

Bill of Rights Forum

Preamble, Enforceability and Implementation Working Group

Notes of third meeting, 6 September 2007

Present: Aideen Gilmore (convenor); Patrick Yu; Neil Faris; Brian Crowe; Peter Weir; Jean Gould; Mark Mallon; Alan Sheerin; Stephen Farry; Chris Sidoti (for the first part of the meeting only).

Apologies: Laura Mc Mahon; Martina Anderson.

Observers: Kevin Hanratty (Human Rights Consortium); Fiona Nic Dhonnacha (Dept. of Foreign Affairs); Mari O'Donovan (CAJ).

1. Notes of previous meeting

These were accepted as an accurate account of what was discussed and agreed.

2. Administration Issues

- (i) The secretariat requested members' telephone contact details.
- (ii) Chris Sidoti, chairperson of the Bill of Rights Forum, advised the group that a legal advisor, who specialises in constitutional law and human rights law, has now been appointed by the Forum. She will attend the Working Group's meetings from here on. However, she has prior commitments to lecture in

Trinity College, Dublin on Thursday afternoons - the time at which the Group had previously agreed to hold its meetings. Chris requested the Group to reschedule the time of its meetings in order to accommodate the new advisor. It was agreed that two suitable alternative times are Tuesday afternoons or Wednesday mornings. While neither of these times suit Jean Gould, she suggested that she could liaise with a member of Help the Aged who could attend the meetings in her place.

- (iii) Aideen Gilmore circulated a timetable to the Group that sets out the deadlines for the presentation of papers by members on the various aspects within the remit of the Group. There were a number of topics outstanding on which no one had volunteered to prepare and present a paper. Stephen Farry agreed to undertake the subject of devolved and non-devolved issues.
- (iv) Copies of a compilation of international instruments were handed out to those who had not previously received a copy.
- (v) Chris Sidoti advised the Group that should any member wish to contact him on any issue, they may do so through the convenor, Aideen Gilmore. He then left the meeting.
- (vi) As agreed at the last meeting, Aideen had written to Chris Sidoti requesting an extension of the deadline for the Working Group to report on its findings, owing to the reliance of many of its findings on the outcomes flowing from other working groups. Chris is sympathetic but will raise the issue for agreement at the plenary forum on 7 September 2007.

3. Limitations and Derogations

Neil presented his paper previously circulated on the subject of limitations and derogations clauses. Neil's paper was largely based on papers of the Northern Ireland Human Rights Commission. In the area of limitations, the Commission in a 2001 Report set out two options: (1) a general limitations clause that would apply to all rights (with the exception of its application to non-qualified rights); or (ii) limitation clauses on a right-by-right basis, wherein a specific limitation clause is physically attached to each of the rights that are deemed suitable for limitation within the Bill of Rights, and is specially tailored to suit its applicability to the right to which it applies.

The right-by-right model is the one adopted by the European Convention on Human Rights, and the Commission itself favoured this model in 2001 when it invited submissions on the alternative model. The Commission's 2003 Summary Report outlined that 22% of the submissions received supported a general clause while 13% preferred the right-by-right model. The former included submissions that wished the Commission's draft general clause to be more tightly drafted in a manner akin to that of the Canadian and South African Constitutions' general limitations clauses. Neil noted that the Commission's 2004 Report stated that the Commission itself was now in favour of a general limitation clause, but that it clarified that this clause would apply only to "additional rights" within the Bill of Rights, owing to the impermissibility of interfering with the nature of ECHR rights.

On the matter of derogation, Neil advised the Group that the Human Rights Commission in Chapter 17, NIHRC 2001 proposed a derogation provision based on Article 15 ECHR which was to be supplemented by provisions similar to those within the South African Final Constitution. Neil noted that in the Commission's 2003 Summary Report, it was recorded that several submissions had been made to the Commission arguing that all of

the rights within the Bill of Rights should be non-derogable, while various other submissions argued for other varying degrees of derogability.

The Commission's 2004 Report set out an amended version of a derogation clause whose main distinguishing feature from that of the 2001 Report was the requirement that a "declaration of a state of emergency" may only be made by the UK Parliament once this has been approved by a cross-community vote in the NI Assembly.

Neil suggested that it would also be wise to check if the issue of derogation is being decided upon by the Criminal Justice and Victims Working Group and/or the Civil and Political Rights Working Group.

Discussion flowing from Neil's presentation:

Aideen summarised the main points for discussion (it was agreed that in future each presenter should highlight these in their reports):

- Whether to have a general limitations clause or on a right-by-right basis
- Whether to have an emergency/derogation clause
- If so, how widely or tightly drawn
- Should Westminster or the NI Assembly (NIA) declare a state of emergency?
- What other safeguards need to be put in place?

(i) Limitation Clauses:

Peter proposed that any interference with the rights and their limitations contained within the ECHR would lead to interpretive difficulties for courts, and that there should, therefore, be no divergence from the situation pertaining under the ECHR. Further, it is

better to have limitations attached to each right as they can be tailored to cover in a more comprehensive manner the situations in which the right may need to be limited.

Neil also favoured the right-by-right model as he felt that it would be more helpful to follow the ECHR approach, as well being more accessible for readers of a non-legal background and allowing different kinds of limitations for different rights.

For the reason of maintaining uniformity with the ECHR/Human Rights Act, Brian also favoured a right-by-right approach.

Stephen differed; feeling that potential conflicts in the application of rights would be easier dealt with through a general limitations clause.

Alan proposed that it would be provide greater textual clarity to adopt the right-by-right approach, and that the general clause approach may lead to greater complications on the part of the non-legal reader.

Jean agreed, but added that the aim should be to harmonise, as far as possible, the content of all the limitations clauses, including that of the limitations clauses attached to socio-economic rights.

Patrick agreed noting that while not all rights are absolute, some are and that it would be better to follow the right-by-right approach of the ECHR.

- A tentative consensus was reached – that due to the considerations of reader accessibility and the need to keep substantive and stylistic uniformity with the ECHR approach –the right-by-right approach was perhaps the best. Stephen Farry wished to have his reservations on the matter recorded.

- Having reached this general consensus on approach to be adopted, the group agreed that the detail of each clause would obviously have to await the proposals from the other groups..

(ii) Derogations:

Peter believed that it is necessary to have a derogations clause for emergency situations, and that the decision of when an emergency exists should be made by Westminster after consultation with the Assembly.

Brian pointed out that it has not been agreed that policing and criminal justice powers should be devolved. He believed that the Assembly could not veto a declaration of emergency by Westminster.

Neil suggested that we should find out whether there are Bills of Rights that do not have derogations clauses and requested the reasons advanced by the CAJ in a previous consultation for not including a derogations clause.

Aideen clarified that CAJ's position was that it did not agree with the suspension of rights in any situation as limitations clauses would be sufficient to deal with any situation where rights may need to be limited, and agreed to circulate their previous submissions.

Stephen stated that a derogations clause is a pragmatic necessity given the reality that emergencies are possible and that in such times governments may be forced to derogate from their human rights' commitments. He believed that failing to provide a derogations clause would leave open the possibility of a constitutional crisis in times of emergencies and that it is better, therefore, to have such a clause so as to enable the government to manage crises in a regulated manner.

Brian highlighted that it would be difficult to reach agreement on the matter of derogations without further knowledge of what the relationship will be between the additional rights and the Human Rights Act, as well as which additional rights the other groups will propose. In particular many of the rights which could potentially be derogated from are already contained in the HRA and subject to a derogation clause therein.

- It was agreed that the decision of whether a derogations clause should be included in the Bill of Rights would be deferred until the relationship with the Human Rights Act had been discussed further, and more information on additional rights was available from other groups.

4. Adoption, Entrenchment and Amendment

Brian presented his paper on this topic, which had looked at what the Belfast Agreement (BA), the Saint Andrew's Agreement (SAA), the Sewell Convention (SC), and the NIHRC's Making a Bill of Rights for Northern Ireland (2001) had said on the matter.

Brian advised that apart from a reference in the BA that the rights will be defined in Westminster legislation, there is no further explicit statement therein as to how the Bill of Rights is to be adopted or entrenched. He noted that this matter was not revised or elaborated upon in the SAA.

Brian proposed that in light of the Dept of Constitutional Affairs statement that the SC has application to the devolved institutions in Northern Ireland, the SC has relevance as to the role the NI Assembly should play in the adoption of a Bill of Rights for NI and that there may therefore be "a strong case" that Westminster would require the consent of the NI Assembly before adopting legislation creating a Bill of Rights for Northern Ireland:

Brian then set out the three methods suggested by the NIHRC's 2001 Guidance for ensuring entrenchment of a NI Bill of Rights:

- no amendment without the request/consent of the NIA by a cross-community vote;
- incorporation of guarantees in the Bill of Rights in an international treaty between the UK and RoI.
- no amendment without a referendum of the people of NI.

The first method was identified by the NIHRC as well-established constitutional practice. The second method was regarded by it as being "wholly in line" with the rights' obligations placed upon the UK and RoI Governments in the BA, and the third method was also normal constitutional practice.

Discussion flowing from Brian's presentation:

Aideen suggested that the three options proposed by the NIHRC were a good starting point for discussion, but that the issue of requiring a referendum for adoption may need to be differentiated from a referendum to amend.

Peter stated that consent for the adoption of a Bill of Rights by the NI Assembly was important both given its powers on devolved matters and the fact that a Bill of Rights that could not pass the Assembly was pointless. He also felt that the preferred method for amendment would be through a cross-community vote in the NI Assembly. He believed that the requirement of a referendum for adoption and amendments might actually prove to be a deterrent for improvement as it is an expensive process, and further, some issues may not be controversial and therefore would not require a referendum. Furthermore, he pointed out that a referendum is not the normal process

for amending an act of Parliament and that to require this would raise issues of Parliamentary sovereignty.

Stephen believed that it would be necessary for the NI Assembly to give its consent and it would be difficult for Westminster to go against the will of the Assembly. He opposed a referendum on the basis that there were very often pointless and tedious. He felt that an intergovernmental treaty might be useful, particularly if it encouraged a common regime of rights throughout Ireland and the UK.

Patrick believed that whether amendment was to be effectuated through a referendum or Assembly cross-community consensus, that there would be a need for one, other or both to ensure ownership of the Bill of Rights in Northern Ireland.

Neil believed that both a cross-community vote and a referendum were important in order to provide ownership. He noted that the Republic of Ireland, for example, always holds a referendum to amend its Constitution. He pointed out that rights reflect a State's fundamental commitments, and that this was why it was necessary to establish from the outset which issues are fundamental and which are best regarded as matters of social policy and thus left out of a Bill of Rights. The more detailed the Bill of Rights, the more it may require amendment which is when it would become impractical. Neil also argued that the very adoption of a Bill of Rights for Northern Ireland already represents an inroad into Parliamentary sovereignty and that establishing the will of the people on the matter of fundamental rights is most important.

Brian supported Assembly consent and argued that the Sewell Convention points to the need for consent of devolved institutions. He was not in favour of a referendum and pointed out that in any case it could only be required for non-HRA rights as it is already adopted.

Alan was in favour of a referendum and cross-community approval in the NI Assembly for an amendment to the Bill of Rights.

- A consensus was reached that cross-community Assembly approval was necessary for the adoption and amendment of the Bill of Rights.
- There were a range of views on within the group on the need for a referendum which can be recorded in our report to the Forum.

6. Preamble to the Bill of Rights

Aideen suggested that while the drafting of any preamble would be left to the end, it might be useful to discuss the process by which this would be done, e.g. is it a task for this group, the plenary, or someone with more expressive writing skills!

Brian felt that if a preamble was even necessary it should be very short, and he envisaged problems in relation to, for example, definition of the “people of northern Ireland” since this is not a sovereign state and there would be political disagreement over how it is defined.

Neil suggested we could look at how other states with charters of rights developed their preambles.

Peter Weir felt that the Group would first need to know the exact rights contained within the Bill of Rights before it could decide upon a preamble but that in general he preferred a short rather than a long preamble.

Patrick highlighted that the aspirational aspects of the preamble might be better developed by the Forum plenary, or that other Working Groups could propose preambular text relating to their area.

Neil pointed out that there are different types of preamble – they can either be purely aspirational or they can be of great legal importance in providing interpretive guidance to courts as to how competing rights should be balanced.

It was agreed that research should be carried out into:

- ✓ How the content of preambles were reached in other countries and in particular in regional Bills of Rights.
- ✓ Different types of preambles (e.g. long / short)
- ✓ Different types of legal effect/application

6. Further reading materials

Ben had circulated an e-mail of potential reading highlighting documents of particular relevance to each group. Patrick circulated a number of documents in relation to implementation issues.

- ✓ Aideen to circulate information sent by Alan on Sewell Conventions.
- ✓ As regards documents submitted to the NIHRC Working Group, agreed that Aideen would get all of them copied and keep them as a reference source in CAJ for anyone who wanted to use them.

7. AOB

No AOB

8. Next Meeting

Will be on Tuesday, 18 September 2007 at 16.00 in Stormont.