

## **Bill of Rights Forum**

### **Preamble, Enforcement & Implementation Working Group**

#### **Notes of Thirteenth Meeting, 29 January 2008**

Present: Aideen Gilmore; Catherine Donnelly; Peter Weir; Alban Maginnis; Barry Fitzpatrick; Neil Faris; Shannon Brooke Murphy.

Apologies: Laura McMahon; Brian Crowe; Patrick Yu; Colin Harper.

Observers: Fiona Ni Dhonnacha; Lisa Coyle; Maria O'Donovan.

#### **1. Notes of Previous Meeting**

Barry stated that the third example from rights cited by him from the CJ&V interim report would most likely *not* be justiciable. Catherine stated that the right used by Irish courts in the past in order to give effect to social and economic rights was the right to *bodily* integrity and not *personal* integrity.

Apart from these two points, the notes were accepted as an accurate account of what was discussed and agreed upon.

#### **2. Meeting Venues**

The meeting scheduled for 5<sup>th</sup> February 2008 will take place in Room 342 (Stormont) at 16.00 and the meeting scheduled for 12<sup>th</sup> February will take place in Room 144 (Stormont) at 16.15. Thereafter (19<sup>th</sup> and 26<sup>th</sup>) the meetings will take place as usual in Room 21 at 16.00.

#### **3. Submissions Received**

These will be discussed at next week's meeting.

#### **4. Working Group Report Examination**

The convenor circulated a table that set out the names of the members who will be responsible for examining the final reports from other working groups in order to identify those parts within them that overlap with and impact upon the remit of the Group. Neil

requested that the convenor compile a checklist of the exact issues that members are expected to identify. She agreed to do this and suggested that members also liaise with Catherine when carrying out their examinations.

Catherine informed that the Children and Young People's report has already been submitted to the Chair and that the reports of the Civil and Political Group and the Women's Group are expected to be ready by next week. The convenors stated that she will forward the various reports to the relevant members of the Group for examination as soon as they are made available to her. The following timetable for the examination of working group reports was provisionally agreed upon:

1. Meeting of 12 February: Children and Young People; Civil and Political Rights; Criminal Justice and Victims.
2. Meeting of 19 February: Women; Economic and Social Rights; Culture, Identity and Language.

#### **5. Matters Arising from the Legal Advisors' Meeting with the Chair**

Catherine and the legal advisors of the other working groups met with the Chair on 29 January 2008. Catherine stated that the following points which arose at the meeting were of particular relevance to the Group:

1. The Economic and Social Rights Group will be recommending a general clause on programmatic obligations. Catherine stated that it would be viable for this clause to fit in with a non-retrogression clause.
2. Some of the language used by the Culture, Identity and Language Group will need to be considered as it seems it could have implications upon legal enforceability.
3. The legal advisors of other groups made it clear at the meeting that their groups do not wish the Preamble, Enforcement and Implementation Group to "second-guess" their limitations clauses. Some legal advisors believe that limitations are part of the substantive content of rights and thus do not wish this Group to have a final veto on the matter of limitations. It seems that a clause-by-clause approach is generally being adopted by other groups. The legal advisors seemed to express agreement, however, to a general derogations clause as well as a general overarching limitations clause.

Peter stated that while the Group may respect the wishes of other groups, a different position may emerge following the Plenary Forum's deliberations. Barry suggested that there may be a need for a limitations' audit to be carried out. It was agreed that the points highlighted by Catherine would be discussed in detail at a later meeting.

## 6. Enforcement

Barry presented a paper prepared by him on the matter of the enforcement of supplementary rights (SRs). In summary:

- 1) At present the following provisions deal with the enforcement in NI of the rights contained within the Human Rights Act 1998:
  - a. Section 69(4) of the Northern Ireland Act 1998 - re the advisory role of NI Human Rights Commission on the compatibility of NI Assembly Bills.
  - b. Section 4(5) HRA - re the making of declarations of incompatibility by the High Court and Court of Appeal.
  - c. Section 3 HRA - re the interpretative obligation of courts and tribunals.
  - d. Section 7(2) - rules can be issued to determine which courts or tribunals can hear Section 6 actions taken against a public authority.

The Joint Committee on Human Rights also oversees human rights issues at Westminster.

- 2) The NIHRC in Section 18 of its 2004 Report were of the view that all existing courts in the legal system of NI should be obliged to apply the Bill of Rights. While it acknowledged that a new Human Rights Court could be an important symbol of a new start in human rights, it did not, however, believe that a strong enough case had yet been made for such a court to help enforce the BoR. It suggested the possibilities that special assessors could be appointed to assist the usual judges in BoR cases, or that judges could be required to consider the opinion of the NIHRC in such cases.
- 3) A Note on Earlier Issues Discussed by the Group:
  - § The practicalities of having any enforcement processes going beyond those which complement existing processes are partly dependent upon decisions taken on other issues within this WG's remit and potentially dependant on the extent of SRs to be included in the BoR. The latter does not concern this WG but decisions on the former will fashion the scope for 'supplementary' enforcement processes.
  - § For example, if model three on the relationship between the HRA and the BoR - wherein a separate statute to cover SRs without any impact on the HRA would be enacted (see further notes of week 5) - is chosen, the argument on one hand would be that the rationale for special HR processes could be undermined to the extent that HRA issues would still be determined under existing processes. On the other hand, the opportunity to be innovative appears to exist under Model 3 without intruding on HRA processes. In any event, NI rules on S.6 actions could be amended without amendment to the HRA itself and a Human Rights Division etc could be created within the High Court without amendment of the HRA. Without these innovations, any 'supplementary' processes would, in hybrid HRA/SR cases, have to give way to the existing HRA provisions.
  - § Although the Group seems to be largely settled on Model 3, there appears to be a choice between a procedural impasse under Model 3 and a political impasse under Model 2. It can be anticipated that many cases will involve both HRA and SR

issues. Even if the forum to which cases are brought is harmonised, a range of matters upon which the WG might wish to see some innovation, e.g. on standing and a wider definition of public authority, will be difficult to apply without amendment of the HRA. There may not, however, be the political will to amend same.

- § A preference for Model 3 can also have implications for the extent to which the enforcement mechanisms in the BoR apply to non-devolved matters. If the BoR is to be purely concerned with SRs, without any implications for the HRA, it may be more difficult to envisage how enforcement measures might work in relation to reserved and excepted matters. Could 'supplementary' processes be applied by NI courts/tribunals/com mittees to reserved or excepted matters? Could courts in GB apply these supplementary processes to reserved or excepted matters?
- § There are significant enforcement implications in relation to decisions on justiciability. If a wide variety of provisions are proposed without clarity as to the legal status of the proposals, legal uncertainty will result which will encumber the BoR for a considerable length of time. One way forward might be to have three categories of measures. First, such measures could be clearly justiciable, subject to general or specific limitations. Secondly, some measures could be expressed as statements of principle and hence be sources of interpretation of other laws but not directly enforceable. Thirdly, some provisions could be expressed unequivocally in programmatic form.

#### 4) **Possible Enforcement options:**

##### (i) Apply present HRA processes:

- All courts and tribunals would interpret Assembly and possibly Westminster statutes in accordance with SRs (including both directly enforceable provisions and principles of interpretation. Programmatic measures could also have an interpretative function).
- Declarations of incompatibility and actions against PAs would be accomplished by way of High Court actions.
- This option would maintain continuity with existing processes although some supplementary enforcement mechanisms may differ from HRA processes. This model does not rule out some 'bottom line' enforcement of programmatic rights.

##### (ii) Creation of Human Rights Division of the High Court:

- It could make declarations of incompatibility and hear actions against PAs. It would be necessary to alter the Rules of the Supreme Court so that both HRA and SRs could be heard in the same forum. There are still some procedural difficulties with Model 3 discussed above.

- References of SR (and possibly HRA?) matters from courts and tribunals could possibly be made to the HR Division. This would be a variation of the HRA approach but might be seen to slow down litigation. Alternatively, cases from lower courts and tribunals could be appealed to the HR Division if they have SR aspects, particularly on the meaning of interpretive principles.
- The NIHRC could possibly refer Assembly Bills to the HRD for pre-enactment declaration of compatibility – akin to the Irish system.

(iii) Creation of Human Rights Tribunal:

An extra-judicial mechanism which could be composed of academics and others. It could be based on the European Committee on Social Rights model and provide:

- Determinations on programmatic rights in the SRs which would be non-binding.
- Possibly advisory opinions on principles of interpretation or pre-enactment Assembly Bills.
- Preliminary opinions on any SR matters. For example, in another context, the Equal Treatment Commission in the Netherlands gives opinions on discrimination complaints which frequently settle disputes and must be taken into account by courts in which further litigation occurs (or courts must set out reasons if not following the ETC's opinion).

It would have to be decided which persons had standing to seek the assistance of the Tribunal, e.g. NIHRC, NGOs, anyone with standing under the BoR.

(iv) Creation of a Human Rights Assembly Committee:

- This should have the powers of the Joint Committee on Human Rights to explore aspects of human rights compliance, take evidence, issue reports, etc.
- An alternative to the creation of a HRT would be to give an Assembly Human Rights Committee additional powers so that 'non-judicial' enforcement would be in the hands of politicians rather than human rights experts on the HRT.

- There could be references of pre-enactment Bills to the Committee by the NIHRC. This mechanism would be a variation on what is already provided in section 69(4) NIA.
- The Committee could hear complaints from the NIHRC (and other bodies with standing) re the non-realisation of programmatic rights.

(v) Development of ‘human rights mainstreaming:’

Under S.75 NI Act 1998, there is already in place a system of equality schemes and EQIAs, etc with an enforcement mechanism through ECNI investigation. An adaptation of this mainstreaming system would help prevent human rights abuses and lessen the need for ex post facto enforcement mechanisms.

**Summary of Group Discussion on Enforcement:**

Neil stated that at present there is no need for a separate division of the High Court to deal with human rights issues and he did not believe that there would be a need to adopt such a division to deal with supplementary rights. He stated that while the tribunal based on the European Committee on Social Rights model is interesting, he believed it is more suited in a regional rather than a national context. He believed that the idea of an Assembly Committee which would directly engage politicians would be a positive option.

Shannonbrooke stated that her party was not content to settle with Model 3 on the relationship between the HRA and the Bill of Rights. She stated that Barry’s presentation was a good starting point, but believed there remained a gap in the models under consideration. She stated that it would be necessary to consider a separate constitutional court as exists in South Africa which is regarded internationally as a best practice model. She believed that the Group needs to be clear about the enforcement and monitoring mechanisms it wishes to be implemented and that it needs to break these down and see how they work together.

Peter stated that practically speaking a human rights division of the High Court would only have the appearance of a different division. Already, the same judges tend to hear judicial review cases. He believed that, on a broad level, the current court procedures work well and he did not want a system that takes a different direction to the rest of the UK. He stated that it is not realistic to compare NI with South Africa where democracy was denied for many years and vast human rights violations occurred. Further, there would exist cost implications for the creation of a new court outside the current system and these would require Westminster’s approval. On the matter of a Human Rights Assembly Committee, he stated that from a practical point of view the NI Assembly is

much smaller than Westminster and thus the pool of people in the Assembly that could serve the Committee would be significantly less. He believed that political parties might be reluctant to consent to such a Committee.

Alban stated that he believed it was better to be able to argue human rights at all levels and thus did not see any need for a separate constitutional court. He also believed that, from a practical point of view, a HR Division of the High Court would not make much difference to the present situation given that the same judges tend to hear judicial review cases. On the matter of a Human Rights Tribunal, he felt that because it wouldn't be a court in the strict sense of the word that it would not permeate the mainstream of judicial decision making. He felt that an Assembly Committee could, however, be a positive approach. He suggested that perhaps the NIHRC could deal with non-justiciable rights.

Catherine advised that the Joint Committee on Human Rights promotes dialogue between the judiciary, the executive and the legislature. She believed that such a body is a practical necessity and that it is important symbolically to have a committee that prioritises human rights. She stated that the JCHR examines and carries out consultations on non-justiciable rights, and suggested that if a monitoring obligation is included in the Bill of Rights that an Assembly committee could oversee that obligation. Catherine believed that the mainstreaming of human rights was important. It prevents the need to initiate different procedures and allows human rights arguments additional to other legal arguments to be made in cases. She believed that UK courts have shown to date that they are capable of dealing with human rights issues.

- ✓ As the meeting was not quorate, no final decisions were made on enforcement. The convenor suggested that a table setting out the various options could be drawn up and that consensus on the preferred options could then be sought at a later meeting. She requested that members contact her if they wished to include any suggestions on enforcement additional to those outlined by Barry. Neil stated that a tabular format may present the options too starkly and requested that text be provided in addition to a table.

#### **4. A.O.B.**

Shannonbrooke stated that a representative from her party was unable to attend the meeting of 15 January at which devolution matters were considered. She requested that its position on these matters be recorded. She stated that on the question of whether the Bill of Rights should apply to both acts of the Westminster Parliament and the NI Assembly, in common with the NIHRC, her party believe that it should. On the question of whether this applicability should extend to both reserved and excepted matters, again in common with the NIHRC, it believes that it should. In all three cases – transferred,

reserved and excepted matters – and regarding both primary and secondary legislation, her party seek the following:

- A requirement for a declaration of compatibility.
- An interpretive obligation on the courts.
- The power to void/invalidate incompatible legislation, insofar as it applies in NI, as the party is of the opinion that the current declaration of incompatibility mechanism that applies to the ECHR rights on this island, north and south, is insufficiently robust.
- A remedial obligation.
- A compatibility obligation on public authorities.

Shannonbrooke stated that her party is persuaded by the legal opinion of Catherine that these options are legally and constitutionally feasible, and that there exists precedents for differing application of law across the regions. Failing this, the British Government could consider effecting a special arrangement, for example, by establishing the Bill under a freestanding international agreement with the Irish Government.

## **5. Next Meeting**

The next meeting will be held in Room 342 in Stormont on 5 February at 16.00.