

Briefing Paper, Bill of Rights Working Group on Women and Children

International Standards on the Rights of Women

The Bill of Rights is expressly designed to supplement the European Convention on Human Rights, in order to address the 'specific circumstances of Northern Ireland'. Any Bill of Rights must also, however, be consistent with the state's existing human rights obligations under international law. At this stage, it is envisaged that the Bill of Rights will include an interpretation clause, directing that a court, tribunal, or other body, when interpreting the Bill of Rights, 'must have due regard to international law and practice'. The principle statement of women's rights in international law is the Convention on the Elimination of Discrimination Against Women (CEDAW). Further guidance on best practice in implementing these rights have been developed through a series of 'soft law' standards, most notably in respect of women by the Beijing Declaration and Platform for Action of 1995. The CEDAW Committee, the body responsible for monitoring the implementation of CEDAW across signatory states, also formulates General Recommendations on specific provisions of CEDAW, and although these are not binding interpretations of the Convention, they are considered to be highly influential.

In ratifying CEDAW, the UK government has committed to 'undertake to adopt all necessary measures at the national level aimed at achieving the full realisation of the rights recognized in the present Convention' (article 24). In practice, implementation of CEDAW has been patchy, and exercised through periodic reports by the UK government to the CEDAW committee. More recently, the UK government has ratified the Optional Protocol to CEDAW, which allows for the Committee to receive and consider complaints from individuals or groups within its jurisdiction. However, in order for a claim to be eligible for consideration under the Optional Protocol, the applicant must first approach the domestic courts ('exhaust domestic remedies'). This has been a recurring issue in complaints made to the committee. Indeed, in both of the complaints brought concerning the UK government, the Committee was unable to consider the merits of either claim as the government argued successfully that domestic remedies had not been exhausted. It is currently very difficult for women in Northern Ireland to have their rights guaranteed under CEDAW vindicated by any court or tribunal. The Bill of Rights offers the opportunity to make the rights enshrined in CEDAW justiciable in local courts, thereby significantly enhancing the legal protection of women's rights in Northern Ireland.

The Convention for the Elimination of Discrimination Against Women (CEDAW), often known as the Women's Convention or the Women's Bill of Rights, emerged from the United Nations in 1979 and was ratified by the UK in 1986. The Preamble to CEDAW notes the gender equality in provisions in the already existing international human rights treaties, but goes on to say 'Concerned, however, that despite these various instruments extensive discrimination against women continues to exist'. The Convention marked recognition by the international human rights system, that where the gender-specific needs of women were not given express recognition, those rights would continue to be ignored by the existing international human rights apparatus (an important lesson to be borne in mind by those involved in drafting the Bill of Rights for Northern Ireland). CEDAW deals with a range of women's gender-specific needs. The legal status of women receives the broadest attention. The basic rights of political

participation are restated; provides for the statehood of women, irrespective of their marital status. Articles 10, 11 and 13, respectively, affirm women's rights to non-discrimination in education, employment and economic and social activities. These demands are given special emphasis with regard to the situation of rural women, whose particular struggles and vital economic contributions, as noted in article 14, warrant more attention in policy planning. Article 15 asserts the full equality of women in civil and business matters, demanding that all instruments directed at restricting women's legal capacity "shall be deemed null and void". Finally, in article 16, the Convention returns to the issue of marriage and family relations, asserting the equal rights and obligations of women and men with regard to choice of spouse, parenthood, personal rights and command over property.

In its scoping paper, the women's sector has prioritised the need for improved rights protections around persistent gender inequality, political participation, violence against women, health (especially reproductive health) and socio-economic rights more broadly; therefore, I will concentrate in this presentation on how CEDAW and relevant implementation guidelines address those issues. CEDAW's first five articles deal with the question of persistent inequality, setting out the state's general obligations arising from CEDAW. Firstly, discrimination against women is defined to include direct and indirect discrimination:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

This provision has been interpreted very broadly at the international level (i.e. by the CEDAW Committee) to encompass patterns of disadvantage which women face, rather than adopting an unduly formalistic approach to the terms that has generally adopted by domestic courts when considering whether discrimination exists.

Article 2 goes on to require states to ensure women's equality is enshrined in the law. Article 3 requires states to take 'all appropriate measures' to vindicate the rights of women included in the Convention. Article 4 should be of special interest to the Working Group, as it provides that 'Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention'. While CEDAW uses the language of 'temporary special measures', in Northern Ireland we tend to use the language of 'positive action'. It is also worth noting that states are *permitted* to adopt temporary special measures to advance women's equality; they are not *required* to do so. The Convention is careful to ensure that signatory states are not just required to address discriminatory legislation, but go further to require them to take all appropriate measures to 'modify [discriminatory] social and cultural patterns' (article 5).

In terms of democratic rights of women, CEDAW incorporates the 1952 Convention on the Political Rights of Women. Article 7 of CEDAW guarantees the equal right of women to vote, to participate in public policy formulation and public office, and to participate in non-governmental political and public life. Article 8 goes on to require states to ensure that women have an equal opportunity to represent the state at the international level.

Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Article 8

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

One other significant international commitment by the British government concerns UNSC Resolution 1325 on women, peace and security. This is significant because members of the UN agree to accept and carry out the decisions of the Security Council, placing member states under a legal obligation to obey. The resolution has as its centrepiece the need for women's increased participation in all stages of peace processes.

Socio-economic rights are addressed throughout CEDAW, however, articles 12 and 16 are most significant in respect of women's health and reproductive health. The first section of the article guarantees the equality of women and men in accessing those services.

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

And the second section goes onto guarantee women's gender-specific needs in respect of their reproductive health:

2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 16(1)(e) recognized the right of women 'to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights'.

Although CEDAW does require states to prohibit the trafficking of women and the exploitation of prostitution (article 6); CEDAW does not specifically address violence against women. However, the CEDAW Committee has interpreted violence against women as constituting discrimination against women within the meaning of the Convention, even though it's not explicitly mentioned. In General Recommendation 19 of 1993, the CEDAW Committee held that the definition of discrimination against

women includes gender-based violence, that is, violence against women that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. The Committee noted that the Convention applies to violence perpetrated by public authorities, by also that under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation. The UK government reports at length on violence against women and its actions to end violence in the periodic reports to CEDAW, and therefore recognizes this interpretation of violence against women as part of discrimination against women. The UK government is also signatory to the Beijing Declaration and Platform for Action, which identified violence against women as one of the areas for strategic objectives and action.

Women's Rights in the Proposed Bill of Rights

The process of consultation on the Bill of Rights was officially launched in March 2000. It has been a fraught process, however in that period the Human Rights Commission produced two documents, one in 2001 and a second in 2004, setting out the Commission's views on the rights to be included and how they should be enforced. In the most recent phase of the process, with the Bill of Rights Forum, all parties have been keen to point out that everything is on the table- everything is up for negotiation. Nevertheless, it is useful to review how the earlier drafts dealt with women's rights, just to get a sense of where the difficulties and disagreements have been.

One area of contention of particular significance to the women's sector is the discussion of how best to entrench and protect rights to equality and anti-discrimination. Broadly speaking, there are three possible approaches:

(a) Mainstreaming all rights

This would entail recognising that the word "everyone" in the various sections of the Bill includes every member of every disadvantaged sector. For some, perhaps people with disabilities, this would in itself be a step forward, since up to now they may have felt unrecognised even as full human beings. But the drawback with this approach is that the very specific rights which some disadvantaged groups are claiming (*e.g.* the right of people with disabilities to have access to public transport) would not be contained in the Bill because it does not confer any corresponding right on "everyone".

(b) Mainstreaming most rights but adding a few specific rights

This approach would mean adopting the previous position but inserting in appropriate sections some specific rights which would otherwise be excluded. For example, people with disabilities could be guaranteed the specific right to have access to public transport, women could be guaranteed the specific right to participate in political decision-making, older people could be guaranteed the specific right to free nursing care, etc.

(c) Inserting specific rights for a number of specific groups

Protecting rights in this way would require wholly separate sections in the Bill of Rights dealing with the full range of rights which members of different disadvantaged groups should be entitled to. There would be fairly lengthy sections in the Bill of Rights covering the specific rights of children, older people, people with disabilities, etc.

NIHRC 2001 Proposal for a Bill of Rights

The 2001 draft contained a general equality clause prohibiting discrimination on the grounds of sex. The draft also included a separate clause in the same section saying:

*Equality between men and women must be ensured in all areas. The State shall take **all necessary measures to promote** the equal enjoyment, benefit and protection of all human rights and fundamental freedoms for women and girls.*

Women were the only group given special additional recognition in the equality and non-discrimination section (not children, not people with disabilities, not ethnic minorities, etc). This provision included a duty of positive action, however the chapter on equality contains a general positive action clause in respect of all forms of discrimination. In its commentary on the gender equality provision, the Commission argued that 'even if it has the same legal weight as the general equality provision, [the gender equality provision] carries a symbolic and interpretative value'. Concerns were raised subsequently as to why it was only women who received this attention.

The 2001 draft then went on to 'mainstream' women's rights [note: section entitled 'women's rights' only a representational exercise- did not amount to separate chapter as was the case with children's rights], although the Commission appeared very open to hearing responses on this decision. Rather than dedicating a separate chapter to women's rights, clauses were added to the sections on democratic rights, victims' rights, and socio-economic rights dealing specifically with women. The Commission indicated that responses to their consultation process had highlighted equality protections, political participation, violence against women, and women's reproductive rights as key concerns. The Commission therefore formulated rights specific to women in these areas:

The section on democratic rights set out 'participation rights', which included:

The State shall take all appropriate measures to promote the right of women to fair, full and equal participation in public life, including participation in decision-making processes and access to power.

The section on social, economic and environmental rights included a right to health care, which specifically stated:

Everyone has the right to have equal and free access to sexual and reproductive health care and to information and education relating to sexual and reproductive matters at all levels, free of coercion, discrimination or violence.

While this provision did speak to the 'particular circumstances of Northern Ireland', where there have several issues around the intimidation and harassment of women seeking to avail of reproductive health services; a very weak enforcement mechanism was attached to this right. It was not to be directly enforceable through the courts, rather the government would be expected to deliver on this right over time [a process known as 'progressive realisation' of rights].

The section on victim's rights set out three categories of victims (victims of the conflict, victims of the future, and victims of violence against women), with different rights attaching to each category. The clause dealing with women stated:

The State shall take all appropriate measures to prevent and eliminate all forms of violence against women and girls whether physical, mental or emotional.

It's worth stating these three rights were clear additions to the language of the European Convention on Human Rights. The right to equal political participation was included in the Good Friday Agreement. The provisions on reproductive healthcare and violence against women reflected human rights developments secured by women at the international level through the 1990s.

Progressing a Bill of Rights for Northern Ireland: An Update (2004)

In the 2004 draft, in response to a largely critical response from all sectors to the 2001 document, several changes were made, many of them affecting women's rights. The Commission noted in the introduction to the 2004 document that a 'number of bodies representing disadvantaged groups were unhappy with the 2001 document' [women were not listed as one of these 'unhappy' groups]. The introduction went on to say that 'It is clearly unsatisfactory and invidious to include detailed provision for some but not all groups of this kind and the responses to the consultation document from a number of representative bodies have strongly argued for some but not all groups of this kind and the responses to the consultation document from a number of representative bodies have strongly argued for the inclusion of detailed and specific protections for those whom they represent. On the other hand, it can be argued that detailed protections of this kind are better dealt with by specific legislation and that the proper role for a Bill of Rights is to guarantee effective equality of provision for all... There is a need to ensure that the Bill of Rights does not become too detailed a document.'

In the 2004 document, a separate equality clause dealing specifically with women, and providing for 'positive action' was retained. It is defended by the Commission on the following grounds that provision 'reflects the Commission's belief that the history of a denial of human rights to women and girls is such that special mention of them in this section of the Bill is justified. By imposing a duty on the State to take all necessary measures to promote the equal enjoyment of all human rights and fundamental freedoms by women and girls the Bill is going further than merely ensuring that women and girls have the same rights as men and boys. A positive action provision like this should ensure that in practice the Bill of Rights makes a real difference to the way in which women and girls experience their rights.'

Democratic rights now included, rather than a single clause dedicated to women:

*The State shall take all appropriate measures to promote the right of under-represented sectors of society, **in particular women**, to fair, full and equal participation in public life, including participation in decision-making processes.*

The section on victim's rights removed the distinction between victims of the conflict, victims of the future, and victims of violence against women. Instead, it set out a

range of rights relating to ‘every victim’, with no specific mention of women or violence against women. The Commission defended this decision on the grounds that ‘it was difficult to justify excluding a similar provision for men and boys. Instead, a provision on violence in the home’ has been inserted into the proposed section on the right to be protected against violence. The provision in question is gender-neutral:

Laws shall be passed to ensure that the use or threatened use of all forms of violence, including violence in the home, bullying in the workplace or in schools, and intimidation or harassment in any context, is prohibited and, where appropriate, punished.

As I already mentioned, the entire approach to socio-economic rights in the Bill has been very contentious. The argument has concerned how these rights are to be protected. Some people argue that decisions about how public money is to be spent is a decision for our elected politicians, who can balance competing demands for scarce resources; that these are not decisions to be made by legal documents and courts. Others argue that it is important that at least a minimum standard of public services is guaranteed to all individuals.

Three options have been presented for enforcing socio-economic rights: the first option is to protect a set of minimum rights only, that would be directly enforceable through the courts; a second option is to set out a larger range of rights, and the state would be required to ensure that these rights are progressively realised; the third option is a combination of both, where some rights would directly enforceable, and others would be progressively realised. The Commission did not take a definitive position on this in the 2004 draft, rather it set out five possible directly-enforceable ‘minimum’ rights: access to health care, protection against destitution, shelter, work, and protection against a dangerous environment. The rights to be ‘progressively realised’ were the same as the 2001 document, and therefore included the section on sexual and reproductive healthcare.

International Experience of Women and Bills of Rights

In terms of international best practice, the two bills of rights most often referred to on questions of equality generally and women’s rights specifically are those of Canada and South Africa, respectively. The Canadian Charter makes two separate references to women’s equality. Firstly, in the general equality clause of section 15, which states that:

(1) Every individual is equal before and under law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex or mental or physical capacity.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

And secondly, in the clause specifically dealing with gender inequality, section 28: *Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.*

The Canadian experience is instructive because, despite the absence of a specific chapter dedicated to women, the Supreme Court has been quite proactive and progressive in its defence of the rights of women. Secondly, although section 28 was celebrated as a great victory for the women's movement when it was initially incorporated into the Charter, it has since turned out to be something of 'dead letter'. Cases dealing with sex discrimination are more often brought under the general equality provision in section 15, because it allows for recognition of multiple forms of discrimination (for example, against women of colour, or women with disabilities, or lesbians).

Section 1 of the South African Constitution ('founding provisions') states that:
The Republic of South Africa is one, sovereign, democratic state founded on the following values:

b. Non-racialism and non-sexism.

The South African Bill of Rights also has a general equality provision (section 9):

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.

3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

5. Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The South African Bill of Rights does not contain a separate chapter of women's rights, or a separate provision in the equality section restating the prohibition of sex or gender discrimination. Nevertheless, the Constitutional Court has been a champion of women's rights (see appendix), and the section 1 commitment to non-sexism as a founding provision of the Constitution has been critical to that.

A couple of lessons can be drawn from the Canadian and South African experience. Firstly, there is no 'magic formula' when it comes to entrenching women's rights in a Bill of Rights, and the interpretation of those rights does depend very much on judges. Canada, and particularly South Africa, have had visionary judges who been willing to interpret those rights in a progressive way. Northern Ireland, however, does not have the same tradition of judicial activism, and the courts have tended to be very deferential to the decisions of government.