

# Bill of Rights Forum

Preamble, Enforcement & Implementation Working Group

Notes of Fifteenth Meeting, 19 February 2008

Present: Aideen Gilmore; Patrick Yu; Brian Crowe; Shannonbrooke Murphy; Barry Fitzpatrick; Neil Faris; Colin Harper; Catherine Donnelly; Laura McMahon; Alban Maginnis. (Lisa Coyle acted for Mr Maginnis while he was absent from the first part of the meeting).

Apologies: Stephen Farry.

Observers: Paula Molloy; 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 summary of these will be presented at the next meeting.

## 3. Deadline for Report – Proposal from Chair

The convenor informed the Group that in response to the Group's concerns about reaching the deadline set by the Forum Chair for submitting its final report, the Chair had suggested that the Group could submit this in two stages – preamble and implementation on 29<sup>th</sup> Feb and enforcement on 12 March 2008. Catherine and Aideen has discussed this and felt that (1) the topics do not divide up that easily and (2) Aideen is on holiday from 29<sup>th</sup> Feb – 10<sup>th</sup> March anyway, so we should endeavour to complete the entire report by the original deadline of 29 February 2008. The Group proposed that it would be both feasible and preferable to complete it by this date. Members believed that the plenary should have as much time as possible to examine the report.

Brian, Colin and Barry suggested that the interim report should be used as a basis from which to draft the final report. The convenor stated that it would be also necessary to highlight issues arising from other reports that are relevant to the areas considered by our Group. Neil suggested that Catherine's papers should also be included in an annex to the report in order to provide more in-depth explanations of the issues discussed within the main body of the report. He stated that the annex would serve two important purposes. First, it would provide non-legal persons with an understanding of the issues being discussed and help to avoid them from getting lost in technical details in the main body. Second, it would provide evidence to legal persons that decisions were reached after detailed consideration of the various subjects. Patrick and Barry agreed that an annex would be important to provide background detail to the technical issues considered by the Group. Colin was not in favour of the annex proposal. He stated that discussion papers were used to formalise Group discussions and decisions and that it would thus be necessary to provide greater detail within the main body of the report in order to properly explain the rationale for decisions. Peter stated that people may not read the report if it is too long. Therefore, it would be better to have a concise version that is supported by a detailed annex.

The convenor stated that to be accessible the report should attempt to summarise discussions and decisions in as concise a way as possible and include legal papers as appendices, but that we could take final decisions on these matters as we agree each section of the report.

#### 4. Children and Young People's Report

Lisa informed the Group of the matters within the Children and Young People's Report that may have implications for subjects being considered by the Group. In summary:

1. Preamble: The report proposed a preamble which it recommended should be attached to a child-specific chapter within the Bill of Rights.
2. Limitations Clauses: The report did not propose a general limitations clause. However, it acknowledges in its introduction that apart from the right to be free from torture, inhuman and degrading treatment, no other right is absolute, and that some of the rights within the Bill could be subject to a test of reasonableness and the availability of resources.

3. Provisions 7(1) and 14 (12) are examples of rights proposed within the report that are subjected to given limitations.
4. Derogations: The report does not make any specific recommendations about derogations.
5. Entrenchment and Amendment: While it proposes that children's rights should be contained within a Bill of Rights that should be interpreted in accordance with the evolution of society, the report does not make any recommendations as to how the Bill should be entrenched or amended.
6. Horizontal Application: While many of the rights proposed in the report are described in the context of the relationship between individuals and the state, upholding some of them would involve the relationship between individuals and other individuals. For example, the best of interest of the child provision states that "in all actions and decisions, including policy and legislative decisions, concerning or impacting children, whether taken by public or private institutions ... the best interests of the child shall be the paramount consideration." Also, provision 10(2) provides that a public authority shall take all appropriate measures to protect children from all forms of abuse "including, but not limited to such acts or omission while in the care of the parent(s), legal guardian, or any other person who has the responsibility for or care of the child in whatever capacity." See also provision 5(4).
7. Standing: The report does not make any claims or recommendations as to who should be able to take a claim under the Bill of Rights.
8. Remedies: The report does not include a section on remedies. However, provision 9(1) provides that the public authority shall promote and protect the rights of children to participate in matters or decisions affecting them, including judicial or administrative proceedings and provision 10(3) which deals with protection from abuse suggests judicial involvement as a protective measure.
9. Interpretation: The report does not propose a particular interpretive clause. However, its detailed rationales on every provision and the group's minutes are proposed as interpretive tools. Further, international instruments are referred to in the preamble, various provisions, definitions and the rationales of definitions and provisions. For example, the rationale for the definition of a child refers to the UN Convention on the Rights of the Child. See also, for example, the rationales to the provisions on the age of criminal responsibility and children in detention that refer to various types of international and regional law.

10. Implementation: While no general recommendation was made as to how all the rights within the report should be implemented, specific recommendations are made regarding accessible language, training/education and resources in relation to the effective protection of certain rights. See provisions 14(7)(a), 10(2) and 11(2).
11. Devolved and non-devolved matters: Many of the rights concern youth justice which is a reserved matter. See for example, provisions 10(2-4), 13(1-2) and 14.
12. Justiciability: The report does not specify exactly which rights are to be justiciable. However, the issue of budgeting in a legislative context was alluded to in the section on healthcare provision. The working group agreed that its role was to set the benchmark against which legislation was to be framed and amended and not to consider the financial aspects of implementation, which they reiterated are subject to the test of reasonableness and availability of resources.
13. Enforcement: There is specific section on enforcement in the report. (Some provisions specify various measures/sanctions that should be in place in order to ensure the effective protection of particular rights. See for example provisions 10(3) and 11(2)(c). Remedies?)

### Group Discussion

Peter stated that for consistency he would prefer a single preamble at the beginning of the Bill of Rights rather than a series of preambles that introduce each section.

Catherine stated that it was necessary to note that the rights concerning conscription in armed forces and the criminal age of responsibility concern non-devolved matters. Further, there are a large number of programmatic rights within the report. The Group needs to discuss how these will be monitored – whether by a committee, etc. She stated that the Group also needs to look at international sources in relation to the justiciability of rights and to make general comments in regard to the justiciability of rights. The Economic and Social Group's report should also be useful in this regard.

Shannonbrooke agreed that it was preferable to have only one preamble in the Bill of Rights. She suggested that it may be possible to rework some of the content of the preambles proposed in reports into interpretive-type material and proposed that this suggestion could be communicated to the relevant working groups so that we are seen to be making constructive alternative recommendations where we are

rejecting something. She stated that she did not wish to have the claim made by the C&YP's group that freedom from torture is the only absolute right as coming from this Group. She questioned whether the rights within the UNCRC are subject to derogation. She stated that if they are not, then the Group must ensure in its recommendations on a derogations clause that the Bill of Rights should not fall below this standard.

There was a general discussion of how our report should address the issues that emerge from other groups' reports. It is obviously inappropriate to comment on the substance that has been agreed. Barry and Peter suggested that examples of issues that pose challenges for recommendations we are making could be identified without commenting on the recommendations themselves.

Aideen summed up the discussion follows:

1. The Group should acknowledge that while other reports have suggested text for preamble for particular sections, we recommend that there should be only one preamble at the beginning as is normally the case with preambles.
2. Recommendations from various groups that pose challenges around implementation and enforcement should be cited only as examples in the context of recommendations we are making.

### 3. Civil and Political Rights Report

Neil and Shannonbrooke informed the Group of the matters within the Civil and Political Rights Report that may be relevant to subjects being considered by the Group. In summary:

1. Preamble: The report does not include suggestions on a preamble.
2. Limitations Clauses: Limitations clauses that largely follow the equivalent ECHR provisions are set out for the following proposed rights: right to respect for private and family life (clause 10); freedom of thought, conscience and religion (clause 11); freedom of expression (clause 12); freedom of assembly and association (clause 13); right to protection of property (clause 16); freedom of movement (clause 17).  
Additional limitations are proposed in relation to clause 10 where the right to privacy and family life interferes with the right to freedom from domestic violence and/or the best interests of the

child. Similarly, clause 13 proposes a new limitation where the rights of others to live free from harassment protected at clause 2 is impaired. Limitation in Clause 17(6) in relation to the right to freedom of movement and residence do not include the ECHR condition of "necessary in a democratic society."

The following definitional clauses also follow the ECHR scheme to have the effect of limiting rights against the powers of the state: right to life 3(2); prohibition on slavery and forced labour 5(3); right to liberty and security 7(1)(a)-(f); right to a fair trial 8(1) and 2(4)(f); right to marry and form civil partnerships 14.

Thus the treatment of limitations is on a specific and 'right by right' basis largely following the ECHR scheme.

Where proposed Bill of Rights provisions would remove or further narrow the scope of these rights limitations, they can be considered to provide rights protections additional or supplemental to the ECHR.

A majority of the WG wished to exclude morals as a ground on which there could be limitations on rights while some members wished to retain this ground. There are also minority proposals to narrow limitations in the case of the right to life, the prohibition on slavery and forced labour, and the right to liberty and security.

3. Derogations: The report has no provisions or proposals for derogations.
4. Entrenchment and Amendment: No provisions or proposals for these issues.
5. Application: The report does not contain any discussion or proposals on application. However, when read in the absence of a clear provision on application, several of the formulations are implicitly horizontal as well as vertical. For example, the prohibition on harassment clause 2; the revised clause 4 on the prohibition on torture, inhuman and degrading treatment. See also clauses 5, 10(1), 12(1), 13(1); 15(1), 16, 17(1). As currently drafted, all of these could be read as having potential horizontal application to natural or legal persons.
6. Standing: No discussion or proposals.
7. Remedies: Apart from clause 7(5) on wrongful arrest or detention which sets out the standard of an effective remedy,

- including compensation, the report does not contain any general recommendations, discussion or proposals on specific remedies.
8. Interpretation: The report does not contain any recommendations, discussion or proposals on an interpretive clause, nor does it refer to guidance from any international human rights instruments -other than basing proposed rights on the ECHR. There are vague references to the UN Convention on Torture and the refugee Convention in section discussing provision 4.
  9. Implementation: No recommendations or discussions.
  10. Devolved and Non-Devolved Matters : While there are no discussions on devolution matters, the report deals with rights that fall, in whole or in part, within the spheres of criminal law, immigration law or electoral law.
  11. Justiciability: The rights in the report are generally justiciable.
  12. Enforcement: No recommendations, discussions or proposals on this issue.
  13. Legal Persons: The report contains no discussion, recommendation or proposal as to whether the rights can be invoked by all legal persons including companies. The ECHR may be relied upon by all legal persons and presumably this report intends that the rights it proposes should be available to all legal persons including companies. In any event, the BoR provisions must not fall below the ECHR standard of protection.
  14. Other relevant issues: Conflicting provisions on equality and discrimination and criminal justice and procedural rights have emerged between the proposals set out by the CPR WG, the CJV WG and the CYP WG. This will need to be resolved.

### Group Discussion

Catherine stated that in terms of application it is necessary to distinguish between positive obligations on a state and the possibility for individuals to take direct actions against other individuals. Some provisions in the report seem to go beyond positive obligations jurisprudence, for example the harassment and servitude provisions. The Group needs to examine this issue more carefully. Further, in order to ensure compliance with international standards the word 'shall' should be used instead of 'should.'

Patrick stated that it was not altogether clear what new rights were being proposed within the report as existing rights are also contained within the report.

Colin stated that by adding limitations to existing ECHR rights that there is a possibility that their current protection is being diminished. This would not be possible under the non-diminution and harmonisation clauses.

Shannonbrooke agreed that existing standards cannot be diminished. She pointed out that they can, however, be supplemented.

The convenor pointed out that the matter of combining new rights with existing ECHR rights is also relevant to the Group in relation to its deliberations on which 'HRA and supplementary rights model' should be proposed.

#### 4. Criminal Justice and Victims Report

Brian and Barry informed the Group of the matters within the Criminal Justice and Victims Report that may be relevant to subjects being considered by the Group. In summary:

1. Preamble: The report contains an 8-clause preambular statement that exclusively addresses criminal justice and victims' issues.
2. Limitations: Limitations clauses are recommended on a right-by-right basis.
3. Derogations: The report mentions on page 44 that careful consideration needs to be given to the subject of derogations, but it makes no specific recommendations on the subject.
4. Entrenchment and Amendment: No reference to these issues is made in the report.
5. Application: In its reference to victims, the report recognises that actors other than the state can be perpetrators when it comes to human rights abuses. However, there is no explicit reference to application to any body other than the state. See page 7.
6. Standing: No specific recommendations are made by the report although it does refer to definitions of victims.
7. Remedies: Beyond references to "the right to compensation" for victims, no reference is made to specific remedies.

8. Interpretation: There are no interpretive clauses in the report. There are some definitional clauses, particularly on the meaning of victims of the conflict and victims of crime and human rights abuses. There is extensive reference to international standards in the report. See pages 6, 8, 11, 19, 20, 23, 29, 33, 35 and 36.
9. Implementation: At p 6, the report states "The DUP and UUP representatives took the view that the section on victims of human rights abuse belonged best in the implementation section of a Bill of Rights. Other members considered that the implementation section should have a brief reference to victims' rights and refer victims to these longer provisions."
- Provisions on violence against women (p 13) shall include:-
- "4. The Public Authority shall ensure appropriate perpetrator programmes for all offenders of violence against women which shall be mandatory in nature.
5. Criminal justice agencies should receive gender-awareness training; including on the extent and nature of violence against women."
- The provisions on Policing and CJ (General) include (p 24): -
- "10. Training for Police/all criminal justice personnel and those delegated to fulfill any criminal justice function on behalf of the state shall take full account of the need to challenge and combat racism, sectarianism, sexism, homophobia and xenophobia, to appreciate and attend to the particular needs of children, young people and the vulnerable in society and to inculcate a culture of respect for the human rights of all as the bedrock of effective policing and criminal justice."

Under Right of Victims/Witnesses to a Fair Trial (p 35), it is stated:-

"5) Lawyers representing clients or prosecuting in sexual crime, child abuse and/or domestic violence cases shall only be deemed eligible to do so if of commensurate experience and expertise or who have been specifically trained for the purpose."

Under Rights in Detention (p 37), it is provided:-

"15. The Public Authority shall ensure adequate and appropriate provision and access to education, training and purposeful activities."

10. Devolved and Non-Devolved Matters: Some of the victims' provisions are largely understood to be devolved, eg on restorative justice and a duty to consider compensation. Most victims' provisions concern criminal justice matters which are

- reserved. The vast bulk of the CJ and policing matters obviously concern reserved matters. There are infrequent references to issues of security and immigration which are excepted matters.
11. Justiciability: In an earlier paper on Justiciability, Barry mentioned some examples from this Report. Given the range of international instruments invoked in this Report, it is impossible to do justice to the levels of justiciability in this report. It is anticipated that a significant number of measures are intended to be justiciable although many are directed at 'the Public Authority'.
  12. Enforcement: There is a range of measures on access to justice in this Report.
  13. Legal Persons: The provisions appear largely to be directed towards individuals.
  14. Other Issues of Relevance to the Group: There is a range of equality/discrimination measures throughout this Report.

### Group Discussion

Catherine pointed out that while the report makes reference to private institutions to which powers have been delegated, it does not refer to private contractors to whom functions have been delegated. The latter group would include, for example, private prison services. She thought that while some of the rights within the report are intended to be justiciable, some may be intended to be programmatic. The report seems to intend the rights to be invoked also by legal persons as it mentions those who have suffered "economic loss."

### 5. Next Meeting

The next meeting will be held on 26 February 2008 at 14.00 in Room 21 in Stormont.