
Summary

The Human Rights Commission has responded to a consultation by the Northern Ireland Office on its proposal to end the so-called 50:50 measures designed to increase Catholic representation in the Police Service, and among police support staff.

We acknowledge the progress made in securing Catholic participation in the police (now almost 30 per cent) but we recommend the continuation of the special measures in respect of police support staff (where Catholics are still significantly under-represented.) We set out the international human rights standards that permit exceptional measures to be applied in addressing inequalities in public-sector employment.

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 reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights, advising on legislative and other measures which ought to be taken to protect human rights, advising on whether a Bill is compatible with human rights and promoting understanding and awareness of the importance of human rights in Northern Ireland. In all of that work the Commission bases its

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1 Northern Ireland Act 1998, s.69(1).
2 Ibid, s.69(3).
3 Ibid, s.69(4).
4 Ibid, s.69(6).
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 welcomes the opportunity to contribute its views to the latest consultation on the review of the temporary recruitment provisions in place for the Police Service of Northern Ireland (PSNI). It last did so in January 2010, when it supported Government proposals to extend the measures.

3. The temporary provisions flowed from a recommendation of the Patten review (the Independent Commission on Policing for Northern Ireland, 1998-99). They are contained in the Police (Northern Ireland) Act 2000 (“the 2000 Act”), sections 44(5) to (7) and 46; article 40A of the Race Relations (Northern Ireland) Order 1997 (as amended); and article 71A of the Fair Employment and Treatment (Northern Ireland) Order 1998 (as amended), all in respect of 50:50 recruitment as police trainees and police support staff of qualified Catholic and non-Catholic applicants. The provisions in respect of support staff apply only in recruitment exercises involving six or more posts, while those in respect of trainees are applied to all. Additionally, s.45 of the 2000 Act provides for ‘lateral entry’ (targeted recruitment) of Catholic officers from other constabularies.

Consultation process

4. The consultation documentation was less than satisfactory. The letter sent to consultees gave an incorrect web address for the full consultation paper, leading to a web page indicating that there were no current consultations. The paper provides extensive detail on recruitment of police trainees, including numbers of applications and community backgrounds of applicants for each exercise, but does not provide comparable data for police support staff. For that group it gives only the annual statistics for Catholic composition, not for those applying or appointed.

5 Northern Ireland Office letter dated 11 November 2010.
5. As the much greater community background differential is found among support staff, the absence of this data, or any detailed discussion of the relative lack of progress towards representativity, is perplexing. Most striking is the absence of any discussion of the option of extending the provisions in respect of support staff. Although 30 per cent representation in the main body of 7,200 police is likely to be secured, there remains significant under-representation of Catholics among the 2,500 support staff.

6. There is no discussion of the uptake or impact of the s.45 ‘lateral entry’ provision. No rationale is provided for discontinuing this measure, which aimed to facilitate, in particular, the transfer into the PSNI of senior Catholic officers from An Garda Síochána and other forces. Although regulations were put in place to facilitate such transfers, it appears that difficulties over pension arrangements meant that there was little or no take-up by Gardaí.

7. The consultation indicates that almost 29.4 per cent of PSNI officers are from a Catholic community background (as of 1 October 2010), compared with 8.3 per cent in the Royal Ulster Constabulary when the provisions were introduced. Among police support staff, the proportion of Catholics had reached 17.9 per cent (12 per cent in 1999). On that basis, Government has indicated that it is minded to allow the temporary provisions to expire on 28 March 2011.

The Commission’s position

8. The Commission is of the view that the 50:50 provisions should no longer be applied in respect of the recruitment of trainee police officers, but that they should be retained in law and continue to be applied, or more effective measures introduced, in recruiting police support staff. Representativity in this key area of public service is crucial to ensuring confidence in, and effective delivery of, policing. On present trends in police and, especially, support staff composition, this is likely to require application of various forms of affirmative action for some years to come. There are of course many forms of affirmative action that are routinely applied across the public sector in Northern Ireland without the special

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8 See evidence of the Policing Board to Northern Ireland Affairs Committee: *Cross-border cooperation between the Governments of the United Kingdom and the Republic of Ireland*, NIAC Second Report of 2008-09, Evidence, Ev93.
arrangements provided for by the current legislative exemption for the 50:50 scheme. These measures include targeted advertising, welcoming statements, diversity awareness programmes, etc., and they do not compromise the merit principle that must be the norm in public sector recruitment. Application of such measures, with appropriate monitoring and adjustment, should assist in maintaining progress towards representativity in the composition of the Police Service. However, the differential in support staff justifies the maintenance of an exceptional measure.

9. The Commission is of course aware of the political sensitivity of provisions that operate to the disadvantage of certain applicants on the basis of their community background. This is often perceived or presented as “religious discrimination”. As explained below, special affirmative action measures designed to secure reasonably equitable representation, so long as they are time-bound, proportionate and secure a legitimate public interest, are in accordance with international human rights law and do not constitute discrimination.

10. In the present paper, the Commission extends the review of human rights standards presented in its submission to the January 2010 review on the same matter, which was followed by the renewal of the provisions for one year. The Commission is satisfied that neither the standard-setting bodies, nor European case law, have in the interim significantly changed the position that in 2010 led us to affirm the compatibility of the temporary provisions with human rights law.

**Relevant human rights standards**

11. The Commission has consistently taken the view that the 50:50 recruitment arrangements are consistent with international human rights law, under which measures to promote full and effective equality are not considered to constitute discrimination, provided that there is an objective and reasonable justification for those measures, such as that they meet a pressing social need, that they respect the principle of proportionality, and that they are discontinued as soon as they are no longer needed.

12. The general framework for human rights-compatible measures of this kind was enunciated by the UN Human Rights

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Committee (the body overseeing the International Covenant on Civil and Political Rights), in its General Comment no. 18 (Non-discrimination), especially paragraph 10, which provides:

...the principle of equality sometimes requires States parties to take affirmative action. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation...

13. In specifically addressing “the right and the opportunity of citizens to have access on general terms of equality to public service positions”, the Human Rights Committee later said in General Comment 25:

... Affirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens.

14. In relation to the ‘sister’ Covenant, the International Covenant on Economic, Social and Cultural Rights, its supervisory Committee said as follows in its General Comment no. 20 (para. 9):

... States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved.

15. The International Convention for the Elimination of All Forms of Racial Discrimination (ICERD) provides specifically for special measures (Article 1, paragraph 4). Provided that such measures are temporary and curtailed once they have achieved the objectives for which they were originally taken, the Convention provides that special measures “taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise” of rights do not constitute racial discrimination. The treaty’s supervisory body, the UN Committee on the Elimination of Racial Discrimination (CERD), has stated in its General Recommendation 32 that such special measures are “not an exception to the principle of non-discrimination but are
integral to its meaning” (para. 20) elaborating as follows (para. 8):

...The term ‘non-discrimination’ does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same...

16. In General Recommendation 32 the CERD is explicit that such special measures, when circumstances warrant, are obligations under the Convention (para. 11). Special measures need to be temporary and proportionate, and need to be grounded in a realistic appraisal of the current situation (para. 16) and designed to ensure “adequate advancement” of the disadvantaged group. This “implies goal-directed programmes which have the objective of alleviating and remediying disparities” (para. 22).10

17. Several other international and regional human rights standards affirm that special measures taken to accelerate or achieve equality do not contravene the principle of non-discrimination. These include:

- Convention on the Elimination of All Forms of Discrimination against Women (Article 4, paragraph 1)
- Framework Convention for the Protection of National Minorities (Article 4, paragraph 3)
- Charter of Fundamental Rights of the European Union (Article 23)
- Convention on the Rights of Persons with Disabilities (Article 5, paragraph 4)
- Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities (Article 1 2(b))

10 The “50:50 recruitment” process uses ‘religion’ (Catholic) as its indicator for the disadvantaged target group. The divide between the two largest ethnic groups in Northern Ireland is often characterised on the basis of religion (Protestant/ Catholic), or political opinion (Unionist/ Nationalist), but it is manifest also in nationality (British/Irish). There are therefore clear correlations and ‘intersectionality’ between these indicators of ethnicity (religious and political affiliation, national identity and citizenship), highlighting the application of the duties and framework of ICERD to the temporary recruitment provisions.
• 12th Protocol to the European Convention on Human Rights (third recital of the Preamble).

18. Additionally, there are several human rights instruments that positively encourage, and in some circumstances require, states to adopt measures of this nature, including:

• International Convention on the Elimination of All Forms of Racial Discrimination (Article 2, paragraph 2)
• Framework Convention for the Protection of National Minorities (Article 4, paragraph 2)
• Council of Europe Committee of Ministers Recommendation R(85)2.

19. Other relevant provisions in treaty law and other standards establishing firstly, the scope for differential treatment when (and for so long as) that is justified in terms of redressing historic under-representation, and secondly, in terms of securing the participation of, in particular, minorities in public services, include:

• International Labour Organisation Convention C111 (Convention concerning Discrimination in Respect of Employment and Occupation, especially Article 5)
• ILO Convention C122 (Employment Policy Convention)
• Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights
• UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
• Vienna Declaration and Programme of Action
• European Charter for Regional or Minority Languages.

**European equality law**

20. While the Commission’s focus is on the international human rights standards rather than the more specific field of equality law, equality is a core principle in the whole corpus of human rights law, and equality standards are generally established with close attention to conformity with human rights norms. Specifically, the European Union, as the main driver of equality legislation at regional level, has always sought to ensure that its equality law meets the human rights standards set by the Council of Europe and the other regional and international systems. It considered the compatibility of the 50:50 scheme in drafting Council Directive 2000/78/EC of 27 November 2000 (establishing a general framework for equal
treatment in employment and occupation), and at the request of the UK Government addressed this precise issue as follows (Article 15(1)):

In order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland, differences in treatment regarding recruitment into that service, including its support staff, shall not constitute discrimination insofar as those differences in treatment are expressly authorised by national legislation.


In accordance with Article 141(4) of the Treaty, with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment does not prevent Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

22. The European Court of Human Rights has also addressed the scope for positive measures involving differential treatment that, in the absence of justification, could contravene Article 14 of the European Convention on Human Rights (ECHR). As the Court stated in Abdulaziz, Cabales and Balkandali v UK (1985): “a difference of treatment is discriminatory if it ‘has no objective and reasonable justification’, that is, if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’”. Subsequent case law has been consistent with that ruling although the Court has emphasised that distinctions on particular protected grounds, which include nationality and religion, require justification by “very weighty reasons” in order not to constitute discrimination. The Court has held that special treatment measures are permitted provided they are temporary and reasonably and objectively justified by the need to remedy the inequality faced by the disadvantaged group.11

23. Whilst these principles flowing from the ECHR are important in interpreting human rights compliance, Article 14 is not a freestanding right to equal treatment without discrimination. A freestanding right to non-discrimination is found under

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ECHR Protocol 12, but the UK has not ratified this Protocol. Article 14 only protects against discrimination in relation to the substantive rights set out in other Articles of the ECHR. The ECHR does not include a ‘right to work’, although the European Court of Human Rights has ruled that a right not to be discriminated against in access to work can fall within the ambit of the right to private and family life.12

**Legitimacy, proportionality and effectiveness**

24. The Northern Ireland Human Rights Commission is satisfied that the objective of securing reasonably equitable representation of the two main communities in Northern Ireland in employment with the PSNI is such a legitimate aim, and that the measures recommended by Patten and enacted in the 2000 Act are proportionate.

25. The legitimacy of the aim derives not only from the desirability per se of redressing an historic and severe under-representation of a large section of the community in the workforce of one of the largest public-sector employers. It derives also from the wider social good of having a police service that, by being more reflective of and connected to the community that it serves, is better able to deliver community policing, to know and respond to local needs, to secure acceptance and support across the community, and to receive the information, intelligence and co-operation that it needs to prevent and detect crime and to engage in other policing work that increases the safety, security and confidence of the people.

26. If the legitimacy of the original policy objective is established, it remains necessary to consider the legitimacy of its maintenance beyond March 2011. That requires consideration of its effectiveness to date in securing progress towards the desired outcome.

27. In respect of recruitment of trainee police officers, there is evidence of the effectiveness of the 50:50 recruitment process to date in increasing the proportion of Catholic applicants to a level approaching their participation in the overall workforce (averaging 37 per cent of applications in 2001-10), and also

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12 Sidabras and Džiautus v Lithuania (2004) 42 EHRR 104, para. 61 (a violation of Article 14, read alongside Article 8, was found where a Lithuanian law banned former members of the KGB - and other organisations characterised as criminal - from taking up a wide range of jobs in the public and private sector for ten years after the entry into force of the law).
28. The Commission is aware that the vast majority of those who undergo the PSNI selection procedure are not appointed for reasons other than the operation of the 50:50 rule. We are nevertheless sensitive to the disappointment of those qualified candidates, approximately 1 per cent of the total field of applicants, who have been denied employment solely as a result of their community background. The appointments that have been made are producing a police service that is, year by year, more representative of the population it serves, and that is an important and welcome development.

29. It is important that any procedures that depart from the norm of equality of opportunity be kept under periodic review and that special measures be discontinued as soon as they have served their purpose. The objective set in introducing 50:50 recruitment was not to secure representation that precisely matched the perceived community backgrounds in the whole population, but rather, to secure 30 per cent Catholic participation. The current consultation notes that at 29.4 per cent “is now broadly reflective of the community” and is within the ten-year Patten target range of 29 to 33 per cent. The policy assumption in Patten was that 30 per cent met the level representing a ‘tipping point’ at which prospective recruits from the Catholic population would feel confident in the PSNI as an employer and that, following this point, the Catholic participation would continue to rise towards the proportion in the overall workforce in Northern Ireland.14

30. The Commission in this instance is asked to respond to a specific proposal to eliminate the temporary provisions. However, the Commission also has the statutory function of advising on measures that ought to be taken for the protection of human rights, whether or not on foot of a proposal from Government. In that context, the Commission notes particular concern the very significant under-representation of Catholics among PSNI support staff,

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13 As of 1 November 2010: www.psni.police.uk/index/updates/updates_statistics/updates_workforce_composition_figures.htm.
14 The Patten Report described its 29-33% target as “the range of ‘critical mass’... needed to ensure that a minority does not find itself submerged within a majority organisational culture”: Independent Commission for Policing in Northern Ireland (1999) A New Beginning: Policing in Northern Ireland, para. 14.10.
and recommends that consideration be given to alternative and more effective temporary provisions.

31. Just under 18 per cent of current support staff are Catholic (Protestant 78.4 per cent, not determined 3.6 per cent).\textsuperscript{15} It would thus appear that the 50:50 measure has been effective in respect of regular officers, but ineffective or insufficiently effective in respect of support staff. The consultation document offers almost no explanation of the limited impact of the temporary provisions in changing the composition of the support staff; there is no discussion of whether the restriction to exercises involving six or more staff positions has impaired the effectiveness of the scheme, indeed no account of the percentages of Catholic applicants or appointees to vacancies either by competition rounds (as is provided for the police) or on an annualised basis.

32. Rather than discontinuing 50:50 recruitment for support staff, Government should extend that measure for several years, and consider introducing additional measures to accelerate progress towards fair participation rates.

33. The consultation document seeks to explain the situation as follows (paras. 33-34):

\begin{quote}
The increase in Catholic composition in support staff posts is not as advanced as that of regular officers, as 50:50 only applies to those recruitment competitions where there are six or more vacancies of a similar nature to be filled at or about the same time. [...] Because of these factors (sic.), continuing the temporary provisions would in any event have a very limited impact on increasing the numbers of Catholic support staff.
\end{quote}

34. The singular ‘factor’ cited is the restriction of 50:50 to larger recruitment exercises. There is no discussion of the impact that alternatives might have, for example application to all recruitment on a rolling basis, or application of a 75:25 ratio (as was envisaged in the legislation in strictly limited circumstances, but never actually applied). If the six-vacancy rule is indeed the reason why such a relatively radical departure from equality law as 50:50 has failed to produce a representative workforce, Government should bring forward options to redress this imbalance.

\textsuperscript{15}\textit{Ibid}.
35. In respect of regular officers, the Commission would stress the need to secure and monitor progress towards more equitable participation rates. Should it become clear at any point that progress towards representativity has regressed, notwithstanding the application of other affirmative action measures, consideration should be given to the reintroduction of 50:50 or a similar special measure. In the interim the exception provided for in the EU Directive should be maintained.

Other under-represented groups

36. The Commission notes also the very substantial growth in female representation in the police service, from 12 per cent in 2001 to 25.7 per cent currently, with an expectation that this will reach 30 per cent within five years. One area of historic under-representation remains of concern. Northern Ireland is becoming an increasingly diverse society, but ethnic minority officers account for only 0.46 per cent of the PSNI (32 officers) and 0.4 per cent of support staff. While the consultation document (para. 38) relies on a comparison figure of 0.48 per cent ethnic minority representation among people of working age in Northern Ireland, that figure is not sourced and may be dated or otherwise an underestimate. The 2001 Census indicated that 0.85 per cent of Northern Ireland’s population were from minority ethnic groups, and there has been significant inward migration since that time.

37. The proven effectiveness of special temporary measures in addressing the under-representation of one section of our society may indicate that consideration should be given to affirmative action measures that might increase the representation of ethnic minorities within the Service.

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16 As of 1 November 2010: PSNI website, see note 9.
17 The 2001 Census indicated that 0.85 per cent of Northern Ireland’s population were from minority ethnic groups, and there has been significant inward migration since that time.