

## FOREWORD

### REVIEW OF THE PARADES COMMISSION

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27 September 2002

Dear Secretary of State

You announced on 27 November 2001 my appointment to conduct a Review of the operation of the Parades Commission and the legislation under which it was established. I have the honour to submit this Report.

The touchstone by which I have tested my proposals is fairness. South Africa Supreme Court Justice Sachs has said that 'justice is not only in the end result; it is also in the process'.

I am confident that, given an open and co-operative relationship between those on either side of the parades dispute and the regulatory process which I propose, the situation can be progressively transformed so that (in the words of my Terms of Reference) there is 'further confidence on all sides, respect for the rights of all and the peaceful resolution of disputes'. My proposals are predicated on such a relationship. Turning the page will not, of itself, create a new beginning.

Yours sincerely



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## GLOSSARY OF TERMS

- (1) 'ECHR' and 'Convention' are The European Convention on Human Rights.
- (2) 'North' is the Independent Review of Parades and Marches chaired by Dr (now Sir) Peter North.
- (3) '1998 Act' is the Public Processions (Northern Ireland) Act 1998.
- (4) '1987 Order' is the Public Order (Northern Ireland) Order 1987.
- (5) Throughout the Report, for stylistic reasons, I variously use the terms 'procession', 'parade' and 'march'. The title of the 1998 Act refers to 'Processions' whereas 'Parades' was used in the title of the resultant Commission. It is for consideration whether, looking to a day when the events which are the topic of this Report are a form of 'civic endeavour', 'procession' should be the term used in all contexts.
- (6) For convenience, I have referred to 'the sides to the parades debate'. This should normally be interpreted, unless the context otherwise requires, as the Loyal Orders and their supporters in the Unionist/Loyalist/Protestant community on the one hand and those (and their supporters in the Nationalist/Republic/Catholic community) on the other who have found themselves at odds with the Loyal Orders in respect of parades in particular locations.

- (7) Also for convenience, I refer to those 'within the parading tradition'. This should normally be interpreted, unless the context otherwise requires, as the Loyal Orders.
- (8) Whilst I often refer to the Loyal Orders collectively, I am aware that each has its own institutional identity and that any general statement will not necessarily be equally applicable or relevant in respect of each.
- (9) I have used 'He' throughout rather than He/She.

## EXECUTIVE SUMMARY<sup>1</sup>

1. The brief from which this Report arises was to review the operation of the Parades Commission (the Commission) and the legislation under which it was established and to consider whether there are any changes which could promote further public confidence on all sides, respect for the rights of all and the peaceful resolution of disputes on parades.

### The historical and cultural context

2. Both sides to the parades dispute are conditioned by history. When those who have no affinity with Orangeism see it in procession, many of them see history on the march. And they see Orangeism as having been throughout its long history, as well as today, on the wrong side, certainly on the 'opposite' side. Both traditions need to try harder to see all the historical actors as players caught up in the complicated choreography of tragic conflict, which converted difference into the disastrous division which still persists. It is our own choice as a society whether we escape from the enslavement of history. The most effective form of revolt may be a joint attempt by both traditions to take ownership of our entire history.
3. Parade disputes will become much easier to resolve if 'history on the march' is replaced by an institution which has drawn on its value system to create a contemporary Orangeism. The intention of the Grand Orange Lodge of Ireland to consider in depth the way forward over the next ten to twenty years is to be

<sup>1</sup> This Summary relates to Parts III and IV of the Report but most of the analysis and supporting material has inevitably had to be omitted. Parts I and II are introductory and descriptive.

warmly welcomed. Until people develop a better understanding of Orangeism, the notion of parading as a 'civic endeavour' enjoying a degree of consensus with those affected by parading is likely to prove elusive.

4. The scale of the problem around parades and hence the effort required to resolve it are likely to be underestimated unless it is appreciated how much the Nationalist/Catholic perception of Orangeism has been at odds not only with how Orangeism views itself but with how Orangeism believes it is viewed in the Nationalist/Catholic community.
5. Any attempt to gloss over these mutually incompatible perceptions or to deny the sincerity with which they are held does no service to the attempt to resolve the parades issue. Each community has to explain itself to the other and to make a better effort to understand the other. Neither explanation nor understanding can be achieved in the absence of patient and tolerant interaction. There is an abundance of social capital in Northern Ireland but it is of the kind which bonds those who feel a natural affinity towards each other because they share history, religious and cultural values and political belief. There is a paucity of the social capital that bridges difference.
6. Each side feels an outsider to the other's culture. Both cultures need to feel respected and secure. Those who feel threatened need to express their culture all the more strongly and the other side then feel all the more threatened. We need to talk in order to understand what all of us really need.

7. Instead of having cultures which are complementary rather than competing, we have a conflict of cultures. We are currently opting, whether voluntarily or involuntarily, for separation and confrontation, continuing the trend of the past 150 years when cultural cleavage has been reflected in territorial segregation. Some would see the contention over routes for parades as another aspect of the issue of territoriality.
8. Enforced fraternity at the level of Government has not led to a softening of the sharp edges at community level. Addressing people's inability to live together (or even, peacefully, apart) is the central challenge for our devolved institutions.
9. It will be very difficult to achieve consensus around the emotive issue of parading whilst both communities not only consolidate and reinforce the separation which is evident in current trends but also engage in the communal strife which the separateness purports to prevent. To the extent that those who wish to see parades take place along disputed routes contribute to community tensions, they reduce the prospect of achieving their objective.
10. The fault lines revealed by the parades issue are merely part of a complex network of such lines, reflecting a deeply riven society. An easing of the tensions around that issue will contribute to the creation of the inter (rather than multi) cultural society which is an imperative for Northern Ireland's wellbeing.
11. To make progress, community relations programmes must initially put most emphasis on work with single identity groups so that, when intergroup work takes place, it can provide a constructive medium through which prejudice, intolerance

and negative social stereotypes are addressed. The challenge of such work is to ensure that it does not simply reinforce the tendency for people to define themselves in terms of their suspicions of, or hostility to, others.

12. All – on both sides or none – whether seeking solutions to contentious parades or to a badly fractured and even dysfunctional society are unlikely to get far without a vision of an inclusive, open, tolerant, compassionate society whose members have the self-confidence to embrace diversity and thrive on difference.

### **Evidence**

13. There was support for a strongly proactive mediation-type function to try to achieve local settlement without the need for formal Determination, although it was recognised that achieving the improved community relations which would provide a better context for resolving particular parade difficulties was a long-term project. When a formal Determination had to be made, those on both sides of the parades dispute wanted to be able to understand better why decisions were reached and argued for a more open and transparent process. It was asserted on all sides that it was rights that were at the heart of disputes and that the rights of all should be recognised. There was considerable support for the European Convention on Human Rights (ECHR) as the best available framework within which to consider rights issues. There was broad acceptance that parades, simply viewed as events, should (like other major cultural or sporting events) be managed effectively. It was strongly argued that organisers should accept responsibility (and be made more accountable) for their events. There was support for finding ways of introducing more certainty into the situation

regarding contentious parades and getting away from the tensions created by the annual cliffhanging over routes.

14. Most of those who gave evidence (including some who were very critical of the operation of the existing arrangements) accepted that independent third party regulatory machinery was probably a fact of life and concentrated on the changes needed to address their concerns about its operation.

### **Options for the future**

15. There are at least three options. The first would reflect a view that the present Commission model will gradually guide protagonists towards local accommodation and that there is now considerable evidence of this process working itself out. As with all kinds of change, people simply need time to adjust. On this view, what is most needed at present, therefore, is a stable system without the constant promise of imminent change.
16. The second option would reflect a view that at least some of the contentious routes (given the demography of the area and the history of parades) are so contentious that they should be regarded as closed to parades, if not permanently at least for the foreseeable future, although the possibility of a subsequent review in light of local discussions (likely to be a long process) is not completely ruled out. It seems likely that prohibiting parades solely on the basis that those who live near the relevant routes wish this to be done would be in breach of the ECHR. However, if it was determined within the framework of the ECHR that limitation of the right to march was necessary in a democratic society

to protect the rights and freedoms of those objecting and if (as the following option would permit) such a Determination had a longer currency than a year, a route could in effect be closed to parades.

17. The third option would involve addressing seriously the concerns expressed on all sides about aspects of current arrangements and reshaping the existing regulatory machinery as necessary to accommodate those concerns, but in ways compatible with the imperative to ensure independence and impartiality. Such an approach does not reflect on the work which the Commission has done. Building on the foundations laid by the Commission, this option would enable a considerable acceleration in the trend towards local accommodation and, in what it is to be hoped would become a speedily diminishing number of cases requiring formal Determination, provide a process whose outcomes are achieved within a framework which is transparently fair and recognised as such. This is the approach adopted in the Report.

### **European Convention on Human Rights**

18. Convention rights range from the right to life and personal liberty and security to protection of privacy and family life, freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association (which includes not only static meetings but also public processions). Strong rights may sometimes compete with each other and with other important public interests, which is why presumed rights have to be qualified. The grounds for interfering with rights must be relevant and sufficient and any limitation placed on them has to pass a number of tests. In particular, it has to be necessary in a democratic

society for the purpose of achieving certain specified legitimate aims (one of which is the protection of the rights and freedoms of others) and it must be proportionate to that purpose.

**Settling disputes without the need for Determination: 'Settlement without Judgment'**

19. The Parades Commission's Authorised Officers have been the key players in seeking to broker local solutions. They have got to know many of the personalities on all sides and have developed a good degree of insight into the situation on the ground. The Commission's Guidelines make clear the importance which it attaches to communication between the parade organiser and the local community and the Commission, while avoiding an excessively prescriptive approach, has furnished a set of pointers to what constitutes genuine engagement.
20. The Commission believes that, whilst there is no seismic change, there is now considerably more engagement and that 'the green shoots of resolution are breaking through what was once particularly stony ground'. Given engagement, it does not believe there are many circumstances where a loss of route is inevitable.
21. A key feature of engagement has been the diversity of forms it has taken. It has been sometimes but not usually a matter of direct contact between the opposing interests, although there is encouraging evidence of a shift towards face to face dialogue. More often it has been a matter of shuttle diplomacy, with the

Authorised Officers operating in a murky world of shadows within a process of labyrinthine complexity. The difficulties associated with the current process can lead to mutual recrimination, as each side seeks to explain the failure to engage.

22. Nearly six years on, there are still situations where there is no real engagement, in the sense of the parties sitting on the opposite side of the table to the common problem which it is in their joint interests to solve. There are, however, notable examples of such 'pith and substance' engagement and of what it can achieve.
23. The fact that engagement is one of the factors taken into account by the Commission in making its Determinations has led to charges by the Loyal Orders that the Commission is inconsistent in how this factor is applied. Nationalists argue that dialogue must be seen as a genuine and long-term process of conflict resolution and that the appearance of genuine engagement can take place simply with a view to influencing a decision of the Commission and not to deal with the concerns of local residents.
24. The process of achieving local accommodation has to move from what can often be furtive deal making to a future which is more secure and more vibrant in its various expressions, with both parts of the community and organisations like the Loyal Orders more open to one another and less fearful of misunderstanding. That is a matter of relationships and it is upon the mending of these that true settlement of the parades issue depends. This cannot be achieved without professional facilitation services whose work would build on what has been accomplished to date in very testing circumstances.

25. The Report argues the case for developing a stronger and more structured role for a Facilitation function to deal with parade disputes. It draws on experience in other contexts (in disputes situations involving a high degree of personal feeling) to demonstrate the growing acknowledgement that solutions which the parties agree among themselves are preferable to those imposed by a third party. The aim should be to achieve settlement without judgment. A settlement freely entered into resolves the issue. A third party settlement, on the other hand, has the ability to produce a stark 'win' or 'lose' result which hinders the development subsequently of a positive relationship, even though it may be in the interests of both parties to develop such a relationship. Experience elsewhere reinforces the view that, in the parades context also, the process of Determination should be a last resort, when serious efforts to arrive at an agreed settlement have failed.
26. The Report recommends the establishment of a function charged with facilitating settlement, which is located within the regulatory machinery and directly managed by it. It would be headed by a Chief Facilitation Officer (CFO) whose appointment would be a duty imposed by the legislation, from which he would derive his authority. The CFO would be responsible for providing a local facilitation network, some of which might well be recruited from within the existing Authorised Officer cadre. The function would need to have a diverse and flexible panoply of problem-solving techniques at its disposal.
27. The function would be neutral. For the facilitator, an acceptable outcome would have been achieved when the parties arrive at their own agreement, whatever that might be. It would be for the Facilitation function, bearing in mind the object of the legislation, the needs of the parties, and the importance of building mutual

- trust, to follow whatever procedures, and generally to do whatever it considers would resolve the problem.
28. Where there were issues arising from the Facilitation process which needed to be pursued in greater depth and on a longer timescale than was possible through the process itself, the parties could have recourse to the good offices of organisations in the private sector which have already shown their ability to contribute significantly to relationship-building in difficult situations. If it were deemed appropriate, the Facilitation function could provide modest financial support, so long as it was evident that there was serious intent on the part of all concerned to make progress.
29. The parties would not be obliged to use the Facilitation function if they preferred an alternative recourse but the function would have a role in seeing that they did not sit on their hands when there was problem-solving to be done. The aim must be that a route towards dispute resolution is being pursued in every case when that it necessary in the interests of the parties themselves and of the wider community and that the roles of those travelling that route are crystal clear. The issues involved are usually complex and difficult enough without the superimposition of an ineffective process which generates, quite unnecessarily, additional misunderstanding and suspicion.
30. It is reasonable to expect the parties to deal with each other in good faith at the facilitation stage. In line with precedent elsewhere, the facilitator, at the end of the stage, would report on success or failure and on the extent to which the parties had acted in good faith and had participated in a manner designed to

resolve the issues involved. In the absence of settlement, before Determination proceedings could commence, the Determining Body would have to have a Report from the Chief Facilitation Officer certifying that the organiser of the parade had satisfied that requirement, thereby ensuring that the aim of making the facilitation of settlement the primary problem-solving mechanism was not frustrated.

31. Where it felt that it would be conducive to progress, the Facilitation function would no doubt seek to bring the parties together for discussion. Between people prepared to do business, the open and efficient communication which direct contact allows can greatly increase the prospects for success. But failure to achieve direct contact should not in itself prevent the issue of a positive Report to the Determining Body.
  
32. Apart from reporting as above, there would (again following ample precedent elsewhere) be a non-permeable wall between the Facilitation function and the Determination process. This meets the objections advanced by both sides against the role presently played by the concept of engagement, which have already been alluded to. Nationalists argue that, regardless of the 'rights' issues underlying the dispute, Determinations are used to 'reward' parade organisers for what are not necessarily genuine efforts at local problem-solving. Organisers argue that what happens at the pre-Determination stage should not colour the Determination process.
  
33. Agreements reached under the auspices of the Facilitation function should be committed to paper to avoid misunderstanding, should have the same force as a

Determination and should be formally registered with the Determining Body. It is not a question of being legalistic but of avoiding the loose sloppiness which can lead to misunderstanding and mutual recrimination which may nullify any progress made.

34. A well-structured, properly resourced, professional Facilitation function could enhance considerably the prospects for the successful resolution of parades issues. Good faith efforts directed to finding local solutions and skilfully facilitated must surely be the most effective way of defusing community tensions and initiating the process of improving relationships within the community.

#### **Formal Determination: rights and responsibilities**

35. Even given good faith efforts, settlement by agreement will not always prove possible and a formal Determination will be necessary. The criteria by which decisions are presently taken (contained within the Public Processions (Northern Ireland) Act 1998 (the 1998 Act) and the Guidelines issued by the Parades Commission under it) are characterised by too much complexity and insufficient clarity. Nor is it always clear from the text of Determinations what weight has been given to the different criteria or how the information relevant to the disputed issues has been evaluated in light of the criteria. It is therefore often difficult to discover in any real sense the reason for the decisions. Both sides of the parades debate contend that Determinations are overly formulaic and legalistic.
36. It would promote greater confidence and understanding (and reduce the occasions on which charges of perverse and inconsistent decision-making are

levelled from both sides) if those affected had a greater insight into the reasoning underlying decisions.

37. The fundamental issue surrounding contentious parades is a conflict over rights and, more particularly, the extent to which the right to march peacefully is compatible with the maintenance of the rights and freedoms of others. Both sides of the parades debate talk in the language of rights. This issue has become obscured by the complexities of current arrangements. There would be much benefit in going back to basics. The means of simplification is to hand in the ECHR (para 18 above).
  
38. Replacing Section 8(6) of the 1998 Act (which contains the existing criteria by which Determinations are made) with legislation modelled precisely on Article 11 of the Convention (which deals with the right to freedom of peaceful assembly) would entail:
  - (i) A provision that everyone has the right to freedom of peaceful assembly (defined to include 'peaceful procession').
  
  - (ii) A provision that such restrictions shall be placed on the exercise of this right as are necessary in a democratic society for the protection of the rights and freedoms of others and for the protection of health and morals.
  
  - (iii) A further provision which is set out in para 60 beneath.

- There would, as under the existing legislation, be a duty to issue Guidelines for the exercise of the powers to place restrictions under (ii).
39. The difficulty in discovering in Determinations the reason for decisions or the weight attributed to the various existing criteria has led to charges that the fundamental reason for imposing conditions on processions is the threat of violence on the part of objectors. Objectors argue that this seriously misinterprets their position, which is based on a principled stand on the rights issue. It is therefore important that the focus should be on that issue.
40. The extent to which a parade would affect the rights and freedoms of others would be assessed by considering five broad areas, with the key factors to be taken into account in relation to each being specified. This would be done in the Guidelines. Four of the five areas might be: the nature of the parade; the arrangements; the characteristics of the contested part of the route; and the potential for disruption. The fifth area would embrace any other matter concerning the parade which arises under any Article of the ECHR or any other international human rights agreement to which the United Kingdom is a party or under the general law which affects the rights and freedoms of others.
41. The new legislation would not replicate the current provision in the 1998 Act which requires that regard be had to the desirability of allowing a procession customarily held along a particular route to be held along that route. Within a rights-based framework it would be illogical to argue that the rights and freedoms of others should be protected less fully in some circumstances than in others. Moreover, discrimination in favour of traditional, as against new, parades

(whatever the auspices or purposes of those new parades) could run counter to equality considerations.

42. It would be reasonable, however, to have regard to traditionality if it were proposed to hold another parade at the same time or if the number of parades was being limited on the grounds of unreasonable frequency and priorities had to be established. And of course the Facilitation stage prior to any necessary Determination would provide an opportunity for it to be explained why so much importance is attached to processing along customary routes.
43. Except in circumstances where there is overwhelming support from the local population, it would be surprising (particularly if the number of parades has been steadily increasing and the rate of increase shows no signs of abatement) if consideration did not have to be given to whether a curtailment of the number of parades could be effected without denying adequate expression of culture to the parading group concerned. The Facilitation function should be at their disposal if the parading interests were minded to work out a priority scheme on a voluntary basis. It seems better to pre-empt what could be a difficult situation rather than be taken by surprise.
44. In the case of a facilitated settlement, it would be for the parties to agree amongst themselves what its scope and duration should be. Each parade would, of course, still have to be notified to the police so that they could discharge their responsibilities. In the case of parades which were the subject of Determinations, discretion could be given to the Determining Body to make

rulings for periods of up to, say, five years, subject to the proviso that these could be reviewed if any material change was brought to the attention of the Body.

45. A sad feature of our history and of the contemporary scene is the collapse of what has been described as public civility between the two traditions. There should be inserted into new Public Processions legislation the following right:

‘In the exercise of their right to freedom of peaceful assembly, all have a right to have their honour respected and their dignity recognised and must themselves respect the honour and recognise the dignity of others’.

This gets close to the concept of parity of esteem which, by its very nature, denotes a reciprocal relationship fully consonant with the pairing of rights and responsibilities which is the hallmark of the ECHR.

#### **The process for making Determinations**

46. The Procedural Rules of the Parades Commission provide for all evidence to it, both oral and written, to be treated as confidential, although it reserves the right, as part of an explanation for its decision, to express unattributed general views heard in evidence. Both sides allege lack of openness and transparency, with the Loyal Orders arguing that it is unjust that their membership is asked to defend their rights without knowing what evidence is presented that is so fundamental that those rights should be denied.

47. The experience of the Commission leads it to believe that its confidentiality rule has encouraged a broad spectrum of people to supply it with material information, views and representations. It believes that, without it, the frank and uninhibited disclosure of information would be impaired, thus frustrating and compromising the performance of the Commission's statutory functions. The conditionality rule is not one-sided, inasmuch as it operates to protect fully the confidentiality of all information supplied to the Commission by parade organisers, their supporters and representatives.
48. In several cases before it, the European Court of Human rights has underlined the importance of procedural fairness when there is a discretion exercisable which is capable of interfering with the enjoyment of a Convention right.
49. The test of fairness cannot be fully met within the tight confidentiality constraints by which the Commission is bound by its Procedural Rules. If, in future, the outcome of the Determination process pivots on how exercise of the right to freedom of public assembly affects the rights and freedoms of others, with the matters to be taken into account being as above (para 40), it is difficult to envisage circumstances in which many need feel any inhibitions about expressing their views fully. The Determining Body should, however, have discretion to handle, in whatever way it deemed appropriate and so as to disadvantage none of the principal parties, any submissions which were made on a confidential basis.
50. A model for a process which would enable all sides of parades disputes to feel that their case has been fairly considered exists in the arrangements operated by

Scottish local authorities when making decisions on parades in respect of which there have been objections. It requires little adaptation to be suitable for use in Northern Ireland.

51. Objectors would be offered the opportunity formally to register their objections and copies would be made available to the organisers of the procession. The Determining Body would arrange a hearing for the parties directly in dispute and any others who wished to offer evidence relevant to the proceedings. This would enable the parties to explore each others' positions and challenge each others' statements as necessary, with the aim of exposing to the Body the issues in dispute. The Body would be able to ask its own questions and to conduct whatever inquiries of its own it deemed necessary, the outcome of which should, of course, also be available to the parties. A Determination would then be issued, evaluating the evidence in terms of the factors which the Guidelines obliged to be considered and showing clearly the reasons for the conclusion.
  
52. The Scottish arrangements prove that a user-friendly, readily intelligible process, with simple procedures, can be devised to enable the Determining Body to discharge its role. The aim should be to create an atmosphere which gives all parties confidence in their ability to participate in the process and has them leaving the proceedings feeling that they have had a fair opportunity to put their case.

### **Notice of intention**

53. Difficulties anticipated in regard to future parades which are expected to be contentious should begin to be addressed immediately after the end of the previous marching season, so that the Facilitation and Determination functions have maximum opportunity to deliver their full potential in resolving those difficulties.
  
54. The chances of success are likely to be greater if facilitation does not take place in an atmosphere where last-minute crisis management is the order of the day. A period of facilitation should be fixed so that if, despite good faith efforts, there is failure to agree, the issue can proceed to Determination in time to allow that effort to be properly conducted. The period of notice of intention to parade in existing legislation needs to be adjusted accordingly, as described in Chapter 17.

### **Compliance**

55. Determinations must be regarded as binding and systems must therefore be in place to ensure that failure to comply will have consequences. In fairness to parade organisers it is important that alleged failure to comply with a Determination (or the terms of a settlement) should be brought to their attention as quickly as possible after a parade has taken place and that the matter should be dealt with by a process which is fully consistent with the principle of transparency, as described in Chapter 18. This should be fully supported by organisers, the vast majority of whom wish to be responsible for well-conducted

- events and whose hand in dealing with any non-compliant members will be greatly strengthened by such provision.
56. It is logical that the same process should apply to protests. Provocative, sectarian, offensive or abusive behaviour on the part of protestors is as reprehensible as similar behaviour on the part of those on parade.
57. There are locations which have not hitherto been contentious where it may become apparent that (because of breaches of the Code of Conduct or for other reasons) there are initial signs of imminent difficulty which, if promptly addressed, can be averted. Police should be asked to identify any incipient concerns promptly.
58. Those monitoring parades should be obliged to bring to the attention of the Determining Body any aspects of the policing of the event which merit review in the context of arrangements for the policing of future events, so that these can be pursued in accordance with whatever Protocol for handling such matters might be agreed between the Body and the Policing Board.

### **Protests**

59. It is illogical for different modes of protest (moving and static) to be dealt with on different criteria by different bodies (the former by the Commission and the latter by the police). It makes sense for one and the same body to be seized of the totality of the event – both parade and protest. The criterion for deciding whether limitations should be placed on processions – namely their impact on the rights

and freedoms of others – is equally relevant for protests. Freedom to protest is a vital aspect of the Article 11 right to freedom of peaceful assembly and should be affirmed as such in the Public Processions legislation but it, no more than the right to process, cannot be regarded as absolute. The definition of protest should be extended as necessary to include protest in respect of a Determination as well as a parade.

### **Public safety etc**

60. As indicated above (para 38), a further provision would be required in new Public Processions legislation modelled on Article 11 of the ECHR in order to match fully the range of aims which may be legitimately taken into account in deciding whether it is necessary in a democratic society that the right to freedom of peaceful assembly should be limited. A provision on the following lines would achieve this objective:

Such restrictions shall also be placed on the exercise of this right as are necessary in a democratic society in the interests of national security or public safety or for the prevention of disorder or crime.

61. The willingness or otherwise of the State to protect rights which it had been formally determined would not adversely affect the rights and freedoms of others (as distinct from rights asserted regardless of the rights of others) poses a serious issue of public policy. There is authority for the proposition that rights being properly exercised should be protected unless this runs counter to the ‘absolute necessity for preserving the King’s peace’. The possible restriction on

- the right to freedom of peaceful assembly on grounds of public safety etc envisages precisely that 'necessity of the case'. Article 11(2) of the Convention from which the provision proposed in para 60 is derived makes clear that the interference with the right must be necessary in a democratic society and proportionate to the aim to be pursued (in this case safeguarding public safety etc).
62. There is also authority for the proposition that, through the combination of common law developments and the incorporation of the Convention into UK domestic law, it might now be regarded as unreasonable, in the absence of special circumstances, for the police to interfere with a person who is doing something lawful in order to forestall an unreasonably violent response by an opponent.
63. Currently it is the Parades Commission which, in making its Determination, has regard inter alia to the possibility of public disorder or damage to property, taking into account advice received from the police. This Report proposes that the legislation should empower the police to make the public safety decision but that the Secretary of State should have a reserve power to intervene if he felt that the re-routing of a parade was necessary in a democratic society in the interests of national security or public safety or for the prevention of disorder or crime.
64. Dealing with public safety etc issues in this way would enable it to be clearly seen where accountability for decisions regarding policing lay. It is also the police who are best placed to make a judgment on how the police budget is best

spent, given other claims on it. The police are, of course, obliged to have regard to the ECHR and are subject to the remit of the Police Ombudsman.

65. These arrangements would not represent a return to the situation prior to the 1998 Act. The police would have no part to play in the evaluation of the rights-based factors with which the Determining Body would be concerned. Indeed it would be much clearer than it is now that the public safety factors which are related to the police function would have had nothing whatsoever to do with the view which is taken on the rights issues. The police would be involved in the implementation, not the making, of the Determination and would not therefore have the dual role which was regarded as an unsatisfactory feature of the pre-1998 Act situation. They would not, of course, be able to allow a march which the rights-based process had already ruled would infringe the rights and freedoms of others.
66. Whilst the possibility has to be addressed, public safety ought not to be an issue in the context of a rights-based regulatory regime. The procession itself should not constitute any threat to public safety since, unless it was to be peaceful, it would not have any right to march under the Convention or the new Processions legislation modelled on it. Nor would the parade have been allowed to proceed without limitation unless it had been adjudged not to impact adversely the rights and freedoms of others. If in these circumstances a violent protest were nonetheless to be threatened or to occur, it would lack any justification.

### **New structures**

67. It is in the nature of the Facilitation and Determining functions that each should operate independently of the other. Neither can be only 'partly' independent. Otherwise the integrity of the Facilitation process is compromised and the facilitator, whatever his disclaimers, could be suspected of being manipulated. The Determination function would also have difficulty refuting the charge that, rather than looking objectively at the facts for itself in terms of the criteria to which it was obliged to have strict regard, it was simply an extension of the 'settlement' process attempted without success at the Facilitation stage. The suspicions might be farfetched and groundless but, as experience to date has demonstrated, confidence and trust are of the essence in a situation where rumour and speculation abound.
68. An attempt to square the circle by continuing to have a unitary Commission with mutually independent Facilitation and Determination functions within it would contain the seeds of such misconceptions as to be doomed from the start. People would be unlikely to be able to get the present unitary model out of their heads or to rid their minds of the suspicion that the two functions would, despite all protestations to the contrary, be working hand in glove. Structure, like process, has to be transparent, with possibilities for misunderstanding eliminated so far as is humanly possible.
69. To meet these difficulties there should be established, as the body which makes Determinations, an independent Rights Panel for Parades and Protests, comprising a Chairman with legal qualifications and experience to be appointed

- by the Lord Chancellor and two other members drawn from a list of suitable persons.
70. A Panel which issued Determinations that could be ignored with impunity would quickly lose authority. Compliance would be crucial and the Panel should have a Compliance Branch responsible for the process for follow-up of parades and protests as in para 21.18.
71. All other matters pertaining to parades should be the province of a body which, given the key nature of its remit, might be called the Parades Facilitation Agency. In addition to the Facilitation function, it would be responsible for the preparation of the Guidelines, Procedural Rules and Codes of Conduct; the appointment of monitors; and Education.
72. An Agency with such a role could benefit from a degree of innovation in the devising of its governance arrangements. Whilst it is difficult to expect active contributors on either side of the parades debate to serve on a body responsible for making Determinations, there seems no reason why they could not be involved in the direction of the Agency. It would be a good augury for the intercultural society of the future and perhaps serve as a role model in other contexts.

### **Parades as events**

73. Any organisation bringing people together for any event (eg sport fixtures, road races, open air concerts or parades) bears a huge responsibility for doing

everything in their power to ensure that it goes off peacefully, with minimum inconvenience to those who are not involved in the event. To insist that those who organise parades should match the high expectations which people now have of those who organise events of any kind has nothing to do with the suppression of the culture or beliefs of those who take part in them nor does it militate against events that are totally relaxed, enjoyable and even joyful. Laying down stringent requirements for parades reinforces the efforts of the majority to induce a proper sense of responsibility on the part of the minority whose actions can bring disgrace on the whole organisation.

74. Now that there is a great deal of experience of the working of the Parades Commission's Code of Conduct, it should be revised as necessary in consultation with all the interests concerned. It is widely accepted that drinking is a key factor in cases where the Code of Conduct is breached. The alcohol provisions of the 1998 Act should be strictly enforced and legislation should be brought in, similar to that introduced in Great Britain as a result of incidents at sporting fixtures, which makes it an offence for a person who is the operator, or the person to whom it is hired, knowingly to allow alcohol to be carried on to a public service vehicle.
  
75. Whilst good practice is now widespread, high standards of conduct are not yet being universally attained. Whatever the sphere of activity, there will of course be people who fall short of the qualities to which the great bulk of their peers want them to aspire. The response by the organiser to deviant behaviour must be one which makes clear where he stands and that there is no tolerance for this behaviour or room for those who are not prepared to conform to the rules. There

is every reason to believe that such an approach would be welcomed by the vast majority of those who parade.

### **Bands**

76. The marching bands are a significant social phenomenon, an expression of Protestant grassroots culture which, however it may be viewed by some (many of them within Unionism as well as in the Nationalist/Republican tradition) cannot be ignored or wished away. Ideas within the Ulster Bands Association for an educational strategy, with a particular emphasis on a programme of both cultural and social education, addressing particularly but not exclusively the needs of the younger generation, are well worth serious consideration and support. The aim would be for the marching band to become an experience for the learning of discipline, social life skills and education for positive citizenship. The musical dimension of the programme would be crucial in order to ensure that the flute's versatility as a musical instrument is fully reflected in the quality of playing.
77. This approach would also be relevant to marching bands within the Nationalist tradition and there could be more opportunity than might superficially appear for co-operative activity between bands from both traditions.
78. It is accepted even by those strongly supportive of the marching tradition that there are bands (or individual bands members) who misbehave. In the interests of the marching bands as a whole, effective action to deal with this problem needs to parallel the educational initiatives.

79. The Loyal Orders should therefore review the basis on which they hire bands to bring it into line with the Conditions of Engagement operated by the Grand Orange Lodge of Scotland. A separate Code of Conduct for bands should be prepared. Those who do not subscribe to it or to an approved Code issued by a Band Association should be required to register under the registration scheme which the Government has power under the 1998 Act (not yet exercised) to introduce. Breach of the Code of Conduct would also lead to a requirement to register and to have the registration renewed annually for three years, after which the requirement would lapse, provided no problems had arisen.
80. The time at which band parades end is one of the most usual causes of complaint. It also reinforces adverse perceptions regarding the frequency of parades. A solution should be sought which provides ample opportunity for the culture represented by band parades to be given full expression; recognises that parades serve as a vital means for bands to support themselves financially; and takes into account the views of those who are not wildly enthusiastic about band parades.

### **Educational role**

- 81 Under the proposals in this Report it would be for the new Parades Facilitation Agency to be very proactive in making sure that organisers of parades understand the rationale and role of the regulatory machinery, how it operates and how it relates to the ECHR. It should also play its part in providing the intellectual leadership needed to get effective action on the historical and broader

contextual issues addressed in paras 2 to 12 above. Other functions are set out in Chapter 25.

### **Parades and the economy**

82. So far as the outside world is concerned, the marching season still equates to rising tension, hot summers and communal disorder. Even inside Northern Ireland there is apprehension each year as to what is likely to happen. It would therefore betray dangerous complacency to think that, because disputes over parades no longer significantly affect the life of the community at large, putting Northern Ireland out of business for days on end, they no longer have any significance for our economic future.
  
83. Every image of embattled police lines flashed around the world diminishes our ability to realise our economic potential. Some of the areas which generate most of the images are precisely those where economic regeneration is most imperative. The impact on tourism cannot be challenged. There is loss of credibility for the tourism product and the perception of the quality experience which visitors should expect is damaged. And yet the positive aspects of parades could be marketed as tourist attractions if the negative baggage could be removed. The cost of policing as a consequence of failure to achieve consensual parading has been enormous. Resolution would release scarce resources within the police budget to meet pressing needs elsewhere.
  
84. There is no doubt about the serious problem for business which any return to the pattern of disruption of the worst years would create. So long as there is no real

consensus around the parades issue, the risk always remains of actions having unintended and largely detrimental consequences. We simply cannot afford to ignore the symbiotic link between prosperity and social stability.

### **Offences**

85. Rather than create further offences, it is more important that those guilty of any of the wide range of existing offences should be identified and prosecuted. In the absence of the rule of law, talk of a culture of rights is mere rhetoric.

## **PART I**

This Part contains introductory comment, together with an account of the steps I took to mobilise the views of those directly involved in the parades debate and of others.

# CHAPTER 1

## INTRODUCTION

- 1.1 My appointment to conduct the Review was announced by the Secretary of State on 27 November 2001. I was given the following Terms of Reference:

“To review the operation of the Parades Commission, since it took its current form in February 1998, and the legislation under which it was established and to consider whether there are any changes which could promote further public confidence on all sides, respect for the rights of all and the peaceful resolution of disputes on parades”.

- 1.2 There had been previous reviews, whose main recommendations (for the purpose of this Review) I describe in Chapter 6. They had terms of reference which obliged them to take as given the existing structures and legislation. I was freed from any such constraint.

- 1.3 The Government’s intention to establish the Review was one of a number of ‘proposals on normalisation’ included in a letter to the Party Leaders on 1 August 2001, following discussions at Weston Park the previous month. The Government made clear that it believed the Parades Commission had had four successful years of operation against a difficult background.

- 1.4 There were those who feared that the purpose of the Review, given its announcement in the aftermath of the Weston Park discussions, might be ‘to re-

emphasise a connection between the marching issue and other issues in the wider political arena' and might even represent an attempt 'to revert to a pre-1998 situation where the marching issue would again be subjected to the vagaries of political necessity or control'. Others had opposite concerns, that the Review was simply a cosmetic exercise of going through the motions to a fore-ordained conclusion which endorsed the status quo.

1.5 I was at considerable pains to reassure all that it would be a robust Review conducted with as much professionalism as I sought to bring to other tasks, without fear or favour, and with reference to nobody's political agenda. I believe that I have remained completely loyal to that intention.

1.6 The Secretary of State assured me that I would be left to operate in total independence from Government. He and his officials have adhered scrupulously to that assurance.

1.7 Whilst maintaining a critical distance, as is proper for a Review, I have sought throughout the Review to empathise with the arguments from those within and those outside the parading tradition. My concern has been to see whether, as I was enjoined to do by my Terms of Reference, I could identify changes which would:

- (i) Promote further public confidence on all sides. I took that to mean exactly what it said and that a result which increased confidence on one side at the expense of loss of confidence on the other would not fulfil the terms of my remit. I was also conscious that

the ability of the arrangements set up under the Public Processions (Northern Ireland) Act 1998 (the 1998 Act) to command widespread confidence had been identified during its progress through Parliament as a precondition of their success.

- (ii) Promote respect for the rights of all. I felt that I could not do better than take as my compass for this part of my remit some words of the theologian Jürgen Moltmann:

‘I am free and feel myself to be truly free when I am respected and recognised by others and when I for my part respect and recognise them .... Then the other person is no longer the limitation of my freedom; he is an expression of it’.

- (iii) Promote the peaceful resolution of disputes on parades. It has been proved in many historical and contemporary contexts that, whatever the sharp conflicting interests of those on opposite sides of a dispute, it behoves them to strive to discover the solid common interests which make it sensible for them to write the peace treaties without first fighting the wars. Northern Ireland has had – and continues to have – a surfeit of destabilising conflict.

1.8 The more I engaged with the wide range of interests who furnished evidence, written and oral, the more I became convinced that progress could be made. Almost without exception, the need for regulatory machinery was accepted on all sides, but all had ideas as to how its effectiveness might be enhanced.

## **CHAPTER 2**

### **MY APPROACH TO THE REVIEW**

- 2.1 Having absorbed as much background material as possible, I wrote to a wide range of organisations and individuals on 8 February 2002, inviting them to submit written evidence by 23 March 2002. This invitation was accompanied by an Issues Paper (Appendix 1) which I made clear was intended to be illustrative of the range of the Review but not to be prescriptive or to constrain the scope of responses or the manner in which they were presented. An invitation was also advertised in the Press, with an accompanying News Release which received wide publicity.
- 2.2 I agreed to all requests for an extension of time for the submission of evidence and I wrote again on 20 May 2002 to those who had not by that date submitted evidence, offering them a further opportunity. I continued to receive evidence up till and throughout September but I have been able to take it all fully into account.
- 2.3 I attended the Conferences on 'Parades – a Vision for the Future' organised by the Parades Commission, the Community Relations Council and INCORE on 26 January 2002 and 9 March 2002 and I derived considerable enlightenment from the range of excellent papers which were presented and the ensuing debates both within the Working Groups and in plenary session. I made known to all attending both Conferences that I should welcome evidence from any who had not been included in my original list of invitees. I also attended a very interesting

Conference on 13 April 2002 organised by the Grand Orange Lodge of Ireland on Human Rights.

- 2.4 A few of the responses simply explained why the respondent would not be giving evidence. However, apart from these, I received 104 substantive (and in some cases very substantial) replies. I considered this a very satisfactory response, not least considering that this was the third review (albeit on this occasion with much wider Terms of Reference) in two years. I was particularly pleased that the range of respondents gave me access to what I suspect must be the entire spectrum of views on parades issues.
- 2.5 I also had the benefit of reading the voluminous published evidence in relation to the earlier review conducted by the Northern Ireland Affairs Committee of the House of Commons.
- 2.6 I decided that I was likely to gain much from in-depth discussion with some who had provided written evidence and from a few others who did not, but whom I was anxious to meet. I spent probably 130 hours meeting some 60 individuals and representatives of organisations.
- 2.7 I had a productive visit to Derry<sup>1</sup>, meeting a range of interests, and also spent a very interesting evening in Ballymena. I familiarised myself with contentious routes in Belfast and Craigavon and received briefings from senior police officers in the South and Urban Regions.

<sup>1</sup> Like many in Northern Ireland, I have used this terminology from childhood and retain it in this Report as being what comes most naturally.

- 2.8 I visited Scotland for what proved to be most useful meetings with the representatives of the Grand Orange Lodge of Scotland and North Lanarkshire Council.
- 2.9 A list of all who gave written and/or oral evidence is at Appendix 2.
- 2.10 I could not be sufficiently grateful for the helpfulness of all those who wrote to me. I owe a particular debt to those whom I met face to face. Without exception, these meetings were amongst the most courteous, open and constructive in which it has ever been my good fortune to be involved. There was none which did not afford me some fresh insight.
- 2.11 Given my Terms of Reference, it was obviously important that I not only achieve as much familiarity as possible with the work of the Parades Commission but also become inward with the thinking which informs its approach to its very challenging task. The Commission, demonstrating immense commitment, has been working might and main to achieve a lowering of tension. It can derive considerable satisfaction from the extent to which the situation has improved in recent years<sup>1</sup>. As well as meeting the full Board of the Commission, I met the Chairman on three occasions and also had lengthy discussions with each of the six members of the Commission. I met the Commission's senior officers and had two meetings with Authorised Officers of the Commission. In addition I was offered, and sought, written evidence on a wide range of issues. I studied a considerable number of the case papers in relation to contentious routes. I perused carefully all the Determinations issued during the currency of the Review and not a few of those issued previously. I greatly appreciate the patience with

<sup>1</sup> Statistics on contentious parades are at Appendix 3.

which the Commission bore my importunities. I am satisfied that I have been able to gain a sufficient understanding of the operation of the Commission on which to base the conclusions which I have reached in this Report.

2.12 I have been superbly supported by George Martin and Alice Sheridan, who were seconded to the Review by the Northern Ireland Civil Service. I could not have asked for a more hardworking or agreeable team. As well as being an excellent chef de cabinet, George kept a comprehensive record of all our meetings, provided an invaluable conspectus of the evidence to make sure that nothing was inadvertently overlooked, and was tireless in chasing information. Alice was adept at sorting out dates for the oral sessions and did wonders in typing up a succession of almost illegible drafts of the Report. I could not be sufficiently grateful to both of them.

2.13 It would be impossible to produce a report which neatly reflected the range of disparate views and ideas which were put to me. I found, however, that the evidence, on all sides, was permeated by themes which (whilst naturally presented to me within the different perspectives which different interests bring to the parades issue) were widely shared.

2.14 I would, therefore, ask those who read the Report not to go in search of something which matches one of their favourite prescriptions or to discover what has not been included which they would have wished to see there. I would instead urge them to look at the Report as a whole and see whether it provides a fair, transparent framework within which there can be developed a very important dimension of what has to be a genuine rights culture in Northern Ireland.

2.15 There is no comfort in this Report for any – on either side of the debate - who seek vindication of the view that the rights at issue are absolute. This is not because I have so chosen to write the Report. It is because the United Kingdom is locked into the structure of the European Convention on Human Rights, which is unambiguous in this respect. Domestic law must be compatible with the Convention and it must be administered in a way which is compatible with the Convention. That view has, very properly I believe, informed this Report throughout.

## **PART II**

This Part describes the process out of which the existing Parades Commission model emerged. It summarises key features of the North Committee's Report and of the Parliamentary proceedings on the ensuing Bill, which became the Public Processions (Northern Ireland) Act 1998. There follows a brief description of the functions of the Parades Commission and a note of key recommendations emerging from the Reviews of the Commission conducted by the Northern Ireland Office and the Northern Ireland Affairs Committee of the House of Commons.

## CHAPTER 3

### THE NORTH REPORT

***‘We have a choice to make between chaos and community ..... Too much time is spent either shaking hands with the past or shaking one’s fist at it. Would it be possible to spend more time shaking hands with a different future? ... The future does not just happen: people have to create it’.***  
***The North Report.***

- 3.1 The establishment of a Parades Commission was recommended in the Report of an Independent Review of Parades and Marches chaired by Dr (now Sir) Peter North, which was published early in 1997. For brevity’s sake, I shall refer to the Independent Review hereafter simply as North.
- 3.2 Not all those who read my Report may have read North in its entirety and not all who have may, nearly 5 years later, have total recall of its contents. North is vitally important, however, as are the Parliamentary proceedings on the ensuing 1998 Act for an understanding of the rationale of present arrangements for the regulation of parades. I therefore attempt here a summary of key features of the Report. It cannot hope to do justice to an admirably comprehensive and richly textured document but I shall have achieved my purpose if I succeed in conveying the pith and substance of the ideas which framed the Report’s analysis of the issue, leading in turn to proposals for change in the régime represented by the Public Order (Northern Ireland) Order 1987 (the 1987 Order).

- 3.3 About half the Report was very usefully devoted to a description of the Parading Organisations; a summary of the events surrounding parades the previous year; a review of evidence which was received; the existing legal (and the wider Human Rights) framework; and issues arising out of the policing of public order. I largely ignore these parts of North for the purposes of this summary.
- 3.4 North located the sources of the problem within the inability of our society to deal positively with difference and with shared time and space. The slightest audio-visual stimuli can recall the ghosts of centuries old conflicts. One group's faithful remembering of an event can be felt by another group as a reminder of something that they feel is best forgotten, and yet we know that there is no way forward which does not involve reason and reconciliation and mutual accommodation.
- 3.5 Residents groups speak about the triumphalism of the Loyal Orders. The Loyal Orders in turn speak about sophisticated strategies being deployed which lead to them being humiliated and frustrated. All of us are armed with stereotypes of the opposition. There is much more to people than those stereotypes.
- 3.6 It takes a significant leap of imagination for these two groups sympathetically to understand one another, a leap of imagination made more difficult by the contemporary experiences of each group. North asks if it be possible to move beyond the exercise in divisive remembering to a shared sensitive remembering which could turn parades into a shared cultural experience. Marches and parades would no longer be seen as a pejorative and triumphal remembrance of

- victory by one side or the other, but a joyful recognition that together the community had created a better future.
- 3.7 North felt that such a future depended on creating the kind of trust that permits people to take risks in yielding up some of their own control of situations in favour of tackling them together. Sometimes it is more responsible not to exercise a right in the interests of the concerns of other people or of the wider society than to insist on exercising it regardless of the consequences.
- 3.8 We need to be more open to one another and less fearful of misunderstanding. Relationships of trust and openness are ones in which deep disagreement and hurt can be aired, as well as positive feelings expressed. Leadership in a diverse society is weak and harmful if it is based on consolidating difference rather than on encouraging trust and interdependence.
- 3.9 North was told by members of the Loyal Orders and others that they saw the issue as concerning religious and civil liberty, the identity of parts of the community, and the relationship between groups within a community. Representatives of the Nationalist community regarded the issue as raising fundamental questions concerning parity of esteem, a failure to recognise the rights of local communities, and the relationship between groups within the community.
- 3.10 North quoted Desmond Bell's point, in Acts of Union (1990), that marching bands and parades are amongst the means by which an exclusive Protestant identity is represented and renewed in the loyalist mind. At the group level, parades

provide a manifestation of a sense of belonging to a social group. North quoted Bryan, Fraser and Dunn, in Political Rituals: Loyalist Parades in Portadown (1995), to the effect that, since it is part of the participants' identity, opposition to the ritual becomes an attack upon both the individual and his or her community. Reference was also made to other commentators' view that the parades issue symbolised power relationships.

3.11 Contradicting the perception of many loyalists, North was told by a very broad spectrum of Nationalist opinion that, in a considerable proportion of the areas where the community was mixed, parades for many years had at best been 'grudgingly tolerated'. Good neighbourliness was not to be confused with a welcome for parades. Some, particularly those in residents groups, said that loyalist parades were intrinsically sectarian. Many saw parades as a territorial act, serving to remind the current residents in areas affected by demographic change that they lived in an area to which the other part of the community still laid some claim. It was put to North, especially in Portadown, that certain loyalist parades were a deliberate reminder that Nationalists were still second class citizens. Certain aspects of parades could have a threatening and intimidatory effect. Nationalists looked upon the Loyal Orders as having close connections with their political opponents and could see no reason why the Orders should be allowed to march as they wish within or near to Nationalist communities.

3.12 Whilst recognising the limitations of the law in addressing the issue of flawed communal relationships, North saw the law as an important mechanism that provides a basic framework within which the competing and conflicting interests can be measured and reconciled. North suggested that its proposals, as people

took advantage of the opportunities offered, might generate a groundswell of movement towards accommodation. A recurrent theme is the need to understand one another and to reach local accommodation. Mediation had an important role to play, but not simply as an 11<sup>th</sup> hour process. Relationships had to be established over a longer period, with trust developed and sustained.

- 3.13 North addressed the results of attitude surveys, including those commissioned by itself. Key points from the surveys are worth recalling:

On the root causes of the disagreements over parades, two of the three most commonly named by both Catholics and Protestants were 'too many parades' and 'Unionist/Loyalist genuine fear of losing ground'. The third cause, for each, was the desire of the other to show dominance.

Re-routeing of marches was favoured as the proportion of the 'other' tradition in an area increased. At a 75/25 split (ie 75% of the population from the same community as the marchers) 17% of Catholics and 5% of Protestants favoured re-routeing. At a 25/75 split, 31% of Catholics and 18% of Protestants favoured re-routeing.

At a 75/25 split, negotiation of marches was supported by 50% of Catholics and 26% of Protestants. At a 25/75 split, the figures became 36% and 44%.

There was a question as to whether the consent of the majority population in any area needed to be given for any marches by the opposite tradition through the area. 80% of Catholic respondents and 44% of Protestant respondents thought

so. For a Sunday church parade the figures fell to 50% and 24% respectively. For an ordinary congregation of the opposite tradition attending their normal weekly service at their place of worship in the area, there were as many as 15% of Catholics and 14% of Protestants who felt consent to be necessary.

Respondents were asked to choose from a list of options which march organisers should adopt when facing opposition to their proposed route. Meeting with residents was the most popular first choice with both Catholics (67%) and Protestants (46%).

Respondents were asked to react to a list of possible actions by those who object if a parade is allowed to go ahead. There was broad agreement between the two traditions on the acceptability of the handing in of a letter of protest or of demonstrating peacefully on the pavement. 86% of Catholics and 95% of Protestants said that blocking the road with vehicles was not acceptable and 69% of Catholics and 91% of Protestants reacted similarly to sitting in the road as a form of protest.

Respondents were asked whether, if there is a dispute between residents and marchers, those in dispute should seek a negotiated accommodation. 97% of Catholics and 83% of Protestants agreed. As to who might be thought to have primary responsibility for helping to resolve disputed parades, the most popular first choice for both Catholics and Protestants was representatives of the groups involved (31% for Catholics, 26% for Protestants). An independent commission was favoured by 30% of Catholics and 20% of Protestants.

Asked if a binding decision should be taken by someone else if an accommodation is not possible, 82% of Catholics and 77% of Protestants said yes, and an independent commission for this purpose was the first choice of 65% of Catholics and 40% of Protestants.

3.14 North had observations to make on demographic issues. For example, the religious composition of the hinterland of rural towns and villages may differ from that of the town or village itself but they too will tend to think of the town or village as 'theirs'. Due to demographic change, Orange halls can find themselves in locations where the composition of the surrounding population has changed significantly. Members of the Loyal Orders often continue to belong to the lodges or preceptories in the areas where they were born, returning to the original hall for meetings and to attend parades there. Demographic changes have heightened the difficulties of the parades issue. From a Nationalist perspective, what a lodge or preceptory may see as a traditional parade has often been seen as a residual claim to territory that is now predominantly Nationalist. Local residents may feel that the influx of people, some of whom they would see as outsiders, is a threat. For their part, lodges or preceptories may feel the need to uphold what they see as traditional routes, and in turn feel threatened by the number of residents in the Nationalist community who turn out and object to their parades.

3.15 A question asked in the Survey commissioned by North was whether, if the religious mixture in an area had changed a lot over recent years, those organising parade routes should take account of these changes in making their

plans. 96% of Catholics and 61% of Protestants said 'Yes, Definitely or Probably'.

3.16 North focused increasingly sharply on the rights issue as it moved towards its discussion of recommended measures. Referring to the limitations on the right to freedom of peaceful assembly in the European Convention on Human Rights (ECHR), it noted that the application of these limitations and notably that concerned with protection of the rights and freedoms of others is crucial for the parades issue. North said; 'We are clear that neither the right characterised as the 'right to march' nor what some have characterised as a 'right to withhold consent' is absolute. Reaching an accommodation between competing, or at times conflicting, rights is required'.

3.17 North identified six common strands in the evidence it received:

- (i) There was recognition of a need for greater understanding in both parts of the community about the other's values and perceptions.
- (ii) A consistent theme was the value placed upon local accommodation, and support for discussions that would lead to it.
- (iii) There was a high level of support for the rule of law.
- (iv) There was widespread recognition of the importance of rights.

- (v) The principle of rights being exercised in a responsible way was a common theme.
- (vi) A significant proportion felt that the RUC should not be required (as was then the case) both to make the decision in respect of a contentious parade, and then to enforce that decision.

3.18 North summarised the main criticisms of existing arrangements in the 1987 Order:

- (i) Focused on public order, it failed fully to recognise the rights of peaceful assembly, the rights of those in the area through which a procession passes and those of the wider community.
- (ii) It placed a premium on threats of disorder.
- (iii) It had been implemented inconsistently, with a lack of transparency, and with insufficient rigour.

3.19 North also isolated a number of criteria against which it should test its emerging proposals:

- (i) Accepting that the law as it then was provided an incentive for those who threatened disorder, new arrangements should assist the search for accommodation and should reinforce the rule of law.

- (ii) Any new arrangements should ensure that the rights of marchers, residents and the wider community can be accommodated.
- (iii) Roles and responsibilities should be appropriately clarified, providing greater transparency in the process.
- (iv) Proposals for change should be proportionate to the problem and avoid creating unnecessary restrictions and costly, bureaucratic processes.
- (v) Any new arrangements should lead to greater consistency in decision-making and, where practical, to achieving an accommodation for parades in individual locations over a longer time frame.

3.20 North concluded that there was a need for a legislative framework to provide a means of accommodating the competing rights which could be inferred from the UK's international legal obligations. It noted that the existing marching machinery provided no explicit machinery for the consideration of the views of local residents other than through the threat of protest.

3.21 North recommended what it described as fundamental principles which should form the basis for the development of processes and procedures to address the issue of conflict over parades:

- (i) The right to peaceful free assembly should (subject to certain qualifications) be protected.
- (ii) The exercise of that right brings with it certain responsibilities; in particular, those seeking to exercise that right should take account of the likely effect of doing so on their relationships with other parts of the community and be prepared to temper their approach accordingly.
- (iii) All those involved should work towards resolution of difficulties through local accommodation.
- (iv) In the exercise of their rights and responsibilities, those involved must neither commit nor condone criminal acts or offensive behaviour.
- (v) The legislation and its application must comply with the United Kingdom's obligations under international law, and provide no encouragement for those who seek to promote disorder.
- (vi) The structure for and process of adjudication of disputes over individual parades should be clear and applied consistently with as much openness as possible.

- (vii) Any procedures for handling disputes over parades and the enforcement of subsequent decisions should be proportional to the issues at stake.

3.22 North set out the arguments for and against an independent body to provide input before any decision was taken in relation to a contested parade. Amongst those adduced in favour were:

- (i) the ability of such a body to stimulate work towards local resolution and to play a key role in facilitating the work of the range of individuals involved in bringing together interested parties; and
- (ii) the fact that it would be much better placed than the police to take account, and be seen to take account, of wider community interests.

3.23 Amongst the arguments against were fears expressed by representatives of the Loyal Orders that any such body would give undue weight to the views of residents groups and that its deliberations would lead to further restrictions on future parades. North, however, felt that there was nothing intrinsic in the creation of a new body that would reduce the right to peaceful assembly (subject to the limitations imposed by the wider Human Rights framework). Another contra argument considered was that the creation of an independent body would reduce the pressure to reach local accommodation if the responsibility could be passed to somebody else. North, however, felt that experience in the labour

relations field suggested that the prospect of independent arbitration can beneficially focus the minds of the disputants to reach their own solutions.

3.24 The remit recommended for a Parades Commission was as follows:

- (i) Education, ie working for greater understanding at the local level.
- (ii) Promoting and facilitating mediation and the search for local accommodation in respect of contentious marches.
- (iii) If mediation fails, considering what conditions might be imposed in respect of individual parades where such conditions are merited under the statutory criteria, and, after consultation, notifying the interested parties of its conclusions.
- (iv) Keeping under review and amending a Code of Conduct which North recommended should be prepared.
- (v) Arranging for contentious parades and protests to be monitored.

3.25 So far as (ii) above is concerned, North doubted whether, whilst it should have a significant function in supporting mediation and in making it more professional, the Commission itself would need to develop a professional mediation capability amongst its own staff.

3.26 As to (iii) above, North devoted considerable attention to the criteria to be used by the Commission in its consideration of forthcoming parades. It believed that rather than abandon the existing criteria in the 1987 Order, these should be expanded to enable account to be taken of 'the impact of contentious parades on relationships within the community'. North said that without further amplification there could exist a good deal of doubt about the application of that phrase. It recommended that this be done in Guidelines which would set out the factors to which the Commission would have regard in reaching a judgment on each individual case, thereby leading to greater consistency and transparency in decision-making.

3.27 It was recommended that the Guidelines cover four main areas broadly relating to the nature of a parade:

- (i) Physical location and route.
- (ii) Impact on the local community, including frequency of parades, disruption to trade, traffic and everyday life.
- (iii) The purpose of the parade, eg whether it is commemorative, a Sunday church parade or a band parade.
- (iv) Features particular to that parade, eg tradition, numbers, past behaviour etc.

- 3.28 North also recommended that, alongside these four elements, the Commission should take into account the preparedness of the parties to work to reach local accommodation and to look constructively at alternative means of doing so.
- 3.29 North believed that the Commission would be well placed to identify potential problems months in advance of receiving formal notification of a parade and should itself initiate consideration of them. Discussions could be on the basis of those involved in a single parade or could be with one or more organisations involved in holding parades over a whole season in one locality. Indeed North thought that this might well prove to be the most likely way by which the Commission considered parade disputes. The Commission should be empowered to come to a conclusion in relation to one or more parades covering a period of a year or even longer, thereby providing consistency and continuity for all parties. It recognised that there could be factors which would necessitate a review of any such long term decision.
- 3.30 North also recommended the preparation by the Commission of a Code of Conduct covering the expected behaviour of participants in a parade and of any protestors to it as well as public guidance on, inter alia, the procedures the Commission would itself follow. These would include the publicity requirements, if any, associated with notices of processions and how objections to these were to be registered.
- 3.31 Amongst specific issues given particular attention in North were sanctions for breaches of the Code of Conduct, alcohol, hangers on, stewarding, monitoring, and bands. On bands, it recommended that the introduction of a registration

scheme be actively considered and (but without making a specific recommendation in this regard) tended to favour a court-based system of registration.

3.32 North's final paragraph reiterated a theme permeating its Report: 'Our proposals are designed to provide all the interested parties with mechanisms and opportunities to work towards mutual understanding and local accommodation'.

3.33 The continuing relevance of North should be apparent from this summary. Indeed, some of my proposals pick up themes which I believe can usefully be further developed.

## CHAPTER 4

### PARLIAMENTARY PROCEEDINGS

***‘Sometimes it is difficult to come to a firm conclusion because of the strength of the argument on both sides’. (Mr Adam Ingram)***

4.1 The Parliamentary proceedings on the Bill which implemented North extended to some 300,000 words. No one underestimated the challenge of providing effective legislation. One Member said that getting it right was a bit of a wing and a prayer.

4.2 Moving the Bill’s Third Reading, the Minister (Mr Ingram) said:

“If we succeed in resolving an issue that is, in so many ways, a microcosm of the almost intractable problems that Northern Ireland has faced for so long, it will surely help to serve as a blueprint for a more stable and better future for all the people. That is the Government’s earnest wish.

..... [The] task [of the Parades Commission] could be difficult, or it could be easy. It will depend on the willingness of those who are exercising their right to march, and those who may wish to protest, genuinely to seek points of agreement, to understand the language of compromise and to accept the other person’s right to have a different point of view. That is the true sign of a healthy and mature democracy.”

4.3 The Government emphasised its desire that the legislation should lead to a fair and even-handed solution to the issue of parades. It looked forward to a time when all sections of the community could express their identity in whatever way they chose without infringing the rights of others. 'We are essentially about recognising the importance of the ability to march, but not regardless of the impact on others.'

4.4 The Government indicated that legislation should be created which would be 'accepted by all the people in Northern Ireland'. Speaking during the Second Reading Debate in the House of Lords, Lord Dubs for the Government said:

'That is what we are aiming at. We want consent for the legislation. I believe that the attempt to achieve balance will help to get consent ..... the consent that is essential if the legislation is to have a fair run and if the [Parades] Commission is to be able to carry out its task.'

4.5 Mr Ingram reiterated the point during the Bill's Second Reading in the House of Commons:

'No law is perfect; no new structures are without problems or flaws. However, without the support of both sides of the community in Northern Ireland, whatever legislation is enacted or whatever structures are built will just not work.'

4.6 The need to achieve confidence, trust and understanding was a constant theme. One Member said that most people he talked to wanted 'greater openness in decisions which result in the ultimate permission to march, to do something else or to vary a route'. It was vital that such decisions were firmly in the public

domain. 'To give that degree of openness, hopefully to know the broad parameters on which any decisions are made, and thus to gain the confidence of all communities, would make it much more difficult for those people who want to exacerbate the situation .....

4.7 The Government was confident that this imperative had been met. Lord Dubs said:

'We believe that the structures established under this Bill will put the whole question of parades on a new, even-handed, transparent and, it is to be hoped, broadly acceptable basis.'

4.8 The Government's rejoinder to those who argued that at the heart of disputes about parades was 'a political dispute about the constitutional status of Northern Ireland', was that it was 'seeking to depoliticise, to take this out of politics and to create a body [the Parades Commission] which is concerned not with representing sides and political disputes but with the competing rights to which the North commission report referred'. Mr Worthington (Parliamentary Under-Secretary of State) went on:

'The North Commission Report and the great majority of people in Northern Ireland, as shown in the public opinion poll, recognised that an independent body was needed to move away from the "My side, right or wrong" approach into an area where the right to free assembly was recognised but without it being taken so far as to damage the interests of others ...'

4.9 The Government commended North's support for the perception that a mainly public order-based approach, such as had prevailed hitherto, did not enable wider considerations of the conflicting rights and responsibilities at issue to be taken into account.

4.10 In further justification of the arrangements ushered in by the new legislation, the Government indicated its strong support for 'the fundamental recommendation of the North Report, that the factors that should be taken into account in imposing both conditions and bans [on parades] should be expanded to cover the wider impact that the parade may have on relationships within the community'. Mr Ingram went on:

'We would not have established the [Parades] Commission in the first place had we believed that the criteria in the Public Order Order were adequate. We set up the Commission not as a snub to the RUC, but because we believed that the RUC is put in a difficult position under the current legislation, and that it would not be best placed to judge the community relations issues that the Commission will need to assess.'

4.11 There was frequent reference to the need for compromise, possibly 'brokered' compromise. One Member said:

'... the necessity for the Bill is a bad reflection on [Northern Ireland's] communities in that we appear to be unable to compromise when that should obviously be the order of the day. Perhaps a bit of give and take, a bit of understanding and a bit of acceptance of a different view would have done away with the deep divisions that have been created by marches and counter protests and the enormous economic and social damage that was done as a result of those confrontations.'

4.12 The Government acknowledged that Northern Ireland had been pushed to the brink of anarchy by the grave difficulties associated with some contested parades. 'On both sides of the divide, malign forces have sought to influence for their own ends the passions that the issue arouses.'

4.13 The contributions of those opposed to the Bill reflected their belief that it was intended not to regulate parades but to deny people the right to hold them. The Bill, they argued, would not be any panacea, it would make matters worse. It was a 'disastrous Bill'.

4.14 But neither was there any easy optimism on the part of the Bill's supporters. One Member pointed out that the Bill could make a contribution, but should not be mistaken for a solution. He went on:

'In the end, we are dependent on the growing confidence, a display of common sense, the ability to compromise and the recognition of each other's point of view.'

4.15 Another Member said that 'the Bill, even with the best will in the world, is a blunt and clumsy instrument to deal with the failure of human relationships'. But he expressed the hope that 'the tension which the Bill was intended to deal with will be removed from the communities in which we live and which we all love in our different ways'.

4.16 Referring to the role of the Parades Commission, a Member said presciently:

‘I do not envy those in Northern Ireland who must perform what must be regarded as one of the most difficult functions in the Province.’

The mood of the Bill’s supporters is perhaps best summed up as hope tempered by a strong sense of the difficult terrain to be traversed.

4.17 The Bill was amended in certain respects during its passage through Parliament. I mention here only the more significant points, to some of which I shall return later in this Report where appropriate.

4.18 As presented, the Bill would have enabled the remit of the Parades Commission to be extended to include the law and practice relating to other expressions of cultural identity (apart from sporting events) which take place in the open air and may have an adverse effect on relationships within the community. This was heavily criticised on all sides in the House of Lords (where the Bill was initially presented) and the relevant Clause was dropped.

4.19 The other adjustments may be briefly summarised at this point:

- (i) The Bill originally empowered the Commission to engage in direct mediation as well as to facilitate mediation. The former power was removed.
- (ii) In the interests of achieving ‘balance’ within the Bill, a notice requirement for those organising protest meetings against public processions was included and the coverage of the Code of

Conduct which the Bill obliged the Commission to produce in respect of parades was extended to deal also with the conduct of those participating in protest meetings. Such meetings were not, however, put under the jurisdiction of the Commission but continued to be dealt with by the police under the 1987 Order. The maximum penalties which could be imposed for the various offences under the legislation were equalised.

- (iii) The definition of 'public procession' was brought into line with that in the 1987 Order, thereby making clear that it includes processions involving vehicles and other conveyances.
- (iv) The Secretary of State's power to make an order introducing a registration scheme for bands was made more flexible, leaving open the option of having a scheme other than one requiring application for registration to be made to a court.
- (v) A clause was inserted obliging the Secretary of State to secure that as far as is practicable the membership of the Commission is representative of the community in Northern Ireland.

4.20 There were various issues discussed, which did not result in any amendment of the Bill. For example:

- (i) It was argued that, as recommended in North, the Commission should be able to group parades together

rather than consider all parades individually. It was suggested that this would allow more scope for negotiation and compromise. Taking parades seriatim could produce 'the domino effect of attitudes entrenched and hardening'.

- (ii) Arguments were advanced for a radically different structure from that envisaged in the Bill, with the Commission being responsible only for mediation and the police retaining the power of decision.
- (iii) It was suggested that there should be created privileged categories of parades eg, those which might be considered traditional or which had associations with church services, which would be exempt from the notice requirements under the legislation and therefore removed from the jurisdiction of the Commission.

4.21 It was recognised during the debates that legislation was concurrently proceeding through Parliament to embody the European Convention on Human Rights (ECHR) in UK domestic law. The Government provided assurance that nothing in the Bill was contrary to the ECHR. Mr Worthington said:

'It introduces a different way of administering marches .... It does not restrict the right to march.'

## CHAPTER 5

### THE PARADES COMMISSION

This Chapter provides a brief description<sup>1</sup> of the Parades Commission as it emerged from the Parliamentary process.

1. The Commission was established on a non-statutory basis on 27 March 1997, acquiring its statutory functions when the Public Processions (Northern Ireland) Act 1998 (the Act) entered into force on 16 February 1998.
2. The Act also made statutory provision for the Commission to issue a Code of Conduct, Procedural Rules and Guidelines and provided for drafts of each of these to be subject to Parliamentary approval before coming into effect. The Commission was given power to impose conditions on public processions while having regard to the guidelines. The Act also introduced a number of changes and extensions of the law in relation to the regulation of public processions.
3. The Act imposes four specific duties on the Commission:
  - To promote greater understanding by the general public of issues concerning public processions;
  - To promote and facilitate mediation as a means of resolving disputes concerning public processions;

<sup>1</sup> This is an edited and abbreviated version of ppv-viii of the Report on the Parades Commission (Volume 1) produced by the Northern Ireland Affairs Committee of the House of Commons (March 2001).

- To keep itself generally informed as to the conduct of public processions and protest meetings; and
  - To keep under review, and make such recommendations as it thinks fit, to the Secretary of State concerning the operation of the Act.
4. As well as having a statutory obligation to issue (and to keep under review) a Code of Conduct, procedural rules and a set of guidelines concerning the exercise of its power to impose conditions on public processions, it also has powers :
- To facilitate mediation between parties to particular disputes concerning proposed public processions and take such other steps as appear to the Commission to be appropriate for resolving such disputes; and
  - To issue determinations in respect of particular proposed public processions.

In connection with the duties and powers described above, the Commission may, with the approval of the Secretary of State, provide financial or other assistance to any person or body on such terms and conditions as it may determine, and it may commission research.

5. A person proposing to organise a public procession is required to give notice to an officer in the Police Service for Northern Ireland (PSNI) not below the rank of sergeant, at the police station nearest to the proposed starting place of that

procession, not less than 28 days (or if that is not reasonably practicable, as soon as is reasonably practicable) before the parade. This is done by completing the prescribed form, Form 11/1. The PSNI is required to forward a copy of the completed form to the Commission immediately.

6. In similar fashion, a person proposing to organise a related protest meeting with the intention of demonstrating opposition to the holding of a public procession is required to give notice in similar fashion not less than 14 days (or if that is not reasonably practicable, as soon as is reasonably practicable) before the meeting is to be held. This is done by completing the prescribed form, Form 11/3. The PSNI is required to forward a copy of the completed form to the Commission immediately.
  
7. Under Section 8 of the Act, the Commission may issue a determination in respect of a proposed public procession imposing conditions on the organisers or the participants. A determination, once made, may be amended or revoked. In considering whether to make a determination, or what conditions a determination might impose, the Commission is required to have regard to the Guidelines. These are required in particular to provide for the Commission to have regard to:
  - Any public disorder or damage to property which may result from the procession.
  
  - Any disruption to the life of the community which the procession may cause.
  
  - Any impact which the procession may have on relationships within the community.

- Any failure of a person of a description in the Guidelines to comply with the Code of Conduct (whether in relation to the procession in question or any related protest meeting or in relation to any previous procession or protest meeting).
  - The desirability of allowing a procession customarily held along a particular route to be held along that route.
8. The Commission has no powers in relation to protest meetings. The imposition of conditions on such meetings is a matter for the PSNI under the Public Order (Northern Ireland) Order 1987.
  9. The Commission has no powers to prohibit a public procession: this is a matter for the Secretary of State. The Secretary of State may also, on an application made by the Chief Constable, review a determination by the Commission and substitute his own judgement. This then in effect supersedes the Commission determination.
  10. The Act provides for the Commission to be a body corporate, consisting of a chairman and not more than six other members appointed by the Secretary of State. In making appointments, the Secretary of State is required to secure that as far as is practicable the membership of the Commission is representative of the community in Northern Ireland.
  11. The Commission is funded by a grant-in-aid from the Northern Ireland Office. It has an annual budget of around £1.3 million.

## CHAPTER 6

### PREVIOUS REVIEWS OF THE PARADES COMMISSION

6.1 There have been two reviews of the Parades Commission.

#### **NIO Review**

6.2 The first, which was conducted by the NIO itself, was announced by the Secretary of State on 8 October 1999. Its remit was:

‘Within the existing framework of law and structures, and taking account of views received from interested parties and the experience of the marching seasons over the last two years, to consider

- possible ways of achieving even greater acceptance of the approach to handling contentious parades, and, in particular
- the arrangements for mediation.’

6.3 Its findings were announced on 16 February, 2000. One concerned the bringing forward of the implementation of the Human Rights Act in respect of decisions on contested parades. This did not happen but the Act was, of course, implemented in full from 2 October 2000. It is interesting, however, to note the following comments by the Secretary of State when the findings were released:

'In the course of the Review, we were struck by the emphasis all sides put on a rights based approach. Different sides had their own interpretation of what the rights at issue were. But everyone agrees that the ECHR is the way forward for resolving these disputes according to internationally agreed human rights best practice'.

6.4 Although the other findings have been described as 'minimalist', they in fact touched on a number of important issues:

- The Commission had achieved many of its objectives in encouraging local agreement wherever possible. This had contributed greatly to the improved atmosphere in the past two marching seasons. But the Commission itself wanted to do even better.
- The Commission could do more to heighten awareness of mediation, including its own network of local 'Authorised Officers'. It should also provide a guide on all forms of third party intervention in parades issues, including a list of those willing to help.
- The Commission might also seek to expand its public visibility and understanding of its roles through more media activity, better exploitation of the internet and a CD-ROM pack for schools.
- Acceptance of the Commission's determinations could be further improved if the reasoning behind them were set out in more detail in published determinations.

- The Commission had placed increasing weight on the importance of ‘engagement’ by both sides when making decisions on contested parades. It might consider using its next Annual Report to give further guidance on how it would assess engagement in practice.

### **Northern Ireland Affairs Committee Review**

6.5 The second review was undertaken by the Northern Ireland Affairs Committee of the House of Commons between March 2000 and March 2001 with the following Terms of Reference:

‘To examine the operation of the Parades Commission since its inception and to consider, within the existing framework of law and structures and in the light of the conclusions of the Northern Ireland Office’s review of the Commission, how its effectiveness might be enhanced.’

6.6 There were eighteen conclusions and recommendations, to some of which I wish to draw attention here:

- (i) Pointing out that parades differ markedly in character, depending upon their purpose, the Committee recommended that a table should be included in the Commission’s Annual Report, analysing the extent to which each category of parade is subject to route restrictions and conditions.
- (ii) It suggested that, given the general advantage in engagement between the Orange institutions and the Commission, a useful first

step might be for Grand Lodge to spell out the specific barriers it sees to engagement and suggest how the Commission and others might act to overcome them.

- (iii) It concluded, on balance, that there are advantages in separating the power of determination from responsibility for policing a parade, not least because the range of the statutory criteria to be considered in relation to issuing a determination was significantly broadened by the 1998 Act beyond proper public order considerations.
- (iv). Adverting to the Commission's plans to bring the Authorised Officers under the control of the Commission rather than the Mediation Network, which might impact on their acceptability as mediators, it was recommended that the Commission should not use them to report on parades but should employ separate staff for the purpose. It was recommended that, as a matter of policy, the Commission should send official observers to all parades in respect of which a determination has been made, thus reducing its reliance on police reports.
- (v) The Committee viewed with some concern the view of the Chairman of the Commission that the Commission's procedures in relation to decisions on parades might be open to challenge on the grounds of natural justice. It recommended that the Government and the Commission consider urgently whether the

procedures need to be improved by greater transparency and, if so, to put the necessary steps in hand.

- (vi) Noting the Commission's view that it would be helpful if it had a power enabling it to make general policy statements in relation to individual contentious areas, the Committee recommended that the Government examine this proposal carefully.
  
- (vii) Whilst noting doubts expressed by the Chairman of the Commission over the present need for it to have power to assist litigants, the Committee recommended that consideration be given to enabling the Commission to contribute to the legal costs of parties taking cases that raise points of general importance in relation to the clarification of the application to parades of human rights law.

## **PART III**

To assess the nature and scale of the problem, this Part places parades in their historical context and then examines them from the perspectives of those who find themselves on opposite sides of the parades debate. In conclusion it sketches a vision of a future which could provide a new context for dealing with this issue as well as with others where inherited adversarial positions make resolution difficult.

## CHAPTER 7

### HISTORY ON THE MARCH OR FORWARD MARCH?

*'There is no street with mute stones and no house without echoes'*

*Góngora Y Argote (1561-1627)*

#### History on the march

- 7.1 Both sides to the parades dispute are conditioned by history. As Dr A.T.Q. Stewart<sup>1</sup> put it so aptly:

‘To say we can do without [history] is like saying we can breathe without oxygen. It has made us what we are, and is in our bloodstream, in the language we speak, the culture we proclaim, the homes, streets and cities we live in. The call of the past to us is insistent; we cannot ignore it. It presses irredentist claims upon us, impatient for us to pass under its sway.’

- 7.2 Neither tradition is likely to understand – and may even demonise – the other, if it is not recognised that both contributed to the development of politics within a confessional (or sectarian) framework in the 19<sup>th</sup> century, with religion as the badge of identity.
- 7.3 So origins are important, not least when considering the parades issue. Orangeism is distinctive in many respects, and not least in its longevity. It has been part of the warp and woof of Irish history for 207 years and has outlived all its protagonists. But, while Orangeism’s old adversaries may be gone, the

<sup>1</sup> The Shape of Irish History (2001), p186.

batallioned ghosts remain to haunt it. There is no statute of limitations on memory. When those who have no affinity with Orangeism see it in procession, many of them see history on the march. And they see Orangeism as having been throughout its long history, as well as today, on the wrong side, certainly on the 'opposite' side.

7.4 It is therefore important (without expressing any view of its opinions) to put the phenomenon of what many still regard as the 'bogeyman' of the last couple of hundred years of Irish history in context. Its rise in 1795 is now seen as a consequence rather than a cause of the tensions of the time, the product of long-standing feuds and economic rivalries which the norms of the period (and of many periods in Irish history) made it acceptable to settle by violence. The alliance between the Catholic peasantry (the Defenders) and the United Irishmen increased Orange fears of Catholic domination. The Government found it expedient to enrol the Orangemen to help suppress the 1798 rebellion and thereby set them up as a political force. From then on, Orangeism was in and out of favour with Government. It was, as it has been said, a matter of reluctant alliance followed by rapid disengagement.

7.5 Orangeism opposed Catholic emancipation but William Cobbett, writing in 1823, said tellingly that 'the Orangemen have for allies all the unconquerable prejudices of ninety-nine hundredths of the people of England'. Throughout their history, like most popular organisations, their ideas were not peculiar to themselves but were shared by many of their contemporaries.

- 7.6 The institution's fortunes fluctuated, ebbing when there was no threat and its political *raison d'être* was removed. It was dissolved and reconstituted and from time to time thought it advisable to refrain, and was sometimes statutorily prohibited, from marching, culminating in a ban which lasted from 1850 to 1872.
- 7.7 Despite sporadic discouragement from the authorities and sometimes even (for various reasons) from some within the leadership, leading to ups and downs in the number and size of parades, the parading tradition persisted<sup>1</sup>. The Belfast News Letter's suggestion (in 1846) that 'in these days of education and enlightenment, Protestantism and loyalty have discovered better modes of asserting themselves than by wearing sashes and walking to the music of fife and drum' fell on deaf ears so far as the rank and file were concerned.
- 7.8 The 19<sup>th</sup> century was punctuated by hundreds of communal disturbances, with the major incidents usually involving death and injury. In the second half of the century it was Orange (or more rarely Nationalist) processions which provided what has been described as the *casus belli*, 'followed by street fighting, burning of houses and schools, and conflicts with the police ..... the residential and social apartheid which [the riots] encouraged in turn fostered prejudices and hostilities which rendered the next riot more likely'<sup>2</sup>. Then, as now, there was interminable debate as to whether the activity which resulted in riot caused (in

<sup>1</sup> The origins of the Orange parading culture as ritual social behaviour can be traced back to the first birthday of William III after the Battle of the Boyne, celebrated in Dublin on 4 November 1690. Throughout the 18<sup>th</sup> century (and not least during the period of the Volunteer movement which ante-dated the formation of the Orange Order in 1795) it was the King's role in the Glorious Revolution rather than his military campaign that was commemorated, although it was not long before there were separate celebrations linked to the famous battles.

Celebrations in this latter mould soon eclipsed the more inclusive Williamite vision of early Orangeism, although as late as 1805, Dr William Drennan, Ulster Presbyterian progenitor with Wolfe Tone of the United Irishmen, could comment severely when King William's statue was disfigured in Dublin, that 'to make his statue an instigation of bigotry is to disgrace his memory, for he was one of the best of men' (The Drennan McTier letters, Vol III, Ed. J. Agnew (1999), P388).

<sup>2</sup> I Budge and C O'Leary, Belfast Approach to Crisis (1973).

- the sense of necessarily caused) or merely precipitated the disorder.
- 7.9 Orangeism frequently declared that it considered every loyal subject 'as our brother and friend, let his religion be what it may' but, crucially, that left the definition of loyal subject open to interpretation.
- 7.10 Neither of the great streams of Irish history which emerged as the century wore on had a vision of an inclusive society. The roles played by those who formed each stream were shaped by circumstances rather than by deliberate choice but they were decisive for the creation of the citadels of intolerance which have dominated the social, cultural and political landscape.
- 7.11 Given the sectarian response which it elicited, the battle for Catholic emancipation, instead of being (as it should have been) the product of a secular alliance, was inevitably fought under almost exclusively Catholic auspices. It has been well said that, by his victory, O'Connell both opened the way to Catholic domination of Irish representative politics, as the franchise for local and parliamentary elections was progressively opened up, and also provided a working model for later nationalist activists.
- 7.12 In the zero-sum game which has constituted so much of our history, it was inevitable that Catholic renaissance, particularly when expressed in 'clerical nationalism which so fed Protestant terrors of political Catholicism'<sup>1</sup>, would be mirrored in a heightened political consciousness amongst Protestants which was reinforced by the growing force of the evangelical movement. The conservative interests which gradually coalesced and achieved a coherent alliance during the

<sup>1</sup> Marianne Elliott, The Catholics of Ulster (2000), p265.

era of Home Rule politics included the Orange Order. Indeed O'Connell dubbed the early manifestation of this emerging movement the Orange Party. But it embraced a disparate range of convictions and Professor Theodore Hoppen<sup>1</sup> makes the point that nationalist opinion later in the century, following O'Connell's lead, sustained the comfortable but mistaken belief that what it saw as intransigence was the exclusive preserve of Orangeism rather than the broad tide of Protestant opinion.

- 7.13 Professor Marianne Elliott<sup>2</sup> describes the Ancient Order of Hibernians as 'a mirror image (if never as strong) of the Orange Order in its sectarian identity and its mesmerisation with parades'. By 1909 it was the main nationalist organisation, 'firmly constitutionalist in its activities'. It 'looked after its own kind within existing sectarian politics'. Professor Elliott makes the vitally important point that:

'The headlong rush of Catholics and Protestants in apparently opposite directions in these years disguises one very important fact: it brought about a measure of stability. With their separate social, educational, religious and political institutions, both communities could feel a certain kind of security.'

- 7.14 The entrenchment of Unionist power in the Northern Ireland which was created in 1921 and the close alignment of the values of the new entity and those of Orangeism ensured that the sense of exclusion felt by nationalism fuelled a hostility which was directed as much against Orangeism as against Unionism. '.... Their self-proclaimed Britishness ... [was] held against them, as it [was] this which denied the legitimacy of the 'indivisible island'.<sup>3</sup>

<sup>1</sup> K T Hoppen, Ireland since 1800, Conflict and Conformity 2<sup>nd</sup> Edition, (1999), pp137-138.

<sup>2</sup> The Catholics of Ulster.

<sup>3</sup> Frank Wright, Northern Ireland: a Comparative Analysis (1987) p158.

- 7.15 The inherent differences between those from the two main traditions were steadily enhanced. Whilst their relationships with each other were in some contexts characterised by (a perhaps only superficial) tolerance, in others their social spheres remained quite distant. On a cynical view, keeping apart – each (in Seamus Deane’s words) knowing the other by ‘fearful reputation’ – kept the latent hostility latent. Thirty years of Troubles further deepened division.
- 7.16 Even this brief survey makes it easy to understand why many from each tradition view contemporary issues through the prism of that tradition’s experience of ‘the other’.
- 7.17 I suggest that both traditions need to try harder to see all the historical actors as players caught up in the complicated choreography of tragic conflict, which converted difference into the disastrous division which still persists. A history which knows only black and white must sharpen present antagonisms, making it seem ‘as if time itself has lost the power to separate the centuries’.<sup>1</sup>
- 7.18 It is our own choice as a society whether we escape from the enslavement of history. The most effective form of revolt may be a joint attempt by both traditions to take ownership of our entire history.
- 7.19 A prominent Republican, speaking recently of the Somme anniversary, said that ‘at the end of the day the most important thing is to remember what these people died for. If we can create a situation where no one feels alienated, that has to be a good thing’. Belfast’s Lord Mayor Alex Maskey has in the same context said that it was his objective ‘to seek to identify common ground for all of us in this

<sup>1</sup> Hoppen, p1.

- generation' and has indicated his intention to 'contribute in a positive way' to the development of a public debate about the use of (inter alia) commemorations.
- 7.20 It is perhaps not irrelevant to the progress which has been made in Derry between the Apprentice Boys and the Bogside Residents Group that its spokesman Donncha MacNiallais could write<sup>1</sup> that he and the Apprentice Boys 'have a common heritage in saluting the courage of the people of Derry during the siege ..... We all need to accept that none of us is an island. We are the sum of all our parts and we all contribute to the diversity of the Irish people'. That is close to Thomas Merton's observation that 'every other person is a piece of myself, for I am a part and a member of mankind'.
- 7.21 This year the service in St Columb's Cathedral which was part of the Apprentice Boys of Derry Maiden City Festival was advertised in a Mass bulletin in St Eugene's, which expressed the hope that it would help move things towards 'a community festival event rather than it pertaining to one section of the community'.
- 7.22 Derry is still, of course, not free from wider tensions. Even as I write, there is news of additional security fencing being erected along the only interface on the west bank. And, in the context of parading itself, there is still insufficient confidence to allow commercial interests in the city to stay open and take full advantage of the influx of people connected with the parades.
- 7.23 There are community festivals during the summer on the Garvaghy Road and in Ardoyne. It would no doubt be regarded as risible to suggest that Loyal Order

<sup>1</sup> News @ the Forum. Issue 3: Spring

parades and festivals such as these could even be spoken of in the same breath or have any connection with each other. But the events of recent years in Derry would have seemed equally improbable in 1969. One has always to remain open to the possibility of being surprised by progress.

- 7.24 Particulars apart, however, my fundamental point is that unless both traditions make a serious attempt to explore together what they have no choice but to regard as a shared heritage – to discover together how to remember without replicating - issues such as parades will continue to fester. Deals may be done but the fault lines will be only half-buried. The problem will only be permanently resolved by those on opposite sides of the debate patiently embarking upon a journey of mutual understanding. On all sides, we may have to cast a more wide-angled - and even sympathetic - look backward in order to be able to move forward. A challenge for the new era is how to accommodate a phenomenon (Orangeism) which prides itself on its Britishness but is also a variety of Irishness.

### **Forward march**

- 7.25 It is always difficult for any organisation whose roots go deep and which sees the past as a reminder of present dangers to communicate clearly how it relates to the contemporary world in a way which neither betrays itself nor threatens others.
- 7.26 It might be argued that it is the business of none other than those who espouse Orangeism how it engages with the wider world. I would disagree. Any major institution (and the trade unions and the Press are other obvious examples) has

import for the wider society which transcends its own sectional domain. Very relevantly for this Review, parade disputes will become much easier to resolve if 'history on the march' is replaced by an institution which has drawn on its value system to create a contemporary Orangeism.

7.27 To illustrate what I mean I have tried to distil, from a book<sup>1</sup> written 35 years ago by luminaries within Orangeism and bearing the imprimatur of the (then) Imperial Grand Master, the essence of what an institution neither betraying its principles nor threatening others might be saying when seeking understanding from those who see only 'history on the march'. Difference per se need not be threatening. AOH lodges proclaimed their distinctive identity in the Resolutions which (according to Press reports) were moved when they held their traditional 15 August demonstration in Donegal town this year: loyalty to the Roman Catholic faith and the peaceful reunification of Ireland.

7.28 The sentences which follow are all derived from the book. Needless to say, there is much more in the book, some of whose polemic is less apt for my purpose.

'The Order are neither bigots nor extremists. They are pledged not to 'injure or upbraid any man because of his religious beliefs'. They stand for tolerance and compassion towards all men, but they stand also for that underlying principle of the Christian faith, the dignity and rights of the individual, against the tyranny either of a soulless state or of an authoritarian Church. It is the duty of Orangemen to support and maintain the laws and constitution. If we lost our constitutional position within the United Kingdom, 'civil and religious liberty for all' would be endangered. This represents the Orange attitude to politics. Orangemen have always been encouraged to recognise the need for a political awareness as

<sup>1</sup> M W Dewar, J Brown and S E Long, Orangeism (1967).

responsible members of a free society. An Orangeman recognises the responsibility of political involvement and community service.

But the Orange Order is pre-eminently a religious organisation. The whole tenor of the movement is religious: by its conditions of membership; by its ritual; by its church services and spiritual affiliations; by its keen interest in the Protestant and evangelical emphases of the Gospel.

This is no Mafia-like brotherhood, no repulsive secret society. The Orange Order has the utmost respect for the rule of law and the Christian ethic. It never condones violence or bigotry. It stands for great principles in faith and conduct. Whilst it accepts the fact that the Protestant religion must be a self-propagating faith it will not deny the same rights to other religious persuasions. There is an abundance of good will on the Orange side.

No large organisation of whatever kind is so perfect that faults cannot be found in it and in its members. The critic who presumes that the Order is blind to its faults is very wrong.'

7.29 If this description of Orangeism is still apt, is it adequately reflected in how Orangeism presents itself to – and is perceived by – contemporary society? If not, what needs to be done?

7.30 I hope I shall not be too severely chided for venturing into such territory. I do so in a helpful and constructive spirit. If Orangeism wishes to be better understood, these are the kinds of questions it may want to address – which is not to suggest that in so doing it should be expected to abandon its core beliefs and values. I have been informed by the Grand Orange Lodge of Ireland of its intention to consider in depth the way forward over the next 10 to 20 years. I very much

welcome this and believe that it should be applauded on all sides. It would be consistent with the spirit of mutual openness to new possibilities that, in light of developments within Orangeism, those hostile to it would at least be prepared to revisit their perceptions.

7.31 I refer in Chapter 23 to the issue of 'branding'. Brands that excel are created around excellent products. Until people – particularly those not historically predisposed to any sympathy for the Orange brand and who (to continue the figure of speech) are impacted by what they may regard as intrusive and unwelcome 'advertising' in the shape of parades – develop a better understanding of the Loyal Order 'product', the notion of parading as a 'civic endeavour' (to borrow a phrase from the Parades Commission<sup>1</sup>) which enjoys a degree of consensus with those affected by parading is likely to prove elusive.

<sup>1</sup> Third Annual Report, p15.

## CHAPTER 8

### COMTEMPORARY PERSPECTIVES

- 8.1 One of the greatest obstacles to solving any problem is failure to appreciate its scale. The parades issue is no exception. The almost exclusive focus on the role played by Republican activists in the 1990s in raising awareness of the issue has obscured the extent to which the Nationalist/Catholic perception of Orangeism has been at odds not only with how Orangeism views itself but with how Orangeism believes it is viewed in that Nationalist/Catholic community.
- 8.2 It is impossible to generalise as to attitudes within any community since, like Orangeism itself, they are far from monolithic, but here are some of the more trenchant comments which I noted in documents (including Press reports) which I read whilst the Review was in progress:
- 'Hijacking a whole season to express one's cultural identity is simply a case of mass insanity, stemming from a sense of arrogance and inconsideration, topped off with a large amount of steaming insecurity.'
  - 'The Orange Order is an anti-Catholic organisation and the marches, the speeches, the party times are drum-thudding displays of arrogance, designed to upset and provoke their Catholic neighbours.'

- 'The problem was an anti-Catholic march being pushed through a Catholic area.'
  
- 'Republicans and Nationalists accept that there are areas in the six counties where the presence of Republican and Nationalist parades would not be welcomed and, when necessary, have voluntarily re-routed. The Loyal Orders and Loyalist band parade organisers seem unable or unwilling to accept this very basic principle that would radically transform the whole marching issue. Furthermore they have never properly addressed the issue of why they insist on parading in Nationalist areas, why they engage in sectarian behaviour, why they play sectarian party tunes etc ..... The intent of Loyalist marchers is to parade through a Nationalist area in what is viewed as an offensive and provocative act. In many cases the behaviour of marchers and their sectarian tunes and chants support this viewpoint'.
  
- 'It is utter madness [for] an Order to live by the Bible ... [and] to put so many people at risk by putting thousands of Orangemen in that district, with their hangers-on, with their beer, and with the potential for violence.'
  
- 'Undoubtedly there are decent human beings and sincere Christians in the Loyal Orders but it is patently obvious that Orangeism is seriously infected with the virus of sectarianism ..... an evil that insinuates into human hearts the notion that I am better than my brother and sister.'
  
- 'Any club that parades through enemy territory anywhere in the world is inherently provocative.'
  
- 'Parades of this kind do nothing but remind people of past abuses.'

8.3 It is important that I expand the second passage above to include significant additional words:

‘That’s not to say the memory of William of Orange should not be maintained and honoured, if that’s how you see history. .... Much is made by Orange Brethren of the pleasures of the field ..... In which case logic suggests getting to the field as quickly as possible, rather than forming ranks to march past Catholic churches or Catholic neighbourhoods with The Sash or Dolly’s Brae at full volume.’

8.4 The opening sentence of this passage reflects a view which I encountered frequently in the course of the Review – that it was not the proclamation of faith, the celebration of culture or the declaration of identity which was an issue but the doing of it in areas where it was perceived as political coat-trailing, the marking out of territory, a reflection of the doctrine that where you can walk you are dominant. It was put to me in evidence on several occasions that processions in such circumstances were still seen as an attempt to brand Nationalists/Catholics as second-class citizens.

8.5 It was also suggested to me that civil and religious liberty has not always cut both ways. Earlier days were recalled when the boot was on the other foot and the local balance of demography and power prevented Nationalists from marching where they wanted and where the control of public space was used to control political expression.

8.6 Those actively involved in the Loyal Orders have a very different view of the world. Many of them have come to genuine religious conviction through their

part in Orangeism. A contributor to The Twelfth - What it means to me<sup>1</sup> spoke for many when he wrote:

‘I have always believed that being an Orangeman is a natural expression of my church life. This has been so since I joined the Orange Order in the ‘Juniors’ almost sixty years go. Shankill Junior LOL No 5 was conducted as though it was a Sunday school class, with hymns and scripture instruction. This early training has stayed with me and been reinforced by my membership of the senior Order.’

8.7 Some have said to me that they found their role models in deeply religious members of the Loyal Orders. Personal conversion, telling the ‘good news’ to others and publicly proclaiming the faith (as in the open air meeting, for example), are important strands within (particularly evangelical) Protestantism. Many members of the Orders see their processions as such a proclamation.

8.8 It is worth setting out in full the Mission Statement of the Royal Black Institution:

‘As a worldwide organisation, the Royal Black Institution exists to give its members the opportunity to:

† Study Holy Scripture

in order to understand the Christian Faith and demonstrate its relevance for today’s society

† Increase knowledge of the Reformed Faith

in order to extend its influence and development throughout the world

<sup>1</sup> Ed G Lucy and E McClure (1997).

- † Engage in Christian and Charitable outreach  
in order to demonstrate their personal faith in Jesus Christ,  
their commitment to regular Christian Worship and all  
aspects of charitable living
  
- † Continue and further develop social and responsible citizenship  
in order to maintain and enhance greater and higher  
standards of Justice, Truth, Honesty and Integrity in both  
private and public life.'

8.9 The First Resolution at its major Processions in 2001 included the following:

'The Lord Jesus Christ, in whose Cross we glory ... is also the Perfect Exemplar of all that we are to strive to be and to do.

The Red Cross, which we are privileged to wear, is at once a confession of our Christian belief and a challenge to our consistent behaviour.'

To mistake this for hypocritical window-dressing would, I believe, be to fail to understand what is, even in this much more secular age, a very significant element within the Ulster Protestant psyche.

8.10 On the spectrum of varieties of Protestantism, many within Orangeism would be towards the evangelical end and the Loyal Orders as a whole, rightly or wrongly, tend by those outside their ranks to be identified with fundamental Protestantism, which many in Nationalist areas exposed to Orange processions translate as anti-Catholic. Evangelism is a key feature of the evangelical style. It is evident

that Orangeism has not succeeded in explaining the part which a desire to convert others so that they 'see the light' occupies in their belief system and how it is distinguishable from antagonism or even coercion on the one hand and patronising condescension on the other.

8.11 An important feature of Orangeism was neatly captured by a commentator who said that the Twelfth was as much about taking part as actually saying something. It has played a major part in communal bonding. It has offered people something to belong to. It has been the means to a remarkable bridging of the generations. Immense pride is taken in handing on the tradition from father to son to grandson.

8.12 One Orangeman has described the Twelfth as 'my community's national day ..... It's what people do the world over: celebrate and commemorate. Much of human social interaction and activity is based on tradition and commemoration'.

8.13 Someone sympathetic to Orangeism reflected what I believe, on the basis of the evidence I received, is a widespread view:

'The Twelfth should be for everyone to enjoy and it is always important to me personally to see Roman Catholics watching the parade pass by in our home town, because I believe it says something about our community as a whole and the way things should be elsewhere too.'

8.14 Public manifestations by the Loyal Orders are also witness to the resolve of their members to retain their distinctiveness in religious, cultural and political terms. The more rapidly people are propelled into an uncertain future, the more they

yearn for the (often imagined) security of the past. Traditional marches have been so central to that feeling of security (and occupy so much of the Protestant cultural landscape) that any challenge to them is seen as the tip of the iceberg, evidence of a wider threat to the ability to be different and maintain your identity. The Loyal Orders are proud of their roots in the libertarian tradition that blossomed into the principles that now inform democratic practice throughout the world. Catholics, on the other hand, regard their patriot icons as having fought through the centuries for the freedom to be Catholic.

- 8.15 Many in the Loyal Orders see their fears confirmed by the sharp contraction in the number of Protestants in the Republic since Partition and by the losses suffered by their members during the Troubles. The more they perceive their identity to be under threat, the more they draw strength from remembrance of things past, when threats were resisted and overcome.
- 8.16 Opposition to particular marches is interpreted not just as 'we are not welcome here' but as 'we are simply not welcome'. The sense of belonging has become very precarious indeed, with pervasive echoes of John Hewitt's line 'We are not natives here, or anywhere'. As I took evidence from the Unionist/Protestant community, I recalled words by John Mitchell of Jail Journal fame: 'a deep enough root those planters have struck into the soil of Ulster, and it would now be ill striving to unplant them'. Given the sense of precarious belonging, constant repetition of those words may be needed in contemporary Ireland.
- 8.17 I have tried to identify as honestly as I can the mutually incompatible perceptions which the two traditions have of each other. On the Unionist/Protestant side

there is a new feeling of powerlessness. The quest for new ways of exerting influence to replace the loss of dominance is proving elusive. For the other side, the ability to claim space as one's own and resist unwanted intrusion symbolises a long overdue shift in the balance of power.

- 8.18 Any attempt to paper over these acute differences or to deny the sincerity with which such opposite perceptions are held does no service to the attempt to resolve the parades issue. Each community has to explain itself better to the other and to make a better effort to understand the other. Neither explanation nor understanding can be achieved in the absence of patient and tolerant interaction. There is an abundance of social capital in Northern Ireland but it is of the kind which bonds those who feel a natural affinity towards each other because they share history, religious and cultural values and political belief. There is a paucity of the social capital that bridges difference.
- 8.19 A contributor to The Twelfth – What it means to me from outside the Orange tradition asked the right question and supplied an answer which deserves to be tested:

‘Why is it that we feel so much outsiders to each other’s culture .....? Part of the answer lies in our need for respect and security. Both (my emphasis) cultures need to feel respected. All (my emphasis) of us need security, for our cultures as well as our lives. When we feel we are not respected, or when we feel threatened, then we need to express our culture all the more strongly, and the other side then feel all the more threatened ..... We need to talk in order to understand what it is that all of us really need.’

8.20 The writer had a dream that things might be different – that an Orange procession might go along a contentious route, stopping on the way to have tea and sandwiches with local people, so that it would be a communal celebration by people from different traditions. He goes on: ‘And, on St Patrick’s Day, we could have Catholics marching to a Protestant area to celebrate the common gift of faith which we have all received’.

8.21 That dream resonates well with the remarks on which I concluded Chapter 7.

## CHAPTER 9

### A VISION FOR THE FUTURE

***'Once the concept of 'otherness' takes root, the unimaginable becomes possible'. Slavenka Drakulić***

***'... There is much to do before our pride can move with mercy in its equal stride'. John Hewitt***

- 9.1 It is generally accepted by those who work in the field of social science that the frame of reference we bring to any problem may lay it more, or less, open to solution. It encapsulates what we assume is valuable and believe is possible.
- 9.2 It is difficult to see how for Northern Ireland the frame of reference can be other than the plural society, containing many separate interests with a variety of objectives (often divergent) which have to be maintained in some kind of equilibrium if sufficient common purpose is to be achieved. It is not a matter of integrating the various interests. Instead, it is a question of balancing them in a way which gives each the maximum freedom compatible with the general interest of the society as interpreted and articulated by those responsible for its government, with the support of public opinion.
- 9.3 Such a model implies a multi-cultural society and, functioning effectively, it would also imply no conflict of cultures, which should be complementary rather than

competing. But that could involve no more than cultural co-habitation – benign apartheid – without the interaction or exchange (inter-culturalism) which might make difference fruitful. It has been suggested that the stark choice in these two types of plural society is between policies based on the acceptance of separation and policies based on the objective of sharing.

9.4 Present reality is not congruent with the plural frame of reference. We are currently opting – whether voluntarily or involuntarily – for separation and confrontation and this choice continues the trend of the past 150 years, when cultural cleavage has been reflected in territorial segregation. We have been well described as sharing a tremendous capacity for congealing into aggressive or defensive blocks. Since the middle of the 19<sup>th</sup> century, in urban areas most of all and particularly in Belfast, residential segregation (with loyalty to one locality identifying itself in terms of its opposition to another) has been shown to be both a necessary prerequisite for riot and the most popular mechanism for avoiding the sharper penalties of community conflict<sup>1</sup>. It has, of course, proved to be a faulty mechanism. No decade between 1850 and 1940 lacked at least one summer of serious rioting. Violence and the fear of it determined residence preferences. Since segregation increased more in bad times than it reduced in good times, the trend was steadily upwards. In 1999, 71% of public sector housing estates were segregated. Interestingly, 1935-1968 was the longest period in Belfast's history without major riotous confrontations.

9.5 An analysis of the community relations module of the 2001 Northern Ireland Life and Times Survey revealed that whilst Protestants and Catholics were slightly more optimistic about community relations than they were 12 years ago, the

<sup>1</sup> A C Hepburn, A Past Apart (1996)

- trend in positive attitudes between 1999 and 2001 was downward and there was also less optimism about the future. It seems a reasonable assumption that these trends would have been strongly reinforced by events of recent months.
- 9.6 Between 1999 and 2001 there was a steady increase in the desire for single identity communities and a concurrent decrease in the preference for mixed neighbourhoods and, compared with 1989, both communities are now more likely to prefer own religion neighbourhoods. Both Protestant and Catholics are significantly more likely to prefer own religion workplaces. The increasing support between 1989 and 1999 amongst both Protestants and Catholics for mixed religion schools went into reverse between 1999 and 2001.
- 9.7 The decline in the preference for mixing was sharper in lower occupational groups and within the Protestant community. The response to a question designed to gauge the extent of respect for diversity suggests that Catholics are more likely than Protestants to tolerate cultural expression normally associated with the 'other' community.
- 9.8 A report of a survey to provide an insight into the cultural and political awareness of young children aged 3 to 6 showed a rapid rate of increase in the proportions of children beginning to identify themselves with one particular community and to make sectarian comments at the ages of 5 (7%) and 6 (15%).
- 9.9 It is clear that the enforced fraternity at the top, which is the principle informing current arrangements for Government in Northern Ireland and is itself working only imperfectly, has not led to a softening of the sharp edges at community

level. Addressing people's inability to live together (or even, peacefully, apart) is the central challenge for our devolved institutions. Otherwise we risk a situation where Northern Ireland (in Professor Edna Longley's words) becomes infinitely devolved, as territorial boundaries are rigidly enforced. Some would see the contention over routes for parades as another aspect of the issue of territoriality.

9.10 Recent trends are in contrast to the results of a survey in 1996<sup>1</sup>, when hopes for a smoother transition to a post-conflict situation were higher. Inter alia, it tested attitudes on the general issue of separation or sharing. A huge majority of both Protestants (80%) and Catholics (94%) chose greater co-operation and sharing in many aspects of their daily lives, whilst only 7% (Protestant) and 2% (Catholics) wanted more separation. When the stakes were increased by seeking views on sharing even at some cost, the Protestant figure was 50% (with separation going up to 24%) whilst the Catholic figure was 70% (with separation going up to 9%). The study concluded that most people wanted Government policy not only to secure equality of treatment and parity of esteem for the two communities but also to ensure that there is choice for those who prefer sharing to separation.

9.11 It is evident that it will be very difficult to achieve consensus around the emotive issue of parading whilst both communities not only consolidate and reinforce the separation which is evident in current trends but also engage in the communal strife which the separateness purports to prevent. The tensions which are adduced as reasons why parades should not take place along certain routes are often attributed to the pervasive pattern of community violence in the locality. To

<sup>1</sup> T Hadden, C Irwin, F Boal, Separation or sharing.

the extent that those who wish to see such parades take place contribute to those tensions, they reduce the prospect of achieving their objective.

9.12 But the relationship between the wider phenomenon of separateness and the parading issue goes deeper than this. It has been argued by those who find parades unwelcome that the parade is the only interest evinced in their locality by the 'other' tradition which the parade represents. This challenges those who seek the ability to parade in all areas as a symbol of cohesiveness to consider what that principle means on a much wider front for the future shaping of a society in Northern Ireland which seeks diversity in dynamic unity.

9.13 I have already suggested in Chapter 7 that both communities need to recognise the mixed parentage (in historical terms) of the current generation and take joint ownership of:

'..... a history  
so complicated, gashed with violence,  
split by belief, by blatant pageantry,  
that none can safely stir and still feel free,  
to voice his hope with any confidence.'<sup>1</sup>

I have also suggested, in Chapter 8, that both communities have to meet each others' need to feel secure and respected in their identity.

9.14 The Community Relations Council summed it up well when it said that civil society 'depends on a shared discourse which requires and affirms differences but also allows these to exist in constructive relationships with each other'. That implies the centrality of the notion of interdependence, which requires a

<sup>1</sup> The Collected Poems of John Hewitt, Ed F Ormsby

recognition by each of their obligations and commitments to the other, leading to the development of a society that is at once cohesive and diverse. People do not need to have a common value system in order to have a common interest. When people are in the same boat, they share an interest in not tipping the boat.

- 9.15 There is a growing and welcome recognition that within community relations programmes there must be more emphasis on work with single identity groups so that, when intergroup work takes place, those on all sides can perceive themselves as being on an equal footing with others. This is particularly important for any experiencing the nihilism and fatalism which beset those in psychological retreat. A more direct route to cross-community work may simply engage those already most disposed to interact with the 'other' and bypass those most averse to a cross-community agenda. It has been well said that::

'Only when individuals are comfortable with their own group identity and have some sympathy for the position of others, can contact provide a constructive medium through which prejudice, intolerance, and negative social stereotypes are addressed.'<sup>1</sup>

- 9.16 There are obvious dangers in single identity work. People whose definition of themselves is dependent on their suspicion of, or hostility to, others may be reinforced in that tendency and cultural distinctiveness may become even more key to self-esteem. Single identity work needs to challenge people with the question posed by the Very Reverend Dr John Dunlop:

<sup>1</sup> J Hughes, Journal of Ethnic and Migration Studies, Vol 24

‘If we are not prepared to be enriched by proximity to and interaction with people who are different, have we any future here other than in diminished and frozen isolation?’

- 9.17 Intergroup initiatives which are predicated on the prior existence of trust are likely to be still-born, since trust has an opportunity to develop only in the context of relationship. As trust strengthens, the aim should be to create the ability and the will to act collectively for the common good.
- 9.18 The task is daunting. It was put to me in evidence that more people are ‘finding something deep within them that can’t stand the other’. I have no doubt that the fault lines revealed by the parades issue are merely part of a complex network of such lines, reflecting a deeply riven society.
- 9.19 As this Report suggests, much can be done, even in current circumstances, to ease the tensions around that issue. And, of course, to the extent that this is done, it will contribute to the creation of the inter (rather than multi) cultural society which is an imperative for Northern Ireland’s well-being. But equally I have no doubt that significant progress on the wider front would produce a much more benign context in which to tackle not only the parades, but many other, issues.
- 9.20 All – on both sides or none – whether seeking solutions to contentious parades or to a badly fractured and even dysfunctional society, are unlikely to get far without a vision of an inclusive, open, tolerant, compassionate society whose members have the self-confidence to embrace diversity and thrive on difference.

## **PART IV**

This Part begins by identifying the principal themes, as well as a number of other points, in the written and oral evidence and then explores three possible options for the regulation of parades for the future. There follows an analysis of the European Convention on Human Rights which forms the essential backcloth for the rest of the Report.

The succeeding Chapters examine:

- experience to date in achieving local solutions to local problems and the scope, going forward, for developing a professional Facilitation function which would play a pivotal role in helping to resolve parade disputes without the necessity for formal Determination;
- the present criteria, and the process, for making Determinations and whether changes might be made to address current concerns;
- the implications of such changes for existing arrangements for notifying an intention to parade or protest;
- appropriate means of ensuring compliance with Determinations and a steady improvement in the conduct of parades and protests;

- the case for including all forms of protest (and not only, as now, protest parades) within the scope of the regulatory machinery for parades;
- various options for handling the public safety dimension of parades and protests;
- a summary of the main characteristics of a model which combines the features emerging from the antecedent analysis;
- the 'event management' aspect of parades;
- particular issues connected with the involvement of bands in parades organised by others as well as purely band events;
- the educational role;
- the implications of parade disputes for the economy; and
- the adequacy of the range of offences within existing legislation.

## CHAPTER 10

### EVIDENCE

10.1 I was particularly interested to see whether there were themes in the written and oral evidence, preferably commanding a fair measure of cross-community support. Such themes emerged clearly, especially in the oral evidence sessions when basic points tended to be more sharply etched. These themes are prominent in this Report, in the course of which I refer to other points not recorded here when they are particularly relevant to the context. Here I identify nine themes:

- (i) With a few exceptions, there was no demand for a return to the pre-1998 Act situation when the regulatory function was discharged by the police or when politicians had a role in decision-making. Most of those who had very serious reservations about the existing arrangements (and made these very clear) accepted that independent third party regulatory machinery was probably a fact of life and concentrated on the changes needed to address their concerns about its operation. No individual or organisation that I can recall did not regard the existing arrangements as being in need of some change. The implications of some of the changes proposed were often more far-reaching than appeared always to be recognised by those who proposed them.

- (ii) The need was identified for proactivity on the part of the regulatory machinery, with a strong role for what was variously called conciliation, mediation and negotiation in achieving local settlement without the need for formal Determination. Questions were raised as to whether the role of the regulatory body in this area should be direct or at one remove; whether a single body could perform that role along with its quasi-judicial role; if not, which role should have priority; and whether, to the extent that there were 'structural' or 'governance' difficulties, these could be circumvented by outsourcing the conciliation etc function. It was felt to be necessary to clarify the role and status of the Authorised Officers and to give them appropriate professional support. There were views as to the likely efficacy of a conciliation etc function, no matter how professional. These ranged from, on the one hand, the deeply sceptical, given the polarisation of the interests involved and their lack of empathy towards each other, to, on the other hand, a firm proposal that a specific duty should be laid on the regulatory body to pursue mediation in the first instance and that it should be permitted to issue a Determination only when all reasonable efforts to facilitate mediation had proved unsuccessful.
- (iii) It was recognised that the achievement of the improved community relations which would provide a better context for resolving difficulties around particular parades was a long-term project and that, in the most tense situations, progress could be

retarded by attempts to achieve a quick fix. Parade disputes were a symptom of a wider Northern Ireland malaise: if we were not experiencing problems over parades, there would be no Northern Ireland problem either.

- (iv) When attempts at settlement outside the quasi-judicial process fail and Determinations have to be made, people need to be able to understand better why these decisions were reached. What really were the decisive criteria in each case? How could common criteria, uniformly applied, produce what some on both sides of the parades debate felt to be inexplicable, illogical and inconsistent decisions? What weight was given to each criterion? Was it engagement which was key or was it a matter of who could threaten most violence and create most tension or mobilise the most telling political support? How was the impact on relationships within the community measured – and did a decision for or against a parade not impact adversely on one ‘side’ or the other? The procedure for reviewing Determinations in certain circumstances was regarded with suspicion as a means of giving the ‘other’ side a chance to exert undue influence to have a ‘good’ decision overturned. There were concerns that political representatives could obtain reviews even when (allegedly) no new evidence was being presented.
- (v) There was a widespread demand for the veil on how decisions were made to be drawn aside, for the black box to be opened, so

that people might be better able to be persuaded of the fairness of the decision-making process. The word 'transparency' recurred time and again, occasionally in uneasy juxtaposition with the notion that there might have to be some sources of evidence which would not wish their identity to be disclosed. The police were sometimes, but not always, cast in that role.

- (vi) It was asserted on all sides that it was rights that were at the heart of disputes. It was not always clear whether the rights being claimed bore the claimant's own stamp of validation or were more independently grounded. There was, however, considerable support for the ECHR as the best available framework, although this was occasionally tempered by a hankering for adjustments (perhaps via a customised Northern Ireland Bill of Rights) which would bring the Convention more into line with the view of the world held by whoever was proposing the adjustment.
  
- (vii) it was sometimes an explicit (and in many cases an implicit) view that more use should be made of the whole year by all concerned in order to get a better grip on the problems and reduce the traditional tensions around the marching season itself. This view was not merely in the context of trying to sort out in good time disputes affecting particular parades. Some parade interests, for example, wanted immediate feedback on adverse reports about parades so that the rights and wrongs of any issues arising could be speedily dealt with rather than left in limbo and perhaps

resurrected some time in the future. Others, coming at it from a different angle, wanted effective action taken to ensure strict adherence to the conditions attached to each parade, including observance of the Code of Conduct.

- (viii) There was general acceptance of the importance of effective events management. Those within the parading tradition affirmed their commitment to peaceful, orderly parades and, whilst recognising the right to protest, stressed that it would assist their efforts if protests, too, were peaceful and orderly. Those outside the tradition disputed the commitment of organisers who, they felt, should accept responsibility (and be made more accountable) for their events. The conduct of bands and of those accompanying parades was regarded by many (including those within the parading tradition) as on occasion falling short (sometimes far short) of acceptable standards of public behaviour. Alcohol was frequently cited as the downfall of many a good intention.
  
- (ix) There was some support (albeit for different reasons, depending on the source) for the introduction of more certainty into the situation and for getting away from the annual cliffhanging over routes which raises tension as decisions on individual parades are awaited. There were suggestions for 'grouping' parades for consideration and for having Determinations apply for a whole season and beyond in appropriate circumstances.

10.2 There was a miscellany of other points, not all mutually compatible. The following list is not exhaustive:

- (i) The Parades Commission should be disbanded and the legislation set aside.
- (ii) Appointments to the Board should pay regard to the need for gender balance. Politicians should (perhaps on the model of the Policing Board) be involved in the Board. Politicians should be kept as far away from it as possible. Appointments should be made by the First Minister and Deputy First Minister and the Board should be accountable to the Assembly. Those who have experience of parading should be strongly represented on the Board. The Board should consist of a body of experts rather than be representative. Appointments should be staggered so as to provide some continuity of membership.
- (iii) When appointing staff to the regulatory body, the net should be cast widely. Frequent changes of personnel should be avoided.
- (iv) The arrangements for disseminating Determinations could be improved, with care to ensure that copies are made available to participating bands.
- (v) The forms used for notifying intention to parade should be revised. There should be a separate form for band parades. Bands should

only be required to provide the name of the band, not of any individual associated with it.

- (vi) There should be a much more structured, high-profile Education programme in which the regulatory body can fully explain itself as well as assist each side to understand better each other's position. People should be made familiar with the impact of Human Rights legislation.
- (vii) Paramilitary displays should be eliminated from all parades.
- (viii) People's right to parade or protest peacefully should be protected by the police.
- (ix) Parades should be placed in different categories according to their nature and purpose and traditional parades should be allowed free passage.
- (x) The Assembly should play a greater role in tackling inter-community division and providing a forum for the discussion of contentious issues.
- (xi) Area Forums, carefully constituted and sensitively conducted, may have a role in creating the better community climate in which parades disputes in particularly contentious locations may become

easier to resolve. There was also a view that politicians should not be involved in such forums.

- (xii) The role of the police in handling parades and protests can be crucial. Police performance should be carefully monitored. Lessons should be learnt so that best practice may spread and be incorporated in police training programmes.
- (xiii) The Secretary of State's power to review the decisions of the regulatory body in certain circumstances should be removed.
- (xiv) The police should have power to close public houses along sensitive routes.
- (xv) Certain (eg trade union) parades should be removed from the ambit of the 1998 Act.
- (xvi) No one should have access to legal aid.
- (xvii) There should be a more formal method of submitting, and responding to, objections in respect of disputed parades.
- (xviii) Bands should be registered/should not be registered.
- (xix) Those intending to parade should be required to take out public liability insurance and/or to post a bond.

## **END-NOTE**

### **AOH**

I was disappointed that, despite my best efforts, I received no evidence from the Ancient Order of Hibernians. I have sought to repair that omission by reading as much as I could of what has been published about the organisation. Whilst, therefore, in terms of direct evidence, I have perforce had to focus on the marching tradition represented by the Loyal Orders and the reactions to which it gives rise, I have been at pains to examine case papers relating to some parades in which the AOH were participants and where there were objections to those parades. Change the names and the venues and you find that these situations have characteristics which are virtually mirror images of situations where Loyal Order marches are at issue. I have no doubt that the various changes which I propose in this Report with regard to the regulatory machinery for parades are also relevant so far as parades other than those by the Loyal Orders are concerned.

## CHAPTER 11

### THREE POSSIBLE OPTIONS FOR THE FUTURE

- 11.1 There may be many ways of progressing the parades issue. Here, however, I only consider three and indicate which one seems to me to offer the best way forward.

#### **Option I**

- 11.2 This option would reflect the preference of the Parades Commission itself.

#### **Parades Commission view<sup>1</sup>**

- 11.3 The Commission believes that there is a strong case for continuing with the fundamentals of the present general framework, at least in the short-term, but extending the role of the Commission to enable it to restrict static protests about parades. In addition, consideration should be given to linkage of determinations, so that a preliminary view could be taken in relation to the quantity of parading expected in any particular locality over a season. Greater emphasis should be placed on the responsibilities of every parade organiser, in relation to the management and conduct of parades, recognising the significant environmental impact of parading in modern society.

<sup>1</sup> See also Appendix 4.

11.4 The Commission believes that steady and sustained progress is preferable to radical change in the statutory framework at this point in time. There is a danger of immediately reacting to topical concerns and responding to popular but transient pressures by instituting structural change. What is needed most at present is a stable system without the constant promise of imminent change. Harsh realities about dialogue will then be faced more quickly. The Commission accepts that there is a much better way to handle parading problems than an arbitrating Commission. It believes that unfortunately, at this juncture, some of those involved in conflict around parades have not demonstrated the level of maturity and commitment to accommodation, which would empower alternative approaches to resolution. The Commission feels that this model will gradually guide protagonists towards local accommodation and it believes that there is now considerable evidence of this process working itself out.

**Points made by others**

11.5 Others argue that dissatisfaction expressed with current arrangements is akin to the dislike generated initially by Fair Employment legislation, which is now operating smoothly. As with all kinds of change, people simply need time to adjust. They have a perhaps natural feeling of loss, even of disenfranchisement. Many forms of change induce a sense of bereavement. People want to get back to where they were. But the world has experienced irreversible change. Many, even outside the nationalist community, are no longer prepared to tolerate a situation where an 18 year old can issue an invitation to scores of bands and mobilise an event which, with scant regard for the convenience of the public, virtually closes down its host venue, goes on very late into the evening and

exhibits no great regard for orderly or seemly conduct. An occasional event may be accepted, however reluctantly, but frequent repetition tests patience too far. Parading of all kinds on the scale of former years, when roads were far freer of traffic, is no longer appropriate. The increasing importance of service-type businesses (compared with the large, traditional manufacturing enterprises) demands a re-think of the impact of parades on everyday life.

- 11.6 In short, runs this argument, the Commission, by setting itself the objective of getting parading by agreement, is performing an indispensable role – and with increasing acceptability.

### **Option II**

- 11.7 It has been suggested to me that at least some of the contentious routes are so contentious that they should be regarded as closed to parades, if not permanently at least for the foreseeable future, although the possibility of a subsequent review in light of local discussions (likely to be a long process) is not completely ruled out. Those advocating this course point to the demography of areas adjoining the route, a history of sectarianism, harassment and provocation surrounding parades there, and the consensus within those areas that parades are unwelcome. It was put to me that in situations such as this ‘a genuine and long-term process of genuine conflict resolution is going to be required to create the conditions where marches can take place in an atmosphere free from fear’.

11.8 In evidence to me, two main arguments against a blanket ban have been advanced – and by those not connected with any of the interests involved with parades on these or any other routes.

11.9 First, it is argued that:

‘any proposal that automatically denied people an opportunity to exercise their rights (either to march or to protest) or any opportunity to challenge that alleged abuse of their rights ..... would bring the authorities into direct conflict with the Human Rights Act and the European Convention. We assume that the Government would be relatively immune from domestic or European challenges under the present arrangements since they have established a Parades Commission with a clear brief to respect – and balance – the rights of everyone involved ..... If, however, groups and individuals were denied access to this mechanism against their will because of the imposition of a ‘blanket ban’ or moratorium imposed in its stead .... it is unlikely that the legal system would be sympathetic.’

11.10 The second argument has been put to me in the context of a discussion about the importance of tolerance as a means to peace and reconciliation. It goes on:

‘.... it is hard to see how tolerance can be effectively promoted by a régime in respect of parades which appears to place such heavy emphasis on the idea that certain areas or streets ‘belong’ to one or other community which can then assert the right to allow or refuse parades that it regards as offensive. A better approach .... may be to encourage mutual toleration and respect by measures which encourage the participants to engage with and seek the consent of potential opponents but make it clear that the consent is not to be unreasonably or intolerantly withheld.’

11.11 In this context attention is drawn to the Good Friday Agreement (Human Rights, para 13):

‘An essential aspect of the reconciliation process is the promotion of a culture of tolerance at every level of society, including initiatives to facilitate and encourage integrated education and mixed housing.’

It has been put to me that this also reflects the recognition of the concept of tolerance in international human rights law, in which ‘the idea that individuals and communities should respect the identity and culture of others, both individually and collectively, and should therefore be willing to tolerate the expression of identities and cultures which are different from or unwelcome to them, is inherent’.

11.12 Article 6(1) of the European Framework Convention on the Protection of National Minorities is considered to be in point here:

‘States shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons’ ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.’

It has been put to me that, since these obligations are imposed on the United Kingdom as a whole, they apply with equal force in respect of both communities here, regardless of whether one or the other might be regarded as a majority or a minority at a regional level.

11.13 It is implicit in the argument whose key features I have summarised in paras 11.10-11.12 that denying access to certain routes on the basis of considerations closely linked to demography would consolidate and strengthen the trend towards segregation and separation which is already so strong in many spheres in Northern Ireland. It could also be argued that in a context where, apart from the parades issue altogether, demographic change and what is perceived as loss of territory are sources of acute tension, establishing an automatic link between demography and parading rights would raise the stakes and exacerbate those tensions considerably.

11.14 I cannot avoid the conclusion that any attempt to prohibit parades solely on the basis that those who lived on, or in proximity to, the relevant routes wished this to be done, for what they believed to be compelling reasons, would be regarded as in breach of the Human Rights Act 1998 and the ECHR which it incorporates. Rights on either side of the argument (whether, for example, to peaceful assembly or to privacy) cannot be exercisable only at the discretion of the other side. However, as Chapter 12 makes clear, the ECHR sets out how, where rights are qualified (as the right to process is under Article 11 of the Convention), a decision to limit them is reached. The proposals which I develop under Option III offer that facility. Therefore, if a Determination made according to the criteria, and using the process, which I describe in Chapters 15 and 16 respectively, were to find that parades on a particular route should be re-routed and if, as I propose in Chapter 16, Determinations had a longer currency than a year (unless there was a material change in circumstances), then such a route would in effect be closed to parades. This would be so because it had been established within the framework of principle provided by the ECHR and reflected in the relevant Public

Processions legislation that in this instance it was necessary in a democratic society to limit freedom of peaceful assembly in order to protect the rights and freedoms of others, and that re-routeing was a proportionate response.

### **Option III**

11.15 It was clear to me that the great majority of those who gave evidence wished to see the retention of an independent capability to deal with disputes regarding parades, free from any political control or influence. But, that assured, there were none who did not have suggestions (some entailing legislative change) as to how existing arrangements could, from a variety of perspectives, be improved.

11.16 So the third option is to address seriously the concerns which have been expressed, on all sides, about aspects of current arrangements and to be prepared to reshape the existing regulatory machinery as necessary to accommodate those concerns, but in ways compatible with the imperative to ensure independence and impartiality. This is the approach adopted in this Report.

11.17 To do so in no way reflects on the work which the Commission has done. Building on the foundations laid by the Commission, my proposals look to enabling a considerable acceleration in the trend towards local accommodation and, in what I hope will become a speedily diminishing number of cases requiring formal Determination, they also look to providing a process whose outcomes are achieved within a framework which is transparently fair and recognised as such.

## CHAPTER 12

### EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

- 12.1 Given the significant implications of the European Convention on Human Rights, reference to which is often in very general and incomplete terms which may reflect or cause misunderstanding, it is important that I try to identify here some salient points, which make no claim to being exhaustive.

#### Introductory

- 12.2 The European Convention for the Protection of Human Rights and Freedoms is a treaty of the Council of Europe, which is quite separate from the European Union. The United Kingdom played a major part in its drafting and was the first country to ratify it in March 1951. It has now been ratified by 44 countries. In 1966 the United Kingdom accepted that an individual could bring a case against it in Strasbourg, seat of the European Court of Human Rights.
- 12.3 It was not considered necessary to write the Convention into British law, since it was considered that the rights and freedoms guaranteed by the Convention were already, in substance, fully protected. However, it became clear that it took too long and cost too much to get an action into the European Court after exhausting all the domestic remedies. The Human Rights Act 1998, (which came into force on 2 October 2000) incorporated the Convention in British law, thereby enabling people to enforce their Convention rights in the British Courts.

12.4 As a result of the Act, it is intended that the Courts should strive to find an interpretation of existing legislation that is consistent with Convention rights and only in the last resort conclude that the legislation is simply incompatible with them. The existing law protecting human rights remains. A person who relies on a Convention right does so without prejudice to any other right or freedom conferred on him.

### **Freedom of peaceful assembly and other rights**

12.5 Convention rights range from the right to life and personal liberty and security to protection of privacy and family life, freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association. The text of the rights most frequently referred to in the context of the parades issue is provided in Appendix 5. For convenience, I repeat here the text of Article 11, which deals with freedom of assembly:

- (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.
- (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.

In the Greek case [1969] it was made clear that 'Freedom of assembly' is a major part of the political and social life of any country.

12.6 The European Commission of Human Rights held in Rassemblement Jurassien and Unité Jurassienne v Switzerland [1979] that the subjection of meetings in public thoroughfares 'to an authorisation procedure does not normally encroach upon the essence of the right. Such a procedure is in keeping with the requirements of Article 11.1 if only in order that the authorities may be in a position to ensure the peaceful nature of a meeting, and accordingly does not as such constitute interference with the exercise of the right'.

12.7 It has been ruled<sup>1</sup> that:

'The freedom of peaceful assembly covers not only static meetings but also public processions. It is moreover a freedom capable of being exercised not only by the individual participants of such demonstration but also by those organising it, including a corporate body ...'

G v Federal Republic of Germany [1989] made clear that Article 11 does not apply to a 'demonstration where the organisers and participants have violent intentions which result in public disorder'.

<sup>1</sup> Christians against Racism and Fascism v UK [1980].

### **Limitations on rights**

12.8 Strong rights may sometimes compete with each other and with other important public interests, which is why presumed rights have to be qualified. It is therefore a feature of the Convention and of comparable international documents that they set out circumstances in which the rights may be limited. Sometimes, as in the Universal Declaration of Human Rights (1948), this is done by means of a single limitations Clause:

‘In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.’

A single Clause is also the method adopted in the Canadian Charter (1982), which makes rights and freedoms subject to:

‘Such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’

12.9 The European Convention opted for a more specific approach to each right, as reflected in Article 11(2) above. Article 11 is not unique in this respect, as will be evident from the Appendix. Articles 8, 9 and 10, for example, also allow for interference by the authorities in specified circumstances. It is generally accepted that the whole system of the Convention presupposes that only the restrictions expressly authorised by the Convention are allowed<sup>1</sup>:

<sup>1</sup> K Starmer, European Human Rights Law (1999).

'In each case, the list is intended to be exhaustive: there is no scope for states to infer grounds for restriction which are not explicitly stated. In addition, there is a rule of strict interpretation. Not only may the listed criteria alone justify any restrictions; these criteria, in turn, must be understood in such a way that the language is not extended beyond its ordinary meaning.'

### **Procedure for determining limitations**

12.10. The grounds for interfering with rights must be relevant and sufficient. Any limitation placed on a right such as is contained in Article 11 therefore has to pass a number of tests.

12.11 First, a core concept in Convention jurisprudence is the rule of law, so the domestic legal system must sanction the interference. It must be 'in accordance with the law' (Article 8) or 'prescribed by law' (Articles 9, 10 and 11). In order to be regarded as law for this purpose, it must be accessible to the citizen and it must be sufficiently precise to enable citizens reasonably to foresee the consequences which a given action may entail and regulate their conduct accordingly. This does not mean that the law need rule out the exercise of discretion on the part of those administering it but the limits of the discretion must be clear so as to afford protection against arbitrary interference.

12.12 Second, the restriction must have a legitimate aim, a permissible purpose. In the case of Articles 8, 9, 10 and 11, the permitted purposes of the interference with the rights are: protecting national security, public safety, health or morals and the rights and freedoms of others, and preventing disorder or crime.

12.13 Third, it must be shown that it is 'necessary in a democratic society' to interfere for one of these permitted purposes. It has been said that this is arguably one of the most important clauses in the entire Convention since, in principle, it gives the Strasbourg organs the widest possible discretion in condoning or condemning interferences with rights which states seek to justify by reference to one or more of the permitted purposes. It has to ensure that the interference conforms to the genuine interests of democracy and is not merely political expediency in disguise.

'Necessary in a democratic society' has been held by the European Court to mean that the interference must correspond to a pressing social need. 'Necessary' does not simply mean 'reasonable' or 'desirable'. The case law has also clarified that what is meant by a democratic society is one characterised by pluralism, tolerance and broadmindedness. It has been said<sup>1</sup> that:

'... the Court works according to a 'rich' model of democracy, which is different from mere majority rule. In a democracy which protects Convention rights, minorities must be adequately protected against unfair treatment and abuse by the majority of a dominant position.'

Another commentator<sup>2</sup> writes:

'...it will be difficult, if not impossible, to establish a pressing social need to protect intolerance and narrow-mindedness.'

12.14 The Handyside [1976] case is the classic statement of the right to freedom of expression in a democratic society:

<sup>1</sup> D Feldman, Civil Liberties and Human Rights in England and Wales (2<sup>nd</sup> Edition, 2002) p56.

<sup>2</sup> Starmer, p180.

‘Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man.... It is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’

The point was further emphasised by Sedley LJ in Redmond-Bate v DPP [1999]:

‘Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence ..... our world has seen too many examples of state control of unofficial ideas .... A central purpose of the European Convention on Human Rights has been to set close limits to any such assumed power.’

12.15 The Sheriff’s Court in Scotland made interesting observations on the import of the ECHR. In the Aberdeen case<sup>1</sup> it said:

‘This [Article 11] right is not restricted to those whose views accord with the majority. It is of the essence of a civilised democratic society that many points of view may be expressed in public. The right to public assembly .... may be restricted in certain circumstances .... But it is for the public authority to show that it is necessary to curtail the basic right before any such restriction will be withheld .... it is the right of individuals and groups in a civilised society to express their views so long as neither their words nor their actions contravene the law. Tolerance is what is required in a democratic society and that includes toleration of views or sentiments which may not coincide with one’s own.’

<sup>1</sup> Aberdeen Bon Accord Orange Lodge 701 v Aberdeen City Council [2001].

12.16 Fourth, if the necessity for a restriction is convincingly established, the means employed to limit the right must be proportionate to the permissible purpose which is being relied on to justify the limitation. A sledgehammer cannot be used to crack a nut. The seriousness of the interference therefore has to be balanced against the seriousness of the threat to the interests protected by those permissible purposes eg public safety, rights and freedoms of others, to see whether there is a less restrictive but equally effective alternative:

‘The principle of proportionality is a vehicle for conducting a balancing exercise. It does not directly balance the right against the reason for interfering with it. Instead, it balances the nature and extent of the interference against the reason for interfering’<sup>1</sup>.

12.17 It is relevant to take note of instances where it has been held that action taken by the authorities to curtail ECHR rights was necessary in a democratic society and proportionate. All were the subject of opinions stated by the European Commission of Human Rights<sup>2</sup>.

12.18 One<sup>3</sup> involved the amount of noise expected at a demonstration, which led the authorities to ban it. The Commission held that:

‘... it can ...be regarded as ‘necessary in a democratic society’ to prevent excessive noise of a demonstration, and it was not disproportionate in the present case to do so by the prohibition of the demonstration rather than by its subsequent dissolution. Having regard to the previous experience<sup>2</sup>, it was in no way unreasonable or arbitrary to assume that the proposed demonstration would also lead to unnecessary noise.’

<sup>1</sup> Feldman, p57.

<sup>2</sup> Until November 1998, the Commission’s role was to state an opinion on whether there was an arguable claim to go before the European Court of Human Rights that a right had been violated.

<sup>3</sup> Application 13812/88 by S v Austria.

12.19 Another case<sup>1</sup> involved the ban of a rally in Trafalgar Square. The Commission held that:

‘Having regard to the fact that the refusal of permission [on grounds of public order] did not amount to a blanket prohibition on the holding of the applicants’ rally but only prevented the use of a high profile location (other venues being available in central London) ..... the restriction in the present case may be regarded as proportionate and justified as necessary in a democratic society.’

12.20 In the third case<sup>2</sup> the authorities had prohibited all trespassory assemblies within a radius of four miles from the junction of roads adjoining the Stonehenge Monument for four days. The Commission referred to disorder at Stonehenge in previous years and went on:

‘.... the Commission notes that the ban did not affect groups of less than twenty persons and that it was open to the applicant to practise his religion or belief in a smaller group within the four mile exclusion zone .... Bearing all the factors in mind, the Commission considers that the interference with the applicant’s right of freedom of assembly can reasonably be regarded as ‘necessary in a democratic society .... for the prevention of disorder’ within the meaning of Article 11, para 2 of the Convention.’

12.21 When assessing whether there is a pressing social need and whether, if there is, the restriction adopted is proportionate, the European Court allows the national authorities a measure of discretion (or leeway), termed ‘a margin of appreciation’, in deference to the fact that in principle they are (as the Handyside case put it) ‘by reason of their direct and continuous contact with the vital forces of their

<sup>1</sup> Application No 25522/94 by Rai et al.

<sup>2</sup> Application No 31416/96 by Pendragon.

countries, ... in a better position than the international judge to give an opinion on..... the 'necessity' of a 'restriction' ....'. However, the Court always stresses that this discretion goes hand in hand with the supervision of the Court.

12.22 It has been suggested that the doctrine of the margin of appreciation – described as 'a spreading disease' - has the power to undermine the Convention but it has been defended on the ground that it is based on respect for the different cultural and judicial traditions of the states which are party to the Convention. The amount of discretion allowed by the Court in individual cases has varied to the extent that one study concluded that it is quite hazardous to try and foretell whether the margin of appreciation which is allowed will be wide or narrow. There is support for the view that, since the domestic courts are an integral part of the system within the State for protecting human rights, the 'margin of appreciation' doctrine should have no place in domestic law. That might have implications for how the domestic courts use cases which have been decided by the European Court in accordance with that doctrine.

### **The proportionality approach and judicial review**

12.23 It will be apparent that there is a material difference (as well as an overlap) between the orthodox approach by British courts to traditional judicial review and the proportionality approach. Lord Steyn addressed the issue in another recent case (R on the application of Daly v Secretary of State for the Home Department, [2001]). Making clear that the review undertaken by the courts could still not be a merits review, he said:

'... the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not whether it is within the range of rational or reasonable decisions ... the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.'

In the same case, Lord Bingham, referring to a 1999 case where the European Court had ruled that the orthodox judicial review approach by the English Courts had not given the applicants an effective remedy for the breach of their Convention rights, said:

'Now, following the incorporation of the Convention ....., domestic courts must themselves form a judgment whether a Convention right has been breached (conducting such inquiry as is necessary to form that judgment) and, so far as is permissible under the Act, grant an effective remedy.'

### **Other Articles**

12.24 I have focused primarily on the form of those Articles which illustrate how rights and limitations on rights are juxtaposed in the Convention. It is also worth noting other Articles of significance. Article 1 requires governments to "secure" the rights and freedoms included in it. This imposes positive obligations on states to protect individuals from the infringement of their rights by others. I have referred in Chapter 20 to the Plattform case which is relevant in this context and where it is an Article 11 right which is at issue. The purpose of the Convention would be frustrated if the rights it guaranteed proved merely theoretical or illusory rather than practical and effective, and the Court has said so.

12.25 Article 14 prohibits discrimination, 'so that it is not more difficult for proponents of some views 'to exercise their freedom of expression than for proponents of other views'<sup>1</sup>. Article 17 is designed to make it impossible for some to take advantage of the provisions of the Convention to destroy other people's enjoyment of their rights. Article 18 seeks to ensure that the motives of those imposing limitations on the exercise of rights are pure and that 'a legitimate ground for restriction [set out in various sub-Articles of the Convention] cannot be used as a pretext for a measure which is purely aimed at another, improper purpose'.<sup>2</sup>

### **The change to the landscape**

12.26 Finally, it is important to note the difference which the incorporation of the Convention made to the human rights landscape in the United Kingdom in regard, for example, to the right to peaceful freedom of assembly. In a 1936 case, the Judge said that English law did not recognise any special right of public meeting for political or other purposes, the right of assembly being nothing more than a view taken by the courts of the individual liberty of the subject. There was no duty on the State to allow or facilitate the liberty, whereas the Human Rights Act requires every public authority to give effect to the Convention rights unless statutory provision makes it impossible to do so. And of course, in these circumstances, there is provision for the court to make a declaration of incompatibility.

<sup>1</sup> Feldman, p1032

<sup>2</sup> Starmer, p177

### **'Our Bill of Rights'**

12.27 A recent Privy Council case, Brown v Stott [2001], sums up neatly the rationale and some key features of the Convention. Lord Steyn said:

'The framers of the Convention recognised that it was not only morally right to promote the observance of human rights but that it was also the best way of achieving pluralistic and just societies in which all can peaceably go about their lives. .... [It] requires that where difficult questions arise a balance must be struck .... The scheme and structure of the Convention reflects this balanced approach .... as a European nation, it represents our Bill of Rights. We must be guided by it.'

12.28 The Human Rights Act, incorporating the Convention, has been aptly described<sup>1</sup> as one way of enhancing principled accountability by decision-makers. I believe we should exploit to the full its potential to improve the context within which rights and responsibilities in respect of public processions are considered. I pursue this theme in Chapters 15 and 16.

<sup>1</sup> Feldman, p1032.

## CHAPTER 13

### LOCAL ACCOMMODATION AND ENGAGEMENT

**‘No decision-making process can match an amicable settlement on the ground’. (Lord Dubs, introducing the 1998 Act during Second Reading in the House of Lords, 28 October 1997)**

#### The Commission’s concept

13.1 North stressed the importance of local accommodation, of local solutions to local problems, and one of the fundamental principles which it recommended should form the basis for the development of processes and procedures to address the issue of conflict over parades was that ‘all those involved should work towards resolution of difficulties through local accommodation’. The same theme pervaded the parliamentary proceedings which translated North’s proposals into legislative form, although there was no explicit reference to the point on the face of the Act itself. However, the Act required the Commission to issue a set of guidelines as to the exercise of its powers to impose conditions on public processions. These Guidelines addressed the point as follows:

4.4 **Communication with the Local Community:** The Commission will also take into account any communications between parade organisers and the local community or the absence thereof and

will assess the measures, if any, offered or taken by parade organisers to address genuinely held relevant concerns of members of the local community. The Commission will also consider the stance and attitudes of local community members and representatives.

13.2 This process is normally described as 'engagement', and in each Determination issued by the Commission there is usually a standard passage along the following lines:

'As indicated at page 15 of its second Annual Report, the Commission (while avoiding an excessively prescriptive approach) considers the essence of engagement to be attempts at genuine communication between protagonists to a particular parading dispute. A series of 'pointers' to what constitutes genuine engagement is listed on page 16 of that Report.

As stated in paragraph 4.4 of the Guidelines, the Commission takes into account any communication between parade organisers and the local community or the absence thereof. Further, the Commission will assess the measures, if any, offered or taken by parade organisers to address genuinely held relevant concerns of members of the local community.'

13.3 The 'pointers' referred to above were:

'Each party could be expected to:

- enter the process with no pre-conceived outcomes,
- listen to and try to understand the other's concerns,

- show respect to the other, by taking their concerns seriously,
- be willing to communicate their own legitimate concerns clearly,
- focus on issues that are capable of being addressed by the parties concerned,
- demonstrate a commitment to resolving the problem and addressing legitimate concerns, preferably within a target timetable,
- be represented by people with the authority to speak for their protagonists, and
- demonstrate a willingness to consider some form of third party intervention, such as mediation, if direct dialogue is not possible.’

In most cases a Determination indicates whether engagement has taken place and in some cases there may be additional comment.

### **The Commission’s view**

13.4 I sought the Commission’s view on engagement. I was told that, whilst there is no seismic change, there is considerably more engagement, particularly through the Commission’s Authorised Officers. It believes that the patient, steady approach of the Parades Commission model is beginning to reap rewards: ‘The green shoots of resolution are, it seems, breaking through what was once particularly stony ground’. The Commission expects that engagement will lead to

a significant number of parades ceasing to be marked contentious if the Parades Commission model carries on for another two or three years. Given engagement, it does not believe there are many circumstances where a loss of route is inevitable. In its judgment, there are no town centres or main thoroughfares that are currently contentious where a reasonable amount of parading could not continue with meaningful engagement. It is, indeed, of the view that no contentious routes can or should be seen as closed and it strenuously tries to ensure that the freedom to parade is maintained unless it judges it absolutely necessary to restrict.

#### **The role of the Authorised Officers in engagement**

- 13.5 The Commission's Authorised Officers are the key players in seeking to broker local solutions. Over time, they have got to know many of the personalities on all sides and to develop a good degree of insight into the situation on the ground. They are also able to liaise closely with the police. Much of what they do is therefore carried out on their own initiative, in line with the objects of the Act, but not necessarily in pursuit of a carefully co-ordinated strategy worked out for each location by the Commission, although the Authorised Officers obviously keep in touch with the Commission and are relied upon by it as a key source of information. The staff of the Commission may also see occasion to develop their own direct initiatives in respect of a particular parade or may be drawn by others into doing so. I was told that things work best when there are good communications maintained between the staff of the Commission and the Authorised Officers. Otherwise, matters may become confused locally.

13.6 It is a moot point whether, given the work of the Authorised Officers, the Commission is in effect discharging a mediation role (which was denied it during the passage of the Bill through Parliament) or simply (as the Act empowers it to do) facilitating mediation. The Authorised Officers are not employees of the Commission but are recruited by it and are remunerated by it for the services they provide. Prior to that they were recruited by, and related to, the Mediation Network for Northern Ireland and the Commission has recently appointed a business that specialises in mediation support to support and further develop the Authorised Officer team. In this paragraph I use the term 'mediation' loosely since the Authorised Officers would not claim that, by and large, their activities on the ground have developed to the point where they can technically be described as 'mediation'. They are, rather, trying to make local deals in a situation where people are focused on achieving immediate outcomes rather than developing relationships.

13.7 The somewhat semi-detached status of the Authorised Officers can give rise to an ambivalent situation. Some assume, or purport to assume, that Authorised Officers are agents acting on the instructions of the Commission, which can therefore be held accountable for everything they do. Where, therefore, the actions of an Authorised Officer have not commended themselves to someone already disposed against the Commission, this has reinforced that negative perception. Others, on the other hand, who have not been prepared to have formal relations with the Commission, have found it useful to relate to the Authorised Officers precisely on the basis that they are not the Commission or that it can be pretended that they are not. The classic defence of 'deniability' can, if need be, be invoked. Generally, Authorised Officers believe that their

status and role is enhanced by their association with the Commission and that any rupture now of the link between them would be premature. The term 'good creative ambiguity' has been used to characterise the current set-up.

### **The nature of engagement**

13.8 A key feature of engagement has been the diversity of forms which it has taken. It has been sometimes but not usually a matter of direct contact between the opposing interests, although there is encouraging evidence of a shift towards face to face dialogue. More often, however, it has been a matter of shuttle diplomacy. Those who are in effect speaking for a local lodge or club may be at pains to make clear that they are not doing so in their 'official' capacity. The message the Authorised Officer is getting (intended to be passed on to the Commission 'but mind you I've said nothing') may be quite different from the hard front being publicly presented by the interest concerned and may sometimes reflect a difference of approach within the organisation to a compromise on the route for the parade. That does not prevent a Determination which re-routes a parade accordingly being subsequently strongly criticised.

13.9 I have been struck by the murky world of shadows in which the Authorised Officers have to operate and by the labyrinthine complexity of the process. They were careful not to break confidentiality but I have been impressed by their 'feel' for local situations, the skill, ingenuity and tenacity they bring to problem-solving and their complete dedication.

13.10 North acknowledged that the going would not be easy:

‘We have referred .... to the difficulty that representatives, from both sides of the community, may have in entering into direct discussions. But their willingness or otherwise to enter direct discussions need not of itself .... prevent the search for local accommodation, provided the parties are prepared to look constructively at alternative means of reaching accommodation.’ (para 13.27).

### **Progress to date**

- 13.11 It is disappointing, however, that the steps towards engagement have been so tentative and that, nearly 6 years on, there are still situations where there is no real engagement – in the sense of the parties sitting together on the opposite side of the table to the common problem which it is in their joint interests to solve.
- 13.12 Nationalists would say that the reason is the failure of some of the Loyal Orders to recognise that those objecting to parades can have an arguable case which at least merits the courtesy of serious consideration. Some in the Loyal Orders would say that the objections are often contrived and politically motivated and that, in some instances, to meet the objectors would be tantamount to supping with the devil. Whatever the limitations on their right to march, they do not believe that they include the need (as they would see it) to obtain the consent of objectors.
- 13.13 The difficulties associated with the current process can lead to mutual recrimination, as each side seeks to explain the failure to engage. There are accusations of unwillingness on one side or other to enter talks without preconditions and of agendas being too loose, too broad or too narrow. There

are interminable arguments about process. An already tense situation risks becoming even more charged when even the machinery for alleviating it becomes a bone of contention.

### **Measuring engagement**

13.14 The fact that engagement is one of the factors taken into account by the Commission in making its Determinations has led to charges by the Loyal Orders that the Commission is inconsistent in how the factor is applied. Different situations are minutely compared. It is alleged that engagement of a kind which has 'secured' a parade on one occasion or in a particular location is for unknown reasons not deemed sufficient to secure a parade on another occasion or in another place. This perception fuels claims of inconsistency in decision-making. And, since it is believed that engagement is often the determining factor in a decision to impose conditions, it looms large in criticisms made of the Commission. In these circumstances the fact that, for reasons intended to be helpful to the parties, the Commission has been deliberately unprescriptive can compound the problem.

13.15 But Nationalists also have points to make about engagement. It has been put to me in evidence that 'dialogue must be seen as a genuine and long-term process of conflict resolution, as a means to an end, not an end in itself ... it would be entirely wrong should any organisation that has previously chosen not to engage with its opponents be automatically rewarded simply for taking that step'. Another submission in evidence said:

‘.... the current practice of the Parades Commission of measuring ‘genuine engagement’ between the two sides as a reason for allowing or not allowing a parade is fatally flawed. It is our experience that ‘genuine engagement’ can appear to take place when in fact no such engagement is actually taking place. The appearance of ‘genuine engagement’ takes place with a view to influencing a decision of the Parades Commission and not to deal with the genuine concerns of local residents.’

Such criticisms reflect apprehension that ‘engagement’ may become no more than a mechanical ‘ticking of boxes’, a form of jockeying for position which has none of the pith and substance of what most people would understand by the term engagement.

### **Role models**

13.16 There are, of course, notable examples of such ‘pith and substance’ engagement. The Apprentice Boys of Derry and the Bogside Residents Group are often cited as a model and my attention has been drawn to at least one other excellent example. The Derry solution came about because civil society there was alert to the ruin which refusal to tackle the issue could bring to the City. The resultant process received powerful and skilful leadership from the business community and strong support from the civic authorities, churches and politicians, and the moves needed to provide the context within which the key players could work towards a mutual accommodation were beautifully choreographed and executed. Both sides to the dispute deserve great credit for the sense of responsibility they displayed to the wider community, whilst being properly mindful of the interests of their own ‘sides’. The Apprentice Boys have

been admirably innovative in making sure that their history and culture is better understood in that wider community, which in turn has displayed a welcome responsiveness.

13.17 I was told on all sides in Derry that it would be wrong to let complacency creep in. New relationships (in that context as in any other) need to be carefully nurtured and the connection being made between the main parade in Derry and the ‘feeder’ parades in other parts of Northern Ireland which ultimately join it still remains a problematical issue. But, all being well, it may not be unrealistic to envisage a future in which, increasingly, Loyal Order parades are no longer (in North’s words) ‘seen as a pejorative and triumphal remembrance of victory ... but a joyful recognition that together the community had created a better future’ (para 1.53). The fact that the process of local accommodation shows signs of helping to solve parade issues involving other Loyal Orders is to be welcomed.

13.18 The other example of engagement I referred to above has some of the same characteristics, and there has been strong evidence of professionalism. Here it has been a matter of creating an environment in which disparate interests, who would come at parades from different angles, can meet to discuss wider issues of community relationships (including parades). The greater mutual understanding and respect engendered has facilitated accommodation on parades which would otherwise have been unlikely.

13.19 I have also been told of events where there was Loyal Order participation (for example a display of banners and insignia involving all traditions) which built bridges across deep rivers of mutual distrust. I have been told of other cases

where two people from opposite poles came together and have been heard to say that the other is 'not a bad fellow' – high praise indeed in the context.

### **Some conclusions**

13.20 I draw a number of conclusions from this discussion of engagement:

- (i) It is proving difficult but the aim should still be to work towards a situation where local accommodation is the normal means of achieving disputes resolution. In any context, the fact that a goal proves elusive does not destroy the case for persisting in its achievement. The difficulties should come as no surprise. Society in Northern Ireland is more fractured and attitudes more polarised than within living memory. People – very understandably in view of our recent history – find it hard to accept that a divided society, whose story can be neatly summed up as 'a past apart', must now negotiate a shared future on the basis of consensus. The evidence of communities' inability to communicate with each other and tackle problems together is all around us. The parades issue could stand as a symbol for a host of other divisive issues and none has the ability to arouse more passion. As North put it, 'there are matters that operate at levels deeper than rationality. We were sometimes taken into the recesses of bewilderment, anger and even humiliation' (para 5.2). I, too, was left in no doubt as to the strength of feeling on all sides. It would therefore have been nothing short of miraculous if the

polar opposites who have to achieve a meeting of minds on this matter should have found it easy to climb their Everest. That is no reason for giving up the attempt.

- (ii) The process could take a great leap forward if the Loyal Orders were to engage fully with the regulatory machinery and establish the kind of ongoing relationship which would enable any concerns they may have about engagement to be thrashed out.
- (iii) More could be done to explain why so much importance is attached to engagement. The ability to explain could, of course, be greatly enhanced if there were an open relationship between the regulatory machinery and all sides to the parades debate. It is not, as I understand it, a matter of inducing the organisers of parades and the objectors to talk to each other for the sake of it but to use local dialogue as a means of easing local tensions and trying to see if it is possible to create the climate in which peaceful parades can go ahead in a peaceful environment. No one can force particular outcomes but the process of engagement hands the cards to dialogue rather than disorder.
- (iv) No process of change management goes smoothly but it is always essential to be able to demonstrate success – to show that things are working – and thereby provide encouragement to keep rolling out the process. More could be done to demonstrate what it is believed is being achieved by engagement and thereby

encourage increased effort. This (and the explanatory process at (iii)) could be part of an education programme. It is a tall order when in some instances those who have successfully engaged insist on the fact that engagement has taken place being concealed. But it should be possible to give some quantification of outcomes to date in a way which generates greater confidence in the process not only within the Loyal Orders but also in the wider community. There is undoubtedly a perception within the Loyal Orders that it is not worth attempting engagement because they will be met with intransigence and risk loss of face.

- (v) Given the charge of inconsistency I referred to earlier, the Commission might also have made clearer how it applies the engagement factor and why, recognising that each case must be dealt with on its individual merits, the weight it has given to it or to particular manifestations of engagement may have differed from case to case.
- (vi) The Commission has hitherto had a care – and perhaps understandably so in the circumstances – not to evaluate the degree to which each of the parties to engagement or attempted engagement is being constructive or obstructive, when benchmarked against the ‘pointers’ in the Commission’s Second Annual Report. It is difficult to do so without compromising the integrity of the facilitators but there might have been merit on occasion in bringing home to the parties that the whistle can be

blown on either or both if serious efforts to reach accommodation are not being made.

- (vii) Those who represent objectors could help by making clearer (if it is in fact the case) that a parade is not ruled out and that there are circumstances in which objections could be withdrawn, which they are prepared to discuss. That should be sufficient to lead to discussion, without the necessity for further clarification. Equally, if objectors do rule out the possibility of a parade in any circumstances and dialogue would serve no other purpose than to explain fully why that is so, it would in my view be preferable for that to be stated clearly rather than to chase a mirage, thereby increasing rather than reducing tensions and hostility.
  
- (viii) I get the impression that some in the Loyal Orders who might be disposed to seek local accommodation feel unable to do so because of the likely reaction of those who could be assumed to be their political supporters or of those in their communities more disposed to rely on the argument of force than the force of argument. Those who prevent an attempt at local accommodation do no service to the protection of the marching tradition. Quite the reverse.
  
- (ix) There has probably been little alternative hitherto, if complete stalemate was to be avoided, but to encourage a mosaic of often furtive deal making of the sort I have described in this Chapter.

Some kind of start had to be made. But it is only in a very few cases that the process has begun to show signs of producing the sort of future North envisaged – one ‘more secure and more vibrant in its various expressions’, the result of ‘both parts of the community and organisations like the Loyal Orders [being] more open to one another and less fearful of misunderstanding’ (para 1.37). That is a matter of relationships and it is upon the mending of these that true settlement of the parades issues depend. That needs to be kept in view as the ultimate goal of the project for local accommodation.

- (x) This goal (and even a short-term goal of peaceful co-existence) cannot be achieved without professional facilitation services. One of their prime tasks initially is probably to teach each ‘side’ to have more mutual comprehension of each other’s negotiating styles, which are as different as those of Westerners and of the Japanese – and I intend no disrespect to either. Businessmen had to come to grips with this reality. In our own context, I suspect that one side tends to want to cut the cackle and go for product; the other (particularly in its most sophisticated manifestations) tends to attach importance to process, out of which product may – or may not – emerge. The fact that both calculate so very differently the shortest distance between two points can in itself lead to mutual suspicion which hinders progress.

13.21 In the next Chapter I take up this last point about the role of professional facilitation and how, building on what has been accomplished to date in very testing circumstances, it can be brought to bear most effectively on the problem.

## CHAPTER 14

### FACILITATING SETTLEMENT OF DISPUTES

*'The aim of an argument or discussion should not be victory but progress'<sup>1</sup>*

*Joseph Joubert*

#### Introductory

- 14.1 It was a key element in North and a theme running through the Parliamentary debates on the legislation that, if possible, an effort should be made to solve parades disputes without it being necessary for the Commission to play the quasi-judicial role conferred on it by the 1998 Act.
- 14.2 In this Chapter I explore the extent to which, in many fields in which issues have to be decided, efforts are being made to achieve settlement without the matter having to be formally adjudicated. I consider how, in respect of the issues surrounding disputes about parades, we can draw lessons from this wider experience. I then examine (paras 14.22 to 14.27) the case for developing in Northern Ireland a stronger and more structured role for a Facilitation function to deal with such disputes and what the relationship should be between that function and the subsequent Determination stage if the issue has to proceed to Determination.

<sup>1</sup> I am indebted for this very apt epigraph to one of the Loyal Orders, which used it as epigraph for its own evidence to the Review. There is another saying attributed to Joubert which is equally apt in this context, 'Never cut when you can untie'.

### Experience in other contexts

14.3 This approach is not peculiar to those who have reflected on parades disputes in recent years. It is fully consistent with what has been happening in the field of civil justice generally. A useful analysis<sup>1</sup> of this points out that, whilst litigation has long been used as the vehicle for lawyer negotiations in an attempt to settle, civil justice has historically presented itself as being fundamentally about the availability of authoritative third-party determination. We have thought about the courts almost exclusively in terms of judgment. The courts have, however, been moving towards a new primary role as sponsors of settlement. The Lord Chief Justice, Lord Woolf<sup>2</sup> has described the overall purpose of judicial case management as:

‘to encourage settlement of disputes at the earliest possible stage; and, where trial is unavoidable (my italics), to ensure that cases proceed as quickly as possible to a final hearing which is itself of strictly limited duration.’

14.4 The relationship between the processes of settlement and litigation can take a variety of forms. The White Paper ‘Looking to the Future’ and the subsequent Family Law Act introduced the notion of sponsoring consensual settlement before formal litigation, ie before there is an application for divorce and whilst the parties are experiencing a period ‘for reflection and consideration’. The purpose of this period, during which mediation is available, is to give the parties an opportunity to take joint decisions about the future and to make whatever consequential arrangements are necessary with regard to children, finance and property.

<sup>1</sup> I summarise Professor Simon Roberts, ‘Family Mediation in the New Millennium’ in Family Law: Essays for the New Millennium (Family Law, 2000).

<sup>2</sup> Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales (1995).

- 14.5 The litigation and settlement stages are more intimately entangled in those cases in England and Wales where the District judge in person seeks to facilitate an agreed outcome between a divorcing couple on issues such as property and access to children, which are consequent upon the process of obtaining a divorce. The judge is directly involved in attempting to resolve the issues on a mediated basis. The idea is to encourage the parties to come to their own agreement rather than to have an outcome imposed upon them. However, if the issues remain unresolved and the case goes for hearing, it is in front of a different judge who knows nothing about the background of the case.
- 14.6 The handling of disputes about employment rights provides another interesting analogue. At present virtually all cases commenced in Employment Tribunals in Great Britain (Industrial Tribunals in Northern Ireland) are referred to ACAS (LRA in Northern Ireland) in order to see if conciliated settlements can be achieved, and ACAS and the LRA have a duty to continue to seek such a settlement for as long as the two parties wish this to continue. In order to strengthen this alternative disputes resolution procedure, the Employment Act 2002 established for England and Wales a system of a fixed period for conciliation with the aim of encouraging earlier settlements. This is achieved by enabling Tribunals to postpone the time and place for a hearing for a period to give opportunity for the proceedings to be settled by conciliation and withdrawn. Further time will be given (but probably only exceptionally) if ACAS considers that this will yield results.

14.7 On the other side of the world, in New Zealand, the principal legislation in this field (the Employment Relations Act 2000) states plainly on its face that the object of the Act is:

‘... to build productive employment relationships through the promotion of mutual trust and confidence ....

- by promoting mediation as the primary problem-solving mechanism and
- by reducing the need for judicial intervention.’

The legislation recognises that ‘expert problem-solving support, information and assistance needs to be available at short notice to the parties’ and that ‘the procedures for problem-solving need to be flexible’.

14.8 Very importantly, when a matter comes to the Employment Relations Authority for determination, it must first consider whether an attempt has been made to resolve it by the use of mediation. It must then direct that mediation (or further mediation, as the case may be) be used before it investigates the matter unless, for reasons which are clearly specified and in regard to which the Authority itself is the sole arbiter as to their applicability, it decides not to do so. Where the Authority does direct mediation or further mediation, the parties must comply.

14.9 In the UK, in the interests of managing their casework, the Courts are increasingly exploiting the potential of Alternative Disputes Resolution procedures. The approach is summed up in the catchphrase ‘Disposition where

possible, trial where necessary' which, in the context of this Review, might be translated as 'Settlement where possible, Determination where necessary'. One such option in the Courts context is mediation, subsumed in the term 'facilitation' used in this Review. Lord Woolf<sup>1</sup> has described this as:

'a form of facilitated negotiation, where a neutral third party guides the parties to their own solution. Mediation can be used in a wide range of disputes, and in many cases produces an outcome which would not have been possible through the strict application of the law.'

He further said that 'it may offer a better and less confrontational way of dealing with disputes between neighbours'.

14.10 'Active case management' is defined in Civil Procedure Rules for England and Wales as including 'encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate ....' Very importantly, the Rules also provide that 'The parties are required to help the court to further the overriding objective' of active case management. Failure to do so can have serious consequences since, when exercising its discretion as to costs, the court must have regard to all the circumstances, including the conduct of the parties.

14.11 A recent Court of Appeal (England and Wales) ruling which shows the Civil Procedure Rules in action is persuading more companies involved in legal disputes to seek mediation. In Dunnett v Railtrack [2002], Lord Justice Brooke argued:

<sup>1</sup> Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (1996).

‘Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve.’

And instancing ‘cases where intense feelings have arisen’, Brooke L.J. commented:

‘... when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live.’

14.12 The case is interesting because, although both the High Court and then the Court of Appeal ruled in favour of Railtrack and under conventional legal principles the loser should have picked up the bill for both sides’ costs, Railtrack had to meet the costs of both sides because the loser had suggested mediation and had been turned down.

14.13 A Financial Times article<sup>1</sup>, commenting on the case, observes that the judgment is fostering a climate of peaceful settlement by giving businesses and lawyers a reason to compromise without feeling they are showing weakness. A partner in a law firm says that when disputes finally get to mediation they often find, in spite of their initial suspicions, that it works. A representative of another firm said that the very act of entering on mediation is usually cathartic:

‘[When] both sides have signed up to a mediation agreement, [it] tells them they’re obliged in good faith to negotiate and see if they can reach a

<sup>1</sup> 5 August 2002

compromise. I think the fact of telling your opponent you're prepared to negotiate is at the root of co-operation, which eventually results in the parties settling their differences.'

A legal director of a company commented that he favoured mediation, not so much as a means of avoiding court cases but as a more civilised, formal way to achieve out-of-court settlements, which remains the way more than nine out of ten cases end.

Another telling comment was to the effect that:

'More people might now [following the Railtrack case] rather cynically go through the motions of mediation .... mediation doesn't work unless both sides consent and continue to consent all the way along. If there is no real intention to compromise, no matter how hard the mediator works, he doesn't achieve anything.'

The writer of the Financial Times article makes the comment:

'... it is an essential principle of the process that everything discussed remains confidential: however frustrating it may be, the disappointed side cannot tell a judge that its opponent went to mediation but did not take it seriously.'

- 14.14 A pilot programme for mandatory mediation in certain cases was established in the Regional Municipalities of Ottawa and Toronto in 1999 and evaluated in 2001. The major conclusion was that its success justified its being made a permanent feature of the Rules of Civil Procedure. Even cases where a successful mediated outcome is not achieved are, when they come to judgment,

concluded more quickly as a result of what transpires at the mediation stage. The quality of mediation provided is a major factor in positive outcomes. There are penalties for non-compliance with the mediation régime, including the dismissal of the action or the striking out of the statement of defence, depending on the source of the non-compliance.

- 14.15 It is always a temptation for those involved in any situation to conclude that their circumstances are so unique that analogies drawn from outside their own sphere have little to contribute. My experience, in a number of contexts, is that almost invariably this view is certainly mistaken. Each situation is, in certain respects, unique but not completely so. Parades disputes involve a high degree of personal feeling which could pose challenges for efforts at mediation, but so do family and employment disputes.

#### **Lessons from experience in other contexts**

- 14.16 I suggest that we can usefully draw two conclusions from the above:

- (i) There is a growing acknowledgment in many contexts where issues are in contention that solutions which the parties agree among themselves are preferable to those imposed by a third party. The aim should be to achieve settlement without judgment. A settlement freely entered into resolves (or should resolve) the issue: otherwise it is difficult to divine its purpose. A third party settlement, on the other hand, has the ability to produce a stark 'win' or 'lose' result which hinders the development subsequently

of a positive relationship, even though it may be in the interests of both parties to develop such a relationship.

- (ii) Whilst the process which seeks settlement and that which, if it has to, delivers judgment are becoming increasingly complementary and the judgmental institutions may in effect be evolving into being the overseers of negotiated agreements, there is a non-permeable wall between them, which preserves intact the integrity of the process leading to formal judgment, when efforts at settlement have not been productive.

14.17 Turning to the parades context, experience elsewhere reinforces the view that the process of Determination should be a last resort, when serious efforts to arrive at an agreed settlement have failed. The point was succinctly encapsulated during the Parliamentary debates by a Member sympathetic to the parading tradition: 'If there is to be any resolution of the problems surrounding parades and counter-demonstrations, it has to come through mediation'.

### **North on mediation**

14.18 At present, assistance with problem-solving is furnished largely by the Authorised Officers, independent professional mediation services such as are provided by The Mediation Network of Northern Ireland or bodies within civil society such as Derry's City Centre Partnership. Clearly nothing should be done to discourage initiative in this area by civil society or by a professional body such as The Mediation Network. Indeed North said that the Commission would have a

significant function in supporting mediation and making it more professional. It recommended that the Commission should develop a register of groups and individuals with expertise who could play a part in local discussions. North suggested that the Commission could support mediation by helping to organise conferences, producing information papers and promoting training and good practice. It envisaged that it could be necessary for there to be further comparatively modest support from public funds to ensure that there is an adequate mediation capacity. However, North doubted whether the Commission itself would need to have a professional mediation capability amongst its own staff.

- 14.19 The thrust of North was that, whilst the Commission should facilitate parties in dispute to avail of mediation, it should not provide mediation services itself but should ensure, through the support it provided, that these would be available.

#### **The Parliamentary proceedings and mediation**

- 14.20 The Bill, as originally presented to Parliament, departed from this model to the extent that it empowered the Commission to mediate as well as to facilitate mediation. The Bill was amended during the Parliamentary proceedings to remove the power of direct mediation from the Commission, mainly on the grounds that a mediation function would be incompatible with its adjudicatory function. The view was also expressed, however, that the ability to learn from the personal contact which direct mediation enables – who is being stubborn and who is not, or how genuine and sincere people are in their arguments – would thereby be lost, as would the adjudicator’s personal understanding of the position

of those in relation to whom he would adjudicate. An argument from a supporter of the amendment did not quite see it this way. He argued the importance of having a division between the mediator and the decision-maker, 'as it would facilitate the difficult role of the mediator not to be seen to be making the decision'. He also argued, however, that it did not mean that 'all the contacts, information and influences of mediation should not impinge on the decision-makers'. The debate revealed the difficulty which Parliament had with this issue.

### **North and the relationship between mediation and adjudication**

14.21 North also addressed the issue of the relationship between mediation and adjudication. He said that, whilst there might be thought to be a strong case for asking mediators themselves to report to the Commission on the progress of local discussions, this could jeopardise the trust that should exist between the parties and the mediator, who could then be seen as an arm of the Commission and thus lose effectiveness. North said that the mediators should, however, report success or failure within a set timescale. Thus far, this is all very clear but North also recommended that the Commission should take into account 'the approach of the parties to reaching a local accommodation'. '... their willingness or otherwise,' said North, 'to enter direct discussions need not of itself .... prevent the search for local accommodation, provided the parties are prepared to look constructively at alternative means of reaching accommodation' (para 13.27). It is not evident how that could be done unless the mediator, when reporting success or failure, were to say that the parties had – or had not, as the case might be – engaged constructively. It is implicit in North, however, that this

would be the extent to which the mediation process (which would be external, as North saw it) would impinge on the adjudicatory process.

### **Conclusions as to Northern Ireland arrangements**

14.22 It is obvious that, whilst there has been very broad agreement on the importance of mediation, there has been considerable uncertainty as to who should be responsible for the function and its relationship to the formal Determination process. I shall venture a number of propositions:

- (i) A diverse and flexible panoply of problem-solving techniques needs to be available and I therefore prefer to describe the required function as 'facilitation'. The techniques used may range from a facilitating role to what is in effect expert consultancy. It may be a matter of assisting the parties to understand each other's perspectives, making sure that issues and options are identified and evaluated, or it may go further and suggest terms of settlement for negotiation. Above all, the aim is to support creative thinking.
- (ii) As a key feature of the machinery for promoting resolution of parades disputes, there should be established a Facilitation function which is located within the regulatory machinery and directly managed by it and operates within appropriate procedures and codes of conduct. In order to give stature to the function, the appointment of a professional Chief Facilitation Officer should be

a duty under the legislation, from which he would derive his authority. The Officer may need some limited support at the centre and should be responsible for providing a local network to discharge a very proactive Facilitation function. Those (and certainly not all) involved in the network need not necessarily be full-time. A number might well be recruited from within the existing Authorised Officer cadre. The function would, however, be centrally managed in order to ensure that, as soon as parades were notified (and I recommend new arrangements for notification in Chapter 17) the function swung into action in all cases where objections were notified, in an effort to avoid (in, ideally, all cases) the need for the dispute to proceed to the Determination stage. It is important that all disputed cases are firmly gripped by a Facilitation function which is recognised as the focal point. As (viii) beneath makes clear, the parties would not be obliged to use the function if they preferred an alternative resource but the function would have a role in seeing that they did not sit on their hands when there was problem-solving to be done. The aim must be that a route towards dispute resolution is being pursued in every case when that is necessary in the interests of the parties themselves and of the wider community and that the roles of those travelling that route are crystal clear. The issues involved are usually complex and difficult enough without the superimposition of an ineffective process which generates, quite unnecessarily, additional misunderstanding and suspicion.

- (iii) The facilitator is neutral. For him, an acceptable outcome is achieved when the parties arrive at their own agreement, whether or not that outcome is likely to be the one which would have emerged if the issue had gone for Determination. If he is a true professional, operating on this basis, he should be able to retain the trust of all sides.
  
- (iv) It is for the Facilitation function, bearing in mind the object of the legislation, the needs of the parties, and the importance of building mutual trust, to follow whatever procedures, and generally to do whatever, it considers will resolve the problem.
  
- (v) It is reasonable to expect the parties to deal with each other in good faith during the facilitation process. The facilitator, at the end of the process, would report on success or failure and on the extent to which the parties
  - had acted in good faith towards each other
  - had participated in a manner that was designed to resolve the issues involved.

These words occur in the New Zealand legislation I referred to in paras 14.7-14.8. Used within the context of a professional Facilitation function, they should eliminate the arguments which have developed around the present concept of 'engagement'.

- (vi) Before Determination proceedings could commence, the Determining body would have to have a Report from the Chief Facilitation Officer certifying that the organiser of the parade had satisfied the requirements at (v), thereby ensuring that the aim of making facilitation the primary problem-solving mechanism was not frustrated.
- (vii) Where it felt that it would be conducive to progress to do so, the Facilitation function would no doubt seek to bring the parties together for discussion. My view is that, between people prepared to do business, the open and efficient communication which direct contact allows can greatly increase the prospects for success. But failure to achieve direct contact should not in itself prevent the issue of a positive Report. And, to be clear, the Report is no more than a recognition of honourable failure (despite good faith efforts) to achieve settlement by agreement. In the Determination proceedings, the dispute about rights and responsibilities should be decided on the merits of the case. This meets the objections advanced by both sides against the role presently played by the concept of engagement. Nationalists argue that, regardless of the 'rights' issues underlying the disputes, Determinations are used to 'reward' parade organisers for what are not necessarily genuine efforts at local problem-solving. Organisers argue that what happens at the pre-Determination stage should not colour the Determination process.

(viii) Parties would not be precluded from agreeing between themselves alternative arrangements for settling their differences. However, in order to obtain the Report at (v), the Facilitation machinery described above would have to be used unless that machinery, liaising with the alternative arrangements which had been used, could inform itself sufficiently to issue such a Report. That is to say, the legislation would be providing for a formal process, the first stage of which (Facilitation) would, it is to be hoped, resolve many issues, but with a second stage (Determination) in reserve, to be used in the last resort if necessary.

(ix) A Facilitation function of the kind I envisage would be entirely professional. It could be provided either on direct drive (as I recommend at (ii)) or it could be outsourced. If both the Facilitation and the Determination functions were remaining within the same organisation, the case for outsourcing the functions would be strong in order to underscore the independence of each function from the other. I return to this issue in Chapter 21.

14.23 Where there were issues arising from the Facilitation process which needed to be pursued in greater depth and on a longer timescale than was possible through the process itself, the parties could have recourse to the good offices of organisations in the private sector which have already shown their ability to contribute significantly to relationship-building in difficult situations. It would, of course, be open to the Facilitation function itself to propose that the parties so

proceed and, if it were deemed appropriate, to provide modest financial support, so long as it was evident that there was serious intent on the part of all concerned to make progress.

14.24 Agreements reached under the auspices of the Facilitation function should be committed to paper to avoid misunderstanding. They should have the same force as a Determination and be formally registered. It is not a question of being legalistic but of avoiding the loose sloppiness which, in potentially sensitive situations (as most of these are) can lead to misunderstanding and mutual recrimination which may nullify any progress made.

14.25 By analogy with New Zealand Employment Rights legislation (para 14.7) I would like to see Facilitation accorded primacy by its being made plain on the face of the legislation that its object is to build mutual trust and confidence by promoting mediation as the primary mechanism for resolving disputes and reducing the need for use of the provisions relating to Determination.

14.26 I believe that a well-structured, properly resourced, professional Facilitation function could enhance considerably the prospects for the successful resolution of parades issues. Good faith efforts directed to finding local solutions and skilfully facilitated must surely be the most effective way of defusing community tensions and initiating the process of improving relationships within the community. However, as it was put to me in evidence, 'a pre-requisite ... is that both sides are willing to co-operate in a process aimed at finding a mutually acceptable solution'.

14.27 However, even given good faith efforts, the process will not always succeed. There must, therefore, be a means of last resort in the shape of an adjudication and to that I turn in the next two Chapters. In Chapter 21 I suggest how the respective roles of the Facilitation and Determination functions should be reflected in appropriate structures.

## CHAPTER 15

### RIGHTS AND RESPONSIBILITIES

15.1 In this Chapter I examine the criteria in existing legislation and in the Guidelines for determining whether conditions should be imposed on planned parades; consider the nature of the Determinations in which those conditions are expressed; suggest (in para 15.13) a legislative basis for limitation of the right to freedom of peaceful assembly aligned exactly with the ECHR; also suggest in paras 15.16 and 15.17 new Guidelines consistent with that basis; consider ‘traditional’ parades and the frequency of parades; and make proposals for the currency of Determinations.

#### **Rights and their limitations**

15.2 It is simply a fact that neither the rights of those who wish to march nor of those who object to their marching are absolute. All of the rights contained within the ECHR which are most commonly cited on both sides of the argument are qualified. Each of the relevant Articles not only guarantees rights but also ensures that they are limited in a variety of respects, including limitation to the extent necessary, in a democratic society, to protect the rights and freedoms of others.

15.3 Thus, for example, the rights to respect for private and family life; to freedom of thought, conscience and religion; and to freedom of peaceful assembly are all

limited in this way. This means, in the words used by the European Court of Human Rights in the case of Klass and Others [1978], that ‘a balance must be sought between the exercise by the individual of the right guaranteed to him ..... and the necessity .... for the protection of the democratic society as a whole’.

15.4 This view of the rights issue was fully reflected in North:

**’12.93** What is clear to us is that neither marchers nor residents have absolute rights. The rights of one limit the rights of the other. This leads us to the conclusion that the law should provide for a reasonable proportionality in the balancing of those rights. This provides a firm underpinning for our view that a proposal for a contentious parade may warrant scrutiny under criteria which take account of the relationships within the community.’

North was not, of course, saying that those who claim rights can have them upheld simply on the basis that failure to do so would create or exacerbate community tension or that the respective weights of the tension in each community would determine the issue.

### **The North approach**

15.5 North set out the factors which it believed should be taken into account by the Parades Commission in determining whether a planned parade would affect the rights and freedoms of others in a way which should lead to conditions being imposed on that parade. It viewed all these factors as bearing on a parade’s ‘wider impact on relationships within the community’. That ‘umbrella’ phrase

found its way into the 1998 Act as a requirement that the Guidelines to be prepared by the Commission (and to which it must pay attention when considering particular cases) should have regard inter alia to 'any impact which the procession may have on relationships within the community' (Section 8(6)(c)).

15.6 Recognising that (as it put it) 'without further amplification there could exist a good deal of doubt' about the phrase in the absence of 'guidance on [its] practical application', North spelt out the relevant factors as including:

- (i) The physical location and route of the parade.
- (ii) Its impact on the community. This was further clarified as including disruption to traffic; the impact on local trade and on other factors of collective community life (eg schools and hospitals); the impact on local residents directly affected; the frequency of parades in particular locations; and the size of the event, how long it would take to pass a particular point and whether it required all or only half the road.
- (iii) The purpose of the parade, for example whether it is a main demonstration, a church parade, a feeder parade, a band parade, a march in support of keeping a local hospital open, a trade union demonstration or a peace rally.

- (iv) The features of the parade eg whether a parade or a route is long-standing; the numbers anticipated for the event and whether they are proportionate to the purpose; the quality and quantity of the stewarding proposed; the record of the organisers stewarding previous events; and whether sanctions of a criminal or other nature have been imposed as a result of identified misconduct.
- (v) The approach of the parties to reaching a local accommodation.

### **The 1998 Act**

15.7 When the Government came to draft the legislation, it took one of the five factors which North had packaged as collectively enabling 'any impact which the procession may have on relationships within the community' to be assessed and identified it as a separate element in its own right, in the following terms:

'the desirability of allowing a procession customarily held along a particular route to be held along that route'. (Section 8(6)(e))

The legislation also transferred from the 1987 Order the criterion of 'any disruption to the life of the community which the procession may cause' (Section 8(6)(b)). This was very close to what North had meant by the factor 'impact on the community' which formed part of what I have just referred to as a 'packaged' set of factors.

### **The Commission's Guidelines**

15.8 When the Commission came to prepare its Guidelines, it included under the title which North had given his package - 'Impact of the Procession on Relationships within the Community' - four factors:

- (i) Location and Route. This was one of North's factors but the Guidelines included within it a factor separately identified by North (namely the purpose of the parade, but expanded to cover whether the route is necessary or proportional to that).
- (ii) Type and Frequency of Parades. This was elaborated as covering (again) the notified purpose of the parade as well as numbers notified to take part; past conduct; regalia; nature and number of bands and type of music; frequency. Most of these matters had appeared in North distributed over the discussion of three separate factors.
- (iii) Communication with the Local Community. This corresponded to North's 'the approach of the parties to reaching a local accommodation'.
- (iv) the Broader Context. Given what it described as 'a long history of inter-community strife, much of which precedes any contention about parades', the Commission indicated that it would have particular regard to 'any history of conflict associated with a given

parade, including advice from the RUC, in considering the potential impact which a proposed parade may have on relationships within both the immediate community and the wider Northern Ireland community'. So far as I can see, this had not been suggested by North as a factor.

The Commission, following North, identified compliance with the Code of Conduct as a separate factor to be taken into account, although North had also included 'conduct' issues within the factor which he termed 'the features of the parade'.

- 15.9 It will be evident that difficulty has been experienced in classifying the factors germane to Determinations regarding parades. The legislation grafted North on to what was inherited from the 1987 Order but in a way which elevated 'Traditionality' to a level of importance not accorded to it by North. And there was overlap between what was grafted on and what was inherited from the Order. The Commission's Guidelines added a 'history of conflict' dimension.

### **The Commission's Determinations**

- 15.10 In a typical Determination, the Commission refers not only to the Guidelines but to the rights which it regards as relevant under the ECHR, namely Articles 2, 8, 9, 10 and 11 and Article 1 of the First Protocol. It describes itself as undertaking a balancing act, bearing in mind the Guidelines and the criteria in Section 8(6) of the Act. It deals with the issue of engagement, which it identifies as one of the seven fundamental principles in the North Report rather than by reference to the

part of the Guidelines which deals with 'Communication with the Local Community'. It defines engagement in terms of the treatment of this subject in its Second Annual Report. But it then mentions separately that part of the Guidelines dealing with 'Communications with the Local Community'. A Determination may also refer to community tension and to the possibility of damaging community relations 'with a consequent effect on the likelihood of public disorder should the parade proceed along the entirety of its proposed route'. There may be reference to the fact that the Commission has had regard to the nature and purpose of the parade.

15.11 In support of a decision to place conditions on a parade, a Determination typically indicates that, in doing so, it is seeking to prevent disorder and to protect the rights and freedoms of others under the relevant Articles of the ECHR. It seldom distinguishes between the elements of 'prevention' and 'protection' as factors in its decision. Relatively rarely, a Determination will say explicitly that the rights and freedoms of others are not affected by the proposed march but does not necessarily say on what grounds this conclusion rests.

15.12 It seems to me that:

- (i) The system of criteria by which the Commission takes its decisions is characterised by too much complexity and insufficient clarity. It is a compound of principles and factors from North, criteria on the face of the 1998 Act, the Commission's own Guidelines and the ECHR. Revised Guidelines, having indicated the sources they were drawing on, could pull all this material

together into more intelligible form, though it would be difficult to do this entirely satisfactorily in terms of the existing legislation.

- (ii) There has been a tendency in the community at large to overlook the careful explanation which North gave for its use of the term 'relationships within the community' and the context in which it was used. Hence the frequent writing off of the relevance of the community relations factor on the basis that, whether a parade goes ahead or not, community relations will be adversely affected. North made clear (para 12.93) that the 'firm underpinning' for what it had to say about relationships within the community was a concern for a 'reasonable proportionality in the balancing of ..... rights'.
  
- (iii) Determinations seem primarily concerned to ensure that, if challenged, the Commission can be seen to have faithfully discharged its duty to have regard to everything to which it is obliged to have regard. But it has been put to me, from both sides of the parades argument, that the result is overly formulaic and legalistic; and that it is virtually impossible in most cases to know the weight given to individual factors or to discover in any real sense the ratio decidendi. One comment from an independent source was that 'the determinations ..... could be a little more fulsome in the detail they provide concerning their reasoning processes'. An analysis<sup>1</sup> of the relative influence of the various statutory factors which the Commission takes into account found

<sup>1</sup> Northern Ireland Affairs Committee, The Parades Commission, Second Report, Volume II, p48

that their compilation was not without difficulty. One arose from not knowing what conclusions the Commission had drawn 'from their consideration of any single factor, let alone how those conclusions have been weighed up against other factors when reaching each determination .... it is often presumptive to isolate any single factor and, more particularly, to make a connection between that single factor and the Commission's final determination'.

I was impressed by one Determination (from 1998) which followed a formal two-day evidence-gathering session. During the session an effort (not wholly successful) was made to induce those giving evidence to restrict their views to the salient factors outlined in the Commission's Guidelines document (then in draft form). In its Determination the Commission made its observations on the evidence given 'as it related to the factors in the Guidelines'. The evidence related to each factor was then considered in turn and, in indicating its decision, it was made clear what 'it hinges most on'.

The Commission adopts a different approach to the form in which it indicates the outcome after it reviews one of its Determinations (which it may do 'in the light of any fresh information or representations received'). Such outcomes outline the main points submitted in the course of the Review but they do not

always explain why the Commission has maintained or modified the original Determination.

- (iv) So much of the Commission's work is crammed into such a short period of the year immediately leading up to, and during, the marching season that it would be quite unreasonable to expect it to craft individual Determinations reviewing and evaluating the evidence in terms of the criteria for decision-making. I have no doubt, however, that it would promote greater confidence and understanding (and reduce the occasions on which charges of perverse and inconsistent decision-making are levelled) if those affected had a greater insight into the reasoning underlying decisions. It would also engender greater appreciation in the wider community of the considerations which are (and those which are not) relevant to the decision-making process. I believe that the solution lies not in providing more resources to handle the workload during periods of peak activity but with spreading a significant part of the workload over the whole 12-month period. I return to this matter in Chapter 17.

### **An issue about rights**

15.13 The key point made in North and during the Parliamentary Debates was that the fundamental issue surrounding contentions parades was a conflict over rights and, more particularly, the extent to which the right to march peacefully was compatible with the maintenance of the rights and freedom of others. Those on

both sides of the parades debate talk in the language of rights. I believe that this issue has become obscured by the complexities of current arrangements. There would be much benefit in going back to basics. The means of simplification is readily to hand in the ECHR. Adopting legislation modelled on Article 11 of the Convention would entail:

- (i) A provision that everyone has the right to freedom of peaceful assembly. 'Peaceful assembly' would be defined to include 'peaceful procession', in line with the clarification provided by the 1980 case to which I refer in para 12.7.
- (ii) A provision that such restrictions shall be placed on the exercise of this right as are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of health or morals.

To match fully the thrust of Article 11(2) of the Convention would also entail adding:

- (iii) Such restrictions shall also be placed on the exercise of this right as are necessary in a democratic society in the interests of national security or public safety or for the prevention of disorder or crime.

I discuss in Chapter 21 why I separate the grounds of possible restriction into two categories as at (ii) and (iii).

15.14 There would, as under the existing legislation, be a duty to issue Guidelines for the exercise of the powers to place restrictions on the right to freedom of peaceful assembly under (ii) above. These Guidelines would replace current Guidelines under the 1998 Act. The restrictions at (ii) and (iii) above would replace Section 8(6) of the 1998 Act.

15.15 The difficulty in discovering the ratio decidendi or the weight attributed in Determinations to the various criteria to which the Commission has to have regard has led to charges that the fundamental reason underlying the imposition of conditions on processions (and particularly re-routeing) is the threat of violence on the part of those who object to the procession. The fact that Determinations often say that, should the parade proceed as planned, 'there will be an adverse effect on community relations and a potential for public disorder' is felt to confirm this view. North sought to devise machinery which would deal with the perception of the 1987 Order as a 'rioters' charter'. But the same perception clings to the legislation which replaced it. Residents argue that this seriously misinterprets their position, which is based on a principled stand on the rights issue. It is therefore important that the focus should be on that issue, as I believe North intended.

### **New Guidelines**

15.16 It should be possible to assess the extent to which a parade would affect the rights and freedoms of others by considering five broad areas, with the key factors to be taken into account in relation to each, on the following lines, and the Guidelines could be drawn accordingly.

A. The nature of the parade

- Notified purpose, insofar as relevant to its audio-visual impact.
- Date, time of day, size and duration.

B. Arrangements for the parade

- Evidence of intention to organise a parade which will be peaceful.
- Extent of conformity to the Code of Conduct.
- Steps taken to ensure strict compliance with the Code.
- Evidence of past compliance in respect of previous parades on proposed route or, if relevant, elsewhere.

C. Characteristics of contested part of route

- Location, eg town centre, main road, residential estate.
- Type of property adjoining route eg business, residential.
- Demographic composition of population along the route.

- Presence on the route of sensitive sites eg church grounds, monuments.

D. Potential for disruption

- Effect of parade on traffic flow.
- Effect of parade on freedom of movement by local residents.
- Effect of parade on normal commercial activity.
- Effect of parade on access to public amenities such as hospitals and schools.
- Effect of parade on access to places of worship.

E. Any other matter concerning the parade which arises under any Article of the European Convention on Human Rights or any other international human rights agreement to which the United Kingdom is a party or under the general law which affects the rights and freedoms of others.

The Guidelines should also specify factors which would be taken into consideration when determining whether restrictions should be placed on the right for the protection of health or morals.

Account would be taken throughout of any measures proposed by the organiser of the parade to address objections registered regarding the parade.

15.17 This would constitute a simple, easily understood framework for both organisers of parades and objectors, alerting both to the basis on which Determinations would be made and to the evidence which would be deemed germane to the decision-making process. Determinations made within this framework, making clear the conclusions reached on each factor in light of the evidence adduced by organisers of parades and those registering objections, would enable the reasons for Determinations to emerge clearly. Any who wished to challenge the process by Judicial Review would have a clear understanding of how the decision had been reached. Apart from any other consideration, the changes likely to occur in the approach to judicial review, to which I refer in para 12.23, would demand the kind of clarity which Determinations framed on the lines I suggest would provide.

#### **Processions customarily held**

15.18 Legislation (and Guidelines) on the basis I propose would drop the current provision in Section 8(6)(e) which requires that regard be had to 'the desirability of allowing a procession customarily held along a particular route to be held along that route'. It is difficult to see, even in terms of the architecture of the existing legislation, how this can be meaningfully implemented and it is not clear what weight has been given to it in current decision-making. Given the number of cases in which traditional parades have been re-routed, it has clearly not been the dominant and certainly not the determining factor.

15.19 Any such 'Traditionality' provision would be incompatible with the structure of rights which I propose. It would seem illogical to argue that the rights and freedoms of others should be protected in certain circumstances but not others or should be protected less fully in some circumstances than in others. Discrimination in favour of traditional, as against new, parades (whatever the auspices or purposes of those new parades) could also run counter to equality considerations. Those who claim rights strengthen, rather than weaken, their claim by upholding the rights of others to precisely the same rights. There are only two circumstances I can foresee in which one would be justified in having regard to traditionality. One would be if it were proposed to hold another parade of a non-traditional kind at the same time on the same route as a traditional parade which required no restrictions to be placed on it. Traditionality would also seem to be an appropriate distinguishing factor if restrictions were being placed on the number of parades in an area because, although individual parades would not impact materially on the rights and freedoms of others, the cumulative impact on a community, whatever its attitudes to those parading, would be unreasonable and priorities had to be established.

15.20 Whilst, apart from these circumstances, I do not see how the traditionality of a procession can be factored into a rights-based Determination process, I can see how it could well function at the Facilitation stage prior to that, when an effort is being made to achieve an agreed settlement without the need for adjudication. Such interaction between those wishing to march and those who object provides an opportunity for the former to explain why so much importance is attached to processing along customary routes. I was told on many occasions that such processions are not an expression of hegemony, a display of triumphalism, a

political statement or a sectarian ritual. I was told that they are, rather, a key component of the pattern of oft-repeated familiar activities which, over many years, have bonded people together to create a tight sense of community, bridged the gap between the generations, satisfied the need for a sense of belonging and helped to maintain a belief system (often strongly evangelical) which is at the core of an identity which they wish to preserve intact. Different parts of society have different means of achieving purpose and, in pursuit of it, relating to others with whom they feel some affinity. Those for whom the long-practised ritual of procession is such a means are in the best position to convince others of their sincerity of purpose. I was impressed by the desire expressed to me in evidence by one of the Loyal Orders to engage even more proactively than they are now doing with the wider community in order to bring about greater understanding of their position. I pick up this point in para 25.7.

### **Frequency of parades**

15.21 It would be for the Determining Body to decide in any particular case whether, given the criteria it had to apply and taking into account all the circumstances, limitations needed to be placed on a parade in order to protect the rights and freedoms of others. Except in circumstances where parades have the overwhelming support of the local population, it would be surprising if the number of parades planned for a particular location over what could be a relatively short space of time were not a factor. One parade along a route in a season might be deemed to have insignificant impact on the rights and freedom of others. One a night – to take the case to the other (unlikely) extreme – might be regarded as intolerable intrusion. In between the extremes there is, in principle, a point of

balance which most reasonable people would accept as reasonable. Most people (including many of those favourably disposed to the parading tradition) would surely agree that, if the number of parades in a town has been steadily increasing and the rate of increase shows no sign of abatement, it should be considered whether a curtailment of the number of parades could be effected without denying adequate expression of culture to the parading group concerned. As I have indicated in para 15.19, it would seem wholly reasonable in these circumstances that traditional parades should have priority over other parades.

15.22 I should be surprised if regulatory arrangements incorporating such an eminently sensible approach were to be regarded as unacceptable in the context of the ECHR.

15.23 The Determining Body, if it deemed frequency of parades to be a factor in its decision-making, would indicate accordingly so that all the parading interests in an area had opportunity to arrange their own priorities rather than leave it to the Body to do it for them. The Facilitation function should be at their disposal if the interests were minded to work out a priority scheme on a voluntary basis. In line with the role I have outlined for that function, it would not be for it to work to an agenda of its own on the frequency issue or seek to impose a solution (which in any event it would have no power to do). Its role would simply be to help the interests to discover common ground.

15.24 If frequency is likely to become an issue, it seems better to pre-empt what could be a difficult situation rather than be taken by surprise.

### **Currency of Determination**

- 15.25 I see no reason why, given the régime I propose, a Determination in respect of a particular route should not, subject to certain safeguards, remain valid for a period. Where a settlement was reached by agreement without recourse to Determination, it would be a matter for the parties, in framing its terms, to decide what its scope and duration should be. Each parade would, of course, still require to be notified to the police so that they could adequately discharge their responsibilities.
- 15.26 In the case of parades which were the subject of Determinations, discretion could be given to the Determining Body to make rulings for periods of up to, say, 5 years, subject to the proviso that these could be reviewed if any material change was brought to the attention of the Body. There would have to be sanctions for anyone seeking to exploit the review provision for vexatious or frivolous reasons.
- 15.27 There could be reason for making rulings in respect of a particular route for a period ahead in, for example, two quite opposite circumstances. Where the Determining Body decides that a parade of a particular nature, size and frequency would not adversely affect the rights and freedoms of others, or, alternatively, would do so, it is unlikely that this situation would change significantly in the short term. But, if it could be shown to have done so, the review provision would allow for any material change to be fully taken into account. Notification to the police in respect of each parade would, of course, still be necessary.

## **Conclusion**

15.28 In normal circumstances, the pre-Determination and Determination stages of any process could be characterised as ‘Settlement without judgment’ and ‘Judgment’. In the case of the Commission, some observers perceive these stages to be virtually seamless, with the Determination being used as a further means of steering the parties towards a solution that does not normally involve judgment, in any decisive sense, on the extent to which the rights and freedoms of others are impacted by a planned parade.

15.29 The Guidelines I propose would enable the case for considering placing restrictions on the exercise of the right to peaceful freedom of assembly to be systematically and thoroughly evaluated. Again, as I show in Chapter 12, the European Convention on Human Rights assists in deciding thereafter whether, and if so what, restrictions should be placed. This it does by requiring that the restrictions are necessary in a democratic society. In the words of one commentator<sup>1</sup>, this involves ‘showing that the action is taken in response to a pressing social need and that the interference with the rights protected is no greater than is necessary to address that pressing social need’.

15.30 Peaceful protest is also included within the right to freedom of peaceful assembly. I deal separately with this issue in Chapter 19.

15.31 A sad feature of our history and of the contemporary scene is the collapse of what has been described as public civility between the two traditions. The Northern Ireland Human Rights Commission is currently considering whether

<sup>1</sup> F G Jacobs and R C A White, The European Convention on Human Rights, (2<sup>nd</sup> Edition 1996).

there are rights supplementary to the ECHR which might be incorporated in a Bill of Rights. I would like to suggest one, which would be best inserted in Public Processions legislation so that it is as directly related as possible to the issue of parades. The text I propose, which has been prompted by my reading of Article 11 of a Convention on Human Rights adopted by the Organisation of American States in 1969, is as follows:

‘In the exercise of their right to freedom of peaceful assembly, all have a right to have their honour respected and their dignity recognised and must themselves respect the honour and recognise the dignity of others.’

This gets close to the concept of parity of esteem which, by its very nature, denotes a reciprocal relationship fully consonant with the pairing of rights and responsibilities which is the hallmark of the ECHR.

## CHAPTER 16

### THE DECISION-MAKING PROCESS

*'He that is first in his own cause seemeth just; but his neighbour cometh and searcheth him.'*

*Proverbs 18 v 17*

#### Section 1

16.1 In this Section I consider reservations expressed about the current process; describe the confidentiality principle which informs it; move on to natural justice issues and the ECHR context; and then, in paras 16.27 to 16.30 develop proposals for a new Northern Ireland régime. In Section 2 I describe the process in Scotland for making Determinations, the essentials of which I suggest could usefully be adopted here. I conclude with observations drawn from Sheriff's Court proceedings which illustrate its concern for fair process.

#### Lack of Transparency

16.2 Evidence to the Review from the Nationalist interest contained the following:

'A Parades Commission must operate in an open and transparent way, with decisions based on clear and understandable guidelines ..... We recommend much greater consistency and transparency in Parades Commission decisions ..... The Commission should be obliged to evaluate all the criteria in an open and transparent way and to report fully on each of the criteria in any determination ..... [We] want to see the

marching issue handled in a way that is *open, transparent*, accountable, free from political interference and demonstrably fair and which recognises the rights of all.’ (My italics).

- 16.3 I deal in Chapter 15 with the question of criteria. Here I wish to focus on process and the issue of openness, transparency, clarity and understandability. Similar concerns to the above are expressed from those with no Nationalist sympathies, focused particularly on Rule 3.3 of the Commission’s Procedural Rules:

‘All evidence provided to the Commission, both oral and written, will be treated as confidential and only for the use of the Commission, those employed by the Commission and Authorised Officers. The Commission, however, reserves the right to express unattributed general views heard in evidence but only as part of an explanation of its decision.’

- 16.4 There is a strongly held view within the Loyal Orders that the Commission has used Rule 3.3 to shroud its workings in a veil of secrecy:

‘Our membership is asked to defend its rights, without knowing what evidence is presented that is so fundamental that those rights should be denied. We cannot believe that such an unjust procedure was ever intended by Parliament.’

#### **The case for confidentiality**

- 16.5 The Commission has not adopted Rule 3.3 without giving the issue considerable thought. It believes that, to secure the objectives of fairly and properly discharging its statutory functions, it must receive information, views and representations from a range of human sources, all of whom are prepared to

communicate freely and frankly with Commission representatives. The experience of the Commission leads it to believe that the confidentiality which the Rule guarantees has encouraged a broad spectrum of people to supply it with material information, views and representations.

16.6 It includes amongst those who have furnished significant information and expressed material views to the Commission:

- Persons residing and/or carrying on business in the relevant locality who have no objection to the notified parade.
- Local residents and business persons who do object.
- Representatives of community groups expressing support for or opposition to the parade.
- Representatives or members of precisely the same community groups who disagree with the views expressed by other representatives.
- Members of a family expressing a particular point of view.
- Other members of precisely the same family expressing a different, frequently opposing, point of view.
- Representatives of local political parties or groupings expressing a particular point of view.
- Other representatives or members of precisely the same political parties expressing a different, frequently opposing, point of view

- Local clergymen, whose primary concerns are normally pastoral in nature and who, in consequence, do not wish to become publicly embroiled in a matter of controversy which frequently has political and/sectarian undertones.
- Those who express themselves to be neither in favour of nor opposed to notified parades.

16.7 The Commission indicates that those who provide relevant views and information to the Commission frequently express their concern about publication of their communications with the Commission and the Commission treats with the utmost seriousness the confidentiality of such communications. It believes that, if a confidentiality rule were not in existence, this would significantly impair the frank and uninhibited disclosure of information, which in turn would frustrate and compromise the performance of the Commission's statutory functions.

16.8 The Commission further considers that it owes legal duties to those who provide it with information, including in particular the duties owed by the Commission as a public authority under Section 6 of the Human Rights Act 1998. This provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. From the perspective of the confidentiality of information, the Commission considers that the Convention rights which it must particularly respect and protect are those of Articles 2, 3 and 8. These deal respectively with the right to life, prohibition of torture and the right to respect for private and family life. The Commission believes that any breach of the confidentiality rule would in many cases jeopardise the personal safety and security of persons supplying

information to it. The Commission considers that this would be intolerable in a civilised and democratic society.

16.9 The Commission makes the point that Rule 3.3 is not one-sided. It also operates to protect fully the confidentiality of all information and views supplied to the Commission by parade organisers, their supporters and representatives.

16.10 The Commission points out that, in its decision-making processes, it frequently has communications, oral and/or written, with parade organisers and their representatives, as well as from persons such as those listed above. In these communications it attempts, consistent with Rule 3.3, to provide all interested parties with a summary of the material information, views and representations which it has received. It is the experience of the Commission that those who communicate with it in this way normally understand fully the case which they have to make and meet.

6.11 The Commission believes that there is a growing confidence in and support for its activities, evidenced by the increasing number of persons who convey information or views to, or otherwise co-operate with, the Commission in its decision-making processes. It regards this as an important and welcome trend which it attributes in no small measure to the confidentiality rule.

### **The question of natural justice**

6.12 The issue clearly arises whether the requirements of natural justice are covered by the Commission's decision-making process. In evidence to the Northern Ireland Affairs Committee, the Commission's Chairman said that 'it probably could be challenged on the grounds of natural justice'. The Committee said in its Report that it viewed this with some concern and recommended that the Government and the Commission consider urgently whether the procedures need to be improved by greater transparency.

16.13 In evidence to me, it was argued strongly that Rule 3.3, as applied by the Commission, denied parade organisers any prospect of a fair hearing. It was argued in particular that:

- Details of evidence obtained by the Commission from other parties are not provided to parade organisers.
- This evidence may be inaccurate but the organisers are denied the opportunity to refute it.
- The organisers are denied the opportunity to produce contrary or other evidence which would assist the Commission in coming to a properly balanced decision. There is no procedure to allow the necessary cross-examination of any witness.

- There is no opportunity to make a submission as to the particular weight the Commission should give to any item of evidence.

16.14 It was suggested that, by analogy with the Planning Appeals Commission, a fair and proper procedure would have the following features:

- It would allow each party an 'exchange of evidence' prior to any hearing.
  - Each party would then have an opportunity of introducing material and making submissions on the other party's evidence.
  - Where it was appropriate to hold a hearing, each party would be able to present its own evidence and cross-examine the evidence of the other parties.
  - Each party would then have the opportunity of final submission before the Commission made its decision.

It was contended that such arrangements would afford the Commission itself the full and proper opportunity it needs for the fullest testing of all evidence.

16.15 Lord Guest in Wiseman v Borneman [1971] was cited in support of the view that the Commission was obliged to apply the principles of natural justice:

'Where a statutory tribunal has been set up to decide final questions affecting parties' rights and duties, if the statute is silent upon the

question the courts will apply into the statutory provision that the principles of natural justice should apply’.

In the case of the Commission, the statute is silent on the question.

- 16.16 The evidence in support of the natural justice principle acknowledged that there could be sensitivities in applying the principles without any restriction but argued that these could be addressed by the Commission on a case by case basis according to the particular circumstances of each witness in each case. This would allow legitimate requests for anonymity to be met, without undermining ‘the Commission’s search for truth’.
- 16.17 Of course, if people wish to have a process informed by the principles of natural justice and wish to be able to benefit equally from such a process, they must participate fully and openly in it. Indeed, in a case (Campbell and Fell v UK [1984]) where a person claimed that he did not receive a fair hearing, the European Court of Human Rights had regard to the fact that he was entitled, but declined, to attend the hearing.
- 16.18 I understand that one of the reasons why the Commission currently regard the confidentiality of proceedings as paramount is that those members of the Loyal Orders who meet them do not wish that fact to be known. This situation exhibits all the characteristics of a vicious circle, where failure to engage openly contributes to failure to achieve the goal of transparency for which those who fail to engage argue.

16.19 North also considered this issue. It doubted whether public hearings would be advisable. It considered, however (para 12.98), that the Commission might wish to have more than one group present at the same time, 'thereby allowing interested parties to hear the points others are making, both in order to understand their position better and to be able to take their views into account'. North thought it 'right that the Commission should also have the ability to obtain views in confidence from organisations such as the police or indeed individuals, [which] would mean at least some confidential hearings, [since] intimidation and community pressures are realities in Northern Ireland'. North said that in some cases the Commission might feel it appropriate to explore ways of surveying local opinion through attitude surveys or other means. Evidence to me from outside the parading community made a similar point about the potential utility of what it usefully described as 'community audits'.

### **Article 6 of ECHR**

16.20 Whether Article 6 of the ECHR has relevance to this issue of process is wreathed in virtually impenetrable technicalities. It provides inter alia that

'In the determination of his civil rights and obligations ..... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

Whatever interpretation Clause 6 may require, there is no doubt as to its importance. The European Court of Human Rights has said:

‘In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and purpose of that provision.’<sup>1</sup>

However, the Court has not been prepared to give general guidance as to how far the applicability of Article 6(1) extends. A key issue is whether the Parades Commission is determining civil rights and obligations within the meaning of the Article.

16.21 There have been passages in more recent Court decisions (but usually in dissenting opinions) which could encourage the view, in the layman at least, that the Court may be working towards a more inclusive view of the Article’s scope. For example:

‘Any right which a citizen may feel entitled to assert either under national law or under supranational or international law has indeed to be considered a civil right within the meaning of Article 6(1).’<sup>2</sup>

One commentator<sup>3</sup> has suggested that the Court may be moving to a position where all those rights which are individual rights under the national legal system and fall into the sphere of general freedom must be seen as civil rights.

<sup>1</sup> Delcourt v Belgium [1970].

<sup>2</sup> Gustafson v Sweden [1997].

<sup>3</sup> H Fenwick, Civil Liberties and Human Rights, 3<sup>rd</sup> Ed 2002 p59, citing dissenting opinions in Bentham v UK [1983].

16.22 Be that as it may, the legal advice which the Commission has received is that the Commission is not determining civil rights.

16.23 Whilst the context and the technical issue are very different, it may be relevant to note the approach of the Leggatt Review of Tribunals (March 2001) which had to consider the implications of Article 6(1) for a particular aspect of its task. On a strict interpretation of the Article the work of some tribunals could have been held to attract protection under it, whilst the work of others would not. The Review rejected the double standards which this would entail in the following terms:

‘[Such an] approach would, we think, lead to an absurd result. It would be possible for a government to argue that it is acceptable for there to be an inferior standard of fairness, or of independence and impartiality, in a tribunal case because it involved not a dispute in private law between individual citizens to which the ECHR applied, but a dispute between the citizen and the state itself in an area to which the ECHR did not apply. That is an untenable position. We have therefore treated all tribunals alike when discussing the requirements of a modern service’.

16.24 It might be argued that, even if Article 6 were held to apply, there would be no violation of it so long as the proceedings of the Commission are subject to subsequent judicial control (as they are, through the process of judicial review). But this minimalist view of Article 6 hardly addresses the concerns of those who believe that the needs of natural justice are not served in the absence of much greater transparency.

16.25 In several cases before it, the European Court of Human Rights has underlined the importance of procedural fairness. The Article involved was Article 8 but

there seems no reason to suppose that the Court would take any less robust a view where other Articles which allow for the placing of limitations on rights are concerned.

In W v UK [1988], the Court observed:

‘It is true that Article 8 contains no explicit procedural requirements, but this is not conclusive of the matter. The local authority’s decision-making process [for determining parental access to children in care] cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on the relevant considerations and is not one-sided and hence neither is nor appears arbitrary. Accordingly the Court is entitled to have regard to that process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8.’

In Buckley v UK [1997] the Court said:

‘Whenever discretion capable of interfering with the enjoyment of a Convention right such as the one in issue in the present case [removal of people from a caravan site] is conferred on national authorities, the procedural safeguards available to the individual will be especially material in whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation’.

The Buckley case was cited by the Court in Chapman v United Kingdom [2000] which held that the regulatory procedure did contain adequate procedural safeguards and that the decisions taken in respect of the applicant were based on reasons which were ‘relevant and sufficient’.

16.26 I believe that, whether or not Article 6(1) applies, the process for reaching Determinations should be shaped as if it did. I am not convinced that the test of fairness can be fully met within the tight confidentiality constraints by which the Commission is bound by its Procedural Rules. If, as I have recommended in Chapter 15, the Determination pivots on how exercise of the right to freedom of peaceful assembly affects the rights and freedoms of others, and if the factors to be taken into account are those I also recommend, it is difficult to envisage circumstances in which many need feel any inhibitions about expressing their views fully. But the Determining Body should clearly have discretion to handle, in whatever way it deemed appropriate and so as to disadvantage none of the principal parties, any submissions which were made on a confidential basis. I shall return to the issue of the role of the police in Chapter 20.

### **Proposed Northern Ireland process**

16.27 If all sides of parades disputes are to feel that their case has been fairly considered, I suggest that the following elements are required:

- (i). As envisaged by North, objectors should be offered the opportunity formally to register their objections. In the response to the attitude survey which North commissioned, 77% of Protestants and 90% of Catholics said that it was definitely or probably a good idea to have a formal (two week) period for making objections. In the context of a separate discussion of arrangements for notification of parades (Chapter 17), I shall consider further what the optimum period might be. At present, objections are rarely

formally lodged but come to the Commission's attention by a variety of means eg via information gleaned by Authorised Officers, or through Councillors or MLAs etc.

- (ii) Copies of the objections should be made available to the organisers of the procession. Since it is important that issues should be coming to the Determining Body for decision only after a thorough effort to resolve them, it is to be hoped that in all cases the organisers would already possess a copy of the objections and would have been seeking to address them.
  
- (iii) The Determining Body should arrange a hearing at which the parties directly in dispute (and any others who wish to offer evidence relevant to the proceedings) would be obliged to present their case. This would enable the parties to explore each others' positions and challenge each others' statements as necessary, with the aim of exposing to the Body the issues in dispute. The Body would be able to ask its own questions and conduct whatever inquiries of its own it deemed necessary, the outcome of which should, of course, also be available to the parties.
  
- (iv) A Determination would then be issued, evaluating the evidence in terms of the factors which the Guidelines obliged to be considered and showing clearly the reasons for the conclusion.

- (v) Proceedings should be as informal and user-friendly – and procedures as simple – as possible but with the occasion controlled in such a way as to ensure that the normal civilities and courtesies were observed, in line with the mutuality of respect which should characterise attempts of any kind to resolve parade disputes. The parties should also, of course, be required to respect the standing and dignity of the Determining Body itself. Proceedings should also be disciplined so that they are not unnecessarily protracted and the process used ‘vexatiously, disruptively or unreasonably’ (words I received in evidence from a non-parading source). The aim should be to create an atmosphere which gives all parties confidence in their ability to participate in the process and has them leaving the proceedings feeling that they have had a fair opportunity to put their case.

16.28 Given such a process, there should be no need for the Review stage which is a feature of the current arrangements.

16.29 The utility of a fair process of the kind I describe is, of course, significantly reduced if the reaction of any of the parties to an unfavourable decision is to impugn the integrity of the proceedings or of the decision-makers. Those conducting proceedings and taking decisions would have no axes to grind. They would be performing a largely thankless public service. Their decisions should be respected.

16.30 It is to be hoped that greater transparency in the process and in the explanations of decisions would lead to fewer of the charges of inconsistency which at present come from both sides of the parades debate. Each case has to be treated on its merits but, the greater the clarity of the principles on which the decision-making process rests, the more uniform is the treatment accorded to each likely to be.

## **Section 2**

### **Scottish arrangements for Determinations**

16.31 If my proposal for:

- a more structured, transparent process,
- with decisions taken against more clearly articulated criteria, and
- with the reasons for decisions explained in plain, direct terms, and related to
- the points made by the parties, considered with reference to the criteria

is misinterpreted as the introduction of a rule-bound, legalistic system, it will have been totally misunderstood. The proof that a user-friendly, readily intelligible

process can be devised which has the characteristics I intend is at hand in the process which applies to the regulation of processions in Scotland.

16.32 The legislative context is, of course, different in Scotland but there is no reason why the fundamental features of the approach cannot be replicated in Northern Ireland. In Scotland, it is the Council which is empowered to make an order imposing conditions on a procession. Councils may also prohibit processions, whereas in Northern Ireland this power is reserved to the Secretary of State.

16.33 On receipt of a notification for a procession in the Council area I studied, which is made both to the Council and the Chief Constable, the Council consults the relevant local Councillors, who can notify the Council's Director of Administration that they object to the proposed procession. There is no provision requiring persons proposing to have a public procession to give public notice of that intention. In general most objections are only made by Councillors following extensive consultation with the local community through established community groups or following the making of representations at Councillors' surgeries. The Chief Constable also has the opportunity to request that the Council make an Order prohibiting the procession or modifying the route, start time etc on public order grounds.

16.34 When an objection is made to a proposed procession by the local Councillor, the Chief Constable or both, an ad hoc Sub-Committee is convened. What happens thereafter is governed by a very simple procedure. In brief, there is a (usually public) hearing, (with one of the Councillors acting as Convenor), described as follows in the documentation relating to North Lanarkshire's functions in this field:

The order of the hearing will be:

- (a) (i) the Chief Constable's representative and/or other objectors will present their case;
- (ii) Sub-Committee members and advisors may ask questions arising out of (a)(i), and
- (iii) the proposer [of the procession] may ask questions arising out of (a)(i) and (ii),
- (b) (i) the proposer will present their case;
- (ii) Sub-Committee members and advisors may ask questions arising out of (b)(i), and
- (iii) the objectors may ask questions arising out of (b)(i) and (ii),
- (c) (i) if the Chief Constable is not the objector, his representative shall be consulted at this point on the matters raised;
- (ii) the objectors and proposers will then have the opportunity to ask questions of the Chief Constable, and
- (iii) Sub-Committee members and advisors may ask questions of either party arising out of the evidence heard,
- (d) (i) the objectors will sum up their case (adding no new material); and
- (ii) the proposer will sum up their case (adding no new material);

- (e) the Sub-Committee members will decide whether they wish to deliberate in private or not. If they decide to go into private session, the objector's and proposer's representatives and Chief Constable's representative, if not an objector, will withdraw but remain available in case clarification of points of uncertainty on evidence is required during Sub-Committee discussion. (In the event of any recall, all parties will be invited to re-join the meeting);
- (f) the Sub-Committee, in the presence of the officials appointed to assist them, shall then deliberate; and
- (g) the Sub-Committee decision will be announced to both parties (who will be recalled for this purpose if deliberation has been in private) and the decision will also be confirmed in writing.'

16.35 I have seen the minutes of one of their Sub-Committee proceedings. It consisted of an admirably ordered and lucid account (of about 1000 words) of the evidence given, based on the letters submitted by each objecting Councillor prior to the hearing and elaborated at the hearing. Even to the uninitiated, it was abundantly clear what the issues were. This was followed by a statement of the Sub-Committee's findings as to matters of fact in the form of 9 crisp points (about 200 words). The minutes concluded with the 3 reasons for the Sub-committee's decision to make an Order (in this case prohibiting the holding of the procession), with each reason explicitly linked to the evidence given (some 200 words in all).

16.36 I do not see why the essentials of such a process cannot be adopted here if matters have to proceed to the stage of Determination. The criteria for Determination would be those I describe in Chapter 15. I additionally propose

(para 16.26) that there should be provision for the handling of evidence submitted in confidence and for the Determining Body to make inquiries on its own behalf if necessary, the results of which would be made available to all parties.

### **Scottish Sheriff's Court cases**

16.37 These cases are important for their analysis of the decision-making process. In a case involving a decision by Aberdeen City Council to prohibit a procession notified by Aberdeen Bon Accord Orange Lodge 701, the Court concluded that the Council (insofar as it had regard to a memorandum by its principal engineer) 'relied on matter which was unspecific and irrelevant and should not have formed part of their reasoning'. The Council also quoted as reason for their decision Councillors' local knowledge. On this the Court said:

'it has been repeatedly said that decisions in the exercise of functions such as the respondents (ie the Council) were carrying out in this case must be comprehensible. To be comprehensible they must be based on facts. Such decisions must also be fair. To be fair the facts on which they are based must be known. The appellant (ie the Lodge) argue with, in my view, a good deal of force that the facts on which the respondents relied – local knowledge – were neither provided to the appellants nor explained to them at the meeting.'

Commenting that aspects of the Council's argument could be said to be reliant on 'common knowledge', the Court said:

'The problem with common knowledge is that, in my view ..... what may be common knowledge to one group may not be so to another. Hence the dicta in Risky Business at 927D that the basis of decisions must be

facts identified in the same way as evidence which is relied upon must be identified.'

The Court concluded:

'I am of the view that the respondents failed to give proper reasons for their decisions insofar as they relied on [the] memorandum and their unexplained local knowledge.'

16.38 In an Appeal against a decision by Angus Council to prohibit a march by Wishart Arch Defenders Loyal Orange Lodge 404, the Court found that:

'While [Councillors] may be entitled to use their own knowledge of their local area, they have still to give notice to the appellants (ie the Lodge) as to the basis upon which [they] make their decisions arising out of their local knowledge.'

Referring to the statement of reasons for the decision, the Court 'found it difficult ... to find any foundation for most or all of these statements in fact'. The Court noted that the Lodge had had notice of objections that had been formally lodged but it held that 'If anything else was influencing [Councillors'] view of 'public perception' [against the march], then the [Lodge] ought to have had notice of what that may have been'. The specifics of these cases or their outcomes are unimportant per se. What is relevant is the importance attached by the Court to transparency, with all concerned being aware of the factors which influenced the decision (and the evidence in support of those factors) and being in a position to challenge them. It is the lack of this capability within current arrangements in

Northern Ireland which features in comments to the Review from both sides of the community.

16.39 The references above to 'local knowledge' are interesting. The information made available by the Authorised Officers and the local knowledge possessed by members of the Commission, who between them constitute a formidable pool of experience, represent local knowledge akin to that brought to bear on parades issues by Councillors in Scotland. It could be argued that the Commission benefits from its ability to capitalise on the local knowledge of the Authorised Officers in at least three ways. The Officers are well equipped to report on the state of any local efforts to reach an accommodation. From their local contacts they are able to harvest public perceptions of issues around parades. Based on their resultant 'feel' for local conditions, they can suggest options for the Commission to consider when Determinations are being made, though I understand that they are never present when Determinations are being considered. Their role has been described to me as 'educating and informing' the Commission.

16.40 It is not unreasonable to suppose, therefore, that the remarks by the Sheriff in the Aberdeen case as to the need for the local knowledge on which the Council relied to be disclosed and explained apply equally to local knowledge used by the Commission.

## CHAPTER 17

### NOTICE OF INTENTION

- 17.1 Under existing legislation, parades have to be notified 28 days in advance unless cause can be shown as to why this was not possible. This means that most of the work in connection with contentious parades is compressed into the marching season.
- 17.2 This would allow insufficient time for the process I recommend to be adequately conducted. Difficulties anticipated in regard to future parades which are expected to be contentious should begin to be addressed immediately after the end of the previous marching season so that the Facilitation function which I propose is given a reasonable chance to help the parties to effect settlement well before the event. The chances of success are likely to be greater if facilitation does not take place in an atmosphere where last-minute crisis management is the order of the day. That said, a period of facilitation should be fixed so that if, despite good faith efforts, there is failure to agree, the issue can proceed to Determination in time to allow that process to be properly conducted.
- 17.3 I was told that the dates of most parades are already known. It would be necessary to retain the possibility of later notification if this is necessary for reasons outside the organiser's control but this concession should be rigorously policed. I recommend that organisers should be required to notify intention to parade no later than 1 October and that, where this would allow a period of less

- than 6 months before the date of the parade, the notice should be required to be submitted no less than 6 months prior to that date.
- 17.4 It may entail organisers of parades advancing their planning of parades and the original notice may have to be supplemented later in respect of detail but sufficient information should be available to decide whether the organiser needs to avail of the Facilitation process, with detail being added later in the context of any settlement reached or prior to proceeding to Determination if that should prove necessary.
- 17.5 The fact that notifications have been received and where details are to be found should be advertised. Those wishing to object should be obliged to register their objections formally in writing by no later than 1 November or within one month of a later notification made in the circumstances described in para 17.3.
- 17.6 Those wishing to protest should be required to lodge notice of protest (with a concession for late lodgement in the same circumstances as apply to parades) within 2 weeks of the issue of a Determination unless, exceptionally, the Determination was issued less than fourteen days prior to the parade, in which event it would be for the Determining Body to fix a date for lodgement of notice.
- 17.7 The procedure outlined above could make the full year available to the Facilitation and Determination functions, thereby ensuring that each can deliver its full potential in resolving difficulties which are identified. There seems no reason why, unless there were special circumstances, a Determination should have to be issued less than twenty-eight days before a parade.

## CHAPTER 18

### COMPLIANCE

- 18.1 Determinations must be regarded as binding and systems must therefore be in place which will ensure that failure to comply will have consequences.
- 18.2 It is inherent in my recommendation that the criteria to be applied to parades should be exactly aligned with the ECHR, so that any parade which the organiser could not show would involve peaceful assembly would not merely face the prospect of re-routeing but would not take place at all. This would be an aspect of the decision-making process and would be quite distinct from the use by the Secretary of State of his power to ban parades in certain circumstances. Breaches of the Code of Conduct in respect of previous parades would be taken into consideration.
- 18.3 In fairness to parade organisers, it is important that alleged breaches should be brought to their attention as quickly as possible after a parade has taken place. There should therefore be a requirement on the police and on those monitoring parades to submit a report promptly, setting out any failure to comply with a Determination. Anyone else who witnessed the parade and wished to allege any breach should be enabled to do so within, say, a week following the parade. Breaches considered to be prima facie material should be forwarded to the organiser of the parade for his observations. This could be followed, at the instance either of the organiser or of the Compliance Branch of the Determining

Body, by a meeting. Infringements falling short of gross breaches of a Determination would be dealt with by a warning and by agreement to actions designed to prevent future infringements in connection with the next parade. Gross breaches would be dealt with similarly but before the next parade notified by the organiser could take place he would have to post a bond up to a maximum of £500.

18.4 It would be for the Determining Body to decide, when considering the next parade, whether in light of the planned follow-up action in the preceding paragraph, the organiser intended the assembly to be peaceful.

18.5 This process is fully consistent with the principle of transparency. I believe it would be fully supported by organisers, the vast majority of whom wish to be responsible for well-conducted events and whose hand in dealing with any non-compliant members will be greatly strengthened by such provision.

18.6 It is entirely logical that the same process should apply to protests. Provocative, sectarian, offensive or abusive behaviour on the part of protestors is as reprehensible as similar behaviour on the part of those on parade. This is particularly so since any parade to which objections were lodged would, under my proposals, only go ahead if it were ruled not to infringe the rights and freedoms of others. Moreover, anyone who had cause to lodge a complaint, following a parade, would be entitled to do so.

18.7 I therefore recommend that the same régime as applies to breaches of Determinations in respect of parades (which I make clear in para 14.24 also

includes settlements reached without the need for Determinations) should also apply to protests.

18.8 There are locations which have not hitherto been contentious where it may become apparent that (because of breaches of the Code of Conduct or for other reasons) there are the initial signs of imminent difficulty which, if promptly addressed, can be averted. Police should be advised to identify any incipient concerns promptly so that appropriate action can be taken.

18.9 Monitors should also be under obligation to bring to the attention of the Determining Body any aspects of the policing of the event, in terms of either the parade or any accompanying protest (lawful or unlawful), which merit review in the context of arrangements for the policing of future events. These should be pursued in accordance with whatever protocol for handling such matters might be agreed between the Body and the Policing Board.

## CHAPTER 19

### PROTESTS

19.1 During the proceedings on the legislation, it was felt necessary to make adjustments to the original text in order to ensure that the Bill was 'both balanced and seen to be balanced'. As a result, the Bill was amended so that comparable penalties could be applied to protestors and marchers who broke the law and a duty was laid on the Commission to draw up a Code of Conduct for protest meetings as well as for processions. A notice requirement (14 days) for protest meetings as distinct from protest parades was also introduced. North had concluded that the difficulty of finding a means of distinguishing on the face of the legislation protest meetings connected with parades from other public-air meetings rendered notice impracticable and in any event was not convinced that such notice was necessary. Government, however, succeeded in devising a suitable definition. Government felt that the notice requirement, which (as with parades) would go to the police and be passed immediately by them to the Commission, would provide 'additional and valuable new information' for both. The police, however, rather than the Commission, remained the regulatory body in respect of protests and can, under Article 4 of the 1987 Order, impose conditions on the holding of such meetings. Protests which take the form of processions are, of course, subject to the jurisdiction of the Commission in the same way as other processions.

- 19.2 The Government accepted that it might be argued by some that there is a problem of conflicting responsibility if a public procession is governed by the Commission while the related protest meeting is governed by the police. It noted that the criteria on which the police could impose conditions on a protest meeting would differ 'slightly' inasmuch as they would not include the factor of impact on relations within the community but felt that matters to do with protest meetings were largely public order-based in any event. One might query use of the word 'slightly', since the introduction of this additional factor was a key North recommendation in respect of parades. However, North had also concluded that extending the criteria in respect of protest meetings 'had no present justification'.
- 19.3 It is difficult to know whether North would have recommended that the Commission be given jurisdiction over protest meetings if it had thought that a means of introducing a notice requirement for protest meetings could be found. It did rightly note that 'such a proposal would make little sense without a prior notice requirement'.
- 19.4 I have received evidence from both sides of the parades debate to the effect that protest meetings should be within scope of the Commission. I find this proposal convincing. I am not swayed by considerations of balance, which I consider irrelevant. It is, however, illogical that different modes of protest should be dealt with on different criteria by different bodies. It makes sense for one and the same body to be seized of the totality of the event – both parade and protest. The criterion by which I propose (Chapter 15) that it should in future be decided by the Determining Body whether limitations should be placed on processions – namely their impact on the rights and freedoms of others – is equally relevant for

protests. Freedom to protest is a vital aspect of the Article 11 right to freedom of peaceful assembly and should (like the right to process) be affirmed in Public Processions legislation. But it, no more than the right to process, can be regarded as absolute and the restrictions on the right to process should be equally applicable to protest. The definition of protest should, of course, be extended as necessary to include protest in respect of a Determination as well as a parade.

19.5 The present notice requirement would need to be altered since, under the arrangement I propose, many Determinations would be issued well before the date of the planned procession. It seems reasonable that notice of any protest meeting should be lodged within fourteen days of the issue of a Determination but, as indicated in para 17.6, special provision would be required to deal with situations when Determinations were issued less than 14 days prior to the parade.

19.6 It would be necessary for Guidelines to be prepared indicating the factors which the Determining Body would take into account in deciding whether limitations should be placed on a protest. A key consideration would clearly be to enable the protest to be in sufficient proximity to the procession for it to be effective, whilst at the same time ensuring that protest and parade were not in such close juxtaposition as to make provocative interaction between both groups (as experience demonstrates so frequently) virtually irresistible. As with parades, the scale of the protest and the arrangements made by the organiser to achieve a peaceful protest strictly compliant with the Code of Conduct for Protests would also be crucial.

## **CHAPTER 20**

### **PUBLIC SAFETY ETC**

20.1 I have dealt in Chapter 15 with the restriction which may be placed on the exercise of the right to freedom of peaceful assembly in order to protect the rights and freedoms of others. The other main circumstance set out in Article 11(2) in which the right may be limited is where this is necessary in a democratic society in the interests of national security or public safety or for the prevention of disorder or crime. I proposed in para 15.13 how this should be reflected in new Public Processions legislation. It is to this issue I now turn.

20.2 Where it is established after an open process of the kind I describe in Chapter 16 that the rights and freedoms of others are not adversely affected by a peaceful procession or where conditions are imposed which protect those rights, the event itself should pass off peacefully unless the marchers reneged on their peaceful intentions or a violent attempt was made to negate the outcome of the process. Lawful peaceful protest is, of course, another matter. However, it is necessary to contemplate the possibility that issues may arise in respect of the public safety etc factors listed in the previous paragraph.

### **The protection of rights**

20.3 The willingness or otherwise of the State to protect rights established by law (as these would be) poses a serious issue of public policy. Picking and choosing which rights will be protected puts the whole architecture of rights at risk and ultimately proves counter-productive. I must emphasise here that I am not talking of rights which are asserted regardless of the rights of others but of rights which, if challenged, are upheld after careful consideration within the matrix, the coherent framework of principle, which the ECHR provides.

20.4 The great jurist Dicey was quite clear on this point when he examined the right of public meeting in the context of his discussion of the rule of law<sup>1</sup>. Several passages are in point:

‘..... A’s going into the High Street may lead to a breach of the peace, but A no more causes the breach of the peace than a man whose pocket is picked causes the theft by wearing a watch. A is the victim, not the author of a breach of the law .... The plain principle is that A’s rights to do a lawful act .... cannot be diminished by X’s threat to do an unlawful act ....’

‘The principle ... that a meeting otherwise in every respect lawful and peaceable is not rendered unlawful by the possible or probable misconduct of wrongdoers, who to prevent the meeting are determined to breach the peace, is, it is submitted, well established, whence it follows that in general an otherwise lawful public meeting cannot be forbidden or broken up by the Magistrates simply because the meeting may probably or naturally lead to a breach of the peace on the part of wrongdoers.’

<sup>1</sup> The Law of the Constitution, first published 1885, 9<sup>th</sup> Edition, Revised by ECS Wade (1939).

20.5 An observation by Lord Justice Sedley in Redmond-Bate v DPP [1999], which took into account the impending incorporation of the ECHR into UK domestic law, is also relevant:

‘A police officer has no right to call upon a citizen to desist from lawful conduct. It is only if otherwise lawful conduct gives rise to a reasonable apprehension that it will, by interfering with the rights or liberties of others, provoke violence which, though unlawful, could not be entirely unreasonable, that a constable is empowered to take steps to prevent it.’

The reference to interference with the rights or liberties of others underlines the crucial importance of determining whether a right needs to be restricted precisely on that ground.

20.6 The point about non-interference with others’ rights is reinforced by remarks by Lord Justice Simon Brown in Nicol and Selvanayagam v Director of Public Prosecutions [1996]:

‘.... The court would surely not find a [breach of the peace] proved if any violence likely to have been provoked on the part of others would be not merely unlawful but wholly unreasonable, as of course it would be if the defendant’s conduct was not merely lawful but such as in no material way interfered with the other’s rights. A fortiori, if the defendant was properly exercising his own basic rights, whether of assembly, demonstration or free speech.’

20.7 In the case of Plattform “Ärzte für das Leben” v Austria [1988], (also quoted by North) the European Court of Human Rights held that:

'The participants [in a demonstration] must ... be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents .... In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.'

The Court went further and argued that:

'Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11 ..... Article 11 sometimes requires positive action to be taken, even in the sphere of relations between individuals if need be .....

20.8 It found that the law of the State in question (Austria) was concerned to protect demonstrations by such positive action. But it went on:

'While it is the duty of contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used ..... In this area the obligation they enter into under Article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved.'

In this case the demonstration (against abortion) had been able to go ahead but the organisers complained that the steps taken to protect them were inadequate. The Court disagreed.

### **Constraints on the protection of rights**

- 20.9 Dicey had also recognised that there were limitations to the application of the principle that rights being properly exercised should be protected. He grounded these on what he described as the 'absolute necessity for preserving the King's peace'. He instanced a hypothetical situation where a group he quaintly called the Skeleton Army came together with a view to preventing the Salvation Army from holding a meeting. He supposed that it was impossible for the peace to be preserved by any other means than by requiring the Salvationists to disperse and said that, 'if they can in no other way preserve the peace', the police may lawfully prevent the Salvationists from holding the meeting. He went on: '... the only justification for preventing the Salvationists from exercising their legal rights is the necessity of the case'.
- 20.10 The possible restriction on the right to freedom of peaceful assembly in Article 11 (2) of the ECHR on grounds of public safety etc envisages precisely that 'necessity of the case'. The Article makes clear that the interference with the right must be 'necessary in a democratic society' and proportionate to the aim to be pursued (in this case safeguarding public safety). One authoritative study<sup>1</sup> has concluded that, through the combination of common law developments and the impact of the Human Rights Act 1998, it might now be regarded as unreasonable, in the absence of special circumstances, for the police to interfere with a person who is doing something lawful in order to forestall an unreasonably violent response by an opponent.

<sup>1</sup> D Feldman, Civil Liberties and Human Rights in England and Wales (2002) p1029

### **Responsibility for deciding public safety issues**

20.11 The question I wish to address is who should decide whether, in the interests of public safety etc, restrictions need to be placed on a peaceful procession which has been found not to be inimical to the rights and freedoms of others. Putting it another way, who should decide if the right to hold such a procession should be protected? Under the 1998 Act it is the Parades Commission which, in making its Determinations, has regard inter alia to the possibility of public disorder or damage to property, taking into account advice received from the police. The Chief Constable can, if he wishes, ask the Secretary of State to review a Determination, presumably if he has concerns regarding the policing implications of that Determination.

20.12 There is no reason to believe that the Commission do not operate with the utmost responsibility in the use they make of police advice. It is, however, possible under current arrangements for the Commission to make a Determination which in effect runs counter to that advice. Moreover, it is not clear if, in deciding whether a Determination can be policed, regard is had to the extent to which that will cause undue demands to be made on the police or army, whereas this is one of the matters to which the Secretary of State has to have regard when deciding whether to exercise his powers to prohibit any proposed public procession. There must be an issue of proportionality here, given the demands on scarce police resources and the need to establish priorities.

### **Various options for assigning responsibility**

20.13 Responsibility for determining the public safety etc issue could be handled in two ways:

- (i) The current allocation of responsibilities could remain, but (as I have recommended) with the rights and public safety issues being ruled on separately. Within this option there are two possibilities. One is that the Determining Body would simply rubber stamp the police advice. The other is that they would be free to take a course which, while it took police advice into account, would not necessarily follow the advice. If the Body were simply to act as a rubber stamp, there is no particular reason why they should have any responsibility at all in relation to the issue. If, on the other hand, they were free to modify the advice, it has to be asked on what basis they would do so. Would they be substituting their judgment that a procession can or cannot be policed by the choice of reasonable and appropriate means and in accordance with the ECHR for that of the police? To do so would seem to detract from the accountability of the police for operational decisions. If they were taking a decision at variance with that of the police on whether protecting the right to process would cause undue demands to be made on the police or army, that could entail their making a judgment on how the police budget is best spent without being in a position to evaluate alternative claims on the budget. Protecting exposed families in a troubled interface area or isolated

families in rural areas, for example, might be judged by the police to be a more pressing priority.

- (ii) Legislation could empower the police to make the public safety decision and to impose such conditions as that decision required. The result would be precisely the same as if the Determining Body were confined to rubber stamping police advice on public safety. At present, of course, the police have common law powers (which are confirmed by the 1998 Act) to take action to deal with or prevent a breach of the peace, which could include altering the route allowed under a Determination.

Under this option the Secretary of State should have a reserve power to intervene and review a decision by the police where he decides that re-routeing of the parade is necessary in a democratic society in the interests of national security or public safety or for the prevention of disorder or crime. This power should only have to be used in the most exceptional of circumstances. The power of review would not extend to the rights decision made by the Determining Body since it would not be that Body's decision, but its implementation, which was at issue.

20.14 On balance, I prefer option (ii). This option would enable it to be clearly seen where accountability for decisions regarding policing lay. The police are obliged to have regard to the ECHR and are subject to the remit of the police

Ombudsman. If there are policy issues inherent in policing decisions arising from Determinations, it seems appropriate that these should be considered by the Policing Board rather than by the Determining Body.

20.15 If I were a senior police officer required to police a decision taken against my advice and something went wrong, I would feel extremely exposed if the only knowledge available of the advice I had given was the result of speculation – as it would be, given the nature of confidentiality attaching to such advice at present. I would not be comforted to be told (as I could very properly be) that, if the police had felt so strongly about it, the Chief Constable should have applied to the Secretary of State for a review of the decision.

20.16 I must make clear, however, that, in the context of the rights-based regulatory régime which I propose, public safety ought not to be an issue. The procession must be peaceful: otherwise it would not have passed the first test under Article 11(1) of the ECHR (which I propose should be precisely replicated in the Northern Ireland legislation). It should not therefore constitute any threat to public safety. And, where objections had been lodged, the parade would not have been allowed to proceed without limitations being imposed, unless it had been adjudged not to justify the imposition of limitations under Article 11(2) (and its Northern Ireland legislative counterpart). If in these circumstances a violent protest were nonetheless to be threatened or to occur, it would lack any justification.

20.17 It should be heavily underscored that dealing with the public safety issue as I suggest does not represent a return to the situation prior to the 1998 Act. The

argument in favour of the régime introduced by the Act was that police were not best placed to take account of the factors other than those in the 1987 Order which were added to those factors by the Act. On the model I propose, the police would still have no part to play in the evaluation of those – essentially rights-based – factors. Indeed it would be much clearer than it is now that the public safety factors which are related to the police function would have had nothing whatsoever to do with the view which is taken on the rights issues. The police would simply be required to protect the decision resulting from the rights-based process or to decide in terms of what is necessary in a democratic society that, on public safety grounds, they could not do so. They would be involved in the implementation, not the making, of the decision and would not therefore have the dual role which was regarded as an unsatisfactory feature of the pre-1998 Act situation. And, to be absolutely clear, they would not be able to allow a march which the rights-based process ruled would infringe the rights and freedoms of others.

## CHAPTER 21

### RELATING FUNCTIONS TO STRUCTURE

#### Introductory

21.1 So far I have been concerned with the various functions which I believe are involved in the proper regulation of parades and how those functions should be developed, going forward. Partly for ease of presentation and partly because it seems more logical to proceed from function to form, rather than vice versa, I have so far ignored the implications for the structure of the regulatory machinery concerned. I must, however, now turn to this vitally important issue.

#### Functions and issues

21.2 The functions are, broadly, as follows:

- (i) Setting standards.
- (ii) Very proactive, direct facilitation.
- (iii) Determining Rights when settlement cannot be achieved through facilitation.
- (iv) Ensuring compliance.

21.3 Functions (ii) and (iii) would not (as at present) be largely compressed into the marching season but would operate throughout the year. Both would entail much more activity than is currently undertaken and administrative responsibilities would be more onerous, particularly in respect of (iii), as a consequence of the transparency of the process. Function (iv) would represent a considerable expansion of the work currently undertaken under this heading.

21.4 It is in the nature of functions (ii) and (iii) as I have specified them that each should operate independently of the other. Each cannot be only 'partly' independent. Otherwise there are two undesirable consequences. First, the integrity of the Facilitation process is compromised (as North recognised). People must have absolute confidence that they can talk to the facilitator without any risk that what they say may be introduced at the Determination stage and used to their detriment. They are required to deal with the Facilitation function in good faith and, if a parade organiser ultimately seeks a Determination, he will have to have a certificate from the Facilitation function that he has done so. That, however, should be the only linkage between the two functions. Otherwise the Facilitator, whatever his disclaimers, could be suspected of being manipulated and working to an agenda dictated by some context the Determination function wished to create as backdrop to any subsequent involvement it might have in that, or some other, situation.

21.5 Second, the Determination function would have difficulty refuting the charge that, rather than objectively looking at the facts for itself in terms of the criteria to which it was obliged to have strict regard, it was simply an extension of the 'settlement' process attempted without success at the Facilitation stage.

21.6 The suspicions might be farfetched and groundless, but, as experience to date has demonstrated, confidence and trust are of the essence in a situation where rumour and speculation abound.

### **Options for structure**

21.7 The present Commission model represents what, for convenience, I shall call the unitary model. I do not believe, for the reasons I have adduced (and others to which I now advert) that this model is apt for the discharge of the functions I have described. I consider two options for dealing with the issue.

### **A Rights Committee**

21.8 One option would be to have within the Commission a Rights Committee which would be responsible for Determinations (in respect of protests as well as parades, as I recommend in Chapter 19). It could be surrounded by the Chinese walls which are characteristic of financial services institutions that perform a variety of functions and must keep completely separate activities (and related information) where there are potential conflicts of interest. Reflecting its operational independence from the rest of the Commission, it would have to have staff whose sole duties would relate to the work of the Committee. A Committee appointed by the Commission either from within the ranks of the Commissioners themselves (or from outside) to discharge a Determination function of the kind I describe in this Report is unlikely to be perceived as independent. It would need to derive its authority directly from the legislation, with its independent role in discharging the Commission's remit in respect of Determinations (along with the

method of appointment of the Chairman and members) clearly specified in the legislation.

21.9 It is difficult to see in these circumstances what the connection would be between the Commission and the Rights Committee. For the Chairman to sit on the Board of the Commission (perhaps even as Deputy Chairman), for example, would suggest some connection which, on the contrary, the structure is intended to preclude. The Committee's work would be formally within the ambit of the Commission (which would provide premises and staff) but the Commission could hardly be expected to take any responsibility, or to be accountable, for activities which it could not control or influence. It is unlikely that there could even be sharing of premises without putting at risk the perception of independence.

21.10 In short, in organisational terms, an attempt to square the circle of unitary Commission and mutually independent functions simply does not work. But, even if some way of making it work could be devised, the effort would be nugatory if, as is more than likely, people were unable to get the old unitary model out of their heads or (even if they were prepared to try to understand the new structure) were unable to appreciate the organisational subtleties or to rid their minds of the suspicion that the different functions would, despite all protestations to the contrary, be working hand in glove. A sophisticated arrangement which contained within it the seeds of such misconceptions would be doomed from the start. Structure, like process, has to be transparent, with possibilities for misunderstanding eliminated so far as is humanly possible.

## **A Rights Panel**

21.11 The alternative option, which I believe is far superior, is to establish as the body which makes Determinations an independent Rights Panel for Parades<sup>1</sup> and Protests, whose Chairman would be required to have legal qualifications and experience and be appointed by the Lord Chancellor. The Panel would also comprise two other members, to be drawn from a list of suitable persons. The list would be selected by the Government Department sponsoring the legislation (currently the Northern Ireland Office). It would be assisted in the task by experienced outside assessors. The field of selection could be composed of people applying to a public advertisement as well as of people nominated by the social partners and the voluntary and community sectors, reflecting the responsibility which civil society has to be prepared to discharge in this difficult area.

21.12 Since the essence of the Panel's task would be to make an objective and reasonable assessment of the extent to which objections lodged against a procession satisfied the conditions for placing limitations on the right to freedom of peaceful assembly, the key qualities one would be looking for in drawing up the Panel list would be integrity, commonsense and independence. They should be people with experience of handling challenging situations. It would not be particularly important in what field that experience was gained, but they should certainly 'know their way around'. They should have the analytical skills which enable them to separate the relevant from the irrelevant, the important from the unimportant, and the central from the peripheral. They should not be social engineers manqués. Their job would be to tease out and weigh up the evidence

<sup>1</sup> See (5) of Glossary of Terms.

in terms of the relevant criteria and reach an impartial decision. They should be good at interacting with people, putting them at their ease and enabling them to participate fully in Panel proceedings. But they should also be people who, with the Chairman, will stamp their authority on proceedings, leaving participants in no doubt that they must behave with courtesy towards the Panel and towards all others involved in the proceedings. I can think of many people in business, in the trade unions, and in the voluntary and community sector (and indeed many people with no formal roles in any of these sectors, or retired) who possess these qualities and competencies in abundant measure. The list should be reflective of Northern Ireland in terms of gender, geography and community background.

21.13 The role of the Chairman would be critical. His primary task would be to ensure that the proceedings were fully in accordance with the principles of natural justice and could stand up to scrutiny if the Determination were to be subject to judicial review. He could be expected to be the repository of knowledge on the import of the ECHR and of the jurisprudence which has been, and will be, developing around it. He would want to ensure that Determinations were properly based on the evidence before the Panel and that, where it was necessary to obtain additional evidence, the Panel took appropriate steps to do so. It would be primarily for him to decide how requests for confidentiality should be dealt with. He would be vital to assuring the quality of the Determinations issued. He would be generally responsible for seeing that, although proceedings were conducted in good order and that the legal framework within which they operated was fully respected (as it must be), the proceedings were not legalistic or unnecessarily protracted but, instead, were as informal and user-friendly as possible. The

model should be the proceedings I described in Chapter 16, drawing on my visit to North Lanarkshire Council.

21.14 The Chairman's ruling should be decisive on matters of law and procedure but otherwise the voice of all Panel members should be of equal weight.

21.15 The Panel should produce an Annual Report, as does the Industrial Court, which was reconstituted in 2001 with responsibilities for trade union recognition.

21.16 The ECHR is intended to be regarded as a living instrument and interpreted in the light of present day conditions. The Panel's work would no doubt contribute to the development of the evolving jurisprudence and it would be surprising if the courts did not have to decide on some important matters. I enquired from the Committee on the Administration of Justice (CAJ) about its ability to support cases to clarify aspects of the relevant law. Whilst CAJ advises individuals and organisations who come to it for legal help, it does not yet have the required waiver from the Law Society rules to enable it to practise before the Northern Ireland Courts. Since it relies for its funding on voluntary contributions, it is not in a position to fund representation. The Human Rights Commission, however, is empowered to assist cases or to take cases in its own name, though, because of budget limitations, it needs to be very strategic in the kind of casework it undertakes. The issues to which Public Processions legislation of the nature I propose could give rise might well fit neatly within appropriate strategic parameters.

21.17 I have referred already (Chapter 6) to the recommendation of the Northern Ireland Affairs Committee that consideration be given to enabling the Commission to contribute to the legal costs of parties taking cases that raise points of general importance in relation to clarifying the application to parades of human rights law. Under my proposals it would fall to the Rights Panel to contribute in these circumstances. I believe it would be in the interests of the Panel as well as of those affected by its Determinations to have issues of general importance considered. I strongly endorse the recommendation of the Northern Ireland Affairs Committee and would extend the arrangements to cover clarification of the application of Human Rights law to protests as well. The ability to have recourse to the Human Rights Commission or the Panel for support should fully meet the needs of the situation.

### **Compliance**

21.18 The Compliance function, which I deal with in Chapter 18, is crucial. A Panel which issued Determinations that could be ignored with impunity would quickly lose authority. It should therefore have a Compliance Branch, which would receive reports from monitors and police immediately after events in respect of which it had issued a Determination. It would also consider any matters raised by members of the public in regard to parades which had taken place. Allegations of breaches considered by the Chairman to be sufficiently serious to be relevant to proceedings related to any future Determination should be followed up by the Compliance Branch and the outcome (including any formal warning as to the consequences of further breaches) recorded in correspondence with the organiser of the parade. Where an agreement

regarding action to be taken (and, if necessary, a formal warning) was not considered by the Chairman to be commensurate with the gravity of the breach, he could arrange for a formal hearing, following which, depending on the findings, a sanction could be imposed as suggested in Chapter 18. A compliance procedure of this kind would be fully consistent with the principle of transparency which should inform the entire Panel process.

21.19 It would be equally important that facilitated settlements having the same force as Determinations should be honoured. Breaches of these should also be dealt with by the Panel as described above.

#### **Parades Facilitation Agency<sup>1</sup>**

21.20 All other matters pertaining to parades should be the province of a body which, given the key feature of its remit, might be called the Parades Facilitation Agency, thereby ensuring that its role is not confused with that of the present Commission. It would have general oversight of the parades scene, except that it would have no responsibility for Determinations or for securing compliance with them.

21.21 In addition to providing a Facilitation function, as discussed in Chapter 14, it would be responsible for:

- (i) The preparation of the Guidelines, Procedural Rules and Codes of Conduct under broadly similar arrangements to those which presently govern the production of the analogous documents by

<sup>1</sup> See (5) of Glossary of Terms.

the Commission. The statutory obligation to consult widely should make specific reference to the Chairman of the Panel so that his experience can be fully tapped.

- (ii) The appointment of monitors in sufficient numbers to monitor not only parades which have been the subject of facilitated settlements or Determinations but also to assess the quality of parading in the Province generally<sup>1</sup>. Follow-up action in respect of the former will be for the Panel. It would be for the Agency to follow up as necessary in other situations. Poor quality parading in areas where there are presently no contentious routes could be storing up future trouble.
- (iii) Education, as in Chapter 25.
- (iv) The production of an Annual Report to the Secretary of State on the discharge of its functions, to be laid before both Parliament and the Northern Ireland Assembly. The legislation should contain a requirement for it to be considered by each or by an appropriate Committee of each.

<sup>1</sup> In light of the proposals in this Report I do not envisage the Facilitation network, which would replace the cadre of Authorised Officers, having any role in relation to monitoring, since this could damage the relationship of trust which has to be built up between the Facilitation function and its clients. Significantly expanding the number of monitors presently available will therefore be crucial and the Agency should be adequately resourced to be able to do so and to arrange the training which is necessary if monitors are to perform effectively. In order to get a proper return from the investment in training and create over time an experienced team of monitors, it will be necessary to attract those who are locally based and prepared to devote more than a single season to the role. Organisers of parades and of protests should take steps to ensure that monitors are treated with respect and courtesy. This obligation should be specified clearly in the Code of Conduct.

- 21.22 The Commission is not included within the jurisdiction of the Ombudsman. I do not see why the staff of both the Agency and the Panel should not be included so far as their administrative functions are concerned.
- 21.23 An Agency with the role I describe could benefit from a degree of innovation in the devising of its governance arrangements. It is difficult to expect active contributors on either side of the parades debate to serve on the Board of a Body responsible for making Determinations in respect of contentious parades. I see no reason, however, why they should have any difficulty being involved in the direction of an Agency with the functions described in para 21.21. It would be a good augury for the inter (and not merely multi) cultural society which I describe in Chapter 9 if it could be given expression in this way, perhaps serving as a role model. I have met a number of people in the course of the Review who I have no doubt whatsoever have the ability and the capacity for empathy which would ensure that they rose to the challenge. I would envisage the rest of the Board being recruited on broadly the basis I propose for members of the Rights Panel in para 21.11.
- 21.24 Care should be taken to ‘stagger’ appointments, with some, as I have seen happen in another context, being initially for two years and others for three, with the option of reappointment. In this other context appointees were offered the choice of a shorter or longer appointment. The aim should be to ensure a measure of continuity in the membership and provide an opportunity to introduce new blood if that should be desirable.

## CHAPTER 22

### KEY FEATURES OF THE ALTERNATIVE MODEL

22.1 To recapitulate, the main characteristics of the model which emerges from this attempt to analyse and synthesize are as follows:

- (i) The regulatory activity, in its various manifestations, persists throughout the year rather than being largely centralised in and around the marching season.
- (ii) Notification of intention to parade is given shortly after the conclusion of the marching season, leading to a major and highly proactive exercise by the Parades Facilitation Agency (and directly managed by it) related to all parades in respect of which formal objections are lodged.
- (iii) When Facilitation failed but the Agency could certify that the organiser had made good faith efforts to achieve a solution, the dispute would move to the Rights Panel for Parades and Protests to determine the issue.
- (iv) The test used by the Panel in deciding whether any limitation should be placed on the right to freedom of assembly would precisely reflect the permissible purposes of such limitation

specified in the ECHR, namely whether it is necessary in a democratic society for the protection of the rights and freedoms of others or of health or morals.

- (v) The process for arriving at Determinations would be transparent and fully consistent with the principles of natural justice. There could be appeal to the courts on a point of law and the Panel's proceedings would be subject to judicial review.
- (vi) A Determination could stand for a period of up to five years if the Panel deemed appropriate, subject to review if there was any material change of circumstances.
- (vii) Protests as well as parades would be within the scope of the Panel.
- (viii) It would be for the police (again in conformity with the ECHR) to determine whether on grounds of public safety etc any limitation should be placed on a parade or protest in whatever form either might emerge from the Panel process.
- (ix) Those parading or protesting would be subject to a more rigorous Code of Conduct.
- (x) There would be immediate follow-up with organisers of parades or protests where breaches of a Determination were reported by

monitors, police or others, the outcome of which could have implications for any parade or protest planned for the future.

## CHAPTER 23

### PARADES AS EVENTS

- 23.1 Like sports fixtures, road races or open air concerts, parades are public events. Any organisation bringing people together (often in thousands) for any event bears a huge responsibility for doing everything within their power to ensure that it goes off peacefully, with minimum inconvenience to those who are not involved in the event. The expectations which people have of those who organise events – of any kind – is now extremely high.
- 23.2 To insist that those who organise parades should match those expectations has nothing to do with the suppression of the culture or beliefs of those who take part in them. There would be something inherently wrong with a culture or a belief system which found expression in disorderly, drunken, offensive, intimidatory, abusive behaviour. I have no doubt whatsoever that these views are shared by all who hold positions of responsibility within the marching tradition and by the overwhelming majority of those who march. Laying down stringent requirements for parades reinforces the efforts of the majority to induce a proper sense of responsibility on the part of the minority whose actions can bring disgrace on the whole organisation.
- 23.3 All organisations – whether they be businesses, bands, lodges or clubs – have a brand to protect. It is what gives the organisation its distinctive character. Protecting the integrity of the brand is crucial. It is not achieved – whether in

business or elsewhere – by clever PR. People are not fooled for long by spurious spin or deceived by presentational skills. They are quick to detect inconsistencies in what organisations – again, whether in business or elsewhere – profess and what they practise. Trust and confidence, once lost, is difficult to recapture. To dilute the brand is to destroy the brand.

23.4 The Loyal Orders emphasise their deep commitment to Christian beliefs and, again, I am in no doubt whatsoever that these beliefs are a (perhaps the) core element in the lives of many of their members. Qualifying for entry to the various orders within Orangeism would (if the criteria were strictly adhered to) pose a challenge for the best of us in an increasingly secular environment. The Orders wish to be perceived as being motivated by that commitment. Many of the bands which participate in Loyal Order parades or parade in their own right proclaim commitment to an identity defined by the accompanying adjective 'Protestant'. I doubt if any serious Protestant would wish his or her religion to be judged by behaviour for which there is no mandate within any Protestant system of belief.

23.5 It is perfectly reasonable for the community (and it includes many who, whilst not involved with the Loyal Orders or even sympathetic to their vision, recognise their right to express their culture and their beliefs) to expect conduct and demeanour to be consistent with profession. A church parade on a Sunday employing a band which was engaged the previous evening in drunken and disorderly behaviour at a band parade must expect the bona fides of its organiser to be questioned.

23.6 It is therefore proper:

- (i) That parades, as events, should be subject to a strict code of conduct, which is rigidly adhered to by those organising, and participating in, parades.
- (ii) That compliance is enforced and that breaches of the statutory Code carry sanctions which reflect the fact that compliance is not discretionary.
- (iii) That breaches of the Code which also constitute offences under the law are pursued by the police.

23.7 There is no question of parades being expected to have the characteristics of a funeral procession. A Code need contain nothing which prevents parades being the 'family day out', the term which those from the parading tradition often use to describe the typical parade event. There need be nothing in the Code – nor do I think there is anything in the present Code – which militates against events which are totally relaxed, enjoyable, and even joyful.

23.8 For most of those within the parading tradition, parades – even those which are not closely associated with a church service - will always have a significance which transcends any notion of spectacle or carnival. But Northern Ireland will be the poorer if, for many of its citizens and all of those visiting during the marching season, the major events do not also retain the character of spectacle and carnival. I know that many on all sides in Northern Ireland would wish to see a situation whereby parading gave rise to an influx of tourists for whom one of the

attractions of being here was precisely the pageantry associated with all strands of the parading tradition.

23.9 I suggest in Chapter 27 that the seriousness of intent underlying the Code should be underlined by the inclusion within it of reference to the offences which may arise under the law for conduct which breaches the Code. I recommend, however, that, now that there is a great deal of experience of the working of the Code, it should be reviewed and revised as necessary, in consultation, of course, with the interests concerned, all of whom should co-operate fully in the process. I would like to see such a review conducted in the spirit in which this Chapter is written.

23.10 I have six suggestions (apart from that instanced above) which could be reflected in work on the Code.

(i) Organiser responsibility

Taking any significant number of people on to the streets (and in major parades it is a matter of over 10,000, plus those accompanying them) is a huge responsibility. The organiser should be identified from the start and should be the senior officer of the parading organisation. He or she should sign the form giving notice of the parade and should be required to sign a document formally undertaking responsibility for compliance with the Code. To ensure compliance, that responsibility can – indeed

should – be translated into responsibilities devolved to others but that does not relieve the organiser of ultimate responsibility.

(ii) Risk assessment

No one should embark on any public enterprise of this kind without undertaking a risk assessment, identifying what the risks are, how they can be removed or mitigated and what contingency plans need to be in place if something unexpected occurs. For a church parade involving 30 or 40 people on a Sunday in a quiet village, the risk assessment process will be very simple and informal. For major parades it should be as thoroughgoing as the scale and complexity of the event and the potential attendant risks require. It should be formally written down so that it can be produced as evidence of the organiser's concern to promote a peaceful, well-conducted event. The parade should be followed by a de-briefing, when any necessary lessons are drawn and built into future plans.

(iii) Marshals

I am aware of no disagreement on the point that all parades must be adequately and effectively marshalled and that marshals should be properly trained.

I understand that there are two formal parade marshal training programmes in Northern Ireland, one at NVQ level and the other a basic training programme, in the piloting and launching of which the Parades Commission was actively involved. There has also been innovative Loyal Order engagement with training initiatives for marshals in Great Britain. An assessment should urgently be made as to how much and how fast local provision needs to be expanded (and in which locations) to ensure that, within 3 years, it can be made a firm requirement that all parade marshals have at least basic training and that a proportion of those involved in the larger parades are trained to NVQ standard. Some modest financial support from public funds may be needed to enable the programme to gain adequate momentum but, given the pay-off from well-conducted events which reduce the pressure on police resources, the results should give a good return on the outlay. Since stewarding/marshalling in a wide variety of contexts (including sport and musical events) where crowd management is an issue, is now a major element in any community safety strategy, a coordinated approach to meeting the entirety of the need may prove rewarding, at least so far as the provision of common core skills is concerned.

The present provision that marshals need to be 'fully aware of their responsibilities and role' should be elaborated into a further requirement that the organiser of any parade should discuss with the police where the marshals' responsibilities end and those of

the police begin. In particular, the respective roles in relation to those not part of the formal procession, but accompanying it, need to be crystal clear. Where in regard to a situation of any potential sensitivity it is vital that there should be no misunderstanding, the agreement reached in discussion should be formalised in writing.

In most small parades of an uncontentious nature, two or three marshals for the average-sized lodge and accompanying band should be adequate but more elaborate arrangements will be needed for larger occasions. In this connection it may be useful, when revising the Code, to bear in mind the following points distilled from a document prepared by West Midlands Police for those organising events:

- When preparing an event the organiser should determine how many stewards are needed and exactly what they will be required to do. When people are arriving by coach, it may be necessary to appoint one or more stewards per coach.
  
- It is vital that organisers retain control of their event. To assist, a definite chain of command should be set up so that stewards are fully aware to whom they are responsible and to whom they can refer any issues.

- A 'head steward' should be appointed, preferably from the organising committee, who will have overall responsibility for all briefing. The head steward should make him/herself known to the senior police officer in charge of the event on the day or at a time convenient to both prior to the event.
- 'Chief stewards' should also be appointed and have responsibility for either a section of the march or route and/or specific locations.
- On occasions the police may have to redirect a procession to prevent breaches of the peace. Accordingly, stewards must follow instructions given to them by the police – not the organiser. If a steward ignores such instructions, he or she may be guilty of obstructing police in the execution of their duty.

(iv) Paramilitary trappings

The issue of flags, insignia, emblems, names etc which denote that those displaying them are identifying themselves with a proscribed organisation needs to be more vigorously tackled. There should be no question whatsoever of any parading Order employing bands which have paramilitary trappings. I suggest in Chapter 24 the need to review the contracts presently governing

the hire of bands and I deal further with bands in the same Chapter.

(v) Urination

Urination in public and private places not intended for the purpose is a recurrent theme in any discussion of parades – and not only discussion involving those unsympathetic to the parading tradition. I dare say the incidents get no smaller in the telling but the practice is simply unacceptable and merits zero tolerance.

Organisers of most major sporting and cultural events take their responsibilities seriously in this regard and make provision for public toilets. The North-West 200 motor cycle race is an example where organisers and the local council work together to ensure that existing facilities are open (an obvious point but not, I gather, always attended to where parades are concerned) and extra portable toilets are available. Any sensible risk assessment should address this issue so that the dignity of marchers is not compromised and that wholly unnecessary offence is not caused to anyone.

(vi) Accompanying persons

These were referred to, usually in negative terms, during the Parliamentary debates as ‘hangers-on’. One Member said: ‘.... it

has always been the hangers-on who set off the trouble. The problem for the procession organisers is that they do not know who will turn up. There are always some nut cases who will appear at any procession'. Dealing as necessary on the day with those who accompany processions is a matter for the police rather than for the organiser or marshals. However, where lodges, clubs or bands have known supporters who make a practice of accompanying them during processions, the Code should enjoin them to conduct themselves in a way which does not bring dishonour on the occasion and, when there is opportunity to do so, the requirements of the Code should be drawn to their attention prior to the event. Where it is the case that certain lodges, clubs or bands participating in processions seem persistently to attract unruly elements, it may be more difficult for them to establish that they seek to exercise their right to peaceful freedom of assembly. Marshals also have a role to play in ensuring that the conduct of those participating in the procession is not conducive to reinforcing any disposition on the part of those accompanying them to cut loose.

Alcohol plays its part here too and it is not unknown for those accompanying band processions in particular to act as bag carriers for the quantities of alcohol which fortify the performers. Marshals could be expected to ensure that transactions of this kind cease.

23.11 There is nothing in improved performance in any of these respects which diminishes anyone's ability to express their culture. It is unlikely that, in the near term at least, the parades issue will be wholly free from contention. But the one matter which it should be possible to clear off the table once and for all is the conduct of parades as events. I recommend (Chapter 15) that both the steps taken by the organiser to ensure a parade is well conducted and past conduct should be a relevant factor when it is being decided whether a parade would affect the rights and freedoms of others. The situation must speedily be achieved when there would be no occasion to find the parade deficient on that score. Misconduct could, indeed, prevent a parade even getting to the stage of being assessed against the 'rights and freedoms of others' criterion, since the right to freedom of assembly under Article 11(1) of the ECHR is the right to freedom of peaceful assembly.

23.12 It is now widely recognised that the misuse of alcohol is widespread in our society and is a significant factor in many problem situations (whether it be the tension between students and their host communities or between the opposed groups where there is potential for community conflict). It is also widely accepted (within the parading tradition itself) that drinking is a key factor in cases where the Code of Conduct is breached. I have seen correspondence from one of the Loyal Orders to its members, issued ahead of the marching season and indicating the strict sobriety which must be observed. As was said during the Parliamentary proceedings on the 1998 Act, 'when John Barleycorn calls in, the whip is out and people get started'.

23.13 When one examines S13 of the 1998 Act which relates to the control of alcohol at public processions; the local council by-laws regarding the consumption of alcohol in designated areas; and Translink's Conditions of Private Hire, it is difficult to avoid the conclusion that, for the most part, the need is for rigorous implementation and enforcement rather than for new laws and new offences. Northern Ireland does, however, lack legislation such as was introduced in Great Britain as a result of incidents at sporting fixtures. Amongst various alcohol-related offences in the Sporting Events (Control of Alcohol etc) Act 1985, for example, is one which makes it an offence for a person knowingly to allow alcohol to be carried on to a public service vehicle if he is the operator or the person to whom it is hired. I have been informed that the position regarding the consumption of alcohol on trains and buses in Great Britain has changed dramatically with the introduction and enforcement of this legislation and it is difficult to understand why similar provision has not been enacted in Northern Ireland. It should not, of course, apply only to vehicles used in connection with parades.

23.14 I was pleased to see that, in many Determinations, it is acknowledged that organisers have been compliant with the Code of Conduct. They are to be congratulated on the efforts which have secured them such commendation. However, whilst good practice is now widespread, high standards are not yet being universally attained (as they should be) and there are still too many bands, in particular, which fall short of acceptable personal behaviour, despite the worthy standards which are espoused by, for example, the Ulster Bands Association (Appendix 6).

23.15 Whatever the sphere of activity, complete compliance always proves elusive.

There will be people who fall short of the qualities to which the great bulk of their peers want them to aspire. We could all loosen up a bit and be prepared to tolerate the occasional deviant. But that means that the overall pattern of behaviour must be such that the deviant is seen to be exceptional. And the response by the organiser to deviant behaviour must be one which makes clear where he stands and that there is no tolerance for this behaviour or room for those who are not prepared to conform to the rules. I believe that such an approach would be welcomed by the vast majority of those who parade.

## CHAPTER 24

### BANDS

*'Bands, bands and more bands'*

*The organiser of the New York St Patrick's Day parade defines the essential ingredients for a good parade.<sup>1</sup>*

#### A social phenomenon

- 24.1 Perhaps the most notable new feature of the parades scene this past half century has been the emergence of the marching bands as a key element in their own right, particularly within the Protestant/Unionist tradition. Up to the early 1970s, most bands had a connection with their local lodges or clubs and I understand that the link between the Independent Orange Order and the bands which accompany their lodges is still strong.
- 24.2 An important study<sup>2</sup> has explained the rise of the bands as akin to the development of cultural forms in inner-city areas in Great Britain which are an attempt to retrieve some of the social cohesion which urban redevelopment and economic dislocation have destroyed. These new forms have been characterised by their sharp territorial focus and their ethnically exclusivist character. In the Northern Ireland context also, the bands serve as a focus for local loyalties, give expression to teenage machismo and provide public and recreational space for the marginalised young. But they also create the

<sup>1</sup> This is the epigraph to a very interesting chapter on the marching bands by Dr Neil Jarman in The Irish Parading Tradition ed T G Fraser (2001).

<sup>2</sup> D Bell, Acts of Union (1990).

symbolism which has resonance with, and maintains the tradition of, populist loyalism within a much wider community made up of men and women of all ages. It is, therefore, a very significant social phenomenon, an expression of Protestant grassroots culture which, however it may be viewed by some (many of them within Unionism as well as in the Nationalist/Republican tradition), cannot be ignored or wished away.

- 24.3 It is, however, accepted, even by those strongly supportive of the marching band culture (and I quote from one of them) that 'there are still a small number of bands (or individual band members) who misbehave and bring our bands into disrepute'. The question is, therefore, how to ensure that the culture which the bands represent is able to express itself in a way which does credit to it and recognises the rights and freedoms of others.

### **The Associations**

- 24.4 The principal organisation for the competition bands, (some of whom, of course, may also take part in Loyal Order parades) is the North of Ireland Bands Association, whose Secretary I met. The main Association for the marching bands, however, is the Ulster Bands Association, from which I received a very comprehensive submission and whose representatives I also met.

### **Ulster Bands Association**

24.5 Its Constitution states that ‘the Association shall be non-political and non-sectarian and shall endeavour to develop good relations with people of other religions’. Amongst its objectives are the following:

‘(x) to develop a programme to enable people to understand and deal with issues, for example, of cultural difference, prejudice or conflict which would assist groups address issues of sectarianism or racism.

(xi) to, through its Members, Associate Members and Branches, play a positive role in fostering community spirit at local level and to enable people to realise their full potential and to use it for the benefit of these same communities.’

The Association has issued a Code of Conduct which fits well with its aim ‘to demonstrate our culture in a way that is a colourful spectacle there for all to enjoy’ and ‘to ensure responsible conduct and behaviour and to create a more positive and acceptable image in the public place’. I return to the issue of conduct later in this Chapter.

### **Educational strategy**

24.6 In 2000, the Association held some (facilitated) interaction workshops, whose outcome was summarised in a paper which I have been able to read. I was impressed by the proposals which emerged for an education strategy:

'An educational strategy needs to be concerned with cultural education aimed at the whole community, though there will be a particular emphasis on the education of a younger generation, which is not only cultural, but in a very real way social education. The potential for positive social education of young people is great, and, for many, the marching band will be one of the few experiences for the learning of discipline, social life skills and education for positive citizenship.

The strategy also needs to be concerned with education of the whole community. This does mean taking seriously the dimension of community relations. There are negative images in both Protestant and Catholic communities to be overcome ..... Every cultural expression needs to work at profile and image and in a multi-cultural society there is no dominant or superior role for any. Within the growing pluralism the marching band tradition has its legitimate place.'

24.7 The following education objectives emerged from the workshops:

- 'to improve musical standards;
- to enhance discipline among members;
- to seek greater understanding of one's own cultural tradition;
- to develop the formation of social values;
- to raise social and community awareness;
- to enhance respect for others and their traditions;
- to develop self-respect and worth among members;
- to promote a confident cultural tradition;
- to promote a wider understanding of this cultural tradition;
- to educate others in the ethos of the marching bands tradition;
- to educate members in methods of conflict management and resolution;
- to aim to explore diverse cultural traditions.'

24.8 I believe I can assert pretty confidently that, if I had taken out the reference to marching bands and had not identified the source of this material, few would have guessed that it emanated from the Association whose key objective is 'to establish marching bands as an independent culture'. I do not naively suppose that the ideas set out above would play well with every marching band within the loyalist tradition. But I am firmly of the view that an organisation which generates such material has demonstrated considerable leadership potential and deserves support and encouragement. That could take the form of financial support for the building up of its organisational capacity. But I suggest there is also a strong case for then helping that capacity to implement a strategy which reflects the educational objectives set out above, bearing in mind the emphasis placed on social as well as cultural education.

24.9 The musical dimension of this educational programme would be crucial. Marching bands are now predominantly single-tonal flute bands. Those who have sought to educate me in these matters assure me that one of the categories of this single-tonal group is the b flat five keyed flute, 'an extremely versatile instrument deserving of more recognition by musical professionals than it has received' and capable of playing 'most pipe band music and much of the brass repertoire'.

24.10 The workshops produced ideas which could inform the development of a musical education programme:

'Like all instruments [the flute] has capacity for improvement in quality of playing and performance. This would be enhanced by a system of

accreditation for those who teach the instrument. An assessment method needs to be developed which can and will raise the standard of teaching and performance. Ideally this should be an external accreditation.'

A Policy Document of the Association was sure that 'given the opportunity, .... we can direct a high percentage of our youth away from the dubious activities that only youth can devise towards a useful and enjoyable pastime'. There are, of course, already examples of bands significantly upgrading their musical capabilities.

24.11 Obviously, at least initially, a programme meeting the educational objectives emerging from the workshops would be 'single identity' in character but I have already argued in Chapter 9 that there is no escape from the need to put increasing emphasis on this technique as a key determinant of the success of an effective community relations strategy.

24.12 The Arts Council of Northern Ireland, through its National Lottery Funds, has since 1994 made considerable sums of money available to bands but I suspect that, whilst some of these would also be marching bands, the majority would fall into the category of competition bands who would be members of the North of Ireland Bands Association and who could be described as 'providing a music service acceptable to the wider community'. The marching bands I have been describing in this Chapter are not, as I understand it, regarded as meeting the criteria for funding. Nor do they easily, certainly so far as their main activities are concerned, fit the criteria of the 'Diversity 21' programme of the Department of Culture, Arts and Leisure.

24.13 It is important that support for those currently supported should continue. But it would represent a signal failure of public policy if means cannot be found of seizing the opportunity presented by the forward-looking thinking within the Ulster Bands Association which I have described above and I recommend that the issue be given serious and urgent attention. An appropriate programme will not come cheap but there is significant potential pay-off from removing a sense of grievance that this significant manifestation of Protestant grassroots culture has been 'consistently ignored or deliberately excluded ..... Given that parades are one of the few ways to outwardly express our culture and heritage, the Association believes that marching bands should be afforded an equality of status with other performing arts'.

24.14 Whilst my ideas in this area were stimulated by my contact with the Ulster Band Association, I must emphasise that I intend my remarks to apply equally to marching bands within the Nationalist tradition. Indeed I was greatly encouraged by the enthusiastic acceptance amongst those within that tradition with whom I raised the issue that the development of bands within the Loyalist as well as the Nationalist tradition should be supported. It was also suggested that there could be more opportunity than might superficially appear for co-operative activity to this end between bands from both traditions.

### **Conduct**

24.15 I noted earlier that there was a problem of misbehaviour on the part of some bands or of individuals within bands and I have referred to the Ulster Bands Association's Code of Conduct, reproduced in Appendix 6. In the interests of the

marching bands as a whole, and in support of those within the culture who are anxious to adopt a responsible position, effective action to deal with the problem needs to parallel equally effective initiatives of the kind to which this Chapter has so far been devoted. I believe that action needs to be taken on two fronts.

### **Hiring of bands**

24.16 First, the Loyal Orders should review the basis on which they hire bands. I have undertaken a detailed comparison of the Conditions of Engagement operated by the Grand Orange Lodges of Ireland and of Scotland. The former contain two useful Clauses which are not in the Scottish Conditions, namely that 'shouting in an unseemly manner for the emphasis of certain tunes is strictly forbidden' and that 'bands taking part in Church Parades must also attend the Church Service'. However, there are elements of the Scottish Conditions which could with benefit be adopted.

24.17 Perhaps most important, 'All Scottish Flute and Accordion Bands [which are] engaged must belong to a Band Association recognised by the Grand Orange Lodge of Scotland'. Translated into the local context, this would ensure that bands which wished to be engaged by the Loyal Orders were within a professional body dedicated to enhancing the standards and reputation of the marching bands.

24.18 Also very importantly, in Scotland a new band, in its inaugural year, must be sponsored by a private lodge (subject to the approval of the District Lodge) or by a district lodge and must actively participate in parades with that lodge. All

sponsoring of new bands is subject to the ultimate approval of the County Grand Lodge and, at the conclusion of all engagements undertaken by a band in their inaugural year, sponsors are required to submit a report on the band to their County Grand Lodge.

24.19 Other elements which could usefully be adopted are:

- (i) A much more prescriptive approach to standard of dress. The Scottish Conditions specify that:

‘Dispensation to vary the foregoing uniforms can only be given by the County Grand Lodge of the Association to which the Band belongs or by Grand Orange Lodge of Scotland. The alternative uniform will be subject to inspection before a decision is made’.

- (ii). Under the Grand Orange Lodge of Ireland Conditions, flags which may be carried by bands are approved at the discretion of Parade Marshals or the Senior Officer of the District Lodge under whose jurisdiction the parade is taking place’. The Scottish Conditions are much more explicit. After indicating the number and types of flags that may be displayed, the Conditions go on:

‘Flags must be flown openly; furled flags will not be permitted on parade. Bands may also display a bannerette denoting the Band name only’.

There is also the following Clause which, unlike the majority of the Clauses, is both in capital letters and underlined:

'Bands must comply with the provisions of Terrorism Act 2000<sup>1</sup>. No paramilitary symbolism or connotation will be displayed on uniforms, drums, flags or bannerettes. This includes a chosen name giving the initials of a proscribed paramilitary organisation, or Y.C.V.'

- (iii) The Grand Orange Lodge of Ireland Conditions state that 'under no circumstances should liquor be consumed in the ranks while on parade, or taken aboard coaches or other public transport'. These last eight words do not appear in the Scottish Conditions but the latter emphasise the following, again in capital letters:

'It is strongly recommended that band members refrain from drinking alcohol at all, from early morning until the conclusion of evening parades. Any complaints against, or behaviour by, individual band members, which relate to alcohol, will have repercussions on the band as a whole.'

- (iv) In Scotland, for persistent contravention of the Conditions of the Band Contract or behaviour likely to bring disrepute to the Orange Order while on parade, the organiser of the parade is empowered to have the band removed from that parade.

<sup>1</sup> S13 of the Terrorism Act 2000 states:

- (1) A person in a public place commits an offence if he –  
(a) wears an item of clothing, or  
(b) wears, carries or displays an article,  
in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation ....
- (3) A person guilty of an offence under this section shall be liable on summary conviction to –  
(a) imprisonment for a term not exceeding six months,  
(b) a fine not exceeding level 5 on the standard scale, or  
(c) both.

24.20 I would urge the Loyal Orders to search their conscience as to whether the existing Conditions are too often observed only in the breach and as to why the Conditions should not be strengthened to bring them into line with those of the Grand Orange Lodge of Scotland.

24.21 The author of the observation I quoted in para 24.3 above made the very reasonable point that bands which are accused of breaking the rules should have a fair say. I understand that at least one of the Loyal Orders has a disciplinary committee to deal with all complaints and a range of sanctions. It would be fully consistent with the theme of transparency which runs through this Report that similar arrangements should become standard where they do not already exist.

#### **Code of Conduct and Registration of bands**

24.22 The second line of action I recommend relates to the registration of bands. Government has had such a power since 1971 and it currently exists in Section 12 of the 1998 Act, which stipulates that the Secretary of State may by order provide for the registration of bands. It has never been used. When the legislation was going through Parliament, Government said that it did not expect to have to invoke this provision, since the powers available to the Parades Commission should enable it to deal with any problem. These powers have in practice clearly proved insufficient and I therefore recommend that a scheme of registration be introduced.

24.23 However, I see no reason why a sledgehammer should be used to crack a nut, unnecessarily inconveniencing bands that are prepared to behave reasonably and imposing avoidable costs on the public purse. What I therefore propose is:

- (i) A date should be set after which a band participating in a parade which does not fulfil certain conditions and any organisation hiring such a band for that parade (or, if organising the parade, allowing such a band to take part) is guilty of an offence.
  
- (ii) The conditions to be met would be:
  - a. that the band has subscribed to a Code of Conduct for bands issued by the regulatory authority (which under my proposals would be the Parades Facilitation Agency) or to a Code issued by a Band Association and approved by the Commission; or
  
  - b. that the band is registered under the Government's registration scheme.

24.24 There is no reason why all bands should not be prepared to sign up to, and observe, a Code of Conduct and there is therefore no reason why any band should require to be registered. However, there would need to be provision requiring a band which was found by the Agency to have breached the Code of Conduct to which it had subscribed, or to have otherwise been in breach of a Determination, to register and to have its registration renewed annually. Again,

in order to avoid unnecessary bureaucracy, provided no problems have arisen, the requirement to renew should lapse after three years.

24.25 I believe that the Code of Conduct could usefully import the provisions regarding uniforms, flags and alcohol which are in the Grand Orange Lodge of Scotland Conditions discussed above. The stark message which a Code of Conduct should convey is summed up in a clause in one of the Scottish local authorities' Conditions regarding Parades: 'No cause for complaint shall be given'.

24.26 Certain consequences should flow from these arrangements:

- (i) Grouping of bands into one or more professional associations should be encouraged, with all the resultant benefits from educational programmes etc which I described earlier.
- (ii) The Loyal Orders should be able to achieve parades which are not at risk of being marred by misbehaviour on the part of bands.
- (iii) The underpinning of a Code of Conduct by a Government scheme of Registration, operating only in default, should raise standards generally.
- (iv) The very small minority of bands (as I would hope and expect) which were required to register and breached their conditions of registration would be denied the ability to take part in parades and be guilty of an offence and subject to penalty if they did so.

24.27 I understand that the North of Ireland Bands Association itself operates a system of annual registration, with each bandsman being required to have a registration card that includes name and address as well as a photograph. Other band associations might consider a similar scheme and a Government registration scheme could similarly provide for individual registration cards as well as band registration certificates.

#### **Notification of intention to parade**

24.28 There has been debate as to whether, when notifying intention to parade, the organiser of a band parade should simply list the bands to be involved or (as has been the practice) also furnish the name of someone associated with each band. The former should be sufficient. More difficult is the issue of bands not included on the list because the organiser, having advertised the occasion widely, is not sure who will turn up on the night. If it were known that bands that wished to parade had no option but to let the organiser know in advance, bands could presumably make arrangements to comply. This is very much in the organiser's own interest, since he, as organiser of the parade, is responsible and accountable. In any event, this is the sort of issue which should be capable of practical solution through the kind of machinery I suggest in para 24.32.

#### **Times of parades**

24.29 My final point, which is specific to band parades, relates to the fact that, because most participants usually have to finish their normal day's work before undertaking a parade engagement, many band parades take place in the

evening and, since the larger parades draw their participants from all over Northern Ireland, there are considerable journey times involved in getting to most host venues. Many of the notices for such parades give an official starting time ranging from 7.45pm to 8.30pm. It would not, therefore, be unusual for parades to finish no earlier than 10.30pm or later. The time at which parades end is one of the most usual causes of complaint in relation to band parades. It also reinforces adverse perceptions regarding the frequency of parades.

24.30 It ought to be possible to get a sensible solution which:

- (i) Provides ample opportunity for the culture represented by band parades to be given full expression.
- (ii) Recognises that it is going to be difficult to have band parades which begin much before 7.30/8pm or end before 9.30/10pm, although it should be noted that , in Scotland, at least one local authority's Conditions regarding Parades stipulate that no band shall play later than 9pm.
- (iii) Also recognises that parades serve as a vital means for bands to support themselves financially.
- (iv) Takes into account the views of those who are not wildly enthusiastic about band parades, still more those who are antipathetic towards them.

24.31 One can think of a number of possibilities, for example:-

- that no parade should last longer than 2 hours or finish later than 10 o'clock; or
- that no parade on the public highway should last longer than one hour and should then proceed to an open area, well away from residential properties, where it could finish off the evening until, say, 11 o'clock and whence all bands would disperse, with that also being the pick-up point for transport for those requiring it. Fund collection could carry on in the field, from what would no doubt be substantial gatherings of committed supporters, as well as during the parade itself.

24.32 I put forward these suggestions diffidently in the confident expectation that they will be found wanting in many respects. I shall not be disappointed by that but extremely disappointed if those who are sufficiently informed to devise the optimum solution do not accept that the issue is worthy of attention; that the criteria I advance in para 24.30 are reasonable; and are prompted to put their minds to it to come up with that solution. Given an open relationship between the Parades Facilitation Agency and the band community, it is the kind of issue I would expect to see discussed in a friendly and constructive, not adversarial, atmosphere by a group, set up between the machinery and the bands for that purpose.

### **An unrivalled opportunity**

24.33 I believe that movement in the direction indicated in the totality of this Chapter offers the bands an unrivalled opportunity to carve a highly respected place for themselves, of which they can be proud, amidst the diversity of cultural expression which has to be a feature of a society that wishes to be genuinely multicultural and increasingly (as I argue in Chapter 9) intercultural as well.

## CHAPTER 25

### EDUCATIONAL ROLE

- 25.1 The 1998 Act (S(2)(1)(a)) imposes a duty on the Commission 'to promote greater understanding by the general public of issues concerning public processions'. Under my proposals, this role would fall to the Parades Facilitation Agency. There seem to be at least four significant ways in which this duty might be discharged.
- 25.2 First, organisers of parades need to understand the rationale and role of the regulatory machinery and how it operates. Under the proposals in this Report, that would involve careful explanation of the process of settlement (facilitated by the Agency) and the process conducted by the Rights Panel for Parades and Protests to determine the rights issues if settlement proves elusive. The latter could not be fully understood without explanation of how it relates to the ECHR. It needs to be clear to everyone that the United Kingdom and its public authorities have no discretion as to whether they comply with what is an international obligation, now enshrined in UK domestic law. On the proposals in this Report, the legislation regulating parades in Northern Ireland would be exactly aligned with the ECHR. The wider public also needs to understand how the parades issue fits into an overarching framework of rights.

- 25.3 The Agency would have to be proactive in working with organisations which parade and with others to help arrange the conferences and seminars which would be needed to disseminate the message.
- 25.4 Second, the parades issue and the extent to which it illustrates the complementary nature of rights and responsibilities within the structure provided by the ECHR could form a very useful module within the citizenship programmes which should get higher profile in schools in the future. The module could also constitute a case study of how one sets about accommodating differences when rights appear to conflict.
- 25.5 Third, the Agency should be active in promoting an adequate quantity and quality of training for those who play crucial roles as marshals and monitors in furthering the purposes of the legislation.
- 25.6 Fourth, and most difficult of all, the Agency, in liaison with the Community Relations Council and other relevant bodies, should play its part in providing the intellectual leadership needed to get effective action on the historical and broader contextual issues addressed in Part III of this Report. It may be possible, for example, to envisage a pilot history programme, attractively packaged and widely available, to encourage people to explore what might be involved in both communities taking joint ownership of 'a past apart'. To the extent that the broader questions in Part III are addressed, the tensions around parades disputes will be progressively eased. The Agency's concern that these questions receive adequate attention should give it the confidence to press vigorously for action. For example, the outcome of the current review of policy for enhancing

community relations in Northern Ireland must have implications for the context in which parade disputes are handled.

25.7 Single identity community relations work of the kind discussed in Chapter 9 will be critically important and in Chapter 24 I have considered ideas within the Ulster Bands Association which could form a significant element of such work. In this case (in view of its very direct interest in the outcome) the Agency might be more directly involved than with some other projects. I also received interesting Loyal Order evidence of steps being taken to 'connect' with the Nationalist community. I would hope that this highly desirable outreach activity (preferably reciprocated) would expand significantly. Means of providing encouragement through financial support for appropriate development work contributing to greater mutual understanding should be seriously considered.

25.8 Finally, it is appropriate that I mention here a very interesting suggestion put to me, in evidence from a Nationalist source, for the mounting in (what on my proposals would be) the Agency's offices of a display of banners and other memorabilia of the Loyal Orders and other parading organisations. This would signal in a very visible way that the purpose of regulation is to provide the framework within which the different cultures which make up our society can be given the fullest possible expression.

## CHAPTER 26

### PARADES AND THE ECONOMY

- 26.1 I have no doubt that, if this Review had been conducted half a dozen years ago, it would have elicited a much stronger response from the wider business community. Few of the representative bodies to which I wrote took the opportunity to voice concerns. This may in part have reflected the difficulty which bodies representative of the wider community have in achieving a consensus on a divisive issue of this kind.
- 26.2 However, a major factor also, I believe, is that disputes over parades no longer significantly affect the life of the community at large, putting Northern Ireland out of business for days on end. Roads are not blocked, hampering goods traffic and disrupting supply chains, with dire consequences for businesses dependant on retaining the confidence of (particularly overseas) customers. There are no disputes leading to loss of life, significant injury (other than to the police, who still find themselves in the middle) and widespread damage to property running into millions of pounds. Such trouble as there is has been subsumed into the broader context of community disorder and violence.
- 26.3 So far as the outside world, however, is concerned, marching seasons still equate to rising tension, hot summers and communal disorder. Even inside Northern Ireland, there is apprehension each year as to what is likely to happen.

26.4 It would therefore betray dangerous complacency to think that, because the consequences of disputes are largely borne by the areas within which trouble flares, contentious parades no longer have any significance for our economic future. There are at least five points to be made here.

26.5 First, with average gross domestic product at only 80% of the UK average, Northern Ireland is the region which can least afford to put obstacles in the way of economic growth. Unlike the Republic of Ireland, we were prevented by the appalling image which we presented to the outside world during the Troubles from attracting the flow of inward investment which was needed to upgrade our industrial base. At the very time when globalisation offered an unprecedented opportunity to become integrated into ever-strengthening international trade and investment flows, the province was tearing itself apart. In the present uncertain economic climate it is difficult to say when or whether those flows will regain their former momentum. We can be assured, however, that, as and when they do, the competition to gain access to them will be immense. We are guilty of gross self-delusion if we suppose that the kind of investment we need to attract will locate here in preference to going to other locations where the perceived risks are so much less. Every image of embattled police lines flashed around the world diminishes our ability to realise our economic potential. Moreover, some of the areas which generate most of the images are precisely the areas where economic regeneration is most imperative. To the extent that parades disputes are contributing to wider problems of community unrest, the need to find better means of resolving them remains crucial. As it was put to me in evidence by the Minister for Enterprise, Trade and Investment for Northern Ireland:

‘With competition for mobile investment more intense than at any previous time in IDB’s experience, any negative overseas reporting of such issues can immediately weigh against a decision to invest in – or even consider investing in – Northern Ireland .... [and] place [our] sales pitch at a significant disadvantage.’

26.6 A study recently reported from the United States identified a strong correlation between a region’s economic productivity and the diversity of its population:

‘The key to understanding the rise of [the] creative capitals’, it stated, ‘lies in the three Ts of technology, talent and tolerance. Each is a necessary – but by itself insufficient – condition for economic growth, .... [They] explain why some cities fail to grow in spite of having deep reservoirs of technology and world-class universities: they are unable to be sufficiently tolerant and open-minded to attract top creative talent.’

We do well to beware the consequences of failing to make our diversity a strength rather than a weakness.

26.7 Second, whilst local business has become adept (as it did so resiliently during the Troubles) at addressing what still have to be seen as the potential risks surrounding this marching season – eg by arranging for finished products to be stockpiled in advance at a separate off-site distribution location lest supplies be interrupted – the consequential imposition of an unnecessary burden on its cost base cannot be ignored.

26.8 Third, the impact on tourism of the fears which the possibility of disputes around parades induces cannot be challenged. As the Minister put it in his evidence:

‘These first two weeks in July – a prime holiday period – are dead weeks for the local tourism industry. Most tour operators in Northern Ireland’s key markets, notably Great Britain and the Republic of Ireland, simply factor out Northern Ireland in drawing up their programmes. Because visitors are not coming, restaurants and pubs have no incentive to operate to their full capability, which can dissuade visitors further. There is a danger that a July ‘shutdown’ is becoming accepted.’

The Minister rightly notes that it is a minority of parades that are the cause of local tensions, projecting a negative image across the world’s media and leading to loss of credibility for the tourism product and damaging the perception of the quality experience that visitors should expect and rightly demand, and he comments:

‘If a satisfactory resolution to the contentious parades could be determined, there is no doubt that the tourism industry ..... would quickly respond and deliver the economic payback that will bring benefits to all communities in Northern Ireland.’

The Minister has announced that there is a targeted 25% increase in visitor numbers over the next three years, with a 9% yearly rise in tourism spending bringing it up to £368m by 2004 – a rich prize indeed.

26.9 The Minister was in no doubt that many parades have strong linkages with the cultural heritage of Northern Ireland and said:

‘As such, they are an important part of our unique tourism product, preserving our customs and culture, and bringing home to visitors the local distinctiveness that can add to the holiday experience. NITB would

be keen to market the positive aspects of parades as attractions if the negative baggage could be removed.'

At a time when the NI tourism industry (in common with that of other regions of the UK) has been hard hit by the adverse impact of the 'foot and mouth' crisis and, like tourism destinations worldwide, is suffering the dire consequences of the reduction in air travel following global downturn and the 11 September terrorist attacks on the United States, it could well do without the self-inflicted image problems to which parades disputes – and, of course, the current communal disorder which goes much wider – give rise. It is not merely that holiday visitors are deterred but that local people move out, spending their cash elsewhere and adding to the difficulties for local tourist attractions. Not all would stay at home in any circumstances but the expectation of trouble has undoubtedly led to a mass exodus which is otherwise unlikely to have occurred.

26.10 Fourth, even when there is no parades dispute, business can suffer adverse consequences which appropriate consultation between organisers and commercial interests could avert or at least mitigate. The bringing forward by the Apprentice Boys of the Lundy's Day parade by one week in Derry to facilitate local business in the run-up to Christmas is a good illustration of sensible accommodation. It should not be necessary to justify the proposition that the right of business to pursue its own lawful occasions must be fully taken into account by parades organisers.

26.11 Fifth, the cost of policing as a consequence of failure to achieve consensual parading has, of course, been enormous. Resolution of the issues which have

bedevilled parading would release scarce resources within the police budget to meet pressing needs elsewhere.

26.12 It is clear that, whilst business welcomes the steady reduction in tension in recent years attributable to parades disputes, it is in no doubt about the serious problem for business which any return to the pattern of disruption of the worst years would create. So long as there is no real consensus around the parades issue, the risk always remains of actions having unintended and largely detrimental consequences. As one of my respondents put it very cogently, we simply cannot afford to ignore the symbiotic link between prosperity and social stability.

## **CHAPTER 27**

### **OFFENCES**

- 27.1 There are provisions in both the 1998 Act and the 1987 Order relating to offences.
- 27.2 In the 1998 Act it is an offence to organise or take part in a public procession of which the prescribed notice has not been given or to hold it on a date, or at a time or along a route, which differs from that given in the notice. There are defences available to anyone accused under this provision, including the defence that any divergence from the organiser's notified intentions is done in compliance with conditions imposed on the procession by the Parades Commission. Failure to comply with such conditions constitutes an offence. This provision also covers processions which take place by way of protest.
- 27.3 Protest meetings which are not processions are also required to give advance notice and failure to do so or to depart from the intentions indicated therein also constitutes an offence (to which, again, the accused can offer defences). It is the police not the Commission who regulate protest meetings and failure to comply with any conditions imposed by the police constitutes an offence under the 1987 Order.
- 27.4 If the Secretary of State uses his powers to prohibit a public procession, it is an offence to organise or take part in such a procession.

27.5 The provision in the 1998 Act dealing with the control of alcohol also specifies penalties, as does the provision dealing with preventing or hindering any lawful public procession or annoying those taking part or trying to take part in it.

27.6 There are provisions in the 1987 Order which, although not explicitly linked to processions or protest meetings, could be invoked if the behaviour of those involved in such events came within their scope. I have seen one document issued by the police in Great Britain for the guidance of those planning public events and processions which draws the corresponding aspects of the law there to the attention of organisers. Article 9 (1) of the 1987 Order states that:

‘A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if –

- (a) he intends thereby to stir up hatred or arouse fear; or
- (b) having regard to all the circumstances, hatred is likely to be stirred up or fear is likely to be aroused thereby.’

Article 11(1) of the 1987 Order provides similarly in respect of a person who distributes, or shows or plays, a recording of visual images or sounds which are threatening, abusive or insulting’. ‘Fear’ is defined as meaning ‘fear of a group of persons in Northern Ireland defined by reference to religious belief, colour, race, nationality (including citizenship) or ethnic or national origins’. ‘Hatred’ means hatred against a group of persons in Northern Ireland similarly defined.

27.7 To the layman at least, the definition of 'fear' in the 1987 Order seems broad enough to include 'fear of violence'. Articles 9 and 11 of the 1987 Order would also seem to extend to intimidatory behaviour. This was one of the factors which the police had to take into account under the 1987 Order when deciding whether to impose conditions on a planned procession. It was not carried forward into the 1998 Act when the Commission assumed the responsibility for regulating parades. It remains, however, a factor so far as the imposition of conditions on protest meetings is concerned. The Protection from Harassment (NI) Order 1997 creates at Article 6(1) an offence where a person pursues a course of conduct which causes another to fear, on at least two occasions, that violence will be used against him.

27.8 Both the Articles I have cited from the 1987 Order would also seem wide enough to ensure (as set out in the Good Friday Agreement) the right to freedom from sectarian harassment for those whose rights and freedoms could be affected by public processions or by those protesting against processions. The Crime and Disorder Act 1998 defines racial behaviour as demonstrating towards the victim hostility based on the victim's membership (or presumed membership) of a racial group. Sectarian behaviour (defined on similar lines, but with respect to hostility based on the victim's membership of a religious group) should be captured by the Articles in the 1987 Order.

27.9 In Chapter 24 I cite the text of S.13 of the Terrorism Act 2000 which deals with the wearing, in a public place, of clothing or the wearing, carrying or displaying of an article, so as to arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation.

27.10 I doubt if much would be achieved by the creation of further offences in the context of parades. It seems to be more important that those guilty of any of the wide range of existing offences should be identified and prosecuted. Protection of the rights of those on both sides of the parading issue requires not only a framework within which disputes about rights can be settled (preferably, as this Report argues, without recourse to formal adjudication) but also the existence of the rule of law, without which talk of a culture of rights is mere rhetoric.

27.11 The guidance in the Commission's existing Code of Conduct for those participating in a procession and for those participating in lawful protests against a procession warns against the use of 'words or behaviour which could reasonably be perceived as being intentionally sectarian, provocative, threatening, abusing, insulting or lewd'. Following the example of a police force in Great Britain to which I refer above, I believe that it would be helpful to draw attention formally in the Code to the law concerning processions and protests and to other legislation which may be relevant so that any who are disposed to breach the Code are in no doubt of the possible consequences.

27.12 It is for the police to judge whether to take action against lawbreakers on the spot or to obtain the necessary evidence and follow up later. The reasons why they might prefer the latter course in particular circumstances are perfectly understandable. The current pressure on police resources is also evident. But, if it is perceived that breaches of the law can be committed with impunity, the necessary collateral support which the Code of Conduct should receive from rigorous law enforcement will be lacking. On average, over the period 1998-2001, the number of offences tried under the relevant provisions of the 1998 Act

and the 1987 Order averaged ten per annum. This excludes cases, of course, where the police would have taken action for breach of the peace.

## **CHAPTER 28**

### **MISCELLANEOUS**

- 28.1 It was put to me in evidence that trade unions should be excluded from the operation of the legislation. At present the requirement to give advance notice of a public procession under the 1998 Act is disapplied only in the case of funeral processions and the Salvation Army, the former by the Act itself and the latter by order which the Secretary of State is empowered to make under S6(5). This provides the means for exclusion in appropriate cases.
- 28.2 It may be desirable, in any new Public Processions legislation, to take power to deal with certain procedural etc issues, where issues of principle are not at stake, by Regulation subject to Affirmative Resolution, thereby creating greater flexibility when practical adjustments prove necessary.

## **CHAPTER 29**

### **EPILOGUE**

#### **A NEW CLIMATE**

- 29.1 Once it was established that, just as no one had a right to parade regardless of whether the rights and freedoms of others were affected, equally there was no right of veto by anyone (for whatever reason) on the exercise of a right which on objective grounds was adjudged not to be detrimental to others, I would hope that each side, in cases where their rights were validated by the Rights Panel for Parades and Protests, and freed of any need for mutual defensiveness, would be prepared to outdo the other in generosity. Given the pattern of parading, opportunities for such generosity on the part of parading organisations might arise more often (but not exclusively) for the Loyal Orders. I can think of no more assured way for them to expunge at a stroke much of the hostile publicity they have attracted in recent years than by waiving the right and voluntarily re-routeing in locations where tensions have run – and remain - particularly high. The Orders have, of course done so in some circumstances in the past but never, so far as I am aware, in comparable circumstances where voluntary re-routeing could take place without any perceived loss of principle.
- 29.2 Equally, for objectors, having won the argument, to say: 'you see, we were right, but let's shake hands and why don't you come on down as guests of our

community', would (like voluntary re-routeing in converse circumstances) transform the climate. It might be a final march, closing a chapter, – or it might not. Whatever the future, it would be a future worked out together.

## CHAPTER 30

### MAIN RECOMMENDATIONS

The key element in the Report is the new model scheme proposed for regulating parades and protests. The detail is intended to be no more than indicative.

1. There is a need to place higher on society's agenda a response to the range of broader contextual issues which affect, and are affected by, parading. (Part III).
2. The search for local accommodation, which is an imperative, should be reinforced through the establishment, within the regulatory machinery and directly managed by it, of a Facilitation function, headed by a Chief Facilitation Officer who would be supported by a local, probably part-time, facilitation network. (Para 14.22 (ii)).
3. It should be made plain on the face of the legislation that the object of the Facilitation function is to build mutual trust and confidence by promoting mediation as the primary mechanism for resolving disputes. (Para 14.25).
4. The parties would not be precluded from agreeing between themselves alternative arrangements for settling their differences but the Chief Facilitation Officer would have to be satisfied that, whether using his own

services or by other means, effective steps were being taken to seek resolution of the dispute. (Para 14.22 (ii) and (viii)).

5. The facilitation stage should be characterised by good faith efforts to resolve the issues involved. (Para 14.22 (v) and (vi)).
6. Agreements reached at the facilitation stage should be committed to paper to avoid misunderstanding and should be formally registered so that they have the same force as a Determination. (Para 14.24).
7. In line with Article 11(1) of the European Convention on Human Rights (ECHR), the Public Processions (Northern Ireland) Act 1998 should be amended to affirm that everyone has the right to freedom of peaceful assembly, defined to include peaceful procession. (Para 15.13).
8. In line with Article 11(2) of the ECHR, S8(6) of the 1998 Act should be replaced by a provision that such restrictions shall be placed on the exercise of the right to freedom of peaceful assembly as are necessary in a democratic society (i) for the protection of the rights and freedoms of others or for the protection of health or morals or (ii) in the interests of national security or public safety or for the prevention of disorder or crime. (Para 15.13).
9. New Guidelines should be prepared setting out primarily the factors to be taken into account at the Determination stage in assessing the extent to which a planned parade would affect the rights and freedoms of others

under any Article of the ECHR or any other international agreement to which the United Kingdom is a party or under the general law. (Paras 15.14 and 15.16).

10. Where good faith efforts have not produced a settlement at the facilitation stage, the Determining Body should arrange a hearing. (Para 16.27(iii)).
11. Proceedings should be as informal and user-friendly, and procedures as simple, as possible. (Para 16.27(v)).
12. Determinations should make clear the conclusions reached on each of the Guideline factors in light of the evidence from parade organisers, those registering objections and any other interested party. (Para 15.17).
13. Where frequency of parades is at issue, the parading interests should have an opportunity to arrange their own priorities (including the priority to be given to traditional parades). (Paras 15.21-15.24).
14. The Determining Body should be empowered, at its discretion, to make rulings for periods of up to five years, subject to review if there is any material change of circumstances. (Paras 15.25-15.27).
15. Determinations should be binding and alleged breaches should be reported to a Compliance Branch within the Determining Body and promptly brought to the attention of parade organisers and investigated. (Paras 18.1-18.5 and 21.18-21.19).

16. Organisers of parades should notify their intention to parade no later than 1 October each year for the following season but, where this would allow a period of less than six months before the date of the parade, the notice should be required to be submitted no less than six months prior to that date. (Para 17.3).
17. Those objecting to a parade should be offered the opportunity formally to register their objections within one month of an intention to parade being notified. (Paras 16.27(i) and 17.5).
18. Copies of all objections should be made available to the organisers of the procession. (Para 16.27(ii)).
19. The right peacefully to protest, like the right peacefully to process, should be affirmed in the 1998 Act and should be subject to similar restrictions. (Para 19.4).
20. Protest meetings should be brought within the scope of the Determining Body, as protest processions currently are. (Para 19.4).
21. Guidelines should be prepared indicating the factors which the Determining Body would take into account in determining whether restrictions should be placed on a protest. (para 19.6).
22. Notice of any protest parade or meeting should be lodged within fourteen days of the issue of a Determination. (Para 17.6).

23. Breaches of Determinations in respect of protests should be reported and investigated in accordance with the arrangements where parade Determinations are breached. (Para 18.7).
24. To promote public civility between the two traditions, Public Processions legislation should provide that, in the exercise of their right to freedom of peaceful assembly, all have a right to have their honour respected and their dignity recognised and must themselves respect the honour and recognise the dignity of others. (Para 15.31).
25. The Code of Conduct, which has been produced by the Commission, should be revised in consultation with all the relevant interests to require that:
- (a) the organiser of a parade should be clearly identified and should be a senior officer of the parading organisation;
  - (b) the organiser prepares a risk assessment for each parade;
  - (c) all marshals receive training so that within three years it can be made a Code requirement that all parade marshals have at least basic training;
  - (d) parade organisers discuss with the police where marshals' responsibilities end and those of the police begin;

- (e) no parading organisation employs bands with paramilitary trappings;
  - (f) no item of clothing is worn or any article worn, carried or displayed in such a way or in such circumstances as to arouse reasonable suspicion that a person is a member or supporter of a proscribed organisation;
  - (g) parade organisers arrange for adequate toilet facilities; and
  - (h) parade organisers encourage those accompanying parades to desist from unruly behaviour. (Para 23.10).
26. There should be a separate Code of Conduct for bands and there should be a requirement for bands which fail to subscribe to it or to an approved Code or are guilty of non-observance to be registered under a Government registration scheme. (Paras 24.15-24.27).
27. Legislation should be introduced to make it an offence for a person knowingly to allow alcohol to be carried on to a public service vehicle if he is the operator or the person to whom it is hired. (Para 23.12-23.13).
28. A Parades Facilitation Agency should be established which would have general oversight of parades but no responsibility for Determinations or Compliance.

The Agency should:

- (a) provide a Facilitation function;
- (b) prepare Guidelines, Procedural Rules and Codes of Conduct;
- (c) appoint parade monitors;
- (d) undertake an education role; and
- (e) prepare an Annual Report to be laid before both Parliament and the Northern Ireland Assembly. (Paras 21.20, 21.21, 21.23 and 21.24).

29. The Agency should pursue an active Education role, including support (or encouraging support by other agencies) for 'single identity' initiatives where the Agency has a direct interest in development work contributing to greater mutual understanding. (Chapter 25)

30. A separate independent Rights Panel should be established to be the Determining Body in respect of Parades and Protests, charged with deciding whether restrictions should be placed on the exercise of the right to freedom of peaceful assembly for the protection of the rights and freedoms of others or for the protection of health or morals.

The Panel should:

- (a) comprise a Chairman with legal qualifications who is appointed by the Lord Chancellor and two other members drawn from a list of suitable persons;

- (b) have a Compliance Branch to monitor adherence to Determinations;
  - (c) produce an Annual Report; and
  - (d) be enabled to contribute to the legal costs of parties taking cases that raise points of general importance in regard to clarifying the application to parades or protests of Human Rights law. (Paras 21.11 to 21.17).
31. The police should determine whether any restriction needs to be placed on the exercise of the right to freedom of peaceful assembly in the interests of national security or public safety or for the prevention of disorder or crime. (Chapter 20).
32. Monitors should be under obligation to bring to the attention of the Determining Body any aspects of the policing of an event which merit review. (Para 18.9).
33. The law should be vigorously enforced in respect of offences and Codes of Conduct should draw attention to the law concerning processions and protests and to other relevant legislation. (Paras 27.11-27.12).
34. The staff of the Parades Facilitation Agency and the Rights Panel for Parades and Protests should be within the jurisdiction of the Ombudsman. (Para 21.22).

## APPENDIX 1

### SOME ISSUES

This Paper is an attempt to give some structure to the evidence but it is not intended to constrain the range of issues which respondents can deal with or inhibit the manner in which they may choose to respond.

1. What can be done (and by whom) to promote greater consensus and reduce contention about the issue of parading?
2. Please indicate (with reasons) whether or not you believe that a situation can be reached where parades can take place along hitherto contentious routes without detriment to the rights and freedoms of others and in a non-controversial context.
3. Is it accepted that there needs to be some sort of regulatory machinery to deal with parades and, if so, what ideally should be its role, responsibilities and powers? For example:
  - (a) What form should it take? If it has a Board, on what basis should it be composed and appointments be made to it?
  - (b) Should it not only be charged with making determinations but also be responsible itself for providing a mediation/conciliation service in respect of disputed parades?

- (c) By what criteria should it make its determinations and what form should those determinations take?
  - (d) What process should it follow in arriving at its determinations?
4. Under the Public Processions (Northern Ireland) Act 1998, the Parades Commission acts as the regulatory machinery to deal with parades. Attached is a Brief Description of the Commission. Please indicate the nature of any direct experience you have had of the operation of the Parades Commission. Apart from any responses you may wish to make to the points at 5. beneath, have you any general comments to make on its role and its powers and on how its responsibilities have been discharged?
5. Are there any changes you would like to suggest as regards the Commission or the 1998 Act establishing it? For example:
- (a) the application of the criterion which governs appointments to the Board (ie that the membership is as far as practicable representative of the community in Northern Ireland);
  - (b) the functions of the Commission;

- (c) the Code of Conduct, the Procedural Rules and the Guidelines issued by the Commission;
- (d) the arrangements for advance notice of public processions and the range of processions to which these arrangements apply;
- (e) the arrangements for advance notice of protest meetings related to public processions;
- (f) the distribution of functions between the Parades Commission and the police in respect of protest meetings related to parades. (Lawful protests are included within the Commission's Code of Conduct but the public order aspects of protest meetings are covered by the provisions of the Public Order (Northern Ireland) Order 1987. The police, and not the Parades Commission, are responsible for adjudicating any notifications of protest meetings);
- (g) the Commission's powers to impose conditions on public processions, and the specific factors (set out in 7. of Brief Description attached<sup>1</sup>) which, under the 1998 Act, the Commission has to have regard to when imposing conditions;
- (h) the Secretary of State's powers:
  - on an application by the Chief Constable, to review a determination by the Commission;

<sup>1</sup> This (slightly amended) now forms Chapter 5 of this Report.

- to prohibit public processions in certain circumstances;
  - to provide by order for the registration of bands;
- (i) the control by the police of alcohol at public processions;
- (j) the penalties for offences under the 1998 Act in relation to:
- the requirements regarding giving advance notice of public processions and protest meetings;
  - failure to comply with conditions imposed by the Commission or with a prohibition by the Secretary of State;
  - breach of a band registration order by the Secretary of State;
  - failure to comply with police requirements regarding control of alcohol;
  - prevention, hindrance etc of a public procession;
- (k) the role of Authorised Officers, of whom the Commission has assumed oversight from the Mediation Network for Northern Ireland, a move described by the Commission as 'strengthening a very important relationship which informs our decision-making processes in critical ways';
- (l) the pointers offered by the Commission to how it would assess genuine engagement, defined by it as 'a real attempt to address the legitimate concerns of others, and a preparedness to accommodate those concerns,

provided it is within their power to do so'. In the words of the Commission, 'Each party could be expected to:

- enter the process with no pre-conceived outcomes,
- listen to and try to understand the other's concerns,
- show respect to the other, by taking their concerns seriously,
- be willing to communicate their own legitimate concerns clearly,
- focus on issues that are capable of being addressed by the parties concerned,
- demonstrate a commitment to resolving the problem and addressing legitimate concerns, preferably within a target timetable,
- be represented by people with the authority to speak for their protagonists, and
- demonstrate a willingness to consider some form of third party intervention, such as mediation, if direct dialogue is not possible'.

(m) The work of the Commission in discharge of its duty to promote greater understanding by the general public of issues concerning public processions;

(n) The work of the Commission's team of parade monitors, recruited and trained by the Mediation Network for Northern Ireland;

(o) The Commission's view that all parades should be effectively marshalled/supervised, and its support for the development and provision

of a basic course in stewarding through an established Further Education College so that those involved in marshalling/stewarding can acquire the appropriate skills and knowledge;

- (p) The scope and content of the Commission's Annual Report, which it has already altered (for the year ending 31 March 2001) to include an analysis, by parade type, of restrictions placed on parades;
  - (q) The Commission's approach to its task, and its working methods;
  - (r) Any other aspects not covered in (a)-(q).
6. Is there a role for interests in civil society such as the churches, business and trade unions and the voluntary and community sector in directly assisting, promoting or encouraging the resolution of issues regarding disputed parades? How, if at all, should any such role relate to the work of the regulatory machinery for dealing with parades? If you have been involved in such a role, would you care to contribute to the Review from that perspective by describing and evaluating your experience?
7. A similar point to 6. in relation to political interests, local and regional.
8. Have community forums a role as a means of ensuring, for example:
- that considerations of the wider public interest are factored into the management of disputes;

- that concerns bearing on the community's social and economic welfare etc are addressed with the aim of creating a context in which difficult parading issues become more capable of resolution, to the mutual satisfaction of all parties?

If there is such a role, who should be responsible for promoting the creation of such forums and how should the forums relate to the work of the Parades Commission?

9. Does the parades regime established by the 1998 Act assign an appropriate role to the police?
10. Please indicate whether or not you consider (and, if so, for what reasons) that the incorporation of the European Convention on Human Rights into UK domestic law on 2 October 2000 improved prospects for the resolution of contentious parades issues. The Commission has indicated that it now builds into its determinations specific references to the Convention 'so that people will realise that it analyses these issues carefully every time it considers a parade notification'. Annexed, for convenience, are the texts of Articles 8, 9, 10, 11 and 17, which are most usually cited as being particularly relevant.<sup>1</sup>
11. Are there issues connected with 'other' parades (i.e. parades other than those usually classified as 'loyalist' or 'nationalist') with which the Review needs to be concerned?
12. Are there issues not covered above which should be considered by the Review?

<sup>1</sup> These are now included in the more extended extract from the ECHR which forms Appendix 5 of this Report.

## APPENDIX 2

### LIST OF ORGANISATIONS AND INDIVIDUALS PROVIDING EVIDENCE TO THE REVIEW

Apprentice Boys of Derry General Committee  
Dr D Bryan  
Ards Borough Council  
Mr J Baxter  
Archbishop Seán Brady  
Bogside Residents Group  
Boyne LOL 1054 Newtownards  
Mr P S Burns  
Mr A A Canavan  
Mrs J Carson MLA  
CBI Northern Ireland  
Civic Forum  
Mrs I A Cole  
Committee on the Administration of Justice  
Community Relations Council  
Mr D Cook  
Department of Foreign Affairs, Dublin  
Mrs R Craig  
Father O Crilly  
Dr M Crozier  
Crumlin Community Forum  
Mr B Currin\*  
His Eminence Cardinal Cahal Daly  
Democratic Unionist Party  
Democratic Dialogue  
Department of Enterprise, Trade and Investment for Northern Ireland  
Diocesan Council of Down and Connor  
Mr T Donaghy  
Mr D Donnelly  
Ms M E V Douglas  
Drumcree Parish Select Vestry  
Mr B Duddy  
Very Rev Dr J Dunlop  
Most Reverend Rt Hon the Lord Eames of Armagh  
Cllr Sir Reg Empey MLA  
Mr N Faris  
Flax Trust  
Professor T G Fraser

Free Presbyterian Church of Ulster  
Garvaghy Road Residents Coalition  
General Officer Commanding, Northern Ireland  
Dr C Gibson  
Mr R Gordon  
Grand Orange Lodge of Ireland  
Grand Orange Lodge of Scotland  
Professor A Guelke  
Professor T Hadden  
Mr M Hamilton  
Dr J Harbison  
The Rt Rev A E T Harper  
Senator Dr M Hayes  
Lady Hermon MP  
Mr C A Hewitt  
Holywell Trust  
Imperial Grand Black Chapter of the British Commonwealth  
Independent Assessor of Military Complaints Procedures  
Independent Loyal Orange Institution Imperial Grand Lodge  
Institute for Conflict Research  
Irish Council of Churches  
Dr N Jarman  
Cllr R D Jones  
Rev B Kennaway  
Dr D Kennedy  
Ms A Kilmurray  
Dr S King  
Mr H T Larmour  
Larne Borough Council  
Lower Ormeau Concerned Community  
Loyalist Commission  
Professor P G McKenna  
Mrs A Mawhinney  
Mediation Network for Northern Ireland  
Mr I Milne  
Mr R Monteith  
Mr A Morgan  
Mr N Morrison  
Father K Mullan  
Mr B J Mulholland  
Rev K Newell  
North Down Borough Council  
North of Ireland Bands Association  
North Lanarkshire Council  
Northern Catholic Bishops  
Northern Ireland Chamber of Commerce and Industry  
Northern Ireland Committee ICTU  
Northern Ireland Hotels Federation  
Northern Ireland Housing Executive  
Northern Ireland Human Rights Commission  
Northern Ireland Public Service Alliance

Mr G O'Doherty  
Father B S O'Rourke  
Parades Commission  
Peacewatch Ireland  
Rev J A Pickering  
Police Service of Northern Ireland  
Pomeroy Concerned Residents Association  
Portadown District LOL No.1  
Rev Dr W W Porter  
Presbyterian Church in Ireland  
Father A Reid  
Mr R Reid  
Restoration Ministries  
Road Haulage Association, Scotland and Northern Ireland  
Mr T Ringland  
Mr B M Rowntree  
Mr P Scott  
Sinn Féin  
Mr J Smyth  
Social Democratic Labour Party  
Rev. P Symonds  
Ulster Bands Association  
Ulster Human Rights Watch  
Ulster Unionist Party  
Womens' Coalition

\* Mr Currin very willingly and helpfully made himself available as expert witness in the field of human rights and conflict resolution.

## APPENDIX 3

### STATISTICS - CONTENTIOUS PARADES<sup>1</sup>

Out of 3301 notified parades in 2001-2002, the Commission treated 220 as contentious and imposed some form of restriction on 69% of these compared with 74% of contentious parades which were restricted the previous year. Of the 152 which were restricted, 130 had their route restricted; 22 had other restrictions imposed. The figure of 152 includes 36 Drumcree parades which were notified.

The following Table shows the percentage of contentious parades restricted by parade organiser category.

	Percentage restricted	Percentage not restricted
Nationalist <sup>+</sup>	68	32
Apprentice Boys of Derry	64	36
Loyal Orange Order *	69	31
Royal Black Preceptory	82	18
Loyalist bands	70	30

<sup>+</sup> Including parades notified as protest parades.

\* If parades around the Drumcree situation are excluded, the percentage restricted becomes 54.

The following Table shows the percentage of cases in which particular forms of restriction were imposed.

<sup>1</sup> The information in this Appendix is largely extracted from the 4<sup>th</sup> Annual Report of the Parades Commission pp 37-40.

Route	86%
Music	32%
Time	15%
Exclusion *	4%

\* This is where the Commission restricts the participation of a particular band in a parade, most often because of their past failure to abide by the Code of Conduct.

The following Table shows the percentage of Determinations by the Commission in which particular criteria were cited.

Community Relations	94%
Public Order	89%
Disruption	61%
Engagement	15%
Code of Conduct	9%

## APPENDIX 4

### PARADES COMMISSION EVIDENCE

I distil the substance of the Commission's arguments in its own words.

- (i) The Commission has acquired valuable expertise and experience in dealing with the issues that lie at the heart of the parading conflict and pursuing what is yet needed in terms of the quality management of parading by parades organisations. An experienced, stable Commission is of considerable benefit to both sides in the parading conflict. There have been considerable developments. The contentiousness of parades has steadily dropped as the Commission's framework has become more familiar and more accepted. Dialogue and engagement have yielded steadily improving results. The use of Authorised Officers has been, and is continuing to be, developed in a way that will not jeopardise strengthening relationships at a local level.
  
- (ii) The Commission's approach throughout has, in accordance with the statutory guidelines, placed an emphasis on the centrality of dialogue as the best means of achieving peaceful parading. At the same time, where necessary, the Commission has observed the over-riding direction (in para 1.3 of the Guidelines) that:

‘While the Guidelines are designed to promote consistency in decision-making, they are not intended to do so at the expense of the flexibility and discretion which must be applied to the facts and circumstances peculiar to individual cases.’

- (iii) The Commission believes that, outside those closest to the parading dispute, there is not a serious concern about public confidence in the Commission. The contention surrounding public processions has declined considerably and the problems from contested parading impact less and less on the general public. Invariably the general public learns about the Commission largely in connection with the most contentious (and publicised) parades, so there may well be some negative associations that are impossible to avoid.
  
- (iv) The Commission recognises that there are many people, particularly within the Unionist tradition, who complain about it. It considers, however, that this is inevitable, given that a wider range of viewpoints on the subject of parades is now taken into account in decision-making and given that the creation of a cross-community Commission, with a focus on a wider dialogue, represented a radical way of approaching an old problem. Traditionally, difficulties surrounding parades were a matter of discussion very largely between the Loyal Orders and the police. The Commission model has ensured that a much wider spectrum of people from across the community has become involved in the debate about parading. It also offers the prospect that genuine dialogue will feed through into increased local tolerance for parades.

- (v) As a public activity, parading is a matter for representatives from all parts of the community, because it impacts on the whole community. In that context, dialogue is the Commission's preferred way for parades organisers to deal with issues that arise about parades. There are well-established interests on both sides, which have caused and are causing significant strains in community relations, because of the lack of dialogue. In promoting dialogue, the Commission has had full regard to the statutory provisions as to engagement and accommodation contained in the Guidelines and in the Procedural Rules.
- (vi) The Commission argues that there is now greater acceptance of its decisions throughout the community, even at the most contentious locations. The Commission model has to date managed to take some of the sting out of the parading issue.
- (vii) The incorporation of the European Convention on Human Rights into UK domestic law significantly altered the context in which parades and protests against them would be viewed. The Commission has begun the work of educating people about these rights and responsibilities, including by referring to them in its determinations. There is further work to be done in this regard.
- (viii) Faster progress in resolving parading problems is currently hamstrung because of a wider lack of trust at present between representatives of the different parts of the community. The Commission's view is that it is important to continue to build confidence among the protagonists on both

sides and among their political and community representatives. The attendance at the two Conferences that it organised earlier this year in conjunction with the Community Relations Council and INCORE reflected a growing confidence to engage with the Commission and others on parading and the Commission is making plans to build on this confidence in the future. The Commission would not, however, wish to confuse building confidence with seeking popularity, which should not (and is not) an objective for a body adjudicating on such a sensitive matter as parading.

- (ix) The Commission is confident that there is a critical mass within the Unionist community wishing the Loyal Orders to engage more fully with the current Commission model. This engagement, when it comes about – and although there is still officially a ban on dialogue with the Commission, in practice there is considerable evidence of it being ignored – will be at its most useful if it is with a Commission model which includes both the adjudication and promotion of mediation functions. The Commission-sponsored Authorised Officer network will become even more crucial at that stage and the Commission is therefore investing more resources in the development of these Officers.
  
- (x) In its public statements the Commission increasingly calls for respect (for the rights of others) and tolerance (of the rights of others). The Commission has made decisions that test both communities in relation to tolerance and there is an increasing sense (thus far) that tolerance is growing, in that protest is more likely to be peaceful, or at least more

peaceful than in the past. Respect is best demonstrated by dialogue, and there have been improvements in this regard too, particularly through the Authorised Officers.

- (xi) The peaceful resolution of parading problems requires accommodation. This does not mean that all parades have to have the consent of local groups and the Commission has, indeed, in general sought to keep parading routes open. A judgment has to be made as to the frequency with which this is possible. The Commission does not concur with the view that parades should be dependent on the consent of the host community: host communities can in different situations harbour prejudices that would preclude the free expression of a particular standpoint or culture. This is one of the reasons why, in its discussion with parade organisers, the Commission focuses on the strong desirability, rather than the absolute necessity, of agreement. The Commission is more sympathetic to those parade organisers who are genuinely seeking an agreed outcome and who in many cases are those most likely to be tolerated locally.
- (xii) The current Commission inherited 'closed' routes, which have proved to be the most intractable to resolve, but it intends to promote dialogue as a means of resolving these issues too.
- (xiii) The Commission believes that, whilst much of the good that is achieved has to go unsung in public, whilst failure seldom goes unnoticed, its success can be measured on a number of fronts:

- (a) Equitable and balanced determinations that are upheld by paraders and protestors alike.
- (b) A lowering of the likelihood of public disorder and the promotion of good community relations.
- (c) A reduction in the degree of contentiousness of contentious locations, and the avoidance of new contention. Each year the “marching season” has been increasingly quieter than the previous one. This is despite the fact that the number of parades has not diminished, and despite the fact that the wider political environment is still not entirely settled.
- (d) The provision of a vehicle other than illegal street protest for dealing with new concerns about parades.
- (e) Areas where it has made particular advances in meeting its statutory obligations eg
  - Promoting mediation – particularly through the Authorised Officer team.
  - Education and outreach in general, including a greater focus on human rights.
  - Monitors.

- Marshals: support for training and encouragement of good practice.

## **APPENDIX 5**

### **EUROPEAN CONVENTION ON HUMAN RIGHTS**

#### **EXTRACTS**

##### **Article 8**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, 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.

##### **Article 9**

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in

the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

#### **Article 10**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

#### **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.

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.

#### **Article 14**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

#### **Article 17**

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

#### **Article 18**

The restrictions permitted under the Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

**Article 1 (First Protocol)**

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

**APPENDIX 6**

**ULSTER BANDS ASSOCIATION**

**CODE OF CONDUCT**

1. All Association bands and their respective members shall not, even when provoked, engage in any action that shames or disgraces their band or the Association.
2. All Association bands and their respective members shall at all times promote a sense of unity and friendship towards fellow member bands.
3. No Association band shall have their colour party dressed in paramilitary garb (ie combats and bomber jackets) while on parade.
4. On arrival for a parade no Association member of a band should leave their mode of transport carrying any alcoholic beverages.
5. No Association member of a band shall be seen to be urinating in a public place.
6. All Association bands whose parades are due to start at a specific time should ensure that it is advertised as such. Likewise, if their parade is advertised to start at a specific time, Association bands should ensure that it does so.
7. Always treat the host with the respect that you would expect to receive yourself. If you would like to walk before the main parade has started in order to fulfil

another commitment elsewhere ALWAYS seek permission to do so from your host. Never parade early without prior permission from the organising band. If it is not permissible or practical to parade early then either wait for the appointed time or leave the parade and go to the subsequent parade. We suggest that if the latter applies then a suitable donation be given to the organising band.

8. Always complete the entire parade route – take no “short cuts” without the prior permission of the host.

## APPENDIX 7

### BIBLIOGRAPHY

- BARDON JONATHAN A HISTORY OF ULSTER (1992)
- BELL DESMOND ACTS OF UNION (1990)
- BRITISH-IRISH INTER-PARLIAMENTARY BODY THE CULTURAL SIGNIFICANCE OF PARADES (2001)
- BRYAN D, FRAZER T G & DUNN S POLITICAL RITUALS: LOYALIST PARADES IN PORTADOWN (1995)
- BRYAN D & JARMAN N INDEPENDENT INTERVENTION (1999)
- BRYAN D ORANGE PARADES (2000)
- BUCKLEY A D & KENNEY M C NEGOTIATING IDENTITY (1995)
- BUDGE IAN & O'LEARY CORNELIUS BELFAST: APPROACH TO CRISIS 1613-1970 (1973)
- CAIRNS E THE ROLE OF THE CONTACT HYPOTHESIS IN PEACEMAKING IN NORTHERN IRELAND: FROM THEORY TO REALITY (2002)
- CONNOLLY P, SMITH A & KELLY B TOO YOUNG TO NOTICE? (2002)
- CRAIG PATRICIA THE RATTLE OF THE NORTH (1992)
- CROZIER M (Ed). CULTURAL TRADITIONS IN NORTHERN IRELAND (1989)

DE BONO EDWARD	<u>I AM RIGHT YOU ARE WRONG</u> (1990)
DEWAR M V, BROWN JOHN & LONG S E	<u>ORANGEISM</u> (1967)
DICEY A V	<u>LAW OF THE CONSTITUTION</u> (9 <sup>th</sup> Ed 1939)
DONNAN HASTINGS & McFARLANE GRAHAM (Eds)	<u>CULTURE AND POLICY IN NORTHERN IRELAND</u> (1997)
DUNLOP J	<u>A PRECARIOUS BELONGING</u> (1995)
EDWARDS RUTH DUDLEY	<u>THE FAITHFUL TRIBE</u> (1999)
ELLIOTT M	<u>THE CATHOLICS OF ULSTER</u> (2000)
EMPLOYMENT TRIBUNAL SYSTEM TASKFORCE	<u>MOVING FORWARD</u> (2002)
FARRELL SEAN	<u>RITUALS AND RIOTS</u> (2000)
FELDMAN D	<u>ACHIEVING TRANSPARANCY AND ACCOUNTABILITY IN PUBLIC ORDER DECISION-MAKING: EVALUATING THE NORTH REPORT ON PARADES IN NORTHERN IRELAND</u> (1997)
FOSTER R F	<u>MODERN IRELAND 1600-1972</u> (1988)
FRAZER T G (Ed)	<u>THE IRISH PARADING TRADITION</u> (2000)
GARVAGHY RESIDENTS	<u>GARVAGHY: A COMMUNITY UNDER SIEGE</u> (1990)
GRAY TONY	<u>THE ORANGE ORDER</u> (1972)

HADDEN TOM & DONNELLY ANNE	<u>THE LEGAL CONTROL OF MARCHES IN NORTHERN IRELAND</u> (1997)
HADDEN T, IRWIN C & BOAL F	<u>SEPARATION OR SHARING</u> (PUBLISHED WITH FORTNIGHT 356)
HADDOCK-FLYNN KEVIN	<u>ORANGEISM – THE MAKING OF A TRADITION</u> (1999)
HAMILTON M, JARMAN N & BRYAN D	<u>PARADES PROTESTS AND POLICING</u> (2001)
HEPBURN A C	<u>A PAST APART</u> (1996)
HEWITT J	<u>THE COLLECTED POEMS</u> (Ed F ORMSBY)
HIRST CATHERINE	<u>RELIGION, POLITICS AND VIOLENCE IN 19<sup>th</sup> CENTURY BELFAST</u> (2002)
HOPPEN K THEODORE	<u>IRELAND SINCE 1800</u> (1989)
HUGHES J	<u>RESOLVING COMMUNITY RELATIONS PROBLEMS IN NORTHERN IRELAND: AN INTRA-COMMUNITY APPROACH</u> (2000)
HUGHES J	<u>COMMUNITY RELATIONS IN NORTHERN IRELAND – JOURNAL OF ETHNIC AND MIGRATION STUDIES</u> , Vol 24, No 3, 433-450
HUGHES J & DONNELLY C	<u>TEN YEARS OF SOCIAL ATTITUDES TO COMMUNITY RELATIONS IN NORTHERN IRELAND</u> (2001)

HUGHES J & DONNELLY C

ANALYSIS OF THE  
COMMUNITY RELATIONS  
MODULE INCLUDED IN  
THE 2001 NORTHERN  
IRELAND LIFE AND TIMES  
SURVEY

HUMAN RIGHTS FILES No 15

INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM  
IN ENGLAND AND WALES (1995)

FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN  
ENGLAND AND WALES (1996).

JACKSON ALVIN

COLONEL EDWARD  
SAUNDERSON (1995)

JACKSON ALVIN

IRELAND 1798-1998 (1999)

JARMAN N & BRYAN D

PARADE AND PROTEST  
(1996)

JARMAN NEIL

MATERIAL CONFLICTS  
(1997)

JARMAN N, BRYAN D CALEYRON N & DEL ROSA C

POLITICS IN PUBLIC (1998)

JARMAN N

REGULATING RIGHTS AND  
MANAGING PUBLIC  
ORDER – FORDHAM  
INTERNATIONAL LAW  
JOURNAL Vol 22 No 4  
APRIL 1999

JARMAN N & BRYAN D

STEWARDING CROWDS  
AND MANAGING PUBLIC  
SAFETY (2000)

JARMAN N

MANAGING DISORDER –  
RESPONDING TO  
INTERFACE VIOLENCE IN  
NORTH BELFAST (2002)

LEGGATT A

TRIBUNALS FOR USERS:  
ONE SYSTEM, ONE  
SERVICE (2001)

LIECHTY JOSEPH & CLEGG CECELIA

MOVING BEYOND  
SECTARIANISM (2001)

LONGLEY EDNA	<u>THE LIVING STREAM</u> (1994)
LONGLEY EDNA & KIBERD DECLAN	<u>MULTI-CULTURALISM: THE VIEW FROM THE TWO IRELANDS</u> (2001)
LUCY GORDON & McCLURE ELAINE	<u>THE TWELFTH WHAT IT MEANS TO ME</u> (1997)
McAULEY IMELDA	<u>REFORMING THE LAW ON CONTENTIOUS PARADES IN NORTHERN IRELAND</u> (1998)
	<u>PARADES: FREEDOM OF RELIGION, EXPRESSION AND ASSEMBLY</u> (1999)
McKITTRICK DAVID	<u>THROUGH THE MINEFIELD</u> (1999)
NORTHERN IRELAND VOLUNTARY TRUST	<u>TOWARDS A CIVIL SOCIETY</u> (1999)
NORTH BELFAST COMMUNITY ACTION PROJECT	<u>REPORT OF THE PROJECT TEAM</u> (2002)
NORTHERN IRELAND OMNIBUS SURVEY, MARCH 2001 (PARADES COMMISSION MODULE)	
PARADES COMMISSION	<u>ANNUAL REPORTS</u>
PARLIAMENTARY PROCEEDINGS (28 OCTOBER 1997-9 FEBRUARY 1998) ON PUBLIC PROCESSIONS (NI) BILL	
PAT FINUCANE CENTRE	<u>ONE DAY IN AUGUST</u> (1995) <u>IN THE LINE OF FIRE</u> (1996)
PHOENIX EAMON	<u>NORTHERN NATIONALISM</u> (1994)
PENNEFATHER R S	<u>THE ORANGE AND THE BLACK</u> (1984)
REID K	<u>A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS</u> (1998)

REPORT ON THE PARADES COMMISSION (VOLUMES 1 & 2) – NORTHERN IRELAND AFFAIRS COMMITTEE OF THE HOUSE OF COMMONS (MARCH 2001)

ROBERTS S	<u>FAMILY MEDIATION IN THE NEW MILLENNIUM IN FAMILY LAW</u> Ed. S GETNEY (2000)
SCHABAS W A	<u>INTERNATIONAL HUMAN RIGHTS LAW AND THE CANADIAN CHARTER</u> (2 <sup>ND</sup> Ed 1996)
SENIOR HEReward	<u>ORANGEISM IN IRELAND AND BRITAIN 1795-1836</u> (1966)
SIEGHART P	<u>THE INTERNATIONAL LAW OF HUMAN RIGHTS</u> (1983)
STEWART A T Q	<u>THE SHAPE OF IRISH HISTORY</u> (2001)
STOREY E	<u>TRADITIONAL ROOTS</u> (2002)
WADHAM J & MOUNTFIELD H	<u>BLACKSTONE'S GUIDE TO THE HUMAN RIGHTS ACT</u> (1998)
WRIGHT FRANK	<u>NORTHERN IRELAND A COMPARATIVE ANALYSIS</u> (1987)
WRIGHT FRANK	<u>TWO LANDS ON ONE SOIL: ULSTER POLITICS BEFORE HOME RULE</u> (1996)