

# Bill of Rights Forum

Preamble, Enforcement & Implementation Working Group

Notes of Fourteenth Meeting, 5 February 2008

Present: Aideen Gilmore; Catherine Donnelly; Peter Weir; Alban Maginnis; Barry Fitzpatrick; Laura McMahon; Brian Crowe; Patrick Yu; Colin Harper; Martina Anderson; Stephen Farry.

Apologies: Neil Faris.

Observers: Mari O'Donovan; Lisa Coyle.

## 1. Notes of Previous Meeting

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

## 2. Submissions received

A tabular summary of the submissions received by the Forum that are relevant to the Group was circulated. The full text of the submissions is available on the Forum website. The convenor stated that these submissions will be referred to in preparing the Group's Final Report. She requested Mari to update the table if/when additional submissions are received.

## 3. Working Group Report "Homework" Checklist

The convenor circulated a sheet of questions that summarised all the issues considered by this Group over the past months. She requested that members use this as a checklist when examining the final reports of other groups so as to ensure that all issues within these reports that impact upon the remit of this Group will be identified and considered.

#### 4. Meeting Timetable

The Group have been requested by the Forum Chair to have its final report completed by 29 February 2008 and all other working groups have been requested to have their final reports completed by 15 February 2008. Concern was expressed by members that the workload required for the Group to complete its report may be unachievable within the given timeframe. It was agreed, however, that if all members use the checklist of questions provided by the convenor when examining other groups' reports and provide short answers to these questions, that greater focus and speed, as well as consistency and objectivity, could be achieved. It was suggested that the legal advisors of all groups should also be provided with this checklist so as to achieve greater consistency in language and focus across all final reports. Moreover, this would also assist the swift-working of this Group. The convenor thus agreed to circulate the checklist to all legal advisors.

It was further agreed that the meetings scheduled for 19, 26 and 28 February 2008 should commence at the earlier time of 2pm so as to provide more time for consideration of other groups' final reports as well as this Group's final report.

The Group agreed that it would be fruitless for them to proceed with the meeting scheduled for 12 February 2008 if no reports other than that of the Children and Young People's Group – which was already completed - would be ready for consideration on that date. The convenor agreed to update members after the plenary forum meeting on Friday on the likelihood of other reports being completed by then. She also agreed to write an email to the Chair in order to outline the Group's hopes and parallel concerns of completing its task within the required timeframe.

#### 5. Preamble to the Bill of Rights

Catherine presented a paper written by her on the subject of preambles. This considered:

- a) the uses of preambles in Westminster legislation, given that any Supplementary Rights will have to be enacted in a Westminster statute;

- b) the content of preambles for constitutions, bills of rights, and international human rights instruments;
- c) processes used for drafting preambles to bills of rights, and;
- d) effects of preambles.

In summary:

### Preambles in Westminster Legislation

- Preambles are not a common feature of Westminster legislation, especially since 1911, and for example, the Human Rights Act 1998 does not contain a preamble. However, they are not unknown and where present, they are generally regarded as being capable of having an interpretive effect. The leading UK textbook on statutory interpretation, *Statutory Interpretation* by FAR Bennion, notes that a preamble is an "optional feature in public general Acts" that appears "immediately after the long title and states the reason for passing the Act." It further states that a preamble "may include a recital of the mischief to which the Act is directed," and that "when present, it is thus a useful guide to the legislative intention". Bennion also observes that a preamble "may provide more help" than a long title for the purpose of providing a statement of purpose of an Act. The case of *Siu Yin Kwan v Eastern Insurance Co Ltd* (1994) is cited by Bennion as an example in which a preamble was used with interpretive effect.
- Generally, where there is ambiguity in a statutory provision, the preamble will be used to give guidance (*Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* (1999)). However, courts are reluctant to permit a preamble to override inconsistent operative provisions, and in *AG v Prince Ernest Augustus of Hanover* (1957) it was laid down by the House of Lords that the preamble cannot contradict plain words in the body of a constitutional Act.
- The recital of facts in the Preamble to an Act does not amount to conclusive proof that the facts are true, but constitutes prima facie evidence of them (for example, *Dawson v Commonwealth of Australia* (1946)).
- Preambles are compulsory in private Acts. Bennion notes that in a private Bill, the preamble is required to set forth the expediency of enacting the Bill.

## Content of Preambles to Constitutions/Bills of Rights/International Instruments

- In most constitutions, the preamble is a statement of great significance. It usually reflects the history of the people, outlines the fundamentals of the society, and expresses the people's hopes and aspirations. Preambles are often also considered important as a means of providing information, in a very accessible way, on the basic values underpinning the legal document.
- While there is no one model or form for preambles, many have common features:
  - The source of authority/legitimacy of the legal instrument;
  - The history of the legal instrument;
  - A summary or description of the main ideas of the legal system/instrument;
  - The aims or values of the people and the system; and
  - Statements about beliefs of the people to encourage unity.

## Processes of Drafting Preambles

As a general observation, preambles appear to be drafted using similar processes as those used to draft the substantive provisions of constitutions/bills of rights. This was the case with the ECHR, the Irish Constitution, the South African Constitution and the New Zealand Bill of Rights Act 1990. In New Zealand, for example, the White Paper published in 1985 contained proposals for the Bill of Rights as a whole, and included recommendations in respect of a preamble. Consultation was then conducted in respect of the Paper as a whole, including the preamble.

### Australia

While a pro forma preamble prefaces the Imperial Commonwealth of Australia Constitution Act 1900, the Australian Constitution itself does not contain a preamble. At different times, there have been calls for the insertion of a preamble to express the spirit and aspirations embodied in the constitution. However, there has also been fierce opposition, usually on the basis of the content of the preamble, as well as possible legal ramifications of this text. A first version of a possible preamble to the Australian Constitution was drafted in 1998 by John Howard and Les Murray (Australia's leading poet). This was followed by consultation and national debate; and a second version was then drafted. In 1999, however, the proposed preamble was defeated in the referendum held concurrently with the referendum on whether

Australia should become a Republic. The 'Yes' vote in favour of the insertion of a preamble in the Constitution did not achieve a majority in any of the six states.

### Victoria

In Victoria, the Consultation Committee set up to consider the Bill of Rights, recommended in its Report that the Bill "should also include a preamble that sets out the community values that underpin it. In this form, the Charter could be used in schools and for broader community education, such as for new migrants to Victoria."

The Committee also made recommendations regarding the ideas it considered essential to express in any preamble. Paragraph 1.5 reads as follows:

"The Committee considers that a preamble is an essential element in the new law on human rights. The preamble serves as an overarching statement of values underpinning the Charter and could be a useful educative and interpretive tool. A number of ideas should be reflected in the preamble:

- human rights are necessary to live lives of dignity and value;
- rights and responsibilities are a foundation of democracy;
- respect for the individual and consideration for others;
- respect for the rule of law;
- respect for diversity; and
- the special significance of human rights for Indigenous peoples."

### Australian Capital Territory

The Consultative Committee appointed by the Australian Capital Territory's Attorney General in April 2002, recommended that the ACT bill of rights contain a preamble, on the basis that the "value" of any bill of rights would be "further enhanced by the attachment to the legislation of a short, simply written preamble that sets out in plain English the purpose of the law."

### Canada

The preamble to the Canadian Charter of Rights and Freedoms, ("Canada is founded upon principles that recognise the supremacy of God and the rule of law."), was not drafted according to any particular process, and has generated a degree of controversy. It first appeared in the April 1981 draft and was included despite the fact that there was no call for a preamble by the Special Joint Committee which was reviewing the Constitution, and that the Prime Minister of Canada at the time had no strong interest in having a preamble. However, there had been various religious and Conservative criticisms of the Charter

during its drafting, and significant activism on the part of such groups, resulting in the inclusion of the reference to "God." This reference has generated significant disagreement, with proposals for its removal being made at different times.

### Effects of Preambles

It appears that preambles are generally capable of two types of legal effect: interpretive and bolstering. They are also capable of potentially political effects.

### Legal Effects

#### (a) Interpretive Effects:

The interpretive effects of preambles in Westminster legislation have been discussed above. The preamble to the Irish Constitution has had similar impact, and the ECtHR often notes that provisions in the Convention "must be interpreted in the light of the Preamble to the Convention."

#### (b) Bolstering Effect:

- The preamble to the Canadian Charter does not create any legal rights or obligations; however, on occasion, it has been invoked by the Canadian Supreme Court to bolster and support its reasoning. For example, in the Reference Re Manitoba Language Rights case (1985), the Supreme Court invalidated Manitoban laws not enacted in both French and English, as this could constitute a violation of the rule of law. The Court added that: "The constitutional status of the rule of law is beyond question."
- The ECtHR often relies on the "object and purpose of the Convention," which are found in the Preamble, in resolving questions before it.

### Political Effects

- In the Canadian case of O'Sullivan v Canada, Muldoon J noted that while the preamble could "hardly" mean that Canada had been transformed into a theocracy, "Obviously it is meant to accord security to all believers in God, no matter what their particular faith and no matter in what beastly manner they behave to others. In assuring that security to believers, this recognition of the supremacy of God means that, unless or until the Constitution be amended ... Canada cannot become an officially atheistic state, as was the Union of Soviet Socialist Republics or as the Peoples' Republic of China is understood to be."

- In Catherine's view, such political effects should not, however, be over-stated. For example, in Ireland the strong references to God, Aristotle and Christian philosophy in the Preamble have not prevented evolution to a more multi-cultural and secular society.
- The recent bills of rights in Australian states and territories have regarded the preamble as an important educative tool to promote human rights.

An appendix containing samples of preambles from various jurisdictions was attached to Catherine's paper.

### Summary of Group Discussion on the Issue of a Preamble:

Brian stated that while the reference to supplementary rights in the Belfast Agreement does not rule out the possibility of a preamble, his party is unconvinced of the real need for one. However, if an overwhelming case was made for a preamble, it would be open to looking at a preamble such as the one to the Canadian Charter of Rights or the New Zealand Human Rights Act. He questioned, however, whether these examples, which each consist of only one sentence, could properly be described as preambles and suggested that it might be a misuse of the English language to refer to them as such. He felt that other Forum members would most likely have in mind lengthier, more lyrical and inspirational preambles than them. He stated that his party was primarily proceeding from a parliamentary standing and was sceptical about an inspirational preamble. He stated that a degree of political controversy would also inevitably be attached to drafting a preamble to the Bill of Rights. - the main difficulties would lie in the questions of who the people it belongs to are, where they live, and what happened in the past. He felt that the various parties involved would be unable to agree on these issues.

Alban stated that a preamble could be of both legal and political value. He stated that it could explain to people what the Bill of Rights is about and it could place it in a political context. It could explain that the Bill arises out of our history and that it attempts to create new beginnings and a culture of rights. He believed that a preamble could help to create a political environment in which people can enjoy and assert their rights. An additional legal value, while not essential, could aid courts in legal interpretation. It could reinforce the values contained

within the Bill of Rights. He also believed that it could serve an important educational function that would help people to understand the Bill of Rights. Alban also pointed out that the Bill of Rights is a unique piece of legislation and that it has a value over and above other legislation. Therefore, he felt that in this context a preamble is very important. He stated that while a preamble can be used for interpretive purposes, a parliamentary declaration cannot.

Peter stated that he was sceptical and negative about the need for a preamble, and was not convinced about its merits. He stated that it was noteworthy that the fashion in Westminster over the past 100 years has been not to include preambles, including in important social policy legislation. He felt that preambles have a limited gain, apart from placing legislation into its particular context, which would actually be discussed anyway in parliamentary speeches and explanatory documents. He envisaged that it would be extremely difficult to agree on the text of a preamble and might require a lot of time arguing with draftsmen to endeavour to obtain consensus in terms of the wording. While a preamble may have an interpretive value, this would be of much less value than an interpretive clause in the main body of the text. He pointed out that there are already diverse views within the Forum and the wider political context as to what should be included in a Bill of Rights for NI. He stated that to add into this debate the question of what should be in a preamble would only further add to the difficult problems that have to be solved. Peter further stated that the argument could be made that the supplementary rights are no more important to those contained within the Human Rights Act 1998 – it was not felt that there was a need for a preamble in the HRA and it too could be regarded as a unique piece of legislation. He stated that if there was to be a preamble, it should be short and it would be preferable to leave the decision of what should be contained within it until after the main text of the Bill of Rights is agreed upon.

Martina stated that she believed a preamble would enhance the Bill of Rights and would importantly serve as an interpretive and educational tool. She stated that it was hard to believe that parties would be unable to reach an agreement on a short preamble about our common humanity and values. She believed that outside society would find this fact particularly hard to believe and urged the Group not to shy away from trying to agree on a form of words. She pointed out that other working groups have already drafted sections for inclusion in the preamble. She also felt that the discussion may be more fruitful at the end of the Forum process when we are clearer what the recommendations will look like.

Colin stated that the Human Rights Act 1998 did not need a preamble as the preamble to the ECHR influences and serves as an interpretive tool to courts when ruling upon the rights contained within it. He pointed out that the Human Rights Act has nonetheless been criticised for its lack of a preamble and there is a view that a preamble could have served to establish a sense of ownership and shared values and vision of that Act. He stated that a preamble to the Bill of Rights would be most important. It would play an important educative function and would provide evidence that people have rights. He believed that it would be important to refer to the particular circumstances and background of NI. The preamble would need to recognise the suffering of victims. He suggested, however, that it may be best to leave the decision of what should be written in the preamble to last. It was important to first agree upon the main text of the document.

Catherine stated that it is not a misuse of the English language to call the short opening sentence to the Canadian Charter of Rights a preamble. She advised that this text has been treated as a preamble by Canadian courts. She agreed with Colin's point that the sense of ownership surrounding the HRA may have been greatly enhanced by a preamble. She informed that legal advisors have informed her that other groups will be contributing to the text of the preamble.

Barry stated that preambles can be inspirational and/or interpretive. The former function includes the provision of ownership and education. He advised that all EU legislation has preambles that are taken into account by courts. These preambles help domestic courts to decide what legislation means and they have been mainstreamed into the consideration of the UK courts. He stated that the HRA did not need a preamble as it effectively imported the ECHR preamble into our own system. He believed that it is important to provide basic principles that will steer judges that could help to avoid situations such as the YL-type judgements. He suggested that a purposes clause within the preamble that sets out what values the Bill of Rights is meant to underpin could be short and that an inspirational clause should refer to the end of the troubles as well as our common purpose in building a better future together.

Stephen stated that he could see the value in a preamble for inspirational purposes. He stated there is a need to be conscious that the UK has a unique constitutional settlement and that the supplementary rights are additional to the HRA. He was of the opinion that a preamble to the supplementary rights would do no harm and could be worked into the UK's constitutional framework. He added that

he believed the criticism of the HRA's lack of a preamble contributing to its lack of ownership is overstated.

Patrick stated that a preamble would be crucial for educational purposes. He stated that controversy might arise around whether it is to be legally binding. The inclusion of both a purposes clause as well as an inspirational clause would avoid this problem.

Laura stated that she would like a preamble to be included within the Bill of Rights. It could acknowledge our emergence from the past and common aspirations for the future. She suggested that words like "human dignity" and "hope for the future" should not offend anyone and that it should be relatively easy to incorporate them into a short preamble.

The convenor reiterated that other groups have expressed their wishes that there should be a preamble to the Bill of Rights and that they have suggested text for inclusion within it. These groups also include members from all parties. She stated that it would be disappointing to have to report to the Chair that this Group was unable to agree to some form of preamble and suggested that our report could summarise the discussions and make proposals as follows:

- There are a variety of views in the Group, ranging from strong support to scepticism about the merits of a preamble.
- There are also concerns about the challenges surrounding the agreement of wording that could summarise the "politics" or context of Northern Ireland.
- However, the Group could agree that if there was to be a preamble it should be a short one.
- They did not feel that they should draft this preamble, but rather it should be designed at the end of the process by the Forum plenary.

Brian repeated that he would agree to nothing more than a single-sentence preamble. He also wished to have his concerns about the difficulty of reaching an agreement on its wording recorded. He questioned whether the preamble was to be for both the HRA and the supplementary rights or merely for the supplementary rights. He stated that this would also have a bearing on his party's views. Otherwise these proposals were agreed.

## 6. Miscellaneous Issues

### Non-diminution and Harmonisation Clauses

Samples of non-diminution/retrogression clauses and harmonisation clauses were circulated. Catherine advised that it would be feasible to have a non-diminution and harmonisation clause in the Bill of Rights. This would ensure that the Human Rights Act and supplementary rights should normally be read in harmony, but that where it would be impossible to do so that ECHR should then be afforded precedence over any supplementary rights, while a non-diminution clause could ensure that this did not in any way regress from current international obligations. She cited the example of the clauses contained within Articles 52(3) and 53 of the EU Charter. She also advised that a harmonisation clause would be necessary to address the UK doctrine of implied repeal. She agreed with Patrick that the ECHR is a minimum standard and that it is always open to states to interpret rights as providing greater protection.

Peter pointed out that there is no hierarchy of acts in the British constitutional system and he felt that the harmonisation clause therefore would have merit.

Brian expressed concern about attempts by another group to review the ECtHR's interpretation of the right to education which he believed had implications for the supremacy of the HRA as a UK-wide Bill of Rights. He felt that a supremacy clause would thus be most important.

Barry pointed out that the group in question may have been less intent on increasing ECHR standards, but instead may have been trying to address UNCRC standards. He stated that the varying content of different rights is a complex matter and that there can be a lot of overlap between various rights.

Patrick stated that the ECtHR now refers to international standards when interpreting ECHR rights. For example, in the Roma education case it referred to ICCPR cases.

Colin agreed that rights change over time and that individuals are free to challenge the traditional content of ECHR rights.

- v It was agreed in principle that non-diminution and harmonisation clauses should be drafted based on the EU Charter examples. Catherine to draft.

### Definition of a Legal Person

On the basis of a paper drawn up by Catherine, the Group then turned to discussion of the definition of a legal person and whether the supplementary rights should only apply to human beings, or in some cases to legal persons (e.g. companies) and if the latter whether the supplementary rights should legislate for this or leave to the interpretation of the courts.

Barry believed that a qualified approach was good. For example, a corporation facing a corporate murder charge or health and safety charges should be allowed to enjoy criminal justice rights. A legal person could include companies limited by guarantee and more specifically community and voluntary sector groups so would also offer them protection. He believed that the South African Constitution deals well with this question.

Patrick pointed out that NICEM and other NGOs could be discriminated against and that all EU law Directives as well as the ECtHR and ICCPR allow legal personality.

Peter believed that certain rights are not and should not be applicable to corporations. He stated, however, that if a complete exclusion was adopted, people may use this as a shield - we need to be careful that we do not create a loophole. He believed that corporations should be entitled to certain rights.

Colin questioned whether the term "particular to the circumstances of NI" would properly apply to companies. He was not supportive of companies having more rights than they enjoy at the present time under the HRA.

Martina stated that she opposes the idea that companies should have rights equivalent to those of natural persons.

- ✓ It was agreed to defer the issue of whether a definition of legal person should be contained within the Bill of Rights until the rights being proposed in other working group reports had been examined. As such this should be added as an issue to be considered on the checklist for examining WG reports.

### Process and outcome obligations

Catherine had prepared a paper on process and outcome obligations – which is the question of whether the Bill of Rights would impose a duty

to consider supplementary rights when reaching decisions or require only the outcome to be rights-compliant.

Since this is linked to the issue of a mainstreaming option as a means of enforcement it was agreed to discuss the paper when the enforcement topic is revisited.

#### 7. Next Meeting

It was agreed that members should presume that the meeting scheduled for 12 February 2008 was cancelled unless they heard otherwise from the convenor. The next meeting is scheduled for 19 February 2008 at 2pm (venue tbc).