

# THE BILL OF RIGHTS

## IMPLEMENTATION

### HOW SHOULD A BILL OF RIGHTS FOR NORTHERN IRELAND BE IMPLEMENTED?

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 how such a Bill of Rights should be implemented. This pamphlet tries to deal with some of the issues which arise for consideration in this context. By their very nature most of these issues are rather technical and legalistic, but their resolution is vital to the success or failure of

the Bill of Rights in practice. We have tried to present the issues in as user-friendly language as possible. The pamphlet also includes extracts from Bills of Rights in other countries and from relevant international treaties.

Readers might like to bear in mind that the Northern Ireland Human Rights Commission and the Republic of Ireland's Human Rights Commission are to create a Joint Committee which is obliged to consider the possibility of establishing a Charter reflecting measures for the protection of fundamental rights of everyone living in the island of Ireland.

The issues and options set out in this pamphlet are not exclusive and the Commission will 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.

## **EUROPEAN DEVELOPMENTS**

Throughout its consultation period the Commission will have to keep up-to-date with developments in human rights law in Europe. There is currently a proposal for a new European Union Charter of Fundamental Rights, which may address a broad range of civil, political, economic, social and cultural rights. However, whether and how such a Charter will be enforceable locally is at present unclear. The European Union is also in the process of producing new Directives aimed at protecting people more effectively against discrimination, particularly racial discrimination and discrimination within the sphere of employment. The Council of Europe, likewise, has drafted a new Protocol to the European Convention which will provide additional protection against discrimination. If a coherent human rights framework is to be provided for Northern Ireland, a Bill of Rights for Northern Ireland must clearly take into account not only the existing European Convention but also the potential developments mentioned here.

## **SOME ISSUES FOR CONSIDERATION**

- (a) How should a Bill of Rights be agreed upon in the first place before being presented to Parliament?*
- (b) How could a Bill of Rights "supplement" the rights already guaranteed by the European Convention on Human Rights?*
- (c) How could a Bill of Rights be "entrenched", that is, how could it be made into a permanent part of the law of Northern Ireland?*
- (d) How could provision be made for changing a Bill of Rights to take account of new circumstances or ideas?*
- (e) How should a Bill of Rights be interpreted by the courts?*

- (f) *How should a Bill of Rights be enforced?*
- (g) *How could other laws be made subordinate to the Bill of Rights?*
- (h) *Who should be able to take a complaint to court using the Bill of Rights?*
- (i) *What kind of remedy should a complainant be able to claim?*
- (a) *How should a Bill of Rights be agreed upon in the first place before being presented to Parliament?***

The Belfast (Good Friday) Agreement requires the Human Rights Commission to consult before it gives its advice to the Secretary of State on what should be contained in a Bill of Rights for Northern Ireland. The Commission has interpreted this to mean that it should consult as widely and deeply as possible with all the people of Northern Ireland. We officially launched the consultation on 1 March 2000 and we will continue to take views on the matter until the end of February 2001. In March 2001 we will issue proposals and opinions to the Secretary of State in draft form; at the same time we will publish this draft advice so that further comments can be made on it by members of the public. Having considered these further comments, the Commission will submit its final advice to the Secretary of State in September 2001.

The Secretary of State will then have the responsibility of deciding how much of the Commission's advice to accept. He or she will have to present a Bill to Parliament encapsulating the recommendations. Some people have suggested that whatever is to be presented to Parliament should first be put to the people for their consideration in a referendum. Others think that Parliament should first decide what it wants and then put that to the people. It is also possible to argue that a Bill of Rights is such a complicated document that it is not a suitable subject for a referendum: requiring each person to vote 'Yes' or 'No' to the document would not leave much scope for differentiation between acceptable provisions and unacceptable provisions. But the Agreement was put to the people in a referendum and it is certainly a complicated document. Alternatively people could be asked to vote separately on different parts of the proposed Bill of Rights.

- (b) *How could a Bill of Rights “supplement” the rights already guaranteed by the European Convention on Human Rights?***

The Belfast (Good Friday) Agreement says that the Bill of Rights for Northern Ireland should consist of the European Convention on Human Rights together with rights supplementary to that Convention. Given that the European Convention has already been incorporated into the law of all parts of the United Kingdom by the Human Rights Act 1998 (which is fully effective from 2 October 2000), what method could be employed to produce this combination of documents? One possibility would be a Bill of Rights (NI) Act which sets out the supplementary rights in the body of the Act and then, in a Schedule, reproduces the rights contained in the European Convention.

c) *How could a Bill of Rights be made into a permanent feature of the legal system of Northern Ireland?*

Most people are in favour of having a Bill of Rights for Northern Ireland. All the political parties have supported the proposal and it was promised in the Agreement. Recent opinion polls carried out for the Human Rights Commission and other bodies have confirmed that there is massive support for the idea among the general public.

It is reasonable to assume that people want a Bill of Rights that will give permanent protection to the rights included in it. This means that it will have to be protected from repeal or amendment by future governments – or, in legal terminology, that it will have to be “entrenched”.

This is not usually possible within the British legal system because the Westminster Parliament is regarded as being supreme in the sense that it can always repeal or amend the law. But there are some ways in which a Northern Ireland Bill of Rights might be entrenched even if it was initially enacted by the Westminster Parliament.

One way of achieving this would be to provide for the Bill of Rights to be approved by a referendum in Northern Ireland. That would make it politically very difficult for a future government to repeal or amend it without another referendum.

Another way would be to make the Bill of Rights part of an international treaty between the British and Irish governments so that neither could on its own repeal or amend it without renouncing its treaty obligations at the same time.

A third possibility would be to rule out any future amendment that had not been previously requested by a cross-communal vote in the Northern Ireland Assembly or by a referendum. This was the strategy that was used in the Statute of Westminster (1931) to entrench the independence of the parliaments of the “dominions”, such as Canada, Australia and the former Irish Free State. It can be argued that some fundamental constitutional statutes like this, and also perhaps the Acts of Union between England and Scotland in 1707 and between Great Britain and Ireland in 1800, have a special status and cannot be legitimately altered without the consent of those protected by them.

***(d) How could provision be made for changing a Bill of Rights to take account of new circumstances or ideas?***

Some form of entrenchment of a Bill of Rights is probably necessary. But it can also cause problems in the future. For example, the right to bear arms is protected under the United States’ Bill of Rights, which was adopted in 1791. Because that Bill of Rights is so difficult to amend, American society is lumbered with a right which many people regard as undesirable.

It may therefore be desirable to make some provision for future amendments of a Northern Ireland Bill of Rights in order to reflect changes in society’s ideas on what should or should

not be regarded as fundamental rights. But it is important not to make the procedure for making changes either too easy or too difficult.

The normal rule in the British legal system is that any Act of Parliament can be replaced by any future Act of Parliament. But it is possible, as explained in (c) above, for Parliament to send a signal to future Parliaments about the fundamental nature of a particular law by including a special procedure for amendment. For example, the Act to give force to a Bill of Rights for Northern Ireland could include a section saying "This Act may be amended only if two-thirds of the Members of the House of Commons vote in favour of such an amendment" or "This Act can be amended only if the amendment is approved by a referendum of the people in Northern Ireland".

A referendum of the people is probably the most familiar mechanism for altering a constitutional guarantee. It is the mechanism employed in the Republic of Ireland's Constitution (Article 46.2). There the preferred wording of an amendment is put to the whole electorate, who then vote on it. A simple majority is enough to pass the amendment.

It may, of course, be that some provisions in the Bill of Rights are considered so sacrosanct that they should never be subject to amendment. This is a feature of the 1949 Basic Law of Germany as well as of many other national Constitutions around the world.

***(e) How should a Bill of Rights be enforced?***

The obvious way of enforcing a Bill of Rights is through the ordinary courts. Some would argue, however, that a Bill of Rights is so important that it requires a special court to enforce it. When South Africa was arranging its current institutions in 1994 it created a Constitutional Court to deal with disputes over the interpretation of the whole Constitution, including the Bill of Rights. Countries like Germany and Spain have a special Constitutional Court too.

The Acts which recently devolved power to Scotland, Wales and Northern Ireland have provided that disputes over whether a particular matter is or is not within the powers of the devolved administrations should be decided by a special (although not a new) court, namely the Judicial Committee of the Privy Council. However some people think that court's record on human rights issues is not impressive.

One argument in favour of having a special court for the Bill of Rights for Northern Ireland is that some people in Northern Ireland do not have much confidence in the impartiality of the existing judges. The Northern Ireland Human Rights Commission will have to decide whether it thinks that this feeling is so widespread that it deserves to be taken into account in the arrangements for enforcing the Bill of Rights.

***(f) How should a Bill of Rights be interpreted by the courts?***

The tradition in the British legal system is for courts to interpret legislation 'strictly'. This means that they tend to give a literal meaning to the words used, rather than a meaning which better represents the purpose behind the legislation. In most other countries the provisions in a Bill of Rights are required to be interpreted 'purposively'. Some countries, such as South Africa, try to 'internationalise' the interpretation of their Bill of Rights by encouraging courts to refer to standards applied in other countries or in international treaties. If the model of the Human Rights Act 1998 were to be followed, the Bill of Rights would say that all other laws must be read and given effect to in a way which is compatible with the Bill of Rights "so far as it is possible to do so". Most Bills of Rights also say that they should not be read as denying any rights which are not expressly mentioned in the Bill. A comparable provision in a Bill of Rights for Northern Ireland would allow rights which are already recognised by the common law to continue to play a part in our legal system.

***(g) How could other laws be made subordinate to the Bill of Rights?***

This is not difficult to achieve in the British legal system. A good model is the Human Rights Act 1998, which provides:

- that the High Court can declare other Acts of Parliament to be 'incompatible' with the European Convention on Human Rights (the responsibility then passes to the government to decide how, if at all, it wants to change the law in question); and
- that any court can declare other pieces of legislation (*ie* besides Acts of Parliament) to be invalid because they are incompatible with the European Convention on Human Rights.

These powers exist regardless of when the legislation in question was enacted, whether before or after the passing of the Human Rights Act 1998.

The Northern Ireland Act 1998, similarly, provides that the Northern Ireland Assembly can pass legislation only on certain 'transferred' matters. If it passes legislation on other matters, such legislation can be declared invalid in the courts. This kind of subordination of the local legislature to that in Westminster also exists in Scotland and Wales.

***(h) Who should be able to take a complaint to court using the Bill of Rights?***

The right to take a complaint to court could be granted to any person or body who alleges that he, she or it has been a victim of a violation of the Bill of Rights. This is the stance taken within the European Convention on Human Rights itself and in the Human Rights Act 1998. It could also be granted to groups of persons who, without identifying any particular victim, allege that a particular piece of legislation is contrary to the Bill of Rights; an example would be a church group challenging a law because it supposedly violates the right to equality. In many other countries campaign groups are allowed to take cases to court to further collective interests.

The right to complain could also be vested in a public body with the specific remit to take action for the general good (this is known as 'public interest litigation'). In Northern Ireland the Equality Commission and the Human Rights Commission could play such a role, as has, for example, the National Human Rights Commission in India.

A certain number of Members of the Assembly could perhaps be given the power to refer proposed legislation to the courts or to the people whenever they feel that, if enacted, the legislation would breach the Bill of Rights. This kind of *pre-emptive* review is possible in the Republic of Ireland and in France. In the Republic of Ireland the President may refer a Bill to the Supreme Court and a majority of the Seanad and one-third of the Dail may jointly petition the President to refer a Bill to the people for a referendum. In France, 60 members of the National Assembly or of the Senate may insist upon a Bill being referred to the Constitutional Council for an opinion as to its constitutionality. The right to monitor the human rights situation in Northern Ireland might also be given to one or more established international agencies, such as the Council of Europe or the Organisation for Security and Co-operation in Europe, although this would probably require an international treaty to be drawn up.

Whoever is allowed to take a complaint, it is crucial that adequate public funding be made available for the task. In Germany, for instance, any person may enter a complaint of unconstitutionality if one of his or her fundamental rights under the Constitution has been allegedly violated by a public authority and no fee for filing the papers is required to be paid. It is equally important that whenever a legal case involving the Bill of Rights is under consideration, interested third parties should be able to apply to the court to submit their views as to how the case should be resolved. The Northern Ireland Human Rights Commission has already intervened in this way in several cases.

***(i) What kind of remedy should a complainant be able to claim?***

The current legal rules governing applications for judicial review - whereby the courts are asked to adjudicate upon whether the administrative or legislative authorities have acted within the law - are not particularly helpful to complainants. They might result in a court order requiring the administrative authorities to think again about the decision they have made. But the court is not allowed to substitute its own decision for that of the administration. The court can also invalidate secondary legislation, or declare primary legislation to be incompatible with some international obligation entered into by the United Kingdom. But again the court cannot re-write the legislation itself. Nor is the complainant entitled to an award of compensation, although under the Human Rights Act 1998 the courts have a considerable discretion in this regard.

If it was felt appropriate, a Bill of Rights for Northern Ireland could make provision for ensuring that complainants who win their cases receive some monetary reward for their efforts. This would amount to the creation of a new 'tort', allowing damages to be awarded for breach of constitutional rights. At the very least, the Bill of Rights could ensure that all of the complainant's legal costs are reimbursed if the complaint is upheld.

## **EXAMPLES FROM OTHER BILLS OF RIGHTS**

### **The Canadian Charter of Rights and Freedom (1982)**

#### *Section 24 ('Enforcement')*

- (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
- (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

### **The Basic Law of Germany (1949)**

#### *Article 17*

Everyone has the right, individually or jointly with others, to address written requests or complaints to the competent agencies and to parliaments.

### **The Hong Kong Bill of Rights Ordinance (1999)**

#### *Article 6*

- (1) A court or tribunal:
  - (a) in proceedings within its jurisdiction in an action for breach of this Ordinance; and
  - (b) in other proceeding within its jurisdiction in which a violation or threatened violation of the Bill of Rights is relevant,may grant such remedy or relief, or make such order, in respect of such a breach, violation or threatened violation as it has power to grant or make in those proceedings and as it considers appropriate and just in the circumstances.
- (2) No proceedings shall be held to be outside the jurisdiction of any court or tribunal on the ground that they relate to the Bill of Rights.

### **The New Zealand Bill of Rights Act (1990)**

#### *Section 28 ('Other rights and freedoms not affected')*

An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

*Section 29 ('Application to legal persons')*

Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.

**The Constitution of South Africa (1996)**

*Section 33 ('Just administrative action')*

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must:
  - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
  - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
  - (c) promote an efficient administration.

*Section 38 ('Enforcement of rights')*

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or a class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

*Section 39 ('Interpretation of Bill of Rights')*

- (1) When interpreting the Bill of Rights, a court, tribunal or forum:
  - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and
  - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport, and objects of the Bill of Rights.

- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

**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 to record your views. 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.

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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

### IMPLEMENTATION

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 implementation 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 implementation may be needed:*

3. *What particular provisions on implementation 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](http://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](mailto:NIHRC@BELFAST.ORG.UK)**