

CHAIR'S CONSOLIDATED TEXT
TECHNICAL PROVISIONS

INTRODUCTION

This document is a consolidated list of the proposals presented by Forum working groups related to technical provisions to be included in a Bill of Rights. These provisions are accompanied by draft proposals from the Chair.

Preamble and implementation are the subjects of chapters 3 and 6 of the report. Those chapters are being drafted and will include proposals arising from the working groups' reports and the Forum's discussions in plenary.

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RELATIONSHIP WITH THE HUMAN RIGHTS ACT (P2(i), PEI)¹

Recommendation

The Working Group recognises and brings to the Forum's attention three possible options that exist as regards the relationship between the HRA and the Supplementary Rights/Bill of Rights, as follows:

Model 1:

Repeal the HRA as it applies to Northern Ireland and adopt a new Bill of Rights that incorporates both rights contained within the HRA and any newly proposed Supplementary Rights.

Model 2:

Pass legislation to introduce new rights for Northern Ireland and in the process amend the HRA to address what may be regarded as its present shortfalls (e.g. standing, application, enforcement and substantive rights).

Model 3:

Retain the HRA in its present form and introduce Supplementary Rights in separate legislation for Northern Ireland. Enforceability/implementation proposals beyond those in the HRA would only be applicable to the Supplementary Rights contained in the separate statute.

CHAIR'S PROPOSAL

Retain the three models and indicate the preference(s) of Forum members.

¹ Provision 2(i), page 9, report of the preamble, enforceability and implementation working group.

LIMITATION (P2(ii), PEI)²

Recommendations

- Limitations to the Supplementary Rights/rights in a Bill of Rights should be on a right-by-right basis and uniform to the extent possible. These limitations should be narrowly defined, similar to the model of limitation found in the ECHR, to ensure that the rights cannot be unduly restricted.
- It is beyond the remit of this group to propose limitations clauses for every recommendation made by other Working Groups.
- However, in general, and taking account of comparative and international experience, we recommend that every proposed limitation clause must require that the limitation on the right be: prescribed by law, not adversely affect current domestic or international human rights obligations, and be necessary in a democratic society, taking into account all relevant factors, including but not necessarily limited to:
 - a. the nature of the right;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;
 - d. the relation between the limitation and its purpose; and
 - e. less restrictive means to achieve the purpose.

CHAIR'S PROPOSAL

Limitations to rights should be on a right-by-right basis and uniform to the extent possible. They should be narrowly defined, similar to the model of limitation found in the ECHR, to ensure that the rights cannot be unduly restricted.

² Provision 2(ii), page 12, report of the preamble, enforceability and implementation working group.

DEROGATION (P2(iii), PEI)³

Recommendation

The group recognises that there are a number of options in relation to derogation:

Convention rights:

1. Convention rights, as contained in the HRA, left as they are, that is, subject to derogation; or
2. Derogation removed from Convention rights as contained in the HRA and subjected only to appropriate limitations clauses.

Supplementary Rights/Bill of Rights:

3. Supplementary rights non-derogable but subject to appropriate limitations clauses; or
 4. Supplementary rights subject to derogation, with listed exceptions.
- The group recommends that any supplementary rights corresponding with non-derogable international rights which the UK has ratified must not be derogable in the Supplementary Rights/Bill of Rights.
 - If the Forum agrees that a derogation clause is necessary, it is for the Forum to identify non-derogable Supplementary Rights/rights in the Bill of Rights, if any, additional to those that are already non-derogable as a matter of international law.
 - If a derogation clause is agreed by the Forum, the Group draws to the Forum's attention the following possibilities (which are not mutually exclusive) in relation to a process for the exercise of derogation power:
 - Westminster legislation
 - Cross-community vote of the NI Assembly
 - Judicial scrutiny

³ Provision 2(iii), page 15, report of the preamble, enforceability and implementation working group.

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- o Setting of time limits
- o Review mechanism after the derogation has been in place for some time.

CHAIR'S PROPOSAL

1. No derogation should be permitted to rights not derogable under existing domestic or international law.
2. Any derogations should be provided for on a right-by-right basis and uniform to the extent possible.
3. To ensure that rights cannot be unduly restricted, any permitted derogation should be
 - a. narrowly defined;
 - b. limited to situations of an emergency nature;
 - c. restricted to the extent strictly required by the situation;
 - d. only for a specific period of time;
 - e. applicable only to a specific geographical area affected by the situation ;
 - f. non-discriminatory on any proscribed ground in their application and effect; and
 - g. subject to judicial review of its exercise on the basis of its reasonableness, proportionality and consistency with these principles.

ENTRENCHMENT AND AMENDMENT (P2(iv), PEI)⁴

Recommendations

- The adoption and amendment of the Bill of Rights/Supplementary Rights should require cross-community approval in the NI Assembly.
- A further option is the requirement of a referendum; there are a range of views in the Group in relation to this option.
- The option of an intergovernmental treaty was raised, but there was no extensive discussion of this and thus no consensus view.

CHAIR'S PROPOSAL

1. The Bill of Rights to be enacted through Westminster legislation should first receive cross-community support in the Northern Ireland Assembly.
2. The Bill of Rights to be enacted through Westminster legislation should first receive popular support in a referendum.
3. The Bill of Rights should be amendable only through the same process as led to its enactment.

⁴ Provision 2(iv), page 23, report of the preamble, enforceability and implementation working group.

APPLICATION (P2(v), PEI)⁵

Supplementary Rights/Bill of Rights

- Supplementary Rights/Bill of Rights should be enforceable against 'public authorities'.
- Courts should be included within the definition of 'public authority' to ensure indirect horizontal effect of Supplementary Rights/Bill of Rights.
- The Group draws the Forum's attention to its general position and recommends that careful consideration be given to the issue in the drafting of the Forum's Recommendations.

There are a number of other issues in relation to application of Supplementary Rights/Bill of Rights:

- The definition of 'public authority' should be more generous than that found in the HRA.
- Obligations should be outcome and process based.
- To achieve these ends, the following Proposed Provision should be included in legislation giving effect to supplementary rights:

'(1) It is unlawful for a public authority to act in a way which is incompatible with the Bill of Rights/ Supplementary Rights [or, in making a decision, to fail to give due regard to a relevant right.]

(2) Subsection (1) does not apply to an act if—

- (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
- (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the

⁵ Provision 2(v), pages 25-26, report of the preamble, enforceability and implementation working group.

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supplementary rights, the authority was acting so as to give effect to or enforce those provisions.

- (3) In this section “public authority” includes—
- (a) a court or tribunal, and
 - (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In subsection (3) “Parliament” does not include the House of Lords in its judicial capacity.

[(5) In subsection (3)(b), a “function of a public nature” includes a function performed pursuant to a contract or other arrangement with a public authority which exercises a power or is under a duty to perform that function.]

[(6) In relation to subsection (3)(b), a person will only be a public authority in respect of those acts performed pursuant to the function of a public nature/ In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.]

[(7) “An act” includes a failure to act but does not include a failure to—

- (a) introduce in, or lay before, Parliament a proposal for legislation; or
- (b) make any primary legislation or remedial order.]’

Convention rights – HRA Interpretation Proposal:

There is a possibility to extend the application of the definition of public authority within the Human Rights Act:

- [Insofar as it applies to Northern Ireland, the inclusion within the Section 6(3)(b) definition of “public authority” of ‘any person certain of whose functions are functions of a public nature’, must be subject to the following interpretation:

'In subsection 6(3)(b), a "function of a public nature" includes a function performed pursuant to a contract or other arrangement with a public authority which exercises a power or is under a duty to perform that function.'

ECONOMIC AND SOCIAL RIGHTS WORKING GROUP⁶

Application:

"In giving effect to the economic and social rights in this Bill of Rights, public authorities must pay particular attention to the needs of those groups that are vulnerable or socio-economically disadvantaged."

CHAIR'S PROPOSAL

1. The Bill of Rights should bind all public authorities, broadly defined, including courts to ensure indirect horizontal effect, but not either House of Parliament or a person exercising functions in connection with proceedings in Parliament. It should include persons exercising functions of a public nature. It should also include those performing functions pursuant to a contract or other arrangement with a public authority that exercises a power or is under a duty to perform that function.
2. A public authority shall not act in a way which is incompatible with the Bill of Rights or, in making a decision, fail to give due regard to a relevant right, except where
 - a. as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

⁶ Page 63 of the economic and social rights working group.

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- b. in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the rights, the authority was acting so as to give effect to or enforce those provisions.
3. "An act" includes a failure to act but does not include a failure to
- a. introduce in, or lay before, Parliament a proposal for legislation; or
 - b. make any primary legislation or remedial order.

STANDING (P2(vi), PEI)⁷

Recommendation

- The Group recommends that standing in relation to the Supplementary Rights/Bill of Rights is such as to enable access to justice which is sufficiently resourced and accessible, and proposes a clause based on the current sufficient interest test used for judicial review cases, as follows:

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section ... may—

- (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
- (b) rely on the right or rights concerned in any legal proceedings,

but only if that person has (or would have) a sufficient interest in the unlawful act.

(2) In subsection (1), whether a person has a 'sufficient interest' in the unlawful act must be determined having regard to the need to ensure access to justice.

(3) In subsection (1)(a) 'appropriate court or tribunal' means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

CHAIR'S PROPOSAL

Anyone who claims that a public authority has acted, or proposes to act, in a way which is unlawful under the Bill of Rights may

⁷ Provision 2(vi), page 34, report of the preamble, enforceability and implementation working group.

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- a. bring proceedings against the authority under this Act in the appropriate court or tribunal, or
- b. rely on the right or rights concerned in any legal proceedings

but only if that person has or would have a sufficient interest in the unlawful act having regard to the need to ensure access to justice.

INTERPRETATION (P2(vii), PEI)⁸

Recommendation

- The Group proposes an interpretation clause for the Bill of Rights/Supplementary Rights similar to that contained in the HRA, as follows:
 - ‘(...) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Supplementary Rights/Bill of Rights.’
- An optional addition to the interpretative clause is as follows:
 - ‘International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right [must/may] be considered in interpreting Supplementary Rights/Bill of Rights.’

CHAIR’S PROPOSAL

1. So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Bill of Rights.
2. In interpreting and applying this Bill of Rights the courts may have regard to relevant international human rights law and jurisprudence and the human rights jurisprudence of comparable jurisdictions.

⁸ Provision 2(vii), page 36, report of the preamble, enforceability and implementation working group.

COVERAGE
(DEVOLVED AND NON-DEVOLVED ISSUES (P2(viii),
PEI)⁹)

Recommendation

- There are a range of possibilities that exist in relation to transferred, reserved and excepted matters which are presented in tabular form in Appendix One.

CHAIR'S PROPOSAL

OPTION A

Make use of the tables attached to the working group report and indicate positions in relation to each element.

OPTION B

Attempt a compromise consolidated position with a different approach organised according to category of institution, covering all areas of responsibility of that institution (that is, whether devolved or not devolved) and all activities (that is, whether legislative, subordinate legislative, executive or judicial) undertaken by that institution, as follows:

1. In relation to public authorities,
 - a. Northern Ireland public authorities shall be required to act compatibly with the Bill of Rights, unless compelled by primary or subordinate legislation to do otherwise and

⁹ Provision 2(viii), page 40, report of the preamble, enforceability and implementation working group.

- b. all public authorities, in carrying out their functions in relation to Northern Ireland, shall be required to act compatibly with the Bill of Rights, unless compelled by primary or subordinate legislation to do otherwise.
2. The Northern Ireland Assembly shall be bound by the Bill of Rights.
 - a. A statement of compatibility shall be laid when a Bill is presented to the Assembly or draft subordinate legislation is laid in the Assembly.
 - b. Any Assembly Bill or subordinate legislation that cannot be interpreted compatibly with the Bill of Rights shall be invalid.
3. When a Bill is presented to either House of Parliament or draft subordinate legislation is laid in either House of Parliament and the Bill or draft subordinate legislation has exclusive application to Northern Ireland, the Minister responsible for the Bill or draft subordinate legislation shall make a statement of compatibility with the Bill of Rights to the House. If a statement of compatibility cannot be made, the Minister responsible for the Bill or draft subordinate legislation will make a statement to the effect that, notwithstanding the lack of compatibility with the Bill of Rights, the Government wishes the House to proceed with the Bill.
4. The courts shall be bound by the Bill of Rights.
 - a. Courts shall interpret Assembly legislation and Northern Ireland subordinate legislation compatibly with the Bill of Rights where

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possible. Where compatible interpretation is not possible, the courts shall invalidate the legislation.

- b. Courts shall interpret Parliamentary primary legislation and subordinate legislation with exclusive application to Northern Ireland compatibly with the Bill of Rights where possible. Where compatible interpretation is not possible, the courts shall issue a declaration of incompatibility.

JUSTICIABILITY (P2(ix), PEI)¹⁰

Recommendation:

- The PEI Group notes that a range of language has been used by Working Groups in their recommendations, and recommends that the Forum conduct an audit of justiciability of all its final proposals to ascertain:
 - Whether they confer immediately enforceable rights on individuals (and corresponding, immediate duties on public authorities);
 - Whether they impose programmatic or target obligations on public authorities.
- The option exists for programmatic rights to also be legally enforceable.

CHAIR'S PROPOSAL

OPTION A

All provisions in the Bill of Rights shall be justiciable.

OPTION B

All provisions in the Bill of Rights shall be justiciable except those in relation to which the obligation is one of progressive realisation.

¹⁰ Provision 2(ix), page 48, report of the preamble, enforceability and implementation working group.

ENFORCEMENT MECHANISMS (P2(x), PEI) ¹¹

Legal Institutions:

- There are a number of options for how the Supplementary Rights/Bill of Rights could be enforced in the Courts:
 1. A dedicated Human Rights Court
 2. A Human Rights Tribunal
 3. The creation of a Human Rights Division of the High Court
 4. Rights enforced through existing court system

Other Institutions:

- The statutory powers of the NIHRC should include benchmarking, monitoring and auditing of compliance with the ECHR and Supplementary Rights/Bill of Rights, and in particular with programmatic rights.
- An Assembly committee should perform a similar role to that performed at Westminster level by the Joint Committee on Human Rights, namely to monitor compliance of Assembly legislation with the Bill of Rights/Supplementary Rights; to conduct consultations; and to publish reports.

Remedies:

- The Group also cross-refers in this regard to Section 2(viii) above (recommendations on particular remedies in devolution context) and Section 2(x) (recommendations on general remedies).

CHAIR'S PROPOSAL

1. Any court in which an issue arising under the Bill of Rights is pleaded in the course of another action shall have jurisdiction to decide that issue.

¹¹ Provision 2(x), page 51, report of the preamble, enforceability and implementation working group.

2. In addition there shall be a specialist human rights court or division of a court in which an action based on the Bill of Rights can be initiated.

GENERAL REMEDIES (P2(xi), PEI)¹²

Recommendation

- The following provision should be included in the Bill of Rights/Supplementary Rights:
 - 'Courts shall grant to any person or body whose rights and freedoms under the Supplementary Rights/Bill of Rights have been or may be violated an effective remedy and for this purpose may grant such relief or remedy, including compensation, or make such order, as they consider just and appropriate.
 - The legal aid system should be such as to ensure access to justice via the Supplementary Rights/Bill of Rights.'
- In addition, the Group brings the Forum's attention to the range of possibilities in relation to legislative incompatibility, invalidity and disapplication discussed in Section 2(viii) and in the tables in Appendix One.

CHAIR'S PROPOSAL

A court shall grant an effective remedy to any person whose rights and freedoms under the Bill of Rights have been or may be violated and, for this purpose, may grant such relief or remedy, including compensation, or make such order as it considers just and appropriate.

¹² Provision 2(xi), page 55, report of the preamble, enforceability and implementation working group.

OUTSTANDING LEGAL ISSUES (P2(xii), PEI)¹³

A. Harmonisation and non-diminution

Recommendation:

- The following clauses are proposed:

'The Supplementary Rights/Bill of Rights shall be interpreted harmoniously with the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. This provision shall not prevent the Supplementary Rights/Bill of Rights providing more extensive protection than is provided by the ECHR.

Nothing in this Bill shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by international law and by international agreements to which the UK is a party, including but not limited to the European Convention for the Protection of Human Rights and Fundamental Freedoms.'

CHAIR'S PROPOSAL

1. The Bill of Rights shall be interpreted consistently with the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. This provision shall not prevent the Bill of Rights providing more extensive protection than is provided by the ECHR.

¹³ Provision 2(xii), page 57, report of the preamble, enforceability and implementation working group.

2. Nothing in this Bill shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by international law and by international agreements to which the UK is a party, including but not limited to the European Convention for the Protection of Human Rights and Fundamental Freedoms, or by any law applicable in Northern Ireland.