A BILL OF RIGHTS FOR NORTHERN IRELAND: NEXT STEPS

Response to the Northern Ireland Office

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NORTHERN IRELAND HUMAN RIGHTS COMMISSION

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SUMMARY

It remains the view of the Northern Ireland Human Rights Commission (the Commission) that a Bill of Rights for Northern Ireland, drafted in accordance with its mandate, should include all of the recommendations provided to Government on 10 December 2008.

The Commission notes that in the Northern Ireland Office (NIO) consultation paper Government has committed "to bringing forward legislation" (2.5) for a separate Bill of Rights for Northern Ireland.

Beyond this welcome commitment, the tone and content of the NIO consultation paper is disappointing. The Commission finds itself in the position of analysing a paper that:

1. **demonstrates a lack of understanding of the purpose and functions of a Bill of Rights**
2. **fails to take appropriate account of international human rights standards**
3. **appears to be suggesting the lowering of existing human rights standards in Northern Ireland**
4. **fails to satisfy the minimum common law consultation requirements, and**
5. **misrepresents the advice given by the Commission.**

The Commission has concluded that it is not possible for a national human rights institution to accept the NIO consultation paper as a genuine effort to increase human rights protections in Northern Ireland.

INTRODUCTION

On 10 December 2008, the Northern Ireland Human Rights Commission (the Commission) in accordance with Paragraph 4, in the Rights, Safeguards and Equality of Opportunity section, of the Belfast (Good Friday) Agreement, and section 69(7) of the Northern Ireland Act 1998, provided Government with advice on a Bill of Rights for Northern Ireland. In 1999, the Secretary of State wrote formally to the Commission inviting it to consult and provide advice on a Bill of Rights for Northern Ireland. The Commission accepted this invitation and consulted widely on whether there should be a Bill and, if so, what it ought to include. The advice was not a legislative draft, but nonetheless did set out in detail a set of specific recommendations. Government has now responded to the Commission's advice and is now, for the first time, consulting on what should be included in a Bill of Rights for Northern Ireland. This is of course a separate process to the one conducted by the Commission previously. It remains the view of the Commission that a Bill, drafted in accordance with its mandate, should include all of the recommendations it provided to Government in 2008.

The Commission notes in the Northern Ireland Office (NIO) consultation paper that Government has committed "to bringing forward legislation" (2.5) for a separate Bill of Rights for Northern Ireland. It is justified and desirable to enshrine existing protections in a single, dedicated legislative document, and for that legislation also to include rights supplementary to the European Convention on Human Rights (ECHR), reflecting the particular circumstances of this jurisdiction. The Commission notes that, in principle, there is "no incompatibility" (3.7) between a possible UK instrument and the proposal for Northern Ireland. It welcomes the fact that Government has on a number of occasions,

including in the Green Paper on Rights and Responsibilities[1] (the Green Paper), repeated this view.

However, the Commission is extremely disappointed at both the tone and content of the NIO consultation paper. It had expected by now to be in a position to provide Government with detailed feedback on how it ought to take forward the proposals for a Bill of Rights for Northern Ireland. Instead, it finds itself in the position of analysing a paper that:

1. **demonstrates a lack of understanding of the purpose and functions of a Bill of Rights**
2. **fails to take appropriate account of international human rights standards**
3. **appears to be suggesting the lowering of existing human rights standards in Northern Ireland**
4. **fails to satisfy the minimum common law consultation requirements, and**
5. **misrepresents the advice given by the Commission.**

This response will provide some examples under the headings outlined above and demonstrate why Government must re-think its position in relation to what is needed in a Bill of Rights for Northern Ireland.

[1] Ministry of Justice, *Rights and Responsibilities: Developing our Constitutional Framework*, TSO, London, March 2009 (Cm 7577).

1. Demonstrates a lack of understanding of the purpose and functions of a Bill of Rights

The primary function of a bill of rights in any jurisdiction is to enshrine protections. Government itself acknowledges in the NIO consultation paper that the Human Rights Act 1998 (HRA) operates as a "foundational document" (4.5) Consequently, the fact that a protection may be found in existing legislation, policy documents or existing governmental practice is not a reason to exclude that protection from what should be a "foundational" document. The question of the content of a Bill of Rights is not determined by whether or not protections currently exist in common law or statute or elsewhere. Rather, the question is to decide which values to "draw" from existing protections and give them "expression at a constitutional level".

In the NIO consultation paper, there is no indication that Government has understood this basic point. Repeatedly it explains that some rights should not, in the view of Government, be included in a Bill of Rights for Northern Ireland, because they are already sufficiently protected by existing legislation or, even more worryingly, by policy guidance or existing practice. Unlike the NIO consultation paper, the Ministry of Justice Green Paper has understood and regularly refers to the distinction that must be drawn between the question of existing protection and the question of whether a particular provision should find its way into a constitutional document such as a bill of rights.

The Green Paper correctly refers to a bill of rights having "enduring value"; being a new instrument that "draw[s] on key principles from current common law or statutory sources". Some of these sources

may, we are told, be: "entrenched features of the legal systems of the UK. Others, such as those derived from the UK's complex and well-established welfare system, have not traditionally been framed as rights, but are areas to which Government has been, and remains, firmly committed through its legislative programme. Their importance in the national culture may be such as to merit expression at a constitutional level".[2]

In contrast to this approach, the Commission's proposal "to ensure the right of every child to be protected from direct involvement in any capacity in armed conflicts or civil hostilities including their use as intelligence sources" is rejected on the basis that, even though the Regulation of Investigatory Powers Act 2000 does not prohibit the use by public authorities of children as covert human intelligence sources, there is a Code of Practice, and a piece of secondary legislation (the Regulation of Investigatory Powers (Juveniles) Order 2000), overseen by the Intelligence Services Commissioner, which provide "appropriate safeguards" of use of children as intelligence sources (8.11 and 8.12).

This argument for exclusion is entirely unsatisfactory on a number of levels. First, it fails to directly address the Commission's proposal that children should not be used as intelligence sources at all. Second, it attempts to justify exclusion of the recommended protection in a Bill of Rights on the basis that secondary legislation (which can be amended at ease) and a Code of Practice (which can also be easily amended and which does not even have any legal force) provide "appropriate safeguards".

The examples of reasoning similar to this are numerous.

[2] Above, para 3.13.

In respect of protection of victims (8.8), reference is made to the Victims and Survivors Order 2006, the Commission for Victims and Survivors created in 2008, and the Victims and Survivors Forum which met for the first time in September 2009. None of these innovations legally enshrine protections for victims.

The Commission's recommendation relating to the right of someone who is arrested or detained to consult a legal representative and a medical practitioner (9.6, 9.8 and 9.11) is rejected in part on the basis that the issue is dealt with in legislation and "associated Codes of Practice", such as the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE), the Terrorism Act 2000 (TACT).

In terms of the Commission's proposal on the right to silence (9.9), Government again refers to secondary legislation, including the Criminal Evidence (Northern Ireland) Order 1988 (as amended by Article 36 of the Criminal Evidence (Northern Ireland) Order 1999).

Insofar as the proposed right of prisoners to have family visits is concerned, we are informed (9.14) that "Codes currently permit visits where possible, subject to the discretion of the custody officer, the availability of staff to supervise any visit and the need to minimise hindrance to the investigation". These Codes have no legal force and are discretionary. They do not even come close to answering the Commission's proposal for enshrinement of a right.

The NIO consultation paper states that the Northern Ireland Prison Service (NIPS) "recognises the importance to the prisoner of maintaining contact with the outside world so normal practice is for the prisoner to receive four visits a month" (9.15). Again, this is irrelevant since Government has not demonstrated that it has

considered the question of whether the protection should be enshrined.

We are also informed that the NIPS "encourages family contact by providing support through the Assisted Prison Visit Scheme" (9.15). But encouraging family contact for prisoners is a far cry from enshrining it as a right.

On the question of children in detention, Government maintains that the Juvenile Justice Centre pays "special attention" "to the maintenance of the relationship between a child in custody and his or her family" (9.16). Yet again, this does not answer the question of whether such protection should be enshrined in a Bill of Rights.

In respect of the proposal to have "a legal representative present during questioning, and to have the questioning aurally and visually recorded", Government concludes (9.20), that "the right proposed by the Commission in this area is already very largely met by existing statutory and policy schemes". But this observation is irrelevant. The existing statutory and policy schemes do not create a legally enforceable 'right' for prisoners in the same way that inclusion of protection in a Bill of Rights for Northern Ireland would.

The Commission's recommendation regarding reintegration into society of those in detention or alternative care is rejected on the basis that the NIPS and the Probation Board for Northern Ireland currently co-ordinate with statutory and voluntary partners to "combat crime among released prisoners and boost community safety" (9.21). The NIO consultation paper also concludes (9.24) that the "substantive areas" underpinning the right "are therefore already being addressed through significant policy and operational measures". In this case, first, Government does not even attempt

to explain the basis of the co-ordination so that it can be examined by consultees. Second, the fact that co-ordination is currently in place does not enshrine that protection on a long-term basis. Third, it seems that the focus of the co-ordination is on the community rather than on the prisoners, as would be the case if a right of prisoners to be re-integrated were to be enshrined.

The Commission's proposal on witness protection is rejected on the basis that the Northern Ireland Criminal Justice Board has established a multi-agency sub-group, the Victim and Witness Task Force, which has produced a policy document ("Bridging the Gap"), and which is planning to finalise and publish a Code of Practice (9.34-9.36). Other reasons for rejecting a right to protection for witnesses include the fact that there is a witness protection programme organised under the Serious Organised Crime and Police Act 2005 and the Northern Ireland Office Limited Home Protection Scheme (9.28). Similar justifications are suggested for not enshrining protection of lawyers or jurors.

Government does not seem to have realised that the fact that a protection currently offered by a code of practice, order or statute does not provide stable and enduring basis for that protection. The protection afforded can be amended easily: for example, the Police and Criminal Evidence (Northern Ireland) Order 1989 (on which Government relies to make a number of arguments) was amended in 2007.[3] As such, protection in codes and secondary legislation is not pertinent to the question of whether that protection should be enshrined at a constitutional level in a Bill of Rights. The Commission is left wondering if Government is actually aware of the constitutional significance of such an instrument and rationale for its creation.

[3] Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2007.

2. Failure to take appropriate account of international human rights standards

The Belfast (Good Friday) Agreement 1998 clearly refers to the relevance of international human rights standards,[4] and for every proposal the Commission made in its advice there was a detailed explanation as to how it had considered the relevance of those standards. In contrast, the NIO consultation paper does not indicate that these standards have been considered in any depth, let alone show any cognisance of the concluding observations of the international treaty monitoring bodies, some of which have made specific reference to a Bill of Rights for Northern Ireland and what it ought to include.[5]

The NIO consultation paper refers (3.5) to the international human rights instruments to which the UK is a party: "for example, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the UN Convention on the Rights of Persons with Disabilities".

However, Government barely refers to the protections set down in these instruments (with rare exceptions being found at 5.21 and 7.2).

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[4] The Belfast (Good Friday) Agreement 1998 tasked the Commission with advising on supplementary rights, "drawing as appropriate on international instruments and experience", see: Rights, Safeguards and Equality of Opportunity, para 4.
[5] Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland* (CRC/C/GBR/CO/4), 20 October 2008; and Committee on Economic, Social and Cultural Rights, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland* (E/C.12/GBR/CO/5), 22 May 2009.

3. Appears to be suggesting the lowering of existing human rights standards in Northern Ireland

In the context of equality, it is arguable that Government's proposals may undermine existing protections.

Government appears to be insinuating that expanding the list of protected groups will lead to "significantly diluted" protection for the relevant groups[6] and a loss of "focus".[7]

The first point to make here is that Government's thinking on this issue is unclear: is it actually proposing that if the list of protected groups is expanded, the *quid pro quo* will be a lowering of the substantive protection? If this is the case, Government should be open and direct about it. Second, contrary to what Government seems to be suggesting, it is not inevitable that expanding the list of protected groups must result in lowering of the protection offered. For example, in the context of the European Convention on Human Rights (ECHR), over the years, the European Court of Human Rights has expanded the list of protected groups under Article 14, without lowering the protection required for each group. It is troubling that Government should assume that expanding human rights protections to new groups must result in a lowering of the content of those protections.

The Secretary of State asserts in his Foreword that "for too long issues of human rights and equality in Northern Ireland were seen through the prism of conflict as a kind of 'zero sum game' of

[6] NIO consultation paper, para 5.14.
[7] Above, para 5.15. See also, para 5.18.

winners and losers. As Northern Ireland emerges from conflict it is important that the terms of the debate change". But it appears that Government's thinking in fact perpetuates the notion that more rights for one group means less for another. In this consultation document, it is any individual belonging to any community other than the established communities who is to be denied protections in the form of rights enshrined in a Bill. For example, the Commission's advice in relation to equality provisions is questioned on grounds that:

> While section 76 [of the Northern Ireland Act 1998] is only one of a range of pieces of legislation setting out carefully designated grounds on which discrimination is unlawful (e.g. race and gender), there could be a serious risk that, if the reach of anti-discrimination provisions becomes unlimited, the focus of the core issues identified in the Agreement, and in the other anti-discrimination legislation, could be lost and existing levels of protection against discrimination might, paradoxically, be significantly diluted. (5.14)

The Commission has not advised an unlimited reach of anti-discrimination law. Rather, it has specifically mentioned groups which are at risk of facing discrimination. The concluding words in the Commission's recommendation – "or any other status" (5.2) – are perfectly in-keeping with the language of Article 14 ECHR and evolving jurisprudence as well as Article 26 International Covenant on Civil and Political Rights (ICCPR). To suggest otherwise is to renege on recognising the universality of human rights protections by attempting to confine them to certain groups. This is problematic in itself, but the suggestion, above, that those groups already protected to some extent under existing legislation are in danger of losing that level of protection should the list be widened is misleading.

4. Inadequate consultation: common law

As was observed by Munby J in *R (Montpeliers & Trevors Association) v City of Westminster*,[8] public consultation processes are underpinned by the following "well-established principles of law":

First, where a public authority decides to embark upon a non-statutory process of consultation, the applicable principles are no different from those which apply to statutory consultation.[9] Second, any consultation process must satisfy what are referred to as the 'Sedley requirements'.[10]

The Sedley requirements are such that a public consultation must:

a. be undertaken when proposals are still at a formative stage
b. give sufficient reasons to permit the consultee to make a meaningful response
c. allow adequate time for consideration and response, and
d. the results of the consultation must be conscientiously taken into account in finalising any proposals.[11]

It has to be seriously doubted whether the NIO consultation paper complies with the first three Sedley requirements. Whether it

[8] [2005] EWHC 16 (Admin); [2006] LGR 304, at [25].
[9] *R (Partingdale Lane Residents Association) v Barnet London Borough Council* [2003] EWHC 947 (Admin), [2003] All ER (D) 29 ('Partingdale'), [45]; *R (Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438, [24]. See also: *R (Medway Council and others) v Secretary of State for Transport* [2002] EWHC 2516 (Admin), [2002] All ER (D) 385, at [28], for the proposition that, as, Maurice Kay J, put it, "consultation, whether it is a matter of obligation or undertaken voluntarily, requires fairness".
[10] *R v London Borough of Barnet, ex parte B* [1994] ELR 357, 372G.
[11] See *R (Wainwright) v Richmond upon Thames London Borough Council* [2001] EWCA Civ 2062, [2001] All ER (D) 422, [9]-[10]; *Bovis Homes Ltd v New Forest District Council* [2002] EWHC 483 (Admin), [111]-[114]; *R v North and East Devon Health Authority, Ex parte Coughlan* [2001] QB 213, [108].

complies with the fourth Sedley requirement can only be determined after the Government responds to the consultation.

4.1 The first 'Sedley Requirement': has consultation been undertaken at a 'formative' stage?

4.1.1 The scope of the requirement

In *Montpeliers*, Munby J explained the first Sedley Requirement' as follows:

> [t]he crucial point, as the Deputy Judge expressed it in *Partingdale* at para [47], is that "consultation must take place at a stage when a policy is still at a formative stage … a proposal cannot be at a formative stage if the decision maker does not have an open mind on the issue of principle involved".[12]

In *Montpeliers* itself, it was held that a consultation process on traffic flow was vitiated because an option of central significance "had already been excluded from further consideration".[13] The consultation paper at issue in that case explained why the excluded option was being excluded from consideration, and only sought to consult on the alternatives.[14] Munby J explained: "[f]airness … required that there should be a process of consultation in which those being consulted could express their views on all the various options".[15]

[12] [2005] EWHC 16 (Admin); [2006] LGR 304, at [25].
[13] Above.
[14] Above, at [8].
[15] Above, at [29].

Likewise, in the case of *R (Medway Council and others) v Secretary of State for Transport*,[16] it was held to be unfair and indeed irrational, to exclude Gatwick from the options presented in a consultation exercise relating to the future development of air traffic in the South East.[17]

In addition, as well as being a common law requirement, consultation at a formative stage is recommended in the Government's Code of Practice on Consultation.[18] This Code sets out seven "consultation criteria", the first criterion of which is that "[f]ormal consultation should take place at a stage when there is scope to influence the policy outcome". This means, as Government notes in the Code, "there is no point in consulting when everything is already settled".[19]

4.1.2 The lack of compliance

In the NIO consultation paper, Government suggests that it would "welcome general views on all the issues" covered.[20] The problem is that it appears, however, to have pre-determined a large number of extremely important questions.

The most notable example of pre-determination is found in Chapter 3, which indicates that there is to be no consultation on the appropriateness of inclusion of a large number of rights in any Bill of Rights legislation for Northern Ireland. The excluded rights listed in Chapter 3 are:[21]

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[16] [2002] EWHC 2516 (Admin), [2002] All ER (D) 385.
[17] Above, at [12]-[18] and [29]-[31].
[18] HM Government, Code of Practice on Consultation [Online] Available: http://www.berr.gov.uk/files/file47158.pdf, July 2008.
[19] Above, para 1.2.
[20] NIO consultation paper, para 4.2.
[21] Above, para 3.14.

a. right to marriage or civil partnership
b. education rights
c. freedom of movement
d. right to civil and administrative justice
e. right to health
f. right to an adequate standard of living
g. right to work
h. environmental rights, and
i. social security rights.

The NIO consultation paper explains[22] that its "initial assessment",[23] and then "view",[24] is that these rights are equally as relevant to the people of England, Scotland and Wales as they are to the people of Northern Ireland; that they fall to be considered in a UK-wide context; that their introduction would either be "unworkable in practice, or could give rise to unjustified inequalities across the UK". Accordingly, Government has concluded that:

> The subject of this consultation paper is a Bill of Rights for Northern Ireland, and Government does not propose to address in detail in this paper those rights that it considers to fall outside the scope of such a Bill.[25]

In other words, even though Government is supposed to be consulting the people of Northern Ireland on the content of a Bill of Rights for Northern Ireland, it is stating expressly that it will not consult on any rights "it" (not the people of Northern Ireland)

[22] Above, paras 3.14, 3.15 and 3.20.
[23] Above, para 3.14.
[24] Above, para 3.15.
[25] Above, para 3.16.

"considers" should not be in that Bill of Rights. As such, this proposal can hardly be described as being at a "formative stage".

This phenomenon of pre-determination is repeated throughout the NIO consultation paper. To give two further examples:

Government explains (5.5) that an obligation proposed by the Commission requiring public authorities to take all appropriate measures to promote the rights of older persons and those who are disabled, and enable them to enjoy social, cultural and occupational integration, should not be addressed because it "appears to be of equal importance across the UK rather than having a distinctive resonance in Northern Ireland alone".

Government similarly explains (6.4), that the rights protecting cultural, linguistic and ethnic minorities (outside the two main communities) is part of the national debate and "is therefore not considered further here".

Views are not sought on rights that Government has concluded to be of equal relevance throughout the UK, and as such, it is very difficult to conclude that the proposals being offered are at a "formative" stage.

4.2 The second Sedley Requirement: insufficient explanation of the proposals

4.2.1 The scope of the requirement

With regard to the second Sedley Requirement, it has been held that what is required is a "candid disclosure of the reasons for what

is proposed".[26] For example, in *R (Greenpeace Ltd) v Secretary of State for Trade and Industry*,[27] a consultation was invalidated where the consultation paper contained only "thumbnail sketches" of issues related to the question of nuclear new build as part of the UK's future electricity generating mix.[28]

4.2.2 The lack of compliance

The NIO consultation paper does not provide adequate explanation for its proposals to facilitate a "meaningful response" by consultees. In other words, even though Government is supposed to be consulting on the content of a Bill of Rights for Northern Ireland, it has failed to provide a "candid disclosure" of the reasons for what is being proposed. To give two examples of where this is the case: (i) there is no explanation of 'particular circumstances'; and (ii) only minimal explanation is given for the exclusion of a large list of rights in Chapter 3 (see above at 1.1.2).

i. The particular circumstances of Northern Ireland

Nowhere is there an explanation of the factors Government regards as relevant in determining the 'particular circumstances' of Northern Ireland. More particularly, it is apparent that Government has not even applied a consistent understanding to the question of particular circumstances. Thus, there is often reference in general terms to the concept of particular circumstances without explaining what is meant.

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[26] *R (Lloyd) v Dagenham London Borough Council* [2001] EWCA Civ 533; (2001) 4 CCLR 196, [13].
[27] [2007] EWHC 311 (Admin); [2007] Env LR 623.
[28] Above, at [68].

For example, when discussing the right to health (3.17), Government notes "…there would need to be evidence that the case for this particular right within Northern Ireland is demonstrably greater or different in nature to that in the rest of the UK, due to the particular circumstances of Northern Ireland". This may be so; but the question is, if the consultee is to respond in a "meaningful" way, how does Government envisage such a case being made? Similarly, we are informed that 32 of the rights proposed in the Commission's Advice (4.1) can, "in the Government's view", be argued to reflect the particular circumstances of Northern Ireland. But we are not told why.

The proposed right of access, on terms of equality, to public service (5.20), we are told, "would appear to be potentially relevant across the UK, and there is no evidence that it reflects the particular circumstances of Northern Ireland". But what evidence would Government be interested in hearing? How should the consultee respond if they wish to persuade Government that such evidence does, indeed, exist?

Seven of the children's rights proposed by the Commission (8.10) are, we are told, regarded as of "equal importance" across the rest of the UK'. Yet this is presented as a *fait accompli*, with no reasoning offered.

Again, on the question of criminal justice (9.4), it is concluded that that such rights do not have "unique significance in Northern Ireland", but are "of similar importance across the UK" and should therefore "find their place in the national debate".

When addressing rights for children and vulnerable adults relating to evidence procured through torture and court procedures (9.26),

it is suggested that these "appear to be of equal significance throughout the UK". But still there is no explanation as to why this is the case.

On other occasions throughout the consultation paper, references are made to criteria which Government seems to interpret as being relevant to the 'particular circumstances' of Northern Ireland, but its referencing is inconsistent and the onus is left on the consultee to try to deduce the factors which Government regards as having importance.

For example, the consultation paper states (3.19): "Clearly, the legacy of the conflict forms a part of the particular circumstances of Northern Ireland, and Government accepts that measures to address the impact of this legacy should be considered for inclusion in a Bill of Rights for Northern Ireland". Thus, can we deduce that the 'legacy of the conflict' must be relevant?

Proposals on the right to identity and culture are generally found to reflect the particular circumstances of Northern Ireland (6.3). Presumably (although again, it is not explained), this must be because it "was a central theme in the Belfast Agreement" (see 6.2), and was specifically referred to in the Commission's mandate.

The question of the rights of cultural, ethnic and religious minorities (6.4) is described as being "very much part of the national debate started by the Green Paper".[29] This suggests, although it is not clear, that Government regards inclusion within the Green Paper as a relevant criterion for determining that a right falls outside the 'particular circumstances' of Northern Ireland.

[29] Ministry of Justice, *Rights and Responsibilities: Developing our Constitutional Framework*, Ministry of Justice, TSO, London, March 2009 (Cm 7577).

Victims rights (8.7) are not regarded as part of the 'particular circumstances', on this occasion, because "policies to meet them are being pursued, not only in Northern Ireland but across the UK".

Meanwhile, children's rights (8.10) are excluded because "such rights are of equal importance across the rest of the UK". Thus, a criterion appears to be whether rights are of "equal importance" across the rest of the UK.

The contrast between the NIO consultation paper and the Commission's advice[30] is stark. The Commission provided a detailed methodology to explain the factors it regards as important in identifying 'particular circumstances'.[31] No such methodology is provided by Government. Thus, statements regarding 'particular circumstances' are conclusive and do not provide sufficient detail to enable a 'meaningful' response, as is required by the common law.

ii. Excluded rights

Nine categories of rights from the Commission's advice are effectively excluded from the NIO consultation paper. Even though dialogue about inclusion of these rights has been part of the debate around rights in Northern Ireland since 2000,[32] Government has, apart from one exception, not given an explanation as to why they are excluded. The only right it considers in any detail is the right to health. The NIO consultation paper even accepts that it is not

[30] *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland*, NIHRC, 10 December 2008 (Commission's advice).
[31] Above, at p14 and Appendix 1.
[32] Most of these rights are found in the Commission's first consultation paper, *Making a Bill of Rights for Northern Ireland: A Consultation Summary* (2001) and the *Bill of Rights Forum Final Report*, 31 March 2008.

prepared to offer in depth reasoning for its conclusions (3.16) on the other excluded categories of rights.

Government proceeds to explain (3.17-3.18) the factors for excluding the right to health, with an emphasis primarily on the inappropriateness of involving courts in the expenditure implications of a right to health (3.18 and 3.20). Yet, the other rights listed for exclusion do not obviously involve such resource implications, for example, the right to marriage or civil partnership, freedom of movement, and the right to civil and administrative justice. On what basis are these rights excluded for further consideration? It is not clear. How, in accordance with the second Sedley Requirement, is the consultee to respond to Government's proposal for exclusion in a meaningful way?

In brief, just as in the Greenpeace case, where setting out a thumbnail sketch of the issue was regarded as inadequate, the setting out of an example of reasoning, when the issues at stake are so important, must be regarded as inadequate. This simply does not satisfy the requirement of "candid disclosure".

4.3 The third 'Sedley Requirement': Adequate time for consideration and response

4.3.1 The scope of the requirement

With regard to the third 'Sedley Requirement', the courts require that any public consultation is conducted in a framework that allows adequate time for consideration and response.

4.3.2 The lack of compliance

Consulting on a bill of rights is not a straightforward process. It is complex and requires sufficient time.

Although not determinative, the second consultation criterion in Government's Code of Practice on Consultation[33] (mentioned above) suggests allowing a minimum of 12 weeks for written consultation, with "consideration given to longer timescales where feasible and sensible".

This consultation has been conducted over the Christmas/New Year break (2009-2010); and, as such, barely complies with the minimum suggestion given by Government in its Code of Practice on Consultation.

Given the complexity of the issues at stake, it would have been "feasible and sensible" to have allowed more time for consultation.

[33] HM Government, Code of Practice on Consultation [Online] Available: http://www.berr.gov.uk/files/file47158.pdf, July 2008.

5. Misrepresentations of the advice given by the Commission

The NIO consultation paper often grossly misrepresents the advice given by the Commission in a number of important respects.

5.1 The number of recommended rights

In the NIO consultation paper, it is suggested that the Commission proposed 78 new substantive rights (2.7) in its advice to the Secretary of State. This is accurate insofar as the Commission has advised Government to enshrine 78 rights in primary legislation in the form of A Bill of Rights for Northern Ireland Act. However, for many of the recommended rights no other legislative change would be required. As Government rightly points out, existing legislation in a number of areas already gives effect to the proposed rights. The message being presented here is confused. On the one hand, there is an impression that the Commission posed Government with an insurmountable task in terms of change to existing legislation that would radically alter the legal, social and political framework of Northern Ireland. On the other hand, Government rejects much of the advice provided by the Commission on grounds that the protections already exist.

5.2 The Commission's mandate

Not only is Government's own responsibility in terms of the mandate given to the Commission unclear in the consultation document, but it also seems, in fact, to have misrepresented that mandate in the first place. This would appear to be particularly the case in the sections discussing the Commission's advice in relation

to the need to respect the identity and ethos of the two main communities. The tone is critical of the Commission in not attempting to define the concepts of "identity and ethos" "so as to enable the courts to address them effectively". Yet, it was not in the Commission's mandate to define these concepts, but simply to consider "the formulation of a general obligation on government and public bodies to fully respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland".

5.3 Dilution of the proposals

On a number of occasions, Government has diluted and narrowed the Commission's proposals in subtle ways that will, nonetheless, have extensive impact on the rights in question if they are included in a Bill of Rights. For example, the Commission advised that a right should be drafted so that:

> Public authorities must encourage a spirit of tolerance and dialogue, taking effective measures to promote mutual respect, understanding and co-operation among all persons living in Northern Ireland, irrespective of those persons' race, ethnicity, language, religion or political opinion.

After discussing over a number of paragraphs existing measures it believes are relevant to this recommendation, Government, under "Summary of Proposals", proposes only to "consider extending the duty on public authorities around promoting good relations, so that public authorities would also have regard to the need to promote a spirit of tolerance, dialogue and mutual respect; and to the need to respect the identity and ethos of the two main communities". There is no explanation or proper discussion as to why Government has reduced a provision that would protect the members of all

communities in Northern Ireland to one that would only protect members of the two main communities. The information is so minimal that there is a risk readers might be led to believe the Commission actually proposed the latter or indeed sees no major difference between the two.

5.4 The frame of reference

The Commission must comment on the way in which the NIO consultation paper has framed the terms of the debate. For example, the reference to Sharia law (6.4) is both incorrect and irresponsible. Islamophobic sentiment is well documented in Western Europe and racist hate crimes are evident in an increasingly multi-cultural Northern Ireland. It is particularly unfortunate that Government has decided therefore to make an ill-conceived attempt to prey on fears of what Islam brings to the UK, and xenophobic sentiments. The NIO should be well aware that the concepts of citizenship and shared values are the subject of volumes of Islamic theological, philosophical and political literature dating back centuries. To claim in one sentence that Sharia law is incompatible with European law and culture is, at best, contestable. Moreover, to suggest that the Commission's advice would give rise to the remotest possibility of any laws that might be incompatible with international human rights standards being introduced in this jurisdiction, given the qualifications and limitations recommended, amounts to either a fabrication and wilful misrepresentation of the Commission's work or demonstrable ignorance of the practical operation of domestic human rights legislation. The Commission calls on Government to retract this statement.

Frequent reference is made to the Northern Ireland Act 1998, and Government appears to be using it as model of sorts against which

to evaluate the Commission's advice. Where the advice goes beyond that currently provided for by the Act, Government questions the validity or practicality of recommendations. So, for example, in discussing the free-standing equality provision, the NIO consultation paper states that under section 76 of the Northern Ireland Act 1998, the term 'public authority' refers to a specific set of bodies defined in that section, while the Commission intends that the proposed new provisions apply to the wider range of bodies which are public authorities for the purposes of the Human Rights Act 1998 (5.12). Government is surely fully aware that the Commission correctly took as its frame of reference the domestic application of the ECHR via the HRA. It is misleading to suggest that the Commission has somehow gone beyond the domestic norm, when the mandate explicitly required that the Commission consider rights supplementary to the ECHR.

5.5 Equality

The discussion of the Commission's equality proposals provides a very misleading summary of those proposals in a number of respects. The Commission's recommendation is characterised (5.11) as a "freestanding and unlimited protection against discrimination [which] would be a new step in UK law". Government then goes on to state (5.12): "[i]t is not clear from the Commission's proposals whether a difference in treatment would be unlawful if it could be justified on public policy or other grounds"; and points to voting eligibility as being potentially affected by the Commission's proposal.

This suggestion is a completely unjustified conclusion which could lead an uninformed consultee to believe, for example, that the Commission had actually proposed that two-year-old children

should be permitted to vote. When choosing between the Commission's proposal and Government's proposal, an uninformed consultee could easily be misled into assuming that the Commission's proposal led to absurd consequences. However, this is not the case. As the NIO consultation paper notes at a later stage (10.9), the Commission's advice proposed a general limitation clause to govern the rights it proposed (a proposal which, incidentally, the Government supports, 10.9). Such a limitation clause means that the Commission envisaged that its equality provisions could be limited by public policy and other grounds; yet Government omits this entirely from the consultation paper.

The equality provisions proposed by the Commission do not offer "unlimited" protection against discrimination.

5.6 Democratic rights

The Commission's proposal on democratic rights is similarly mischaracterised (5.21). Government suggests that the Commission has proposed a right to vote without distinction on grounds of age and adds that "[i]t would need to be clear that [the] … right [to vote] could be subject to reasonable restrictions". Here again, Government inaccurately reflects the content and impact of the Commission's proposal, and disregards the application of the Commission's limitation clause, which would cover the situation described.

5.7 Jury trial

Similar to the previous examples, the NIO consultation paper suggests (9.30) that the Commission proposed an "unqualified right to jury trial" which would create risks of "juror intimidation, the

collapse of trials, a decrease in public confidence, perverse acquittals and a potential breach of Article 6 of the ECHR (e.g. if in particular cases the system was not able to deliver a fair trial)".

This is incorrect. The Commission did not create an "unqualified" right to jury trial and its limitation clause would have accommodated all the concerns raised.

5.8 Sufficient interest test

Government opposes the adoption of a "sufficient interest" test as an appropriate standing test for any Bill of Rights for Northern Ireland (10.19). Here, again, the NIO consultation paper is misleading. It states that the sufficient interest test would result "in satellite litigation to determine if persons or groups do indeed have 'sufficient interest' in the matter". But Government omits to mention that the sufficient interest test is actually already used on a daily basis by the courts in the context of judicial review (indeed, this motivated the Commission to propose this test).[34] Courts are already adept and have well-established guidelines for dealing with the sufficient interest test and its parameters are well understood.

5.9 Public authorities

Government suggests (9.24) that it is not appropriate to place an obligation to reintegrate prisoners "on **all** public authorities, since many public authorities will have no involvement with the reintegration of offenders into society".[35]

[34] Commission's advice, p155.
[35] Emphasis in original.

It makes the same point in relation to placing an obligation on all public authorities to protect individuals from sectarian harassment (7.11), suggesting "it would not necessarily be appropriate to place such a duty on all public authorities covered by s.75 of the Northern Ireland Act 1998, or indeed all those individuals or organizations who are public authorities for the purposes of the HRA. Not all those carrying out public functions will be in a position to take such steps".[36]

These comments are misleading. The fact is that currently, pursuant to the Human Rights Act 1998, all public authorities have an obligation to act compatibly with Convention rights, whether or not the likelihood of violating a particular right falls within their area of competence.

But, more significantly, the Commission's proposal would have imposed an obligation to take "all appropriate measures".[37] It is clear from the language that the obligation reflected the nature of the public authority and, of course, public authorities with no involvement in the reintegration of offenders would not, in practice, have had any obligation to take measures.

5.10 Victims

Government misrepresents the Commission's proposal on victims (8.5). The effect of the Commission's proposal is not to make Article 2 retrospective (as Government suggests); this is a distortion. Rather, the purpose of the Commission's proposal was to fill a particular gap – related to the particular circumstances of Northern Ireland – in the application of the European Convention on

[36] Commission's advice, p40.
[37] Above, p24 and p40.

Human Rights (8.5). It therefore was clear that the proposal applied to effective investigation only of conflict related deaths occurring prior to 2000. The specific recommendation made by the Commission was a directive principle to bring forward legislation separate to the Bill of Rights in relation to victims of the conflict. There is no suggestion in the Commission's advice that this could lead to retrospective application of all ECHR rights and this is an irrational and unfounded suggestion on the part of Government.

5.11 Implementation and enforcement

Chapter 10, in particular, of the NIO consultation paper is very confusing.

Government rejects the Commission's proposal in respect of the relationship between the HRA and any Bill of Rights for Northern Ireland (namely, re-enacting the Convention Rights and Supplementary Rights in new legislation, while maintaining the HRA on the statute book) (10.8). Thus, a consultee may respond by agreeing or disagreeing with Government's rejection of the Commission's advice; but what alternative does Government have in mind? No proposal is even made on this fundamentally important issue.

Even more confusingly, having rejected the option of a unified legislative scheme for Convention Rights and Supplementary Rights, Government then makes criticisms of the Commission's advice which would only apply if the Commission's proposal was actually adopted. In fact, the remainder of the comments assumes that there will be a unified legislative scheme for Convention Rights and Supplementary Rights; but this is nonsensical as Government has rejected the unified scheme (10.8).

For example, on the question of the "reach" of Convention rights, at (10.15), Government states that it believes that "the reach of the Convention rights is unquestionably an area in which a single statutory framework and interpretive regime must apply across the whole of the UK". But this concern would only make sense if unified legislation were adopted; and Government has rejected this.

Similarly, it notes (10.17) that the effect of a "process-based" obligation would be to "create a distinctly separate regime for enforcing Convention rights in Northern Ireland compared with the rest of the UK". Again, this is premised, however, on there being a unified scheme, which Government has already rejected. It is not clear, therefore, on what basis this criticism has been made.

Furthermore, when speaking about an interpretive obligation, Government says that the Commission proposes an interpretation framework for the Bill of Rights drawing both on the Preamble (10.2 and 10.3) and on a wider and more purposive duty placed on the courts (including the obligation to take international human rights law into account). Government agrees in principle with the idea of a Preamble, but has some concerns that the wider duty (covering the common law as well as statutory provisions) could lead to different lines of authority emerging in the interpretation of the Convention rights. Subject to any views expressed during the consultation, it believes that any developments in this area should be consistent with current interpretive conventions relating to human rights.

This comment does not make sense within the framework of Government's own proposal, that it will not re-enact Convention Rights and Supplementary rights together because, if the

Supplementary Rights and the Convention Rights are not in the same legislative framework, how could the interpretive proposal have any impact on the interpretation of Convention Rights at all?

Likewise, the consultation question Government poses on standing is broad (10.19) and refers to “human rights actions against public authorities”, without identifying which human rights (when, again, under its own terms Government has rejected a uniform legislative scheme for Convention Rights and Supplementary Rights).

A similar criticism can be made in the context of remedies (10.25), where Government notes “this is an area in which it is particularly important to have a consistent national approach; and Government would be concerned that establishing different provisions for remedies in Northern Ireland could have unintended consequences across the rest of the UK”.

Again, this is a consequence that could only follow if Supplementary Rights and Convention Rights were enacted in a single legislative scheme, which Government has already rejected.

In short, Government cannot have it both ways: having rejected the Commission’s advice on the relationship between the HRA and the Supplementary Rights, it cannot then criticise the Commission’s other implementation and enforcement proposals using a critique that would only apply if it had, in fact, accepted the Commission’s advice on the relationship between the HRA and the Supplementary Rights. All in all, the reasoning of Government in this Chapter is so confused that the question has to be posed as to whether it even understood the issues.

CONCLUSION

A Bill of Rights for Northern Ireland and the UK process

While the Commission agrees with Government that some recommendations contained in its advice may be equally applicable to the people of England, Scotland and Wales (3.14), it fails to see the significance of this observation. The mandate did not ask the Commission to recommend rights that might be considered relevant to the circumstances of the UK. Rather, it asked the Commission to justify rights supplementary to the ECHR on the basis of the particular circumstances of Northern Ireland. The implication that protections justified in accordance with the mandate should only be capable of having meaningful effect in Northern Ireland and not in other jurisdictions (UK or otherwise) is certainly not in keeping with the Commission's mandate.

The Commission agrees that any rights proposed for inclusion in a Bill of Rights for Northern Ireland must be justified on the basis of the particular circumstances of this jurisdiction, but disagrees that such a basis must be determined by demonstrating that the need for such protections is unique, greater than or different in nature to that in the rest of the UK (3.17). No such requirement was stipulated in the Commission's mandate.

Government has used only one example, that of health provision (3.17), to justify the exclusion of numerous categories of rights, recommended by the Commission for inclusion in a Bill of Rights. Yet, the Commission's recommendations were made having been tested against an agreed methodology clearly laid out in its advice.

That methodology was shared with Government, political parties and civil society prior to the Commission completing its task in 2008. No correspondence was received to suggest that Government considered the methodology to be inappropriate. On the contrary, Government has stated that there is no reason to believe that the Commission had exceeded its mandate.[38]

A Bill of Rights for Northern Ireland has been committed to by Government since 1998. The idea of a UK-wide bill is a relatively recent one, and indeed the motives for it were very different to the Northern Ireland context. Moreover, there was no mention of a Bill of Rights and Responsibilities in the Belfast (Good Friday) Agreement 1998, the Joint Declaration of 2003 or the St Andrews Agreement of 2006. It is therefore extremely problematic from the perspective of an international peace treaty, as well as the resultant public expectation, for Government to be suggesting now that because some of the rights needed in Northern Ireland *might* also be needed elsewhere in the UK that this jurisdiction will have to wait until that happens.

The NIO consultation paper is an insufficient document on which to embark on a discussion about what should be in a Bill of Rights for Northern Ireland. It pays little cognisance of the international human rights bodies, numerous individuals and organisations that have contributed to the Commission's advice. Legislation of such significance in the context of a peace process, and the constitutional position of Northern Ireland within the UK, is deserving of greater consideration and analysis than appears to have been invested in the NIO consultation paper. As a national human rights institution,

[38] Correspondence received by the Commission from the Secretary of State for Northern Ireland, 19 May 2009.

the Commission does not accept this as a genuine effort to increase human rights protections in Northern Ireland.