

Bill of Rights Forum

Preamble, Enforcement & Implementation Working Group

Notes of Eleventh Meeting, 15 January 2008

Present: Aileen Gilmore; Colin Harper; Neil Faris; Brian Crowe; Barry Fitzpatrick; Stephen Farry; Patrick Yu; Alban Maginness; Catherine Donnelly.

Apologies: Peter Weir; Martina Anderson, Laura McMahon

Observers: Mari O'Donovan; Fiona Nic Dhonnacha; Lisa Coyle.

1. Notes of Previous Meeting

Catherine noted that her apologies re her inability to attend the previous meeting had not been recorded.

2. Revised Timeline

The convenor circulated a revised timetable that sets out weekly meetings from 15 January 2008 to 5 February 2008 for consideration of the outstanding areas proper to the remit of the Group. It was agreed that further meetings on the 12th, 19th and 26th of February would also be necessary in order to further refine our recommendations having considered the reports of other groups, as well as to discuss other significant miscellaneous matters that have been identified throughout the course of the Group's discussions such as, for example, the legal definition of a person. A final timeline is attached.

On the matter of streamlining the language that should finally be adopted in the Bill of Rights some members were of the opinion that this task is more properly the remit of the Secretariat, albeit with some recommendations from our Group (e.g. on use of state/public authority, legal persons). Patrick believed that it would also be necessary to highlight that different legal consequences as to the scope of rights may arise depending upon whether they are drafted in a positive or negative manner. Neil pointed out that the Forum plenary has yet to decide whether groups' final recommendations should take the form of a draft Bill of Rights or merely point form.

3. Outreach Update

The convenor informed the Group that it became clear at the previous Forum plenary meeting that other members share our concerns over the shortfalls of the outreach. She stated that the Forum Chair has agreed to alert the Secretary of State of these concerns and the matter is to be revisited at the next plenary on 1st February.

4. Submissions received

The convenor informed the group that all submissions received by the Forum are in the process of being posted on its website and that the secretariat will then inform convenors of those submissions that are identified as being relevant to their Working Group. We will therefore have more detail on these next week and can discuss how best to consider them.

5. Devolution

Stephen and Catherine presented papers written by them on the matter of devolution and the Bill of Rights.

Stephen outlined the three different ways in which the powers and responsibilities for the governance of NI are shared between the Westminster Parliament and the NI Assembly. These are: (i) Devolved matters – those which have already been transferred to the NI Assembly/Dept.

(ii) Reserved matters – those currently held by Westminster but have been or could be devolved in the future.

(iii) Excepted matters – those retained by Westminster and not envisaged to be devolved.

Stephen identified two key questions pertaining to the scope of the Bill of Rights under the matter of devolution. First, whether the Bill of Rights should apply to both acts of Westminster Parliament and the NI Assembly. Second, whether or not applicability to Westminster governed actions would extend to both reserved and excepted matters. He pointed out that there is an implicit assumption that the Bill of Rights should apply to all matters. This is evidenced in the conclusions of the NIHRC as well as the way in which current Forum working groups are largely dealing with rights that will impact on both non-devolved matters and excepted matters. He raised the question whether there was a potential problem, particularly in relation to excepted matters, if different human rights regimes existed in one part of the UK compared to others.

On the related matter of enforcement, Stephen pointed out that in relation to the Human Rights Act 1998 there are already different means and options for enforcement of human rights in regard to Acts relating to the powers and responsibilities of the NI Assembly and those relating to Westminster. He suggested that a similar approach with certain

modifications could be extended under the Bill of Rights. He pointed out that differences may lie, however, with the types of remedies that would be available with respect to devolved and non-devolved matters - in relation to the latter, responsibility would solely lie with Westminster to reconsider/address any inconsistencies with the Bill of Rights that may be found in same.

Catherine provided the Group with a comprehensive report on the interaction between federal/central legislation and state/provincial human rights legislation in Australia, Canada and the United States. In summary, in these countries federal legislation will override all provincial/state legislation, including more extensive provincial/state legislative and constitutional human rights protections and federal actors are not expected to comply with state human rights standards.

While a comparative exercise was identified by Catherine as invaluable for generating discussion on possible NI solutions to equivalent interactions between Westminster or Whitehall activity and the Bill of Rights, she did, however, highlight that some important points should be borne in mind. First, the system of federalism that primarily applies in these countries operates quite differently from the system of devolution that applies in the UK. (Catherine identified the main differences between the two systems as: (i) in federal settlements the central and provincial powers are co-equal or co-ordinate sovereigns whereas in the UK, Westminster remains the sole sovereign power and is the sole source of devolved authority; and (ii) in federal settlements power is allocated by an overarching written constitution which binds both central and provincial powers and is amendable only through a formula that involves both, whereas power is allocated in the UK by Westminster legislation and Westminster alone possesses authority to amend the devolution legislation). Second, the value of comparative experience can be particularly questionable given that the solutions found in the different jurisdictions often mirror particular political settlements in each jurisdiction. Third, the novel remedies that exist under the HRA 1998, such as the declaration of incompatibility, and which do not exist to the same extent in these other jurisdictions may open the possibility of different solutions being adopted in NI. Fourth, the possibility for more extensive remedies to be awarded in respect of the central authority (Westminster) exist in the NI situation than do in Canada, the US and Australia as, unlike in these latter countries where the human rights legislation is created by the *provincial* units, the Bill of Rights for NI will instead be enacted by the *central* UK authority itself.

Catherine advised that in light of Westminster's role in enacting the NI Bill of Rights, it would be legally and constitutionally permissible for remedies such as the interpretive obligation and declarations of incompatibility to be adopted in respect of Westminster legislation. She stated that the application of such remedies in the context of excepted matters would not entail 'over-reach' given that Westminster would have consented to their application. Further, the nature of the devolution settlement allows scope to assert any Bill of Rights in the context of areas within Westminster competence.

Catherine circulated a table that lays out all possible remedial actions that can be adopted so as to ensure compatibility with the Bill of Rights (BoR) of legislative and administrative acts within each sphere of competence. In summary:

(1) Transferred Matters:

Compatibility with the BoR of legislation enacted by the NI Assembly on transferred matters could be ensured through Assembly declarations of compatibility (akin to S.19 HRA), an interpretive obligation on courts akin to S.3 HRA, the deeming as invalid of incompatible Assembly legislation (akin to S.6(2)(c) NIA), and a remedial obligation akin to Section 10 HRA. In relation to acts of NI public authorities on matters relating to transferred matters, an obligation to act compatibly with the BoR akin to S. 6(1) HRA could be imposed on such authorities. Catherine noted that all of these remedies had been agreed upon at a previous meeting.

(2) Reserved Matters and (3) Excepted Matters which are Ancillary to Reserved/Transferred Matters:

Compatibility with the BoR of Westminster legislation on these matters could be ensured through an obligation to make declarations of compatibility with the BoR, an interpretive obligation on courts, declarations of incompatibility with the BoR and a remedial obligation. Whitehall secondary legislation on these matters could be dealt with through an obligation to make declarations of compatibility, an interpretive obligation, and either the deeming as invalid of incompatible legislation or declarations of incompatibility on same. Legislation on these matters enacted by the NI Assembly with the consent of the Secretary of State could be addressed through declarations of compatibility, invalidity of incompatible Assembly legislation, an interpretive obligation, and a remedial obligation. The compatibility of acts of NI public authorities on these matters could be ensured through the imposition on them of an obligation to act compatibly with the BoR. Where a conflict with Whitehall or Westminster legislation arises, a defence similar to that which exists under S. 6(2) HRA should be provided to public authorities and then consequent remedial action could be taken as suggested above for incompatible Whitehall and Westminster legislation on reserved matters.

(3) Excepted Matters:

Compatibility with the BoR of Westminster legislation on excepted matters could be ensured through declarations of compatibility, an interpretive obligation on courts, declarations of incompatibility with the BoR and a remedial obligation. Whitehall secondary legislation on excepted matters could be addressed through declarations of compatibility, an interpretive obligation, and either the deeming by courts as invalid incompatible legislation or declarations of incompatibility on same. Acts of NI public bodies could be addressed through an obligation to act compatibly with the BoR and where a conflict arises with Whitehall/Westminster legislation, a defence akin to S.6(2) HRA could be raised by the public body and then the offending legislation could be dealt with through the remedial action suggested for Whitehall and Westminster legislation on excepted matters.

Group Discussion on Devolution and the Bill of Rights:

Neil suggested that the table formulated by Catherine could be put before the Secretary of State as outlining the possibilities that lie open for dealing with transferred, reserved and excepted matters under the Bill of Rights. He pointed out that NI secondary legislation on transferred matters should also be added to the section on transferred matters, and queried whether the option for a court declaration of incompatibility with supplementary rights of NI Assembly legislation had been provided for in the Belfast Agreement. Catherine agreed to check this latter point.

Barry stated that the complicated and technical area under discussion has many practical implications. He pointed out that working groups are dealing with matters that are at the core of excepted matters and that it is most important to devise different remedies for the different categories of legislation affected. For example, if the criminal age of responsibility under the Bill of Rights is raised to 16, should public authorities disregard any incompatible Westminster legislation? With whom would such an action lie if they acted in accordance with such incompatible legislation – should a declaration of incompatibility be sought on the offending legislation or the finding of a violation against the public authority? Catherine advised that the public authority defence would operate in this circumstance.

Patrick suggested that there is a need to suggest a mechanism for dealing with incompatible legislation akin to the Joint Committee on Human Rights so as to minimise the need to seek declarations of incompatibility. Stephen and Alban pointed out that a similar Assembly committee that scrutinises legislation before it is brought before the House already exists. Aideen noted that such a committee has already been flagged as an issue under the subject of enforcement. She stated that the group can return to the matter at a later meeting.

Brian stated that his party does not share the implicit assumption that the Bill of Rights will apply to all areas including excepted matters, as highlighted by Stephen. He believed that declarations of incompatibility on Westminster legislation dealing with excepted matters would raise grave constitutional concerns in relation to parliamentary sovereignty. He believed that such concerns were very real given that it is clear from the interim reports that most of the rights that are being recommended by other groups will largely impact on Westminster legislation, including national security legislation. Brian also expressed reservations about adopting remedies such as declarations of incompatibility on legislation dealing with reserved matters. He was concerned that this would disturb the principle of parity of esteem that currently exists between Britain and NI - allowing declarations of incompatibility on legislation dealing with reserved matters could lead, for example, to an upheaval of the UK's social security framework.

Stephen stated that he shared Brian's constitutional concerns. He believed that the wider political and constitutional issues must be considered and suggested that it was too early to seek a final decision on the matter under discussion until it becomes clear exactly what rights are finally recommended.

Colin believed that it was important that the remedies extend to Westminster legislation, and pointed out that there are already and have always been differences in the law that applies across the regions. He did, however, agree that the group should wait to see what rights are coming forward before making any final decisions.

Catherine stressed that the options put forward are all legally constitutionally feasible, and emphasised that since Westminster is the enacting body, the conversation of what it is willing to accept as constitutionally and legally feasible will take place there.

Agreed:

- ✓ The framework developed by Catherine captures effectively the different possibilities that exist in relation to transferred, excepted and reserved matters and as such should be presented by the Group in our report to the Forum.
- ✓ The report should indicate however that while the Group recognised that these remedies are all legally constitutionally feasible, some members have reservations in relation to the political constitutional concerns that may arise from allowing all the remedies to extend to excepted and reserved matters.

6. Next Meeting

The next meeting will be held on 22 January 2008 at 16.00 in Room 21, Stormont.