



7 February 2006

To the Northern Ireland Office,

Re. the Northern Ireland Office's public consultation on the powers of the Northern Ireland Human Rights Commission

The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international non-governmental organisation, mandated to ensure the *practical* realisation of human rights across the Commonwealth. CHRI is headquartered in New Delhi, India, but we also have an Africa Office based in Ghana and an office in London. Our objectives are to promote awareness of and adherence to the Harare Commonwealth Declaration, the Universal Declaration of Human Rights, and other internationally recognised human rights instruments, as well as in-country laws and policies that support human rights in member states. For more information please visit our website: www.humanrightsinitiative.org.

In 1999 CHRI urged the Northern Ireland Human Rights Commission to regularly evaluate its complaints procedures to assess how the extent of its powers affects its work and further that the Commission should consult widely in devising its rules of procedure and programme. CHRI would like to express its support for the public consultation process on the Northern Ireland Human Rights Commission's powers and welcomes the opportunity to comment on the Government's response to the Commission's own recommendations.

CHRI has a number of concerns about the Government's response to the recommendations. In voicing these concerns, CHRI has alluded to legislative best practice governing national human rights institutions in the Commonwealth and the internationally accepted standards laid down in the U.N. General Assembly Resolution 48/134 of 1993 (commonly known as the Paris Principles).

Recommendation 1 (Appointment)

The composition of the national institution and the appointment of its members whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of social forces of (civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with or through the presence of, representatives of: non-governmental organisations...trends in philosophical and religious thought, universities and qualified experts, parliament, government departments (if they are included, these representatives should participate in the deliberations only in an advisory capacity). – *Paris Principles*

CHRI strongly believes in independent appointment processes for National Human Rights Institutions. Vested with the responsibility to keep in review, the adequacy and effectiveness of law and practice in Northern Ireland relating to the protection of human rights, the Northern Ireland Human Rights Commission is an institution unlike any other.

Section 68(3) of the Northern Ireland Act 1998 requires Commissioners to be representative, as a group, of the Northern Ireland community. Section 75 says it must also take into consideration equality of opportunity with the goal of promoting good relations between people of different religious, political or racial groups.

The Government argues that no changes are required to the Act regarding the Commission's appointment powers because it already provides for fair and merit-based appointments guaranteed by independent oversight. Experience shows that both representation of diversity and equality of opportunity tend not to be observed in the absence of rules or regulations of some kind requiring them. A human rights commission should act as a model to other institutions in society, and by making concrete requirements for diversity and equal opportunity in appointment, the citizens of Northern Ireland can more easily witness the fairness of the Commission in action. A reference to fulfilling the requirements of the UN General Assembly Resolution 48/134 of 1993 or the internationally accepted Paris Principles will strengthen Northern Ireland's commitment to internationally accepted standards and serve as model for replication to other countries seeking to establish National Human Rights Institutions or attempting their reform. CHRI is concerned that if these requirements are not made explicit in the Act, their enforcement will remain insecure.

Recommendations 3 & 5 (Independence in appointments and finance)

The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the government and not be subject to financial control which might affect this independence – *Paris Principles*

A national human rights commission is an independent and autonomous body created by Parliament to protect and promote human rights. As such, its functioning must be flexible and non-bureaucratic. The staff too, should be independently recruited and attuned to human rights values. CHRI unequivocally believes that the Commission should be given sufficient resources to maintain independence and gain the support and confidence from all sectors of society in Northern Ireland. Likewise it must have the authority to appoint own staff and determine their conditions of employment. If, as the Government asserts is required to ensure efficient use of public funds, the Commission is required to obtain Secretary of State approval for appointments and its budget, the independence of the Commission is called into serious question.

The value of having a Human Rights Commission in Northern Ireland cannot be expressed primarily in monetary terms. In fact, the benefits Commissions bring to societies in terms of investigation and access to justice, public participation, education, and advice to government on human rights issues is invaluable and obtained at relatively low cost.

An explicit guarantee of adequacy of funding in the law, as desired by the Commission, helps maintain the independent nature of a National Human Rights Institution. The law governing the Human Rights Commission of Malaysia places a specific obligation on the Government to provide the Commission with adequate funds annually to discharge its obligations.¹ However, inclusion of a similar provision will not preclude the Northern Ireland Human Rights Commission from being subject to requirements of efficiency and sound financial and accounting practice as is any public institution.

¹ Section 19 (1) Human Rights Commission of Malaysia Act, 1999.

Recommendation 4 (Mandate)

A national institution shall be given as broad a mandate as possible, which should be clearly set forth in constitutional and legislative text, specifying its composition and sphere of competence – *Paris Principles*

In order to maintain its legitimacy and independence, the Northern Ireland Human Rights Commission must have a clear mandate. Indeed a statutory basis is the most secure way to guarantee the independence of the Commission as well as defend its legal powers if these are challenged.²

CHRI believes that the MOU set in place upon the Commission's recommendation is a step in the right direction. That the Government promises to keep the Memorandum under review is also positive, but does not do enough to ensure the Commission is secure in its mandate. The scope of the Commission's mandate is not a mere point of administrative procedure, since it is at the heart of the institution's reason for being. If its mandate is to be easily changed or on the other hand rarely reviewed this will have a serious impact on the Commission's legitimacy with the public. The MOU should preferably be reviewed annually.

Recommendation 6 (External fundraising)

The Commission should be given sufficient flexibility to manage its resources and secure additional support if and when necessary to perform effectively. Financial autonomy will guarantee the overall freedom of the Human Rights Commission to determine its priorities and activities. Furthermore raising funds from outside sources should not disqualify the NIHRC from receiving government funding.³ The purpose of funding is to enable the Northern Ireland Human Rights Commission to have its own staff and premises so that it can operate independently of the Government and not be subject to financial control that might affect its independence.⁴

Regular public financial reporting and annual independent audit will ensure probity. There is no special reason to fear that the Commission would fail to uphold basic standards of financial accountability, but on the contrary, if the Commission lacks basic control over its ability to raise funds it runs the risk of being under-resourced and effectively denied the ability to be effective.

Recommendation 7 (Appointment of full-time Commissioners)

In order to ensure a stable mandate for members of the institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate – *Paris Principles*

The significance of the NIHRC in a democracy like Northern Ireland cannot be overemphasised, To enable the Commission to do justice to its broad mandate, CHRI believes a review should take place to determine how many full-time Commissioners are required to effectively run the NIHRC. Once that number is determined, the Commissioner's terms of appointment should include the duration of tenure.⁵ To refrain from so specifying the appointment of Commissioners in the name of flexibility undermines the independence of the commission because no minimum standard is ensured that will facilitate the commission's basic functioning.

² Office of the United Nations High Commissioner for Human Rights and International Council on Human Rights Policy (2005) *Assessing the Effectiveness of National Human Rights Institutions*, Geneva, p. 13.

³ *Id.*

⁴ Paris Principles, "Composition and guarantees of independence and pluralism," section 2.

⁵ *Id.*, section 3.

Recommendation 10 (Implementation of recommendations)

CHRI agrees that the Commission should be enabled to follow-up with the Secretary of State on the extent to which its recommendations have been implemented and where they have not, to be provided reasons why and to make further recommendations. To ensure that Commission recommendations are not ignored, the Government should be obligated by law to respond to recommendations within a specified period. In India, the government is required by law to table any action taken before Parliament with the annual and special reports of the National Human Rights Commission.⁶

In its 1999 submission to the NIHRC, CHRI suggested that such a mandatory time to respond to recommendations should be neither too short, which might elicit a superficial response, or too long, which can diminish the impact of any recommendations. CHRI believes it is very important that where there is disobedience, delay or non-compliance by the Government, the NIHRC should be able to submit its recommendation(s) before a court for enforcement.

Recommendations 11 & 13 (Advice on law and policy)

Opinions, recommendations, proposals and reports as well as any prerogative of the national institution shall relate to: Any legislative or administrative provisions, as well as provisions relating to judicial organisation, intended to preserve and extend the protection of human rights; in that connection the national institution shall examine the legislation and administrative provisions in force as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these conform to the fundamental principles of human rights; it shall if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption and amendment of administrative measures – Paris Principles

The Commission should be given the authority to review on its own initiative any law that is relevant to human rights and recommend amendments where necessary.⁷ Although other bodies are vested with the responsibility of scrutinising draft legislation and policy for human rights compatibility, this is not a reason for the Commission to remain silent on such matters. The Fiji Human Rights Commission can enquire generally into any matter, including any enactment of law or any procedure or practice whether governmental or non-governmental, if it appears to the Commission that human rights may be infringed.⁸ In addition, the Commission can make recommendations on the implications of any proposed Act or regulations or any proposed policy of the government that may affect human rights.⁹ Playing an advisory role with regard to policy and law-making will help the Commission be effective and pro-active in fulfilling its mandate. To not speak on potential laws and policies, or to be consulted so late in the process of their development that any advice is moot or severely weakened in impact, will deny the importance of the Commission in creating a rights culture in Northern Ireland. The legitimacy of the Commission will also be severely undermined if it is in effect sidelined during formulation of human rights policies and laws in its jurisdiction.

Recommendation 17 (Right to intervene in proceedings)

In 1999 CHRI recommended that the NIHRC should as a matter of good practice be empowered to initiate legal proceedings on behalf of an individual or group of persons, to provide assistance to such parties in initiating proceedings on their own behalf, and to act as *amicus curiae* before a

⁶ Section 20 (2) Protection of Human Rights Act, 1993.

⁷ *Assessing the Effectiveness of National Human Rights Institutions*, p. 18.

⁸ Section 7 (d) Human Rights Commission Act, 1999.

⁹ Section 7 (i) Human Rights Commission Act, 1999.

court in cases concerning human rights. Other countries have found this appropriate. For instance, the Human Rights Commission of South Africa can bring proceedings in a competent court or tribunal in its own name or on behalf of a person or group or a class of persons.¹⁰

By contrast, sections 69(5) (a) and 70 of the Northern Ireland Act state that the Commission may only give assistance to individuals in proceedings involving law or practice relating to human rights. CHRI does not find the Government's contention persuasive that because individuals have a right to bring proceedings to enforce European Convention rights under the Human Rights Act (1998), there is no need for the Human Rights Commission of Northern Ireland to have the ability to assist or intervene in cases on behalf of a third party or group. The government also argues that the Human Rights Act (1998) requires there to be one "victim" (who brings proceedings against a public authority for acting incompatibly with a Convention rights or otherwise rely on Convention rights in proceedings involving a public authority) and that the Northern Ireland Act was never intended to circumvent this rule.

One of the very reasons why national human rights institutions exist is because redress through the courts can be next to impossible to achieve in practice, despite the presence of appropriate laws and procedures. As CHRI stressed in 1999, it is essential that the NIHRC be able to assist third parties or groups to take action if the commission is to be, and be seen to be, effective. Persons such as those in incommunicado detention or the mentally disabled may be unable to complain, and others may be too intimidated to make a complaint. CHRI therefore urges that the NIHRC be given the power to provide assistance for third parties and group action to initiate legal proceedings.

CHRI argues that the Northern Ireland Act 1998 does not deny the NIHRC the power to act as *amicus curiae* and that such legal strategy is a developing area in which the NIHRC could take the lead. This was in fact discussed during House of Lords debate when Lord Williams said that "the courts will be free to ask the Commission to provide assistance as *amicus* under the normal rules that apply."¹¹ The Human Rights and Equal Opportunity Commission in Australia has successfully used its intervention powers to argue that the government should act in accordance with treaty provisions it has ratified.¹²

Recommendations 20 & 21 (Education and training)

It shall be a responsibility of the national institution to assist in the formulation of programmes for the teaching of, and research into human rights and to take part in their execution in schools, universities and professional circles – *Paris Principles*

CHRI argued in 1999 that the NIHRC should produce human rights materials and encourage the teaching of human rights in schools and other educational institutions. It felt that mandatory consultation with the Commission during curriculum development was required if materials are to meet a minimum standard of quality across the country. The Commission has likewise recommended that statutory institutions responsible for education and training in Northern Ireland be required to consult with it when determining or reviewing the human rights aspects of their content or delivery in education and training.

The Government concedes that co-operation between all parties must be encouraged but not legislated. It argues that flexibility in education and training must not be jeopardised and that the volume of work involved in a mandatory scheme would be prohibitive.

¹⁰ Section 7 (e) Human Rights Commission Act 1994.

¹¹ Hansard records, 18 Nov 1998, Lords, Column 1061.

¹² In the *Teoh* case, 1994-1995 183 CLR 273.

CHRI would argue that without a requirement that statutory education and training institutions in Northern Ireland consult with the NIHRC there is little to ensure that they will so consult and it would put the burden in the NIHRC to initiate a dialogue in the first instance, which is only likely to challenge the resources of the NIHRC even further. If resources of the NIHRC with regard to education and training are truly of concern the answer is to ensure that the Commission is adequately funded and empowered to seek outside funding as necessary.

Recommendation 22 (Access to detention centres)

CHRI applauds the granting of the Commission with the powers to access all places of detention in Northern Ireland, as well as places where people are in the care of a public authority or person or body exercising such powers. By their very nature detention and care facilities are closed, and most human rights violations within those places are never exposed. Thus it is necessary for the Commission to have access to these places in order for it to effectively fulfil its mandated role of promoting and protecting human rights. There is no need for special safeguards to be put in place to ensure the Commission uses the power to visit appropriately, because like all public bodies it is subject to judicial review for unreasonable behaviour or exceeding its powers.

CHRI does however express its grave concern that the right of managers of detention and care facilities, which the Government has proposed, to request a court to refuse entry to the Commission on the grounds of such a visit being “unnecessary” or otherwise “unreasonable” would all but cancel the Commission’s right of access. It is not for the body under scrutiny to decide if such scrutiny is necessary or reasonable. To give authorities the ability to so decide is to usurp the powers of the NIHRC itself. For instance, in Zambia, the Human Rights Commission is allowed by law, unhindered access to visit prisons and places of detention or related facilities with a view to assessing and inspecting conditions of persons held in such places and make recommendations to redress existing problems.¹³

If the Commission were required to negotiate the terms of reference of its inspection and give a certain period of notice to the authority concerned, it would allow managers of detention and care facilities to cover up the very facts that unannounced, unrestricted visits are designed to bring to light. Nor would Commission visits appear credible. CHRI urges the government to drop its position on these points.

Recommendation 23 (Search and seizure powers)

Within the framework of its operation, the national institution shall hear any person and obtain any information and/or any documents necessary for assessing situations falling within its competence. - Paris Principles

CHRI believes that the NIHRC should have the power (subject to Convention rights of all in the premises) to apply ex-parte to a magistrate for a warrant to search and seize properties if it is reasonably believed that an article sought will provide evidence of human rights violations.

The Government has said that the present investigation powers of the Commission are sufficient. Experience from other jurisdictions such as Papua New Guinea show that human rights protection is best served by allowing for the Commission¹⁴ to seek warrants in cases where immediate intervention is required or where evidence is at risk of being removed. Indeed the power of search and seizure is a crucial advantage official human rights bodies have over non-

¹³ Section 9 (d) Human Rights Commission Act 1996.

¹⁴ The Papua New Guinea Ombudsman Commission is vested with powers to promote and protect human rights, similar to a human rights commission. See Constitution of Papua New Guinea, Sections 219(1)(a-d); *Organic Law on the Ombudsman Commission*.

governmental fact-finding¹⁵ and greatly enhances their effectiveness. In Australia, the law empowers the Human Rights and Equal Opportunity Commission to do all things that are necessary or convenient to be done for or in connection with the performance of its functions.¹⁶

The Government is concerned that rights of those whose premises are searched or property seized will not be protected. These rights can however be safeguarded by hiring staff with professional investigation skills, who are independent from any parties being investigated. They may be brought in from abroad as necessary.¹⁷

Recommendation 24 (Power to compel documents and witnesses)

The power to compel witnesses to appear or produce documents is crucial to an effective human rights commission in Northern Ireland, as elsewhere. CHRI argued this in 1999 when it submitted that the powers of the NIHRC should be increased to meet minimum standards envisaged in the Paris Principles and in accordance with powers enjoyed by Commissions in other states. In Fiji, for the purposes of investigation, human rights commissioners are vested with powers similar to that of High Court judges in respect of attendance and examination of witnesses and the production of documents.¹⁸ In India, the National Human Rights Commission is vested with the power of a civil court in (a) summoning and enforcing the attendance of witnesses and examine them on oath; (b) discovery and production of any document; (c) receiving evidence on affidavits; (d) requisitioning any public record or copy thereof from any court or office; (e) issuing commissions for the examination of witnesses or documents; (f) any other matter which may be prescribed.¹⁹

The Government's concerns about safeguards against abuse of power during investigations is unfounded considering the status accorded to national human rights institutions. Conditioning these powers may affect the independence of the NIHRC. In any case, abuse of privilege or failure to adhere to the principles of natural justice in investigations can always be challenged before the courts.

Recommendation 26 (vacancy on resignation)

CHRI believes that the recommendation of the Commission to place a binding duty on the government to expeditiously fill appointments is vital for the health of the Commission. It is also supported by international best practice. In South Africa, a vacancy in the Human Rights Commission is required to be filled as soon as practicable, in accordance with constitutional provisions.²⁰ A human rights commission must function at full strength if it is to effectively fulfil its mandate. Experience has shown that delays in filling vacancies, impairs the ability of a human rights commission to promote and protect human rights.

Recommendation 29 (alternative dispute resolution)

A national institution may be authorised to hear and consider complaints and petitions concerning individual situations.... the functions entrusted to them may be based on the following principles: seeking an amicable settlement through conciliation or, within the

¹⁵ Assessing the Effectiveness of National Human Rights Institutions, p. 21.

¹⁶ Section 13 (1) Human Rights and Equal Opportunity Commission Act, 1986.

¹⁷ *Id.*

¹⁸ Section 32 (3) Human Rights Commission Act, 1999.

¹⁹ Section 13 (1) Protection of Human Rights Act, 1993.

²⁰ Section 11 (2) (b) Human Rights Commission Act, 1994.

limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality. – *Paris Principles*

CHRI does not agree with the Government that the Commission should not have scope to resolve disputes by mediation, conciliation or negotiation. Based on the facts of a case, there is always an alternative method of resolving disputes and the Commission should be granted the flexibility to decide with the parties which is the best alternative. A party objecting to the format of dispute resolution could raise as an argument lack of subject matter jurisdiction (i.e. that the matter of the dispute has no relevance to the Commission's mandate) or deny consent to participate, with the effect being that the opposing party can instigate civil or criminal proceedings. The Sri Lanka Human Rights Commission is empowered to appoint conciliators or mediators to act on its behalf to bring about an amicable situation in situations where it envisages and imminent violation of human rights arising out of a conflict between two or more state or non-state actors.²¹

For more information:

Stephanie Aiyagari, London Liaison Officer, CHRI London Office: Institute of Commonwealth Studies, 28 Russell Square, London, WC1B 5DS, chri@sas.ac.uk or 0207 862 8857

Mandeep Tiwana, Consultant, CHRI Headquarters: B-117 Sarvodaya Enclave, New Delhi 110 017, India, mandeep@humanrightsinitiative.org or (91 11) 2685 0523

Website: www.humanrightsinitiative.org

²¹ Sections 15 (2) & 16 Human Rights Commission of Sri Lanka Act, 1996 (Sri Lanka).