

Bill of Rights Forum
Preamble, Enforcement & Implementation Working Group
Notes of sixth meeting, 16 October 2007

Present: Aideen Gilmore; Patrick Yu; Barry Fitzpatrick; Peter Weir; Brian Crowe; Laura McMahon; Martina Anderson; Alban Maginness.

Apologies: Catherine Donnelly; Colin Harper; Neil Faris; Stephen Farry.

Observers: Sinead Ryan (Dept. of Foreign Affairs); Kevin Hanratty (Human Rights Consortium); Mari O'Donovan.

1. Welcome and apologies

Apologies noted above.

2. Notes of Previous Meeting/matters arising

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

It was agreed to defer further discussions on the issue of application until the next meeting due to the absence of Catherine who has prepared a paper on same.

Aideen gave a brief account of the papers presented at the Forum residential weekend of 12-13 October 2007 by Olivier de Schutter, Michael O'Flaherty, Christine Bell, Francesca Klug, and Philip Leach on the matters of socio-economic rights, civil and political rights and equality, "the particular circumstances of Northern Ireland," the Human Rights Act, and the evolution of the European Convention on Human Rights respectively . She agreed to

circulate copies of these papers as soon as they are made available, and Patrick stated that he would circulate a copy of a paper written some time ago by Francesca Klug on the issue of judicial deference under the Human Rights Act 1998.

3. Standing – who should be able to make a claim under the Bill of Rights?

Peter presented a paper on the subject of standing. In summary:

- Two main possible interpretations of standing under the proposed Bill of Rights exist. First, a narrow interpretation that would accept that only individuals (victims) who have directly suffered alleged breaches of human rights, and where applicable their guardians or those who act under a power of attorney for them, can take human rights cases. Second, a broader interpretation would acknowledge the right of interest groups to take human rights cases on behalf of others. The latter category may in turn be interpreted in a narrow or broad manner – it could be restricted so as to only acknowledge the right of the Human Rights Commission to pursue public interest cases or it could also allow a wider range of NGOs to pursue such cases.
- The issue of resources is linked to that of standing. Even if a narrower interpretation of standing were to be decided upon, there would remain open the option of making available funding to enable victims with limited resources to pursue their human rights in court. This could be achieved by way of legal aid and/or the right of the Human Rights Commission to sponsor cases.

- Other jurisdictions and regional instruments allow for various degrees of standing:

A narrower interpretation which restricts standing to victims has been adopted by the ECHR (Article 3(2)) and New Zealand. Despite the fact that those with a "sufficient interest" are allowed to seek judicial review in the UK (Section 31(3) of the Supreme Court Act 1981), the HRA mirrors the ECHR approach and only allows standing to victims (Section 7). However, the Human Rights Commission has now been granted standing to take cases under the HRA.

Standing is not defined under the Irish Constitution, but case law reveals that courts are likely to allow broad public interest standing in constitutional challenges where an actual victim is unlikely to emerge, whereas they are reluctant to do so in circumstances where it is likely that a victim will emerge.

While the Canadian Charter only expressly provides that an individual whose rights have been infringed may have standing, Canadian Courts have also allowed public interest standing; although the Supreme Court has stated that this should only be permitted where 'no directly affected individual might be expected to initiate litigation.'

The South African Constitution provides for broad standing that allows human rights cases to be taken by individuals who are acting in their own interests; on behalf of a person who cannot act in their own name; as a member of or in the interest of a group or class of persons; in the public interest; or as an association acting in the interests of its members (Art. 38).

- The advantages of broader standing include: it is arguably an effective tool for holding the Executive to account as they are more vulnerable

to legal challenge; it provides a greater incentive for public institutions to comply with the law; it would tend to result in rights being more widely interpreted as it allows for consideration of how a group rather than an individual may be affected by particular acts/legislation; it allows greater access to the courts as groups may have more resources than individuals (although it is possible to separate the sponsorship of cases from the issue of standing).

- The disadvantages of broader standing include: it could lead to excessive and potentially more vexatious litigation; it will have an impact on the nature of litigation given that it focuses on the wider impact of state action on the public rather than an individual and hence may bring judges into unfamiliar territory; it may lead to greater public expenses; it may lead to greater uncertainty due to the impossibility of definitively stating which groups or NGOs may have the right to take cases, on whose behalf they may do so and in what circumstances.

Summary of views expressed following Peter's paper on standing:

Barry: The danger with narrow standing as provided by the HRA is that it tends to exclude poorer individuals from taking cases while well-funded victims are free to bring their own sometimes idiosyncratic cases. At present NGOs are prevented from taking important human rights cases until an actual victim approaches them seeking representation. However, many individuals are unaware of their rights and are unlikely to bring forward such claims. Thus, public bodies are insulated from challenge and potential and actual human rights abuses are allowed to exist in the absence of a named victim. The ability to prevent human rights abuses by bringing cases that address potential or hypothetical abuses is important. Given their limited resources, NGOs such as Help the Aged would be most unlikely to take

vexatious cases if allowed standing. While a careful expansion of standing is appropriate, broader standing would achieve greater and better mainstreaming of human rights. A sensible compromise might be to allow standing to organisations that have a “legitimate” and “sufficient” interest in the case being brought and where a named victim is unlikely to emerge. It does not make sense to confine broader standing to the supplementary rights, changes to the current position on standing under the Human Rights Act should also be considered.

Patrick: It is important to achieve a proper balance on the issue of standing. In order to avoid excessive and vexatious litigation, the Group could consider the wording of Article 7 of the European Equality Directive which provides that States should ensure that victims and those with a “legitimate interest” in ensuring that the aims of the Directive are complied with be able to take cases. The Article provides that the State should ensure that the latter category are able to bring a case either on behalf of or in support of victims. The issue of funding is imperative for ensuring that such obligations are complied with.

Brian: Given the experience of other jurisdictions, would courts be able to adopt a more flexible approach so as to move from narrow to broader standing in an organic manner and in the absence of an express broad standing provision in the Bill of Rights? The benefits of broader standing could be questionable given the largely political nature of the public interest cases that seem to have been brought before Canadian courts for example. Arguments on broadening standing to assist “vulnerable individuals” are more appealing than to allow broader political challenges.

Peter: Noteworthy that the Human Rights Commission has now been provided with standing to take cases under HRA. Further, many NGOs and trade unions can now sponsor cases and/or may be granted amicus curiae status and can intervene in cases. Another potential danger of providing for broader standing is that if public bodies feel more vulnerable to being sued,

they may become too careful, cautious and defensive. While they must be conscious of the implications of violating human rights, they also need to actually perform their public duties. With the exception of South Africa, a cautious approach to the widening of standing has been adopted in other jurisdictions, including Canada and Ireland.

The two key questions under “standing” are: should the Group leave the matter to judicial interpretation or should it explicitly prescribe for the level of standing that should exist? Standing should be broad enough to ensure that there is not a denial of access to justice – and it should be sufficiently accessible and resourced. If broader standing is to be adopted, it should only apply to any supplementary rights and not to the HRA.

Laura: There may actually be less need for NGOs to intervene if wider standing was allowed. Also, it can prove more costly where various groups intervene on behalf of different individuals on the same issue rather than bringing one public interest case to address the matter. Broader standing would thus make more appropriate use of courts’ time. The ability to challenge human rights abuses should not depend upon finding an actual victim who is willing to bring a case to court in their name. Further, there should not be a need for an actual human rights violation to have occurred in order to bring a challenge under the Bill of Rights, it should also be possible to address and therefore prevent potential human rights violations.

At present courts act as a filter by looking at organisations’ constitutions to see if they can represent victims. Similar judicial scrutiny could be applied for determining the legitimate public interest of NGOs and other groups if broader standing was adopted. The issue of standing may be regarded as directly related to the issue of remedy. By providing a greater incentive to public bodies to carry out their work in a human rights compliant manner, more people would benefit if wider standing were allowed and thus a more effective remedy than compensation would be provided.

There is a need for the Bill of Rights to be accessible to everyone and there should be no fear of allowing broad standing. It is important to provide guidance to courts on the level of standing that should exist under the Bill of Rights. Given that the deliberations and notes of this Group do not have Hansard status, they will not be allowed to be referred to in court. Therefore, the Group should ensure that its intentions on the breadth of standing that should exist are clearly made known. In order to avoid excessive and vexatious litigation, courts could be instructed to only allow "genuine" cases. Peter's suggestion that the issue of standing could be addressed by providing that "there should be no denial of access to justice" should be framed more positively, e.g. ensuring access to justice.

Martina: Would be interesting to explore whether vexatious litigation and problems ensuing from uncertainty have been experienced in other jurisdictions? Given the potential for broader standing to deter public bodies from violating human rights, the fear that it may import increased litigation may thus be ill-founded.

Alban: The Assembly should not think merely in terms of rights being litigated but in creating a culture of rights whereby all public institutions understand human rights and make policy accordingly. The Assembly should ensure that all institutions actively seek to ensure that human rights are protected and that greater funding is provided for access to the judicial system, as rights cannot be properly protected without the provision of adequate resources.

In concluding discussions, consensus was reached that:

- ✓ The group does not support a narrow victim-based definition.

- ✓ The group does not support a definition of standing that is too wide.
- ✓ A formulation could be proposed to assist the court in ensuring that standing in relation to the supplementary rights is such as to enable access to justice which is sufficiently resourced and accessible.
- ✓ Catherine to be asked to develop such a form of words.

4. Membership of outreach sub-committee

At the last Forum meeting, it had been agreed to set up a sub-committee to prepare a programme of work for the outreach workers when appointed so that they would be able to “hit the ground running”. Each WG was therefore being asked to nominate one member to sit on this sub-committee. Colin Harper has volunteered to represent this Group and this was agreed by the group.

5. Further reading

Following a request from Neil, Catherine had compiled a list of articles on the issue of the justiciability of socio-economic rights that was circulated to the Group. The convenor suggested that members contact Catherine if they are unable to access any of these articles that they wish to read.

6. Revised timetable

A revised version of the timetable was circulated.

7. Preparation of report for 31st November and process for receiving submissions/evidence

The Chair of the Forum requires an interim report from all working groups by the end of November that will be consulted upon in December. It was recognised that this group will not have covered all issues at that stage, but that our report could highlight those areas where we have reached agreement, seek views specifically on these, highlight the issues yet to be covered and seek general views in relation to these.

It was agreed that an additional meeting be held at 4pm on 27 November 2007 in order to discuss the Group's interim report and to provide an opportunity for Catherine to advise the Group on the issues she has previously been requested to research.

The convenor informed the Group that she has been contacted by a number of interested groups who wish to make submissions to this working group. It was agreed that due to the Group's wide agenda, the narrow timeframe which it has to cover this, and the busy schedules of members that at this stage only written submissions would be accepted. These submissions can then be examined and if they highlight issues not previously considered by the Group, arrangements may then be made to meet the groups that submitted them. The Convenor also said that she would circulate to other members any invitations that are received to events relating specifically to our topic.

8. Budget

The convenor announced that all the Working Groups had been allocated a budget of £1000 for administrative and other expenses. Given that our

group has no room hire or hospitality expenses as such, it was agreed that from now on Mari would be paid for her note-taking services, and that the remainder could be available for securing external advice (e.g. from Francesca Klug who had offered to help the group in any way she can).

9. AOB

The convenor and other members expressed their regret and disappointment over the attacks that had been made on members of the Forum during the debate in the Northern Ireland Assembly on 15 October 2007. The Convenor stressed that she had found this working group and all its members to be engaged and committed to date and she hoped that this would continue and that we would never speak to or about each other in that way.

10. Next Meeting

The next meeting will be held at 16.00 on 30 October 2007 in Room 21 (Committee Room) in Stormont.