



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

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

### **Preliminary Response of the Northern Ireland Human Rights Commission**

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 requests further information from the Working Group on Parades on the draft Bill, and would appreciate an opportunity to meet. The Commission is concerned that some proposals are potentially incompatible with the European Convention on Human Rights, which would render the legislation outside the legislative competence of the Assembly.<sup>2</sup>
3. The Draft Bill is published with Explanatory Notes, and a partial section of the Report of the Working Group on Parades.<sup>3</sup> The draft Bill is incomplete, with clauses on repeals and presumably interpretation to be added. Further

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

<sup>2</sup> *Ibid.* s.6(2)(c).

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

information is required for the Commission to assess fully its human rights implications.

4. This submission focuses on three main areas, namely:

- Proposed extension of parades notification and adjudication to other public assemblies
- Independence of the Adjudication Body
- Human Rights Framework for Decision-Making

5. Before elaborating on each of these areas, the following summarises a number of the initial questions that the Commission requests be addressed:

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

*The draft Bill proposes the extension of notification requirements, the adjudication body's remit and other associated procedures beyond parades (and counter protests) to a large range of other static assemblies. What is the Working Group's reason for proposing this extension?*

*What is the Working Group's evidence base that demonstrates that such an extension 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 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"?<sup>4</sup>*

*The extension will be to all public meetings of 50 persons or more in a public place. How was this figure arrived at? Does the Working Group regard application to fewer than 50 persons as disproportionate?*

*Is the term "meetings" to be interpreted as set out in the Public Order (Northern Ireland) Order 1987?*

*The draft Bill contains criminal offences for persons organising or participating in an assembly that had not given notice; or an assembly that is materially different*

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<sup>4</sup> In accordance with Article 11(2) ECHR such an evidence base will be necessary to ensure the legislation is lawful.

*to its original notification. The explanatory notes state that this should not prevent prosecutors using “discretion if for some unforeseen reason a reasonable adjustment is made”:*

- *Does the Working Group also foresee similar discretion by prosecutors being exercised when no notification is received?<sup>5</sup>*
- *Does the Working Group believe that such discretion is a sufficient safeguard against arbitrary exercise of the powers?*

### **Independence of Adjudication Body**

*Has the Working Group considered whether any mechanism for adjudicating on parades in Northern Ireland should be compliant with Article 6 of the European Convention on Human Rights?<sup>6</sup>*

*Is it envisaged that the appointments by the First and deputy First Minister of the four-person Appointments Panel are to be regulated by the Commissioner for Public Appointments?*

*How are the appointments by the Appointments Panel to PAPPB to be regulated?*

*Is it intended that the PAPPB will be a non-departmental public body?*

*Is the guidance to be issued by the First and deputy First Ministers to the Appointments Panel intended to set out standards and principles similar to those in the Code of Conduct for Public Appointments?<sup>7</sup>*

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

*The draft Bill provides that decisions of the adjudication body must have regard to ‘human rights’ without any further information on how this is to be interpreted. Will this be clarified in the final Bill? Will the interpretation outline a framework based around ECHR rights, and ‘freedom from sectarian harassment’?*

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<sup>5</sup> Alternatively, would the Working Group expect all organisers and participants in non-notified public meetings to be prosecuted?

<sup>6</sup> The right to a fair trial in relation to determinations on civil rights.

<sup>7</sup> The Commissioner’s Code of Conduct for Public Appointments does not at present apply to non-ministerial appointments.

*The draft Bill provides that guidance will be issued to the Adjudication body as regards rules of procedure. Will this include detailed guidance as to the human rights framework for decision-making on parades and objections?*

*The matters set out in the Bill for the statutory Code of Conduct include reference to the prevention of sectarian and other harassment. How is this to be interpreted?*

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

6. The Commission has consistently asserted that persons exercising ECHR Article 11(1)<sup>8</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>9</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.
7. 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

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<sup>8</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>9</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.”*

for *all* categories of parades to be subject to the same mechanisms and requirements.

8. 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. Considerations such as an expectation of minor traffic disruption or inconvenience in parking are certainly not sufficient to bring a routine exercise of freedom of assembly into the ambit of a tight licensing and/or policing regime.

### Present arrangements

9. The current arrangements under the Public Processions (Northern Ireland) Act 1998, as amended, cover "processions", including parades, and related counter protests (which then fall under the current Parades Commission's jurisdiction).<sup>10</sup>
10. The notification, other requirements and powers under Parades Commission jurisdiction do not apply to other types of static public assembly. There are powers to intervene in open-air public meetings under the Public Order (Northern Ireland) Order 1987 (as amended) whereby a senior police officer can place conditions on public meetings where it is reasonably believed that they are intended to result in serious disorder or the intimidation of others.

### Proposed reform

11. 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 persons, 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 persons in an outdoor public place. The Commission pointed out that this still constituted a significant

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<sup>10</sup> The exceptions to this are funeral processions, or a procession of a class or description specified in an order made by the Secretary of State – currently, processions organised by the Salvation Army.

extension of the present regime and that no clear justification was apparent.

12. The present draft Bill proposes to extend the jurisdiction of the adjudication mechanism to all outdoor “public meetings”<sup>11</sup> of more than 50 persons in a public place.<sup>12</sup> 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 (these typically being large-scale events organised well in advance). This includes a notification requirement of 37 days, with permission for a late notification dependent largely on it being “reasonable in light of unforeseen circumstances”.<sup>13</sup>

### Justification for proposed extension

13. Restrictions on public assembly require compelling justification. The Explanatory Notes do not set out a justification for this proposed extension. There is also no information on the rationale for the figure of 50. There is also a power for the First and deputy First Ministers, by order, to amend the number, including power to *lower* the figure.
14. The Commission is aware of one rationale that had 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.<sup>14</sup> 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

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<sup>11</sup> The term “meetings” is not at present defined in the legislation. Under article 2 of the Public Order (NI) Order 1987, “meeting” means “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”. It is not clear if this definition is to apply.

<sup>12</sup> The draft Bill maintains the exemption of funerals along with any other assembly specified in an order agreed by the First and deputy First Ministers (mirroring the 1998 provisions).

<sup>13</sup> There is also an ‘emergency procedure’ within three days of an assembly to notify PSNI who directly refer to the new adjudication body.

<sup>14</sup> 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.

'discrimination'. It has then been suggested that as 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.

15. 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, ECHR. 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.

#### Implications of extension

16. 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.
17. 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 is comprised of persons '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.
18. For example, the present draft Bill introduces a notification duty, stipulating 37 days before the assembly. If notification is not given the assembly will be unlawful and those organising it and participating in it could face arrest, prosecution, up to six months in prison and a large fine.

Permission for late notification is dependent largely on that being “reasonable in light of unforeseen circumstances”.<sup>15</sup>

19. A notification duty 37 days in advance 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.
20. For example, more than 50 persons 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. 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 a factory in the immediate aftermath of news of redundancies.
21. 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’. Hence participants would have to choose between cancelling the event or becoming liable to arrest and prosecution.<sup>16</sup> A

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<sup>15</sup> There is also an ‘emergency procedure’ within three days of an assembly to notify the PSNI, who would directly refer to the new adjudication body.

<sup>16</sup> There are other requirements which could be problematic for other forms of assembly. 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. The range of assemblies which would be covered would lead to a large number of notifications. This provides its own risks. This is 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). It also introduces the danger of State or non-state actors being able to conduct effective surveillance on all forms of public assembly. Whilst the details of large organisations are already likely to

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.

The proposals must comply with the 'rule of law'

22. The Commission regards it as unwise to dismiss concerns 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.
23. 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.
24. 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

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be in the public domain, this is not the case with individuals involved in small unconstituted groups, who may, by being obliged to identify themselves, incur some risks.

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>17</sup>

### Alternative approaches

25. The Commission has in the past examined alternative mechanisms. This includes a *scheduling-in* power whereby if there was compelling evidence that a particular type of assembly raised Article 11(2) issues similar to designated parades, an independent adjudication body could bring it within its remit. The present Bill replicates the ministerial power to *schedule out* processions specified in an order, currently applied to Salvation Army parades. Alternatively such a power could be vested in the independent body, and could explicitly apply Article 11(2) criteria in its determinations on which classes of organisation or procession it schedules out, or to which it applies a lesser regime.

### **Independence of Adjudication Body**

26. 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... *[Emphasis added]*

27. The adjudication body for parades must be independent from undue political intervention to reach a standard that would be compliant with Article 6 of the ECHR. Hence the Commission

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<sup>17</sup> *Gillan and Quinton v the UK* (App. no. 4158/05), paragraphs 76-77.

expects decisions to be taken by a quasi-judicial body, rather than in the political sphere.<sup>18</sup>

28. 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)

29. OPAPP would be established as the secretariat or administrative body and be composed of designated OFMdFM officials. The functions of the OPAPP may be set out in guidance issued by the First and deputy First Minister. The functions of this body being essentially administrative, 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.

#### Public Assemblies, Parades and Protests Appointments Panel

30. The First and deputy First Ministers are to appoint four persons, representative of the community, to the Appointments Panel for five-year terms. It is not clear whether the Commissioner for Public Appointments will regulate the appointments by the Ministers.
31. 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>19</sup>
32. In the absence of more detailed information on how the appointments procedures are to be regulated, it is not

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<sup>18</sup> See also the opinions of the Lords of Appeal in *Duffy (FC) (appellant) (Northern Ireland)* [30 January 2008, UKHL 4] stating the 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. The Commission believes that mechanisms which deliberate on rights protected by the ECHR need to be independent and impartial.

<sup>19</sup> *Duffy (FC) (Appellant) (Northern Ireland)* [30 January 2008, UKHL 4].

currently possible for the Commission fully to assess the level of independence from political decision-making.

### Public Assemblies, Parades and Protests Body (PAPPB)

33. PAPPB is the adjudication and hence decision-making body, its members 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.
34. The status of PAPPB, for example as a Non-Departmental Public Body, is not explicitly referred to in the Explanatory Notes and should be clarified.
35. The Appointments Panel must appoint the 11 members of the adjudication body having regard to guidance to be issued by the First and deputy First Minister. It is not clear if the guidance will set out standards and principles similar to the Code of Conduct for Public Appointments. It is also not clear whether a regulatory regime will be applied to these appointments.<sup>20</sup>
36. In the absence of more detailed information on the appointments procedures and constitution of PAPPB it is not currently possible for the Commission to fully assess its level of independence.

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

37. 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, hence decision-making requires human rights compliance.
38. Article 11(1) states that 'Everyone has the right to freedom of peaceful assembly.' The limiting clause (Article 11(2)) qualifies this as follows:

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<sup>20</sup> Whilst 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).

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...

39. 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.
40. 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>21</sup>
41. 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' .
42. 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>22</sup>

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<sup>21</sup> *Chassagnou and Others v France* (1999).

<sup>22</sup> The inclusion of freedom from sectarian harassment in any Bill of Rights for Northern Ireland had been recommended by the Strategic Review.

43. 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.

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

44. 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>23</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 PAPPB can dismiss the notice if they are not.
45. 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 ECHR Article 11 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. A further clause could then bind the PAPPB to interpret ECHR rights in accordance with jurisprudence (similar to that in section 2 of the Human Rights Act 1998).
46. The draft Bill includes a power for the Department of Justice, with the consent of the First and deputy First Ministers, to issue a Prohibition Order banning an assembly or assemblies. 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 considerations overlap with the limitation clause in ECHR Article 11(2). The Commission would urge more explicit concordance with provisions in Article 11(2), including reference to the rights of others.

#### Sectarian harassment: interpretation

47. Despite its being an agreed key principle there is no reference at all to freedom from sectarian harassment in the draft Bill, except insofar as reference is prescribed, among other

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<sup>23</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.

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)...

48. No further interpretation is provided in the Bill of harassment. The term may thus fall to be interpreted in accordance with the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO, as amended).<sup>24</sup> 'Other harassment' could allude to similar definitions in other anti-discrimination legislation or alternatively 'a course of conduct amounting to harassment' provided for by the Protection from Harassment (Northern Ireland) Order 1997.

#### Protected freedom of expression

49. There is a complex interface between protected freedom of expression and protection against advocacy of discrimination, hatred or harassment.<sup>25</sup> 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.

#### Detailed guidance and discretion

50. In addition to interpretation being clarified on the face of the Bill the legislation could also provide that detailed guidance on

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<sup>24</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.

<sup>25</sup> 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. 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. This is in reference to past manifestations at processions, the nature of the organising body, and whether those organising a parade or counter-protest had taken effective measures to avoid or prevent such manifestations.

the human rights framework for decision-making, covering the above matters, is to be provided to or produced by 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.

51. The draft Bill provides that OFMdfM may make rules about the proceedings of PAPPB. There is no indication that this guidance has to address the human rights framework. The provision of guidance by OFMdfM, PAPPB or otherwise based on ECHR jurisprudence and complimentary international standards could be explicitly provided for in the Bill.
52. 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, 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

53. 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 requirements on public assemblies.
54. 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 intend to publish and consult separately on the statutory Code of Conduct. The Commission will await this and respond in due course.

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