

Bill of Rights Forum
Preamble, Enforcement and Implementation Working Group
Notes of Fifth Meeting, 2 October 2007

Present: Aideen Gilmore; Neil Faris; Brian Crowe; Mark Mullan; Colin Harper; Patrick Yu; Laura McMahon; Barry Fitzpatrick; Peter Weir; Catherine Donnelly (HR advisor)

Observers: Mari O'Donovan;

Apologies: Martina Anderson, Stephen Farry.

1. Welcome and introductions

Barry Fitzpatrick has replaced Jean Gould as the Age Sector representative and Colin Harper has replaced Alan Sheeran as the disability sector representative on the working group. Thanks were noted to Alan and Jean, and Barry and Colin were welcomed to the group.

2. Notes of Previous Meeting

Patrick Yu had sent apologies for the last meeting which had not been recorded in the notes. Neil also pointed out that while the notes made reference to decisions not being made at the previous meeting once it became inquorate, the group had previously agreed that decisions could be proposed while inquorate, then circulated to the group via e-mail for approval. This was confirmed.

3. The Relationship between the Bill of Rights and the Human Rights Act 1998

Laura presented a paper on the various possible means of relating the additional rights for Northern Ireland to the existing Human Rights Act based on the models proposed by the Human Rights Commission in 2001.

The first model involves repealing the Human Rights Act 1998 (HRA) and adopting a new Bill of Rights that incorporates both rights contained within the HRA and any newly proposed supplementary rights. This single-document option leaves open the possibility of considering different enforcement mechanisms than currently exist, such as a special human rights court which could apply consistently across both HRA and supplementary rights or declarations of legislative invalidity as opposed to incompatibility. The model's main disadvantage is the uncertainty of how an exclusively NI Bill of Rights would effect UK-wide legislation and whether it would be feasible for NI courts to strike down or declare as incompatible legislation that would remain valid throughout the rest of the UK.

The second model involves passing legislation to introduce new rights and amending the HRA to address its present shortfalls (e.g. standing, application). The advantage of the model is that legislation could provide for a range of enforcement mechanisms appropriate to the nature of the rights. Further, it would create the appearance of continuity with present legal structures and it could provide for a coherent enforcement of a broad range of rights. The main concern with this model is that with two pieces of legislation, the pre-existing HRA legislation might tend to dictate how some rights (e.g. new fair trial rights) would be enforced. A further disadvantage is its potential complexity and inaccessibility to the ordinary/non-legal user.

The third model involves retaining the HRA in its present form and introducing new rights in a separate statute. Enforcement mechanisms other

than those in the HRA such as a special human rights court would only be applicable to the rights contained in the separate statute. Thus, ruling out any amendment to the HRA would make it difficult to provide a coherent and accessible structure for the enforcement of the rights contained within the two statutes.

Laura then briefly considered the matters of entrenchment, remedies, application, standing, justiciability, interpretation, devolved and non-devolved issues, including a summary of the views expressed on these by the "Justice" discussion paper, A Bill of Rights for Britain? She suggested that the optimum way forward would be for the Group to decide upon an implementation model and to then consider the approach to be adopted on these matters within the context of the particular model elected by it and when up for discussion on the group's timetable. It was agreed that Laura's document would be a really useful reference point for all these discussions.

Discussion on Laura's presentation:

Peter questioned the wisdom of interfering with the HRA and thus favoured Model 3. He believed that it was more appropriate to concentrate on the approach to be adopted in relation to rights supplementary to those in the HRA that reflect the particular circumstances of Northern Ireland. He also preferred to refrain from deciding upon the issue of standing, for example, until it becomes clear exactly what rights will be contained within the BoR.

Catherine highlighted that another potential downfall of model 3 was that people may seek to recategorise their rights/claims under the newly created supplementary rights legislation as opposed to the HRA, particularly if the former was seen to have better provisions in relation to enforcement, standing, application etc.

Peter suggested that a potential solution to this would be to mirror the approach of the HRA in the new rights legislation.

Brian stated that it was inappropriate for the Group to discuss the perceived weaknesses of the HRA as such discussions should more appropriately be undertaken within a UK-wide arena, and were beyond the remit of deciding upon "rights ...to reflect the particular circumstances of Northern Ireland." He suggested that the current shortfall of the HRA in relation to standing might best be remedied by legislation.

Neil suggested that a neater approach to Model 3 would be to adopt a statute that amended the HRA by providing an additional schedule to it that contained rights particular to the circumstances of Northern Ireland. Where possible, new rights could be placed beside ECHR rights, for example, the right to march could be placed beside Article 11 ECHR. New rights such as cultural rights could provide for wider standing than existing HRA rights.

On the matter of the actual model that should be adopted, Barry believed that Westminster would not wish to actually repeal the HRA for NI – it has developed almost "special act" status and may be regarded as untouchable. As regards standing, Barry believed that a purely victim-focused approach is now outmoded. To move with international developments there is a need to specifically provide for the Human Rights Commission and NGOs, for example, to have standing. In the absence of this extended approach, the rights of older people could not be truly regarded as being protected as they are unlikely to bring cases themselves.

Patrick also felt that it was particularly necessary to address the matter of standing in relation to vulnerable groups. The Convention is now an old document and does not reflect modern developments at a European level - for example, the European Social Charter provides for wider standing. There

is now a need for NGOs and employers to be allowed to represent the interests of vulnerable groups.

Colin was concerned that the newly created rights legislation would be too dependant upon the HRA. He suggested the possibility of merging the two together in one piece of legislation.

Laura was opposed to repealing the HRA as it is now well bedded down and understood in the legal system. She believed that it was appropriate, however, to examine the weaknesses of the HRA and in particular to improve the current HRA standing and application rules.

The convenor suggested that the Group defer the making of decisions upon matters such as standing until they arise in the course of our work.

Agreed:

- ✓ Consensus that Model 1 would not be proposed by the group for the various reasons outlined above.
- ✓ There were a range of views expressed over options 2 and 3 and particularly on whether or not the HRA should be amended.
- ✓ However, agreed that the option of amendment be kept open so that when we proceed through the other issues (such as standing etc) we can determine whether there are particular circumstances of Northern Ireland that may necessitate amendment.

4. Application

Mark summarised the paper prepared by Martina on "application" that examined the approaches adopted on this issue in Canada, the United States, South Africa, New Zealand and Ireland. While all these jurisdictions provide

for vertical effect (applying to government and its agencies) of the rights contained within their Bills of Rights/Constitutions, only Ireland provides for their direct horizontal effect (applying to private individuals and organisations). Canada, South Africa, and the US provide for varying degrees of indirect horizontal application.

The issue of application was also identified as requiring inter alia consideration of the scope for judicial interpretation of the Bill of Rights and the desirability or not of providing for horizontal application of socio-economic rights. Further, should the vertical application of socio-economic rights be "progressively realised"?

The YL case, discussed at the previous meeting, was also identified as highlighting the need to properly address the matter of application and to carefully draft the definition of "public body."

Discussion of Martina's paper:

Patrick suggested that the subject of application also necessitates a discussion of states' positive obligations to introduce laws that protect individuals from human rights abuses by other individuals.

On the matter of the vertical application of socio-economic rights, Neil wondered whether the achievement of progress on socio-economic matters was best left to government social policy. Judges might not be the most suitably qualified to decide, for example, on budgetary allocations and how long it should take to complete public buildings. Further, the vertical application of socio-economic rights may import the risk of judges becoming too executive-minded and exclude the role of public campaigns.

Laura stated that in South Africa, where an urgent need is identified, the socio-economic right is enforced immediately, while in other cases these rights are progressively realised – a timeframe for their realisation is allocated by courts.

The convenor suggested that the matter of socio-economic rights fell more appropriately within the categories of enforceability and justiciability. The discussion was therefore refocused to the definition of “public authority” and horizontal application.

Catherine advised that the ECHR was a 1950s solution when a clear-cut divide between the private and public spheres existed. This is no longer the case given ever-increasing privatisation and the existence of quasi-public bodies. It was clear from parliamentary debates on the HR Bill that wider application of the HRA was intended. However, courts subsequently proceeded to define “public bodies” more narrowly. The government has now responded to the YL case by proposing the introduction of legislation in England and Wales only to extend the application of the rights contained within the HRA on a sector-by-sector approach.

Patrick and Barry suggested that it would be worthwhile examining the European Court of Justice’s more progressive test for a “public body” and Laura suggested that it would also be of assistance to read the two reports written by the Joint Committee on Human Rights on the definition of “public body” and horizontal application.

Brian felt that the matter may be best dealt with by legislating on a sector-by-sector basis.

The convenor suggested that while the gap identified in YL is being closed in England and Wales by this approach, this could be a particular circumstance

of Northern Ireland that might be more easily addressed by amending the HRA to close the gap here via our Bill of Rights.

Neil also suggested that rectifying the gap could be achieved by drafting a wider definition of public body specifically for Northern Ireland.

Catherine agreed to examine for the Group the tests of "public body" applied by the ECJ and the ECHR, the views of the JCHR, as well as how the scope of such a definition relates to horizontal effect clauses.

5. Next Meeting

The next meeting is at 16.00 on Tuesday, 16 October 2007 in Room 21 (Committee Room) in Stormont.