

Bill of Rights Forum

Preamble, enforceability and implementation Working Group

Notes of second meeting, 23rd August 2007

Present: Aideen Gilmore (convenor); Patrick Yu; Neil Faris; Brian Crowe; Peter Weir; Jean Gould; Laura McMahon; Martine Anderson;

Apologies: Alban Maginness; Stephen Farry; Alan Sheeran

Observers: Mari O'Donovan (CAJ); Sinead Ryan (Dept of Foreign Affairs); Kevin Hanratty (Human Rights Consortium); Mark Mallon (Sinn Fein)

1. Notes of last meeting

These were agreed.

2. Enforcement and implementation issues to be discussed/prioritised by the group

The group had agreed to read the report of the NIHRC Implementation Working Group in advance of this meeting, so we could discuss whether the issues they had identified were still relevant, and whether there were any gaps.

In general, the group acknowledged the difficulty of our task in the absence of knowledge in relation to what was emerging from other groups. For example, a Preamble should arguably be the last element to be drafted to incorporate the spirit of the rest of the recommendations; likewise it is difficult to develop recommendations around implementation and enforcement without knowing the nature and scope of content. While recognising that we could begin work on general principles on each of the

areas under our remit, it was felt that we would need extra time to complete our work.

- Agreed: AG to write to Chair to request extension until the end of January.

It was also recognised that we need to be kept regularly informed of the deliberations of other groups. While appreciating that regular updates would be provided in the Forum plenary, it was felt we would need to be kept more up to speed on all the issues being discussed so we could keep ahead of what might impact upon our work. Equally the group did not want to be inundated with all the information from all the groups.

- Agreed: AG to ask other convenors whether they could provide a short note of key bullet points on issues from each of their meetings.

On working methods, the group debated whether to meet more frequently given the workload ahead, but decided a decision on this would be postponed until further into our work. In the interim it was agreed that:

- Group members will be set tasks with deadlines for circulation and discussion via e-mail
- This process should allow consensus to emerge on many issues in advance so that meetings can then focus in on any issues requiring discussion
- If possible, weekly updates will be circulated
- There will be flexibility in relation to substitutes, particularly should meetings become more frequent

Issues

- (i) Relationship with the Human Rights Act

Discussion on this issue will focus on how the additional rights will sit alongside the Human Rights Act, e.g. can the HRA be repealed for Northern Ireland and replaced with a Bill of Rights? Can the additional rights sit alongside the current HRA although this could raise enforcement issues? Can the rights sit aside an amended HRA to allow for the same enforcement measures?

It was recognised that we need to be aware of the realities of issues such as parliamentary sovereignty, but that it could still be open to the group to present a number of options and the arguments for and against each.

It was also recognised that the HRA had not been in place for long when the NIHRC WG explored this issue and that more analysis was now needed of how it had been operating and particularly how it had been enforced and interpreted.

- Agreed: Laura to prepare analysis of recent DCA report on implementation of the Human Rights Act; this issue to be discussed in more detail at next meeting; Laura to circulate report on lack of precedence for undermining internationally agreed rights.

(ii) Enforcement (including discussion of new court)

Discussion focused on the potential for a new court. It was recognised that there are many possible models but all with various constitutional and legal implications, e.g. where would a new court sit in the current court hierarchy, both within Northern Ireland and the wider UK system? Are there any existing differences among the UK jurisdictions?

It was felt that particular legal and especially constitutional expertise would be needed on these that the group's human rights advisor (when appointed) might not necessarily have. The constitutional unit of University College London may be one possible source of such expertise

but we would probably have to commission a piece of work which may require resources.

- Agreed: Aideen to ask Chair whether funds would be available to commission this work; Jean to identify potential academics in UCL and develop brief

(iii) Interpretation

There are two types of interpretation clause – a “negative” one preventing the abuse/destruction of rights (common in the international covenants) and a “positive” one directing courts to apply certain principles in interpreting the rights (more common in domestic bills of rights). It was felt this was an area that could be agreed relatively quickly and easily by the group.

- Agreed: Patrick to look at interpretation clauses from other bills of rights; as well as looking at any case-law in relation to HRA on this issue; and present options to be discussed at a future meeting.

(iv) Justiciability

It was recognised that discussion on this issue is particularly difficult in the absence of knowledge of what other groups are recommending. It was also recognised that the issue of justiciability will relate to more than just socio-economic rights, but other areas such as culture, identity and language rights etc.

Without prejudging whether or not the inclusion of socio-economic rights in the Bill of Rights will be proposed or agreed, it was felt some background work could be undertaken in the interim in looking at how the Human Rights Act had been applied to socio-economic issues, and

perhaps external advice could be sought at a later date (perhaps a half day in January dedicated especially to this topic).

- Agreed: Aideen to circulate paper prepared by expert Bruce Porter for the Human Rights Consortium on the justiciability of socio-economic rights; Jean to talk to British Institute of Human Rights on work they have undertaken in applying HRA to socio-economic issues and any other analysis that might have been done.

(v) Devolved/non-devolved matters

It was recognised that this could be a particularly complicated area given the intermix and overlap of issues that will be devolved and not devolved: some issues may be entirely Westminster's remit, some may be entirely the Assembly's remit and some may be a mix of both. How will the Bill of Rights apply to any or all of these situations? It was suggested that it may be useful to look at the Scottish experience or other federal systems. Again it was felt that this was an area where more technical/legal advice may be required and when more information on what is being proposed is available from other groups.

- Agreed: to come back to this at a later stage

(vi) Limitations (including emergencies/derogation)

There are generally two forms of limitations – one general clause or provisions specific to each clause. The issue of which rights can be derogated from in the case of an emergency would also fall under this topic. The group felt this may be another area where agreement could quite quickly be reached.

- Agreed: Neil to look at provisions from international covenants and other Bills of Rights and prepare paper.

(vii) Entrenchment (to include amendment and adoption)

Again parliamentary sovereignty will be an issue here, and unless there is a radical change of convention on this there may be a limited amount that can be done. However, it was recognised that there were imaginative ways in which Northern Ireland support could be generated (e.g. by way of referendum or cross-community Assembly vote) to send important signals to Westminster on the views from here.

It was pointed out that in relation to amendments particularly a lot depends on how detailed the recommendations are that emerge from other groups, e.g. very detailed provisions which could become irrelevant quickly could almost create a trap of requiring more regular amendment than general clauses.

It was felt in general that this was also an issue which could be agreed relatively quickly.

- Agreed: AG to work with Brian on a brief for him to research and present options; Laura to circulate constitution of Britain paper which raises entrenchment issues

(viii) Application

Traditionally bills of rights and human rights standards apply vertically, i.e., they bind government and its agents. There are also examples of horizontal application, i.e. to the actions of private individuals. There is also what is known as indirect horizontality where courts as public bodies are bound to apply rights in private cases before it where relevant.

There was general agreement that the Bill of Rights would have vertical application. However, the extent, if any, to which it would apply to non-state actors requires further exploration. In addition, following the YL case, the issue of the definition of public authority and particularly private bodies carrying out public functions also falls within this topic.

- Agreed: Martina to carry out further research, particularly recent developments in other jurisdictions.

(ix) Standing

This relates to who can take a case under the Bill of Rights. There was no time to discuss this issue in detail

- Agreed: Peter to look in to developments in relation to this issue.

(x) Remedies

There was no time left to discuss this.

- Agreed: AG to develop timeline of issues to be discussed; any briefs required; and corresponding deadlines for circulation of preparatory documents.

3. Preamble

Agreed to move this on to the agenda of another meeting.

4. Further reading/papers to be distributed

A list of the documents prepared for the original NIHRC Working Group was circulated.

- Agreed: members to look through and pick out those of interest to them, AG will then arrange to copy/send them on; Laura to circulate expanded blueprint document (with the content of all links included).

5. Advisors/experts

To come back to at another meeting.

6. Admin issues (e.g. circulation of papers, secretarial support etc)

The issue of secretariat support has arisen in other Working Groups. CAJ has an observer and part-time staff person who can assist with taking notes and circulation of papers so our group may be self-sufficient in this regard. However, it is clearly important that the Forum itself is linked in in some way. Gareth should therefore be copied in to all e-mails so that he has access to all papers etc for the Forum's records.

7. AOB

The culture, identity and language working group have scheduled all their meetings in the afternoons just prior to ours in Stormont, and there is some overlap of membership. It was therefore agreed to hold our meetings in Stormont from now on.

8. Date of next meeting and future meetings

Next meeting is Thursday 6th September at 4pm in Stormont (room 152).

Dates of future meetings (same time and venue) are:

September – 20th

October – 4th and 18th

November 1st and 15th

December – 6th and 20th