



## Northern Ireland Assembly

### **156/17-22 Report of the Ad Hoc Committee on a Bill of Rights**

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Ordered by the Ad Hoc Committee on a Bill of Rights to be published on  
Friday 04 February 2022

**This report is embargoed until the commencement of the debate in the  
Assembly on 14 February 2022.**

Report: NIA 156/17-22 Ad Hoc Committee for a Bill of Rights

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## Powers and Membership

### Powers

Under Standing Order 53 ad hoc committees shall be established from time to time to deal with any specific time-bounded terms of reference that the Assembly may set. The Assembly shall decide the membership of any such committee and may direct its method of operation.

The Ad Hoc Committee on a Bill of Rights was established by resolution of the Assembly on Monday 24 February 2020 in accordance with Standing Order 53(1). The remit of the Committee was to consider the creation of a Bill of Rights as set out in paragraph 28 of Part 2 of the *New Decade, New Approach* document; and to submit a report to the Assembly by 28 February 2022.

Each ad hoc committee may exercise the power in section 44(1) of the Northern Ireland Act 1998 as below:

*“(1) The Assembly may require any person—*

- (a) to attend its proceedings for the purpose of giving evidence; or*
- (b) to produce documents in his custody or under his control, relating to any of the matters mentioned in subsection (2).*

*(2) Those matters are—*

- (a) transferred matters concerning Northern Ireland;*
- (b) other matters in relation to which statutory functions are exercisable by Ministers or the Northern Ireland departments.”*

## Membership

The Committee has seven members, including a Chairperson and Deputy Chairperson, and a quorum of five members. The Committee agreed that where Members were unable to attend meetings they could nominate MLA colleagues (deputies) to do so in their place. The membership of the Committee is as follows:

- Ms Emma Sheerin MLA (Chairperson)
- Ms Paula Bradshaw MLA<sup>1</sup> (Deputy Chairperson)
- Mr Alan Chambers MLA<sup>2</sup>
- Mr Paul Frew MLA<sup>3</sup>
- Mr Mark Durkan MLA
- Ms Carál Ní Chuilín MLA<sup>4</sup>
- Mr Christopher Stalford MLA

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<sup>1</sup> Ms Kellie Armstrong MLA attended the Ad Hoc Committee in her capacity as Ms Paula Bradshaw's deputy on 8 October 2020

<sup>2</sup> Mr Mike Nesbitt MLA was a Member of the Committee between its inception and 28 May 2021 and served as its Deputy Chairperson during this period. Mr Doug Beattie MLA was a Member of the Committee between 29 May and 22 June 2021.

<sup>3</sup> Ms Michelle McIlveen MLA was a Member of the Committee between its inception and 4 June 2021. Mr Stephen Dunne MLA was a Member of the Committee between 5 June and 13 September 2021.

<sup>4</sup> Mr John O'Dowd MLA attended the Ad Hoc Committee in his capacity as Ms Carál Ní Chuilín's deputy between 18 June and 18 December 2020.

## List of Abbreviations and Acronyms used in this Report

CAJ:	Committee on the Administration of Justice
CEDAW:	Convention on the Elimination of all forms of Discrimination Against Women
CJEU:	Court of Justice of the European Union
COMEX:	Committee of Experts of the European Charter for Regional or Minority Languages
CRPD:	Convention on the Rights of Persons with Disabilities
ECHR:	European Convention on Human Rights
HRA:	Human Rights Act 1998
ICESCR:	International Covenant on Economic, Social and Cultural Rights
LGBTQ+:	Lesbian, Gay, Bisexual and Transgender
MME:	Migrant and Minority Ethnic
NICVA:	The Northern Ireland Council for Voluntary Action
NICCY:	Northern Ireland Commissioner for Children and Young People
NIHRC:	Northern Ireland Human Rights Commission
NIO:	Northern Ireland Office
RaISe:	The Assembly Research and Information Service
UNCRC:	Convention on the Rights of the Child

## **Acknowledgements**

The Committee wishes to record its sincere appreciation to all those who participated in its work through the provision of written and oral evidence, by responding to its call for evidence, by attending stakeholder events and through informal meetings.

Members had the privilege of hearing from a large number of experts across many fields and jurisdictions. It thanks all of the individuals and groups who gave so generously of their time, knowledge and expertise in providing oral and written evidence including senior judges, members of the legal profession, academics, negotiators to the Belfast Agreement/ Good Friday Agreement, trade unions, human rights and equality organisations, other non-governmental organisations, civic society and individuals.

The Committee would like to express its sincere thanks to the Justices of the UK Supreme Court and the Supreme Court of Ireland for sharing their knowledge and expertise with Members during informal meetings in April and May 2021. Members also wish to thank the Houses of the Oireachtas Committee on the Implementation of the Good Friday Agreement for a very engaging discussion held in April 2021.

Members of the Committee would like to thank Dr David Kenny of Trinity College Dublin for his invaluable support during a number of meetings, as well as Professor Merris Amos of Queen Mary University of London and Professor Christopher McCrudden of Queen's University Belfast and the University of Michigan for their beneficial insights. Many others, such as Professor Brice Dickson, Kevin Hanratty, Professor Colin Harvey, Daniel Holder and Dr Anne Smith, also provided support and advice.

The Committee is also very grateful to the Northern Ireland Human Rights Commission for providing training, advice and support throughout the Committee's work. In particular, it would like to thank the former Chief Commissioner Les Allamby, Dr David Russell, Rhyannon Blythe, Éilís Haughey and Claire Martin.

The Committee is extremely grateful to the schools and organisations who participated in the focus groups on a bill of rights. Members would like to thank the young people for their valuable contributions and the teachers and group leaders for supporting the focus groups; especially in light of the unprecedented level of

disruption during the academic year due to the COVID-19 pandemic. The following schools and organisations took part:

- Banbridge Academy;
- Coláiste Feirste;
- Drumragh Integrated College;
- Gaelscoil an tSeanchaí;
- Glenann Primary School;
- Groggan Primary School;
- Kilicomaine Junior High School;
- Killard House School;
- Lismore Comprehensive School;
- Magherafelt High School/ Rainey Endowed/ St Pius X College Year 13 Shared Education class;
- St Nicholas' Primary School, Carrickfergus;
- Sacred Heart Grammar School;
- Springboard Opportunities;
- Strandtown Primary School; and
- Blessed Trinity College.

The Committee is very grateful to the Northern Ireland Assembly's Engagement Service and Communications teams who arranged and carried out extensive engagement with a wide range of stakeholders within the challenging circumstances of the COVID-19 pandemic. Their combined efforts helped to provide a rich body of evidence.

Members would also like to express their gratitude to all of the organisations who helped to facilitate the stakeholder events. Particular thanks go to the Red Cross, Positive Futures, Mencap, Now Project, the Northern Ireland Housing Executive and Women's Aid who tailored the engagement for their specific audiences.

The Committee also wishes to acknowledge work undertaken in previous processes to develop a bill of rights in Northern Ireland.

# Executive Summary

## Background

1. The Ad Hoc Committee on a Bill of Rights was established in February 2020 following the *New Decade, New Approach* document. This provided for an ad hoc Assembly committee to consider the creation of a bill of rights that is faithful to the stated intention of the 1998 Belfast Agreement/ Good Friday Agreement in that:

*...it contains rights supplementary to those contained in the European Convention on Human Rights, (which are currently applicable) and “that reflect the particular circumstances of Northern Ireland”; as well as reflecting the principles of mutual respect for the identity and ethos of both communities and parity of esteem.*

## The Committee’s approach

2. The Committee had the privilege of hearing from a wide range of experts in human rights and constitutional law, as well as those with lived experience of the issues. Members received evidence from those with experience of bills of rights in other jurisdictions; academics specialising in inter-culturalism and anthropology; non-governmental organisations, trade unions, civic society and individuals.
3. It held an informal meeting with the President, Deputy President and Justices of the Supreme Court, and an informal meeting with the then Chief Justice and Judges of the Supreme Court of Ireland. It also had an informal discussion with TDs, Senators and MPs through the Houses of the Oireachtas Committee on the Implementation of the Good Friday Agreement.
4. The Committee held a call for evidence: a short public survey which received 2,346 responses; an opportunity to upload more detailed submissions; a series of stakeholder events with 216 participants; and a series of focus groups with children and young people in schools through the Assembly’s Education Service. The call for evidence was widely promoted through social and print media and via radio.

5. The Committee was keen to engage with all sections of society, including 'lesser-heard' groups. Working with the Assembly's Engagement and Communications teams, the Committee engaged extensively with representative organisations to support understanding of, and engagement with, the call for evidence. For example, it worked with Age NI to develop a separate approach for older people, issuing paper copies with pre-paid envelopes to their day centres for completion. The Red Cross held a series of workshops in English, Somali, Arabic and Tigrinya to facilitate the participation of refugees and asylum seekers. In addition, Women's Aid consulted with women affected by homelessness on the Committee's behalf.
6. The stakeholder events were organised primarily by Section 75 category, including events with children and young people; older people; religious and cultural groups; people with a disability; and carers.
7. The Committee also commissioned the Assembly's Research and Information Service to provide a number of research papers. It received training and support on human rights and constitutional law.

### **Panel of experts**

8. *New Decade, New Approach* said that the Committee would be assisted in its work by a panel of five experts appointed by the First Minister and deputy First Minister. The Committee wrote to The Executive Office on a number of occasions seeking updates on the panel and expressing concern that it had not been appointed. The panel had not been appointed at the conclusion of the Committee's work.

### **Views on existing rights protections**

9. The Committee heard evidence that the human rights of many individuals and groups in Northern Ireland are not sufficiently protected. Disability, age, religion or belief, cultural background and ethnic group were among the areas where stakeholders thought that additional human rights protections were needed.
10. A majority of respondents (61%) to the Committee's survey and most of the young people who participated in the focus groups disagreed that everyone in Northern Ireland is treated equally.

## Views on a bill of rights

11. The majority of stakeholders and witnesses supported a bill of rights for Northern Ireland. Of the respondents to the Committee's survey, 80% described a bill of rights as important or very important, with just 6% stating that it was not important at all. Stakeholders highlighted a range of potential advantages, including that it could:
- Enhance human rights protections;
  - Act as a transitional justice measure;
  - Act as a safeguard underpinning legislation and policy and facilitate political accountability;
  - Help support political stability and play an important role in the face of societal change; and
  - Act as an educative tool and support a rights-based culture.
12. However, a small number of witnesses and stakeholders expressed concern in respect of the creation of a bill of rights. Key issues cited in this regard included a view that existing legislation is adequate; concerns that it may displace decision-making from the legislature to the judiciary and politicise judges; a view that the courts may find certain rights difficult to interpret; and concerns that a bill of rights could lead to an increase in litigation and further entrench division.
13. On 3 June 2021 the Ad Hoc Committee agreed that it supported the creation of a bill of rights in principle, in light of the evidence it received and the references in *New Decade, New Approach*. This decision was made subject to prospective advice from the panel of experts, which was ultimately not made available as a result of the fact that the panel was not established. However, subsequently, the DUP in its position paper expressed disagreement with this decision.

## The 'particular circumstances' of Northern Ireland

14. The Committee heard a diverse range of views on what constitutes the '*particular circumstances*' of Northern Ireland, including differing interpretations from those

who were involved in the negotiations leading to the Belfast Agreement/ Good Friday Agreement.

15. Some witnesses called for a broader interpretation of this phrase, while others advocated a more restrictive approach closely reflecting post-conflict issues. Yet others said that the phrase '*particular circumstances*' is very subjective, relating to an ongoing dispute around competing historical narratives, and as such, it was unreasonable to expect the Committee to resolve this question.
16. There was a great deal of concern among stakeholders in relation to the potential implications of Brexit for human rights here. This related particularly to the limitations of the no diminution commitment and the dynamic alignment obligation of the Ireland/ Northern Ireland Protocol; as well as the reduced application of the EU Charter of Fundamental Rights.
17. The Committee was unable to make a decision on what constitutes the 'particular circumstances' of Northern Ireland or the impact of Brexit on the 'particular circumstances' due to the absence of a panel of experts and the content of the DUP party position paper.

### **Approach to a bill of rights**

18. Members of the Committee heard a range of suggestions from witnesses in respect of how a bill of rights could be taken forward. Many of these approaches overlap and are unlikely to be mutually exclusive.
19. Many witnesses and stakeholders called for the incorporation of international human rights standards into a bill of rights, as well as reflecting or building upon the 2008 advice of the NIHRC to the Secretary of State. Some advocated for a close focus on the mandate of the Belfast Agreement/ Good Friday Agreement, while others discussed enhanced roles for the legislature, executive and judiciary in relation to protecting human rights. A range of options in relation to enforcing economic and social rights was also highlighted, spanning the spectrum between declaratory principles and full enforceability.
20. The Committee heard that a bill of rights can act as a framework, underpinned or followed by primary legislation. Other witnesses proposed seeking to achieve what

would be possible politically, and leaving the rest to come later; while some suggested that primary legislation could effectively address rights issues on an ad hoc basis without the need for a bill of rights.

21. Approaches in other jurisdictions were also highlighted, including advances in human rights legislation in other devolved jurisdictions, such as the incorporation of certain international human rights standards into domestic law in Wales and Scotland.
22. The Committee was unable to make a decision on what approach a bill of rights should take due to the absence of a panel of experts and the content of the DUP party position paper.

### **What should be included in a bill of rights?**

23. Members received evidence on the multifaceted role of many bills of rights internationally, which often combine law, symbolism and aspiration. In addition to detailing rights, they can express values and guiding principles for society now and in the future. These values and principles are often held within a preamble, or an introduction, to the list of rights.
24. Albie Sachs, former Justice of the Constitutional Court of South Africa, and Baroness Helena Kennedy QC spoke of the role of a preamble in establishing a value system, a vision and a tonality for the bill of rights using language that resonates.
25. There was strong support among respondents to the Committee's survey and among the children and young people who took part in the focus groups for a bill of rights to set out an aspirational vision based on guiding or foundational values. The values that received the most support included human dignity; mutual respect; justice; respect for culture, identity, traditions and aspirations; and equality.
26. A strong theme that emerged from the call for evidence was a desire to move away from 'traditional orange and green' identities, noting the increasing diversity of society here and the significant demographic changes that have taken place since 1998. For this reason, some were cautious about the use of the term 'parity of esteem' within a bill of rights, as it appeared to relate to only two 'monolithic'

communities; and instead called for an inclusive bill of rights representing all sections of society.

27. On 27 May 2021 the Committee agreed that the bill of rights should include a preamble with an interpretive effect, so that the preamble and its values would guide the interpretation of the bill of rights over time. This decision was made subject to prospective advice from the panel of experts, which was ultimately not made available as a result of the fact that the panel was not established. However, subsequently, the DUP in its position paper expressed disagreement with this decision.

### **Civil and political rights**

28. There was strong support among the survey respondents (88%) for civil and political rights to be included within a bill of rights. Civil and political rights protect freedoms such as the right to life, right to liberty, freedom of expression and freedom of belief.

29. Many stakeholders called for existing protections within the European Convention on Human Rights (a largely civil and political rights instrument) to be included within a bill of rights. The Committee heard that this could be achieved by replicating Schedule 1 to the Human Rights Act 1998 within a bill of rights. Rights that would be supplementary to the Convention that stakeholders requested included strengthened freedom of movement, equality; and anti-discrimination provisions.

### **Economic, social and cultural rights**

30. Economic, social and cultural rights focus on promoting and protecting people's development and livelihood. They relate to the workplace, social security, family life, participation in cultural life, and access to housing, food, water, healthcare and education. Of survey respondents, 82% agreed that a bill of rights should include these rights. Healthcare rights were among the most commonly called for, along with housing and education rights.

31. Concerns expressed in relation to a bill of rights often related to social and economic rights; for example, challenges in implementing such rights within a difficult socio-economic climate and issues around the enforcement of such rights.

32. The Committee heard evidence about a range of measures that can be taken to mitigate such concerns. The concept of progressive realisation in international human rights law recognises that the realisation of economic, social and cultural rights is often hindered by a lack of resources, and can only be achieved over a period of time. As such, the state's compliance with obligations in implementing such rights would be assessed in light of the resources available to it.

### **Rights for particular groups**

33. Many organisations, particularly those from civil society, advocated the inclusion of rights for particular groups. However, the Committee heard that naming specific groups may appear to exclude those not stated, and that categories could become less relevant over time; with new categories emerging.
34. Indeed, many stakeholders indicated that the more prescriptive a bill of rights is, the less able it will be to stand the test of time. Bills of rights tend to have constitutional status and are not easily amended, and therefore international examples often include provisions in quite general terms, such as the right to healthcare.
35. Nonetheless, there was strong support for children's rights to be included, particularly the provisions of the UN Convention on the Rights of the Child. The 2008 advice of the NIHRC involved a general set of proposals, setting out specific rights only for children. The rationale was that children's rights are distinct and have a degree of horizontal application; as responsibility for protecting children's rights rests with parents or guardians, as well as with the state.

### **Environmental rights**

36. There was substantial support for environmental rights within a bill of rights: rights that focus on ensuring access to a clean, healthy and safe environment. In the survey 86% of respondents supported their inclusion, and there was particularly vocal support for environmental rights from the children and young people who contributed to the Committee's evidence.

37. The Committee was unable to agree which rights should be included within a bill of rights due to the absence of a panel of experts and the content of the DUP party position paper.

### **Justiciability and enforcement of rights**

38. Many stakeholders emphasised that a bill of rights must include justiciable rights, cautioning against a bill of rights that would be aspirational only. The role of the courts in providing an accountability mechanism for holding other branches of the state to account was also highlighted.
39. The Committee heard a number of concerns in relation to the adjudication of rights, particularly economic and social rights. These concerns included potential implications for the separation of powers and the impact on the justice system. Some cautioned against including symbolic or aspirational laws.
40. In relation to economic, social and cultural rights, the then Lord Chief Justice, the Rt Hon Sir Declan Morgan, described the principle of non-justiciability, noting that matters of budgetary allocation are not for the courts, as they are political, rather than judicial, matters. He said that it is the underpinning of rights such as the right to health that would become justiciable.
41. A common thread running through the evidence of Sir Declan Morgan, Sir John Gillen, Sir Stephen Irwin and the Bar Council of Northern Ireland was that any bill of rights must have sufficient granularity (or specificity) to ensure that the rights are, in fact, justiciable.
42. Members heard about varying approaches to enforcing a bill of rights, which were not mutually exclusive. These included political enforcement; judicial enforcement and enforcement by specialised bodies, such as parliamentary committees. Witnesses also highlighted a broad range of options in relation to enforcement mechanisms.
43. The Committee was unable to make a decision on the justiciability and enforcement of rights due to the absence of a panel of experts and the content of the DUP party position paper.

## Source of a bill of rights and entrenchment

44. While a number of witnesses highlighted the scope for a bill of rights to be enacted within the devolved competence of the Northern Ireland Assembly, many stakeholders held the view that it should be taken forward at Westminster, in line with the provisions of the Belfast Agreement/ Good Friday Agreement.
45. Dominic Grieve QC said that the Assembly's devolved powers would provide for a bill of rights that did not touch upon reserved matters, and cautioned that Parliament is sovereign and therefore has the power to overturn any statute, regardless of whatever lock mechanism is employed. Other witnesses noted that it is considered best practice for devolved legislatures to embrace responsibility for protecting human rights.
46. Mark Durkan, former deputy First Minister and a negotiator for the SDLP during the multiparty talks leading to the Belfast Agreement/ Good Friday Agreement, said that there was a clear commitment in 1998 from Mo Mowlam and Tony Blair that Westminster would legislate for a bill of rights, so that '*absolute all-party agreement*' would not be required, and so that it would have constitutional status. Other stakeholders highlighted the greater legislative competence of Westminster and said that such a bill of rights would have priority over other Acts of the Assembly.
47. There was consensus on 23 September 2021 among the Committee that a bill of rights should be enacted at Westminster, in line with the provisions of the Belfast Agreement/ Good Friday Agreement. This decision was made subject to prospective advice from the panel of experts, which was ultimately not made available as a result of the fact that the panel was not established. However, subsequently, the DUP in its position paper expressed disagreement with this decision.

# Introduction: History of a bill of rights and the Ad Hoc Committee

## Early calls for a bill of rights

48. In March 1964 Sheelagh Murnaghan, a Liberal Party MP, gave notice that she intended to introduce a Human Rights Bill to the Parliament of Northern Ireland. The government rejected the Bill in May 1964, as well as similar bills in 1966, 1967 and 1968. Two private members' bills relating to Northern Ireland introduced simultaneously in the House of Commons and House of Lords also fell.<sup>5</sup>

## Standing Advisory Commission on Human Rights

49. The Northern Ireland Constitution Act 1973<sup>6</sup> provided for a Standing Advisory Commission on Human Rights (later repealed by the Northern Ireland Act 1998). It had responsibility for:<sup>7</sup>

- Advising the Secretary of State for Northern Ireland on the adequacy and effectiveness of the current law in preventing discrimination on the grounds of religious belief or political opinion and in providing redress for persons aggrieved by discrimination on either ground; and
- Keeping the Secretary of State informed on the extent to which public authorities prevented discrimination on either ground by persons or bodies not prohibited from discriminating by that law.

50. Although not strictly within its remit, the Standing Advisory Commission on Human Rights considered whether a bill of rights should be introduced. Its report, *The Protection of Human Rights by Law* in Northern Ireland, recommended that Northern Ireland should have a bill of rights based on the ECHR, primarily

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<sup>5</sup> Dickson, B. (2010) *The European Convention on Human Rights and the Conflict in Northern Ireland* Oxford: Oxford University Press

<sup>6</sup> Section 20

<sup>7</sup> Dickson, B. (2010) *The European Convention on Human Rights and the Conflict in Northern Ireland* Oxford: Oxford University Press

protecting civil and political rights, rather than economic and social rights (except the rights to property and education).<sup>8</sup>

51. The Commission's work did not progress and the focus moved on to the need for specific anti-discrimination legislation. A number of reforms were made to address particular injustices and at this time demands for an overarching bill of rights decreased.<sup>9</sup>

## Anglo-Irish Agreement

52. In 1985 the Anglo-Irish Agreement referred to measures to protect human rights, including considering "*the advantages and disadvantages of a Bill of Rights in some form in Northern Ireland.*"<sup>10</sup>

## Committee on the Administration of Justice

53. In 1984 the Committee on the Administration of Justice (CAJ) began considering a bill of rights, and started to actively campaign in this regard in 1986. In October 1990 it published *Making Rights Count*, which included a draft bill for discussion. The CAJ modelled the bill on existing human rights documents, particularly the ECHR and the United Nations' Declaration and Covenants.<sup>11</sup>

## The Framework Document

54. The Framework Document of 1995, jointly published by the British and Irish governments, aimed to assist discussion and negotiation between the parties. The Document did not refer directly to a bill of rights, rather noting:<sup>12</sup>

*There is a large body of support, transcending the political divide, for the comprehensive protection and guarantee of fundamental human rights.*

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<sup>8</sup> Dickson, B. (2010) *The European Convention on Human Rights and the Conflict in Northern Ireland* Oxford: Oxford University Press

<sup>9</sup> Dickson, B. (2010) *The European Convention on Human Rights and the Conflict in Northern Ireland* Oxford: Oxford University Press

<sup>10</sup> Anglo-Irish Agreement 1985 between the Government of Ireland and the Government of the United Kingdom

<sup>11</sup> Committee on the Administration of Justice (1990) *Making Rights Count* Belfast: Committee on the Administration of Justice

<sup>12</sup> *The Framework Documents 22 February 1995. A New Framework for Agreement. A shared understanding between the British and Irish Governments to assist discussion and negotiation involving the Northern Ireland Parties*

*Acknowledging this, both Governments envisage that the arrangements set out in this Framework Document will be complemented and underpinned by an explicit undertaking in the Agreement on the part of each Government, equally, to ensure in its jurisdiction in the island of Ireland, in accordance with its constitutional arrangements, the systematic and effective protection of common specified civil, political, social and cultural rights.*

*They will discuss and seek agreement with the relevant political parties in Northern Ireland as to what rights should be so specified and how they might best be further protected, having regard to each Government's overall responsibilities including its international obligations. Each Government will introduce appropriate legislation in its jurisdiction to give effect to any such measure of agreement.*

## **The Belfast Agreement/ Good Friday Agreement**

55. The Belfast Agreement/ Good Friday Agreement and the Northern Ireland Act 1998 provided for a new Northern Ireland Human Rights Commission, and noted that it would be invited to consult and advise on a bill of rights for Northern Ireland. Specifically, it would consider:<sup>13</sup>

*...the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience.*

*These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and - taken together with the ECHR - to constitute a Bill of Rights for Northern Ireland. Among the issues for consideration by the Commission will be:*

- *the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and*

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<sup>13</sup> The Belfast Agreement/ Good Friday Agreement 1998

- *a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.*

## **Human Rights Act 1998**

56. Around this time the Human Rights Act 1998 incorporated into domestic law rights within the ECHR. This allows anyone in the UK to rely on rights contained in the Convention before the domestic courts.

## **Northern Ireland Human Rights Commission**

57. The NIHRC published a first draft of its advice in 2001. Many academics and campaigners did not accept the proposals. The Commission published a second draft in 2004, considering comments made about its first draft. The British and Irish governments and the unionist parties of Northern Ireland did not approve it.<sup>14</sup>

58. In a 2004 letter the British Government said that the NIHRC had gone beyond its remit, suggesting that the social and economic rights included did not carry greater relevance in Northern Ireland compared to other disadvantaged areas in Britain. In 2005 a largely new NIHRC was formed and inherited a third draft of the bill.<sup>15</sup>

## **The Joint Declaration, St Andrews Agreement and the Bill of Rights Forum**

59. The Joint Declaration<sup>16</sup> in 2003 noted that the British Government was committed to bringing forward legislation at Westminster:

*...to give effect to rights supplementary to the ECHR to reflect the particular circumstances of Northern Ireland. Without pre-empting the processes under way, including in relation to the Bill of Rights and the Single Equality Bill, it is envisaged that many of the above rights will be given legislative effect through these mechanisms, and through legislation to tackle racism and sectarianism.*

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<sup>14</sup> Dickson, B. (2010) *The European Convention on Human Rights and the Conflict in Northern Ireland* Oxford: Oxford University Press

<sup>15</sup> Dickson, B. (2010) *The European Convention on Human Rights and the Conflict in Northern Ireland* Oxford: Oxford University Press

<sup>16</sup> Joint Declaration by the British and Irish Governments, 2003

60. The Declaration committed the British Government to work with the parties to facilitate a response to proposals for a round-table forum on a bill of rights, incorporating political parties and civic society. The St Andrews Agreement of 2006 provided for a forum on a bill of rights to meet initially in December 2006.<sup>17</sup> The Bill of Rights Forum reported to the NIHRC in March 2008.<sup>18</sup>

### **Northern Ireland Human Rights Commission Advice**

61. After an extensive process<sup>19</sup>, in 2008 the NIHRC provided the Secretary of State with its own advice, considering the Forum's report. In line with the previous drafts, the advice took the European Convention rights as a starting point and built upon them.<sup>20</sup>

62. For example, it recommended supplementary rights in a number of areas, such as in relation to democratic, education, language, property, housing, environmental, social security and children's rights, as well as rights relating to liberty and security, equality, identity and victims, among others.

### **Northern Ireland Office response**

63. In November 2009 the Northern Ireland Office published a consultation on next steps for a bill of rights, stating that the advice of the NIHRC '*informed much of the consideration*' in the paper.

64. The government stated that it believed that a bill of rights supported by the people could play an important role in '*underpinning the peace, prosperity and political progress of Northern Ireland*,' and noted that it recognised a case for putting into place additional protections reflecting its particular circumstances. The paper refers to additional protections in areas including:

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<sup>17</sup> The St Andrews Agreement, October 2006

<sup>18</sup> Bill of Rights Forum (2008) *Bill of Rights Forum Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland*

<sup>19</sup> The Northern Ireland Human Rights Commission advised the Ad Hoc Committee on 19 March 2020 that the process included 650 formal submissions; 11 pamphlets on specific areas distributed across NI; 400 community facilitators who engaged at a community level between 2000 and 2008; and in 2000 the Human Rights Consortium was created. Between 2006 and 2008 the bill of rights working group was established, holding 54 internal meetings.

<sup>20</sup> Northern Ireland Human Rights Commission (2008) *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* Belfast: Northern Ireland Human Rights Commission

- equality, representation and participation in public life;
- identity, culture and language;
- sectarianism and segregation;
- victims and legacy of the conflict; and
- criminal justice.

65. The NIHRC in turn criticised the NIO paper, saying that it showed a lack of understanding of the purpose and functions of a bill of rights, and concluded that it was not possible for it to accept it '*as a genuine effort to increase human rights protections in Northern Ireland*'.<sup>21</sup>

### **Haass-O'Sullivan talks**

66. The final report of the Haass-O'Sullivan talks in 2013 recommended the establishment of a Commission on Identity, Culture and Tradition to hold structured discussion in public throughout Northern Ireland on a variety of matters. The Commission would report to the then Office of the First Minister and deputy First Minister on issues including flags, languages, symbols and emblems, and a bill of rights.

### **Ad Hoc Committee on a Bill of Rights**

67. The bill of rights process stalled until the 2020 *New Decade, New Approach* document. This provided for an ad hoc Assembly committee to consider the creation of a bill of rights that is faithful to the stated intention of the 1998 Agreement in that:

*...it contains rights supplementary to those contained in the European Convention on Human Rights, which are currently applicable and "that reflect the particular circumstances of Northern Ireland"; as well as reflecting the principles of mutual respect for the identity and ethos of both communities and parity of esteem.*

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<sup>21</sup> Northern Ireland Human Rights Commission (2010) *A Bill of Rights for Northern Ireland: Next Steps, Response to the Northern Ireland Office* Belfast: Northern Ireland Human Rights Commission

68. *New Decade, New Approach* also provided for the committee to be assisted in its work by a panel of five experts appointed jointly by the First Minister and deputy First Minister.

*The Panel should initially seek to advise the Ad-Hoc Committee on what constitutes our “particular circumstances” drawing upon, but not bound by, previous work on a Bill of Rights and should review and make recommendations on how the UK’s withdrawal from the EU may impact on our “particular circumstances”.*

69. *New Decade, New Approach* said that the committee’s terms of reference and timetable would be agreed within 30 working days of the restoration of devolution. It also stated:

*The establishment of cross party and cross community support will be critical to advancing a Bill of Rights.*

70. On 24 February 2020 the Assembly established the Ad Hoc Committee on a Bill of Rights, with the following terms of reference:

*That, as provided for in Standing Order 53(1), this Assembly appoints an Ad Hoc Committee to consider the creation of a Bill of Rights as set out in paragraph 28 of Part 2 of the New Decade, New Approach document; and to submit a report to the Assembly by 28 February 2022.*

## **The Committee's Approach**

### **Formal evidence**

71. The Committee received oral and written evidence from a range of witnesses, including those with experience of and expertise in bills of rights in other jurisdictions; academics specialising in fields including constitutional law, human rights law, anthropology and inter-culturalism; a number of senior judges, barristers and solicitors; negotiators to the Belfast Agreement/ Good Friday Agreement; current and former Chief Commissioners, Commissioners and staff of the NIHR; trade unions; non-governmental organisations and other key stakeholders including those from the voluntary and community sector, language groups and the churches.
72. When inviting organisations to give evidence the Committee noted that it values diversity and seeks to ensure this where possible. It stated that the Committee aims to have diverse panels of witnesses and asked organisations to bear this in mind when choosing representatives. The Committee also monitored the diversity of witnesses through a short survey provided to all witnesses who gave evidence asking them for information pertaining to Section 75.

### **Informal meetings**

73. The Committee held informal meetings with the UK Supreme Court and the Supreme Court of Ireland during April and May 2021. Members met with:

#### **The UK Supreme Court**

- The President of the Supreme Court: The Rt Hon Lord Reed of Allermuir;
- The Deputy President of the Supreme Court: The Rt Hon Lord Hodge;
- Justice of the Supreme Court: The Rt Hon Lord Lloyd-Jones;
- Justice of the Supreme Court: The Rt Hon Lord Stephens of Creevloughgare; and
- Vicky Fox, Chief Executive Officer, Supreme Court of the United Kingdom and Judicial Committee of the Privy Council.

### **The Supreme Court of Ireland**

- The Chief Justice of the Supreme Court of Ireland: The Hon Mr. Justice Frank Clarke;
- Judge of the Supreme Court: The Hon Ms. Justice Iseult O'Malley; and
- Judge of the Supreme Court: The Hon Mr. Justice Donal O'Donnell.

74. Members also met with the Houses of the Oireachtas Committee on the Implementation of the Good Friday Agreement in April 2021. The session was attended by TDs, Senators and MPs, as well as Members of the Ad Hoc Committee (see pages 116-117 for the list of attendees).

### **Research papers**

75. The Committee commissioned the Assembly's Research and Information Service to provide a number of research papers, namely:

- Key issues for a bill of rights;
- Definitions of the 'particular circumstances' of Northern Ireland;
- Results of the Committee's survey;
- CEDAW and the Istanbul Convention: A comparative view on transposition and implementation in domestic law and practice; and
- Gender budgeting in government: a comparative perspective on legal bases.

### **Call for evidence**

76. The Committee held an open call for evidence comprising a short public survey and an opportunity to upload more detailed submissions. The Committee asked the Assembly's Engagement and Outreach and Communications services to publicise and promote the consultation as widely as possible across all sections of society.

77. To do this, Committee staff, along with Engagement, held a pre-consultation workshop inviting representative organisations across Section 75 categories to raise awareness of the forthcoming consultation; inform the Committee's approach to the consultation; and to gain insight into how to overcome the challenges of

engaging with people during the pandemic and engage with those who may be deemed 'hard to reach' or 'seldom heard'.

78. The Committee conducted the first-ever virtual launch of an Assembly Committee inquiry to promote the consultation and support participation in it. Over 2,370 representative organisations across all Section 75 categories and from all geographic areas of NI were invited to take part.
79. During the consultation period the Engagement team contacted almost 4,000 organisations to promote the survey and to encourage them to send the questionnaire to their members and service users. This comprised non-governmental organisations, community organisations and groups, sporting organisations, food banks and language and faith groups, among others.
80. Engagement also promoted the consultation across all of its activities, for example, during an event and through a social media campaign held for the International Day of Persons with Disabilities.
81. The Engagement team developed a separate approach in conjunction with Age NI to support older people's participation, including briefing their consultative forum and issuing hard copies with pre-paid envelopes to their day centres for service users to complete.
82. The Red Cross held a series of workshops in English, Somali, Arabic and Tigrinya to facilitate the participation of individuals with a variety of immigration status: asylum seekers, refugees, reunited family spouse and destitute (appeal rights exhausted). Individuals from 11 countries took part.
83. Assembly Communications promoted the survey across a range of social media channels and produced supporting materials and a range of content to aid understanding and increase participation. Platform pieces by the Committee Chairperson and Deputy Chairperson appeared in the Irish News and Newsletter respectively, and further articles promoting the survey appeared in the Newsletter, the Belfast Telegraph and other local newspapers. The consultation was also highlighted on BBC Good Morning Ulster and on the BBC News Website.

84. The questionnaire was available online, through paper copy and over the telephone and was also available in Irish. Other alternative formats were available upon request. The Committee is grateful to the NIHRC who assisted with development of the questions and to Disability Action who reviewed the questionnaire to ensure accessibility. A total of 2,346 responses were received from a wide range of groups and individuals.
85. A number of third-sector organisations, such as NICVA and the Human Rights Consortium, held their own events to encourage their members to participate in the call for evidence.

### **Engagement with children and young people**

86. The Committee is grateful to the staff of the Northern Ireland Commissioner for Children and Young People who provided advice and guidance on engaging with children and young people during the challenging circumstances of the pandemic.
87. As a result of this advice, the Committee commissioned the Assembly's Education Service to carry out a series of focus groups with a representative sample of primary schools, post-primary schools, special schools, Irish-medium schools and Education Other than at School Providers, to gather the first-hand views of children and young people.
88. Due to public health restrictions (the COVID-19 pandemic), the Education Service arranged the focus groups virtually with a range of schools, to ensure an appropriate balance of school management types (as far as possible). A total of 15 focus groups were held with primary and post-primary pupils, as well as with young people through an organisation which offers services to young people aged 16-24 within the Greater Belfast area.
89. The Committee also heard oral evidence from delegations of children and young people of the Northern Ireland Youth Forum and the NICCY Youth Panel and held a stakeholder event with young people (see below).

## **Stakeholder events**

90. The Committee was keen to engage with people from all sections of society in Northern Ireland, including civic society and individual citizens, through its stakeholder events. In conjunction with Assembly Engagement and with civil society organisations, the Committee held ten events which mainly focused on Section 75 categories. For those who did not identify with one of these section 75 groups, a general public event was held and a stakeholder event was also held in partnership with the Human Rights Consortium.
91. Assembly Engagement worked in partnership with a number of organisations who ran separate activities to obtain the views of Travellers and Refugees and Asylum Seekers. This was in response to advice from the organisations in the community and voluntary sector who suggested that this would be the most effective way of engaging with them.
92. In total 216 people took part during the project and over 65 organisations participated and helped to facilitate the groups. The Red Cross, Positive Futures, Mencap, Now Project and Women's Aid tailored the stakeholder events for their specific audiences.
93. Organisations representing Travellers advised that the best approach was to speak to individuals from the community through their existing contacts. Therefore, the Northern Ireland Housing Executive approached people from the Traveller Community on the four main sites the Housing Executive manages and condensed the replies into feedback for the Committee.
94. During each of the events the Chairperson, Deputy Chairperson and Members welcomed participants and the Committee Clerk provided background and introductory information. Participants then held discussions in both plenary and breakout group format, considering a number of questions on a bill of rights. Committee staff recorded all of the discussions and provided the notes to Committee Members. A number of Members listened to the feedback and answered questions. The stakeholder events were:

1. Older people;
2. Religious and cultural groups;
3. LGBTQ+;
4. People with a physical disability and carers;
5. People with a learning disability;
6. Women;
7. Black, Asian and Minority Ethnic Communities;
8. Children and Young People;
9. General public; and
10. An event held in partnership with the Human Rights Consortium.

## **Training**

95. The Committee received two training sessions on human rights frameworks, key concepts and terminology from the NIHRC. In addition, Dr David Kenny, Assistant Professor of Law at Trinity College Dublin, provided support to Members on human rights law, policy and practice at a number of strategy afternoons.

## **Panel of experts**

96. The Ad Hoc Committee wrote to the Executive Office on several occasions seeking an update on the panel of experts to be appointed jointly by the First Minister and deputy First Minister as envisaged in *New Decade, New Approach*. The Executive Office advised on these occasions that the matter was under consideration, and, in response to concerns raised by the Committee, that the Party Leaders had agreed that the panel should consist of three experts. The panel had not been appointed at the conclusion of the Committee's work.

## Consideration of the Evidence

### The case for a bill of rights

97. The Committee heard a range of views on the creation of a bill of rights, with the majority of stakeholders who gave evidence or took part in the Committee's consultation outlining support for a bill of rights for Northern Ireland.
98. Les Allamby, the then Chief Commissioner of the NIHRC, informed the Committee that the vast majority of countries around the world have a constitution or a bill of rights. He noted that the role of bills of rights is to set out fundamental rights and values, and usually outline a process for addressing any violations of rights.
99. Findings from the Committee's survey suggest high levels of support for a bill of rights among respondents, with 80% describing it as important or very important and just 6% stating that it was not important at all. This is broadly in line with the findings of an Ipsos Mori poll commissioned by the Human Rights Consortium in 2011, when 83% of respondents considered it to be 'important'.<sup>22</sup>
100. In the Committee's survey there were differences across groups of respondents in terms of the proportion who believe it is important, including:
- More **women** (88% compared to 77% of men) thought that it was important;
  - A greater proportion of **younger people** (87% of those under 35 compared to 79% of their counterparts aged 55+) agreed it was important;
  - By **national identity** (90% of respondents identifying as Irish only thought it was important compared to 73% of those who identified as British only); and
  - By **political opinion** (90% of Nationalists compared to 83% of those selecting 'other' and 73% of Unionists noted that was important).

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<sup>22</sup> Via Rights NI.org

101. Most of the children and young people who took part in the focus groups thought that a bill of rights for Northern Ireland was important. The majority of witnesses and stakeholders highlighted potential advantages of a bill of rights, explored in further detail in subsequent paragraphs, including that it could:

- **Enhance human rights protections;**
- **Act as a transitional justice measure** and support peace and reconciliation;
- **Act as a safeguard** underpinning legislation and policy;
- **Help support political stability** by removing certain matters from political decision;
- **Facilitate political accountability** and good governance and strengthen democracy;
- **Play an important role** in the face of wider change; and
- **Act as an educative tool** and support a rights-based culture.

### **Enhance human rights protections**

102. A large proportion of stakeholders, survey respondents and witnesses thought that a bill of rights would strengthen human rights protections and help protect everyone in society, including the most vulnerable. Many commented that while a bill of rights would not be a panacea for all ills, it could create a solid legal framework to which all public policy, legislation and practice must adhere.

### **Can act as a transitional justice measure and support peace and reconciliation**

103. A number of witnesses and stakeholders, including Professor Monica McWilliams, said that a bill of rights was intended as a transitional justice measure following the conflict. The Northern Ireland Commissioner for Children and Young People, Koulla Yiasouma, also said that a bill of rights is *‘an important mechanism to support Northern Ireland’s transition from conflict’*.

104. The potential role a bill of rights might play in reconciliation and accommodation was also highlighted by Mr Justice Richard Humphreys. He said that bills of rights are, by definition, anti-majoritarian and therefore protect minorities, which would provide benefits for everyone *'given that every side is a minority'*. He said that a bill of rights could benefit those who identify as British, as well as those who identify as Irish.
105. Baroness Helena Kennedy QC also noted the implications of the conflict from her perspective as a barrister involved in a number of related trials. In light of her experience, she thought that a bill of rights was 'vital' in protecting all communities and citizens in Northern Ireland.
106. In her submission Dr Amanda Cahill-Ripley from the University of Liverpool said that protecting and promoting human rights plays an important role in realising sustainable peace. She highlighted UN Security Council Resolution 2282, which states that *'development, peace and security, and human rights are interlinked and mutually reinforcing'*.

### **Can act as a safeguard underpinning legislation and policy**

107. A number of witnesses highlighted the potential role a bill of rights could play in underpinning legislation and policy and ensuring that it is compliant with human rights. For example, the Children's Law Centre said:

*The children's rights protections in the NI Bill of Rights will assist and help inform decisions MLAs take about children's lives and provide them with a touchstone to enable them to make the best possible policy and legislative decisions on behalf of their child constituents and their families.*

108. Professor Monica McWilliams and Mark Durkan, former deputy First Minister, discussed a standing of committee of the Assembly that the Belfast Agreement/ Good Friday Agreement intended to examine whether legislative and policy proposals conformed with human rights and equality requirements.
109. Mark Durkan said that NIO ministers failed to reflect these provisions in the legislation through *'oversight and error in legislative haste'*. Professor McWilliams urged that consideration should be given to establishing such a standing committee

within the Assembly, in line with provisions at the Scottish Parliament and Westminster.

## **Facilitates political accountability and good governance and strengthens democracy**

110. Many witnesses and stakeholders thought that a bill of rights could help hold the Executive to account and facilitate good governance. This, in turn, could help to strengthen democracy. This was illustrated by Dr Katie Boyle of the University of Stirling who said:

*It is a means through which to create an accountability framework against which decisions of the executive and legislature can be subject to scrutiny and it allows the people of Northern Ireland to hold decision makers to account according to international and domestically-developed standards.*

## **Can help support political stability**

111. A number of witnesses suggested that a bill of rights could contribute to political stability by removing certain decisions from the political sphere.
112. In his evidence to the Committee, Professor Colm O’Cinneide from University College London said that having a floor of rights with a degree of political protection could free up space for more political choice: a possibility that Mr Justice Richard Humphreys also pointed to. Niall Murphy thought that it could make the role of legislators ‘*less contentious*’.
113. Mark Durkan, former deputy First Minister, said that pointing citizens to their rights and the mechanisms to challenge decisions in court and assert those rights would mean that parties in the Assembly would have less need to rely on ‘*the more negative safeguard practices in the Assembly*’
114. A submission by Professor Rory O’Connell (Ulster University), Professor Fionnuala Ní Aoláin (Queen’s University Belfast and University of Minnesota) and Dr Lina Malagón (Ulster University) suggested that a bill of rights could support political stability by providing guidelines for the exercise of power.

115. The Equality Coalition said that a bill of rights would mean that everyone (in the Executive) would have to operate to the same standard, *‘without having to argue whether it should be a standard in the first place’*.

### **Could play an important role in the face of wider change**

116. Many witnesses and stakeholders suggested that a bill of rights could offer protection and security for people in Northern Ireland in the face of current and potential societal change. For example, Mark Durkan thought that a bespoke bill of rights in the terms of 1998 could offer *‘some confidence to all at a time when so many are vexed with uncertainty and doubtful of the priority accorded to their rights, needs and interests both now and in the future’*.
117. In relation to constitutional questions, the CAJ argued that a rights-based dispensation is essential *‘regardless of who has jurisdiction’*, and suggested that a bill of rights could protect the rights of all and act as a force for stability.
118. Baroness Kennedy also noted the potential for a bill of rights to provide protections amid wider changes and noted that a key matter was to consider how to deal with the anxieties of people around the implications of enacting a bill of rights:

*I feel very strongly that this too is a protection for the Protestant community in Northern Ireland and for those who feel very strongly that they are British, particularly as we are leaving the European Union. I would have thought that this is a moment when it is really important for all sections of the community to feel that their rights are protected and that they have avenues, as individuals and as communities, for challenging things that might take place.*

### **Covid-19 pandemic**

119. A large proportion of witnesses and stakeholders discussed the impact of the Covid-19 pandemic in relation to human rights. For example, participants at the Human Rights Consortium stakeholder event thought that the pandemic, together with Brexit, had highlighted gaps in equality that a bill of rights could address. The Transitional Justice Institute at Ulster University said:

*The pandemic has highlighted and exacerbated existing inequalities in society. While everyone has been affected by the pandemic, not everyone has been affected equally. The pandemic has disproportionately affected racial and ethnic minorities, women, children, elder persons, people with caring responsibilities, persons with disabilities and health conditions, the economically less-well off, LGBTQ+ persons, and no doubt other groups.*

*A strong commitment to equality and non-discrimination must be central to any effort to rebuild after the pandemic.*

120. The Northern Ireland Commissioner for Children and Young People suggested that the current public health crisis has highlighted the need for robust rights mechanisms. She identified a number of initial concerns, particularly:

- **The decrease in child protection referrals** at times when domestic violence calls to the PSNI increased by as much as 50%;
- Concerns of families of **children with a disability**; and
- The impact on a **child's right to education**.

### **Can act as an educative tool and support a rights-based culture**

121. A further advantage of a bill of rights outlined by a number of witnesses, including the NIHRC, Sir John Gillen and the NI Youth Forum, is that it can act as an educative tool to help people understand their rights and responsibilities. Professor Monica McWilliams said:

*...it is an educational issue. It is not just about running to the courts or the notion that it is there to hold Governments accountable. A culture of rights, particularly in a country coming out of conflict, is really important.*

122. The NI Youth Forum asked whether a bill of rights could be included in the school curriculum, emphasising that it was crucial to educate young people on their rights. Indeed, a large number of stakeholders commented that everyone should be supported to understand a bill of rights. For example, participants in the stakeholder event for people with a learning disability suggested including pictures and ensuring that it was available in other formats, such as braille.

## The case against a bill of rights

123. While the majority of participants in the Committee's call for evidence and stakeholder events supported a bill of rights, a number of witnesses and participants questioned whether a bill of rights was necessary and expressed concerns around potential disadvantages, including concerns that:

- Existing legislation is adequate;
- It may displace decision-making from the legislature to the judiciary;
- It may politicise the judiciary;
- Rights may be difficult to interpret by courts;
- A bill of rights could substantially increase litigation; and
- A bill of rights could further entrench division.

### View that existing legislation is adequate

124. A number of stakeholders and witnesses, particularly some of those who attended the Committee's stakeholder event for religious and cultural groups, thought that existing legislation provides adequate human rights protections.

"We suggested that we didn't really need a bill of rights, but we are not wedded to that idea; but we felt that on balance there was sufficient provision in law and in procedures to cover most of the human rights issues". (Religious and cultural stakeholder event participant)

"A Bill of Rights is not required. Rights are enforceable in courts".  
(Survey respondent)

125. Sir Stephen Irwin, former Lord Justice of Appeal of England and Wales, thought that there is little to be gained from a bill of rights while the ECHR applies. Rather, he thought that a desire to improve social conditions and hold government to account should be fulfilled through the political system.

126. By way of example, he noted existing statutes relating to the NHS, a minimum wage and fair distribution of housing and education as laws that have legitimacy through the *'political will of the electorate through the franchise to the legislature'*.

### **Concerns that it may displace decision-making from the legislature to the judiciary**

127. A number of stakeholders were concerned that a bill of rights would move decision-making from the legislature to the judiciary. This is illustrated by Lady Trimble, who said:

*...any additions to human rights, never mind whether the particular provisions are desirable or not, has the effect of removing that issue from the control of our elected representatives and giving control to the judiciary, and by extension to the group of funding bodies with deep pockets.*

128. The Very Rev Timothy Bartlett said in relation to the main Churches that the *'basic posture of our faith, commitment, vision and values is to support a bill of rights'*, but asserted that there should be consideration of the respective roles to be played in relation to a bill of rights.

129. The NIHRC said that they had made a significant effort in the 2008 advice to maintain the existing balance of power between the three branches of government and the established separation of powers. The advice did not propose new rights: rather:

*.... the further entrenchment of protections that largely exist in domestic law and that reflect either international obligations that were freely entered into by the United Kingdom or relevant developments in jurisprudence.*

### **Concerns that it may politicise the judiciary**

130. A number of witnesses, particularly senior judges, expressed concern that a bill of rights could politicise the judiciary. Sir John Gillen suggested this could happen if the rights were justiciable. However, he commented that although public perceptions are important, judges are not influenced by that.

131. He said that unfavourable headlines about judges, such as those proclaiming that the Supreme Court Justices in *R (Miller) v Secretary of State for Exiting the European Union*<sup>23</sup> were ‘enemies of the people’, would have no impact on the performance of the judiciary. Nonetheless, Sir John was concerned about the impact on public perception.
132. Sir Stephen Irwin thought that aspirational rights would draw the courts into the political arena, potentially setting them in opposition to the legislature. He noted the politicisation of the court system in the US, suggesting that if senior judges are given ‘*activist constitutional authority of that kind*’, their appointment becomes a political matter.
133. Mr Justice Richard Humphreys also suggested that enacting economic, social and cultural rights could politicise the judiciary and potentially lead to changes to the recruitment process for judges. Jeffrey Dudgeon also raised the question of the appointment of judges who would interpret a bill of rights.
134. However, the former Lord Chief Justice, Sir Declan Morgan, suggested that it may be more important that the judiciary is seen to be able ‘*to speak truth to power*’. He said that judges could lose their reputation for integrity and independence if they were not prepared to deal with what parliament put before them.
135. The Lord Chief Justice noted that over the previous decade a lot of social issues had come before the courts, which would not have happened previously. He said that while this has presented challenges for the courts, he did not think that there had been a material impact on public confidence in the independence of the judiciary as a consequence.
136. The role of the courts as an important accountability mechanism in holding other branches of the state to account was also mentioned by Peter Coll QC representing the Bar Council of Northern Ireland and Maria McCloskey, on behalf of the Law Society of Northern Ireland.

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<sup>23</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5

## Concern that rights may be difficult to interpret by courts

137. A number of witnesses raised concerns about the capacity of the courts to interpret certain rights, particularly socio-economic rights. For example, Mr Justice Richard Humphreys said that courts are not well equipped to deal with distributive justice, in the sense of distributing resources, as their role focuses on individual cases rather than on allocating resources across society as a whole. He said that judges lack training as well as access to the information and data that governments, ministers and parliaments have.
138. Dominic Grieve QC, former Attorney General for England and Wales, said that some rights are ‘*by their nature, very vague*’ because they are “aspirational” statements of intent that governments sign up to without intending to have to answer for in court.
139. Professor Tobias Lock of Maynooth University suggested that a court would not be the best forum for assessing compliance with the right to a healthy environment, for example. Instead, plans to implement socio-economic rights in Scotland focus on pre-legislative scrutiny and the policy formulation process, with judicial review available as a last resort.
140. Professor Kate O’Regan, former judge of South Africa’s Constitutional Court and Director of the Bonavero Institute of Human Rights at the University of Oxford, discussed the adjudication of social and economic rights in South Africa. She noted that the Constitution requires the state to take ‘*reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*’ She noted that a person cannot simply go to court and say they want a house. Instead:

*The question will be whether the state has taken reasonable legislative and other measures, within its available resources, to progressively realise your right of access to housing. In some ways, that has become an important programmatic set of rights to ensure that the state cannot renege, in a sense, on the provision of access to housing, healthcare, sufficient water, food or social security.*

*However, it is not a right that can be vindicated without more in the hands of a citizen who does not have access to housing or social security. Of course, that has led to some criticism from people who would really like to be able to go to court and get a house.*

### **Concern that a bill of rights could substantially increase litigation**

141. A number of witnesses expressed concern that a bill of rights would substantially increase the amount of litigation before the courts. This is illustrated by Lady Trimble, who also raised questions about whether legal aid would be available, and the associated costs.
142. However, Niall Murphy argued that the core rights within a bill of rights are already justiciable, and that a bill of rights could in fact lead to reduced litigation, *'because there would be a stronger base or framework'* to which all legislative or Executive intentions would have to comply.
143. Monye Anyadike-Danes QC said that a bill of rights could, over time, reduce the need for people to go to court, which she felt was *'destructive'* for vulnerable people who only turn to litigation because something has gone wrong.

*You hope to reduce the incidence of going to court. Rights are always infringed, I am afraid; that is just the fact of the matter. What you hope to do is reduce the incidence of that and to produce good jurisprudence around it, so that people understand, as time goes on, what the out workings of these rights mean.*

*Then, the next time that a young person comes and complains that they have been put in a bed and breakfast place that is wholly unsuitable for them, we do not have to start thinking about going to court on their behalf. We will be able to see already from a provision in the bill of rights that that is an infringement of their rights. You hope to stop the conduct then and there.*

144. The Lord Chief Justice said that a *'clear, well-crafted document'* can reduce the extent of judicial involvement. However, he remarked that it is extremely difficult to predict all the ways in which rights can come into play, and that victims or applicants

and their lawyers ‘*are clever, inventive people*’, who will pursue issues that have not been picked up.

## **Concern that a bill of rights could further entrench division**

145. One of the main concerns among stakeholders who took part in the Committee’s consultation included that it could exacerbate tensions and divisions in society, and that it could set particular groups against each other in terms of competing rights. Some of the children and young people who took part in the focus groups were concerned that a bill of rights could cause friction and arguments among politicians.

“At some stage it is going to set one group against another when my rights or your rights impinge upon each other’s rights”.

(Religious and cultural stakeholder event participant)

“I believe a bill of rights of this nature is likely to cause more division and lead to years of disputes as interested parties try to enforce their ‘rights’”. (Survey respondent)

## **The Committee’s view**

146. On 3 June 2021 the Ad Hoc Committee agreed that it supported the creation of a bill of rights in principle, in light of the evidence it received and the references in *New Decade, New Approach*. This decision was made subject to prospective advice from the panel of experts, which was ultimately not made available as a result of the fact that the panel was not established. However, subsequently, the DUP in its position paper expressed disagreement with this decision.

## **The ‘particular circumstances’ of Northern Ireland**

### **Provisions of the Belfast Agreement/ Good Friday Agreement**

147. As previously noted, paragraph 4 of the section of the Belfast Agreement/ Good Friday Agreement entitled *Rights, Safeguards and Equality of Opportunity* provides that the new NIHRC would be invited to consult and advise on:

*...the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience.*

*These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and - taken together with the ECHR - to constitute a Bill of Rights for Northern Ireland. Among the issues for consideration by the Commission will be:*

- *The formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and*
- *A clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.*

## **Previous interpretations**

148. RaISe provided a research paper on the ‘particular circumstances’ of Northern Ireland. This noted the different interpretations of the phrase developed in previous bill of rights processes.
149. It said that the Bill of Rights Forum was divided over the meaning of the ‘particular circumstances’,<sup>24</sup> noting the contrast between a broad-range interpretation of the legacy of the conflict and its impact in Northern Ireland and challenges around which conditions were not perceived to be particular to Northern Ireland.
150. Professor Brice Dickson discussed the 2008 NIHRC advice, suggesting that it included rights ‘*which had little if any connection to the conflict in Northern Ireland*’, and noting the assessment of the then Secretary of State, Shaun Woodward, that over half of the rights included were equally as relevant in England, Scotland and Wales. Nonetheless, the UK government suggested that there remained a case for

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<sup>24</sup> Bill of Rights Forum (2008), *Final Report - Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland*, Belfast: Bill of Rights Forum

additional rights protections reflecting NI's 'particular circumstances' in the following areas:

- Equality, representation and participation in public life;
- Identity, culture and language;
- Sectarianism and segregation;
- Victims and the legacy of the conflict; and
- Criminal justice.

### **Negotiations leading to the Belfast Agreement/ Good Friday Agreement and previous discussions**

151. Inter-party negotiations began in Stormont in June 1996 chaired by Senator George Mitchell. The Committee heard from three negotiators to the Belfast Agreement/ Good Friday Agreement: Mark Durkan, former deputy First Minister and a negotiator for the SDLP, Dermot Nesbitt, former Minister of the Environment and a negotiator for the UUP, and Monica McWilliams, negotiator for the Women's Coalition.
152. Mark Durkan noted that the Belfast Agreement/ Good Friday Agreement refers to rights in other parts beyond the direct references to a bill of rights in paragraph 4 of the section *Rights, Safeguards and Equality of Opportunity*, noting the '*strong language in which they are expressed*'.
153. He said that some of the language of paragraph 4 reflects issues that were being argued about at the time, such as group or communal rights, for example, in relation to parading, with differing arguments around which right applied where.

*That is why the language in paragraph 4 is not pointed in one direction or another. Similarly, a general phrase such as "particular circumstances" is used so that we were not up-casting particular breaches, violations or transgressions of rights that people could point to in ways that would then be argued over, and you then get into a whole symmetry of "what aboutery" about what things you do.*

154. Mark Durkan added that as negotiators they did not expect the NIHRC to only consult within the 'narrow' definition of paragraph 4. He said they had '*as a bird in the hand*' a very strong commitment that even if they did not get a wider bill of rights, or achieve everything they wanted from a bill of rights, they would still have the ECHR incorporated into domestic law.
155. Professor Monica McWilliams commented on the phrasing of the Agreement, noting that some people thought that the process of scoping a bill of rights was sufficient, with no obligation for Westminster to take a bill forward. Professor McWilliams says that instead, it should have been made clearer that having a bill of rights '*was a constitutional guarantee*'.
156. Multi-party negotiation meetings on human rights were part of the confidence-building sub-committee, according to Professor McWilliams. Negotiators at these meetings believed that a foundational document, a bill of rights, was needed to build trust for the future, and for this reason, discussions included political, civil, economic, social and cultural rights.
157. Dermot Nesbitt said that the supplementary rights to do with the 'particular circumstances' were mutual respect; identity; ethos; and parity of esteem. In particular, he thought that this referred to identities, culture, language, education and religion.
158. Professor Christopher McCrudden from Queen's University Belfast and the University of Michigan noted research on the negotiations which indicates that some things were added to the Agreement at the last minute without their implications being fully thought through. He suggests that there might not have been extensive consideration of the matter of whether economic and social rights were to be included.
159. The Committee heard from Professor Tom Hadden who served on the Standing Advisory Commission on Human Rights in the 1980s and as a Commissioner of the NIHRC from 1999-2005. He worked closely with the late Kevin Boyle, a human rights lawyer who co-founded the Northern Ireland Civil Rights Association and People's Democracy, and together they are credited with influencing a number of

concepts in the Belfast Agreement/ Good Friday Agreement and other agreements, including in relation to a bill of rights.<sup>25</sup>

160. Professor Hadden said that the formulation for a bill of rights stated within the Belfast Agreement/ Good Friday Agreement referring to incorporation of the ECHR and supplementary provisions to reflect Northern Ireland's particular circumstances can be traced back to the discussions between political representatives and human rights experts at meetings with political party representatives and human rights experts in Kells in 1993 and 1994. Tom Hadden and Kevin Boyle proposed the following 'add-ons' to the Convention at these meetings:

- The right of self-determination for the people of Northern Ireland;
- Recognition and protection of the two communities;
- Education and language rights;
- The right of individuals to be British or Irish; and
- Protection against the unjustified use of emergency powers.

## Views of witnesses and stakeholders

161. The Committee heard a range of perspectives on the meaning of the phrase 'particular circumstances', with some arguing for a broad interpretation of the phrase; others for a more restrictive approach; and yet others urging the Committee not to overly focus on trying to interpret it.

162. Jeffrey Dudgeon argued that the text of the Belfast Agreement/ Good Friday Agreement in relation to particular circumstances is paramount, and that it meant this phrase in a narrow way with its references to '*mutual respect for the identity and ethos of both communities and parity of esteem*'. Lady Trimble also urged that there should be a greater focus on the Agreement and issues such as parading, victims and issues related to the conflict.

163. However, the Equality Coalition said that it did not view the mandate for a bill of rights as being restricted to just a number of consociational identity rights. Daniel

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<sup>25</sup> Chinoy, M. (2020) *Are You With Me? Kevin Boyle and the Rise of the Human Rights Movement* Dublin: The Lilliput Press

Holder said that the core purpose of a bill of rights envisioned in the Belfast Agreement/ Good Friday Agreement was as a safeguard to prevent rights abuses that would fuel conflict and division, providing the example of housing in this regard.

164. In relation to the particular circumstances, the Women's Policy Group Northern Ireland highlighted a range of areas where they thought Northern Ireland lagged behind other jurisdictions. They said that it is *'the only part of the UK or Ireland that is without Government-funded childcare provision and without a strategy for violence against women and girls'*, also mentioning the lack of a domestic abuse commissioner and inadequate perinatal mental health services.
165. The Commissioner for Children and Young People argued that children are *'profoundly affected'* by Northern Ireland's 'particular circumstances', noting increased levels of child poverty, mental ill health, educational and health inequalities; as well as segregation, division and trauma (for example, among children who are witnesses or victims of paramilitary-style attacks).
166. She noted that while today's children and young people have grown up in a time of relative peace, the impact of the 'Troubles' is still heavily felt, with segregation and division continuing to impact on day-to-day life for many young people.

*In a nutshell, when you think of particular circumstances, and certainly when you look at the provisions in the Good Friday Agreement, you think about what is unique about Northern Ireland. ...you immediately think about the particular out workings of the conflict, and that includes our divisions and the trauma that people across Northern Ireland have experienced. That is how I interpret, and how NICCY interprets, the particular circumstances of Northern Ireland.*

167. For the children and young people who took part in the Committee's focus groups, many thought that Northern Ireland was different to other places as a result of: the legacy of the past; segregated housing and education; the importance of national identity and poor mental health.

“Our housing is very segregated – sometimes this is marked out by flags”. (Children and young people focus group participant)

“Lots of people are addicted to drugs and alcohol and the suicide rate is very high – lots of mental health issues”. (Children and young people focus group participant)

168. Chris Quinn of the NI Youth Forum said that he felt young people here experience similar issues to their counterparts elsewhere, but that the legacy of the past magnifies these issues, giving the example of mental health.
169. In relation to the ‘particular circumstances’ Dr Amanda Cahill-Ripley highlighted austerity measures that can be seen as having a negative impact in England, as well as Northern Ireland’s *‘different starting point’* as a result of the conflict. In this regard she noted lack of investment, restrictions on people’s lives in the past and the effects of violence on well-being.
170. The NIHRC said that the question of Northern Ireland’s particular circumstances is subjective, and relates to *‘an ongoing dispute of competing historical narratives’*. As such, it believes that it is unreasonable to expect the Committee to resolve this question, and advised it to avoid attempting to do so. Rather, it proposed that a more productive approach would be to:

*...reflect upon the 1998 mandate generously, whilst focusing on the pressing questions of what provisions are required in a Bill of Rights that would be fit for purpose in 2021 and beyond.*

171. The Committee was unable to make a decision on what constitutes the ‘particular circumstances’ of Northern Ireland or the implications of Brexit for the ‘particular circumstances,’ due to the absence of a panel of experts and the content of the DUP party position paper.

## The implications of Brexit for the ‘particular circumstances’

### Background

172. The UK Government has committed to ensuring that certain human rights and equality protections contained within the *Rights, Safeguards and Equality of Opportunity* chapter of the Belfast Agreement/ Good Friday Agreement will be maintained under the terms of the EU withdrawal treaty.

173. This non-diminution commitment was formalised in the Ireland/Northern Ireland Protocol (Article 2) and given legal standing in the European Union (Withdrawal Agreement) Act 2020.

*The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.*

174. The NIHRC explains that this ‘no diminution commitment’ amounts firstly to a non-regression commitment in respect of the rights within the relevant chapter of the Belfast Agreement/ Good Friday Agreement and underpinned by EU obligations (for example treaties, Regulations and Directives) in place at the end of the transition period.

175. It states that the Belfast Agreement/ Good Friday Agreement anticipated further work on a bill of rights, and as such, it was not a comprehensive statement of rights. Ultimately, the courts will have a role in interpreting the parameters of Article 2.

176. The Protocol also commits that NI law will keep pace with any future EU developments under six EU Directives listed in Annex 1 to the Protocol. They concern equal treatment in employment, self-employment, access to goods and

services, social security and freedom from discrimination based on racial or ethnic origin.

177. This is known as the 'dynamic alignment' obligation and the NIHRC states that this reflects the significance of these EU Directives in contributing to equality standards in Northern Ireland.
178. This obligation does not apply to other relevant Directives such as those protecting pregnant or part-time workers and victims (which are subject to no diminution but not to dynamic alignment). This means that Northern Ireland could fall behind the EU if the Directives are strengthened, for example.

### **Views of witnesses on Brexit and human rights**

179. Many stakeholders and witnesses suggested that withdrawal from the EU strengthens the case for a bill of rights, and that a bill of rights may help to minimise divergence in rights.
180. The NIHRC noted that while the no diminution commitment is important, it would not prevent NI falling behind the EU if legislative protection developed more quickly there than in the UK, with the exception of the six equality Directives. It added that Brexit has largely removed the guarantee of protection afforded by EU law, including access to the Court of Justice of the EU and the '*clear and straightforward application of the EU Charter of Fundamental Rights*'.
181. Many other witnesses discussed concerns around the implications of Brexit for human rights in Northern Ireland. Professor Colm O'Cinneide said that the main impact of Brexit on human rights across the UK, and in particular in Northern Ireland, has been to highlight the lack of embedded legal protection for such rights, including many of the rights under the *Rights, Safeguards and Equality of Opportunity* strand of the Belfast Agreement/ Good Friday Agreement. He suggested that a bill of rights could:

*...place the rights guarantees set out in the Rights, Safeguards and Equality of Opportunity strand on a firmer legal footing than they enjoy at present, and de-emphasise the importance of the NI Protocol in this regard.*

182. Mark Durkan believed that Brexit presents significant implications for EU-derived rights in Northern Ireland, suggesting that Northern Ireland is unique within the UK in terms of:

- having a land border with the EU;
- citizenship rights - including EU citizenship;
- being part of a cross-border governance ambit with an EU Member State via Strand Two;
- continuity PEACE funding;
- special aspects of the Protocol; and
- being the only part of the UK that has a right to elect to re-join the EU without an Article 49 negotiation.

183. The Commissioner for Children and Young People drew the Committee's attention to her position paper of 2018<sup>26</sup> which proposed areas for the UK Government to act to protect children's rights and outcomes following Brexit, including rights relating to identity; freedom of movement; the delivery of services across the border; child poverty and child protection.

184. The Irish Congress of Trade Unions said that the non-diminution commitment was 'somewhat limited' in relation to workers' rights, and that they were concerned that there was the potential for the rights of workers to be eroded over time. It provided the example of a new EU gender pay transparency directive which will not apply in Northern Ireland.

## **EU Charter of Fundamental Rights**

185. The EU Charter of Fundamental Rights enshrines into primary EU law a wide array of rights and entitlements set out in EU treaties, incorporating ECHR rights and drawing upon other international obligations of member states.

186. It became legally binding with the coming into force of the Treaty of Lisbon on 1 December 2009. It applies only within EU Member States and within the scope of

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<sup>26</sup> NICCY (2018) *UK Withdrawal from the EU 'Brexit' - An overview of the potential impact on Children in Northern Ireland*

EU law (i.e. it only binds states when they are implementing EU law). The NIHRC said that the Charter articulated some of those existing rights more explicitly or in a more modern context. For example:

- it provides **free-standing rights to equality and non-discrimination** (Articles 20 and 21) unlike Article 14 of the ECHR, which only protects individuals from discrimination in relation to the exercise of another right (a 'parasitic' right);
- Article 24 details **the rights of the child expressed in conformity with the UNCRC**;
- Article 47 **provides the right to an effective remedy**, whereas Article 13 of the ECHR is not protected within the Human Rights Act 1998; and
- **Standing is wider under the Charter** than the 'victim' test under section 7(1) of the Human Rights Act 1998.

187. Professor Tobias Lock emphasised that the EU Charter of Fundamental Rights applies only where EU law is being implemented or dealt with, and does not apply in purely-domestic situations:

*It is not a panacea or super-remedy that will suddenly disappear from the landscape. The Charter of Fundamental Rights protects more rights than the Human Rights Act, and it protects them in a stronger way. EU law, translated into a UK context, provides stronger remedies than the Human Rights Act does because it can also protect against Westminster legislation, and, of course, the Human Rights Act cannot do that. That is main thing.*

188. The NIHRC suggested that in the absence of a bill of rights, the Charter '*has arguably served as the instrument most closely aligned to the vision set out in 1998 of enforceable rights that supplement to provisions of the ECHR*'. The NIHRC posits that '*a bill of rights for NI may fill the gap that now exists in the human rights architecture*'.

189. Similarly, Mark Durkan suggested that part of the '*compensation*' for not having a bill of rights was that Northern Ireland previously benefitted from the EU Charter of Fundamental Rights. He proposed that the Committee should consider how to

safeguard the rights lost in terms of the Charter following the exit from the EU, noting that a bill of rights could include these rights alongside the ECHR.

190. The future application of the Charter remains the subject of debate. It is no longer fully incorporated into UK law in line with EU membership requirements; however, it is expected that it will remain relevant across the UK for the interpretation of EU law relevant to the Withdrawal Agreement.
191. Indeed, Colin Murray and Dr Clare Rice commented that case law from the Court of Justice of the European Union (CJEU) increasingly places weight upon the Charter as a source of enforceable rights. They suggest that the terms of non-diminution under Article 2(1) of the Protocol could therefore be subject to expansive readings which encompass elements of the Charter.
192. Dominic Grieve QC commented that although the principles of the Charter would be maintained in many cases, the way in which remedies are available may be different, and some rights would disappear completely, for example, the right to vote in EU elections. Some Charter rights are covered by the ECHR, *'but they are not identical'*.
193. He cautioned against simply taking the Charter and turning it into a bill of rights, noting that some of the rights within it are more *'aspirational statements'* than rights, while others fall into reserved matters. He said that the 2008 advice of the NIHRC was, in some ways, an attempt to take lots of charter rights and turn them into legally-enforceable rights.
194. The former Lord Chief Justice, the Rt Hon Sir Declan Morgan, thought that the loss of the Charter would impact *'in certain limited ways'* because the Human Rights Act still incorporates many relevant elements of the ECHR, and much of the content of the Charter was taken and developed from the Convention.
195. By way of example, the Charter is more specific on data protection, with a *'degree of granularity'* that is not as apparent in the Convention. However, Sir Declan thought it was likely that the European Court of Human Rights would take into account jurisprudence developed from the Charter in its approach to data protection and other matters. As such, Sir Declan thought that the impact on the civil and

political rights we currently enjoy may be limited, although he cautioned that the outworkings remain to be seen.

196. The Children's Commissioner said that as the EU Charter of Fundamental Rights will no longer apply, governments will not be obligated to adhere to children's rights standards when implementing relevant laws. The Commissioner suggested that the NI Assembly should seek to counteract this loss of protections.
197. The Committee was unable to make a decision on what constitutes the 'particular circumstances' of Northern Ireland or the implications of Brexit for the 'particular circumstances' due to the absence of a panel of experts and the content of the DUP party position paper.

## Approach to a bill of rights

198. A number of witnesses proposed differing potential approaches for the Committee to consider. Many of these options are not mutually exclusive. They are highlighted in the following paragraphs.

## Incorporating international instruments

199. The UK has a dualist system. This means that a treaty is not part of domestic law unless and until it has been incorporated into the law through legislation by parliament. By way of example, the ECHR was incorporated into domestic law by the Human Rights Act 1998. Very few other treaties have been given effect in domestic law in this way.
200. The UK Supreme Court has described<sup>27</sup> the dualist system as a '*necessary corollary of Parliamentary sovereignty, or, to put the point another way, it exists to protect Parliament not ministers*'. Without the dualist system governments would be able to change the law without first seeking approval from parliament or the courts, which is contrary to the doctrine of the separation of powers which aims to ensure that law-making power resides in the hands of the legislature.<sup>28</sup>

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<sup>27</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5

<sup>28</sup> Brice Dickson (2018) *Law in Northern Ireland: Third Edition* Oxford: Hart Publishing

201. When the UK Government ratifies international treaties, it should adhere to the obligations contained within them, but they are not justiciable of themselves. Individuals cannot derive rights from unincorporated treaties, and cannot be deprived of rights or subjected to obligations.<sup>29</sup> Nonetheless, courts may take the treaties into account.
202. Treaties that are not justiciable are still subject to scrutiny by the UN international treaty and regional treaty monitoring bodies. The NIHRC likened their outputs to 'school reports' with concluding observations and recommendations.
203. A significant proportion of witnesses and stakeholders supported the incorporation of international human rights standards into domestic law within a bill of rights. The NIHRC said that these standards have a value because they are universal, and anything the Ad Hoc Committee could recommend is already in law. Jonna Monaghan of the Northern Ireland Women's European Platform said:

*Northern Ireland does not have to reinvent the wheel, because you can be sure that it is something that has been agreed and approved at international level... It cannot be emphasised enough that Northern Ireland is already bound by these standards because the UK has ratified the treaties.*

204. Many witnesses and stakeholders wished to see the ECHR replicated within a bill of rights. A number of stakeholders, particularly those affiliated with the Human Rights Consortium, recommended the incorporation of the EU Charter of Fundamental Rights and the seven core international instruments the UK has ratified, among other treaties. The seven core human rights instruments ratified by the UK are:

- The International Covenant on Economic, Social and Cultural Rights (ICESCR);
- The International Covenant on Civil and Political Rights (ICCPR);

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<sup>29</sup> *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 476

- The International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD);
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- The Convention against Torture (CAT);
- The Convention on the Rights of the Child (UNCRC); and
- The Convention on the Rights of Persons with Disabilities (CRPD).

205. However, Dr David Russell of the NIHR said that the incorporation of the treaties '*is a slightly different thing from the bill of rights*'. Nonetheless, he said that if the Committee wanted to create rights within a bill of rights rather than simply bring in the instruments, the best place to look is within the treaties. The benefits of this could include that:

- The rights are **already formulated** and have been tested in international law for many years;
- **UK courts are used to the treaties** and look to them for their case law; and
- Using the treaties means that the construction of the rights in question '**will operate properly in practice**'.

206. Professor Monica McWilliams questioned the practicality of simply reading across multiple international conventions in full into a bill of rights, saying: '*that's a big ask*'. She commented that many of the instruments have been ratified and the judiciary takes them into account. She also noted other existing statutory duties within domestic legislation.

*The question would be what extra does the bill of rights bring, and that's where you would want to look at those instruments, and where the gap lies.*

207. Dr David Kenny commented that it is 'obvious' that treaty obligations should be considered in relation to a bill of rights, but highlighted a number of challenges to trying to incorporate the instruments directly into the bill:

- While some of the more specific conventions would be appropriate to adopt in domestic law;<sup>30</sup> these are **usually better incorporated through dedicated domestic legislation** that would also provide for the necessary additional legal and policy measures to help implement them;
- Some treaties<sup>31</sup> include obligations that would be **out of character with rights in a common-law system**. They may be best described as aspirations rather than rights, and enforcement may be challenging;
- Some instruments are duplicative of each other or cover similar subject matter. This would lead to **clashing protections and would make a bill of rights very long; and**
- If including these instruments, care would need to be taken to **omit parts that would not make sense** in a domestic bill of rights.

208. In line with comments from Professor McWilliams, Dr David Kenny concluded that it would be preferable to identify gaps where rights protected in these instruments are not adequately defended in UK law, and incorporate the relevant elements. This would allow for necessary changes to be made to work the rights into the domestic legal order.

## **Framework Convention for the Protection of National Minorities**

209. Dr Robin Wilson, expert adviser to the Council of Europe, said that the formulation for a bill of rights within the Belfast Agreement/ Good Friday Agreement was problematic. He suggested that a bill of rights is incompatible with the notion that you can have parity of esteem between two communities because you cannot have a democracy based on two communities, and because rights must be something

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<sup>30</sup> Such as the UN Convention on the Rights of the Child, Convention on the Elimination of All Forms of Discrimination Against Women and the UN Convention on the Rights of Persons with Disabilities

<sup>31</sup> Such as the Universal Declaration of Human Rights and the European Social Charter

that an individual can claim. He suggested that these challenges help to explain why previous attempts to achieve a bill of rights have failed.

210. Dr Wilson said that there is an alternative approach which is compatible with the ideas that constitutions are based on individual citizenship and that individuals are bearers of human rights. He thought that a bill of rights could give rights to *'persons belonging to'* by incorporating into domestic law the Council of Europe conventions: the Framework Convention for the Protection of National Minorities and the Charter for Regional or Minority Languages.
211. In his oral evidence and through a number of written submissions to the Committee, Dermot Nesbitt said that he believed the approach to drafting a bill of rights should be firmly rooted in international law, and specifically the Framework Convention for the Protection of National Minorities (FCNM). He argued that the principles agreed by the Council of Europe are aimed at solving the problem of a community deeply divided along communal lines and are based on historical experience of European conflicts. He said that the NIHRC advice did not adequately deal with identity and culture.
212. He noted that throughout the talks process and since, his view has been that principles derived from international human rights which balance *'majority rights and secure borders with minority rights and democratic inclusion'* present the solution to the problems of a divided society. Conradh na Gaeilge also called for the incorporation of the Framework Convention for the Protection of National Minorities into a bill of rights.
213. However, in his evidence Mark Durkan said that during negotiations leading to the Belfast Agreement/ Good Friday Agreement discussion on this Framework *'did not go down well with a lot of participants'* due to the language of national minorities. He states that instead, *'people were trying to assert rights on their own terms and in their own right'*.

### **Focus on the Belfast Agreement/ Good Friday Agreement**

214. Professor Brice Dickson recommended that there should be a bill of rights restricted to supplementing the Human Rights Act 1998 with provisions relating to *'the*

*remaining issues that led in the first place to a call for a Bill of Rights in the Belfast (Good Friday) Agreement’.*

215. He said that the Committee could return to the UK government’s comments on the 2008 advice outlining the five key areas where it believed there remained a case for additional rights protections reflecting Northern Ireland’s ‘particular circumstances’. The Committee could then consider the NIHRC recommendations in these areas.
216. He contended that this would be the approach most likely to be successful in satisfying the differing views in relation to a bill of rights, and that this approach would be most likely to gain the approval of the British and Irish governments and be enacted at Westminster. He proposed that the Assembly could then deal with additional rights issues through separate pieces of legislation.

### **Implementing or building upon the Northern Ireland Human Rights Commission’s Advice of 2008**

217. A number of witnesses urged the Committee to return to the NIHRC’s advice of 2008, including Professor Colin Harvey from Queen’s University Belfast and the CAJ. Some suggested building upon the NIHRC advice. Brian Gormally of the Committee on the Administration of Justice said:

*I thought then and I think now that the 2008 advice, while it was not perfect, was the basis for a workable and effective bill of rights that would have benefitted all people.*

218. However, some witnesses did not support the NIHRC’s advice. Lady Trimble and Jeffrey Dudgeon MBE said that the Commission had exceeded its remit. Professor Tom Hadden suggested that successive Commissions had placed too much emphasis on international instruments rather than focusing on what form of a bill of rights would support peace and stability.
219. Professor Monica McWilliams commented that as a national human rights institution, accredited at the UN International Coordinating Committee with an A status, the NIHRC has a mandate to uphold international standards. She also noted that the mandate of the Belfast Agreement/ Good Friday Agreement included

international instruments and experience and that the Commission provided the relevant links and details in its advice.

220. The Commissioner for Children and Young people said that the 2008 NIHRC advice is not her position. The Commissioner and the Children's Law Centre had commissioned legal analysis of the advice<sup>32</sup> which concluded that the advice did not fully implement the UNCRC. Professor McWilliams noted that today there is much more human rights compliant decision-making in relation to children under 18 than there was in 2008.
221. Dominic Grieve QC commented that the Belfast Agreement/ Good Friday Agreement may have intended that a bill of rights should consider issues around different communities not having sufficient regard to the rights and interests of others, and that the NIHRC had gone beyond that. He said that it may have been right to do so and that he made no judgment on the matter, noting:

*The question for you will be this: do you want to pursue what I will describe as the NIHRC proposals, which have clearly been very carefully worked up and put forward but which were rejected by the UK Government after they were first published, or do you want to try to go for something else?*

### **Enhanced roles for the legislature, executive and judiciary**

222. Dr Katie Boyle recommended that the Committee could build upon the NIHRC advice; and that it should consider an enhanced role for the legislature, executive and judiciary, including more robust pre-legislative scrutiny. Her suggestions for a new human rights framework included:

- **Enhancing the role of the NI Assembly as a guarantor of human rights:** a dedicated equality and human rights committee at the NI Assembly, enhanced pre-legislative scrutiny and greater human rights and equality considerations across parliamentary business;
- **Enhancing the role of the NI Executive as a guarantor of human rights:** Dr Boyle noted that the Executive has committed to bring about

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<sup>32</sup> Kilkelly, U. (2008) *Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland: a Children's Rights Analysis*

changes in areas such as the economy, schools, hospitals, housing and welfare, and said that these engage directly with international human rights law. A bill of rights would provide an accountability framework for these decisions; and

- **Enhancing the role of the court as a guarantor of human rights** (as a last resort): considering access to justice issues including effective remedies.

### **Considering various models of enforcing economic and social rights**

223. The Human Rights Consortium commissioned the Human Rights Centre at Queen's University Belfast to produce the report *Economic and Social Rights: Models of Enforceability*.

224. The report identifies possible methods of enforcing economic and social rights (ESR) that span the middle of the spectrum between full enforceability and declaratory principles. The Human Rights Consortium and Professor Christopher McCrudden highlighted five possible models, although they suggested that there may be further solutions beyond these:

- **Pre-legislative scrutiny by the Assembly** and amending the Ministerial Code;
- **Including socio-economic requirements in specific legislation;**
- **Constitutionalising ESR principles**, where the Assembly has principal responsibility to implement;
- **Progressive implementation and restricted judicial review**, such as on grounds of reasonableness; and
- **Application of ESR through their incorporation in future free trade agreements.**

### **Addressing rights issues through primary and other legislation**

225. Dominic Grieve QC emphasised that the approach to take was a matter for the Committee. However, he said that there may be an argument that issues around

rights could be tackled on an ad-hoc basis in the Assembly, and that there would be little difference in the end result, other than this approach would involve one topic at a time rather than a series of matters at once.

226. The Women's Policy Group strongly supported a bill of rights, but proposed that, in the absence of Westminster implementing a bill of rights, international instruments such as CEDAW should be incorporated into domestic law in Northern Ireland.
227. Professor Brice Dickson noted that *New Decade, New Approach* commits the Executive to enacting legislation on language rights, the promotion of reconciliation and tolerance, among others, as well as implementing an anti-poverty strategy and extending welfare mitigation measures. He suggests that the Assembly could pass laws in areas including children's, employees', victims' and disabled people's rights.

*It might be difficult to achieve political agreement in many of these areas, but to make no progress on any of them until there is satisfactory progress on all of them through a comprehensive Bill of Rights which is subject to approval by the UK Parliament seems to me to be extremely counter-productive.*

*It is allowing the perfect to be the enemy of the good, it is undermining the very raison d'être of devolution and it is delaying indefinitely the achievement of a fairer and more just society in this jurisdiction.*

228. Brice Dickson said that the UK government supported an equality provision within a bill of rights, and acknowledged scope for updating the current equality laws. He identified this as a potential key area for attention outside a bill of rights. Professor Colm O'Cinneide said that there is no comprehensive legislation setting out discrimination law here, and, as a consequence, equality and non-discrimination law is '*uniquely easy to amend*'.<sup>33</sup>

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<sup>33</sup> O'Cinneide (2010) *Brexit and its Wider Implications for Human Rights in Northern Ireland* [online] Available at: [www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/written-briefings/brexit-and-its-wider-implications-for-human-rights-in-northern-ireland/](http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/written-briefings/brexit-and-its-wider-implications-for-human-rights-in-northern-ireland/)

## **A bill of rights followed or underpinned by primary legislation**

229. Professor Colin Harvey said that a bill of rights is a framework, and that other things, such as legislation to protect human rights, can develop under it. He said that it acts as a values-based statement and a commitment to human rights, but that it would not solve all issues in society. He highlighted the importance of being clear on what a bill of rights can and cannot do.
230. Dr Katie Boyle highlighted a hybrid model whereby Westminster could pass a skeletal framework, supported by a requirement that the Assembly pass further legislation that gives meaning and content to the rights in the bill. She said this was '*not dissimilar*' to the Finnish approach.
231. The Equality Commission recommended that a bill of rights is underpinned by measures to strengthen NI equality laws, suggesting that it is important to recognise gaps in equality legislation.
232. Specifically, it recommended the extension of current equality legislation so that public authorities are prohibited from discriminating on grounds including sex, age, gender reassignment, pregnancy and maternity and nationality when exercising their public functions. It was also concerned about gaps in policies and programmes aligned to the UN Convention on the Rights of Persons with Disabilities and said that a single equality law in Northern Ireland would best harmonise and simplify the protections available.

## **Considering developments in other devolved jurisdictions**

233. The Rights of Children and Young Persons (Wales) Measure 2011<sup>34</sup> incorporated the UNCRC into Welsh law. It requires ministers to have 'due regard' to Part 1 of the UNCRC and the two optional protocols when exercising their functions. Professor Simon Hoffman from Swansea University noted that the 'due regard' standard aims to ensure that processes are in place to ensure that Ministers substantively take the relevant rights into account when making decisions.

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<sup>34</sup> The Rights of Children and Young Persons (Wales) Measure 2011

234. The Committee heard that this approach does not provide individual children with a right to action where their rights are breached. Instead, it gives rise to a public law duty, with judicial review available where breaches arise. Professor Hoffman said that while it is difficult to assess the impact on children's outcomes, research had shown that it had helped to foster a policy culture in which children's rights are prioritised.
235. Professor Tobias Lock briefed the Committee on work in Scotland to enhance human rights legislation. The Scottish First Minister in 2018 set up an Advisory Group on Human Rights Leadership, which made recommendations<sup>35</sup> including plans for a Scottish Parliament bill to include civil and political rights restated in abbreviated form from the Human Rights Act, as well as a number of economic and social rights, namely:
- **the right to an adequate standard of living**, including the right to adequate housing, food and protection against poverty and social exclusion;
  - **the right to the enjoyment of the highest attainable standard of physical and mental health;**
  - **the right to education;**
  - **the right to social security and social protection;** and
  - **the right to take part in cultural life.**
236. The bill would also include the right to a healthy environment, and further specific rights belonging to children, women, people with disabilities, older persons, LGBTQ+ communities and rights relating to race. A new National Task Force for Human Rights Leadership was established to develop a statutory framework for human rights.
237. The Scottish Parliament recently unanimously passed the UN Convention on the Rights of the Child Incorporation (Scotland) Bill, which would incorporate the

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<sup>35</sup> Miller. A. (2018) *Recommendations for a new human rights framework to improve people's lives* First Minister's Advisory Group on Human Rights Leadership

UNCRC into Scottish Law. It is the first devolved nation in the world to do so. The bill will provide for legal remedies should public authorities act incompatibly with the UNCRC, including strike-down powers and the power to make a declaration of incompatibility.

238. The Commissioner for Children and Young People also drew the Committee's attention to these developments in Scotland and Wales, noting that she was disappointed that children here *'may now in fact be enjoying fewer protections than their peers in the rest of the UK'*.

### **Seeking to achieve what is possible**

239. Mr Justice Richard Humphreys said that it may be worth considering what is achievable, and allowing for further human rights legislation to follow. He posited that perhaps achieving something would be better than *'a grand design that doesn't happen'*. His suggested options were:

- An overall NI Constitution Act including a bill of rights;
- An overall bill of rights statute: *'nothing agreed until everything agreed'*;
- Modest scope and modest stand-alone provision; and
- Adopting an overall programme, dealing with one area at a time, such as building on the Rural Needs Act (Northern Ireland) 2016 or codifying disability rights.

240. The Very Rev Timothy Bartlett thought that the Bill of Rights Forum overreached which led to competing groups and rights. Instead, he recommended that the Committee *'go for what is possible, rather than everything that might be wanted'*.

241. The Committee was unable to make a decision on what approach a bill of rights should take due to the absence of a panel of experts and the content of the DUP party position paper.

## What should be included in a bill of rights?

### Preamble

242. Bills of rights are somewhat unusual in that they set out the law, but they can also be very symbolic. Professor Philip Aston has said that bills of rights could fulfil ‘a combination of law, symbolism and aspiration’.<sup>36</sup> As well as detailing rights, they can express the values and guiding principles or ideas for society now and in the future. These are often held within a preamble, or an introduction, to the list of rights.
243. The Committee heard evidence about international bills of rights and constitutions that include a preamble setting out foundational values. Former Justices of the Constitutional Court of South Africa, Albie Sachs and Professor Kate O’Regan, discussed how the Court draws on the Preamble to interpret the Bill of Rights. Albie Sachs noted that the preamble played an important part in developing South Africa’s Constitution:

*I speak now as Albie the judge — the preamble played a very important role in interpretation. The preamble establishes the value system and, to a certain extent, the historical moment in which the bill of rights or the new constitutional arrangement is being established.*

*If you can get a broad consensus on the kind of country that you feel comfortable living in, it is best to have that in the preamble: "This is why we need a bill of rights. This is what a bill of rights can guarantee in the broad sense". It establishes a tonality, a framework and a vision that is comforting, reassuring and helpful.*

244. Baroness Kennedy agreed with the views of Albie Sachs on the importance of having a preamble, advocating that this could provide a way to communicate with people, and not in the ‘arid’ language she learned as a law student.

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<sup>36</sup> House of Lords and House of Common Joint Committee on Human Rights (2008) *A Bill of Rights for the UK? Twenty-ninth Report of Session 2007-08* London: The Stationery Office Limited

*I always say that rights and the language of rights should be where law becomes poetry. It is where we should speak the language that talks to our hearts. Law is about regulating human relationships, between nations, yes, and our relationship with the state, but it is largely about human relations and our humanity, so we have to find ways that speak to people.*

245. The preamble to Canada's Bill of Rights emphasises the rule of law and the supremacy of God. Professor Kent Roach from the University of Toronto said that the courts had not done much with it, suggesting that courts in general may view preambles as '*political surpluses*'. Nonetheless, he believed that civil society and citizens take them seriously. The former Lord Chief Justice, the Rt Hon Sir Declan Morgan, said that the preambles of the bills of rights of South Africa and Canada enhanced the statutes.
246. There are three broad types of preambles found in international instruments, as outlined in Table 1 overleaf. Dr David Kenny of Trinity College advised that most common approach is to draft a preamble for symbolic and aspirational purposes, but to expect that it will have indirect interpretive effect.

**Table 1 (below) highlights the three main types of preamble and outlines their purpose and legal effect**

Type	Purpose	Legal effect	Examples
An aspirational preamble / statement of values	<ul style="list-style-type: none"> <li>Aspirational or rhetorical</li> <li>Sets out a clear statement of the values that underlie the bill of rights and its purpose</li> <li>Can also define core identities of the society that the bill is to service</li> </ul>	<ul style="list-style-type: none"> <li>None: not designed to have any bearing on the rights contained within the bill of rights</li> <li>May have persuasive effect for politicians or the people</li> </ul>	<ul style="list-style-type: none"> <li>US Bill of Rights</li> <li>Canadian Charter of Rights and Freedoms</li> </ul>
Indirect effect/interpretive effect	<ul style="list-style-type: none"> <li>In addition to the purpose of an aspirational preamble above, this type aims to inspire and guide the interpretation of the bill of rights</li> </ul>	<ul style="list-style-type: none"> <li>Designed to have some effect on the content and meaning of the bill of rights, indirectly</li> <li>Values can be used as core interpretive values</li> </ul>	<ul style="list-style-type: none"> <li>Constitution of Ireland</li> <li>Constitution of the Republic of South Africa</li> </ul>
Enacting of enforceable rights	<ul style="list-style-type: none"> <li>In addition to the purpose of an aspirational preamble above, this type enacts rights</li> <li>Very rare</li> </ul>	<ul style="list-style-type: none"> <li>Directly enforceable rights</li> </ul>	<ul style="list-style-type: none"> <li>Constitution of Cameroon</li> </ul>

247. On 27 May 2021 the Committee agreed that the bill of rights should include a preamble with an interpretive effect, so that the preamble and its values would guide the interpretation of the bill of rights over time. This decision was made subject to prospective advice from the panel of experts, which was ultimately not made available as a result of the fact that the panel was not established. However, subsequently, the DUP in its position paper expressed disagreement with this decision.

## Values

248. A total of 81% of respondents to the Committee’s survey agreed that a bill of rights should set out an aspirational vision based on guiding or foundational values. All children and young people participating in the focus groups also agreed that this was important. Figure 1 below illustrates the values that respondents to the Committee’s survey most frequently thought would make appropriate foundations for rights in Northern Ireland.

**Figure 1 (below) shows the values most frequently chosen by survey respondents that would make appropriate foundations for rights in Northern Ireland. More information is provided in paragraphs 248 to 251.**

Human dignity: 81%
Mutual respect: 65%
Justice: 62%
Respect for culture, identity, traditions and aspirations: 58%
Fairness: 57%
Freedom and democracy: 57%

249. The other values chosen were peace and reconciliation (51%), parity of esteem (48%) and community (33%). Stakeholders participating in the consultation often highlighted these values and others including equality, compassion, participation and diversity and inclusion.

250. The children and young people participating in the focus groups frequently discussed the value of peace. Mutual respect, accepting difference and equality were also commonly cited; and the participants thought that life in Northern Ireland would be better if everyone adhered to these values.

251. Some stakeholders, however, expressed concern that deciding on and interpreting values could present challenges. Dr David Kenny advised that the interpretation of any values within a preamble would likely *‘take on some life of its own’*.

“A preamble can play an important function in setting out that wider vision that we are trying to achieve with a bill of rights”.  
(Human Rights Consortium stakeholder event participant)

“Values should be respect and dignity for every individual. If we take these away what are we left with?” (Black, Asian and Minority Ethnic stakeholder event participant)

“We urge that this process be taken as an opportunity to build the values of diversity and inclusion into the fabric of the institutions shaping Northern Ireland’s political, economic and social life”.  
(Written submission from the Migrant and Minority Ethnic Council)

## Human dignity

252. Human dignity is *‘perhaps the most common founding principle’* in human rights instruments around the world, but is also the most disputed in relation to its meaning and content, as Dr David Kenny advised the Committee.
253. Human dignity was frequently discussed in relation to people with disabilities, for example, with stakeholders noting that people with disabilities often experience a lack of dignity. Tony O’Reilly from the Northwest Forum of People with Disabilities discussed human dignity and how this was missing from the experiences of many people with disabilities when going through the Personal Independence Payment process or accessing social security, for example.

*One of those human rights, if you look at the general principles enshrined in, say, the UN Convention on the Rights of Persons with Disabilities, is the right to dignity and the right to treat people with dignity and compassion. That is a fundamental right, and our current social security provision does not provide that.*

## **Equality**

254. The value most commonly discussed during the stakeholder events was equality. Many expressed a desire to strive towards greater equality and freedom and discrimination.
255. The Equality Commission recommended the inclusion of a principle of equality in a bill of rights. The Commission said that this should include a statement that everyone is equal before and under the law and has the right to equal protection and equal benefit of the law. It explained how this could lead to more specific legislation.

*...the principle of equality is a fundamental element of international human rights law. The inclusion of such a principle could, for example, provide the framework for more specific anti-discrimination legislation, which can spell out, in detail, the matrix of legal rights and duties necessary to give effect to the principle of equality... it could also be used as an interpretive principle to which the courts and public authorities must have a regard.*

256. It also said that including a principle of equality in a bill of rights would be a recognition of the importance and centrality of rights and equality protections in the Belfast Agreement/ Good Friday Agreement.

## **Freedom and democracy**

257. The Committee heard that freedom and democracy are common touchstones found in instruments such as the ECHR and the Canadian Charter, and that justice and peace are often found in 'post-conflict' bills of rights.

## **Parity of esteem and diversity**

258. Robin Wilson, Expert Adviser to the Council of Europe on Intercultural Integration said that parity of esteem only provides for two monolithic communities in Northern Ireland, and ignores those who do not identify as unionist or nationalist, as well as members of national and ethnic minorities.

259. Indeed, a strong theme emerging from the survey, stakeholder events and from many witnesses was that many people wish to move away from traditional ‘orange and green’ identities, noting the increasing diversity of society in Northern Ireland. Many called for a preamble to reflect this. For example, the NI Youth Forum noted recent research it had conducted with 4,000 young people, which found that most of the respondents want to move away from the ‘*stereotypes of the past*’.

“A lot of young people do not like the division and being associated with either one side or the other”. (Young people stakeholder event participant)

“An acknowledgement that we are now a multi-cultural society and need to move beyond Nationalist/ Unionist identity as the only traditions that contribute to Northern Ireland”. (Survey respondent)

“Recognition of the contribution the black and ethnic minority communities have made to society here”. (Black, Asian and Minority Ethnic stakeholder event participant)

260. Professor Dominic Bryan, along with Michael Hamilton and Neil Jarmon, cautioned against framing the function of a bill of rights as an attempt to protect the identity and ethos of both communities. They suggested that such an approach overlooks the rights of other communities, flattens the ‘*rich diversity*’ within communities and hinders shared cultural celebration and exchange. They commented that this:

*...can only serve to entrench and institutionalise difference by elevating the salience of these two communal blocs.*

261. These views were echoed by the Equality Commission, which also recommended that a bill of rights should include a recognition of the increasing diversity in the Northern Ireland population and the significant demographic changes that have taken place since 1998. It said that a bill of rights should recognise and strengthen protection of the human rights of all communities in Northern Ireland, including minority ethnic communities.

## Values guiding limitation of rights

262. The Committee heard that bills of rights often include a limitations clause, and that values and principles can also be used to guide the limitation of rights. Values often used in this regard include a limitation necessary in a free and democratic society, a proportionate limitation or a limitation in accordance with the principles of fundamental justice.

## Responsibilities

263. Many stakeholders discussed including responsibilities within a bill of rights. At the religious and cultural stakeholder event participants suggested that a preamble should include a *'three-legged stool'* referring to rights, responsibilities and relationships. In oral evidence to the Committee Karen Jardine of the Presbyterian Church in Ireland highlighted the African concept of *'Ubuntu'* as having resonance in this regard. Albie Sachs discussed *Ubuntu* with the Committee:

*It is very strong in African culture. Basically, it says that, "I am a person because you are a person. I strengthen my humanity if I acknowledge your humanity." It is a theme of interdependence.*

*...I mention it because the concept of Ubuntu helps to reconcile the individual rights of autonomy —personal autonomy and individuality — with the collective rights of the community. Instead of being hostile, those rights are seen as mutually supportive.*

264. Les Allamby from the NIHRC also referred to the role of a bill of rights in educating people about their responsibilities:

*It is potentially part of a wider educative process and a tool for all of us in society to understand more effectively our rights and responsibilities and what is expected of us and the role that we play.*

265. The Committee heard that it is very rare for a bill of rights or constitution to include duties, but that it is more common to find them in preambles. Dr David Kenny noted that duties may be better suited to a preamble, where they will not have legal effect.

## Rights

266. There were mixed views among respondents to the Committee's survey in relation to whether everyone in Northern Ireland enjoys the same basic human rights. A majority (61%) of respondents disagreed that everyone enjoys the same basic rights while 30% agreed. The following groups were among those more likely to disagree that everyone enjoys the same human rights:

- **Women** (66% of women disagreed compared to 54% of men);
- **Younger people** (64% of those aged under 35 disagreed compared to 55% of those aged 55+);
- **Catholics** (69% disagreed compared to 65% of respondents who recorded no religion and 52% of Protestants);
- **LGBTQ+ respondents** (71% disagreed compared to 60% who identified as heterosexual).

267. Those who thought that everyone enjoys the same human rights tended to note that everyone is equal or that existing legislation is adequate. Those who disagreed with this statement most often referred to inequality and discrimination (51% of respondents) and abortion (in terms of the right to life) (30%).

268. Sectarianism was noted by 7% of respondents, with those who stated this from both Catholic and Protestant backgrounds feeling that they were treated '*like second-class citizens*'. Other issues included criticism of particular political parties, Irish language rights and legacy issues, as well as the limitation of certain rights during the pandemic.

“The existing legislation is adequate”. (Survey respondent)

“I strongly disagree because unborn babies do not enjoy the most basic human rights - the right to life”. (Survey respondent)

“It is not the case that everyone is able to enjoy their rights to the same extent. Disability, poverty and discrimination can prevent the realisation and enjoyment of rights”. (Survey respondent)

269. The majority of the children and young people who took part in the focus groups felt that many groups in Northern Ireland are not treated fairly and equally.

270. In terms of protections for human rights, Figure 2 below highlights the key areas where respondents thought people in Northern Ireland need more protection for their human rights.

**Figure 2 (below) shows the key areas where respondents thought people in NI need more protection for their human rights. More information can be found in paragraphs 270 to 274.**

Disability: 55%
Age: 47%
Religion or belief: 46%
Cultural background: 42%
Ethnic group: 42%

271. Disability was the most frequent answer listed for most respondents, including across both men and women; respondents of all age groups; Protestants, Catholics and those with no religion; by both Nationalists and Unionists; by those with and without dependants; and by those with a disability and those without.

272. The only exceptions to this were among those who identified as LGBTQ+, who were most likely to state that people need greater protection in relation to sexual orientation, followed by ethnic group, gender, then disability; and by those who

identified as Black, Asian and Minority Ethnic, who were most likely to choose ethnic group, followed by disability.

273. Further areas where respondents thought people here need greater protections were; pregnancy and maternity (41%); caring responsibilities (41%); economic status or income (39%); sexual orientation (38%); gender (36%); community background (36%), national identity (36%); and health status (35%).
274. The children and young people who took part in the focus groups most commonly referred to Black, Asian and Minority Ethnic groups, LGBTQ+ groups and people with a disability as needing more protection for their human rights, followed by older people, people with mental health issues and people from various religious backgrounds.

## **Civil and political rights**

275. Civil and political rights focus on making sure that people are free to live, act and express themselves as freely as possible. Examples of civil and political rights include freedom from discrimination; the right to a private life; freedom of expression, assembly, religion and movement; and the right to a fair trial.
276. Of respondents to the Committee's survey, 88% thought that a bill of rights should include civil and political rights. There were differences between some groups of respondents, as illustrated in Table 2 overleaf.

**Table 2 displays the proportion of respondents who agreed that a bill of rights should include civil and political rights by gender, age and political opinion. More information can be found at paragraphs 275 to 282.**

Category	Respondents	Proportion agreed
Gender	Female	91%
Gender	Male	88%
Age	Under 35	93%
Age	35-54	90%
Age	55+	87%
Political opinion	Nationalists	95%
Political opinion	Other	90%
Political opinion	Unionists	85%

277. Survey respondents, participants in the stakeholder events and those who provided written submissions highlighted a broad range of civil and political rights for inclusion within a bill of rights. These included rights within the ECHR such as freedom of expression; freedom of thought, conscience and religion; and the right to a fair trial. Other issues included voting age, access to justice, abortion, freedom from discrimination, identity rights and marriage rights.

“Replication of the ECHR in a Bill of Rights alongside the incorporation of the provision of other relevant standards from International law e.g. UN Convention on Rights of the Child, UN Convention on Rights of Persons with Disabilities.” (Survey respondent)

“Many persons struggle to access justice or to navigate the justice system... a Bill of Rights should explicitly protect the right to an effective remedy.” (Survey respondent)

“Freedom of worship and freedom of assembly. This must include freedom for churches and religious organisations to operate without being compelled to act against their religious beliefs.” (Survey respondent)

278. The Transitional Justice Institute of Ulster University recommended that a bill of rights should include a strong and comprehensive equality and non-discrimination clause, noting that this is a cross-cutting right that applies across all categories of rights.
279. Participants in the focus groups with children and young people most commonly mentioned the right to feel safe and protections from discrimination for groups such as Black, Asian and Minority Ethnic and LGBTQ+ communities, as well as rights including freedom of expression, freedom of religion and freedom of cultural expression.

“I feel it was difficult to be Asian in this pandemic – I know some people said because COVID started in China – they made a lot of racist comments.” (Children and young people focus group participant)

Northern Ireland is made up of many different groups – they should all be protected like young people, the elderly, LGBTQ and the right to be religious.” (Children and young people focus group participant)

280. In her submission to the Committee Dr Katie Boyle noted that the ECHR is largely a civil and political rights instrument, and does not reflect the full body of international human rights law the UK has agreed to be bound by.
281. Baroness Kennedy stressed the importance of the right for individuals born in Northern Ireland *‘to identify themselves and be accepted as Irish or British citizens, or both, as they may so choose’* as provided for in the Belfast Agreement/ Good Friday Agreement. This provision frames national identity in terms of citizenship, rather than guaranteeing equality of treatment. Therefore, she argued for this equality of treatment to be reflected in a bill of rights. Many other stakeholders also highlighted identity rights.

282. She also asserted that a bill of rights for Northern Ireland should contain a special provision to ensure no one is compelled to take an oath in a manner that is contrary to their religion or belief or that requires them to express a belief that they do not hold.

## **Economic, social and cultural rights**

283. One of the key issues in the debate around a bill of rights for Northern Ireland relates to whether it should include economic, social and cultural rights.

284. Economic, social and cultural rights focus on promoting and protecting people's development and livelihood. They relate to the workplace, social security, family life, participation in cultural life, and access to housing, food, water, healthcare and education. By way of example, they could include language rights, a right to education and a right to an adequate standard of housing.<sup>37</sup>

285. Dr Katie Boyle said that incorporating economic, social and cultural rights would give individuals better access to rights directly relating to their conditions of living. This could also ensure that vulnerable and marginalised groups, including children and older people, receive protections, and it could also reduce the causes and consequences of poverty.

286. The Committee's call for evidence demonstrated high levels of support for economic, social and cultural rights to be included within a bill of rights. A total of 82% of respondents agreed that it should include economic, social and cultural rights. There were differences between some groups of respondents, as illustrated in Table 3 overleaf.

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<sup>37</sup> Social, economic and cultural rights are defined by the Office of the High Commissioner for Human Rights as "those human rights relating to the workplace, social security, family life, participation in cultural life, and access to housing, food, water, health care and education."<sup>37</sup>

**Table 3 illustrates the proportion of respondents who agreed that a bill of rights should include economic, social and cultural rights by gender, age and political opinion. More information is at paragraphs 286 to 294.**

Category	Respondents	Proportion agreed
Gender	Female	88%
Gender	Male	80%
Age	Under 35	90%
Age	35-54	87%
Age	55+	81%
Political opinion	Nationalists	93%
Political opinion	Other	88%
Political opinion	Unionists	76%

287. Stakeholders who took part in the Committee's call for evidence frequently called for economic, social and cultural rights, such as the right to housing, healthcare and education and workers' rights, to be included within a bill of rights. Other commonly mentioned economic and social rights included the right to social security; digital inclusion and access and an adequate standard of living.
288. Healthcare rights were among the most commonly mentioned rights, often in terms of ensuring healthcare is accessible to everyone, that there is adequate access to care for mental health, and ensuring the right to access appropriate care at the end of life. For example, the Royal College of Psychiatrists, while taking no position on the merits of a bill of rights, said that if a bill of rights is created:

*...we would seek the inclusion of those with a mental health condition/s and/ or learning disability as having an inalienable right to high quality, sustainable healthcare, to the full range of disability rights and to the full range of appropriate support in accessing said healthcare and rights, as is afforded to, and as is the equal inalienable right of those with physical health conditions.*

289. Among the rights most commonly cited for inclusion by participants in the focus groups for children and young people were the right to healthcare and the rights to a house and good food.

“Every child should have enough food. The government should ensure this. It should not be up to celebrities like Marcus Rashford”. (Children and young people focus group participant)

“I think more protection is needed in terms of property rights and housing. I have experienced delays in accessing these rights and that has impacted negatively upon my family. We live in a property with limited space that does not comply with guidelines on housing conditions”. (Survey respondent)

“Over the past number of years, even before the pandemic struck, the health and inequalities across our community were getting wider and wider in particular areas. I think it is very important that a bill of rights puts in place some mechanism that will counteract the growing inequalities in access to good healthcare”. (People with a physical disability and carers stakeholder event)

290. The potential role of economic and social rights in peacebuilding was highlighted by Dr Amanda Cahill-Ripley who said that the focus tends to be on civil and political rights, with less focus on economic, social and cultural rights. She suggested that these rights are important for peacebuilding, and can act as a first step towards deeper social and cultural change for peace, for the following reasons:

- The denial of economic and social rights can be a causal factor of conflict;
- Conflict itself can cause breaches of economic, social and cultural rights (ESCRs) or exacerbate existing inequalities;

- Real or perceived discrimination in access to services such as housing, healthcare or social security can damage prospects for lasting peace and reconciliation;
- Positive peace (not just the absence of direct violence but the absence of structural violence) requires long-term, persistent, social, economic and cultural changes if peace is to be sustainable.

291. In line with this, a submission by Professor Rory O’Connell (Ulster University), Professor Fionnuala Ní Aoláin (Queen’s University Belfast and Minnesota) and Dr Lina Malagón (Ulster University) identified among the causes of the conflict in Northern Ireland *“violations of a wide range of civil, cultural, economic, political and social rights. These included structural problems and inequalities with housing rights, employment rights and cultural rights”*.

292. Dominic Grieve QC emphasised that it was for the Committee to make decisions in relation to the types of rights to include within a bill of rights. Nonetheless, he expressed concerns about enacting rights that are heavily dependent on the socio-economic climate. He gave the example of healthcare rights, noting that in economic crises it might be difficult to provide certain things. He commented that the NIHRC proposals understood this, and set out that it should be within the bounds of what was socio-economically possible.

*The question that then arises is this: who decides what is socio-economically possible? Is it the Assembly, or Parliament in the United Kingdom?*

*...Ultimately, the buck stops with you. Or will you end up in a situation where a judge sitting in the High Court in Belfast says, "The Assembly Government are under an obligation to do x, y and z because, otherwise, they're in breach"? That may cost millions of pounds. If the millions of pounds are not available, how do you strike the balance between that and spending the millions on something else? Those are the issues.*

293. The Equality Coalition argued that economic, social and cultural rights are operating in many other jurisdictions successfully. It also noted that the UK has committed to such rights as a matter of international law.
294. Professor Christopher McCrudden said that in the context of an international understanding about rights, it would be strange not to include economic and social rights, particularly because the distinction between these rights and civil and political rights *'is wafer-thin, if it is there at all'*.

## **Progressive realisation**

295. The concept of progressive realisation is common within international human rights treaties and obliges the state to take measures towards the full realisation of economic, social and cultural rights to the maximum of its available resources.<sup>38</sup>
296. Specifically, it obliges the state to take immediate and constant action in working towards the full realisation of rights. A lack of resources does not justify inaction in this regard, and states need to demonstrate that they are making every effort to improve the enjoyment of such rights, even when resources are limited. There is also the concept of 'no retrogression', which means that the state cannot normally regress on rights, except in very specific circumstances.
297. Dr Katie Boyle highlighted that some rights have a minimum core, while others have a greater degree of progressive realisation. As such, implementing economic, social and cultural rights does not mean immediately granting everyone the right to the highest attainable standard of health, for example.
298. Professor Kate O'Regan said that when cases come before the Constitutional Court, the Court must consider whether the state has taken reasonable legislative and other measures within its available resources to achieve the progressive realisation of the rights.

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<sup>38</sup> Office of the United Nations High Commissioner for Human Rights (2008) *Frequently Asked Questions on Economic, Social and Cultural Rights* Geneva: United Nations

299. Professor O'Regan provided the example of *Soobramoney v Minister of Health, KwaZulu-Natal*. Mr Soobramoney required renal dialysis but had been refused treatment due to resource shortages. The Court held that although the state has an obligation to provide healthcare within available resources, the Department of Health did not have sufficient funding, and providing dialysis for all who need it would prejudice other state obligations. Mr Soobramoney died a few days after the judgment.
300. She also noted a successful case taken in respect of the provision of antiretroviral medication to prevent mother-to-child transmission of HIV/AIDS. The manufacturer said that it would make the medication freely available for a number of years, but the South African Government said it would only use it in two clinics in each province. The Court struck down the Government's policy and ruled that every clinic should provide it.
301. Professor O'Regan said that these two cases illustrate how the reasonableness test works in practice in South Africa. She noted that the cases can be very tragic, but that the test provides an important constraint on the government to prevent it from adopting policies that do not recognise people's right of access to healthcare.
302. Dr Katie Boyle discussed the concept of progressive realisation within the context of the consociational model in Northern Ireland. She said this could present new challenges, and that political leadership would be required to build consensus, and that a bill of rights could provide a decision-making framework.
303. The NIHRC's advice of 2008 recommended that Departments with responsibility for realising socio-economic rights in health, education or housing for example, should report to the Assembly annually and be held accountable for progressive realisation. The aim was to maintain the current separation of powers, so that the legislature, rather than the courts, could fully scrutinise the progressive realisation of the rights.

## Rights for particular groups

304. Many organisations, particularly from civil society, made a case to the Committee for the inclusion of rights for particular groups. These are explored more fully in the subsequent paragraphs.
305. However, some stakeholders were concerned that naming specific groups within a bill of rights could be divisive and may entrench division. The NIHRC cautioned that a bill of rights should not conform to the ‘*wish list*’ of the Commission, civil society, political parties or anybody else, as that is not what a bill of rights is designed to do.
306. The Very Rev Timothy Bartlett said that one of the issues that arose within the Bill of Rights Forum was that many people sought to have their issues resolved through a bill of rights, suggesting that a key issue in considering such a bill was to give adequate consideration of its limitations.
307. Former Justice of the Constitutional Court of South Africa, Albie Sachs, discussed how apartheid was based on rights for groups, rather than rights for individual people, and that South Africa’s bill of rights wanted to move away from the group approach:

*We wanted a universal franchise and equal rights for everybody... What we did not like about group rights was that they were not collective in nature.*

*...It is not a view that is hostile to looking at rights in a collective way. It is seen as getting the correct balance between individual autonomy on one hand and the fact that you develop your autonomy in a collective setting through schooling, community, neighbourhood, language, associations, literature, music, and all sorts of ways.*

308. Some witnesses, such as Robin Wilson, noted that human rights conventions are framed in individualist terms and this presents a tension in relation to group rights. For example, it presents a challenge for *locus standi* or standing (the right to appear in a court on a given question). He questioned who would present themselves as the voice of one or other community, and how their status would be adjudicated.

309. Much of the Committee’s evidence from stakeholders highlighted the importance of various identities, traditions and diversities in Northern Ireland, with many calling for additional protection for vulnerable groups. David Kenny suggested that this *‘lays bare the contradictions at the heart of rights discourse’*, in that it involves the language of universalism and individualism, but many entitlements are linked to groups, community and group identity, rather than being individual or universal. He proposed three broad approaches to dealing with this issue, illustrated in Table 4.

**Table 4 highlights various approaches to group-based rights and the potential implications of these approaches**

Approach	Potential implications
<b>Avoid group-based entitlements</b> (formulate rights individualistically)	<ul style="list-style-type: none"> <li>• <b>May not encapsulate</b> the nature of the entitlements if concerned with both individuals and groups</li> </ul>
<b>List particular groups</b>	<ul style="list-style-type: none"> <li>• Categories listed <b>may become less relevant</b> over time</li> <li>• <b>New categories</b> may become apparent</li> <li>• Bills of rights are not easily amended</li> <li>• Could be interpreted as excluding those not listed, <b>preventing the protection of other groups</b> by implication</li> </ul>
<b>Protect broader categories</b>	<ul style="list-style-type: none"> <li>• For example, this could involve <b>protecting those who are vulnerable in society</b>, or protecting rights that are particularly relevant to categories of concern</li> <li>• This would <b>allow the application of rights to develop</b> over time</li> <li>• Would be <b>easier to augment or change</b></li> </ul>

### **Ensuring a bill of rights stands the test of time**

310. The NIHRC cautioned that if a bill of rights is overly prescriptive, it may not be able to evolve over time. It emphasised that the Committee should be mindful of the future in its deliberations, as bills of rights tend to have constitutional standing and amendments are the exception, rather than the norm. Consequently, bills of rights around the world tend to include provisions in quite general terms, covering the

right to health, education and so on, and tend to be complemented with strong anti-discrimination clauses.

311. A number of other witnesses, including Professor Colin Harvey and Professor Dominic Bryan also noted that bills of rights shouldn't be overly prescriptive. Professor Bryan noted that aspects such as cultural identity change over time, so a bill of rights shouldn't go into specific areas of cultural identity, although he thought it was important for cultural identity to have a legislative underpinning.

“Introducing human rights based on characteristics or groups that people define themselves as belonging to has a divisive impact. Such an approach means that the narrow interests of particular groups are pitted against one another rather than looking for the common good of society as a whole”. (Survey respondent)

## Children's rights

312. The children and young people who gave evidence to the Committee from the NI Youth Forum and the NICCY Youth Panel unanimously called for a bill of rights to incorporate the UN Convention on the Rights of the Child. Naomi Sloan of the NI Youth Forum discussed her family's difficulties in securing the necessary support to realise a right to education.

*If the UNCRC was in place, if I have a disability and require specialist care needs, those would have to be met. It would also be legally binding on the school, so they could not say, “Naomi, your classroom assistant did not show, so you have to go home now”.*

313. A number of witnesses and stakeholders, including the Northern Ireland Commissioner for Children and Young People and the Children's Law Centre, asserted that children's rights should form a core element of a bill of rights and incorporate the UNCRC.
314. The Children's Law Centre said that the rights of children here receive limited protection and a bill of rights could provide a framework to guard against the erosion

of children's rights; could help inform decisions made by Members about children; and would remedy a '*flawed system*' whereby children's rights need to be protected on a case-by-case basis.

*A Bill of Rights should reflect that children need protection. They need to be recognised as a group. Children are not 'mini-adults'. Individually and collectively children have needs distinct from and in addition to adults. A recognition of this needs to be included in a Bill of Rights.*

315. Baroness Kennedy emphasised the importance of historical context. Stating that there is a trans-generational impact and continuing legacy of the conflict, she recommended that children's rights should be reflected in a bill of rights to afford children here additional protection.
316. The NIHRC commented that its 2008 advice involved a general set of proposals, with the only exception being specific rights for children. The rationale was that children's rights are distinct from all other claimants as they have a degree of '*horizontal application*', in that responsibility for them sits considerably with parents or guardians: not just the state.

## **Rights of persons with disabilities and carers**

317. As previously noted, among respondents to the survey, people with disabilities were most frequently thought to require greater protections for their human rights. Tony O'Reilly of the Northwest Forum of People with Disabilities said that a bill of rights could address perceived deficits in equality legislation, and said that people with disabilities are not viewed within a human rights context, but rather as 'people with special needs'.

*First, it is about recognising that disabled people are human beings who are entitled to human rights and that their issues must be understood in the context of human rights, not within the context of resources; not within the context of unmet need; not within the context of being a burden on society; and not within the context that disabled people are always whingeing, demanding or moaning about something. We are demanding basic human rights, the same rights as everyone else has.*

318. He discussed the impact that seeking social security through the Personal Independence Payment had had on many people with a disability, stating that the process was often ‘*degrading and unlawful*’, with ‘*interrogation*’ lasting for hours in some cases. He said that this has had serious mental health implications for many people.

319. Naomi Sloan of the Northern Ireland Youth Forum discussed her lived experience of disability, stating that accessing special care to enable participation in education (Article 23 of the United Nations Convention on the Rights of the Child) is a ‘postcode lottery’.

*I would love to live in a world where everyone is accepted as they are and we all have the same level of rights. However, I can tell you that, growing up as a disabled young person, that is not the truth... We are made to feel like a burden... if my classroom assistant was ill, I was sent home and denied my right to education.*

320. The Committee was advised that the Additional Learning Needs and Education Tribunal (Wales) Act 2018 requires authorities to have due regard to the UNCRC and to the UN Convention on the Rights Persons with Disabilities.

321. Participants in the stakeholder events for people with disabilities and carers often highlighted equality and freedom from discrimination as a key right. They also called for rights around social security, accessibility, identity, healthcare, marriage, and the right to a family life.

“The right to equality: people should not be judged on who they identify as or what their abilities are.” (People with a learning disability stakeholder event participant)

“People with disabilities should be able to access social security as a right and not feel a loss of dignity with doing it”. (People with a physical disability and carers stakeholder event participant)

322. Stakeholders such as Carers NI highlighted a number of key rights in relation to carers for those who are ill, for older people and for those with a disability, including rights to:

- **family life:** as many carers are unable to have a life outside caring;
- **an adequate standard of living and social security:** in light of the significant financial implications often involved in caring;
- **work:** as many carers have to leave work as a result of their caring role;
- **education:** for young carers in particular;
- **health:** including mental health; and
- **participation in decision-making.**

## **Victims' rights**

323. Baroness Helena Kennedy QC stated that the right of victims to remember as well as to contribute to a changed society is included in the Belfast Agreement/ Good Friday Agreement. She quoted the 2008 advice of the NIHRC which recommended that:

*...legislation must be enacted to recognise all the victims of the Northern Ireland conflict and to ensure that their rights are protected. These rights include rights to redress and to appropriate material, medical, psychological and social assistance.<sup>39</sup>*

324. The former Lord Chief Justice, the Rt Hon Sir Declan Morgan, highlighted the Victim Charter which was placed on a statutory footing in 2015. This sets out extensive rights in relation to victims in terms of information; taking their views into account; ensuring communication, consideration and explanation in relation to decisions to

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<sup>39</sup> Northern Ireland Human Rights Commission (2008) *A Bill of Rights for Northern Ireland Advice to the Secretary of State for Northern Ireland* Belfast: Northern Ireland Human Rights Commission, p. 43

prosecute, and various measures to be taken when the case goes to court and at trial.

325. Professor Brice Dickson noted the view of the then Labour government in 2009 that additional protections reflecting the ‘particular circumstances’ of Northern Ireland should be for victims and the legacy of the conflict, among others. Rev Dr David Clements commented:

*It can be argued that those who suffered most from the Troubles have not been as fairly or generously dealt with, given that they are missing out on justice and are losing support. I have lots of friends in the WAVE Trauma Centre who are also in the WAVE injured group. Some are in wheelchairs and so on. For almost ten years, they have campaigned endlessly... That might be a good illustration to explore to see whether progress can be made on people's specific rights as they relate to the Northern Ireland situation.*

326. Sir John Gillen set out the benefits and disadvantages of a bill of rights for victims/complainants of serious sexual offences. He thought that a bill of rights could provide a useful supplement to the ECHR relevant to Northern Ireland, and that this could be part of a wider educative, societal and cultural process providing a tool for all citizens to understand their rights and responsibilities.

327. However, he urged that it must have sufficient granularity and questioned whether victims’ rights could best be protected through a bill of rights or through ‘*specific, tight and detailed legislation*’, for example, introducing the Victim Charter and the UNCRC into law.

328. Niall Murphy of KRW Law said that the legacy provisions of a bill of rights would have ensured the codified incorporation of Article 2 (right to life) requirements for independent investigations into unresolved deaths.

329. Professor Louise Mallinder of Queen’s University Belfast provided a written submission exploring victims’ rights under international law. Her key points included:

- Victims' rights form part of NI's 'particular circumstances';
- International human rights law holds that individuals should be recognised as victims on the basis of the harm they experienced, including through being the subject of violence, by intervening to protect others, or by being a family member of a direct victim;
- International human rights law requires that states analyse challenges victims may have in engaging with legal and administrative processes;
- Victims of crime should have rights to access justice, restitution and compensation. Victims of human rights violations should also have rights to rehabilitation, satisfaction (including the right to the truth) and the guarantees of non-repetition.

330. Rights to dignity and participation, and to an effective remedy, are not included within the Human Rights Act 1998 (although UK courts have followed case law from the European Court of Human Rights on the procedural obligations arising from violations of the right to life).

331. As such, Professor Mallinder notes that their inclusion within a bill of rights would provide '*supplementary protections*' in line with the Belfast Agreement/ Good Friday Agreement. She suggests that enhanced recognition of victims' rights:

*...would demonstrate Northern Ireland's respect for and solidarity with victims, provide safeguards to ensure that victims are able to engage with mechanisms to address their needs with an enhanced sense of safety and security, and should lead to greater compliance with the UK's obligations to fulfil victims' rights to access to justice, truth and reparation, which have all too often been delayed.*

## **Women's rights**

332. The Northern Ireland Women's European Platform said that while current legislation '*complies with the broad aim to prohibit discrimination*', women and girls are not able to enjoy their human rights as a result of a number of barriers. It

recommended that equality law should be *'harmonised and simplified to address significant inconsistencies and anomalies'*.

333. Women who attended the Committee's stakeholder event discussed issues including access to abortion, healthcare, welfare reform, freedom from discrimination and harassment and the COVID-19 pandemic. They also focused on rights in relation to welfare reform, poverty, a living wage and housing, and called for the full implementation of CEDAW.
334. In his evidence to the Committee, Albie Sachs commented that South Africa's Bill of Rights does not include specific women's rights, but has a *gender-sensitive approach to all its elements*.

## **Language rights**

335. The Committee heard that the Canadian Charter of Rights and Freedoms includes minority language education rights and rights in respect of the use of French and English in federal institutions and in the province of New Brunswick.
336. South Africa's Bill of Rights includes a clause that protects the right of everyone to use the language and participate in the cultural life of their choice but asserts also that no one exercising these rights may do so in a manner inconsistent with any provision in the Bill of Rights.
337. Albie Sachs, in his evidence to the Committee on 1 October 2020 discussed the approach in South Africa to language rights.

*...united in our diversity, that tension runs right through our constitutional structure. Our first objective was to bring the country together from the divisions of apartheid, the Bantustans, separate areas, segregation and group areas. We had to have a united country, so unity comes before diversity.*

*Diversity was apartheid and separateness. However, it is unity not through compelling everybody to subordinate themselves to a single theme or stream into which they have to assimilate; it is unity across*

*difference, a unity that allows for a multiplicity of political views, languages, religions and beliefs. That is strongly expressed in our Bill of Rights.*

338. Conradh na Gaeilge said that, ‘as a *minimum*’, a bill of rights should incorporate the full provisions of the European Charter for Regional or Minority Languages, as well as recommendations from COMEX, the Committee of Experts, the Council of Europe oversight body that monitors implementation of the Charter. They commented that this would confer a number of benefits, including removing language from political decision-making.
339. Niall Murphy commented that while many language rights campaigners have criticised the NIHRC’s 2008 advice for not going far enough in terms of language protections, its recommendations around the European Charter for Regional or Minority Languages would have provided some protection.

## **LGBTQ+ rights**

340. A number of witnesses raised concerns in relation to existing rights protections for LGBTQ+ individuals and communities, including in respect of socio-economic rights such as rights to healthcare and housing.
341. Alexa Moore of Transgender NI said that a ‘patchwork’ of equality legislation meant that there were gaps, including that sex discrimination legislation does not apply in schools. She believed a bill of rights could help address the gaps.

*Trans people will absolutely benefit from just having a bill of rights. Certain minority and marginalised communities need to be named in a bill of rights just to ensure that it applies to all people without exception. The rights are all the same. It must be clear that we all have the same rights and that they must apply unequivocally to all those different groups.*

342. Many stakeholders referred to the right to freedom from discrimination. For example, Danielle Roberts of HERe NI said that 21% of LGBTQ+ workers believe that their sexual orientation or gender identity will have a negative impact on their

career progression. Stakeholders also particularly highlighted the right to a private life.

“The right to freedom from discrimination and the right to live your life freely should be included”. (LGBTQ+ stakeholder event participant)

“The right for trans people to be recognised as their gender without discrimination. The right for trans people to access gender-affirming healthcare”. (Survey respondent)

### **Rights of Black, Asian and Minority Ethnic communities**

343. Participants in the Committee’s stakeholder event with Black, Asian and Minority Ethnic communities discussed a wide range of rights, often in the context of racial discrimination; such as housing rights, the right to vote, the right to education, the right to a fair trial and cultural rights.

“It should enshrine rights for those from minority, racial and faith communities, not just contextualise rights as an orange and green sectarian issue”. (Black, Asian and minority ethnic stakeholder event participant)

“The right to enjoy culture: if you don’t have that it leads to mental health issues”. (Black, Asian and minority ethnic stakeholder event participant)

“The right to multiple identities especially here in Northern Ireland. You can be Irish/British but you cannot be Irish/British/Kenyan”. (Black, Asian and minority ethnic stakeholder event participant)

344. The Migrant and Minority Ethnic (MME) Council believes that a bill of rights provides ‘an invaluable opportunity to look beyond the binary’ and ensure that everyone’s voices are heard. It urged the Committee to adopt more a more inclusive and open

approach to rights and safeguards for everyone, including Black, Asian and Minority Ethnic communities, migrants, refugees, asylum seekers and other newcomers. It particularly highlighted:

- **Inclusive service provision:** noting gaps;
- **Representation and data transparency:** stating that MME communities are underrepresented in public organisations;
- **Education for diversity:** highlighting a need to address social exclusion, negative stereotyping and educational attainment of MME communities;
- **Health:** highlighting inequalities in health outcomes for different groups; and
- **The justice system:** in relation to hate crime and structural discrimination.

## Rights of refugees and asylum seekers

345. A number of witnesses and stakeholders suggested that refugees and asylum seekers require additional rights protections in Northern Ireland.

346. Saira Khan of the Northern Ireland Youth Forum noted a number of issues that young asylum seekers face. These include inadequate legal representation; challenges in accessing third-level education with just four scholarships available in Northern Ireland (asylum seekers are charged fees as international students and are unable to access student loans); and discrimination.

Although it is the law that hate crime is still a crime, I feel that people in authority put it on the back burner. The police do not really treat it as a serious offence.

...We have come from countries where we were used to violence and feeling in danger. We have come to a country seeking help

and asylum, and we want to feel protected and safe. Instead, we are having experiences that are completely new but still abusive. I do not feel that that is taken seriously enough.

“We would like to see some clarity on the rights of refugees and ethnic minorities. We would like to see their rights implemented and that they are not discriminated against”. (Women’s stakeholder event participant)

## Religious and cultural rights

347. Many of the participants at the Committee’s stakeholder event for religious and cultural groups expressed concerns about how competing rights would be managed, and noted concern about how Christian values are viewed in today’s secular society, with some feeling marginalised. Many thought that the right to freedom of speech and freedom of religion should feature within a bill of rights. A number of participants also called for a bill of rights to include the right to life for unborn children.

“We need to embrace all faiths going forward” (Religious and cultural stakeholder event participant)

“From a Christian point of view there is a concern that much of the agenda is driven by a secular mind-set. That’s a fundamental concern I think many of us would share and because of that I think there is a slight reticence to encourage a further growth of what we might see as something not entirely in tune with a faith view of life.” (Religious and cultural stakeholder event participant)

“We should have the right to express Christian views in society. It is enshrined in Section 75 that religious groups should be protected; I haven’t always felt that that is the case in a secular society.” (Religious and cultural stakeholder event participant)

## Environmental rights

348. Environmental rights focus on ensuring access to a clean, healthy, and safe environment.
349. Environmental rights attracted strong support for inclusion within a bill of rights among respondents to the Committee’s survey and participants in its stakeholder events. A total of 86% of respondents agreed that they should be included. Table 5 below illustrates responses in relation to environmental rights by gender, age and political opinion.

**Table 5 sets out the proportion of respondents who agreed that a bill of rights should include environmental rights. It is broken down by gender, age and political opinion**

Category	Respondents	Proportion agreed
Gender	Female	92%
Gender	Male	85%
Age	Under 35	89%
Age	35-54	88%
Age	55+	81%
Political opinion	Nationalists	92%
Political opinion	Other	90%
Political opinion	Unionists	82%

350. The children and young people who participated in the focus groups and stakeholder event also showed strong support for environmental rights. This was supported by evidence from the NI Youth Forum, who noted the importance of environmental rights for young people, highlighting the link between environmental rights and health made by the UN Committee on the Rights of the Child.

*...the reduction of air pollution is referenced in relation to children’s health. Again, you could argue about the right to life. Air and water pollution are particularly bad here. Children grow up in inner-city areas with air pollution, and that is not spoken about.*

351. Professor Tobias Lock advised that Scotland is considering enacting environmental rights. He said that the right to a healthy environment would require government to mainstream environmental issues or concerns, checking all legislation for compliance, with particular regard to pre-legislative scrutiny.

“Environmental rights are much more fundamental than just having somewhere to go that is nice. Access to clean air, to clean water, to safe food, to a functioning climate system would be the basic minimum requirements when considering any environmental rights”. (Human Rights Consortium stakeholder event participant)

352. RSPB NI said that any bill of rights should cover areas such as the Aarhus Convention, including rights of access to environmental information, public participation in environmental decision-making and access to justice on environmental matters. The Gathering, a grass-roots collective of over 50 community-based environmental campaigns, said:

*Human Rights and Natures Rights (and rights of communities) are interlinked as the climate emergency is showing us. Each will be stronger by recognition of the other and will help us all to find a new way of living that nurtures (not destroys) all our life support systems.*

353. The Committee was unable to agree which rights should be included within a bill of rights due to the absence of a panel of experts and the content of the DUP party position paper.

## **Justiciability and enforcement of rights**

354. The Committee heard a range of evidence in relation to the justiciability and enforcement of rights, including in respect of: the separation of constitutional powers; the justiciability of economic, social and cultural rights; enforcement mechanisms; and the role of the courts in providing an accountability check for government.

## **Relationship between parliament, executive and the courts**

355. A number of witnesses considered the role of a bill in rights in relation to the relationship between parliament, the executive and the courts. Professor Monica McWilliams and Les Allamby said that it is a myth that a bill of rights displaces the Executive's power by giving the courts too much say in policy decisions, referring to the implementation of the Human Rights Act since 1998. Les Allamby commented:

*We see a bill of rights sitting perfectly comfortably in the UK's tripartite constitutional approach of executive, judiciary and legislature.*

356. Sir John Gillen commented that the legislature '*should have nothing to fear from the judiciary*', as its role is to interpret the legislation and apply the law as it is.

## **The justiciability of economic, social and cultural rights**

357. The then Lord Chief Justice, the Rt Hon Sir Declan Morgan, noted that matters relating to the allocation of the Executive's budget are not justiciable. He noted that the right to work, the right to housing and the right to health are not justiciable of themselves. Instead it is their underpinning that becomes justiciable, because they should create political rather than judicial obligations.

*Judges are not there to decide how the Budget should be split up and how the Executive's resources should be applied among competing priorities. That is not our function, and we should not be asked to do it, and if we are asked to do it, we should decline. That is what non-justiciability is about. Were something of that sort put in front of us, the likelihood is that we would find it non-justiciable, because it is a political rather than a judicial matter.*

358. The principle of non-justiciability was also highlighted by Peter Coll QC, on behalf of the Bar Council of Northern Ireland, who referred to the range of case law that highlights that it is not the function of the courts to take decisions on questions pertaining to the executive's budgetary arrangements and competing priorities. He cited Sir John Gillen's judgment in the case of *The Department of Justice v Bell*

*(Patricia) and Police Ombudsman for Northern Ireland*<sup>40</sup> in which Sir John supported a number of principles in distinguishing between decisions for the executive and the courts.

359. Dominic Grieve QC highlighted concerns around decision-making in relation to the progressive realisation of socio-economic rights. He cautioned against symbolic laws, noting that judges will be reluctant to have to rule on what appear to be aspirations:

*Say that, aspirationally; people should try to spend the maximum possible to reduce poverty. What does that mean in practice, if, for example, you are facing a massive economic crisis and you decide that you are going to peg or reduce the level of benefit support? Will the decision on that be made by a judge or by politicians who are answerable to the electorate at elections? Those are profound issues, to which there are, in truth, no easy answers. You can see why opinion gets polarised.*

360. Sir Stephen Irwin questioned whether judges are equipped to make ‘*such broad policy decisions*’ in relation to economic and social rights, and whether it would be appropriate for them to adjudicate on the allocation of state resources.

361. In his evidence Professor Tobias Lock discussed the thinking in Scotland around the justiciability and enforcement of economic, social and cultural rights. Measures would be put into place to keep judicial review to a minimum, with a sunrise clause so that judicial review would only be available after five years.

*Going to court for a judicial review is a costly and alienating process for most, unless you are a lawyer, and it should be the very last resort... what we are calling for is a real paradigm shift in law making and in policy formulation on the part of the Government.*

*You need to mainstream human rights-based decision-making. That has to happen at the policy stage, before Bills are brought to any Parliament or to the Assembly.*

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<sup>40</sup> [2017] NICA 69

362. In relation to the experience of South Africa, Professor Kate O'Regan noted that when cases come before the Constitutional Court, it must consider whether the state has taken reasonable legislative and other measures within its available resources to achieve the progressive realisation of the rights.
363. Professor O'Regan highlighted the view of the Constitutional Court of South Africa that the concept of the 'minimum core' (or minimum content) of a right that is subject to progressive realisation is for the state to decide. However, if the Court deems that a political discussion has led to a minimum core that is not reasonable, it may say so.
364. Dr Katie Boyle explained that a minimum core is about recognising the social minimum below which no one should fall, for example, that no one should live without adequate shelter or food.
365. Professor O'Regan also noted that the Constitutional Court of South Africa has not generally had challenges that directly raise budgetary obligations, for example, alleging that the state should have allocated more funding to housing. Budgetary matters often arise over the course of the case. However, she noted that a lot of the challenges relate to a civil service that does not function well.
366. Professor Kent Roach thought that having both judicial and legislative voices lead to a more democratic balance. He described a '*creative tension*', arising when the legislature does something – usually for a good reason, and the court asks about its effects on certain people. He suggests that the legislature may neglect individuals who have not appeared before it, but that courts have to listen to those individuals.

### **Granularity and justiciability**

367. A common thread running through the evidence of the former Lord Chief Justice Sir Declan Morgan, Sir John Gillen, Sir Stephen Irwin and the Bar Council of Northern Ireland was that any bill of rights must have sufficient specificity or granularity to ensure that the rights are justiciable.

368. Sir Declan Morgan emphasised the importance of ensuring sufficient granularity in any rights legislation to ensure justiciability.

*...if you are looking at things such as the right to work, the right to housing and the right to health, none of those assertions, of themselves, is justiciable. What will become justiciable is their underpinning, because those rights should create political obligations rather than judicial obligations.*

*It is the coming into play of those political obligations that should then form the granularity that would make it appropriate for the courts to become involved in whether the substance that was given to the right was being delivered. That is why, in the Child Poverty Act 2010 case, it was the failure to appoint a commission, which was a granular obligation, that led to the court being able to intervene.*

369. Sir John Gillen, former Lord Justice of Appeal, said that without granularity, cases will not come before the courts with any force. He urged that any bill of rights taken forward by the Committee should have granularity and justiciability built into it.

370. Peter Coll QC on behalf of the Bar Council of Northern Ireland commented that while a well-crafted and tightly-drawn bill of rights would reduce the need for judicial interpretation and determination of any dispute in relation to the provisions, it would still be likely to result in additional cases in the courts:

*...it would be unrealistic to assume that the limits of any new rights and how they should be applied in any individual set of circumstances would not be tested in our courts on a regular basis, and that is the very clear experience of practitioners and, indeed, many Departments and public agencies more generally in the context of the model that we have on human rights law in this jurisdiction through the Human Rights Act 1998.*

371. Sir Stephen Irwin believed that inquiries into judicial review<sup>41</sup> and the Human Rights Act 1998<sup>42</sup> are linked to tensions around the growth of judicial review, which has

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<sup>41</sup> UK Government (2020) Independent Review of Administrative Law

<sup>42</sup> UK Government (2020) Independent Review of the Human Rights Act 1998

raised the frequency with which judges are asked to interfere with executive action, often in areas involving social policy or even politics.

372. Many witnesses, including Peter Coll QC representing the Bar Council of Northern Ireland, and Maria McCloskey, on behalf of the Law Society of Northern Ireland, spoke of the role of the courts acting as an important accountability mechanism in holding other branches of the state to account.

## Models of enforcement

373. Dr David Kenny advised the Committee that there are many potential approaches to enforcing a bill of rights. He highlighted three broad potential models of enforcement, and noted that many of the different approaches might be combined rather than taken alone.

- **Political enforcement:** the enforcement of rights is for the legislative, executive and administrative branches of government, who may do so out of a sense of duty or through public pressure and opprobrium. This would be considered a weak form of protection on its own, as lacks an *'external remedy for political neglect and potentially no remedy at all for wilful disregard'*;
- **Judicial enforcement:** the judiciary is empowered to hear complaints about rights breaches and to make determinations. This can involve an oversight role or more significant powers, such as the power to invalidate or remedially interpret laws to remedy rights violations;
- **Enforcement by specialised bodies:** parliamentary committees, a human rights commission, or an ombudsman could provide oversight, receiving complaints and reports about rights concerns arising from policymaking or implementation. A parliamentary committee or a law officer (such as the Attorney General) might have a duty to report on the implications of proposed legislation for human rights.

374. In 2008 the NIHRC proposed enforcing human rights through existing judicial mechanisms (rather than by creating a dedicated human rights court), and by

simultaneously establishing a scrutiny committee of the Assembly. It further recommended a role for the NIHRC to monitor and audit compliance with a bill of rights, which would reflect its statutory duties and the mandate of similar Commissions elsewhere. Rhyannon Blythe commented:

*We are the only jurisdiction of the UK not to have a specialist Committee that looks at human rights: an equivalent of the Joint Committee on Human Rights at Westminster. Such a Committee could have a place alongside a bill of rights to ensure that the Assembly had additional scrutiny powers on human rights issues and on issues arising from the implementation of a bill of rights. That would mean that things would not always have to go to the courts.*

## **Enforcement mechanisms**

375. Professor Kent Roach of the University of Toronto talked about novel remedies. He suggested the use of a suspension power, asserting that strike-down powers or a declaration of incompatibility are overly blunt remedies in today's era. He also praised the use of interim emergency remedies in South Africa.
376. Professor Tobias Lock discussed plans in Scotland to use such a suspension power, while Professor Christopher McCrudden noted the option of issuing an order that would have no suspensory effect on the continuation of a provision found not to be in compliance with principles for economic and social rights. This would give the Assembly time to amend the provision to ensure compatibility.
377. In South Africa, Professor Kate O'Regan noted that the courts must declare conduct and legislation that is inconsistent with the bill of rights to be invalid. The Constitutional Court has powers to suspend orders of invalidity, to make them retrospectively limited or prospective only. It may also give other forms of 'just and equitable' relief. Professor O'Regan thought that the remedial provisions of the South African constitution had been very successful in practice.

*Those are the sorts of structural provisions that I think one should not underestimate when thinking of drafting a bill of rights. In addition to*

*thinking about the substantive rights that one wants to protect, these, in some ways, less exciting, more nuts-and-bolts or toolkit aspects of a bill of rights require consideration.*

378. Mr Justice Humphreys suggested that the best approach may depend on the scope of the question. By way of example, he said that parity of esteem rights *'are too sensitive to leave in doubt'* and may need entrenchment, while other rights could usefully adopt a *'take into account'* approach.
379. Professor Brice Dickson agreed with the NIHRC advice that the bill should contain different kinds of enforcement for different rights. He said that all rights should be justiciable, but not necessarily in the same way as the Human Rights Act.
380. Particularly, he referred to the report presented by Christopher McCrudden and the Human Rights Consortium, to which he contributed. He noted that this inferred that rights can be legislated for indirectly, through the imposition of duties (rather than directly through the conferment of rights). He said that the UNCRC relies considerably on protecting rights by imposing duties, such as requiring public authorities to primarily consider the best interests of the child.
381. Sir Stephen Irwin also discussed remedies, noting that presently, where courts rule that governments are in breach of the law, they simply issue a declaration, and government abides by the ruling without further order. He questioned remedies for situations where courts ruled that the legislature had not gone far enough to satisfy an aspirational right, asking whether they might need to order alterations to legislation which may conflict with a government's mandate.
382. Peter Coll QC, on behalf of the Bar of Northern Ireland, noted the range of remedies available to the courts in judicial review, including quashing the respondent's decision; stopping them from doing a particular act; making an injunction; making a declaration; awarding damages; granting no relief; and directing the respondent to take the decision again.
383. The Committee was unable to make a decision on the justiciability and enforcement of rights due to the absence of a panel of experts and the content of the DUP party position paper.

## Source of a bill of rights and entrenchment

384. The Committee heard a range of views about where a bill of rights should be enacted: at Westminster as envisaged in the Belfast Agreement/ Good Friday Agreement, or by the Northern Ireland Assembly. Table 6 provides an overview of the potential advantages and disadvantages of the two approaches.

**Table 6 (below) highlights the advantages and disadvantages of a bill of rights enacted by Westminster or the Northern Ireland Assembly. More information on these advantages and disadvantages can be found at paragraphs 384 to 397.<sup>43</sup>**

Source of legislation	Advantages	Disadvantages
Westminster	<ul style="list-style-type: none"> <li>• Envisaged in the Belfast/ Good Friday Agreement</li> <li>• Entrenched/ 'constitutional' status</li> <li>• Priority over other Assembly Acts</li> <li>• Greater legislative competence</li> </ul>	<ul style="list-style-type: none"> <li>• Requires cooperation from the UK Government</li> <li>• Could be bypassed, amended or repealed by Government regardless of proposed 'lock' mechanism</li> </ul>
Northern Ireland Assembly	<ul style="list-style-type: none"> <li>• Could allow for a range of enforcement options</li> <li>• Has legislative competence in a range of areas</li> <li>• Considered good practice for devolved legislatures to embrace responsibility for protecting rights</li> <li>• May provide more scope for consensus-building</li> <li>• In line with developments in Scotland</li> </ul>	<ul style="list-style-type: none"> <li>• Cannot go as far as Westminster legislation</li> <li>• Could be amended or repealed by a future Assembly</li> <li>• Not envisaged in the Belfast/ Good Friday Agreement</li> </ul>

<sup>43</sup> A range of witnesses highlighted these advantages and disadvantages including the Committee on the Administration of Justice; Dominic Grieve QC; Mr Justice Richard Humphreys; Mark Durkan, Dr Katie Boyle, Professor Simon Hoffman, Professor Brice Dickson and Professor Tobias Lock

385. Many contributors, including the CAJ, said that a bill of rights must be enacted through entrenched Westminster legislation.

*The Agreement said that the Bill of Rights would be enacted at Westminster. That would enable it to be clearly authoritative, as passed by the UK Parliament, a “constitutional” document similar to the Northern Ireland Act and entrenched in that it could only be amended, explicitly and transparently, by Parliament, with the cross-community consent of the Assembly. It would also cover all governmental activities undertaken in Northern Ireland, not just those within devolved competencies. That should still be the position.*

386. Mark Durkan, in his evidence to the Committee, said that the Belfast Agreement/ Good Friday Agreement made it clear that Westminster was to legislate for a bill of rights. He said that the idea was to guarantee that a bill of rights would not require ‘*absolute all-party agreement*’. He also noted the potential benefit of entrenching a bill in ‘*what might be called “British constitutional law”*’.

*It meant that nobody was going to be guaranteed absolute satisfaction that everything that they wanted in a bill of rights was going to be in it or that anything that they did not want in a bill of rights was not going to be in it. The clear commitment and understanding was there, and not just from Mo Mowlam but from Tony Blair. That was understood.*

387. Some other witnesses highlighted the possibility of the Assembly enacting its own bill of rights, highlighting potential advantages and disadvantages to such an approach.
388. Dominic Grieve QC suggested that the Assembly may wish to explore preparing a bill of rights itself. While this was not envisaged in the Belfast Agreement/ Good Friday Agreement, he notes that it is not beyond the Assembly’s powers to do so (unless it touched upon reserved matters).
389. He also highlighted a risk that the Westminster Parliament, being sovereign, has the power to change any statute, regardless of whatever lock mechanism is proposed. He cited the UK Government passing a further statute to bypass the

Fixed Term Parliaments Act 2011 to enable an election in 2019, even though the Act itself remains. Mr Grieve also noted that the UK Government has not accepted the 2008 NIHRC advice:

*You are not in a position to coerce the Westminster Parliament into passing legislation, which is why there has been the question discussed this afternoon, on whether Northern Ireland would like to do something on a cross-community basis. That would be very remarkable indeed.*

*If you were to be successful in doing that, I suspect that the Westminster Government and Parliament would have to wake up. If you all decide collectively that you want something, it would be a rather bold Westminster Government and Parliament that said, "No, we're not going to let you have this".*

390. Professor Simon Hoffman noted that while the primary responsibility to implement human rights rests with the state party signatory to international human rights treaties, the governance of human rights is increasingly a responsibility of other institutions, including devolved governments. Devolved institutions play a significant role in determining how people experience rights.
391. Mr Justice Richard Humphreys warned of potential 'pushback' from Westminster if entrenchment went beyond NI-specific measures. He noted that an entrenched Westminster statute could give a bill of rights priority over Assembly Acts, and that this approach would require cooperation from the UK government. On the other hand, a non-entrenched Assembly act could allow for a variety of options, ranging from a declaration of incompatibility, such as with the Human Rights Act 1998, through to non-statutory guidance.
392. The Committee heard that it is considered best practice that devolved legislatures embrace responsibility for protecting human rights within their spheres of competence. Dr Katie Boyle thought that such an approach may provide more room for consensus building and cross-party support in the Assembly, and would place NI 'back in step' with Wales and Scotland. However, she said that it would not be able to go as far as Westminster legislation, which can take on a form of entrenchment similar to the status of the Northern Ireland Act 1998.

393. There was consensus on 23 September 2021 among the Committee that a bill of rights should be enacted at Westminster, in line with the provisions of the Belfast Agreement/ Good Friday Agreement. This decision was made subject to prospective advice from the panel of experts, which was ultimately not made available as a result of the fact that the panel was not established. However, subsequently, the DUP in its position paper expressed disagreement with this decision.

## **Review of the Human Rights Act**

394. A large number of witnesses raised concerns about the Independent Review of the Human Rights Act by the UK Government, which reported in October 2021. The review considered:

- The relationship between the domestic courts and the European Court of Human Rights (ECtHR);
- The impact of the HRA on the relationship between the judiciary, executive and Parliament, and whether domestic courts are being unduly drawn into areas of policy;
- The implications of the way in which the Human Rights Act applies outside the territory of the UK and whether there is a case for change.

395. The government has said that *'the UK remains committed to the European Convention on Human Rights'*, noting that the review is limited to looking at the structural framework of the HRA, rather than the rights themselves.

396. Many witnesses emphasised that there should be no regression in terms of human rights, and expressed concern about the potential implications of the review. Dr Clare Rice and Colin Murray of Newcastle University said:

*...it cannot be assumed that the 1998 Agreement's explicit references to the ECHR will provide sufficient basis to ensure the Human Rights Act's retention in its current form. Should any such moves lead to a diminishment of rights in Great Britain vis à vis those currently in place, a*

*Bill of Rights could serve as a further layer of protection on Northern Ireland's already differentiated legal framework on these matters.*

397. Mark Durkan also highlighted concerns in this regard and asserted that a robust bill of rights would confer relevant additional rights and confirm that the ECHR commitments and further protections *'are a cornerstone of the Agreement'*.

## Party Position Papers

398. At the Committee meeting of 4 November 2021, Members agreed to provide position papers outlining the view of each political party represented. These are set out in this section as received. The submissions should not be relied upon as the position of the Ad Hoc Committee on a Bill of Rights.

### **The Alliance Party**

The Alliance Party is supportive of a strong, stand-alone Bill of Rights for Northern Ireland and with the Review into the Human Rights Act in Westminster, we feel this more than ever. We welcomed the inclusion of a commitment to establishing the Ad Hoc Committee in the New Decade New Approach document to move the process forward.

We believed this to be an opportunity to create a Bill of Rights that everyone could support and that it would be sufficiently durable to take account of the changing circumstances in an evolving and diversifying Northern Ireland, which moves us on from the premise of two separate communities.

The Alliance Party would like to see a Bill of Rights that is consistent with European and International Human Rights standards and capable of guiding legislative and policy development now and into the future.

### **The Democratic Unionist Party**

The Democratic Unionist Party remains unconvinced by current proposals for a Bill of Rights for Northern Ireland. We hold grave concerns regarding the implications of any course of action which establishes separate human rights legislation that is distinct from other parts of the United Kingdom. A Bill of Rights should only be considered as a subset of wider agreement progressed at Westminster which is applicable and compatible throughout the United Kingdom. This is consistent with the original stipulation contained in the *Rights, Safeguards and Equality of Opportunity* chapter of the Belfast Agreement that any specified supplementary rights be defined in '*Westminster legislation*.' The expansionist approach proposed by a number of other parties is not in keeping with the spirit and intention of the

Belfast and St Andrew's Agreements. These provisions clearly envisaged such an instrument - if agreed - extending to "*rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland.*" The DUP continues to interpret 'particular circumstances' as limiting the scope of any Bill of Rights to only issues that are unique to Northern Ireland and which subsequently would not be relevant to citizens in London, Dundee, Swansea or Cork.

### **The Social Democratic and Labour Party**

The SDLP believes in a fairer, socially just society where difference is respected and embraced. Since our foundation, our party has been the vanguard in the fight for equality and human rights.

Human rights provide vital protections for everyone in Northern Ireland. The SDLP believes it is the responsibility of all of each and every one of us to respect the rights of others and believe the adoption of a Northern Ireland Bill of Rights will protect, strengthen and uphold the social, cultural and economic rights we currently enjoy. In our post-conflict society, a Bill of Rights would provide an integral tool in peace and reconciliation. While staying true to the principles of the Good Friday Agreement, any BoR must also be cognisant of our changing and growing society. We feel the 'two communities' is no longer applicable or reflective of our citizens. As a democratic society and in order to live up to that name, it is important that the rights of all are respected and that assurances are given that people will be treated fairly i.e. embedded protections for minority groups including LGBTQ+, ethnic minorities and women. We hope a Bill of Rights for Northern Ireland can bridge the gap left in the wake of Brexit and the subsequent loss of the EU Charter of Fundamental Rights.

### **Sinn Féin**

Sinn Féin have long advocated for the establishment of a comprehensive Bill of Rights, which draws on international human rights instruments as per the commitments made in the Good Friday Agreement.

This Bill should address the rights deficit that exists in the North of Ireland, which has been exacerbated by Brexit and the loss of the EU Charter of Fundamental Rights. Sinn Féin recognises that we are a post-conflict society, and that a Bill of Rights can be an extremely important tool for reconciliation. However, this Bill of Rights should be reflective of everyone in our society and not just the ‘two communities.’ This Bill should legislate to protect those currently disadvantaged within society, such as ethnic minorities, women, the LGBT+ community, children, the elderly, and those with disabilities, among others.

Sinn Féin’s suggested rights for inclusion in a Bill of Rights were drafted subject to assistance from a Panel of Experts, as per NDNA. The panel of experts has not been established, and therefore their assistance was not available. Our position paper should be considered in this context.

### **Ulster Unionist Party**

The Ulster Unionist Party remains committed to the principle of a Northern Ireland specific Bill of Rights, as first envisaged in the 1998 Belfast / Good Friday Agreement. Further, we believe it should be enacted by the Westminster Government and consist of two parts: (i) an inspirational / aspirational / preamble, articulating a Vision for the society we wish to create; and (ii) a list of justiciable rights.

However, given what we consider the abuse of powers by the Committee Chair on 25 November 2021 <https://niassembly.tv/ad-hoc-committee-on-a-bill-of-rights-meeting-thursday-25-november-2021/> and the published view of the Law Society of Northern Ireland in its letter to the Committee dated 03 December 2021, we are unable to continue our engagement with the Committee, pending a statement from the Chair accepting, what was in our opinion, an abuse of position and her subsequent invitation to Committee members to reconvene the Committee without the appointment of the Panel of Experts.

## **Participants at informal meetings**

### **Meeting with the UK Supreme Court, 22 April 2021**

The President of the Supreme Court: The Rt Hon The Lord Reed of Allermuir

The Deputy President of the Supreme Court: The Rt Hon Lord Hodge

Justice of the Supreme Court: The Rt Hon Lord Lloyd-Jones

Justice of the Supreme Court: The Rt Hon Lord Stephens of Creevyloaghgare

Vicky Fox, Chief Executive Officer, Supreme Court of the United Kingdom and Judicial Committee of the Privy Council

### **Meeting with the Committee on the Implementation of the Good Friday Agreement, 30 April 2021**

Fergus O'Dowd TD (Chairperson)

Jennifer Carroll McNeill TD

Rose Conway-Walsh TD

Patrick Costello TD

Pádraig Mac Lochlainn TD

Brendan Smith TD

Frances Black – Senator

Niall Blaney – Senator

Emer Currie – Senator

Niall Ó Donnghaile – Senator

Órfhlaith Begley MP

Mickey Brady MP

Michelle Gildernew MP

Claire Hanna MP

Paul Maskey MP

Francie Molloy MP

Paul Stephens (Committee Clerk)

Veronica Carr (Committee Staff)

Ciara Kilbane (Committee Staff)

### **Meeting with the Supreme Court of Ireland, 6 May 2021**

The Hon Mr. Justice Frank Clarke (The Chief Justice)

The Hon Mr. Justice Donal O'Donnell (Judge of the Supreme Court)

The Hon Ms. Justice Iseult O'Malley (Judge of the Supreme Court)

Patrick Conboy (Executive Legal Officer to the Chief Justice)

## **Selected terminology**

### **Belfast Agreement/ Good Friday Agreement**

Reached on Good Friday, 10 April 1998, the Belfast Agreement/ Good Friday Agreement was an agreement between the British and Irish governments, and most of the political parties in Northern Ireland, on how Northern Ireland should be governed.

### **Bill**

Is a formal proposal for primary legislation to create a new law, or a change in the law, that is put forward for consideration by Parliament.

### **Bill of rights**

This term has no specific legal meaning and can mean different things in different countries. In essence a bill of rights contains human rights protections for everyone – it is essentially a list of the laws a country agrees to make to protect all the people who live there.

### **The Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT)**

The Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) is an international human rights treaty adopted in 1985 by the United Nations General Assembly.

### **The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)**

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) is an international human rights treaty adopted in 1979 by the United Nations General Assembly.

## **The Convention on the Elimination of All Forms of Racial Discrimination (CERD)**

The Convention on the Elimination of All Forms of Racial Discrimination (CERD) is an international human rights treaty adopted in 1965 by the United Nations General Assembly.

## **The Convention on the Rights of Persons with Disabilities (CRPD)**

The Convention on the Rights of Persons with Disabilities (CRPD) is an international human rights treaty adopted in 2006 by the United Nations General Assembly.

## **Civil and political rights**

Rights which protect freedoms, such as right to life, right to liberty, freedom of expression, freedom of belief, freedom of association.

## **Civil society**

The “third sector” of society, along with government and business. It comprises civil society organisations and non-governmental organisations.

## **Concluding observations**

Concluding observations are the observations and recommendations issued by a treaty body after consideration of a State party’s report. Concluding observations refer both to positive aspects of a State’s implementation of the treaty and areas where the treaty body recommends that further action needs to be taken by the State.

## **Constitution**

A constitution is the set of principles and rules by which a country is organised. This is usually contained in one document; however, the UK has not written its constitution within a single document. Instead, the various statutes, conventions, judicial decisions and treaties which, taken together, govern how the UK is run, are referred to collectively as the British Constitution.<sup>44</sup>

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<sup>44</sup> UK Parliament (2021) *Glossary*

### **Declaration of incompatibility**

A power granted by the Human Rights Act to Northern Ireland's High Court (and equivalent courts elsewhere in the UK) to read primary legislation (defined below) as inconsistent with the rights protected by the European Convention of Human Rights.

### **Devolved competence**

Devolution is a system of government which allows decisions to be made at a more local level.

### **Dualist**

In dualist states a treaty ratified by the Government does not alter the laws of the state unless and until it is incorporated into national law by legislation. This is a constitutional requirement: until incorporating legislation is enacted, the national courts have no power to enforce treaty rights and obligations either on behalf of the Government or a private individual.

### **Economic, social and cultural rights**

Rights that focus on promoting and protecting people's development and livelihood. They relate to the workplace, social security, family life, participation in cultural life, and access to housing, food, water, healthcare and education.

### **Entrenchment**

Entrenchment is a constitutional tool that renders legal change more difficult.

### **Environmental rights**

Focus on ensuring access to a clean, healthy, and safe environment.

### **European Convention on Human Rights**

A document consisting of 66 Articles and 11 Protocols for the protection of citizens against violations by states. It primarily protects the civil and political rights of people in countries that belong to the Council of Europe, and came into force in 1953.

## **European Charter of Fundamental Rights**

The EU Charter of Fundamental Rights enshrines certain political, social and economic rights for EU citizens. The Charter became legally binding on EU member states when the Treaty of Lisbon entered into force in December 2009.

## **Human rights**

Human rights are freedoms and protections belonging to everyone, regardless of age, gender, religion, political belief and other characteristics. They cannot be taken away, although they can sometimes be restricted.

## **Human Rights Act 1998**

The Human Rights Act 1998 sets out the fundamental rights and freedoms that everyone in the UK is entitled to. It incorporates most of the rights detailed in the European Convention on Human Rights (ECHR) into domestic law.

## **Incorporation**

The idea of including UN treaty rights within domestic law.

## **International Covenant on Civil and Political Rights (ICESCR)**

A United Nations treaty based on the Universal Declaration of Human Rights, created in 1966 and entered into force on 23 March 1976.

## **International Covenant on Economic, Social and Cultural Rights**

A multilateral treaty adopted by the United Nations General Assembly on 16 December 1966, and in force from 3 January 1976. It was ratified by the UK in 1976 and is binding on the UK in international law only.

## **Justiciable**

Subject to trial in a court of law.

## **Maximum available resources**

This means that states must take steps to the maximum of their available resources, in order to progressively achieve the full realisation of economic, social and cultural

rights.<sup>45</sup> The phrase ‘to the maximum of its available resources’ was intended to refer to resources both within the state and from the international community (in terms of cooperation and assistance, including technical assistance).

The ICESCR also provides that states would need to provide strong justifications if they introduce retrogressive measures. They would have to demonstrate that they adopted the measure only after carefully considering all the options, assessing the impact and fully using the maximum available resources.

### **Minimum core**

Under the ICESCR, the concept of minimum core obligations relates to states’ obligations to meet the minimum essential levels of each right: this has immediate effect.<sup>46</sup> Minimum core is about recognising the social minimum below which no one should fall, for example, that no one should live without access to basic shelter or the minimum essential food.

### **Monist**

In a ‘monist’ state, a treaty obligation becomes directly applicable in domestic law simply by virtue of the act of ratification.

### **New Decade, New Approach**

The Rt Hon Julian Smith CBE MP, then Secretary of State for Northern Ireland, and Simon Coveney TD, then Tánaiste and Minister for Foreign Affairs and Trade, published *New Decade, New Approach* on 9 January 2020, to restore devolved government in Northern Ireland.

### **Non-governmental organisations or NGOs**

Groups which are independent of government, are normally created by their members and work on an international, regional, or local basis to achieve a social goal.

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<sup>45</sup> *General Comment No 3: The Nature of States Parties’ Obligations*

<sup>46</sup> Office of the United Nations High Commissioner for Human Rights (2008) *Frequently Asked Questions on Economic, Social and Cultural Rights* [online] Available at: <https://www.ohchr.org/Documents/Publications/FactSheet33en.pdf>

## **Parliamentary sovereignty**

Considered the most important part of the UK Constitution, parliamentary sovereignty makes Parliament the supreme legal authority in the UK, so that it can create or end any law. Generally, the courts cannot overrule its legislation and no Parliament can pass laws that future Parliaments cannot change.<sup>47</sup>

## **Preamble**

Bills of rights are in some ways unusual in that they set out the law, but they can also be very symbolic. As well as setting out rights, they can express the values and guiding principles or ideas about what we would like to achieve for society now and in the future. These are often held within a preamble, or an introduction, to the list of rights.

## **Progressive realisation**

This concept recognises that the realisation of economic, social and cultural rights can be hindered by a lack of resources, and can only be achieved over a period of time.<sup>48</sup> It also means that a state's compliance with its obligations in implementing these rights will be assessed in light of the financial and other resources available to it.

## **Ratification**

The process undertaken by a state with regard to a treaty which indicates an intent to be bound by it.

## **Separation of powers**

A principle which holds that the power to make laws, the power to administer laws and the power to judge legal disputes about laws should be exercised by different bodies.

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<sup>47</sup> UK Parliament (2021) *Glossary*

<sup>48</sup> Office of the United Nations High Commissioner for Human Rights (2008) *Frequently Asked Questions on Economic, Social and Cultural Rights* [online] Available at: <https://www.ohchr.org/Documents/Publications/FactSheet33en.pdf>

**Soft law**

Law that does not create technically binding obligations on a state, but which sets out standards which are supposed to influence and shape the conduct of a state.

**State parties**

The states or governments which are party to a convention or treaty.

**Treaty**

An agreement between at least two countries committing them to future action, governed by international law.

## **Links to Appendices**

### **Appendix 1: Minutes of Proceedings**

[View Minutes of Proceedings of Committee meetings related to the report.](#)

## **Appendix 2: Minutes of Evidence**

[View Minutes of Evidence from oral evidence sessions.](#)

## **Appendix 3: Written submissions**

[View Written Submissions received by the Committee.](#)

## **Appendix 4: Research Papers**

[View Research Papers produced by the Assembly's Research and Information Service \(RaISe\) in relation to the report.](#)

## **Appendix 5: Other Documents Relating to the Report**

[View other documents received in relation to the report.](#)

## **Appendix 6: List of Witnesses**

19 March 2020

**Les Allamby**, Northern Ireland Human Rights Commission

**Dr David Russell**, Northern Ireland Human Rights Commission

4 June 2020

**Dominic Grieve QC**

**Janet Johnston**, The Executive Office

**Siobhan Broderick**, The Executive Office

18 June 2020

**Professor Tobias Lock**, Maynooth University

**Professor Simon Hoffman**, Hillary Rodham Clinton School of Law, Swansea University

2 July 2020

**Professor Kate O'Regan**, Bonavero Institute of Human Rights

**Koulla Yiasouma**, Northern Ireland Commissioner for Children and Young People

**Mairead McCafferty**, Northern Ireland Commissioner for Children and Young People

17 September 2020

**Dr Katie Boyle**, University of Stirling

**Professor Kent Roach**, University of Toronto

24 September 2020

**Dr Amanda Cahill-Ripley**, University of Liverpool

1 October 2020

**Baroness Helena Kennedy QC**

**Albie Sachs**, former judge, Constitutional Court of South Africa

8 October 2020

**Professor Tom Hadden**, Queen's University Belfast

15 October 2020

**Mark Durkan**

**Dermot Nesbitt**

22 October 2020

**Daniel Holder**, Equality Coalition

**Patricia McKeown**, Equality Coalition

5 November 2020

**Kevin Hanratty**, Human Rights Consortium

**Professor Christopher McCrudden**, Queen's University Belfast

12 November 2020

**Dominic Grieve QC**

19 November 2020

**Brian Gormally**, Committee on the Administration of Justice

**Dr Anne Smith**, Committee on the Administration of Justice

**Professor Colm O'Cinneide**, University College London

26 November 2020

**Sir Declan Morgan**, Lord Chief Justice of Northern Ireland

**Mandy Kilpatrick**, PPS to the Lord Chief Justice

3 December 2020

**Professor Brice Dickson**, Queen's University Belfast

**Mr Justice Richard Humphreys**

10 December 2020

**Peter Coll QC**, Bar Council of Northern Ireland

**Maria McCloskey**, Law Society of Northern Ireland

17 December 2020

**The Rt Hon Sir Stephen Irwin**, former Lord Justice of Appeal

**The Rt Hon Sir John Gillen**, former Lord Justice of Appeal

28 January 2021

**Professor Colin Harvey**, Queen's University Belfast

**Professor Dominic Bryan**, Queen's University Belfast

11 February 2021

**Lady Daphne Trimble**

**Jeffrey Dudgeon MBE**

18 February 2021

**Alexa Moore**, TransgenderNI

**Tony O'Reilly**, Northwest Forum of People with Disabilities

25 February 2021

**Jonna Monaghan**, Northern Ireland Women's European Platform

**Dr Robin Wilson**, Council of Europe

4 March 2021

**Danielle Roberts**, HERe NI

**Rhyannon Blythe**, Northern Ireland Human Rights Commission

**Dr David Russell**, Northern Ireland Human Rights Commission

11 March 2021

**Professor Monica McWilliams**, Ulster University

**Natalie Corbett**, Northern Ireland Youth Forum

**Jack Dalzell**, Northern Ireland Youth Forum

**Ciara Hesketh**, Northern Ireland Youth Forum

**Saira Khan**, Northern Ireland Youth Forum

**Chris Quinn**, Northern Ireland Youth Forum

**Naomi Sloan**, Northern Ireland Youth Forum

18 March 2021

**Clare Moore**, Irish Congress of Trade Unions

**John Patrick Clayton**, Northern Ireland Committee, Irish Congress of Trade Unions

**Patricia McKeown**, Northern Ireland Committee, Irish Congress of Trade Unions

**Louise Coyle**, Women's Policy Group Northern Ireland

**Rachel Powell**, Women's Policy Group Northern Ireland  
**Dr Evelyn Collins CBE**, Equality Commission for Northern Ireland  
**Roisin Mallon**, Equality Commission for Northern Ireland  
**Geraldine McGahey OBE**, Equality Commission for Northern Ireland

25 March 2021

**Niall Murphy**, KRW Law  
**Ciará Fettes**, NICCY Youth Panel  
**Natasha Manganaro**, NICCY Youth Panel  
**Hanna Sabu**, NICCY Youth Panel  
**Madalaine Wilson**, NICCY Youth Panel  
**Koulla Yiasouma**, Northern Ireland Commissioner for Children and Young People

15 April 2021

**Conchúr Ó Muadaigh**, Conradh na Gaeilge  
**Dr Pádraig Ó Tiarnaigh**, Conradh na Gaeilge

29 April 2021

**Monye Anyadike-Danes QC**, Children's Law Centre  
**Paddy Kelly**, Children's Law Centre  
**Les Allamby**, Northern Ireland Human Rights Commission  
**Éilis Haughey**, Northern Ireland Human Rights Commission  
**Roisin Mallon**, Equality Commission for Northern Ireland  
**Geraldine McGahey OBE**, Equality Commission for Northern Ireland

6 May 2021

**The Very Rev Timothy Bartlett**, Catholic Church  
**Rev Dr David Clements**, The Methodist Church in Ireland  
**The Very Rev Shane Forster**, Church of Ireland  
**Rev Trevor Gribben**, Presbyterian Church in Ireland  
**Karen Jardine**, Presbyterian Church in Ireland  
**Danielle McElhinney**, Evangelical Alliance

## **Appendix 7: Party Position Papers**

At the Committee meeting of 4 November 2021, Members agreed to provide longer position papers, along with their abridged version, outlining the view of each political party represented. These are set out in this section as received. No paper was received from the Ulster Unionist Party for this section. The submissions should not be relied upon as the position of the Ad Hoc Committee on a Bill of Rights.

### **The Alliance Party**

#### **Introduction:**

The Alliance Party is supportive of a strong, stand-alone Bill of Rights for Northern Ireland and with the Review into the Human Rights Act in Westminster, we feel this more than ever. We welcomed the inclusion of a commitment to establishing the Ad Hoc Committee in the New Decade New Approach document to move the process forward.

We believed this to be an opportunity to create a Bill of Rights that everyone could support and that it would be sufficiently durable to take account of the changing circumstances in an evolving and diversifying Northern Ireland, which moves us on from the premise of two separate communities.

The Alliance Party would like to see a Bill of Rights that is consistent with European and International Human Rights standards and capable of guiding legislative and policy development now and into the future.

#### **Two Communities:**

The Alliance Party believes that ascribing special rights to “two communities” clearly results in direct and indirect discrimination against those who do not define as either. More broadly, speaking of solely “two communities” further entrenches division, when the purpose of a process like this is to produce a Bill of Rights with the potential to unite all sections of society behind it. Likewise, we need to ensure that the Preamble reflects the increasingly diverse population now and into the

future; therefore, it is important not to use language and terminology which would continue to perpetuate division.

### **Group Rights**

While the right to associate together to exercise our rights is a freedom we enjoy, and which should be protected, there is also a right not to do so without any resultant diminution of rights. By placing the emphasis on group rights and on rights for very specific groups in the manner which the 1998 and 2006 Agreements did, we are often entrenching inequality and, given the intersectional nature of rights, this has the potential to cause disadvantage to groups we should wish to protect.

As an example of where such a diminution of rights occurs, there are currently only two openly LGBTQ+ people in the Assembly. As a result of group rights (known as “parallel consent”), their votes count for less than others in respect of legislation and some motions. The consequence is a form of indirect discrimination against gay people in the Assembly (and thus in society among the electorate), albeit unintended. Similarly, under 50:50 recruitment, the groupings of “Catholic” and “Protestant or other”, meant that Black, Asian and Minority Ethnic (BAME) applicants were discriminated against by inclusion within the majority grouping, despite being an under-represented group.

Most people have multiple and complex identities, and the rights should first attach to the individual rather than to groups.

### **First Generation Rights**

The Alliance Party would like to see first generation rights included that are largely consistent with those contained within the European Convention on Human Rights and the Universal Declaration of Human Rights. These rights are long-established both domestically and internationally.

We are concerned, however, that Protocol 12 of the European Convention, relating to the “Prohibition of Discrimination”, has not been ratified by the UK and the Northern Ireland Assembly does not, therefore, have the legislative competence to incorporate it into Northern Irish law.

On the “Right to Life”, the Alliance Party maintains that the current law on the right to an effective investigation under Article 2 of the ECHR is adequate, and no special law for Northern Ireland is required. We are content that this provision is reflected in the Northern Ireland Bill of Rights.

Concerning victims of crime, Article 14 of the ECHR outlaws discrimination on the basis of “any status”. In this context, The Alliance Party does not believe a Bill of Rights should single out groups for special treatment. Therefore, we would not support any differentiation between victims of crime and conflict-related crime.

### **Second Generation Rights**

The Alliance Party strongly believes that the “Right to Healthcare” should be enshrined in law through the Bill of Rights. We also believe that “Education Rights” should include a right to Integrated Education, as we take the view that this is a supplementary right which clearly meets the “particular circumstances” test which appears in the 1998 Agreement.

Likewise, “Identity and Cultural Rights” need to be enshrined through this process given their particular relevance in Northern Ireland.

We would like to see the other rights included; however, we feel that each of them would be greatly enhanced by their inclusion in supplementary stand-alone legislation, as they would each require detailed drafting which would not be suited to a Bill of Rights itself. This would allow for the incorporation of parts of ratified International Instruments through Northern Ireland legislation, thereby not going over the head of the UK Government, while at the same time being drafted in a way which is reflective of and complementary to existing Northern Ireland legislation relating to rights.

The Alliance Party also believes that a “Progressive Realisation Clause” should be carefully drafted. We are concerned that there will be instances in the future where one welfare benefit is reduced but another is raised, meaning that some people in society are worse off than before while others are better off. This is linked, therefore, to the issue of “no retrogression” and how this could be challenged in the event of policy change that is taken by the UK Government (such as the recent £20 uplift to Universal Credit).

On this premise, the Alliance Party supports an obligation on the relevant government department to demonstrate it has taken reasonable measures to achieve the progressive realisation of rights.

### **Third Generation Rights**

The Alliance Party would like to see the inclusion of a broad heading of “Right to a Healthy Environment” and also takes the view that this should be supplemented with stand-alone legislation enacted by the Northern Ireland Assembly.

### **International Instruments**

The Alliance Party remains supportive of the Good Friday Agreement provision that a Bill of Rights for Northern Ireland should draw on appropriate international instruments and experience. It was clear from the evidence supplied to the committee that there is support for the ratification of several international human rights instruments into domestic law.

## **Democratic Unionist Party Position Paper**

### **A Northern Ireland Bill of Rights**

#### **Introduction**

The Democratic Unionist Party remains unconvinced by proposals for a Bill of Rights for Northern Ireland. We hold grave concerns regarding the implications of any course of action which establishes separate human rights legislation that is distinct from other parts of the United Kingdom.

#### **Scope**

It is our view that an expansionist approach to the specified rights contained in any Bill of Rights is not in keeping with the spirit and intention of the Belfast and St Andrew’s Agreements. These provisions clearly envisaged such an instrument - if agreed - extending to “*rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland.*” We interpret ‘*particular circumstances*’ as limiting the scope of any provision to only

issues that are unique to Northern Ireland and which subsequently would not be relevant to citizens in London, Dundee, Swansea or Cork.

We do not adjudge the United Kingdom's exit from the European Union, or the independent review of the Human Rights Act, to be justification for incorporating a broad range of rights already codified under separate instruments - such as the European Convention on Human Rights - within the framework of a Bill of Rights.

The duty to incorporate the ECHR into Northern Ireland law, as prescribed in the Belfast Agreement, was fully operationalised by the provisions of sections 6 and 24 of the Northern Ireland Act 1998. Subsequently, we do not hold that compliance with the aim of 'no diminution' hinges on the continuation of the HRA as presently drafted, future EU membership or any hypothetical Bill of Rights.

### **Constitutional implications**

We remain concerned that a distinct Bill of Rights for Northern Ireland would have serious constitutional ramifications. Most notably, it would risk establishing regional disparities between the body of human rights legislation and inequalities between communities and individuals in Northern Ireland and Great Britain. This is not an isolated concern. We have raised similar reservations with the Government surrounding any appetite to rescind the application of the ECHR in GB.

It is possible that a narrow focus on a small category of rights that reflect demonstrably different circumstances in Northern Ireland would mitigate the potential for divergence in human rights principles across the UK. However, this is not the only constitutional implication.

The DUP also believes a Bill of Rights that is enacted by the devolved institutions would raise far-reaching concerns regarding the sovereignty of the UK Parliament. This is particularly salient where the proposed rights relate either directly or indirectly to reserved or excepted matters. For example, there could be serious budgetary implications should the rights conferred in any Bill of Rights be justiciable or subject to progressive realisation. This could also lead to a hierarchy of spending decisions.

In light of this concern, we reiterate the view that a Bill of Rights should only be considered as a subset of wider agreement progressed at Westminster which is applicable and compatible throughout the United Kingdom. This would allow the wider ramifications to be understood and accounted for in final arrangements. It would also ensure the Assembly doesn't pre-empt the outcome of future policy direction taken by the UK Government.

The aforementioned position is also consistent with the original stipulation contained in the *Rights, Safeguards and Equality of Opportunity* chapter of the Belfast Agreement that any specified supplementary rights be defined in '*Westminster legislation.*'

### **Enforcement**

The Ad Hoc Committee received a range of views on options for enforcement of any future Bill of Rights. As a Party, we believe safeguards must be included to prevent the interpretation of specified rights in a fashion that undermines the primacy of the Executive and Assembly to make laws or which brings ministers into confrontation with the courts.

We do not support the replication of the ECtHR living instrument doctrine. This has brought the courts increasingly into conflict with governments on a range of important ethical and moral issues.

A Bill of Rights could ultimately set out fundamental principles to which future policies should adhere. However, we believe any move to a model of full entrenchment, enabling courts to strike down laws on the basis of incompatibility with specified rights, could have a disruptive and disproportionate effect on political stability under Northern Ireland's unique power-sharing arrangements.

### **Social and economic rights**

We do not believe aspirational and unachievable socio-economic rights should form part of a prospective Bill of Rights. They are also in most cases not specific, unique

or particular to the circumstances of Northern Ireland and by default run contrary to the intentions of the Belfast Agreement.

Court rulings relating to unrealizable social and economic rights would inevitably come into conflict with the legislative competence of the Assembly or our national Parliament and affect ministerial decision-making, particularly in relation to budgets. We believe this would be a clear overreach. Subsequently we are not supportive of attaching a progressive realization clause to any generational rights.

### **Application**

Should plans for a Bill of Rights progress, issues surrounding any potential retrospective effect would also require robust consideration. We have previously raised concerns that the outworking of the Human Rights Act has effectively ignored the non-retrospectivity principle enshrined within it.

## **SDLP Party Position Paper**

### **First Generation Rights**

- Prohibition of discrimination: A Bill of Rights must enhance and strengthen this provision to ensure its effectiveness.
- Right to equal marriage: We agree with the additions as per The Commission's recommendations.
- Right to a fair trial/ access to justice: There is a need to extend fair trial rights and improve access to justice. We would advocate for a renewed focus on restorative justice where applicable.
- The strengthening of equality laws/ clause is desirable however we recognise the limitations of the BoR framework.

- Freedom of movement: Essential to provide domestic effect to Protocol No 4 given the weakening of this fundamental right under Brexit.
- Participation and representation in public life/participation in decision making: We agree with a broad principle that focuses on democratic rights and we are content not to list groups for fear of excluding anyone. This right should be general in nature allowing for greater inclusion.
- Victims' Rights: We are of the view that all victims should benefit from the same rights. Special clauses should not be incorporated which would deem one victim more deserving than another. In doing so, we would run the risk of creating a 'hierarchy of victims.'
- Right to life: We would welcome *a provision requiring that legislation should be enacted to ensure that all violations of the right to life relating to the conflict are effectively investigated in a human rights-compliant manner.* While conscious of the legacy proposals outlined by the UK government, this should not undermine human rights nor should it deny victims their right to justice in NI.
- Right to Civil and administrative justice
- Support a proportionate limitations clause to *stand over the Bill of Rights in its entirety.*

### **Second Generation Rights- Social, economic and cultural rights**

Progressive realisation: We acknowledge that socioeconomic rights must be subject to a carefully drafted progressive realisation clause. Agree that *state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the rights. A lack of resources, however, does not provide cover for wilful failure to deliver. States must provide evidence of considered plans to deliver rights for citizens. In the NIHRC's 2008 BoR they suggested that Departments with responsibility for economic and social rights such as Health, Education or Housing, should report to the Assembly annually to be held accountable for their progressive realisation.*

We would also support the inclusion of a 'no retrogression' clause except in very specific circumstances. Realise that this may have implications particularly in relation to social security- the recent delay in implementing Welfare Mitigations and the removal of the Universal Credit £20 Uplift could potentially be viewed as a retrogression for example.

- Healthcare rights/Right to health; recognise that this must be subject to progressive realisation.
- Healthcare rights/reproductive rights: acknowledge that specific clauses will change over time based on available science etc. but we support the inclusion of reproductive rights.
- Accommodation and adequate standard of living
- Right to social security: We appreciate this will be subject to the limitations clause and that of progressive realisation.
- Right to work/ workers' rights
- Right to remain at home/ live independently
- Digital inclusion and access (inclusive of Education rights)
- Right to bereavement leave
- Education rights: *agree with the promotion of human rights, equality, dignity and tolerance.*
- Language rights: Should entrench language rights
- Children's rights: Recognise that there is a duty upon parents and state in this regard

- Identity and cultural rights: Uphold the right to be Irish, British or both as outlined in the GFA. Opportunity to promote tolerance, understanding and respect for all identities.
- Freedom from violence, exploitation and harassment: As per David Russell's suggestion.

### **Third Generation Rights**

- Environmental rights: absence in of such a right within HRA. Evidently there is a clear gap. Any Bill of Rights for NI must reflect its current situation and robustly address the climate crisis. As stated by David Kenny, *very few common law bills of rights include environmental rights*, NI has the potential to be global leaders in this regard and should take the opportunity to address climate change and embed provisions within a BoR.
- Right to adequate air quality, access to clean water and safe food
- Access to environmental information
- Public participation in environmental decision making
- Access to justice on environmental matters

**International Instruments:** As per GFA provision, any bill of rights should draw 'as appropriate on international instruments and experience'.

Agree that we should draw on aspects of international instruments to fill gaps in UK law and enhance human rights, particularly given the implications of Brexit.

- CEDAW (Convention on the Elimination of all Forms of Discrimination Against Women)
- UNCRC (UN Convention on the Rights of the Child)
- UN Convention on the Rights of Persons with Disabilities (CRPD)

- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- EU Charter of Fundamental Rights
- Framework Convention for the Protection of National Minorities
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW) and the International Convention for the Protection of All Persons from Enforced Disappearance (CPEd)
- European Charter for Regional or Minority Languages

## **Sinn Féin Party Position Paper**

### **Introduction:**

Sinn Féin are advocating for a comprehensive Bill of Rights, drawing on international human rights instruments, as per the Good Friday Agreement. This Bill should address the rights deficit that exists in the North of Ireland, which has been exacerbated by Brexit and losing the EU Charter of Fundamental Rights.

Sinn Féin recognises that we are a post-conflict society, and a Bill of Rights can be an extremely important tool for reconciliation. However, this Bill of Rights should be reflective of everyone in our society and not just the ‘two communities.’ This Bill should legislate to protect ethnic minorities, women, the LGBT+ community, children, the elderly, and those with disabilities, for example.

### **First generation rights:**

- Right to life – *in context of legislation requiring that all violations of the right to life relating to the conflict are investigated.*
- Strengthened equality laws/equality clause
- Prohibition of discrimination
- Freedom of movement
- Right to equal marriage
- Participation and representation in public life – *avoid listing groups, should be universal.*
- Right to a fair trial/access to justice
- Victims’ rights – *need to differentiate between victims of conflict-related crime and*

*victims of crime.*

- Right to civil and administrative justice
- Protection of property
- Limitations clause – *this can be ‘a limitation necessary in a free and democratic society’, ‘a proportionate limitation’ or a ‘limitation in accordance with the principles of fundamental justice’. It stands over the entire Bill of Rights. I suggest a proportionate limitation.*

### **‘Second generation’ rights**

- Healthcare rights/right to health – *reproductive rights inclusive in this. Must be subject to progressive realisation.*
- Accommodation and adequate standard of living
- Right to social security – *subject to progressive realisation and general limitations clause.*
- Right to work/workers’ rights
- Right to remain at home/live independently
- Education rights – *with digital inclusion and access included, and directed toward the promotion of human rights, equality, dignity, and tolerance.*
- Language rights – *should just entrench language rights.*
- Identity and cultural rights – *the right to be British, Irish or both.*
- Children’s rights – *duty on parent’s as well as the state.*
- Freedom from violence, exploitation, and harassment.

**To add:** Progressive realisation clause – *the state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the rights. A lack of resources, however, does not provide cover for wilful failure to deliver. States must provide evidence of considered plans to deliver rights for citizens. In the NIHRC’s 2008 BoR they suggested that Departments with responsibility for economic and social rights such as Health, Education or Housing, should report to the Assembly annually to be held accountable for their progressive realisation.*

No retrogression clause – *States can’t regress on rights, except in very specific circumstances.*

**‘Third generation’ rights:**

- The right to a clean, healthy, and sustainable environment – *recently adopted by the UN Human Rights Council.*
- Right to adequate air quality
- Access to clean water and safe food

**International Instruments:** The rights included in the Bill of Rights should draw from ratified international instruments such as CEDAW, CRPD, UNCRC, ICESCR, ICCPR, ICERD, CAT and the EU Charter of Fundamental Rights to replace rights lost because of Brexit. The Bill should look at including unratified instruments. Instruments should include the Framework Convention for the Protection of National Minorities, the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, and the European Charter for Regional or Minority Languages.

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