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**Response to the Northern Ireland Prison Service
(NIPS) consultation on the introduction of an
early removal scheme for foreign national
prisoners**

21 June 2012

1 Introduction

NICEM is an independent non-governmental organisation working to promote a society free from all forms of racism and discrimination, where differences are recognised, respected and valued, and where human rights are guaranteed. As an umbrella organisation¹ we represent the interests of black and minority ethnic (BME) communities.² Our vision is of a society in which equality and diversity are respected, valued and embraced, that is free from all forms of racism, sectarianism, discrimination and social exclusion, and where human rights are guaranteed.

NICEM takes note that during a Justice Committee hearing, Junior Minister Jennifer McCann MLA suggested to the Northern Ireland Prison Service (NIPS) to consult NICEM directly on the draft consultation document.³ NICEM would have been keen to be involved at such an early stage in the consultation process. Nevertheless, we are glad to have the opportunity to respond to the consultation at this stage.

This response will address the questions put forward in the consultation document under three broad headings.

2 Overarching concerns in relation to the scheme and its potential impact on certain prisoners

NICEM is not content with the fact that this scheme will apply to all foreign national prisoners, except those serving life or extended/indeterminate public protection sentences, as this does not take the particular circumstances of each prisoner into account. It is NICEM's view that this scheme may have an adverse impact on three vulnerable groups of foreign national prisoners in particular, namely asylum-seeker prisoners, victims of human trafficking and prisoners with family members in Northern Ireland. The issues facing those prisoners was also raised by Jennifer McCann MLA during a Justice Committee hearing, who noted her concern that there are "some people who may be vulnerable if they went back to their own country due to threats on their life".⁴

It is a well-known fact asylum-seekers or victims of human trafficking have often broken the law upon entering the country as they may have used false documents

¹ Currently we have 29 affiliated BME groups as full members. This composition is representative of the majority of BME communities in Northern Ireland.

² In this document "Black and Minority Ethnic Communities" or "Minority Ethnic Groups" or "Ethnic Minority" has an inclusive meaning to unite all minority communities. It refers to settled ethnic minorities (including Travellers, Roma and Gypsy), settled religious minorities, migrants (EU and non-EU), asylum seekers and refugees and people of other immigration status.

³ Hansard Official Report, Committee for Justice, Foreign National Prisoners: Early Removal Scheme Proposals, 29 March 2012.

⁴ Hansard Official Report, Committee for Justice, Foreign National Prisoners: Early Removal Scheme Proposals, 29 March 2012.

to gain entry. If those prisoners were to be returned to their country of origin without having the opportunity to appeal the deportation, they may face a threat to their life. A number of cases have come before the European Court of Human Rights on this issue and the Court has held that the return of such persons would amount to a breach of Article 3 of the European Convention on Human Rights.⁵

Similarly, early deportation might have an adverse impact on prisoners with serious health issues who are receiving medical care or treatment in Northern Ireland. A number of such cases have also come before the European Court of Human Rights and the Court has held that the return of such persons would amount to a breach of Article 3 of the European Convention on Human Rights.⁶

In addition, if any of those prisoners have family members living with them in Northern Ireland, early deportation could have a disproportionate impact on their enjoyment of the right to family life.⁷

Therefore, it is submitted that the introduction of such a scheme should take into account the human rights and particular circumstances of each individual prisoner rather than adopting a generalised categorisation of prisoners. Moreover, the scheme must be in line with the Human Rights Act 1998, particularly the prohibition of inhuman and degrading treatment (Article 3 ECHR) and the right to family life (Article 8 ECHR).

Lastly, in the consultation document, one of the reasons set out for the introduction of the scheme is language difficulties and the subsequent “disproportionate drain on administrative resources”. While NICEM acknowledges that there can be an increased administrative cost in addressing language barriers, NICEM is deeply concerned that this has been put forth as the rationale for a scheme developed by an organ of the Department of Justice. Receiving information in a language one understands is fundamental to the administration of justice and therefore, it is not an acceptable policy consideration for the development of this policy. NICEM is also concerned that if this is an accepted rationale for policy development that it could potentially be used to justify other government policies in the future. Moreover, it has been noted that the scheme is based on a hybrid of the schemes currently in operation in England and Wales and Scotland. NICEM advocates the adoption of best practices from other jurisdictions, provided they have been proven to be a best practice through evaluation and review and are tailored to the needs of the local jurisdiction in Northern Ireland.

⁵ For example, *Hilal v. United Kingdom*, Application no. 45276/99, 6/6/2001 and *Chihal v. United Kingdom*, Application no. 22414/93, 15/11/96.

⁶ For example, *Aleksanyan v. Russia*, Application no. 46468/06, 5/6/2009.

⁷ This issue also arose in the abovementioned cases at footnote 5.

3 Right to fair procedures and an effective remedy

In the consultation document, questions were asked in relation to the setting of time limits for the scheme. NICEM is concerned that strict time limits might have the effect of placing an unwarranted focus on the timescale rather than taking the individual rights and circumstances of each prisoner into consideration. This might infringe upon the individual's right to fair trial and/or the right to an effective remedy as set out in Articles 6 and 13 ECHR respectively.

In addition, and as outlined above, certain prisoners may be more vulnerable than others. Given the lengthy nature of legal proceedings and the risk of encountering delays within the criminal justice system, NICEM is concerned that the proposed accelerated deportation procedure set forth in this consultation document could allow for the deportation of prisoners before the finalisation of an appeal. Given the potential serious implications that deportation may have for some prisoners, NICEM urges the NIPS to put in place certain safeguards to ensure that this does not occur. Therefore, NICEM is not content with the mandatory nature of this scheme and recommends that the NIPS put an appeal mechanism in place.

4 Equality issues and concerns relating to the consultation process

It is understood, as stated in the consultation document, that the purpose of the scheme is to accelerate the will of the court and/or decisions taken by the UKBA. However, NICEM is not content with the view that an Equality Impact Assessment is not required given the concerns raised in this response about the potential adverse impact of this policy on foreign national prisoners. Therefore, as a designated public authority under section 75 of the Northern Ireland Act 1998, the NIPS has failed to fulfill its obligations to submit an Equality Impact Assessment with the consultation document.

Moreover, NICEM is very concerned about the shortening of the consultation period as this may be in breach of the common law requirements regarding consultation. Under the common law there are four requirements that must be adhered to when during the consultation process, which are known as the 'Sedley requirements', and may be list as follows:

1. Proposals must be at **formative stage**
2. **Sufficient reasons** must be given to enable a meaningful response
3. **Adequate time** must be given for consideration
4. Results of consultation must be **conscientiously taken into account**

In order to satisfy the third criterion, the Code of Practice on Consultation (hereafter 'the Code') sets down a minimum time period of 12 weeks, which may be extended "where feasible and sensible".⁸ This Code recognises that;

⁸ HM Government, Code of Practice on Consultation (2008), p. 8.

when timing is tight, for example when dealing with emergency measures, or international, legally-binding deadlines, or when the consultation needs to fit into fixed timetables such as the Budget cycle, consideration should be given to whether a formal, written, public consultation is the best way of seeking views.⁹

However, the Code clearly sets out that once a formal consultation exercise is carried out, there must be “good reasons for it to last for a shorter period (e.g. to seek views to inform the UK’s negotiating position on EU proposals soon to be discussed in the Council of Ministers)”.¹⁰ Speaking about the shortening of this consultation period during a Justice Committee hearing, an official from the NIPS cited timesaving and the number of consultation responses received by England and Wales and Scotland when they carried out a similar consultation as the rationale for the shortened consultation period.¹¹ It is submitted that timesaving and experiences in other jurisdictions does not constitute a “good reason” for the purposes of fulfilling the common law requirement of adequate time. Moreover, when a decision has been taken to shorten a consultation period, the Code emphasises the importance of considering “additional means through which people can express their views”.¹² There is no evidence of such a measure in this consultation process.

Therefore, it seems that the NIPS appears to be in breach of the common law requirements regarding consultation. This is a cause of concern for NICEM as the consultation process is integral to ensuring the effectiveness of section 75 of the Northern Ireland Act 1998.

7 Further Information

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⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Hansard Official Report, Committee for Justice, Foreign National Prisoners: Early Removal Scheme Proposals, 29 March 2012.

¹² HM Government, Code of Practice on Consultation (2008), p. 8.