



Northern Ireland Council for Voluntary Action

NICVA'S Response to Progressing a Bill of Rights for Northern Ireland An Update

18 August 2004

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Progressing a Bill of Rights for Northern Ireland: An Update

Introduction

NICVA welcomes the latest proposals from the Northern Ireland Commission for Human Rights (NIHRC), which reveal an immense amount of work, including discussions with experts from the Council of Europe and consideration of responses from previous consultations.

We understand that the report was originally intended as a working paper to assist the political parties in the proposed 'Roundtable' which did not materialise. We also understand the rationale for putting the proposals out for consultation at this time in order to restore some momentum to public debate.

Our comments are informed by NICVA's role as the representative body for the voluntary and community sector and by the vision of society set out in our Policy Manifesto "where all citizens are treated as equals, where sectarianism and discrimination are not tolerated and where respect for human rights is regarded as the norm. We believe the Bill of Rights should underpin this vision.

We also believe strongly in the need for ownership of a Bill of Rights by people in Northern Ireland in order for a human rights culture to be embraced by all. This has clearly not yet happened. In our opinion confusion has been increased by controversy over the composition, powers and authority of the Commission, widespread criticism from across the political spectrum and in the media, and the apparent lack of government support (the Bill of Rights and the Commission are barely mentioned in the latest Priorities and Budget document). The Joint Committee on Human Rights at Westminster emphasised the importance of political and public ownership when it said: 'It is vital to ensure that the final advice on a Bill of Rights presented to the Secretary of State is credible, and grounded in community and political participation.'

NICVA continues to support a strong and inclusive Bill of Rights and believes that it must apply in its entirety to everyone in Northern Ireland. We believe that the Bill of Rights should state that it is about providing rights to everyone, but particularly to those who need them most. Previous consultations with NICVA's members also revealed support for highlighting the indivisibility of rights and the inclusion of social and economic rights to underscore the principles of equality and human dignity.

Despite the hard work of the Commission to try to gain cross-community support through the Roundtable process, not all the parties took part and in our view there is insufficient cross-community support to carry the proposed Bill through the legislative process. Therefore we believe that the impending appointment of new commissioners could present an opportunity to postpone submission, reconvene the Roundtable of political parties with the participation of civil society, clarify the Bill of Rights and create support for the process.

Having said that, we will make brief comments on the current update draft. This response will follow the format of the NIHRC document, with comments on the various sections and further observations in conclusion.

General Comments

We welcome the Commission's introductory analysis which summarises criticisms of previous proposals and attempts to clarify the range of human rights and related provisions in the Good Friday Agreement. It considers firstly, the sections of the Agreement about the duty of the Commission to advise the Secretary of State on the scope of a Bill of Rights including rights additional to those contained in the European Convention on Human Rights (ECHR) to deal with the 'particular circumstances of Northern Ireland', parity of esteem, equality duties and rights, and international standards and experience. Secondly, it deals with other provisions in the Agreement relating to human rights, including the commitment by the two governments to continuing protection of civil, political, social and cultural rights in Northern Ireland; the commitment by the pro-Agreement parties to a specified list of rights; the proposed joint Charter of Rights for the island of Ireland; the rights of victims and the need to encourage tolerance and reconciliation and to create space for integration. Moreover, two further issues figured prominently during consultation – the inclusion of socio-economic rights and the extent of mainstreaming rights.

NICVA supports the recognition of the need for positive action to ensure effective equality for previously disadvantaged groups and of the importance of socio-economic rights. We welcome the Commission's acknowledgement that it has not made up its mind about the mainstreaming debate and seeks further discussion.

The Commission's objectives

NICVA agrees with the Commission's decision to set out objectives. However we are not convinced that they are adequate to the task eg in view of the failure to gain political and public ownership and support for the Bill of Rights, we suggest that this should be an important objective. Moreover, given the advice of the Council of Europe experts on the complex debate about identity, we suggest reference to the need for the Bill to establish a level playing field for diverse identities to stimulate conciliation rather than exacerbate competing identity claims. It is important to work towards acceptance of human rights and equality as an area where everyone can benefit, where a just and rights-based society is the means to a more shared future. We would also suggest that an objective should be to ensure that the Bill stands the test of time and looks to the needs of future generations.

The Preamble to the Bill of Rights

NICVA welcomes the principles that will sustain a Bill of Rights with several provisos:. We would be inclined to re-order the list by putting (c) first, (a) second, followed by (b), (d) and (e).

There may also be merit in composing some inspirational wording such as: ‘The essence of justice is that it secures the rights of the weak against the strong’. The inscription over the entrance to the Old Bailey puts it well for an earlier time: ‘Defend the widow and the fatherless’. A few words at the beginning could summarise the message eg ‘This Bill of Rights is based on the following values – dignity, justice, equality, freedom, respect, participation, democracy, solidarity’.

Interpretation

We support the location of the interpretation after the preamble and welcome the provision at 1(3) to ensure that the whole of the law in Northern Ireland will be rendered consistent with the Bill of Rights. But we would suggest inclusion of an explanatory outline of the relationship between the ECHR, the Human Rights Act and the Bill of Rights at this early stage. We would also like to see a note that ‘everyone’ in the preamble and elsewhere in the document refers to nationals and non-nationals, including asylum seekers, migrant workers, refugees and visitors. This might also be the best place to explore the applications of the proposed Bill. NICVA would argue the case to have the Bill made applicable to the operations of any institution with jurisdiction over the people in Northern Ireland, rather than limit it to the operations of the Northern Ireland Executive and Assembly, as proposed by the Commission.

Democratic Rights

In light of the dangers of majoritarianism in a divided society, we support the inclusion of proportionality. NICVA is concerned by the phrase ‘The Commission is not in favour of conferring rights to participation in governance on groups or individuals other than elected representatives.’ This runs contrary to the principle of participative democracy, partnership and consultation which NICVA advocates. We would recommend changing to word ‘governance’ to ‘government’.

At 2(3)) we would add: ‘the State shall take all appropriate *positive* measures to promote the right of under-represented sectors of society, in particular women’ to encourage affirmative action and at 2(4) we would call for accessibility of polling stations and the inclusion of people with mental health difficulties in political life to strengthen the democratic rights of people with disabilities.

Identity and Community Rights

We suggest amending 3(7)(d) to read: ‘protect persons who are or may be subject to threats or acts of discrimination, hostility or violence as a result of their national, ethnic, religious, linguistic, cultural, sexual identity or disability’

As stated in previous responses, NICVA believes that the Bill of Rights should confer a right on individuals not to be treated as a member of a particular community. However, this needs to be dealt with carefully in order to ensure that practices such as employee monitoring remain valid.

The Right to Equality and Non-Discrimination

NICVA supports the five proposals in this section although we would suggest changing 'sex' to 'gender' and adding gender reassignment, pregnancy, HIV status, the care of dependants, culture and disadvantaged socio-economic status in order to underscore social, economic and cultural rights. However, there will need to be consideration of the compatibility between its longer list of grounds and the Section 75 grounds.

We suggest clarification of 'difference of treatment' at 4(4) and 4(5). It might be better to explain in clear language that the right to equality means treating all people as equal unless there are good reasons to make exceptions and give special treatment to certain groups. Therefore it is lawful to discriminate in favour of a certain group of people and treat them differently to meet a Genuine Occupational Requirement (GOR) or Genuine Service Requirement (GSR) at 4(4); and for affirmative action to correct under-representation and encourage a 'level playing-field' at 4(5). This conforms with recent thinking that equality should be substantive rather than formal and aim for equality of life chances, not just equality of opportunity and that the Bill of Rights presents an opportunity to promote equality proactively through the use of affirmative action, rather than simply prohibiting discrimination.

The Right to Life

Since this is the most fundamental of human rights we would recommend that it is formulated to provide maximum protection. We would suggest that Section 5(a) should read: 'when the official is acting in self-defence or defence of others *against* an imminent threat of death or serious injury' to bring it into line with the UN Basic Principles on the Use of Firearms. We also recommend that the provision should provide that law enforcement officers may only use lethal force as a last resort in carefully prescribed circumstances, and only when strictly unavoidable in order to protect life, rather than the negative phrase 'only when less extreme means are insufficient to achieve these objectives'.

NICVA believes that the Bill of Rights should include the right to a thorough investigation into all deaths in custody and killings in disputed circumstances and contain a provision that abolishes the death penalty and prohibits its reintroduction.

Physical and personal integrity should be protected and it would be useful to place a right in this section to indicate the state's positive duty to protect its citizens. Legislation (to ban stalking, for example) may result from the inclusion of this provision.

The Right to be Protected against Violence

In line with the preamble that affirms the right to live free from violence and the importance of human dignity, we support the strongest possible formulation of this fundamental right. The Bill should prohibit torture and other *cruel*, inhuman or degrading treatment or punishment (the ECHR omits the word ‘cruel’ which is incorporated into other international standards, including Article 7 of the International Covenant of Civil and Political Rights (ICCPR)). In keeping with the intention to render the whole of the law in Northern Ireland consistent with the Bill of Rights, we would recommend that the guarantee of this right include the right of all persons to be free from all forms of unlawful violence from either public or private sources. We would prefer to see prohibition of violence against women and girls made explicit in this section as well as in the section on victims’ rights. We also support the inclusion of a right to physical integrity and a right to dignity, including a ban on the use of corporal punishment and incommunicado detention.

The Right to Liberty

NICVA supports these provisions but would recommend the addition of several stronger protections. At 7(3) we suggest that everyone who is arrested has the right to confidential consultation with a solicitor of their choosing. We would also argue that these rights should be extended to people who are charged and detained. This right should include the right of counsel free of charge where a person does not have sufficient funds. We therefore disagree with the Commission’s decision to delete a proposed reference to the UN’s Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, which is reinforced by the UN Basic Principles on the Role of Lawyers.

In the section on children at 7(7) the provision should include the guarantee enshrined in the Convention on the Rights of the Child that the deprivation of liberty of any child shall be used only as a last resort and for the shortest appropriate period of time.

We would also argue that detained non-nationals should have the right to contact their consulate.

Civil and Administrative Justice

We support these proposals to provide the right of information about, and access to, civil and administrative justice. We recommend that everyone whose rights have been adversely affected by administrative action has the right to effective review as well as a written explanation.

The Rights of Victims

We support these provisions but oppose strongly the inclusion of the word ‘inexpensive’ with its unfortunate connotations. We also suggest placing the definition of victim at

10(3) and (4) at the beginning of the section and including the right of a relative to have cause of death investigated.

Since the Bill is looking to the future and should stand the test of time, we wonder about the merits of specifying a truth and reconciliation process.

The Commission's decision to exclude a provision on violence against women because it would be difficult to justify the exclusion of men and boys is hard to understand in light of the incidence of domestic violence against women. We suggest that this serious and growing problem should be acknowledged in this chapter as well as in the section on The Right to be Protected against Violence. The provision should read something to the effect that the state shall take all measures to prevent and eliminate all forms of violence against women and girls whether physical, mental or emotional.

The Rights to a Family Life and Private Life

We welcome the recognition of developments about same-sex partnerships, the right of transsexuals to marry and the importance of data protection. We recommend inclusion of the right of journalists not to disclose their sources of information, the right to confidential communication and consultations between counsel and client within their professional relationship, the need for warrants for searches, interceptions and surveillance in all but exceptional circumstances and the right of women to privacy about reproductive health rights.

In line with the Commission's own recent research on the plight of many people with mental health problems, indicating that medication without consent is at odds with Article 8 of the ECHR, any interference with the right to respect for private life needs to be justified and be proportionate in the circumstances in each case.

The Rights of Children

Since many of the rights in the UN Convention on the Rights of the Child (UNCRC) are not included in the ECHR, the Commission suggests that the UNCRC should be incorporated into the law in Northern Ireland except where local standards are higher. It states that it has decided to focus mainly on supplementary rights. However, there is some confusion because parts of the UNCRC are included in the present proposals. It is not clear if the provision at 12(c) that 'public bodies shall carry out their functions ...in accordance with the provisions of the UN's Convention on the Rights of the Child' means that the convention is incorporated into the law and it is difficult to cross reference because the UNCRC is not provided. We appreciate the desire to minimise detail in line with advice from the Council of Europe, but would suggest clearer presentation. It should be stated that public authorities will take all necessary measures to implement the rights in the UNCRC and/or Bill of Rights and that children need the utmost protection – that children should enjoy the same protection from physical punishment under law as adults, in line with recommendations from the UN Committee on the Rights of the Child; that

children should not be recruited to the armed forces or paramilitary groups or as police informers and must be protected during times of armed conflict.

NICVA suggests that provisions should include the right of children to be consulted, the right to have their views given due weight in accordance with age and maturity (in keeping with Section 75), the right to participate in political and public life and to play a constructive role in society.

We would recommend that ‘on a regular basis’ should be stated in clause 12(c) about the right to maintain contact with parents and family members; that the clause requiring the age of consent to be kept under review be reinstated and that the limitation ‘to the greatest extent possible’ be deleted from the clause about children living with disability. Furthermore we would recommend inclusion of the right to play, the right of every child to a standard of living adequate for the child’s physical, spiritual, moral and social development, the protection from exploitation and dangerous employment conditions, the right to human rights education and the right to the highest standards of health including appropriate and balanced information on reproductive and sexual health.

Education Rights

NICVA on the whole supports the provisions for educational rights. Notwithstanding our preference for the abolition of the transfer test and for the introduction of secular mixed schools to prepare young people for a shared future, we recognise the strength of feeling about parental choice. The Bill should simply state that parents have the right to choose education for their children and the state shall support all schools on an equitable basis, subject to requirements including minimum numbers and ability to provide the curriculum entitlement. This would allow support for a broad range of education including Montessori, mixed and other ‘specialist’ schools as well as religious and language schools.

We would also argue for inclusion of Traveller children and ethnic minority children at 13(5), the need for education to be more flexible to meet the needs of the Travelling community and for its delivery in appropriate languages. The Bill should provide for the right of all children to be educated in a mainstream school and the right of all who wish to learn to access education in the manner most suited to their needs. We agree that the education rights and needs of children with disabilities should be respected but this respect must include appropriate support.

NICVA’s policy manifesto states:

“Our education places too much emphasis on acquiring skills for the economy and not enough on life skills, personal development and citizenship, even with the welcome changes proposed to the curriculum. Greater emphasis should be placed on the role education plays in developing the individual as a citizen and an independent thinker, thus equipping them to engage well in the social and economic activity of Northern Ireland.”

We therefore suggest that children should have the right to human rights education underscored by personal development education including anti-bullying strategies,

healthy living and appropriate and balanced information about mental, sexual and reproductive health. It follows that the programmes for all those working with children and young people should include anti-discrimination, equality, human rights, personal development and sex education training.

NICVA believes that early years provision is especially important as it has been shown that investment at this stage has the greatest impact on life chances. We would therefore argue for the right to universal high quality early years provision.

We would also argue for the right to affordable and accessible life long learning.

Language Rights

NICVA supports the provisions outlined and, in light of the differing viewpoints among members, we would opt for the clause: 'Legislation shall be enacted to prescribe the situations in which people have the right to use the language of their choice.' We would suggest that all children should be offered the opportunity to learn a range of languages at school including Irish. NICVA's Policy Manifesto calls for a comprehensive Irish Language Act to clarify these issues.

Social, Economic and Environmental Rights

NICVA agrees that these rights are indivisible from, and inter-dependent on, civil and political rights and we therefore support their inclusion in a Bill of Rights. NICVA's aims and values reflect a commitment to combat poverty and social exclusion. Social justice is a fundamental human rights issue and must feature strongly in the Bill of Rights in order to create relevance for the most disadvantaged people and communities.

According to the document, the Commission justifies its limitation of these rights to the operations of the Northern Ireland Assembly and Executive because the devolved Assembly has responsibility for many social, economic and environmental matters and this will help defuse any opposition at Westminster to one part of the UK being granted rights denied to other parts. NICVA would argue that this is unrealistic because tax rates and socio-economic rights such as rights to a fair minimum wage and social security are tied to the operations of non-devolved institutions. We therefore recommend that the duties on public bodies should extend to Westminster and in fact to any jurisdiction which affects the lives of people in Northern Ireland, whether national or non-national.

The Commission has put forward three ways of protecting these rights – the first version would protect a set of minimum rights enforceable through the courts; the second would protect a larger range of rights to be progressively realised and the third version would combine one and two. We would have preferred a mix of one and two, with minimum justiciable rights combined with obligations on public bodies to progressively realise rights but this third version is not developed and therefore it is impossible to comment on it. Therefore NICVA will comment on the provisions outlined in the second version.

We agree with the provisions in the section on health care but wish to offer some suggestions. People with mental illness are one of the most marginalised groups in society with the lowest employment rate of any group with a disability. Many would like to work but are faced with the prejudice of employers. Since depression is expected to be the major cause of disability by 2020 (World Health Organisation) and discrimination is increasing, we would like to see more emphasis on the rights of this group to improved treatment from health care professionals, employers and the media. The Commission's own recent research into mental health highlights the need to ensure that the law, policy and practice are compatible with human rights standards.

We welcome the provision of the right to sexual and reproductive health care and to information and education relating to sexual and reproductive matters at all levels, free of coercion, discrimination or violence, which will help to counter the prejudices of certain organisations active in this field. However we would argue that this should be strengthened by stating that information, education and services should be provided free of coercion, discrimination, violence or harassment.

We also recommend the right to respite care for carers, the right of access to culturally appropriate information and the right to affordable healthy food.

In the section on the right to an adequate standard of living, we would add social security to the provision of social care - the Commission even explains its intention to establish the right to social welfare such as disability, unemployment and retirement benefits as well as social services such as social work and the provision of nursing care and other practical support. In establishing the right to social welfare, the Bill should include all social security benefits including carers' allowance and the need for its increase to reflect carers' contribution. Social care should also include the right to personal care in residential and nursing homes and improved availability of community care in the home.

The title 'right to housing' should also include 'accommodation' to reflect the rights of Travellers to a nomadic way of life and the provision of halting sites. In light of the need for reconciliation, the right to mixed housing is also recommended. In view of a growing older population, it might be prudent to provide for higher standards of accessible accommodation.

NICVA would posit that the rights to a fair living wage, to equal pay for women and men, to high quality child care, to part-time and flexible working, to respite care and accessible public transport are needed to make the right to work a reality. We also argue for inclusion of the right to unionise, to a safe and non-threatening working environment, to development of appropriate skills and to work voluntarily.

We support the provisions for a healthy and sustainable environment and the right to clean air and water, to accessible public transport, leisure facilities, green and other public spaces and children's right to play in a safe outdoor environment. This right to a healthy and sustainable environment should figure more prominently in any Bill of Rights considering the rapid deterioration of our environment and the seeming inability to

produce viable alternative sources of energy, to counter the consequences of the rich world's consumerism and the push for economic development at the expense of conservation and biodiversity. NICVA argues that we could start to reverse these trends by seeing the connection between conservation and human rights. Greater emphasis on reducing income differentials and highlighting the importance of the public good rather than rampant economic growth and individualism would benefit not only the environment but also the socio-economic rights of the more disadvantaged, here and in the developing world.

For these and other reasons, NICVA has long argued for a much stronger anti-poverty strategy which is outcome-focused with action plans, targets, timescales, enforcement and remedies to improve the income and living conditions of the most disadvantaged. We therefore argue that the Bill of Rights should include a positive duty on the State to provide realistic and measurable standards by which to hold those responsible to account. These should be agreed as part of consultation and inform the annual progress report to the Assembly or Westminster as specified at 1(b).

Limitations

We support the Commission's proposal to specify the limited circumstances in which restrictions may be imposed, the principles behind any such limitation and the statement that they must not go beyond limitations permitted under international law and standards.

Emergencies

We support the provisions to ensure that there are effective safeguards to prevent an unjustified resort to emergency powers, that no derogation from the Bill of Rights will be lawful unless a state of emergency has been declared prior to the derogation and that a cross-community vote in the Assembly should be required. We would argue the case for publishing a list of non-derogable rights such as the right to life, human dignity, fair trial and freedom from torture and highlight the importance of effective safeguards against serious human rights violations during emergencies.

Enforcement

We welcome the provisions that the State must respect, protect, promote and fulfil the rights in the Bill of Rights and that the Bill should have a horizontal and vertical application.

We prefer 'will' to 'may' in 18(5) 'legislation may be referred to the courts for a decision as to whether it is at that time compatible with this Bill of Rights'.

We welcome the Commission's view that the system for appointing and training judges should be reformed to ensure that those who are appointed are committed to the obligations imposed on them by the Bill of Rights.

Since the capacity to approach a court is the first necessary step to obtaining justice, NICVA believes it is important not to preclude any form of representative action by individuals or associations on behalf of people who cannot act in their own name. Legal aid should also be available for those taking cases, and some form of test should be available to save claimants' and defendants' time and to exclude frivolous and vexatious cases.

We welcome the availability of effective remedies and once the Bill is at the legislative stage, we recommend the publication of a summary document and an awareness campaign to encourage effective enforcement.

Amendments

NICVA agrees with the proposal that it should not be too easy to amend a Bill of Rights which contains fundamental protections and that therefore no amendment should be made without the consent of the Assembly in a resolution adopted by a cross-community vote or (if the Assembly is suspended) without the support of a weighted majority as expressed in a referendum in Northern Ireland. Since the Bill of Rights will be an Act of the Westminster Parliament and involve the Irish Government through an international treaty, we agree that the views of the Irish Government on any proposed amendment should be taken into account and that the international treaty should also be amended.

Additional comments

NICVA offers further comments as follows:

Women's Rights

The case for women's rights needs to be made again. Given the current backlash against women's rights, the disadvantages experienced by women in public and political representation, social and economic rights, gender-based violence and lack of reproductive rights, NICVA argues that the mainstreaming approach is inadequate and that there should be a separate section on women's rights. (The 'mainstreaming' failed to recognise the largely gender-specific nature of domestic violence in the section on the Rights of Victims.)

Moreover, we would strengthen the democratic rights section to comply with section 18(1) on enforceability to read: 'the State shall take *positive* measures to *ensure* the right of women to fair, full and equal participation in public life, including participation in decision-making processes'.

NICVA wishes to specify rights to a fair living wage, to equal pay for women and men, to a fair pension, to high quality child care, to part-time and flexible working, to respite care and accessible public transport in order to make the right to work a reality for most women.

Right to Seek Asylum

The Human Rights Act does not incorporate Protocols 4 and 7 of the ECHR, therefore the Bill of Rights should include asylum seekers' rights to liberty and freedom from arbitrary detention, the right to legal assistance, prohibition of return to a country where they expect human rights violations, rights to adequate support, food, appropriate and safe housing, education and health care. As this is a reserved matter for the Home Office, it provides a further reason for making the Bill of Rights apply to all institutions involved in Northern Ireland.

Conclusion

We understand that the Commission has tried to reconcile many competing demands but the resulting document is too long and confusing. On some occasions it mirrors the Human Rights Act when it does not recommend incorporating certain ECHR protocols. At other times it suggests additions to the ECHR provisions and in other cases it extends protections to include ECHR protocols not ratified by the UK. Moreover, it is very difficult to follow the format with the constant need to cross-reference various conventions, most of which are not provided in the document.

NICVA favours a simpler approach with 'read across' from the ECHR and additions to bring it into line with recent thinking and the particular circumstances of Northern Ireland. Then the fundamental rights to life and prohibition of torture would appear at the beginning and would be given their proper weight. The explicit inclusion of the Freedom of Expression and Freedom of Assembly and Association would provide the opportunity to refer to the vexed issue of flags and parades as well as an opportunity to add protections for journalists and public officials who put information into the public domain when it concerns violations of human rights by government agencies.

From our experience as members of the Human Rights Consortium and meetings with political parties, we have noted support for socio-economic rights across the political spectrum and think that socio-economic rights would be a good starting point for discussion and agreement. NICVA would also recommend a communications strategy, building upon the work that the Commission has already undertaken, to inform the public about human rights standards and further discussion to gather support for a strong and inclusive Bill of Rights.

Most people view human rights law as mainly concerned with violations of human rights by states, but in Northern Ireland the great majority of casualties were killed by 'non-state entities'. This has led many people to dismiss the Bill of Rights as irrelevant to meeting the particular circumstances of Northern Ireland. However the Commission's proposals at 1(3) that the Bill will affect all relationships, be binding on non-state entities at 18(2) and help ensure that Northern Ireland law is consistent with the Bill of Rights could provide another opportunity to increase political and public support. This may be a sensitive area and one reason it has not been 'flagged up' by the Commission, but the

public and politicians need to know that human rights and equality can benefit everyone and that they represent the only means to a just, rights-based society and shared future.