

## Bill of Rights Forum

### Preamble, Enforceability and Implementation Working Group

Notes of fourth meeting, 18 September 2007

Present: Aideen Gilmore (Convenor); Neil Faris; Brian Crowe; Catherine Donnelly; Martina Anderson; Laura McMahon; Philip Weir.

Observers: 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 upon.

#### 2. Legal Advisor for the Working Group

The convenor welcomed the legal advisor, Dr. Catherine Donnelly, to the meeting and circulated copies of her curriculum vitae to the Working Group. Catherine informed the Group of her academic and professional history. She is a graduate of Trinity College, Dublin, University of Oxford and Harvard Law School. She lectured in law at the University of Oxford and she has been employed as a lecturer in law at Trinity College since January 2007.

Catherine is also a member of Blackstone Chambers, New York Bar and was called to the Irish Bar in July 2007.

Neil suggested that the Group identify the main areas in which Catherine's advice will be required. The convenor briefly familiarised Catherine with the areas that the Group are considering as well as the progress achieved by it to date. One of the specific areas that needs to be examined in closer detail is the options available for the enforcement of the Bill of Rights. For example,

would a special court be required, what are the various feasible models, and how would these models accord with the existing UK court system? Another specific area where advice is required is in how devolved, non-devolved and hybrid issues would be addressed within the Bill of Rights?

Neil brought Catherine's attention to a 2001 special issue of the Northern Ireland Legal Quarterly in which the matter of a constitutional court and devolved issues was discussed by academic lawyers including Chris McCrudden and Stephen Livingstone. Neil also suggested that it may be useful if Catherine examined the Irish, South African and Canadian enforcement models. He stated that it was particularly important to consider any practical implications that may attach to the various models being considered, for example, delays that may occur whenever constitutional issues are raised in civil cases.

Neil suggested that Catherine also address the matter of the justiciability of rights, and in particular the justiciability of socio-economic rights. He cited the paper prepared by Bruce Porter and Aoife Nolan in which the authors called for complete justiciability. Neil requested that Catherine identify any counter-arguments that may exist on this subject. He also questioned whether there is any obligation in the Belfast Agreement that the Republic of Ireland commit themselves to an equivalent level of rights protection to that which will exist within the Northern Ireland Bill of Rights. He also wished to be informed of the prevailing debate on the justiciability of socio-economic rights in the Republic of Ireland.

The extent of Catherine's involvement in the preparation of Working Group presentation papers was then discussed. The convenor suggested that it would be helpful if Catherine could advise members, where necessary, on the preparation of their papers. Catherine believed that an optimal approach would be for members to contact her whenever they have identified specific questions for her. Neil suggested that Catherine could also read members'

papers once circulated by them, and then add any important points that may have been omitted. Aideen also suggested that it would be useful for Catherine to advise the Group of the approaches adopted in other jurisdictions on any areas being discussed.

### 3. The Relationship between the Bill of Rights and the Human Rights Act

Neil informed the Group before his early departure that he had read the paper prepared by Laura on the Human Rights Act and that he wished to make some points on the subject. He stated that he wished the Human Rights Act to be retained – this included the retention of the existing numbering of its sections which he believed was important due to the familiarity that now surrounds them. Neil proposed two different methods by which the HRA could be retained: the Bill of Rights could be enacted in addition to it, or alternatively, the HRA could be re-enacted for Northern Ireland with additional schedules attached to its sections.

Laura then presented her paper – which she had previously electronically circulated to all members of the Group. It was largely based on a report published by the Department of Constitutional Affairs in July 2007 on the implementation of the Human Rights Act to date. In summary, the main findings were identified as:

- The HRA's impact upon the development of UK law has been significantly less, and less negative, than originally predicted.
- Up until May 2006, 1/3 of the cases coming before the House of Lords centred on the Human Rights Act. However, it is believed that in many instances the same outcome could have been reached under the common law.

- The impact of the HRA has proven to be largely beneficial and has led to positive dialogue between the judiciary in the UK and the European Court of Human Rights.
- While the impact of the HRA on counter-terrorism legislation has been significant, it has had no significant impact upon criminal law or the Government's ability to fight ordinary crime.
- The Act has had no significant impact on the constitutional balance between parliament, the executive and the judiciary.
- The Act has proven to be of particular benefit in the area of policy development. It has led to greater formalisation of the policy formulation process due to the requirement of a statement of HRA compatibility on all bills coming before Parliament and scrutiny by the Joint Committee on Human Rights. Further, legal challenges under the Act may force a change in government policy, and change in governmental behaviour is driven by the provision in the Act that it is unlawful for a public authority to act incompatibly with Convention rights.

Laura stated that the Report identified the following concerns:

- Many myths and misconceptions surround the HRA and it continues to be widely misunderstood by the public.
- Deficiencies in training have led to an imbalance in some cases wherein excessive attention was afforded to individual rights at the expense of the interests of the wider community.

The following points were flagged by Laura as being of particular interest:

- The most important HRA cases have been in the public law domain. Courts tend to afford a degree of deference or "discretionary area of judgement," to the legislature and the executive in such cases.

- The question of what bodies constitute “public authorities” for the purposes of the HRA continues to be contentious. This problem has been brought into sharp focus following the recent decision of the House of Lords in YL.
- The UK tends to receive more favourable outcomes than previously in Strasbourg since the adoption of the HRA. This is thought to be due to the manner in which UK judges now adjudicate cases which has gained the approval and respect of the European Court of Human Rights.
- On the matter of devolution, the Report states that:

The Human Rights Act provides not only the constitutional framework within which devolved powers are exercised, but lies at the foundation of the way devolution has been effected. Any process of amendment would need to pay due regard to this dimension ... A commitment to safeguarding human rights and equality of opportunity was a fundamental part of the Belfast Agreement and has consequently been incorporated into the Northern Ireland Act 1998.

- The Report briefly considers the option of a “UK Bill of Rights.” The Report states that this would entail repealing the HRA and enacting a separate set of fundamental rights which would no longer be connected in law to the European Convention on Human Rights. The Report considers two major difficulties attached to this approach. The first relates to the effect this would have on Parliamentary Sovereignty in that Parliament would be unable to amend or violate them. The second difficulty lies in the uncertainty and confusion that would ensue from having two sets of fundamental rights – the Bill of Rights and the European Convention on Human Rights. The Report considers that such an approach would leave individuals without “a single, clear catalogue of their rights and freedoms, which the Human Rights Act provides and which is shared by 800 million people across Europe.”

Discussion flowing from Laura's presentation:

One of the reasons that the Report was published by the Department of Constitutional Affairs was in response to a request by the UK Prime Minister for the Lord Chancellor to consider the need for "clearer cross- Governmental guidance on the balance that needs to be struck by officials when making decisions with human rights implications, ensuring that public safety is at the forefront of decision making." Brian stated that his party are of the opinion that the Report insufficiently addressed the matter of public safety and individual entitlement to fundamental rights, particularly in relation to Article 2, and that some rebalancing may be required in this regard.

Brian also noted that the constitutional balance that has been maintained between the executive, parliament and the judiciary, despite the HRA, could be upset by the introduction of socio-economic rights into the Bill of Rights – he stated that a similar point has been made in the recent Green Paper, The Governance of Britain. The latter states that the incorporation of social and economic rights into British law "would involve a significant shift from Parliament to the judiciary in making decisions about public spending and, at least implicitly, levels of taxation."

Brian noted that the UK Government's policy on a Bill of Rights has changed since the Report was written – it has now clearly committed itself to consider a Bill of Rights for the UK in the Green Paper, The Governance of Britain. Brian pointed out that in the latter, the Government talks about constitutional reform falling not only to it alone, but also to "all of the people of these islands." Brian stated that this means UK wide, including Northern Ireland and that, therefore, the direction of a Bill of Rights for Northern Ireland could now change.

Laura agreed that the inclusion of socio-economic rights within the Bill of Rights for Northern Ireland could shift the balance of power but she pointed

out that the terms of reference of the Forum do not tie it to any particular set of rights and that it can go beyond the rights discussed in The Governance of Britain.

Martina stated that the terms of reference for a Bill of Rights for Northern Ireland have not been altered in any way. She suggested that the approach being adopted by Scotland should be examined. She believed that any discussions on a Bill of Rights for the UK should not deter the Group – in any case, such a Bill of Rights may never in fact materialise.

The convenor pointed out that the Group and the Forum have their own particular mandates to fulfil and that there is no reason why Northern Ireland could not lead the way – the discussions on a Bill of Rights for the UK could roll over for many years as it is not one of Westminster's priorities. Further, Westminster will have the final say when it comes to approving the Bill of Rights for Northern Ireland.

The matter of defining "public authorities" was then raised by Martina. She wondered whether the issue is less pressing here given the wider scope of Section 75 of the Northern Ireland Act 1998. Laura pointed out, however, that breaches of Section 75 are dealt with in a particular way – the Section has its own particular remedy and further, it is more process rather than outcome-focused.

The recent decision by the House of Lords in *YL v Birmingham City Council* (20 June 2007), that residents of private care homes that were placed there by local authorities do not have Convention rights against the care home due to the fact that the latter does not exercise a public function for the purposes of Section 6(3)(b) of the HRA, was thought by Laura to leave a serious gap in human rights protection in Northern Ireland. Laura suggested that the Group could consider the possibility of using the definition of "public authority" in

the Bill of Rights that was contained within the recently proposed private members bill, the Human Rights Act 1998 (Meaning of Public Authority) Bill. The latter sought to include a clause in the Human Rights Act that ensures that a function of a public nature includes a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform that function.

Since the meeting was not quorate, no further decisions were made. Aideen stated that further discussion needed to take place about how the additional rights would sit alongside the Human Rights Act - the Northern Ireland Human Rights Commission had previously identified three different models and greater analysis of these models was needed, including the advantages and disadvantages of each. Since this is linked to the issue of application, Laura agreed to work with Martina and Catherine in preparing a discussion paper for the next meeting.

#### 4. Extension of the Working Group

The convenor informed the Group that it was agreed at the previous plenary meeting that the deadline for the submission of the Group's findings be extended to the end of January 2008.

#### 5. Next Meeting

The next meeting will be held at 16.00 on 2 October 2007 in the UUP's party room in Stormont.