Minister of State

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Dear Mr Mallon,

Many thanks for your letters of 27 and 29 October, in which you raise a number of issues arising from the Northern Ireland Bill in the human rights, equality and national security areas. In this response, I will try to deal in this response with all of the points that you raise. But, first, I should emphasise the Government's commitment to implementing the Agreement in full. In the Bill, our aim is to give effect to all elements of the Agreement which require legislative provision.

This has been a difficult and complex task - the Bill now runs to almost 100 Clauses. In Parliamentary terms, it has been done at great speed. But we have endeavoured, at every stage, to consult the parties to the greatest possible extent.

In my experience, no Bill has been subject to such widespread and continuous consultation during its passage. As a result, the Bill is much better now than at the start, and will be better still after further amendments are tabled next week. Some of these will pick up points you make.

Human Rights Commission: bringing proceedings

In terms of bringing legal proceedings in its own name, under the Bill the Commission will enjoy the same rights as any legal person to initiate proceedings in its own name, notwithstanding that it can also (under Clause 66) support cases brought by individuals. The only - and I emphasise only - restriction on the ability of the Commission to initiate proceedings in its own name is in Clause 67. In common with the policy which the Government has adopted in the Human Rights Bill, Clause 67 restricts the bringing of proceedings in respect of Convention rights to a "victim", as defined in the Convention itself. The only exception provided is in Clause

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67(2) for the Attorney General, the Attorney General for Northern Ireland or the Lord Advocate. This exception is required because the law officers may need to bring devolution proceedings on questions of legislative competence.

The Commission could bring proceedings in its own name, for example, by initiating legal proceedings to argue that an Act was unlawful, because it was incompatible with Community law or because it discriminated on the ground of religious belief or political opinion, providing the case involved some aspect of human rights. Equally, the Commission could initiate proceedings in its own name to prevent a Minister or Northern Ireland Department acting in a way which was incompatible with community law or which discriminated on the grounds of religious belief or political opinion, contrary to Clause 22, again providing some aspect of human rights were involved. Nor is there anything to prevent the Commission initiating proceedings in its own name under Clause 72 of the Bill.

These are just examples. It is particularly relevant that the Bill, in Clause 65(11)(b), defines human rights in a very wide fashion. Although I expect most proceedings to be brought in support of specific individuals, the Commission will, under the Bill as it stands, be able to bring its own legal proceedings in appropriate cases. This conforms with the requirements of the Agreement.

Power to Compel Co-operation with Investigations

Strong arguments have been advanced for the Commission to be able to compel, in the course of its investigations, the attendance of witnesses and the production of documents. Let me repeat the reassurances my colleague, Lord Williams, explained in Committee stage in the Lords.

The Government does not wish the Commission to be a toothless body. But the Agreement is silent on whether the Commission should have available to it formal powers of compulsion. Of course, the Bill fills in a great deal of detail on which the Agreement is silent, but in all significant areas we have sought, and I hope achieved, consensus among the Northern Ireland parties on the approach we have taken.

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I have held extensive consultations with the parties to the Agreement on this very issue. We were unable to achieve the "sufficient consensus" which was the prerequisite for the Agreement itself. Some parties to the Agreement believed that the Bill as it stands faithfully reflects the Agreement in full and it would be wrong now to reopen the negotiations on this issue. In this circumstance, although we are sympathetic to the arguments for an extension of the Commission's powers in this way, we decided it would be wrong to proceed in this Bill while there did not exist a sufficient consensus among the Northern Ireland parties on the issue.

Individuals will, of course, be able under the Human Rights Act to enforce their rights under the Convention through the courts. The courts will have access to the full range of their usual powers to compel witnesses and the production of documents in the course of any such human rights case.

So an individual bringing a case under the Human Rights Act - and, under this Bill, he or she may well have the support of the Commission in doing so - will be able to ask the courts to procure the necessary information, whether by compulsion of witnesses or production of documents, for the case.

As Lord Williams explained, the Government will fully co-operate with any investigation undertaken by the Commission. We shall provide it with any information and documents necessary for such an investigation, subject only to adequate arrangements to protect information where confidentiality is necessary to safeguard national security, public safety and public order.

In any circumstances where the Commission considers that it is being frustrated in obtaining the necessary information it needs to do its job, we expect the Commission to say so and to draw the attention of Parliament and the Assembly to any such failure to co-operate. One option then available, either to the Assembly or to either House of Parliament, is to take up the investigation and use its own powers to compel witnesses and the production of documents to obtain the necessary information.

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We also made clear that the Government has not closed its mind on this issue. We therefore brought forward amendments at Committee stage in the Lords to require the Commission, no later than two years after its establishment, to review the adequacy of its powers.

If, on the basis of its experience, the Commission reports that it has been frustrated in the tasks set it under the Agreement because of the absence of powers of compulsion, then that would offer a powerful case for legislation to deal with that. Moreover, if there was broad consensus among the Assembly that the Commission should have such powers, then the Government would look sympathetically at legislation to provide them.

Scrutiny of Westminster Bills

Under Clause 11, all Bills introduced in the Assembly will be sent to the Commission. Lord Williams also responded in the Lords to amendments which would require Bills introduced in Parliament to be submitted to the Commission if they appeared to affect human rights in Northern Ireland. Westminster Bills will in future be subject to the regime proposed in the Human Rights Bill to ensure that Ministers consider their compatibility with the European Convention on Human Rights. Every Minister introducing a Bill will have to certify compatibility or non-compatibility with the convention. That will be part of a Minister's duties when introducing a Bill. And Bills are of course published, and it will be open to the Commission to obtain copies of them and offer advice whether or not they are asked to do so.

Changes to Equality Provisions at Report Stage

The Northern Ireland Bill has been an exceptionally complex piece of legislation, carried forward in a very tight timescale. Government amendments have been tabled at Commons Committee and Lords Committee Stages and further amendments will be tabled at Report Stage in the Lords. Not all of the amendments which the Government had been considering were ready for Lords Committee Stage. It had been intended that these would be tabled at Lords Report and we are still working to that timescale. I hope that you will defer judgement on the approach which we are taking until all relevant amendments have been tabled.

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Application of Direct Obligation to New Public Authorities

We shall table an amendment to impose an obligation directly on new, as well as existing, public authorities after they come into existence.

Impact Assessments

On Committee stage, Lord Dubs gave notice of a number of significant changes we plan to the detail of policy impact assessments. We shall table amendments to Schedule 10, embracing the consideration of alternative policies, measures to mitigate adverse impact, monitoring of outcomes after implementation of the policy, consultation on impact assessment and publication.

Powers of Assembly over Equality Matters

The Agreement requires that all matters which were the responsibility of Northern Ireland Departments should be transferred to the legislative and executive authority of the Assembly. This included the existing legislation on fair employment, sex discrimination, race relations and disability which had been within the Departmental responsibilities of the Department of Economic Development and the Department of Health and Social Services. The recent amendments to the Bill make clear that the institutional existence of the Equality Commission will be a reserved matter and appointments to it will be made by the Secretary of State. The equality of opportunity obligation will also be a reserved matter. But the Agreement requires that existing equality legislation should remain a transferred matter and under the Assembly's control. This will be subject to important safeguards. Potentially any such legislation could be made subject to cross-community support. Also, under Clause 6(2), the Assembly cannot legislate in a way that is incompatible with the Convention rights or Community law (relevant to equal opportunities in particular), nor in a way which discriminates on grounds of religious belief or political opinion. Moreover, if the Assembly legislates in other ways incompatible with the UK's international obligations, then under Clause 12(5) the Secretary of State may decide not to submit such a Bill for Royal Assent.

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National Security Certificates

You have also raised concerns about the new Tribunal to be established to hear appeals against national security, public safety and public order certificates.

The Tribunal is in direct response to the ECHR ruling this summer in the Tinnelly and McElduff cases where the UK was found to be in breach of article 6 of the Convention. Unless we ensure ECHR-compliance by providing such a right of appeal, the certification powers in the Bill are deficient. We were not prepared to remove those powers because the Government remains convinced of the need to protect from disclosure sensitive intelligence information in the interests of safeguarding national security. Without the certification powers, the Government may have to rely on Public Interest Immunity applications in the original proceedings. We believe that establishing this Tribunal is the preferable approach as it will allow the national security arguments to be aired and reviewed by this independent judicial process, separate from the original proceedings which gave rise to the certificate.

In establishing this Tribunal, the Government is very much aware of the need to balance the rights and interests of an appellant against the national security considerations. The amendments debated at the Lords Committee stage on 26 October were designed precisely with that aim in mind and in ensuring ECHR compliance. I fully accept that the Government's amendments contain provisions which differ from usual judicial proceedings but we believe that these arrangements are essential if we are to strike the balance we aim to achieve. As you know, those provisions met with general approval at the Lords Committee stage.

I should stress that the judgement in the Tinnelly and McElduff cases did not require the Government to provide that an individual should have disclosure of the information which led to the decision not to grant him employment. Under the Government's amendments the appellant will not have a right to that information because to allow disclosure would be prejudicial to national security, public safety or public order. Instead, the new Tribunal provides a dedicated forum in which the information can be tested as part of its independent review of the act in question.

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The amendments also require the Tribunal to consider not only whether the act was undertaken for the reasons stated in the certificate, but also whether the act in question was a proportionate response. This is a major step forward from the current position whereby a certificate is conclusive evidence of the reasons for the act in question and where no right of appeal exists against a certificate.

I can assure you that the appellant's interest have been taken fully into account in devising these procedures, within the constraints which safeguarding national security imposes. I know that you are especially concerned that he or she will be represented by a special advocate appointed by the Attorney General rather than by his or her usual representative. This ensures that the appellant's interests are represented by a suitably qualified person while protecting intelligence information from disclosure. Again, I fully accept that this is an unusual arrangement but it is not unprecedented.

The special advocate provisions are modelled directly on the Special Immigration Appeals Commission established last year to hear immigration appeals where national security is an issue. That Commission was also established in the light of an ECHR-ruling in the Chahal case. In the Tinnelly and McElduff judgement, the Court noted that it had been possible in other contexts to modify judicial procedures to safeguard national security concerns about the nature and sources of intelligence information while according the appellant a substantial degree of procedural justice. The Government's proposals were again developed with that in mind and we see the special advocate provisions as being central to these provisions.

Finally, I should point out that we intend to bring the certification powers in fair employment, race and gender legislation within the Tribunal's remit in due course and we do of course accept fully that where a certificate is quashed by the Tribunal, the individual must be able to continue his case before the original court or Tribunal. In such circumstances, the Tribunal would have disposed of the national security defence and that would not be further relied upon.

You also suggested in your letter of 29 October that we have not provided for the special advocate to represent the interests of the appellant. In fact, we have followed the Special

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Immigration Appeals Commission in this respect and the wording you quote appears at clause 85(7) of the Bill. It refers to parties to the appeal, rather than to the appellant, but the appellant will of course be a party. Can I also just clarify that the Bill's provisions do not relate to section 42 certificates. Our intention is that those certificates will be brought within the Tribunal's remit in due course.

I hope that what I have said here meets your concerns. Please get in touch if you want me to clarify our position further on these or any other issue.

Debbie Sweeney
(approved by Minister and signed in his absence.)

Paul Murphy MP
Minister of State

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