



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

## **Response to the Draft Public Assemblies, Parades and Protests (Northern Ireland) Bill**

### **Summary**

The Commission made its preliminary response to the Draft Public Assemblies, Parades and Protests (Northern Ireland) Bill in May 2010. In this full response, we repeat our concerns that some proposals in the draft Bill are potentially incompatible with the European Convention on Human Rights (ECHR), which would render the legislation outside the legislative competence of the Northern Ireland Assembly.

Our concerns include:

- the compatibility of the draft Bill with the ECHR and the right to freedom of peaceful assembly and to freedom of association with others (Article 11, ECHR)
- the independence of the proposed new Adjudication Body
- the proposed extension to the time limit for notification to be given of parades and counter-protests, and the effects on other types of public assemblies, and
- the Human Rights Framework for Decision-Making.

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including advising on whether a Northern Ireland Assembly Bill is compatible with human rights.<sup>1</sup> The Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies.
2. The Commission issued a preliminary response to the consultation in May 2010, requesting further information from the Working Group on Parades on the draft Bill. The Commission was pleased to have the opportunity to meet representatives of the Working Group during the course of the consultation, and now has some further detail on the intent behind a number of the proposals.
3. The Commission reiterates its concerns that some proposals in the published draft Bill are potentially incompatible with the European Convention on Human Rights (ECHR), which would render the legislation outside the legislative competence of the Assembly.<sup>2</sup> The Commission would hope that the final Bill will be substantially revised to address such matters.
4. The Commission has a specific remit for legislative scrutiny for human rights compliance, and aims to provide clause by clause scrutiny of the current Bill when published in full. The following response will cover three main areas covered in our preliminary submission; namely, the independence of the new Adjudication Body; the proposed extension of parades notification; and related requirements to other public assemblies and the Human Rights Framework for Decision-Making. The response will first look at other issues relating to the proposals.

## **Consultation and ECHR information requirements**

5. The Draft Bill was published with Explanatory Notes, and a partial section of the Report of the Working Group on Parades.<sup>3</sup> While the Commission has a specific remit and role

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<sup>1</sup> Northern Ireland Act 1998, s.69(4).

<sup>2</sup> As above, s.6(2)(c).

<sup>3</sup> Set up as a result of Section 2 (Parades) of the Agreement at Hillsborough Castle 2010.

to scrutinise legislation, it would be remiss not to mention that the consultation will have been inaccessible to much of the general public. In addition, there are still information gaps regarding the reasons behind some proposals. In particular, the Working Group on Parades is yet to give a formal explanation as to the reason for the proposed extension in the draft Bill of notification and related requirements beyond parades (and counter-protests) to many static assemblies.

6. In common law any consultation process must satisfy what are referred to as the Sedley requirements.<sup>4</sup> This includes giving sufficient reasons to permit the consultee to make a meaningful response; this has been held as a requirement for “candid disclosure of the reasons for what is proposed”.<sup>5</sup> This is particularly relevant to the subject matter of the draft Bill as it concerns rights protected by Article 11 of the ECHR. Therefore, to ensure human rights compliance an evidence base is required to justify that any interference is, in the Convention’s language, “necessary in a democratic society”; namely, how does it meet a pressing social need? How can it be demonstrated that the measure is proportionate to meeting “the interests of national security, public safety, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others”?
7. The Commission welcomes indications from the Working Group on Parades that this particular aspect of the proposals is being reviewed. As detailed later, ECHR jurisprudence indicates such an extension could constitute an interference in Article 11 rights requiring compelling justification in the above terms.

### **Extension of notification periods for parades and counter-protests**

8. The issue of extension to static assemblies is dealt with below. The draft Bill, however, would also extend the notification period for parades from 28 days to 37 days. It would also replace the present requirement for notification of a counter-protest to be lodged 14 days before it is to be held

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<sup>4</sup> R v London Borough of Barnet, ex parte B [1994] ELR 357, 372G.

<sup>5</sup> R (Lloyd) v Dagenham London Borough Council [2001] EWCA Civ 533; (2001) 4 CCLR 196, [13].

(and hence up to 14 days after the original parade notification).<sup>6</sup> Under the draft Bill, this would be amended to a two-stage process whereby a notice of 'concerns or objections' must be given within seven days of the publication of a notice notifying a parade and, then, a separate notice of a counter-protest 22 days before it is to be held.<sup>7</sup>

9. The Commission understands from the Working Group on Parades that this proposal results from the reported desire from Loyal Orders and residents groups to have a longer notification period (for parades and counter-protests only), to allow sufficient time for the processes set out in the Bill to run their course.
10. It is noted that many fraternal order parades are organised on an annual basis or many months in advance and, in these instances, a longer period is unlikely to constitute a hidden obstruction to the realisation of such processions. However, the Commission is conscious that 28 days is already one of the longest notification periods anywhere in Europe, and there should be demonstrable evidence to justify the need for any further extension. Before a decision is taken for the final Bill, the Commission would urge further examination of the evidence base in this regard, including views from affected groups submitted in response to the consultation.
11. As indicated in the draft Code of Conduct, it is strongly encouraged that local dialogue starts as soon as possible when events are planned a considerable time in advance. Some successful mediation or dialogue processes have taken place over a period of months prior to parades which take place annually or another regular basis. These processes have taken place outside of the notification period. Therefore, careful analysis should take place of whether the additional days for notification of parades and counter-protest notification can be demonstrably justified. In addition, analysis should take place of whether other types of processions caught by the new notification period, which do not tend to be organised so far in advance, could be adversely affected.

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<sup>6</sup> The present 28 and 14 day notification periods are provided for under section 6 and 7 of the Public Processions Act 1998, both have a late procedure whereby it is not reasonably practicable to meet the deadline the notification should be submitted as soon as reasonably practicable.

<sup>7</sup> Clauses 13(1) parades, 14(2) (concerns or objections), 15(1) counter protests.

## **Decisions by new adjudication body (PAPPB)**

12. The proposed process usually only allows for a decision by the new Adjudication Body when a notice of concerns or objections has been lodged. It is not clear if evidence other than that on the concerns or objections form, PSNI evidence or evidence gathered through the dialogue and mediation processes can be considered by the Adjudications Body. This would appear to differ from the present broader process of acquiring information and taking evidence undertaken by the Parades Commission, which has also issued determinations where there has been no counter-protest.
13. It is not clear how the Working Group on Parades would expect a parade to be dealt with where there is compelling evidence of, for example, interference with the rights of others but where there is no group with the capacity to gather and submit evidence on a concerns or objections form.
14. It is not clear if there will be a transitional arrangement between the new Adjudication Body and previous evidence gathered by the Parades Commission. This would include compliance issues relating to the Parades Commission's Code of Conduct. If not, this may create a 'year zero' whereby evidence of previous parades or counter-protests which engaged rights of others or disorder issues may not be available to adjudicators.

## Missing sections from the draft Bill

15. The draft Bill is incomplete, with clauses on repeals and presumably interpretation to be added. The Commission understands from the Working Group on Parades that the intention is to repeal the Public Processions Act 1998 in its entirety and to repeal sections of the Public Order (Northern Ireland) Order 1987.<sup>8</sup> An interpretation clause may elaborate on the definition of 'meetings' and 'human rights'. Both of these matters are considered later in this response. The Commission will await the final Bill to provide further commentary on the missing sections from the Bill and clarification on what is to be repealed.

## Independence of Adjudication Body

16. The Commission regards it as of the utmost importance that any proposed adjudication mechanism ensures compliance with any obligations under Article 6 ECHR, which might be equally held to apply to determinations on parades or protests. This involves the requirement for independence and impartiality. Article 6(1) (Right to a Fair Trial) states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

17. Any adjudication body for parades must be independent from undue political intervention. Therefore, the Commission's position is that decisions should be taken by a quasi-judicial body reaching a standard that would meet the standards set by Article 6 of the ECHR, rather than in the political sphere. In *Duffy*, the Lords of Appeal stated that there was a requirement for independence, impartiality and objectivity on the part of the Parades Commission. While pointing out that the Parades Commission was not a court, and not going so far as to indicate the need for full Article 6 compliance in its proceedings, the Lords declared that the tasks it performed were tasks which can only be satisfactorily performed by a body which is accepted as independent, impartial and objective in its approach.<sup>9</sup>

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<sup>8</sup> Section 2 of the Order contains powers in relation to open air public meetings, there are also other related powers including article 20 dealing with 'obstructive sitting etc.' in a public place.

<sup>9</sup> *Duffy (FC) (appellant) (Northern Ireland)* [30 January 2008, UKHL 4].

18. The Commission believes that mechanisms which deliberate on rights protected by the ECHR need to be independent and impartial. The agreed outcomes of the Working Group on Parades are to reflect the key principles outlined in the Agreement at Hillsborough Castle, which included commitment to “independent decision-making”. The draft Bill sets out the constitution of new bodies as follows.

### **Office of Public Assemblies, Parades and Protests (OPAPP) (the Administrative Body)**

19. OPAPP would be established as the secretariat or administrative body and be composed of designated Office of the First and deputy First Minister (OFMdFM) officials. The functions of the OPAPP may be set out in guidance issued by the First and deputy First Minister.
20. The functions of this body are set out as being essentially administrative. If this is the case, it would appear not to encroach on determinations on civil rights. Until the contents of the guidance are published, however, it will be difficult to make a comprehensive assessment in this regard. The status of the administrative body and its relationship with OFMdFM could be clarified in the final Bill. The role of OPAPP in establishing and maintaining a list of mediators and information on the training and experience required from mediators could also be elaborated on.

### **Public Assemblies, Parades and Protests Appointments Panel (the Appointments Panel)**

21. The First and deputy First Ministers are to appoint four persons, representative of the community, to the Appointments Panel for five-year terms. The final proposals should make clear the Commissioner for Public Appointments will regulate these appointments by the Ministers.
22. It is worth noting that non-compliance with the provisions of the Code of Practice on Public Appointments played an important part in assessing the appropriateness of ministerial involvement in appointments to the Parades Commission in the *Duffy* case.<sup>10</sup>

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<sup>10</sup> As above.

## **Public Assemblies, Parades and Protests Body (PAPPB) (the Adjudication Body)**

23. PAPPB is the adjudication and, therefore, decision-making body. Its members are to be selected by the Appointments Panel. It is to be composed of 11 members of equal standing, with no chairperson, including three members with legal expertise.
24. The Commission has received clarification from the Working Group on Parades that the PAPPB will be a non-departmental public body. This should be explicitly set out with the final Bill.
25. The Appointments Panel must appoint the 11 members of the PAPPB having regard to guidance to be issued by the First and deputy First Minister. The final proposals should make clear if the guidance will set out standards and principles similar to the Code of Conduct for Public Appointments. Also to be clarified is if a regulatory regime will be applied to these appointments.<sup>11</sup>
26. In the absence of more detailed information on how the appointments procedures are to be regulated, it is not currently possible for the Commission to assess fully the level of independence from political decision-making.
27. Further consideration should be given as to the right of an independent appeal to conditions placed on a public assembly by PAPPB. Clause 26(11) sets out a right to review an initial PAPPB decision but only on the grounds of a significant change in facts rather than an appeal procedure *per se*.<sup>12</sup>

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<sup>11</sup> While the Commissioner for Public Appointments can only fully regulate, and hence apply the Code of Conduct to, ministerial appointments, there is the potential for other public appointments to be regulated as 'Third Party Organisations'. (See Commissioner for Public Appointments, *Twelfth Report 2006-7*, p11).

<sup>12</sup> Section 9 of the Public Processions Act 1998 does provide for a review of a Parades Commission determination by the Secretary of State for Northern Ireland on application of the Chief Constable. However this is a decision taken in the political domain and not by an independent body.

## **Proposed extension of parades notification and related procedures to other public assemblies**

28. Different forms of public assembly can and should be treated differently when there is a reasonable and objective justification for doing so. A 'one-size fits all' approach runs the risk of undue interference in the exercise of freedom of assembly the approach was not designed around.
29. The draft Bill would extend for the first time the parades notification requirements, parades 'no change' requirements and parades Code of Conduct requirements for all outdoor public meetings of more than 50 persons in a public place. This would bring a wide range of social, cultural and protest activity within the auspices of what is effectively a tight licensing regime clearly designed with the nuances of Loyal Order, Republican and other contested parades in mind.
30. No case has been made to justify the necessity of such a measure or reason formally given as to why this extension is being sought. The Commission sees no justification for this extension of requirements which it is concerned will constitute a hidden interference in the right to freedom of assembly.
31. The Commission understands that the Working Group on Parades is revisiting this issue, which is welcome. The Commission would urge that the extension of the above requirements beyond parades and counter-protests to other static assemblies ('public meetings') is removed from the Bill. The following section examines the implications, including in relation to compliance with the European Convention, if the extension is retained.

### **Definition and threshold of 50**

32. Clause 7 of the draft Bill proposes bringing into the 37-day notification, 'no change' and Code of Conduct requirements for all "public meetings" of over 50 people or more, which are held in a public place and the public, or a section of the public is invited to.<sup>13</sup> A public place is defined as a road, footway or any other place, outside of a building, to which the public, or a section of the public has access (whether paying or not, and whether or not explicitly or implicitly invited). The term

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<sup>13</sup> With the exception of counter-protests to parades which, like in the present legislation, are dealt with separately (as 'protest meetings').

“meeting” is not defined in the draft Bill, but is defined in the Public Order (Northern Ireland) Order 1987 as:

...a meeting held for the purpose of the discussion of matters of public interest or for the purpose of the expression of views on such matters.

33. Presuming this is the definition that the draft Bill intended to apply, there has been significant public discourse as to the extent of events this would capture. The definition would capture static political protests, and clearly the Working Group on Parades intended it to do so, having listed “a protest against the closure of a local sports facility” as an example to which the definition would apply.<sup>14</sup>
34. A member of the Working Group on Parades has also indicated that the definition is intended to apply to open-air church services. Arguing that there were unlikely to be open-air gospel meetings of more than 50 people, elaboration was given that “we were very careful to set the figure at 50, knowing this would accommodate the gospel meetings that are held across Northern Ireland week by week, especially over the summer”. It was further stated that the figure had been increased to 50 to exempt most other open-air church services.<sup>15</sup> To date, this is the only public indication the Commission is aware of as to why the Working Group on Parades set the figure at 50.<sup>16</sup>
35. There are a number of issues with this. First, there would appear to be no general objective and reasonable justification for having set the figure at 50. If the figure was set with one particular category of meetings in mind, then there would be questions as to the objective and reasonable justification for having done so. Second, we are aware, from representations from church groups, that a substantial number of open-air church services exceed the 50-person threshold, and would be caught by the Bill. The Commission sees no justification for open-air church services of 50 people or more being brought within the parades regulation framework.

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<sup>14</sup> Explanatory notes, Clause 8.

<sup>15</sup> Nelson McCausland MLA quoted in McBride, Sam ‘Row flares over church meetings’ *Newsletter* 29 April 2010.

<sup>16</sup> There is a power for the First and deputy First Ministers, by order, to amend the number, including power to *lower* the figure.

36. The current arrangements under the Public Processions (Northern Ireland) Act 1998, as amended, cover “processions”, including parades, and related counter-protests but not other static assemblies. It is worth noting that there has never been a notification requirement for other ‘public meetings’ in Northern Ireland, nor does such a requirement exist in the rest of the UK or Ireland.<sup>17</sup>

## Implications of extension

37. In the worst instance, the Commission would be concerned that the proposals could deter the exercise of freedom of assembly and could lead to the criminalisation of a large number of persons who organise or participate in social, commercial or campaigning activities.
38. There are existing powers, vested in a senior PSNI officer, to impose conditions on open-air public meetings under the Public Order (Northern Ireland) Order 1987. These conditions relate to the place the meeting may be held, its maximum duration and maximum number of participants.<sup>18</sup> Under the draft Bill, powers for restrictions on public meetings would be vested in the new Adjudication Body (PAPPB) and provide for a broader set of conditions.<sup>19</sup>
39. The introduction of notification and related requirements is entirely new and would mean public meetings face:
- a notification requirement, usually of 37 days;
  - a “no change” requirement, insofar as no material change to the notified assembly is permitted;
  - a requirement to abide by the Code of Conduct developed for parades.

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<sup>17</sup> The exception to this is the current requirement, under the Serious Organised Crime and Police Act 2005, for demonstrations in the vicinity of the Westminster Parliament to provide six days notice where reasonably practicable, or as soon as possible afterwards where not reasonably practicable, and in any case within 24 hours of the time of the demonstration.

<sup>18</sup> Article 4: Conditions can only be set if it is reasonably believed that the meeting may result in serious public disorder, serious damage to property, serious disruption to the life of the community or for the purpose of intimidating others.

<sup>19</sup> Referred to as requirements and set out in clause 26(4) of the draft Bill. These powers are dealt with later in this submission.

40. The 'no change' requirement is set out in clause 37 which makes it an offence for the public meeting to differ in any material respect from the details specified in the notification.
41. Like other offences in the draft Bill,<sup>20</sup> if this is the case organisers and participants can be subject to arrest, prosecution and imprisonment of up to six months and/or a £5000 fine.<sup>21</sup>
42. The explanatory notes state that this should not prevent prosecutors using "discretion if for some unforeseen reason a reasonable adjustment is made". The Commission does not regard 'discretion' by the prosecution service as sufficient safeguard to prevent arbitrary exercise of such a power.
43. All persons organising and participating in a public meeting will also be required to abide by the new Code of Conduct designed around parades. Under the present draft, there is a range of detailed duties to include, for example, for organisers to provide at least one appropriately trained steward for every 50 participants. If a meeting does not abide by the Code of Conduct, then this is a matter taken into account when the new Adjudication Body (PAPPB) makes decisions on future public meetings, and therefore could be used to justify a legally binding requirement on a subsequent meeting which it would be an offence to breach.
44. In relation to notification requirements if no notification is received, then the public meeting will be unlawful and those organising and participating will be guilty of an offence. Unlike material changes, there is no expectation set out in this instance for police and prosecutors to use discretion in this instance. The Commission is concerned that it would constitute disproportionate interference in the right to freedom of assembly to suffer arrest and prosecution for not abiding by an administrative requirement in the context where there is no justification for the requirement and there is no evidence of other matters which would permit conditions under Article 11(2). Equally, if 'discretion' is applied and some groups are selectively prosecuted for non-notification

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<sup>20</sup> Other offences set out in clause 37 are organising or participating in a public meeting for which no notification was given under the Bill or has been subject to a prohibition order.

<sup>21</sup> A defence is provided if a person did not know, or could not reasonably have been expected to know of the difference. A defence is also provided beyond control or as a result of processes or directions from the Adjudication Body or police.

but not others, this could require objective and reasonable justification to avoid being discriminatory.

45. Provision is made within the draft Bill for late notification of public meetings under clause 33. However, the consequences of late notification are not presently clear and may not meet the requirement of legal certainty. Permission for late notification is dependent largely on it being “reasonable in light of unforeseen circumstances”. In this instance, the notification will be accepted as if it had been received on time.
46. When late notification is accepted “as if it was on time”, the Adjudication Body (PAPPB) can still decide to place conditions on the meeting and disapply or apply with modifications the dialogue and mediation processes. Less clear, is what happens if a late notification is received and is not considered “reasonable in the light of unforeseen circumstances”. In this instance, the matter is referred to the Adjudication Body (PAPPB). It is not clear, however, how this matter is to influence the decision of the Adjudication Body (PAPPB), and whether there is an expectation that conditions should be imposed as a sanction for late notification.
47. This process also applies when late notification is given within three days of a meeting for which an “emergency procedure” under clause 36 applies. In this instance, notification is to be handed into the nearest PSNI station. The explanatory notes indicate this is “only intended for extreme emergency situations”. Again, it is not clear what the consequences are if the Adjudication Body (PAPPB) does not regard the event as an extreme emergency. The explanatory notes go on to give an example of “some unforeseen event”, a concept which may or may not match the definition of an extreme emergency. Either way, there is little legal certainty as to when this process is permitted and what its consequences are. Both sets of late notification provisions in the draft Bill are more complex than the existing notification arrangements for parades, which provide for late notification when it has not been reasonably practicable to notify on time.<sup>22</sup>
48. Should the consequences of late notification be significant, sanctions may constitute an undue interference in the right to freedom of assembly. Should there be no consequences for late notification, there is the risk of the deadline being ignored, including for contended parades where a case for the

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<sup>22</sup> Section 6, Public Processions Act 1998.

necessity of such requirement has been made. Should the sanctions for late notification be applied arbitrarily, this could be held as discriminatory. In all cases, the extension of notification requirements to public meetings is potentially problematic.

49. It is notable that the present proposals from the Working Group on Parades are further to section 2 of the Hillsborough Agreement on parades, and the Working Group on Parades is comprised of members “with experience of dealing with parading issues”. The proposals produced, down to the details of the Code of Conduct, are clearly aimed at the nuances of parades, and draw on evidence of issues associated with parades (and counter-protests where there are competing Article 11 rights). Similar observations could be made of the Independent Review of Parades and Marches (North Report) and the Strategic Review of Parading.
50. A lengthy notification duty may be both necessary (to facilitate the various stages envisaged in the process) and, while time consuming, generally unproblematic to organisers of large parades, given that parades tend to take place on fixed annual dates or are organised considerably in advance by formally constituted organisations. However, for a number of other forms of assembly such notice periods are problematic.
51. For example, more than 50 people may actually attend an event when a lower number had been anticipated. In such cases, the unexpected success of the event could create a liability for the organisers and participants. While it may be argued that the intention is for organisers to notify public meetings where they reasonably expect 50 people to attend, this is not explicitly provided for in the draft Bill.
52. Another difficulty relates to assemblies of a more or less spontaneous nature, which may have a perfectly legitimate purpose. These could include a demonstration for the purpose of displaying public reaction in the aftermath of a recent event such as a racist attack or an international human rights atrocity, where the immediacy of events may lead to a public assembly being organised in just days or hours; or workers gathering outside their workplace in the immediate aftermath of news of redundancies. In this instance, it may not be reasonably practical to obtain, fill in and submit a form at a PSNI station.

53. If organisers and participants are not to be deterred from proceeding in these instances, it may be more straightforward to argue, if prosecuted, that these were 'unforeseen circumstances'. However, in the case of other events which have simply not been planned 37 days in advance, it would be difficult to argue that the circumstance was 'unforeseen'. Therefore, participants would have to choose between cancelling the event or becoming liable to arrest and prosecution. A 37-day notification requirement would therefore be introduced for events, many of which by their nature have tended not to be organised so far in advance: in effect, a regression in terms of the enjoyment of freedom of assembly.
54. Small, unconstituted organisations that do not have office bearers or a formal structure, as is the case with many small campaigning groups, may have to rely on individuals to submit notifications. In this instance, an individual can hand in the notification, effectively on behalf of the group, and therefore become responsible for the assembly. However, the liabilities for individuals doing this may deter either the assembly, or the provision of the notification, given that the notification will itself identify the individual responsible.
55. In the case of some spontaneous protests, in particular, there may not be one group or even individual who is effectively the 'organiser' of the protest, and therefore no one to provide notification.
56. It is likely that political protests, in particular, will routinely change their time, message, purpose, number of participants and other material factors in light of emerging events. This is likely to take place in the 37 days after the notification deadline and therefore constitute a material difference in the notification (and therefore an offence).
57. The range of assemblies which would be covered would lead to a large number of notifications. It is an unknown quantity as to how many public meetings are organised in Northern Ireland and the additional resources that the new mechanisms will require. This provides its own risks, not just of overwhelming numbers of notifications (giving rise to a risk that parades and counter-protests with significant Article 11(2) issues may receive insufficient attention).

58. It is also worth pointing out that there are other regulatory regimes already in place for a number of the types of public assemblies that will be captured by the Bill. For example, requirements for entertainments licences.

## **Reasons and justification for proposed extension**

59. Regardless of the intention behind the extension of the above requirements beyond parades and their counter-protests to public meetings, new wide, discretionary powers could in future be used to interfere unduly with the rights to freedom of assembly of a broad range of groups.
60. No reason has been formally given for the proposed extension of parade notification requirements to other public meetings. The Commission regards the most likely reason as the idea that all public assemblies should be treated the same<sup>23</sup>, and that the present situation whereby parades (and counter-protests) are regulated, constitutes unfair treatment to the Loyal Orders which presently organise the majority of parades. This is not the case when there are demonstrable objective and reasonable rationales for differential treatment, engaging the proportionality principle applicable to any restriction of ECHR rights.
61. Such a rationale has been put forward in the past as justification for extending the parades adjudication mechanism to other public assemblies. This was based on the assertion, erroneous in human rights law, that it is 'discriminatory' not to treat all assemblies in the same way. There was recognition that the current law regulates Loyal Order, Hibernian and a wide range of other Nationalist, Loyalist and other parades and counter-protests. However, it was argued that, as Loyal Orders currently organise *more* parades, the Parades Commission therefore have to make *more* decisions and spend *more* time on these parades than others. The conclusion was then drawn that this constitutes 'discrimination'. It has then been suggested that, because other types of social and campaigning events are likely to be organised in more equal numbers by Protestants and Catholics, bringing them under the same decision-making mechanism would somehow balance out the numbers and mitigate the 'discrimination'. This rationale is flawed and is a misconception of discrimination.

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<sup>23</sup> Albeit that the proposals do concede differential treatment is needed by providing for the threshold of 50 for a public meeting.

62. The present Parades Commission regime was designed with the evidence of issues associated with parades and counter-protests in mind. This relates to the high threshold of interference necessary for matters protected by Article 11. Serious problems arise if the same criteria are then applied to other forms of public assembly, where none of the evidence of issues which the mechanism has been designed to address, has been presented. Bringing such assemblies within a tight licensing regime designed around the nuances in regulating parades (and counter-protests) would have serious implications, and may be incompatible with the ECHR.
63. The Interim Report of the 2008 Strategic Review on Parading proposed a dramatic extension of the parades adjudication mechanism to all public assemblies of over 15 people, potentially anywhere. The Commission voiced serious concerns and contended that this would be unnecessary and would disproportionately interfere with rights under Article 11 ECHR. The Strategic Review subsequently indicated, when meeting the Commission, that it would consider a revised proposal of extending the mechanism to static assemblies of more than 50 people in an outdoor public place. The Commission pointed out that this still constituted a significant extension of the present regime and that no clear justification was apparent.
64. The Commission has consistently asserted that persons exercising ECHR Article 11(1)<sup>24</sup> rights should be subject to no more onerous procedures than are demonstrably necessary to satisfy the interests referred to in Article 11(2).<sup>25</sup> Proportionality is an essential consideration in determining the propriety of any restriction on the exercise of a Convention right. This implies that there should be a presumption that any form of assembly, including a public procession, should be permitted and facilitated to proceed without restrictions, unless there is a compelling case under 11(2) to impose such restrictions as are strictly justified.

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<sup>24</sup> ECHR Article 11(1): "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests."

<sup>25</sup> ECHR Article 11(2): "No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

65. Implicit in this is the need *not* to treat different forms of public assembly that have entirely different Article 11(2) contexts in the same way. It is questionable whether the same amount of detail, notice and conduct requirements ought to be required of applicants in relation to other public assemblies, as is required in relation to those parades or related protests where there is evidence indicating Article 11(2) issues, such as potential interference with the rights and freedoms of others or the likelihood of disorder. While parades in general may present a higher risk of (for example) disorder, the Commission has argued that it is not necessary for *all* categories of parades to be subject to the same mechanisms and requirements.
66. The mechanism should ensure the minimum necessary level of state intervention. The primary duty of the state is to ensure that everyone enjoys the substantive right to the fullest extent possible, and real 'freedom' of assembly in the absence of any indication that the rights of others are likely to be prejudiced. The jurisprudence of the ECHR will now be further considered to this end.

## Requirements of the European Convention

### Notification requirements

67. In general, notification requirements for public assemblies have normally been accepted under the European Convention on Human Rights and most Council of Europe member states have a notification requirement. However, the Convention is a living instrument and the recent case law of the European Court of Human Rights has increasingly circumscribed such requirements. Proportionality remains a key consideration and we are not aware of any member state which has a notification period for static assemblies approaching 37 days. In the European Court of Human Rights, cases cited below the notification periods examined in Turkey and Hungary concerned 72 hours and, in Russia, 10 days.
68. Convention case law has generally held that a notification procedure does not usually encroach and hence interfere with the right of freedom of assembly, provided its purpose is for the authorities to ensure the peaceful nature of the meeting.<sup>26</sup> However, this has been qualified that such requirements are

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<sup>26</sup> *Rassemblement Jurassien Unité v Switzerland* (app. no. 8191/78) Commission decision of 10 October 1979.

only acceptable if they do not 'represent a hidden obstacle to the freedom of peaceful assembly protected by the Convention'.<sup>27</sup> The Court has also recently stated that a notification procedure 'does not *normally*' encroach upon the right but qualifies this as long as the genuine purpose is for authorities to take 'reasonable and appropriate measures' to secure the smooth conduct of the assembly.<sup>28</sup> In the same case, the Court reminded parties to the Convention that:

States must not only safeguard the right to assemble peacefully but also refrain from applying unreasonable indirect restrictions upon that right. In view of the essential nature of freedom of assembly and its close relationship with democracy there must be convincing and compelling reasons to justify an interference with this right.<sup>29</sup>

69. In relation to the proportionality of notice requirements the necessity of length of a notification period has been scrutinised. In the above judgment against Russia, the necessity of the length of the notice period, which at 10 days is at the longer end of the scale in the European context, was tested by a picket in front of a court which had only given eight days notice. In this instance, the Court observed that the two extra days served no useful purpose for the Russian authorities, and were not needed in order for them to prepare for the picket. In these circumstances, the Court considered that:

...a merely formal breach of the notification time-limit was neither relevant nor a sufficient reason for imposing administrative liability...<sup>30</sup>

70. The Court has also examined penalties for administrative irregularities (i.e. protests which were domestically unlawful) and stated that they must be proportionate. A violation was found in Turkey when police moved in and arrested demonstrators who had taken part in demonstration which was unlawful by virtue of not having given 72 hours notice. This was taken to be a disproportionate response in the absence of any other reason for taking such a course of action noting that the demonstration had not represented a real danger to public order. The Court stated that an unlawful

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<sup>27</sup> *Eva Molnár v Hungary* (app. no. 10346/05) judgement of 7 October 2008, paragraph 37.

<sup>28</sup> *Sergey Kutznetsov v Russia* (app. No 10877/04) judgement of 23 October 2008, paragraph 42.

<sup>29</sup> As above, paragraph 39.

<sup>30</sup> As above, paragraph 43.

situation does not itself justify an infringement of freedom of assembly and that, “where demonstrators do not engage in acts of violence it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance”. The Court found that the forceful intervention of the police in making arrests had been disproportionate and “not necessary for the prevention of disorder within the meaning of the second paragraph of Article 11 of the Convention”.<sup>31</sup>

71. The Court has also found that domestic irregularity of a spontaneous protest should not breach the right of freedom of assembly stating:

...in special circumstances when an immediate response, in the form of a demonstration, to a political event might be justified, a decision to disband the ensuing peaceful assembly solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction on freedom of peaceful assembly.<sup>32</sup>

72. In this instance, as the Court noted, a 72-hour notification requirement had left the applicants with a choice of not having the protest or doing so ‘in defiance of administrative requirements.’<sup>33</sup>
73. There are therefore a number of Convention compatibility issues with the draft Bill which can be drawn upon from the above jurisprudence; in particular, the matter of proportionality of the proposed notification period and sanctions, both in general and in special circumstances, when notification is not possible. In addition, it is important to consider if the new discretionary powers in relation to public meetings are “in accordance with the law” in Convention terms.

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<sup>31</sup> Ota Ataman v. Turkey (App. no. 74552/01) judgment of 5 December 2006 paragraphs 9, 39, 42-43.

<sup>32</sup> *Bukta and Others v Hungary* (App. No 25691/04) judgement of 17 July 2007, paragraph 36.

<sup>33</sup> As above.

## **The proposals must comply with the ‘rule of law’**

74. The Commission regards it as unwise to dismiss concerns that wide discretionary powers could be used arbitrarily by asserting that, if the authorities always take a commonsense approach, no issues will arise. Wherever wide discretionary powers exist, there is the potential for them to be exercised in an arbitrary, unaccountable and discriminatory manner, beyond the purpose for which they may have been originally intended.
75. Clause 37 of the draft Bill contains criminal offences for organising or participating in an assembly for which notice had not given, or that turns out to be different to that which was notified. If the difference is not materially relevant it is disregarded. In addition to this, the explanatory notes state that the offence should not prevent prosecuting authorities “using discretion if for some unforeseen reason a reasonable adjustment is made”. It is not clear whether the Working Group would also foresee discretion being used by prosecutors when no notification is received, or if similar discretion is expected from the PSNI in exercising their associated powers of arrest.
76. Arguments that ‘discretion and common sense’ alone will prevent abuse of power fall short of legally required human rights standards. Restrictions under Article 11(2) must be “in accordance with the law”. This does not just mean as stated in a law, but being compatible with the concept of the rule of law in a democratic society, in which state agents should not be given excessive discretionary powers. The European Court of Human Rights has recently stated:

The Court recalls its well established case-law that the words “in accordance with the law” require the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct.

For domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal

discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.<sup>34</sup>

## Scheduling out power

77. In addition to exempting funeral processions, clause 5(2) of the draft Bill contains a scheduling out power whereby the First and deputy First Ministers, acting jointly and subject to the 'negative resolution' procedure in the Northern Ireland Assembly, can issue an order to exclude particular meetings or processions entirely from the remit of the Bill.
78. This is similar to the power in the present parades legislation to exclude particular parades from the remit of the Parades Commission. Currently, such an Order exists to exempt Salvation Army parades.<sup>35</sup> The Commission in the past has suggested this power, which is solely vested in the Secretary of State for Northern Ireland, could be vested in the independent body and could explicitly apply Article 11(2) criteria in its decisions on which classes of organisation or procession it schedules out, or to which it applies a lesser regime.
79. The Commission understands that one option under consideration may be more extensive use of this power, to schedule out a broad range of types of public meeting from the auspices of the Bill and to lessen the impact of the extension of notification and associated requirements to public meetings. The Commission sees a number of risks in this approach. First, there must be objective and reasonable justification for differential approaches to different organisations or classes of event. Currently, no criteria are set out for decisions to this end. One of the most strongly protected forms of protected freedom of expression is political expression which is linked to the right to protest. Second, decisions under this power are made in the political rather than quasi-judicial domain and could be reversed in future without requiring primary legislation.

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<sup>34</sup> *Gillan and Quinton v the UK* (App. no. 4158/05) 2010, paragraphs 76-77.

<sup>35</sup> Under the Public Processions (Northern Ireland) Act 1998 (Notice of Processions) (Exceptions) Order 1998.

80. Rather than taking this approach, the Commission would seek the removal of public meetings in their entirety from the notification and associated procedures in the Bill. The final proposals should also clarify, in this instance, whether there would still be an intention to repeal or amend the powers currently held by the PSNI in the Public Order (Northern Ireland) Order 1987, to impose conditions on public meetings, by transferring them to the new Adjudication Body (PAPPB) and/or by more tightly circumscribing them.

## **Human Rights Framework for Decision-Making**

81. The draft Bill sets out that a decision to impose conditions on a public assembly by the Adjudication Body (PAPPB) must have regard to “human rights” as well as relevant previous failures to comply with the code of conduct (clause 26(7)). Concerns or objections in relation to a public assembly must be lodged on the same grounds.
82. The Commission has consistently drawn attention to the importance of Article 11 ECHR, freedom of assembly, in relation to making decisions regarding public processions. Decisions made by the Adjudications Body in being subject to judicial review are, in any event, bound to apply the provisions of Article 11 by virtue of the Human Rights Act 1998; therefore, decision-making requires human rights compliance.
83. Article 11(1) states that, ‘Everyone has the right to freedom of peaceful assembly.’ The limiting clause (Article 11(2)) qualifies this as follows:
- No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others...
84. The Commission’s position has been that there should be a presumption that any form of assembly, including a public procession, should proceed without restrictions, unless there is a compelling case engaging the matters set out in 11(2). Thus no restrictions should be placed on the right to assembly for reasons other than those defined in Article 11(2) and such restrictions, and sanctions, must be strictly proportionate.

85. Article 11(2), in qualifying the right to peaceful assembly, references the rights and freedoms of others, and therefore encompasses all other relevant Articles of the ECHR. The express reference to “the rights and freedoms of others” makes it clear that limitations may, and in certain circumstances should, be placed on the exercise of the right to peaceful assembly in order to protect the rights of others affected by an assembly, whether such rights are engaged by the assembly per se, or by measures taken to preserve public order in the context of the assembly. Consideration of the rights of others can include recognised rights outside the ECHR where there are ‘indisputable imperatives’ to do so.<sup>36</sup>
86. The Commission welcomed the placing of human rights at the heart of the framework for decision-making on parades in the Interim Report of the Strategic Review of Parading. The Strategic Review set out a detailed human rights framework and found an “indisputable imperative” for the incorporation of the Belfast (Good Friday) Agreement provision of “freedom from sectarian harassment” as a “right of others”.
87. The Commission concurred with the need for a detailed human rights framework for decision-making based around Article 11, and stressed the need for further elaboration. In our December 2008 advice to government on a Bill of Rights for Northern Ireland, the Commission advocated the inclusion in such a Bill of a right to freedom from sectarian (and other forms of) harassment.<sup>37</sup>
88. In addition to recognising that there can be competing rights, the Agreement at Hillsborough Castle also set out the right for everyone to be free from sectarian harassment as one of the “key principles” to guide the agreed outcomes of the Working Group on Parades, and hence the proposals in the draft Bill.

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<sup>36</sup> *Chassagnou and Others v France* (app. nos. 25088/94, 28331/95 & 28443/95) judgement of 29 April 1999.

<sup>37</sup> The inclusion of freedom from sectarian harassment in any Bill of Rights for Northern Ireland had been recommended by the Strategic Review.

## **Adjudication decisions: which human rights are to be applied?**

89. The draft Bill provides that a PAPPB adjudication decision “must have regard to human rights”, and to any previous failures to comply with the Code of Conduct.<sup>38</sup> This may not be a strong enough wording to ensure that decisions can only be made compatibly and in accordance with human rights standards. Notices of concern or objection must also be based on one or both of these factors and the Adjudication Body (PAPPB) can dismiss the notice if they are not.
90. While the Commission welcomes the explicit inclusion of human rights as the main decision making ground, no interpretation of ‘human rights’ is set out on the face of the Bill. To set out the human rights framework, the Bill could specify Article 11 ECHR and make it explicit that, in particular, “rights of others” is to be read as including other ECHR rights and the right to freedom from sectarian (and other discriminatory) harassment. This could be set out in the sections of the Bill where ‘human rights’ is specified or in an interpretation clause. A further clause could then bind the Adjudication Body (PAPPB) to interpret ECHR rights in accordance with jurisprudence (similar to that in section 2 of the Human Rights Act 1998). The Commission hopes this will be further elaborated on in the final Bill.
91. In addition to interpretation being clarified on the face of the Bill, the legislation could also provide that detailed guidance on the human rights framework for decision-making, covering the above matters, is to be provided to or produced by the Adjudication Body (PAPPB). A detailed, regularly updated framework is important to ensure legal certainty in decision-making, given the discretion (‘margin of appreciation’) that states have generally been granted when taking decisions regarding limitations to the right to freedom of assembly under Article 11.
92. The draft Bill provides that OFMdFM may make rules about the proceedings of Adjudication Body (PAPPB) and a number of matters these rules must cover are listed in Clause 22(2) of the draft Bill. The Commission recommends that a duty is placed on the Adjudication Body (PAPPB) to produce and use detailed guidance on the above human rights framework

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<sup>38</sup> In decision-making PAPPB can also take into account whether either party refused to take part in dialogue although it is directed that this is not to be a ‘determining factor’ in its decision nor can it be the sole basis of the decision.

which is regularly updated in light of ECHR jurisprudence and developments in other relevant international human rights instruments.

## **Prohibition Orders**

93. Current parades and public order legislation provide for prohibition orders to ban parades and public meetings respectively. These powers allow the Secretary of State for Northern Ireland to ban an individual event or to ban all or some assemblies in a particular area for up to 28 days. In the case of public meetings, the powers can be delegated to a senior police officer. Organising or taking part in a banned parade or meeting is an offence which can lead to up to six months in prison or a £5,000 fine. The ban can be imposed in light of factors including likely serious public disorder, serious disruption to the life of the community and undue demands on the police.<sup>39</sup>
94. Clauses 27-29 of the draft Bill include a power for the Department of Justice, with the consent of the First and deputy First Ministers, to issue a Prohibition Order banning a particular assembly and a power to ban all or some assemblies in a specified area for up to 28 days. In addition to being satisfied that it is 'necessary in the public interest', various matters to which the Department must have regard when considering whether to make a Prohibition Order are set out in the draft Bill. These are the likelihood of serious – disorder, damage to property, disruption to community life, along with the advice of the PSNI and the principle that prohibition orders are to be measures of last resort. Wherever practicable, the Adjudication Body (PAPPB) and PSNI must be consulted before an order is made.
95. When compared to the present powers the provisions in the draft Bill have further safeguards including requiring the 'triple lock' consent of Ministers and the introduction of a principle of last resort. However, the Commission would urge that any such power is tightly drafted, and in particular the reasons it can be invoked are in explicit concordance with the disorder and rights of others provisions in Article 11(2), when a lesser restriction cannot be reasonably imposed.

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<sup>39</sup> Section 11 Public Processions Act 1998 and Article 5 Public Order (Northern Ireland) Order 1987.

## Sectarian harassment: interpretation

96. Despite it being an agreed key principle of the new framework in the Hillsborough Agreement, there is no reference to freedom from sectarian harassment in the decision-making framework in the draft Bill, except insofar as reference is prescribed, among other matters, to be included in the Code of Conduct. The draft Bill states that the Code must:

...be designed to be designed to ensure that all parties take measures to prevent the sectarian harassment (meaning harassment on the grounds of religious belief or political opinion), or other harassment, of any person in the vicinity of a public assembly (whether or not the person is participating in the assembly)...

97. Clause 29 of the draft Bill also introduces an offence of disruption for anyone preventing or disrupting a public assembly or to 'harass' persons on a lawful public assembly. This is elaborated on as including behaving offensively or abusively or hindering, molesting, annoying or obstructing persons on a lawful public assembly or being disorderly towards them.

98. No further interpretation is provided in the Bill of harassment in relation to either the code of conduct or disruption. Both definitions as they are presently framed therefore move beyond harassment on discrimination grounds to more general harassment. Once an interpretation clause is added, the term may fall to be interpreted in accordance with the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO, as amended).<sup>40</sup> 'Other harassment' could allude to similar definitions in other anti-discrimination legislation or alternatively a different definition in 'a course of conduct amounting to harassment' provided for by the Protection from Harassment (Northern Ireland) Order 1997. It is important that any definition of harassment adopted draws on human rights standards, is proportionate to the context of Assemblies and, in particular, is compatible with protected freedom of expression.

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<sup>40</sup> Largely relating to employment, FETO defines harassment as unwanted conduct reasonably considered in the circumstances to violate dignity or create an intimidating, hostile, degrading, humiliating or offensive environment.

## Protected freedom of expression

99. There is a complex interface between protected freedom of expression and protection against advocacy of discrimination, hatred or harassment. A human rights framework in the Bill could provide some clear direction grounded in jurisprudence on the boundaries between protected expression and legitimate restrictions on racist (including sectarian) expression.
100. The Commission sees this matter as of key importance to the 'rights of others' context of public processions, and a key determinant in distinguishing between protected manifestations of peaceful assembly and the permissible restrictions in Article 11(2) contexts.
101. The Commission has consistently pointed out that there is no 'right to be offended' and, therefore, no human right to object to public assemblies simply on the grounds that they cause offence or annoyance. This is distinct from advocacy of hatred or discrimination perpetrated through motivations or manifestations of sectarianism and other forms of racism, etc. Such advocacy, therefore, could be regarded as a key determinant of interference in the rights of others in reference to Article 11(2) ECHR, in the context of evidence used to inform adjudication decisions. Key contextual indicators that can be determined from jurisprudence (in addition to past manifestations of sectarianism related to parades or counter-protests) are the nature of the organising body, the intention of the event and the likely impact of the sectarian expression.
102. The present consultation specifically asks for opinions on restrictions in defined "sensitive locations" on "flags of historical significance" perceived as sensitive by one section of the community or another. Views are sought on the extent to which, and in what circumstances, the Adjudication Body (PAPPB) should have discretion to impose restrictions. Again, this is a situation whereby human rights law can assist, both by providing guidance as to the boundaries between protected expression and legitimate restriction, and assisting in demarcating the limitations on discretion. It is not clear if such a detailed examination has taken place.

## **Statutory Code of Conduct**

103. In addition to human rights, determinations can take account of any relevant previous failures to comply with a statutory Code of Conduct. The draft Bill provides that the Code will be enforceable through the imposition of binding conditions on public assemblies, in addition to past failures to abide by the Code of Conduct itself being a factor in decisions on assemblies.
104. The Commission does not oppose standards that are aimed at ensuring compliance with matters set out in the limitation clause of Article 11(2) provided that all such measures must be necessary and proportionate to achieving this aim in the specific context of the assembly that is under deliberation. The First and deputy First Minister have published, and are consulting on, the statutory Code of Conduct separately and the Commission will examine its provisions in due course.

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**Northern Ireland Human Rights Commission  
Temple Court, 39 North Street  
Belfast BT1 1NA  
Telephone: (028) 9024 3987  
Textphone: (028) 9024 9066  
Fax: (028) 9024 7844  
Email: [information@nihrc.org](mailto:information@nihrc.org)  
Website: [www.nihrc.org](http://www.nihrc.org)**