

# **Submission to the Boundary Commission for Northern Ireland 2018 Review of Parliamentary Constituencies Revised Proposals (s470)**

**March 2018**

The Committee on the Administration of Justice (CAJ) is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.

## **Summary**

- This submission is in response to the Boundary Commission NI 2018 Revised Proposals on changes to the Westminster (and hence also NI Assembly) constituency boundaries, which recommend significantly different changes to the Commission's previous proposals in 2016;
- The work of the Boundary Commission as a public authority engages compliance with human rights law, notably the requirements of 'equal suffrage' and non-discrimination which are inherent in rights to free elections, and are a key safeguard to prevent the repetition of discriminatory practices of gerrymandering that have plagued Northern Ireland in the past;
- Under the Human Rights Act 1998 the Boundary Commission must both read/give effect to legislation and also ensure its actions are compatible with rights in the European Convention on Human Rights (ECHR). This includes the provisions of Article 3 of Protocol 1 on rights to free elections without discrimination in accordance with ECHR Article 14. ECHR rights are to be themselves interpreted in accordance with other relevant UN and Council of Europe standards on electoral systems and principles such as equal suffrage and non-discrimination. However, there is no evidence in the consultation report that the Boundary Commission has ensured it has complied with such instruments and duties in reaching its Revised Proposals, and we would seek remedy for this in the final phase of the Commissions deliberations;

## **Context of Boundary Commission Proposals**

### ***Historical and institutional background***

The drawing of electoral boundaries and the work of Boundary Commissions<sup>1</sup> in Northern Ireland have long raised a significant issues of concern regarding human rights compliance. The ending of practices of ‘gerrymandering’ where electoral boundaries are drawn in a discriminatory manner ensuring unequal access to power was a key demand of the civil rights movement. The official Commission appointed by the UK Government to report on the causes of the ‘disturbances’ at the onset of the ‘Troubles’ (the Cameron Report) includes in its primary conclusions the following as a key factor:

Complaints, again well documented, in some cases of deliberate manipulation of local government electoral boundaries and in others a refusal to apply for their necessary extension, in order to achieve and maintain Unionist control of local authorities and so to deny to Catholics influence in local government proportionate to their numbers.<sup>2</sup>

The report elaborates that the basic complaint was the weighing of the then electoral arrangements against ‘non-unionists’, with the Commission presenting data that showed the complaints were ‘abundantly justified’. In the areas examined the report records that in “each of the areas with Unionist majorities on their council the majority was far greater than the adult population balance would justify.” It cites other local government districts where “a Catholic majority in the population was converted into a large Unionist majority on the Councils” and considered the ‘most glaring case’ to be that of “Londonderry County Borough, where sixty per cent of the adult population was Catholic but where sixty per cent of the seats on the Corporation were held by Unionists.” The report cites the influence of the drawing of ward boundaries to achieve such results.<sup>3</sup> In addressing arguments from unionist representatives that such outcomes had been the result of demographic change and that it was not unusual in democracies, including in the UK context, for a small majority or even minority to be translated by an electoral system into a large majority the Commission stated that:

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<sup>1</sup> Most notably this includes the work of the first Boundary Commission to determine the borders between Northern and Southern Ireland, whose work was derailed following the premature publication of a map and its findings in November 1924 and the subsequent suppression of its report that was not formally released until 1968. Some of the Commission’s problems began with the breadth and vagueness of its Terms of Reference which required the Commission to “*determine in accordance with the wishes of the inhabitants so far as may be compatible with economic and geographic conditions, the boundaries between Northern Ireland and the rest of Ireland...*” (see Blake, Gerald ‘Some Lessons from the 1924-25 Irish Boundary Commission’ IBRU Boundary and Security Bulletin, Winter 1995 – 1996, pp 55-58.

<sup>2</sup> Disturbances in Northern Ireland Report of the Commission appointed by the Governor of Northern Ireland (Cameron Report) Cmd. 532, 1969, conclusion 3 in reference to paragraphs 133-137.

<sup>3</sup> As above, paragraph 134.

These arguments however ignore the realities of the local situation in Northern Ireland. It is obvious that local politics in these areas have always turned on questions of sectarian control and influence. There has never been anything resembling electoral swings from Conservative to Labour and back again. This is an important consideration. The electoral arrangement of wards tends inevitably to stereotype political representation without prospect of a change in the balance of political power by the ‘swing of the pendulum’. The initial choice of ward areas effectively decided the permanent result of council elections...<sup>4</sup>

These types of issues engage compliance with the provisions in human rights law relating to free elections, in particular the principles of universal and equal suffrage (elaborated on later in this submission). There is an additional dimension when voting in the context of ethnically divided societies, where voting is not on, for example, fluctuating red and blue lines, but rather community lines where questions of ensuring non-discrimination arise. Whilst it is not the case that such principles provide that there should be ‘no wasted votes’ or representatives being returned in *exact* proportions to community strengths there is an onus to ensure electoral boundaries by accident or design do not produce significant under or over representations. Put simply when voting is largely along community lines one community with say 50% of the electorate should not be returning 70% of the representatives.

Reforms introduced into Northern Ireland to redress the above problems include universal suffrage and the use of proportional representation (Single Transferable Vote- STV) in local government and EU elections. In accordance with a requirement in the Belfast/Good Friday Agreement elections to the Northern Ireland Assembly must also be by STV. The drawing of electoral boundaries in Northern Ireland however remains a relevant consideration.

The voting patterns in Northern Ireland largely remain along ethnic lines. Recent research by the Electoral Reform Society into the 2016 Northern Ireland Assembly Election found that only 4% of Catholics and 2% of Protestants voted for unionist and nationalist parties respectively (and hence the ‘other bloc’) as first preference in that STV election, which the report holds is likely to reflect electors voting preference in a First Past the Post (FPTP) election.<sup>5</sup> The report states that around 80% of voters “cast a first preference from parties from their own community” with 17% of Protestants and 20% of Catholics voting for what it referred to as ‘centrist’ or ‘cross-community’ party (noting that these votes would not likely result in Stormont representation under a FPTP System).

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<sup>4</sup> As above, paragraph 136.

<sup>5</sup> Electoral Reform Society ‘THE 2016 NORTHERN IRELAND ASSEMBLY ELECTION How voters use STV’ February 2017. pp4-5 <https://www.electoral-reform.org.uk/wp-content/uploads/2017/06/2016-Northern-Ireland-Assembly-Election.pdf>

The most recent 2017 Westminster election resulted in 11 unionist (10 DUP, 1 Independent) and 7 nationalist seats (all SF). On a percentage basis this is 61% unionist and 38% nationalist, albeit two seats at least were quite marginal. Rough crude figures based on the vote for the four largest parties and independent MP would indicate, excluding 'others' that this was from a voting base of 54% unionist and 46% nationalist.<sup>6</sup> Such figures should be taken with significant qualification and a significant range of caveats. More detailed analysis of figures would nevertheless have a level of reliability in projecting likely patterns of representation.

There are clearly a range of considerations that come into play when designing electoral boundaries, for example, not unnecessarily splitting a town or other 'natural' entity into two. The importance of producing changes that redress and do not exacerbate over or under representation is also a reasonable consideration in such contexts. There is engagement with human rights legal requirements in relation to any system that by accident or design would produce a significant imbalance. Where factors relating to the likely electoral impact of electoral boundary changes are being taken into account we believe there should be transparency in relation to such considerations.

Whilst the current exercise relates to Westminster seats, by virtue of s33 of the Northern Ireland Act 1998 there will also be a knock on effect of reconfiguring boundaries for future elections to the Northern Ireland Assembly. Changes could also impact on any over or under representation within the Assembly. Given the multi-member nature of constituencies the drawing of boundaries may be likely to determine whether the nationalist or unionist community which is in the minority in any particular constituency is likely to have any representation at all in the Assembly in that constituency. Whilst multimember constituencies themselves do improve fair representation there can be circumstances where boundaries mean a minority community-bloc within in a particular area ultimately may be left without representation when boundary lines are drawn in a manner which splits its vote across several constituencies. For example, the current Belfast West constituency has no unionist MLAs despite having some significant unionist voting areas.<sup>7</sup> It is possible that the Proposals produced by the Commission may leave a number of constituencies without minority representation. The Commission could conduct analysis in relation to the likely impact of its proposals to this end.

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<sup>6</sup> The Combined total of votes for the DUP (292,316) & UUP 83,280 & independent unionist Silvia Hermon (16,148) were = 391744. Hence 54%- when compared to SF (238,915) SDLP (95,419) = 334334 (46%). (from a combined total of 726078). This does not include the Alliance Party Votes (64,553) and that of smaller parties – (Greens, TUV, PBP and others).  
[http://www.bbc.co.uk/news/election/2017/results/northern\\_ireland](http://www.bbc.co.uk/news/election/2017/results/northern_ireland)

<sup>7</sup> In a contrary example Sinn Féin have claimed that the current 2018 proposals by the Boundary Commission would leave four constituencies without any nationalist representation:  
<https://www.irishnews.com/news/2018/01/31/news/fresh-boundary-commission-plans-spark-sinn-fe-in-concern-over-stormont-seats-1245610/>

### *The current Boundary Commission and proposals*

The current Boundary Commission for Northern Ireland is a four-member independent public body, operating out of Stormont House alongside the Northern Ireland Office. The Commission is formally chaired by the Speaker to the House of Commons; in practice the Commission is presided over by its deputy chair, a judge appointed by the Lord Chief Justice, and has two other members appointed by the Secretary of State.<sup>8</sup>

The origin of the present review of boundaries relates to the UK-wide reduction in Westminster seats to 600 sought by the Conservative party and legislated for in 2011 under the Conservative-Lib Dem Coalition. This change was linked to the proposal for an Alternative Vote system which was ultimately defeated in a referendum.<sup>9</sup> The reduction in seats would see Northern Ireland reduced from 18 constituencies to 17. Making this reduction is a statutory requirement on the Boundary Commission in formulating its recommendations.

The respective Boundary Commission proposals for Great Britain are opposed by Labour and the Liberal Democrats who wish to see them abandoned.<sup>10</sup> The proposals are supported by the Conservative Government. In the context of opposition from some Tory backbenchers, the current parliamentary arithmetic would require the support of the DUP for the recommendations to achieve passage through the House of Commons and be enacted.

The Boundary Commission Provisional Proposals for Northern Ireland in 2016 recommended, along with other changes, a reduction in seats in the city of Belfast from four to three.<sup>11</sup> These changes were strongly opposed by the DUP who regarded them as detrimentally affecting unionism and called for them to be reconsidered.<sup>12</sup> There no analysis in the current report as to whether the 2016 proposals were likely or not to lead to significant unionist underrepresentation as was being contended. The proposals were also opposed by the UUP and TUV.<sup>13</sup> The UUP were however in favour of a three seat model for Belfast, which was opposed by the SDLP who supported the retention of four seats.<sup>14</sup>

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<sup>8</sup> Section 2 and Schedule 1 of the Parliamentary Constituencies Act 1986 (as amended).

<sup>9</sup> Schedule 2 Parliamentary Constituencies Act 1986, amended by the Parliamentary Voting System and Constituencies Act 2011.

<sup>10</sup> See for example <https://www.theguardian.com/politics/2017/oct/17/boundary-changes-house-of-commons-mps-ministers-plans>

<sup>11</sup> The current East Belfast constituency would have largely remained, but the existing Belfast North, West and South seats would be reconfigured into two new constituencies– Belfast South West and Belfast North West.

<sup>12</sup> <http://www.itv.com/news/utv/2016-09-09/boundary-changes-detrimental-to-unionism-dup/>

<sup>13</sup> <https://www.belfasttelegraph.co.uk/news/northern-ireland/unionists-fearful-that-ni-electoral-boundary-changes-may-boost-republican-seats-36104047.html>

<sup>14</sup> Boundary Commission for NI Revised Proposals Report, January 2018, para 4.18-19. .

<https://www.belfasttelegraph.co.uk/news/northern-ireland/northern-ireland-parties-didnt-influence-new-boundaries-says-commission-36545007.html>

The Boundary Commission published its Revised Proposals in January 2018 (although the maps were accidentally revealed on its website earlier).<sup>15</sup> The revised proposals abandon the plans to cut seats in the city of Belfast and involve changes to other constituencies. The proposals may now command the support of the DUP, but were denounced by Sinn Féin as ‘gerrymandering’, a charge rejected by the Boundary Commission.<sup>16</sup> There is no analysis in the report as to whether the new proposals would lead to significant nationalist or unionist under representation or not. The new proposals have also been criticised by Alliance (who advocate a three seat model for Belfast) as ‘bizarre’ for extending Belfast boundaries ‘far into the countryside’ and merging towns as far apart as Newtownards and Banbridge in the same constituency.<sup>17</sup> There is therefore considerable contention over the current recommendations, and a political context whereby it is particularly important transparency and objectivity inform considerations, in order to maintain public confidence in the legitimacy of the system across the community.

In relation to the legislative basis for decisions, the Boundary Commission sets out in its report the statutory provisions which have guided its determinations.

These are the Rules set for the Boundary Commission under the Parliamentary Constituencies Act 1986 (as amended) and in particular Rule 5(1) which sets out factors such as (in summary): special geographical considerations (size, shape and accessibility of a constituency); alignment with local council boundaries; correlation with the boundaries of existing Westminster constituencies; maintaining local ties that would be broken by changes, and the inconvenience of any changes. Seats are required to fit within a quota range of roughly similar numbers of electors. Notably these rules, which are discretionary and not prioritized in the legislation give the Commission significant leeway in determining proposals.

Whilst these considerations are generally set out in the report there is no information as to whether the Boundary Commission in its modelling and assessments has given consideration to its obligations under human rights law and in particular the principles of ensuring equal suffrage and non-discrimination. We have not undertaken any calculations to this end on either set of proposals, nor would we have reliable enough data to do so, yet the engagement with human rights legal requirements would place some duties on the Commission in relation to its considerations.

The current 2018 Revised Proposals are open for consultation until 26 March 2018, and are the last opportunity to contribute to the 2018 review.

The following section sets out some further information regarding the framework and duties in human rights law that should underpin this work.

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<sup>15</sup> Boundary Commission for NI Revised Proposals Report, January 2018.

<sup>16</sup> <http://www.bbc.co.uk/news/uk-northern-ireland-42865159>

<sup>17</sup> <https://www.belfasttelegraph.co.uk/news/northern-ireland/new-electoral-boundary-map-for-northern-ireland-bizarre-says-alliance-mla-ford-36549560.html>

## Human rights legal obligations and ‘equal suffrage’

The most relevant concept in relation to the right to free elections under electoral law is that of ‘equal suffrage’. There are a number of elements to equal suffrage, the first is the principle of ‘one person, one vote’ which is no longer generally an issue in Northern Ireland.<sup>18</sup> In addition, the concept also encompasses the principle that:

“each vote should count more or less the same, with implications for the delineation of electoral district boundaries. Gerrymandering, the opportune changing of electoral boundaries in bad faith, is inadmissible under the principle of equal suffrage.”<sup>19</sup>

Article 25 of the UN International Covenant on Civil and Political Rights (ICCPR) provides that, on the basis of non-discrimination every citizen has the right to:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by *universal and equal suffrage* and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

The ICCPR is a legally binding treaty based obligation on the UK within the UN human rights system. The meaning of provisions of Article 25 have been further interpreted by the UN Human Rights Committee which has held, that whilst the ICCPR does not impose any particular electoral system the:

...system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.<sup>20</sup>

Also relevant within the UN system is the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The ICERD Committee

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<sup>18</sup> Whilst property-linked voting has long been abolished the context of BREXIT does have implications for the existing voting rights of EU26 citizens living in NI for local government and NI Assembly elections, and overall implications for representation in the European Parliament, in particular with Irish citizens and other EU 26 citizens remaining EU citizens.

<sup>19</sup> EU Election Observation and Democratic Support ‘Compendium of International Standards for Elections’ (Fourth Edition), Brussels 2016.

<sup>20</sup> UNDoc CCPR/C/21/Rev.1/Add.7 (Human Rights Committee), General Comment 25 (ICCPR) Paragraph 21

(and Council of Europe) have held that sectarian discrimination in Northern Ireland is a form of racial discrimination to be afforded the protections of ICERD and hence the treaty's provisions apply to non-discrimination in relation to the two main communities (and also all other ethnic groups) in Northern Ireland. Article 5 of ICERD commits the UK to eliminate racial discrimination in all its forms and to guarantee on equal terms a range of rights, including "*Political rights, in particular the right to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage...*" (Article 5(c)).

In relation to the European Convention on Human Rights (ECHR), the right to free elections is provided for in Article 3 of Protocol 1 (which has been ratified by the UK). This right can be read alongside Article 14 ECHR which provides for the prevention of discrimination in the exercise of ECHR rights. Article 3 of Protocol 1 reads:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Official commentary on the case law of this right notes that:

....while Article 3 of Protocol No. 1 includes the principle of equality of treatment of all citizens in the exercise of their right to vote, it does not follow, however, that all votes must necessarily carry equal weight as regards the outcome of the election. Thus no electoral system can eliminate "wasted votes" ....

However, the vote of each elector must have the possibility of affecting the composition of the legislature, otherwise the right to vote, the electoral process and, ultimately, the democratic order itself, would be devoid of substance.... States thus enjoy a broad margin of appreciation in the organisation of the ballot. An electoral boundary review giving rise to constituencies of unequal population does not breach Article 3 of Protocol No. 1 provided that the free will of the people is accurately reflected.<sup>21</sup>

Whilst there is some discretion on states under these electoral provisions of the ECHR this discretion is not entirely unfettered and should be read in context of the particular circumstances of NI and the other treaty based obligations of the state. The provisions of the ECHR are directly justiciable in the domestic courts by virtue of the Human Rights Act 1998, and thus are legally binding domestically in relation to the Boundary Commissions interpretation of legislation and acts.

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<sup>21</sup> European Court of Human Rights 'Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights, updated August 2017, Paragraphs 7-8.  
[http://www.echr.coe.int/Documents/Guide\\_Art\\_3\\_Protocol\\_1\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_3_Protocol_1_ENG.pdf)



Section 3(1) of the Human Rights Act (HRA) provides that “*So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*” This would include the provisions of the Parliamentary Constituencies Act 1986 (as amended). Section 6 of the HRA in relation to the Acts of Public Authorities – which would include the Boundary Commission’s proposals- provides that

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
- (2) Subsection (1) does not apply to an act if—
  - (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
  - (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

Furthermore, it has been held that ECHR rights stand to be interpreted in line with other relevant authoritative international standards and jurisprudence, which in this case would include the aforementioned provisions of ICERD and the ICCPR.

It is worth noting that the Belfast/Good Friday Agreement provided for an ECHR+ Bill of Rights for Northern Ireland. The NI Human Rights Commission, in discharging its mandate under the Agreement, advised that the Bill of Rights should contain seven further codified provisions, in addition to Article 3 Protocol 1 of the ECHR to ensure democratic rights. These included a provision further codifying rights to equal suffrage.<sup>22</sup> The Bill of Rights has not yet been legislated for.

## **Conclusion**

There is no evidence in the current report that the Boundary Commission has conducted any form of human rights impact assessment in accordance with the provisions of the ECHR and other international standards, and its duties under the HRA, in preparing its recommendations.

CAJ would urge the Boundary Commission to ensure these obligations have been met in the final phase of its work.

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<sup>22</sup> NIHRC Bill of Rights Advice 2008, democratic rights pp35-38 including “1. Everyone has the right and the opportunity, without any of the distinctions mentioned in Recommendation 2 of the Right to Equality and Prohibition on Discrimination section of this Advice and without unreasonable restriction, to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and to be elected at genuine periodic elections, which must be by universal and equal suffrage, and must be held by secret ballot, guaranteeing the free expression of the will of the electors.”