

THE BILL OF RIGHTS

EQUALITY

SHOULD A BILL OF RIGHTS FOR NORTHERN IRELAND PROTECT RIGHTS TO EQUALITY AND TO NON-DISCRIMINATION?

Under the Belfast (Good Friday) Agreement and the Northern Ireland Act 1998, the Northern Ireland Human Rights Commission has been given the task of advising the Secretary of State on a Bill of Rights for Northern Ireland. The Agreement also says that the Bill should reflect the particular circumstances of Northern Ireland and the principles of mutual respect for the identity and ethos of both communities and parity of esteem. The exact wording of the relevant paragraph from the Agreement is reproduced in the box below.

EXTRACT FROM THE BELFAST (GOOD FRIDAY) AGREEMENT, 1998

'The new Northern Ireland Human Rights Commission will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and — taken together with the ECHR — to constitute a Bill of Rights for Northern Ireland.

Among the issues for consideration by the Commission will be:

- the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and*
- a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.'*

One of the questions which the Human Rights Commission has to ask itself is whether and, if so, how rights to equality and to non-discrimination should be protected in a new Bill of Rights. This pamphlet tries to deal with some of the issues which arise for consideration in this context.

This pamphlet also includes extracts from Bills of Rights in other countries or from relevant international treaties. The issues and options set out in this pamphlet are not exclusive and the Commission would welcome other suggestions and proposals on

this aspect of its work. The ways in which you can make your views known are set out at the end of the pamphlet.

SOME ISSUES FOR CONSIDERATION

- (a) Should there be a general equality clause?*
- (b) Relationship with a discrimination clause*
- (c) Direct and indirect discrimination*
- (d) Criteria for justification of discrimination*
- (e) Authorisation for positive action*
- (f) Issues of separation/integration*
- (g) Are there any relevant European developments?*

(a) Should there be a general equality clause?

Many National Bills of Rights include a general equality clause, such as 'All individuals shall be equal before the law'. As there is no general equality clause in the European Convention on Human Rights, the question arises whether a general statement of this kind should be included in a Northern Ireland Bill of Rights. This raises a number of distinct issues.

The first is whether this would add anything to the current equality provisions under the Northern Ireland Act 1998, which requires all public bodies to have due regard to the need to promote equality of opportunity for nine specified groups. If the proposed Bill of Rights is enacted only in Westminster legislation, as the Agreement suggests, it might have no greater legal force than the 1998 Act and might not add anything of substance to it. On the other hand, it can be argued that a guarantee of 'equality before the law' is different from one of 'equality of opportunity'. 'Equality before the law' suggests equal treatment rather than equal opportunity and is therefore potentially stronger, subject to any possible justifications as discussed below. A Bill of Rights might also allow equality of opportunity to be enforced through the courts to a greater extent than is at present allowed.

It might also be possible to give the Bill of Rights a status comparable to that of the Human Rights Act 1998, which compels judges to interpret law to be in compliance with the European Convention "so far as it is possible to do so" and permits judges to invalidate secondary legislation if it contravenes the Convention.

A further question is whether any general right to equality should be enforceable only against public bodies or also against private sector bodies and individuals. A right to 'equality before the law' would probably be limited to the government and public sector, while a right to 'equality of opportunity' or 'equality of treatment' could be

formulated or held to extend to the private sector. Some equality guarantees in other Bills of Rights, such as those in South Africa and the Republic of Ireland, have been formulated or interpreted as giving private individuals or bodies direct rights against other private individuals or bodies. But it is not clear that this is the best way of guaranteeing rights in the private sector. It may be better to provide for this under specific legislation.

A final question is how a strong provision on individual equality is to be related to a possible right to equality of treatment or esteem on a communal level. Ensuring communal equality in any sphere may have adverse effects on individuals in a previously advantaged community and some guidance as to the priority to be given to each might be needed. In general, international standards give priority to individual rights to equality.

(b) Relationship with a discrimination clause

There is an important distinction between a right to equality and a right not to be discriminated against. A right to equality is potentially more positive, since it may require action to be taken, while a right not to be discriminated against is more negative, since it merely prohibits actions which may have an adverse effect.

In addition, discrimination is usually prohibited in respect of specified grounds and may therefore be of less general application. But this is not a necessary distinction: rights to equality can be limited to specific categories or grounds, as in section 75 of the Northern Ireland Act 1998, and conversely the right not to be discriminated against can be formulated in general terms, as for example by the inclusion of the phrase 'or other status' in Article 14 of the European Convention on Human Rights.

In practice many national Bills of Rights include both a general equality clause and a prohibition of discrimination on specified grounds. This raises the additional question whether any specified grounds should be the same for an equality clause and a discrimination clause. For example, the protection of equality under section 75 of the Northern Ireland Act 1998 specifies nine relevant groups while the prohibition against discrimination under section 76 specifies only two grounds, namely religious belief and political opinion.

(c) Direct and indirect discrimination

Most recent anti-discrimination statutes make specific reference to the distinction between direct and indirect discrimination. Direct discrimination is discrimination in which the basis or ground for the difference in treatment is openly or covertly expressed or intended. Indirect discrimination is discrimination which is the unintended effect of decisions or practices adopted on other grounds. This raises the question whether indirect discrimination should be expressly included in any provision in a Northern Ireland Bill of Rights. It is currently covered in the Fair Employment and Treatment (Northern Ireland) Order 1998 and in the Sex Discrimination (Northern Ireland) Order 1976, but not in the prohibition under section 76 of the Northern Ireland Act 1998, of discrimination on the grounds of religious or political opinion in legislation enacted by the Northern Ireland Assembly or in action

by public bodies. Under some national Bills of Rights, notably in the United States and Canada, the issue has been left to judicial interpretation. But indirect discrimination is explicitly covered in the South African Bill of Rights.

(d) Criteria for justification of discrimination

It is clearly impractical to achieve absolute equality or to rule out all kinds of differential and potentially discriminatory treatment. It is therefore necessary to allow for differences in treatment to be justified on some but not on other grounds. The question is whether this should be left to the good sense of judges or specified in legislation in some way. The ECHR and the US and Canadian Constitutions leave it to the judges, who have developed their own criteria in successive cases. The South African Constitution goes a little further by referring to 'unfair discrimination' and adding that any discrimination is to be treated as unfair unless it is shown to be fair. In the UK most of the anti-discrimination statutes include specific provisions for the justification of differences in treatment.

(e) Authorisation for positive action

There may also be a need for specific authorisation of positive or affirmative action taken to remedy long-standing inequalities. Current legislation in Northern Ireland and Great Britain allows only indirectly positive discrimination, such as providing special training for under-represented groups or recruiting from the unemployed. Other Bills of Rights have authorised positive measures which might otherwise be directly discriminatory, such as giving preferential treatment to applications from under-represented groups or providing for temporary quotas in recruitment in order to achieve a better communal balance. This is what is proposed in respect of recruitment for the new Police Service of Northern Ireland. Exemptions from equality and discrimination provisions of this kind are clearly permissible under the relevant international standards, provided they are limited in time and designed to remedy established inequalities. For example, the formulation in the United Nations Convention on the Elimination of All Forms of Racial Discrimination is as follows:

'Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights or fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.'

Provisions of this kind have been included in the Canadian Charter of Rights and Freedoms and in the Bill of Rights in the South African Constitution.

(f) Issues of separation / integration

Similar specific authorisation may also be called for in respect of special measures to promote the integration of members of distinctive communities or to allow members of minority communities to express and develop their culture or language. These too are regarded as legitimate in principle under the relevant international standards, as for example in the United Nations Declaration on the Rights of Members of National or Ethnic, Religious or Linguistic Minorities (1995):

‘Measures taken by States in order to ensure the effective enjoyment of the rights set forth in this declaration shall not prima facie be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights.’

In the Northern Ireland context a provision of this kind might be considered in respect of integrated education or housing, or the provision of separate educational facilities for minority communities on more favourable terms than for other larger communities.

(g) Are there any relevant European developments?

One of the main arguments for the inclusion of an equality clause in a Northern Ireland Bill of Rights is the relative weakness of the discrimination provisions of the Council of Europe's European Convention on Human Rights. Account must be taken, however, of anticipated developments on a European level which may remedy some of these deficiencies. Protocol 12 to the ECHR has been agreed which will extend the Convention's protection against discrimination to 'the enjoyment of any right set forth by law' and would include a general prohibition of discrimination on the established grounds by any public authority. The UK government, however, may not agree to be bound by this new Protocol.

In addition, there are proposals within the European Union for a Charter of Fundamental Rights and for two new measures on equality and discrimination. The Charter may or may not be directly enforceable in member states. The proposed Framework Directive for Equal Treatment in Employment and Occupation would extend the existing Equal Treatment Directive in respect of sex discrimination in employment to cover discrimination on the ground of 'sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation' and would authorise certain positive measures. An additional Directive on Equal Treatment between People of Different Racial or Ethnic Origin, which has already been agreed, introduces new protections against racial discrimination on a wider range covering not only employment but also social security, education and the supply of goods and services. Once adopted, these European Directives would automatically apply in Northern Ireland within, probably, a three-year period. Careful attention will have to be paid to the formulations proposed or adopted in these measures when the Human Rights Commission is drafting specific provisions on equality and discrimination for a Northern Ireland Bill of Rights.

EXAMPLES FROM OTHER BILLS OF RIGHTS

The following examples of equality and discrimination provisions from international conventions and national Bills of Rights may assist in the discussion of these and other issues.

The Universal Declaration of Human Rights (1948)

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

The International Covenant on Civil and Political Rights (1966)

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The European Convention on Human Rights (1950)

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.

The Constitution of the United States of America (1789)

14th Amendment (1868)

All persons born or naturalised in the United States, and subject to the jurisdictions thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Constitution of the Republic of Ireland (1937)

Article 40(1)

All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

The Canadian Charter of Rights and Freedoms (1982)

Section 15

- (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability

The Constitution of South Africa (1996)

Section 9

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

WHAT CAN I DO TO MAKE SURE THAT MY VIEWS ARE TAKEN INTO ACCOUNT BY THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION WHEN IT IS DRAWING UP ITS RECOMMENDATIONS ON THESE ISSUES?

You can contact the Commission at any time to express your views. The address, telephone, fax and email numbers are set out below. You can use the response sheet at the end of this pamphlet. If you have a special interest in any of the issues identified above, you can also ask to be included in the arrangements for more detailed discussion on that issue. The Commission has established a working group of individuals and representatives with a special interest in this area to advise it on more detailed formulations which might be considered for adoption. That working group can also be contacted through the Commission; it would be interested in hearing from you.

Northern Ireland Human Rights Commission

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BILL OF RIGHTS PAMPHLETS

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| 1. <i>A Bill of Rights for Northern Ireland</i> | March 2000 |
| 2. <i>The Bill of Rights: Introduction</i> | September 2000 |
| 3. <i>The Bill of Rights: Children and Young People</i> | September 2000 |
| 4. <i>The Bill of Rights: Criminal Justice</i> | September 2000 |
| 5. <i>The Bill of Rights: Culture and Identity</i> | September 2000 |
| 6. <i>The Bill of Rights: Education Rights</i> | September 2000 |
| 7. <i>The Bill of Rights: Equality</i> | September 2000 |
| 8. <i>The Bill of Rights: Language</i> | September 2000 |
| 9. <i>The Bill of Rights: Social and Economic Rights</i> | September 2000 |
| 10. <i>The Bill of Rights: Victims</i> | September 2000 |
| 11. <i>The Bill of Rights: Women</i> | November 2000 |
| 12. <i>The Bill of Rights: Implementation</i> | September 2000 |

Any or all of the pamphlets are available from the Northern Ireland Human Rights Commission.

BILL OF RIGHTS RESPONSE SHEET

EQUALITY

The Northern Ireland Human Rights Commission welcomes responses on the proposed Bill of Rights in any form. It would be particularly helpful to have your comments and suggestions on the various issues raised in this pamphlet. This response sheet is intended to make it easy for you to do so.

1. *Do you think that special provisions on equality rights should be included in the Bill of Rights?*

Yes

No

Don't Know

2. *Please add the reasons why you think some special provision on equality may be needed:*

3. *What particular rights on equality do you think should be included? If possible give your reasons.*

4. *Can you suggest how these rights might be formulated – would any of the examples given in the pamphlet be a good model?*

If there is not sufficient space on this sheet please use extra sheets. You can if you wish enter your response on this form on the Commission's website at www.nihrc.org.

PLEASE RETURN TO: NORTHERN IRELAND HUMAN RIGHTS COMMISSION, TEMPLE COURT, 39 NORTH STREET, BELFAST, BT1 1NA; FAX: 028 9024 7844, EMAIL: NIHRC@BELFAST.ORG.UK