It made, "*Recommendations supplementary... [to the HRA/ECHR]...to be considered for incorporation in a Bill of Rights for Northern Ireland.*" These recommended supplementary rights<sup>1</sup> were expansive and reflected broadly an extension of those contained in the HRA/ECHR. However, the Belfast/Good Friday Agreement was unambiguously clear. These additional (i.e. supplementary) rights were to be limited and "*to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem...*" In short: the NIHRC did not comply with Section 69(7) of the NI Act 1998.

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<sup>1</sup> Supplementary rights related to: life, liberty & security, fair trial, marriage, equality & no discrimination, democracy, education, freedom of movement (not incorporated in the HRA), freedom from violence/exploitation/harassment, identity & culture, language, victims, civil & administrative justice, health, adequate standard of living, accommodation, work, environmental, social security and children.

## **B. Contrasting Perspective**

6. Given the above context, consider some comments made to the Ad Hoc Committee by three persons who were directly involved in considering a Bill of Rights (except the first quotation in par. 8). In **Professor Brice Dickson's** written submission he commented:

I now believe we need a Bill of Rights that addresses directly the issues that were referred to in the section of the Belfast (Good Friday) Agreement dealing with a Bill of Rights and two or three other issues that were mentioned elsewhere in that Agreement... it should be a fairly short document which addresses the 'rights issues' that were relevant to the continuation of the troubles in Northern Ireland prior to 1998.

7. He further commented in his written submission that: *"The European Framework Convention for the Protection of National Minorities (FCNM) is also worthy of careful consideration..."*
8. **Professor Tom Hadden** stated in 2010: *"But the Human Rights Commission and the human rights community at large seriously misunderstood what was intended and agreed by the parties and the two governments in 1998."*<sup>2</sup> His written submission commented:

In my view the proper role of a bill of individual and communal rights in a divided society like that of Northern Ireland is to facilitate peaceful and consensual change as the population balance changes over time, not to set an example to the wider world by the adoption of an exemplary range of internationally recognised human rights. The failure of the Human Rights Commission to focus on this particular circumstance of the people(s) of Northern Ireland has been, in my view, the most significant missed opportunity that was provided under the Good Friday/Belfast Agreement.

9. His oral presentation succinctly made clear his views: *"It was not about what I used to call the all-singing, all-dancing model of human rights that would be better than that of anyone else in the world. It was about the rights needed in a divided society"*.
10. In the context of the comments by Professors Dickson and Hadden and given that **Dr. Robin Wilson** was *rappporteur* for the working group on culture and identity set up to advise the NIHRC, his comments are informative. He indicated in his oral presentation:

It is possible, in my view, to construct a Northern Ireland bill of rights that would give rights to persons belonging to communities. The simplest way to do so, by far, rather than reinventing the wheel, would be to incorporate into domestic law the two Council of Europe conventions that apply in this area: the Framework Convention for the Protection of National Minorities (FCNM) and the European Charter for Regional or Minority Languages (ECRML).

11. The above comment supported his written submission: *"This approach would certainly be in the spirit of the agreement...The fact that these conventions carry international legitimacy and already have associated monitoring bodies makes this approach far superior to endlessly trying to reinvent the wheel"*.
12. His concluding comment in his written submission places the above proposal in a historical context:

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<sup>2</sup> Tom Hadden: 'How the Bill was lost'; 'Fortnight', September 2010, pages 10 and 11.

The working group on culture and identity established by the NIHRC during its first consultation on a bill of rights recommended just this outcome – that the Council of Europe Framework Convention for the Protection of National Minorities and its European Charter for Regional or Minority languages be incorporated into Northern Ireland law via the Bill of Rights and thereby rendered justiciable.

13. Interestingly, Dr. Wilson neither indicated that the above recommendation was accepted by the NIHRC nor is there any substantive evidence in the NIHRC's 2008 submission to indicate that it was adopted. Indeed, was the working group's report even seriously considered?

### **C. Northern Ireland Context**

14. While I recognise that others take a different perspective to the above and considering there are now more than the traditional two identities in Northern Ireland, nevertheless the above approach can fit with today's more varied society. And, the overall guiding principal is clear, as referenced in 'New Decade, New Approach' (January 2020). It states: "*The Ad-Hoc Committee will be established to consider the creation of a Bill of Rights that is faithful to the stated intention of the 1998 Agreement...*" (Page 37, par. 5.26). Its stated intention was and is clear and should be implemented.
15. The 1998 Agreement is a constitutional document, reflected in domestic law and an important element of international law. Put simply: the NIHRC did not subscribe to the law (Section 69(7); NI Act 1998) as written and reflecting the 1998 Agreement. Professor Hadden referred to "*the most significant missed opportunity*" and I believe this failure rests substantially with the NIHRC. Compromise is required, as I stated in my oral evidence: "*Les Allamby said that we are in a very different position and that we should start in 2020. I say, yes, you can look at that, but 1998 is still with us.*"
16. As Senator George Mitchell stated: "*Division over identity in Northern Ireland does remain a threat to the stability of the institutions and addressing those issues must be a clear commitment by all of the political parties and all the leaders in Northern Ireland*".<sup>3</sup> The present disturbances display the clear necessity for progress, given the still prevalent underlying community division.
17. The meaning of the language describing the 'particular circumstances' applicable to Northern Ireland is clear. The central elements of one's 'Identity' are: culture, language, education and religion.<sup>4</sup> 'Ethos' can be described as the characteristics of a community and manifested by its attitudes and aspirations. 'Parity of Esteem' refers to equal respect for the identity, ethos and aspirations of both communities. This is not rigorism, rather it's the simple plain meaning of the language.
18. A Bill of Rights would provide the basis by which a judgement could be made on not only new policies but also the outworking of existing policies as well as related prevailing community attitudes. This would require the consideration and assessment of supporting legislation. There is thus a clear necessity for an appropriate Bill of Rights.

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<sup>3</sup> Senator George Mitchell (Chair of 'The Talks' that led to the Belfast Agreement): quotation of him speaking at a Conference (University of Ulster) on 14 May 2019 to consider the Report, 'Sectarianism in Northern Ireland: A Review'; Belfast Telegraph, 15 May 2019.

<sup>4</sup> Council of Europe's FCNM: Articles 5 and 6

## **D. Concluding Comments**

19. On a personal note, I wrote the following in June 1997 and before focused negotiations began in September 1997 that led to the Agreement on 10 April 1998:

Firstly, the new Labour government has the key responsibility. It already has made proposals to incorporate into UK law the 'European Convention on Human Rights', which it views as a valuable step in protecting basic human rights. It needs to go further for Northern Ireland by ratifying and implementing the 1995 'Convention for the Protection of Minorities'. This could best be done by incorporation into a Bill of Rights for Northern Ireland.<sup>5</sup>

20. Professor Daniel Philpott stated that reconciliation *"in the political realm will always be partially achieved, compromised by power, challenged by its sheer complexity, and often delayed in its enactment"*.<sup>6</sup> Nevertheless, I did not expect 24 years later that no progress would have been made.

21. The Belfast/Good Friday Agreement was concluded and in turn agreed by two referenda on the island of Ireland in May 1998, with the primary purpose of enabling a resolution of the conflict between the two communities. Notwithstanding that today Northern Ireland is a more diverse society, there are issues remaining to be resolved between the two traditional communities. A Bill of Rights was aimed at contributing to the resolution of this conflict. It is unacceptable that there has been a generational gap from when agreement was reached and thus the stalemate must cease and demonstrable progress be made.

22. Regrettably, the NIHRC has misapplied its position of influence regarding the composition of a Bill of Rights. It should have created a model where, primarily, both communities have clearly identified rights with associated responsibilities. This in turn could have provided a basis to develop a normal society, based upon principles expected elsewhere in Europe.

23. My final plead: the Ad Hoc Committee can and must play a vital role in ensuring confidence is engendered regarding political progress towards a normal and stable society by developing a bill of rights *"that is faithful to the stated intention of the 1998 Agreement"*. I genuinely hope that the NIHRC works constructively with the Committee. We need to address, firstly, the 'particular circumstances' and then consider some 'add-ons'. There should be no more procrastination when there is such a simple way forward to ensure satisfactory progress.

Regards,

Dermot

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<sup>5</sup> Dermot Nesbitt: 'Responsibilities and challenges facing positive unionism'; News Letter, 5 June 1997.

<sup>6</sup> Professor Daniel Philpott (At time of publication he was: Prof. of Political Science and Peace studies and Director for the Centre for Civil and Human Rights at the University of Notre Dame): 'Just and Unjust Peace', Oxford University Press, 2012, p 5