



NORTHERN
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Is that right?
Fact and Fiction on a Bill of Rights



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Foreword

Under the terms of the Belfast (Good Friday) Agreement 1998, the Northern Ireland Human Rights Commission (the Commission) was asked to consult and advise on a Bill of Rights for Northern Ireland. The Commission delivered advice to the Secretary of State for Northern Ireland on 10 December 2008. The Northern Ireland Office subsequently undertook a public consultation. In that context and more broadly, the form of a possible Bill of Rights has been debated vigorously, although very little progress has been made towards the adoption of the instrument.

The ongoing delay in adopting a Bill of Rights for Northern Ireland is a matter of regret for the Commission, which continues to consider that the advice it delivered constitutes a strong basis on which to proceed. Furthermore, the Commission does not accept that the process has to be stalled pending the outcome of the current consultation regarding a possible United Kingdom (UK) Bill of Rights.

The Commission will continue to support efforts for the adoption of a Bill of Rights for Northern Ireland. The present publication is intended to assist in this regard. It responds to a number of the concerns that have been expressed in the political, civil society and media spheres. It also identifies and corrects a number of technical misunderstandings. It is hoped that the report will thus contribute to a constructive advancement of the process.

In conclusion, the Commission recalls that the onus is now on the Government to take the necessary steps to ensure that a Bill of Rights for Northern Ireland will be adopted. To avoid that responsibility is to renege on one of the most important provisions of the Belfast (Good Friday) Agreement.



Professor Michael O'Flaherty
Chief Commissioner

I. Introduction

Many countries have a bill of rights. Between 1788 and 1948, 82% of the constitutions drafted contained some form of protection for human rights¹, a figure that increased to 93% between 1949 and 1975.² This upward trend continued throughout the 1980s, and from 1990 onwards, as many countries moved through peace processes towards new constitutional settlements, human rights frameworks such as a bill of rights became routine³. Apart from the UK, where the Human Rights Act constitutes a form of bill of rights, Australia is the only common law country not to possess a bill of rights. Yet, even here, it is a topic frequently debated and on the political agenda.

1.1 What is a bill of rights?

Bills of rights are constitutional documents operating as a type of contract between citizens and their government. Bills of rights can take many different forms, however all contain as their primary purpose the provision of human rights protections for citizens. They set out the most fundamental rights to which those within the country are entitled.

1.2 Why do societies choose to have a bill of rights?

Societies choose to have bills of rights because they recognise that there are certain values which are so basic that they wish to put them beyond the reach of any government. Rights such as the right to fair trial, or the right not to be tortured, are often viewed as matters which should not be taken away by any government but should be protected irrespective of the prevailing political climate. Bills of rights in essence aim to lift such values above the political fray.

Societies adopting bills of rights also tend to have a broader understanding of the democratic framework, particularly concerning restrictions on political decision-making. This vision of democracy emphasises participation whilst simultaneously limiting majority rule to the extent that it is deemed necessary so as to ensure the equal participation of all and to protect individuals from abuses of power.

1.3 When and how do societies adopt a bill of rights?

In practice societies tend to adopt bills of rights in one of the following circumstances:

- when agreeing a new or substantially revised constitution, for example, Canada incorporated a Charter of Rights into the Constitution Act 1982 as part of a new constitutional settlement;

- as part of a peace settlement, for example, South Africa agreed an Interim Constitution in 1993 which included a Bill of Rights, a revised version of which was produced within the Final Constitutional Settlement after a period of wide ranging civic participation and consultation.
- in response to moral, political or legal pressure to address failures to protect rights, for example, the adoption of the Human Rights Act 1998 in the United Kingdom – a form of bill of rights - followed in part from a sense that too many cases were being lost at the European Court of Human Rights and the view that a more embedded national approach to rights was required.

1.4 Who needs a bill of rights?

While a bill of rights affords an additional layer of protection to all, it is of particular relevance to members of vulnerable or marginalised groups. In Northern Ireland for example, serious human rights issues have been raised with respect to children in detention, and women with mental health problems who have been detained, often for very minor crimes. These groups are unlikely to be the centre of political attention since their members cannot vote and so it is of vital importance that a bill of rights is put in place to act as their defence.

1.5 Why is a bill of rights important in Northern Ireland?

Since the 1960s different groups from across the political divide have proposed that a bill of rights would be a 'good thing' for Northern Ireland. They have argued that Northern Ireland would be a better place and that relationships between people could be improved if everyone felt sure that no matter who was in power politically, human rights would be respected.

The Belfast (Good Friday) Agreement and St Andrews Agreement provided that the Northern Ireland Human Rights Commission should advise government on a Bill of Rights for Northern Ireland. The Commission presented its advice on 10 December 2008. Opinion polls in Northern Ireland have consistently shown high support for a bill of rights across all sections of the community.

1.6. Are there any concerns about adopting a bill of rights?

Despite the fact that bills of rights are very common, particularly in democratic countries, and that there has been a long-standing commitment to and support for a Bill of Rights for Northern Ireland, objections remain. These objections are sometimes framed as general opposition to bills of rights and how they work, and are the type of concerns that people in any country might have. Other objections are more specific to our particular context. For example, there are concerns that a bill of rights is incompatible with the legal system in the UK, that a Northern Ireland specific bill of rights may be difficult to implement or have a negative effect with respect to the political culture of Northern Ireland.

Many objections to a bill of rights, both general and specific, derive from legitimate concerns about:

- the nature of fundamental values that a bill would protect;
- the relationship a bill of rights might establish between people, politicians and courts; and,
- the type of culture that it would promote.

These are concerns which deserve to be heard and discussed. Indeed, discussion about the nature of human rights, and the appropriate balance of judicial, political and civic participation in our political process, is central to any attempt to produce a bill of rights.

As a consequence of the important concerns raised regarding bills of rights, they have been the subject of much debate, receiving significant attention from academics, judges, politicians and civil society, over many years. The outcome of such discussions did not remain in the abstract but fed into the drafting of future bills of rights. As a result, those responsible found ways of reflecting and addressing the concerns in practice. Today, the outcomes of this long debate and practical experience presents a useful resource for the current process in Northern Ireland.

2. General concerns regarding a bill of rights

A number of general objections to bills of rights have been made and responded to, some over a period of centuries. These concern the relationship of bills of rights to democratic processes, the role of judges in upholding bills of rights, the appropriate content of a bill of rights, and who a bill of rights should apply to.

2.1 'Bills of rights are undemocratic'.

Bills of rights aim to limit what elected politicians can decide, but only in terms of fundamental values, such as the right not to be tortured. However, bills of rights do not dictate government policy, rather they operate by providing a list of minimum standards against which legislation, policy and practice can be measured. The purpose of human rights is to ensure that everyone can participate in the democratic life of the country on an equal basis. They limit the actions of politicians in order to strengthen democracy rather than undermining it.

Human rights work best as part of the legislative process, where proposed legislation is measured against rights, and if found wanting, modified by the legislature before it becomes law. This model already applies in Northern Ireland, Wales and Scotland, through their devolution statutes, whereby Executive ministers must review legislation to make sure that it complies with the European Convention on Human Rights, and make a 'statement of compatibility' in the Assembly or Parliament. Most bills of rights, however, also involve judges and courts in adjudicating on alleged violations.

2.2 'Bills of rights give judges too much power'.

People are sometimes concerned that a bill of rights will result in judges having too much power. Concern about the role of judges tends to be heightened in systems where they are given the power to strike down any law that is deemed incompatible with the bill of rights. The United States constitution, for example, is enforced by the Supreme Court who can strike down legislation where they find that it contravenes the Bill of Rights. People question why it is that an unelected and often unrepresentative group of judges can strike down laws passed by democratically elected representatives.

In fact, giving judges power to strike down legislation which contravenes a bill of rights is only one of many ways in which judges can be used as guardians of human rights. Some bills of rights and constitutions (for example the Irish Constitution) give judges an advisory role whereby proposed legislation can be referred to them for an opinion on compatibility in the light of the constitution. This opinion can then feed into the decision-making process helping to ensure that the rights implications of the legislation have been properly considered. Moreover, as touched on above, bills of rights are often most effectively implemented not through judicial review of human rights violations, but by proofing proposed legislation before it is implemented.

Nonetheless, some form of judicial review remains an important part of enforcing many bills of rights, and to this end the objection that judges have too much power needs to be addressed. Defence of the apparently counter-majoritarian role of judges rests on the concept of bills of rights acting as a set of minimum standards which underpin democracy. The role of the judge in examining whether legislation, policy or practice complies with a bill of rights is not to substitute their view of what a better policy would be, but to inject consideration of how it will impact on fundamental rights. Ultimately their power is constrained by the nature of the judicial function: namely to interpret and apply the law.

Those concerned about the role of judges, however, often have a rejoinder: judicial adjudication of rights looks and feels different from other types of judicial decision-making. Adjudicating on human rights matters is not like applying a piece of ordinary legislation such as criminal law, rather it involves balancing fundamental values, for example, the right to a fair trial against the right to security. This type of balancing is something which we tend to view politicians as elected to do, and we can un-elect them at the next elections if we do not like the balance they come up with. Judges however, are not elected and cannot be removed because we do not like their decisions. Those concerned about the power which a bill of rights can give to judges including strong advocates of human rights, are concerned that the nature of judicial adjudication of rights is different and more open than judicial adjudication in other areas, and that rights which were designed as minimum standards can be interpreted by judges in a more maximalist way so as to encroach on what is the appropriate sphere of politicians and legislatures.

Concern about the nature of adjudication in a bill of rights context has two responses. The first response is to reiterate that while rights seem more political, the task of judges is essentially the same as with any piece of legislation, namely to interpret and apply the law – in this case the bill of rights. Interpreting the protections contained in a bill of rights only seems more political because statements of rights look more abstract than other pieces of legislation, for example, the criminal law.

Second, we should in any case keep in mind that there are ways to recalibrate the balance between the legislature and the judges. Countries have innovated in several different ways in order to address concern over the power of judges with respect to their Bill of Rights. Some have varied in the extent to which they give courts and judges the power to strike down legislation that does not comply with the Bill. Much of the academic literature around the role of judges in enforcing rights has been generated by the US Constitution and Bill of Rights which enables judges to strike down incompatible legislation. In contrast, New Zealand, South Africa, Canada and the UK have sought in different ways and to different extents to limit the judiciary's reviewing powers and respect the primacy of the legislature. The variations in approach are set out below.

- New Zealand: in 1990 a bill of rights in the form of an ordinary Act of Parliament was passed. The Attorney-General was then tasked with a duty to tell Parliament when proposed legislation conflicted with the Bill. The courts were permitted to judge the legality of actions taken by public officials, but not to assess the validity of Parliamentary

legislation, whether enacted before or after 1990. This mechanism was criticized by some as being 'too soft' with too little adjudication of the Bill of Rights, but demonstrates a mechanism based largely on trust;

- South Africa: where a judge finds a piece of legislation to be in violation of the Bill of Rights it is returned to the legislature which is given a period of time to change the legislation;
- Canada: the Charter of Rights 1982 provides that if legislation is found to be in violation of the rights contained therein, the law can still be passed but needs a specific declaration that the conflict is deliberate. The Charter also provides as a safeguard that a process of review must follow for any such legislation;
- UK: the Human Rights Act 1998 is particularly innovative. It provides that where a judge finds a violation between the rights as laid out in the European Convention on Human Rights (ECHR) and secondary legislation - that is to say, legislation not passed by the UK Parliament but by authorities to whom it has delegated power, including the devolved legislatures - he or she can strike the legislation down. However, it also provides that where a judge finds a violation between the ECHR rights and primary legislation - legislation passed by the UK Parliament - he or she may not strike it down but can issue a 'Declaration of Incompatibility'. The Government can then institute a fast-track procedure to make the amendments needed to the primary legislation to ensure ECHR compatibility. Although technically able to ignore the Declaration of Incompatibility, the UK Government has tended in practice to revise the legislation.

Countries have included provision in bills of rights addressing the type of interpretation and the types of sources that should be used when applying their contents. In South Africa, for example, based on concern about legalistic interpretations of legislation during the apartheid era, the Bill of Rights provided that: 'When applying a provision of the Bill of Rights... a court in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right.'⁴

2.3 'Bills of rights often include socio-economic rights which allow judges to interfere with political decision-making'.

Many people think that it is important to include socio-economic rights in a bill of rights. They argue that the interconnectedness of all human rights means that socio-economic rights, such as rights to access a minimum standard of healthcare, must not be viewed as less important than civil and political rights. For others, however, the distribution of socio-economic goods is not an appropriate area for a bill of rights to deal with, since it enables judges to become involved in evaluating public policies and political decisions.

The Government is already committed to implement certain socio-economic rights under international human rights law which imposes legally binding standards. Further, it is not unusual for bills of rights to provide for socio-economic rights. A number of existing bills of rights, such as that of Finland, South Africa, India and Ireland, have included socio-economic rights in different ways indicating that the distinctive nature of socio-economic rights is not an obstacle to including them in a bill of rights. When designing and implementing a bill of rights, it is also good practice to engage in thorough consultation and therefore achieve a level of public support and political consensus for the bill.

2.4 'Bills of rights can result in substantial litigation and legislative upheaval'.

Countries that adopt a bill of rights as a result of a peace process, for example South Africa, have often arrived at a bill of rights through such a painful process, that resulting litigation or legislative inconvenience is not a primary concern. In other situations however, the concern about litigation has been addressed by trying to human rights proof existing laws, policies and practices, prior to implementation, and by educating decision makers on good practice.

However, evidence also suggests that the concern over a possible flood of litigation is misplaced. Evidence demonstrates, for example, that the Human Rights Act in the United Kingdom led to an increase in the number of cases in which human rights arguments were also made. This is not surprising as the purpose of the Human Rights Act was to enable human rights arguments to be made in domestic courts. However, there is no clear evidence of a more general rise in litigation.

In 2003 the Audit Commission which evaluates all new pieces of legislation to see if they are achieving their goals and providing value for money, noted that human rights arguments were only made in around half of judicial review cases.⁴ Figures from a Sweet & Maxwell audit record that the number of reported cases making Human Rights Act arguments more than tripled between 1999-2000 and 2000-1 reaching a peak of 714 in 2001-2, before declining until 2007-8 when it appears to have levelled off.⁵ The overall number of cases in which Human Rights Act arguments were made in 2008-9 was 348.

It is difficult to assess how many of these cases were taken purely due to a Human Rights Act line of argument, and it is therefore difficult to assess how much 'new' litigation has really resulted from the Act. But it is likely to be a very small number out of the 348. Moreover, as the Audit Commission pointed out, litigation can result from a preventable failure of public authorities to implement the Human Rights Act. The Audit Commission noted at the time of its report that a flurry of activity with regard to human rights proofing the delivery of public services immediately after the Act's introduction in 2000 soon gave way to complacency and a failure to embed the practice.

2.5. 'Bills of rights hold out expectations that cannot be met'.

Objectors sometimes allege that bills of rights promise too much and deliver too little. For instance, early criticisms of the Canadian Charter on Rights and Freedoms, tended to assert that it had delivered too little litigation and too little protection of rights, rather than not enough.

Bills of rights are fairly conservative documents. As discussion of the democratic objection has shown, they perform a modest role of making sure that legislation, policy and practice does not deny fundamental rights. They do not ensure a perfect legislative programme or complete and instant protection for all. Neither do they ensure an overnight human rights culture. This is because the protection of rights is the business of everyone, from legislators, courts, civil servants and public bodies, to the media, schools, and all those living in a society.

Nonetheless, bills of rights are an important part of promoting and enforcing human rights as a central value of society, but are only one small part. Providing a bill of rights makes it more likely that government bodies and the public will understand and be concerned about the importance of human rights.

2.6 'Bills of rights only restrain the state when often it is others who violate rights'.

For some of those who are critical of bills of rights, an apparently exclusive focus on the human rights of 'the people' vis-à-vis the actions of government (even taken in its widest sense of including all the activities of any public body) is a distorted emphasis. By focusing principally upon the duties of the state, bills of rights would seem to leave non-state actors untouched including but not limited to: serious criminals, corporations, and terrorist groupings. All of these bodies appear to be capable of violating human rights.

We began by describing a bill of rights as a type of 'contract' between a state and its citizens. The idea of a 'social contract' between the government and the governed has been at the heart of rights thinking for many centuries. It underlies how a bill of rights works to bind common values into the fabric of all of society's relationships. While it is true that bills of rights mainly concern the vertical relationship between the government and the people they also come to bear on horizontal relationships between the people themselves in the following ways:

- some bills of rights do apply to all peoples. Such provisions can signal that the protection of human rights is an ongoing responsibility not just for government, but for everyone;
- international experience has demonstrated that where a government binds itself to rule of law commitments through allegiance to human rights, this has a dampening effect on the acts of groups such as terrorists; and,
- bills of rights can be applied to how laws governing relationships between people or between people and corporations are implemented, by requiring that the interpretation of these laws be consistent with the bill of rights. For example, the application of a bill of rights might ensure that defamation cases between individuals and newspapers take account of rights such as freedom of speech.

2.7 'Bills of rights contribute to a selfish "me" culture where rights are emphasized at the expense of responsibilities'.

Some critics of bills of rights are concerned that a focus on the rights of the individual can encourage negative behaviours. More specifically the concern is that human rights framed as the entitlement of individuals promotes a 'me and my rights' culture whereby people feel less obligated to fulfil their own responsibilities.

In responding to this criticism it must be noted that many rights are in fact balanced with the notion of responsibilities and an obligation to uphold broader societal values. For example, Article 10 of the European Convention on Human Rights states that: 'Everyone has the right to freedom of expression.'

However, the Convention goes on to make clear that: the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

While framed in terms of a right with limitations, the Article which protects freedom of expression taken as a whole indicates that both rights and responsibilities are present. In particular, the right in question must be balanced with other laws important to maintaining democracy and protecting the rights of others.

Some human rights, such as the right not to be tortured, have no limitation. This is not because of a commitment to the individual, but because of a decision not to allow torture in any circumstances. The right not to be tortured exists regardless of whether one has behaved responsibly, or whether it could be argued that torturing people would achieve a wider social good such as preventing a crime. This absolute right demonstrates a second response to the allegation that rights promote a selfish 'me' culture. Human rights are often about ensuring communal values that should withstand the test of time, and be robustly protected in times of crisis when political expediency might seek to do away with them. They are about asserting a common humanity even with those we most distrust or disagree with.

Designing an effective bill of rights with the capacity to protect human rights in practice, often involves identifying the vulnerable and marginalized in a society – groups that do not receive attention in the mainstream political process – and considering how they are treated. The process of debating and establishing a bill of rights is one that requires a society to think very carefully about who it includes and who it does not, what its common sense of community is, and what the fundamental rights are that it wants to protect from the day-to-day business of law, policy and practice. Archbishop Tutu talking about the South African Bill of Rights process has pointed to this dynamic:

*"Then we began speaking about a bill of rights, a constitution, the sorts of things that we thought we might want. Each, I suppose, initially approached it from the position of 'well, what is good for me?' Then people gradually discovered: 'hey the things that bind us, the things that are common to us, are many times more than the things that divide us.'"*⁸

3. Specific UK concerns regarding to a bill of rights

In addition to the general concerns and debates about bills of rights, there has been discussion over whether and how a bill of rights would work in the context of the United Kingdom's legal system. This debate is also sometimes raised in the context of a bill of rights for Northern Ireland.

3.1 'Bills of rights are anti-British and we have got on very well without one'.

This concern stems from the argument that a bill of rights enforceable through the courts is not really the way things are done in the United Kingdom. Here the focus, it is suggested, has tended to be on the protection of civil liberties with limited judicial intervention. Human rights in the United Kingdom have generally been protected through a political culture of respecting rights, or so it is argued, rather than a bill of rights per se.

This debate has been much less prevalent however since the Human Rights Act came into force. Even the recent establishment of a Commission on a United Kingdom Bill of Rights tasked with considering the future of the Human Rights Act, itself a form of bill of rights, has not resulted in an outright demand to remove the framework. Rather the focus has been on the question of whether the Act is itself the most 'British' way of doing things or whether an alternative bill of rights should be introduced to replace the existing law.

The criticism of bills of rights as somehow alien to the United Kingdom is based on a short view of our legal history. Historically, human rights would seem to be a particularly 'British' affair. The very phrase 'bill of rights' comes from England and the Bill of Rights 1689. The United Kingdom made a significant contribution to entrenching human rights and bills of rights internationally. In particular, the United Kingdom often promoted bills of rights as a tool suitable for dealing with identity conflicts in former colonial states. Moreover, civil servants and politicians from the United Kingdom were also key to the drafting of the European Convention on Human Rights and Fundamental Freedoms in 1950.

It is true that prior to the Human Rights Act there was political resistance to an entrenched bill of rights in the United Kingdom. However, a record of losing legal cases before the European Convention on Human Rights (only Turkey had a higher record of litigation) led to a re-think. The incorporation of the ECHR through the innovative enforcement mechanisms of the Human Rights Act, has demonstrated how a Bill of Rights can be reconciled with the United Kingdom's legal system.

3.2 'A bill of rights cannot be entrenched because of the UK doctrine of Parliamentary Sovereignty'.

In the United Kingdom Parliament is supreme. This means, among other things, that no Parliament can bind a future Parliament. For many years the supremacy of Parliament was assumed to be a clear obstacle to entrenching a bill of rights. Judges are bound to give priority to legislation passed by the Parliament of the day, so it seemed impossible to give human rights a special place within the legal system without undermining a basic constitutional premise. However, the Human Rights Act found a balance between entrenching and protecting rights on the one hand, and maintaining Parliamentary sovereignty on the other.

3.3 'We already have lots of international and European human rights law and a bill of rights in the form of the Human Rights Act and do not need another bill of rights'.

There are strong arguments that the United Kingdom's international commitments under human rights treaties and the Human Rights Act, are sufficient to protecting rights and that a Bill of Rights for Northern Ireland is not required. However, human rights treaties while an important form of protection cannot be directly used in courts. The Human Rights Act provides that the ECHR can be used in domestic courts and it places an obligation on all public authorities to act consistently with it. However, there is clearly room to add to these rights with a particular reference to Northern Ireland's political and social context. The Commission has advised government on how additions could be made to the ECHR so as to constitute a Bill of Rights for Northern Ireland. However, ultimately a political process is required leading to legislation in the Westminster Parliament.

4. Specific Northern Ireland concerns regarding a bill of rights

Northern Ireland has seen years of discussion and debate on a bill of rights, during which many objections have been made. Many of these reflect issues already dealt with in this publication.

People concerned about the 'undemocratic' nature of bills of rights, for example, may view this as something to be particularly worried about given the early difficulties experienced in establishing and sustaining the Northern Ireland Assembly.

Concerns about the role of judges in interpreting and enforcing a bill of rights, are also likely to be heightened in a society where the judiciary itself was a subject of political scrutiny and criticism and threatened with violence throughout the conflict.

Others are worried that to give judges a role in what is seen as the primary business of politics, could be particularly negative in Northern Ireland given that politicians have only recently re-gained power, and are still learning to work together.

All of these objections may have some validity, but they are nonetheless subject to the answers already provided. There are, however, additional Northern Ireland specific objections to bills of rights that must be considered. These fall into three groups:

1. objections that question the need for a separate Bill of Rights in Northern Ireland rather than dealing with human rights on a United Kingdom-wide basis;
2. objections that suggest it might be divisive to try to get agreement on the content of a Bill of Rights for Northern Ireland;
3. objections due to concerns over the legal feasibility of having a Bill of Rights for Northern Ireland as a devolved jurisdiction.

4.1 'We don't need a Bill of Rights for Northern Ireland because we already have the Human Rights Act and the human rights protections in the Northern Ireland Act and that is enough'.

In addition to the explanation already given as to why the Human Rights Act might not be enough, it is possible to point to further reasons why a Bill of Rights for Northern Ireland might be a good idea:

- it has popular support and people view it as being of assistance in moving forwards politically;
- the Government has committed to a Bill of Rights for Northern Ireland throughout the different peace agreements and processes of consultation;
- there are specific needs such as sectarianism and victims-rights, which could benefit from being specifically addressed in a tailor-made Bill of Rights for Northern Ireland.

4.2 'We need to await the outcome of the United Kingdom Bill of Rights Process (or, if we need a bill of rights we just need one for the whole United Kingdom)'.

It can be argued that any Northern Ireland process should await the outcome of the consultation on a United Kingdom Bill of Rights. This objection prioritizes a new United Kingdom-wide settlement on human rights ahead of any agreement to a Bill of Rights for Northern Ireland. There might be two reasons for this prioritization:

- first, because it would seem more logical to agree a state-wide Bill of Rights first, and a devolved one thereafter;
- second, because one does not really want a Bill of Rights for Northern Ireland and views the United Kingdom Bill of Rights project as a better alternative.

In response it should be noted that there is no legal or political reason to agree a state-wide approach to human rights protections in advance of a Bill of Rights for Northern Ireland. Neither is it more logical. In Australia, for example, two regional bills of rights have been agreed in Victoria and the Australian Capital Territory. Moreover, the processes and debates by which these regional bills of rights have been agreed also proved useful in helping to clarify a national debate over how an Australia-wide bill of rights might work.

To subjugate a Bill of Rights for Northern Ireland to a United Kingdom-wide debate could unnecessarily stall an advanced process in favour of a new and uncertain outcome. The Northern Ireland and United Kingdom Bill of Rights processes are distinct, with two different political contexts. The first has its roots in the peace process, and has developed over a long period with a much greater degree of public consultation. This second, by contrast, is a very new and time-limited process, involving mainly lawyers, and has no broad public education function or capacity.

It is unclear whether or how a coalition government with publicly-acknowledged different views on a Bill of Rights in the United Kingdom will agree to move forward on the outcome of an initial, quite low-key, consultation. There are also concerns in Scotland and Wales that a United Kingdom Bill of Rights would have a negative impact on the human rights cultures of those jurisdictions, and require a re-working of the devolution Acts.

4.3 'We don't need a Bill of Rights for Northern Ireland because there are no rights violations now that the troubles are over'.

A range of cases, and also investigations by the Commission, have demonstrated that violations of rights continue to take place in Northern Ireland, even though they are often different in scale and nature from those that took place during the conflict. In addition important 'legacy' issues also remain which a Bill of Rights for Northern Ireland might help address.

4.4 'We don't need a Bill of Rights for Northern Ireland because we already have legislative protection for many important rights such as equality'.

It is very important to have legislation relating to issues such as equality. But the primary function of a bill of rights in any society is to enshrine human rights protections. Consequently, the fact that a protection may be found in existing legislation, policy or government practices is not a reason to exclude that protection from what should be a foundational document. The question of the content of a bill of rights is not determined by whether or not protections currently exist in common law or statute, or elsewhere. Rather, the question is how to decide which values to draw from existing protections and give them expression at a constitutional level.

4.5 'It would be difficult to get politicians from all parties to agree on a Bill of Rights for Northern Ireland'.

This has, indeed, been the experience in Northern Ireland concerning a bill of rights. While it is not the intention of the Commission to take this opportunity to re-open the past political debates it hopes that the following reflections may be of assistance.

As a strict legal matter, the United Kingdom government has committed to a bill of rights in a piece of Westminster legislation and so the passage of any bill will not be down to agreement achieved in the Northern Ireland Assembly. Nonetheless, as a political matter it is likely that the United Kingdom government will wish to see cross-community consensus on the content of a bill of rights. Moreover, a Memorandum of Understanding between the United Kingdom government and the Northern Ireland Executive provides that the Westminster Parliament will not legislate on Northern Ireland without the consent of the Assembly. It could be argued that a bill of rights, due to its nature and the fact that it was agreed to as part of the peace process may require a different understanding of consent of the people of Northern Ireland, rather than being tied to consent of the Assembly.

Ultimately the adoption of any bill of rights will involve more negotiation. Not all matters are up for free negotiation. The broad framework of human rights is constrained by international law which provides a useful baseline for agreement thereby limiting the scope of disagreement. Many human rights are matters on which we know people do broadly agree. Consultation on rights has revealed that in practice people have similar concerns with regard, for example, to access to public services such as healthcare and that a greater consensus exists than might be expected.

4.6 'It would be difficult to get politicians and civil society to agree on a Bill of Rights for Northern Ireland'.

It is indeed important that agreement is reached not just between politicians but that it should reflect a wider engagement and consensus within civil society and amongst the people of Northern Ireland more generally. This objective might seem extremely difficult to achieve. There is evidence, however, that broadening a process can assist agreement rather than prevent it. Consultation in Canada and South Africa – two quite different countries – produced strong and interesting bills of rights.

Currently, a wide civil society involvement in the legislative process takes place in Northern Ireland without controversy. It happens informally, and formally through consultation, and has often proved useful to political parties helping them to reach consensus and produce meaningful and fair legislation.

Civil society groups have been working together on the bill of rights project for many years, across divides such as trade unions and business, Protestant and Catholic religious organizations and different language groups. They have found either common concerns or ways of reaching agreements on issues of dispute. This experience can be useful to politicians as they take forward discussions on a bill of rights.

4.7 'A bill of rights in Northern Ireland would abridge matters that are against the beliefs of faith communities.'

Throughout the process in Northern Ireland some religious groupings have had a persistent concern that a bill of rights is linked to campaigns to change the law in manners inconsistent with widely held moral views, such as on abortion. This concern is linked to a general anxiety held by some religious groups that a bill of rights would impact negatively on their beliefs and that human rights are somehow negative for faith communities.

Faith communities have been very active in campaigns for bills of rights, both in Northern Ireland, and elsewhere. At their heart bills of rights aim for equality and fair treatment, and these values are central to most religions. No bill of rights proposal to date has suggested any sort of right to abortion.

4.8 'It is constitutionally unusual to have different bills of rights and different levels of rights protection for different parts of a country'.

The charge that a bill of rights for Northern Ireland is constitutionally unusual can combine several different objections.

The first objection is that it is unusual for devolved regions to have bills of rights. This view is ill-informed when tested against experience elsewhere. While we are perhaps more aware of large centralized constitutions, countries with federal or devolved governments also often have bills of rights at the regional level. In addition to the Constitution of the United States of America, many of the 52 states have their own bills of rights. Similarly, the two entities that make up Bosnia and Herzegovina have their own bills of rights in addition to the central constitution.

The second charge is that it is unusual to have bills of rights for some regions of a country and not for others. Again, this objection can be factually rebutted. Not all countries with regional bills of rights have them in all devolved regions, in fact in most countries with regional bills of rights these were introduced at different times in different regions. Australia, for example, has no central bill of rights and yet two regions Victoria and the Australian Capital Territory do. Similarly, South Africa has nine regional governments only one of which, Western Cape, has its own constitution. While not providing for a bill of rights as such, this Constitution makes provision for some additional language rights, and for a list of 'directive principles' which incorporate human rights commitments.

The third charge is that it is unusual to have 'more' rights for one region and it would be 'unfair' to people in England, Scotland and Wales for people in Northern Ireland to have 'more' rights. In fact, regional bills of rights tend to operate in conjunction with any central bill of rights to ensure a country-wide minimum standard of protection. It is not unusual for regions to build on those rights and provide different and additional protections at the regional level, in the knowledge that the rights that they frame must be 'additional' to the central constitution.

At the moment there is differential provision for human rights in the United Kingdom. The right to equality is enshrined in the Northern Ireland Act as part of the limitation of the Assembly's powers. But there are quite different equality duties in operation in England, Scotland and Wales. In terms of social justice issues, such as fees for education, or healthcare, the devolved regions have taken quite different approaches. There is no reason why these differences could not be extended to include a bill of rights for Northern Ireland. In any case, the baseline for a bill of rights is the United Kingdom's international human rights treaty obligations which are binding with regard to all parts of its territory.

4.9 'It is unclear what laws a Northern Ireland Bill of Rights would apply to: just the Northern Ireland Assembly, or all legislation?'

It would be possible in theory to have a bill of rights which only applied to the devolved powers of the Northern Ireland Assembly and not to those powers reserved by the Westminster Parliament. However, many issues and human rights cut across both devolved and reserved powers. The current equality duty and right to equality in the Northern Ireland Act applies to both devolved and reserved powers, and current proposals for a bill of rights have contemplated that it would apply to all power exercised in Northern Ireland.

Whatever the result, the point remains that it is not constitutionally or legally difficult, nor is it unprecedented to have a Bill of Rights for Northern Ireland, which applies to the actions of both devolved and central government. Devolution in the United Kingdom is asymmetrical with each of the regions maintaining slightly different powers, a slightly different mechanism of government, and as mentioned, a level of differentiated human rights provision. These differences directly connect to the historic concept of the United Kingdom as a union of four entities with distinct elements. Differentiated rights provision for different devolved regions is arguably a constitutionally-appropriate way to deal with the issue.

5. Conclusion

In conclusion, while the objections to and criticism of bills of rights often point to the issues at stake in drafting and implementation, they do not demonstrate that bills of rights are either impossible to achieve or 'bad things' in general. In fact, the overwhelming practice of using bills of rights globally and their variety demonstrates many ways in which these concerns can be avoided or met, or in some instances, that they are just mistaken.

The possible objections to and criticisms of bills of rights, are important in pointing to: the need for ongoing education on how bills of rights work; the need to remain apprised of developments and innovations in other countries as to how legitimate concerns can be accommodated and can influence the type of bill adopted; and the importance of ongoing public debate as to which rights have particular importance in Northern Ireland, and how they can best be agreed on and implemented.

Footnotes

¹ P. Alston (ed) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, 1999) at 3.

² *Ibid* at 3, citing Van Maarseven and Van der Tang, *Written Constitutions: A Computerized Comparative Study* (1978), 191-5.

³ C. Bell *Human Rights and Peace Agreements* (Oxford University Press, 2000)

⁴ Audit Commission, 'Human Rights: Improving public service delivery' (September 2003) p5 quoting Public Law Project (June 2003), *The Impact of the Human Rights Act on Judicial Review*.

⁵ Sweet & Maxwell, Press Release (15 February 2010). Available at, <http://www.sweetandmaxwell.co.uk/about-us/press-releases/Annual%20Human%20Rights%20Cases%20Research.pdf>. (Accessed 7 August 2012).

⁶ Constitution of the Republic of South Africa, 1996, Chapter 2, Article 8(3)(a).

⁷ The Committee on the Administration of Justice (CAJ), "Dignity, Equality and Inalienable Rights", Lecture, Belfast, November, 2001, cited in CAJ, 'The Best Bill of Rights – A Guide', Belfast 2008, pg 6

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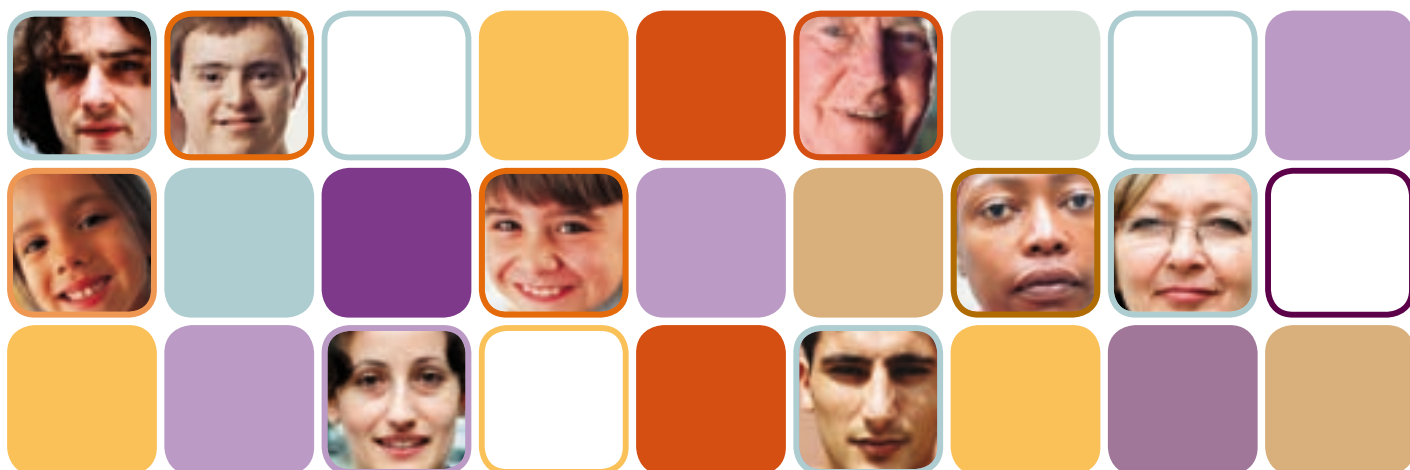


NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

A Bill of Rights for Northern Ireland

Advice to the Secretary of State
for Northern Ireland

10 December 2008





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ISBN 1 903681 77 4

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FOREWORD

Dear *Secretary of State*

In response to your request to provide advice of the kind referred to in Paragraph 4, in the Rights, Safeguards and Equality of Opportunity section, of the Belfast (Good Friday) Agreement, and under Section 69(7) of the *Northern Ireland Act 1998*, you will find enclosed the Northern Ireland Human Rights Commission's final report. The advice represents the extensive work undertaken by Commissioners and staff as well as the contributions from the working groups and advisors, the community, voluntary and statutory sectors, and the hundreds of people who engaged in the consultation process. I am particularly grateful to each of them. While there is agreement on having a Bill of Rights for Northern Ireland, this process has shown that there remains a diversity of opinion on the contents of such a Bill. An agreed methodology was adopted as part of the process and the Commission has taken great care to ensure that this advice conforms fully to its mandate.

If a Bill of Rights is to underpin peace in Northern Ireland, it needs to be embedded in attitudes and mindsets. It should not only influence the thinking and action of those in positions of power, but instil in each person a confidence in asserting and securing their own rights, as well as defending those of others. A democratic society must respect the human rights of all, if it is to be worthy of that name, and should provide assurances that people are to be treated fairly. By affording protections and safeguarding against abuses, a Bill of Rights should move us forward from our contentious past as well as being a point of reference for future generations. No one should feel defensive by the enactment of these rights. A Bill of Rights must be applicable to everyone and should, in this sense, belong to all of us.

On this, the 60th Anniversary of the Universal Declaration of Human Rights, it is fitting to recall the words of its opening statement, that "the equal and inalienable rights of all members of the human family are the foundation of freedom, justice and peace in the world". These values apply globally and locally and are the principles upon which the advice on a Bill of Rights for Northern Ireland is founded.

On behalf of the Commission, I present this report to you on International Human Rights Day and look forward to receiving a timely response.

Professor Monica McWilliams
Chief Commissioner

10 December 2008

CURRENT COMMISSIONERS

Chief Commissioner

Professor Monica McWilliams

Mr Jonathan Bell*

Mr Thomas Duncan

Professor Colin Harvey

Mr Alan Henry

Ms Ann Hope

Mr Colm Larkin

Mr Eamonn O'Neill

Mrs Geraldine Rice MBE

Lady Daphne Trimble*

* In accordance with its Standing Order 22, the Commission records a consensus decision supporting this report, with two Commissioners (noted above) dissenting.

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CHAPTER 1: THE BILL OF RIGHTS PROCESS

Introduction

The need for a Bill of Rights in Northern Ireland has been debated for many years. Proposals were contained in the White Paper on the *Northern Ireland Constitution Act 1973*¹, the Anglo-Irish Agreement 1985² and the Framework Documents 1995.³ The Northern Ireland Human Rights Commission's predecessor, the Standing Advisory Commission on Human Rights, produced a report in 1977, in which it argued for the incorporation of the European Convention on Human Rights as a Bill of Rights for the UK. However, it also recognised that the particular circumstances of Northern Ireland could provide a basis for additional rights stating that:

*"...in the event of the return of devolved legislative and executive functions to a new government in Northern Ireland (either before or after the incorporation of the European Convention into domestic law), it would be desirable for the enabling legislation to include a clear and enforceable charter of rights for Northern Ireland. The guarantees in this charter should be consonant with those which may accompany devolution in other parts of the United Kingdom. This charter of rights could be more comprehensive than the European Convention and should be framed in the light of whatever at the time seem to be the special needs of the people of Northern Ireland."*⁴

Significantly, this report also acknowledged that its recommendation "might be a necessary part of a constitutional settlement in which all political parties and persons interested would be consulted; but it could never be a substitute for such a settlement".⁵

Today, in 2008, a Bill of Rights which builds upon the European Convention on Human Rights has been recognised as integral to the

¹ Part 4, 'A charter of human rights' in White Paper: *Northern Ireland Constitutional Proposals* (1973), HMSO, London.

² *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland* (1985) HMSO, London, Section C, 'Political Matters', Article 5(a),

³ *The Framework Documents: A New Framework for Agreement* (1995) 'Protection of Rights', para 50.

⁴ Standing Advisory Commission on Human Rights (1977) *The Protection of Human Rights by Law in Northern Ireland*, SACHR, Belfast, Chapter 8, 'Principal findings and recommendations', para 6.15.

⁵ As above, para 13.

constitutional settlement in Northern Ireland. It is a component of the Belfast (Good Friday) Agreement 1998⁶ and reference can also be found in the St Andrews Agreement 2006.⁷

A series of independent opinion surveys undertaken on behalf of the Northern Ireland Human Rights Commission have demonstrated that a large majority of respondents (87 per cent) would support a proposed Bill of Rights. Both, Protestants (87 per cent) and Catholics (85 per cent) were in agreement with the concept of having a Bill of Rights that reflects the particular circumstances of Northern Ireland, including the principles of mutual respect for the identity and ethos of both main communities and parity of esteem.⁸

The Bill of Rights mandate

Under the terms of the Belfast (Good Friday) Agreement 1998 and in accordance with the *Northern Ireland Act 1998*,⁹ the Secretary of State for Northern Ireland wrote formally to the Commission inviting it to provide advice of the kind referred to in paragraph 4 of the relevant section of the Agreement, namely:¹⁰

“...to consult and to 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 [European Convention on Human Rights] – to constitute a Bill of Rights for Northern Ireland.”

Issues for consideration by the Commission were to include:

“the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of

⁶ *The Agreement: Agreement Reached in the Multi-party Negotiations* (1998) pp 16-17 [hereafter, Belfast (Good Friday) Agreement].

⁷ *Agreement at St Andrews* (2006) Annex B, ‘Human rights, equality, victims and other issues’ [hereafter, St Andrews Agreement].

⁸ NIHRC Opinion Survey, Market Research Northern Ireland, March 2004, first published in *Progressing a Bill of Rights for Northern Ireland: An Update* (2004) NIHRC, Belfast.

⁹ *Northern Ireland Act 1998*, section 69(7).

¹⁰ Letter from the Secretary of State for Northern Ireland, received 24 March 1999.

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."¹¹

Interpretation

The Commission has given careful consideration to its mandate. For example, the phrase, "to advise on the scope for defining, in Westminster legislation", raised a question as to how broad that scope might be. The Commission has concluded that it is necessary and desirable to provide the Secretary of State for Northern Ireland with comprehensive advice on the possible content of a Bill of Rights. The reasons for this conclusion are outlined below.

When the Commission's mandate was set out in the Belfast (Good Friday) Agreement, the Government had still to give domestic effect to the provisions of the European Convention on Human Rights. When it did so, through the *Human Rights Act 1998*, it did not incorporate the whole of the Convention and its protocols.

For the purposes of developing the advice contained in this report, the Commission adopted a working interpretation of the scope of the term 'European Convention on Human Rights', which refers only to the main body of the Convention rather than including its protocols. The Commission recognises that ratification of international treaties and the decision to give them domestic effect must be made on a UK-wide basis. It therefore recommends that the Government considers giving domestic effect to the full range of protections contained in the European Convention on Human Rights and the incorporation of its protocols. To help achieve this objective, the Commission has agreed to co-operate with the Equality and Human Rights Commission (in Great Britain) and the Scottish Human Rights Commission.

Although the decision to give Convention Rights domestic effect must be made on a UK-wide basis, the Commission, pursuant to its mandate under the Belfast (Good Friday) Agreement, is nonetheless of the view that some Convention Rights not found in the *Human Rights Act 1998*, but which reflect the particular circumstances of Northern Ireland should be included in a Bill of Rights for Northern Ireland. These rights are identified and discussed in Chapters 2 and 3.

¹¹ Belfast (Good Friday) Agreement, pp 16-17.

One crucial area of its mandate, to which the Commission has devoted considerable time, is how to define the “particular circumstances of Northern Ireland”. The Commission acknowledges the importance of a generous interpretation of this phrase. There are many things that Northern Ireland has in common with other parts of the UK and Ireland, but there also aspects of life – historic, political, social, economic and cultural – that are distinct. Nevertheless, by interpreting this section of its mandate, the Commission also acknowledges that there must be limits placed on that interpretation if agreement is to be reached on supplementary rights which merit inclusion within a Bill of Rights.

In providing the advice contained in this report, the Commission notes that its mandate arises from a peace agreement reached after a period of protracted conflict and a political process which established a set of principles and structures for the governance of Northern Ireland. It is for this reason, that the Commission was mandated to consider the principles of mutual respect and parity of esteem. The Commission has interpreted these principles to require – or be compatible with – the due recognition of the identity, ethos and aspirations of the two main communities in Northern Ireland. At the same time, the rights and needs of others must be protected. Both of the above can be best achieved through a common commitment to human rights, fairness, equality and justice for all.

How the Commission approached its task

The process of formulating the Commission’s advice began on 1 March 2000 at a joint launch in Belfast and Derry/Londonderry. In the intervening years, over 650 formal submissions from individuals and agencies were received.¹² In September 2001, the Commission published *Making a Bill of Rights for Northern Ireland: A Consultation*.¹³ There followed a widespread debate on the content of this paper. A *Summary of Submissions on a Bill of Rights*¹⁴ was then published in July 2003 and, in April 2004, the Commission published a further consultation document – *Progressing a Bill of Rights for Northern Ireland: An Update*.¹⁵

¹² Further materials relating to the process, including responses to the various stages of the Commission’s consultation, are available at www.nihrc.org and a dedicated Bill of Rights website at www.borini.info.

¹³ NIHRC (2001) *Making a Bill of Rights for Northern Ireland: A Consultation*, NIHRC, Belfast.

¹⁴ NIHRC (2003) *Summary of Submissions on a Bill of Rights*, NIHRC, Belfast.

¹⁵ NIHRC (2004) *Progressing a Bill of Rights for Northern Ireland: An Update*, NIHRC, Belfast.

A programme of education, training and awareness-raising was developed with the aim of helping people make a meaningful contribution to the debate. This included the publication of 11 discussion pamphlets, three opinion surveys, and the establishment of nine working groups, composed of nearly 200 people from outside the Commission, to examine the need for rights in particular areas. A programme for schools was developed¹⁶ and training was provided to more than 400 community facilitators who, in turn, delivered scores of other events.

An extensive range of workshops, conferences, information events, and public and private meetings were held with organisations and individuals. An advertisement campaign was launched to raise public awareness, and special consultation campaigns for victims and children and young people were successfully carried out. A working paper, *Taking Forward a Bill of Rights for Northern Ireland*,¹⁷ was produced by members of the Commission, in February 2005, to assist the newly appointed Commissioners to assess the progress made.

A Human Rights Consortium¹⁸ had been established in 2000, independent of the Commission. It developed a programme of activities which included research, education and lobbying and, in early 2008, ran a publicity campaign to raise awareness of a Bill of Rights for Northern Ireland. The Commission met regularly with the Consortium during this time.

From January 2006 to November 2008, the Commission convened 54 meetings of an internal Bill of Rights Working Group and held seven weekend seminars. During this period, the Commission met with individual political party representatives in the Northern Ireland Assembly on 18 occasions. The Commission also met with the human rights spokespersons from the major parties at Westminster. It engaged with Northern Ireland Office officials on a regular basis, and met with the Secretary of State and UK Government Ministers on six occasions. The Commission met with the Taoiseach, hosted a meeting with the Minister for Foreign Affairs at its offices and held several meetings with Irish Government officials on a Bill of Rights. It also met with the Irish Human Rights Commission on a regular basis as part of the joint committee between the two commissions agreed under the terms of the Belfast (Good Friday) Agreement.¹⁹

¹⁶ Bill of Rights in Schools Project (2004) *Bill of Rights in Schools: A Resource for Post-primary Schools*, NIHRC, Belfast.

¹⁷ NIHRC (2005) *Taking Forward a Bill of Rights for Northern Ireland*, NIHRC, Belfast.

¹⁸ See: www.billofrightsnri.org.

¹⁹ Belfast (Good Friday) Agreement, p 18.

In 2002, the Commission supported the proposal from some of the political parties for the establishment of a round table forum on the Bill of Rights. The UK and Irish Governments confirmed their support for the proposal in the Joint Declaration of April 2003.²⁰

The Northern Ireland Assembly had been in suspension from 14 October 2002, and it was therefore difficult to progress discussion on a Bill of Rights with the local political parties. As part of the implementation process of the Belfast (Good Friday) Agreement, a Committee was established which drafted the terms of reference for a future round table or Bill of Rights Forum. Some of the political parties involved in this Committee met with the Commission to discuss proposals for a round table or forum. In June 2006, a Preparation for Government Committee was created in anticipation of the devolution of powers to a new Northern Ireland Assembly.²¹ On 5 October 2006, the Commission met with the political representatives of the Committee at its offices to discuss advice on a Bill of Rights and its support for a round table or Bill of Rights Forum. The multi-party talks at St Andrews, in October 2006, finally provided the necessary cross-community political support to establish the Forum on a Bill of Rights for Northern Ireland, as well as providing the framework for restoring devolution in Northern Ireland.²²

The Commission made a *Submission to the Round Table on a Bill of Rights for Northern Ireland*,²³ to welcome the Bill of Rights Forum and to assist the Forum in its deliberations. The timeframe for the Forum to convene was announced by Minister of State, David Hanson MP, on 12 December 2006. After a brief consultation period, the Government established the Northern Ireland Bill of Rights Forum with 28 members.²⁴ The Democratic Unionist Party, Sinn Féin, Ulster Unionist Party and Social Democratic and Labour Party had three seats each. The Alliance Party had two seats. Business, trade unions and the main Churches had two seats each, and representatives from the children and young people's sector, people with disabilities, ethnic minorities, older people, people of different sexual orientations, women, the community and voluntary sector, as a whole, and the human rights sector each had one seat.²⁵

²⁰ *Joint Declaration by the British and Irish Governments*, April 2003.

²¹ Committee on the Preparation for Government of the Northern Ireland Assembly, *Report on Rights, Safeguards, Equality Issues and Victims*, Session 2006/2007, 19 September 2006, p 2, para 6.

²² *Agreement at St Andrews* (2006) Annex B, 'Human rights, equality, victims and other issues'.

²³ NIHRC (2006) *Submission to the Round Table on a Bill of Rights for Northern Ireland*, NIHRC, Belfast.

²⁴ Northern Ireland Office (2006) *A Forum for a Bill of Rights for Northern Ireland – Response to Consultation*, NIO, Belfast.

²⁵ See: www.billofrightsforum.org.

The Commission welcomed this development and, while it remained independent from the process, observed the Forum's proceedings. The Forum's inaugural meeting took place on 18 December 2006. Its terms of reference were to produce agreed recommendations to inform the Commission's advice to government based on the Commission's mandate as outlined in the Belfast (Good Friday) Agreement.

A Final Report by the Forum was submitted to the Commission on 31 March 2008.²⁶ The Commission welcomed the report and, following its receipt, publicly announced its intention to submit advice on a Bill of Rights to the Secretary of State for Northern Ireland on 10 December 2008. It also considered the Forum's recommendations using the methodology outlined below. The Commission's deliberations paid rigorous attention to the proposals contained in the Forum Report, with each considered in detail.

On 9 June 2008, the Commission circulated its methodology for preparing its own advice on a Bill of Rights.²⁷ The Commission held a further round of meetings to receive feedback on this methodology and was reassured by the responses it received from the political parties and civil society. The Commission adopted an approach which allowed the methodology to be used as a set of guidelines for deliberating on the possible content of its advice.

Methodology

In producing the advice contained in this report, the Commission has not set out to draft a Bill of Rights but, rather has aimed to produce a series of recommendations specific enough to provide clear direction. This process required a discussion of the rationale for including, or excluding:

1. A preamble and its possible content,
2. Each right in principle, and
3. A series of recommendations in relation to each right where supplementary protections have been determined as necessary.

²⁶ 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*, BORF, Belfast.

²⁷ See: Appendix 1, *A Briefing on the Methodology used in Preparing the Advice of the NIHRC to Government on A Bill of Rights* (2008) NIHRC, Belfast.

In the case of each proposed right, the Commission has applied the following guidelines in its discussion:²⁸

The particular circumstances

1. Is the case made that the need for this proposed right arises out of the particular circumstances of Northern Ireland?²⁹

The legal aspects

2. Is the proposed right:
 - a) supplementary to the Human Rights Act 1998
 - b) supplementary to those provisions of the European Convention on Human Rights not reproduced in schedule 1 to the *Human Rights Act 1998*, and
 - c) compatible with their existing provisions?
3. Is the case made that the right is not adequately protected under the European Convention on Human Rights and the Human Rights Act?
4. Is the proposed right in line with best practice according to international instruments and experience?

The principles of mutual respect and parity of esteem

5. Will the proposed right help to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem?³⁰

The interests of the people of Northern Ireland

6. In light of the above, taking into account what the consequences might be (positive and negative) of including this proposal in the Bill of Rights, the content of the Forum's Final Report, the support and opposition regarding the proposal, the context of human rights in the UK and on the island of Ireland and any submissions made to the Commission on the subject, does the Commission believe it would be in the interests of the people of Northern Ireland?

²⁸ With the exception of the last two questions, the enumeration is for convenience and does not imply a sequential process. See: Appendix 1, *A Briefing on the Methodology used in Preparing the Advice of the NIHRC to Government on A Bill of Rights* (2008) NIHRC, Belfast.

²⁹ See: Appendix 1 for supplementary guidelines for the discussion of the "particular circumstances of Northern Ireland" to which the Commission may have regard.

³⁰ See: Appendix 1.

The content of the Commission's advice

7. Taking into account all the above and having regard to the totality of rights considered for inclusion in a Bill of Rights, does the Commission consider: a) that this proposed right should be included in its advice to the Secretary of State and, b) that any amendments or additions are necessary or desirable in order to ensure the coherence and effectiveness of the Bill of Rights as a whole?

In addition to the proposed rights, the Commission considered the matters of implementation, entrenchment, enforcement, justiciability and derogation. The important question of how to bring a Bill of Rights into being, making it a living document, through information, education and a thorough application of its principles and values by public authorities has also been examined.³¹

Recent developments

Since the Commission started its work, there have been some developments towards the production of a Bill of Rights for the UK. In July 2007, the Government committed to exploring this possibility as part of a wider programme of constitutional reform.³² The Joint Committee on Human Rights at Westminster has published a report on a *A Bill of Rights for the UK?*³³ This report acknowledged the considerable progress that had already been made towards realising a Bill of Rights for Northern Ireland.³⁴

The Commission has also engaged with political parties at Westminster on the issue of a Bill of Rights for Northern Ireland. In these meetings, the parties have reassured the Commission that they see no contradiction between having a Bill of Rights for Northern Ireland while, simultaneously, pursuing a Bill of Rights for the UK as a whole. The Government has also assured the Commission in its deliberations on a possible UK Bill of Rights and Responsibilities³⁵, that it acknowledges the separate Northern Ireland process and its distinct origins arising from a peace agreement. Similarly, the political parties represented in the Northern Ireland Assembly agree that there should be a Bill of Rights,

³¹ See: Chapter 4.

³² Ministry of Justice (2007) *The Governance of Britain*. Presented to Parliament by the Secretary of State for Justice and Lord Chancellor by Command of Her Majesty July 2007, CM 7170, HMSO, London.

³³ House of Lords, House Commons, Joint Committee on Human Rights (2008) *A Bill of Rights for the UK?* Twenty-ninth Report of Session 2007-08 Vol 1, TSO, London.

³⁴ As above, p 29.

³⁵ Meeting between the Commission and Minister Michael Wills, London, 24 April 2008.

although they may disagree on the possible content.³⁶ The Commission looks forward to progressing its advice on a Bill of Rights with the support of all those who believe it is necessary and desirable for Northern Ireland to have its own Bill of Rights.

³⁶ Meetings between the Commission and local political parties at the Northern Ireland Assembly, 10 June to November 2008.

CHAPTER 2: ADVICE ON THE CONTENT OF A BILL OF RIGHTS FOR NORTHERN IRELAND

In this chapter, the Northern Ireland Human Rights Commission presents those Supplementary Rights which should be added to the rights in the European Convention on Human Rights, already given further effect in domestic law by the *Human Rights Act 1998*. Together, the Convention Rights and the Supplementary Rights will constitute the rights in a Bill of Rights for Northern Ireland. For ease of reading, the Supplementary Rights are presented throughout this chapter in grey boxes.

It is the Commission's view that the recommendations in this chapter reflect the particular circumstances of Northern Ireland, are supplementary to the European Convention on Human Rights as already given further effect by the *Human Rights Act 1998*, and draw as appropriate on international instruments and experience. Further explanations for this are contained in Chapter 3. In addition, an explanation of the recommendations for enforcement and implementation are contained in Chapter 4.

Preamble

As part of our advice to Government, we propose the following preamble which refers to the context and key principles which should underpin a Bill of Rights for Northern Ireland. It is based on the principles in the Universal Declaration of Human Rights (1948) the European Convention on Human Rights (1950) the Belfast (Good Friday) Agreement (1998), the St Andrews Agreement (2006) and other international human rights instruments.

The Bill of Rights for Northern Ireland is an Act to give further effect to rights and freedoms guaranteed under Schedule 1 of the Human Rights Act 1998 plus rights that are supplementary to the European Convention on Human Rights and arise out of the particular circumstances of Northern Ireland.

Founded on the principles of full respect for, and equality of, civil, political, economic, social, and cultural rights and of freedom from discrimination it:

Recognises that a just and equal society is best maintained by a stable and functioning democracy and the common observance of human rights;

Acknowledges the dignity and worth of every person and the equal and inalienable rights of all;

Reiterates an absolute commitment to exclusively peaceful means of resolving differences;

Addresses the legacy of the past and the special needs of victims and survivors of the conflict;

Enshrines the entitlement of all to the full range of human rights and fundamental freedoms, safeguarded by the rule of law;

Strives to ensure that every child will grow up safe and secure;

Values the role of women in public and political life and their involvement in advancing peace and security;

Cherishes our common humanity and advocates freedom from fear and want;

Seeks to protect our common heritage and natural environment for future generations;

Accepts the commitment to mutual respect and the religious and civil rights of everyone;

Welcomes the rich variety of languages, beliefs and traditions which is the cultural wealth of our society;

Upholds the existing rights and protections of individuals and groups especially those that guarantee free and fair participation in economic, social and political life; and

Is dedicated to the achievement of reconciliation and the vindication of the human rights of all.

Incorporation of the Human Rights Act 1998 and the European Convention on Human Rights

A provision should be drafted stating that a Bill of Rights for Northern Ireland will include Schedule 1 of the Human Rights Act 1998 plus rights that are supplementary to the European Convention on Human Rights, and are necessary because of the particular circumstances of Northern Ireland.

The right to life

Articles of the European Convention on Human Rights already incorporated in the Human Rights Act 1998, and to be incorporated in a Bill of Rights for Northern Ireland

Article 2 – Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - a) in defence of any person from unlawful violence;
 - b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The Sixth Protocol

Article 1 Abolition of the Death Penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

The Sixth Protocol

Article 2 Death Penalty in Time of War

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

A provision should be drafted to ensure that –

1. Legislation must be enacted to ensure that all violations of the right to life relating to the conflict in Northern Ireland are effectively investigated. Any mechanisms established must be fully in compliance with international human rights law.

Freedom from torture, inhuman or degrading treatment

Articles of the European Convention on Human Rights already incorporated in the Human Rights Act 1998, and to be incorporated in a Bill of Rights for Northern Ireland

Article 3 – Freedom from torture, inhuman or degrading treatment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Prohibition of slavery and forced labour

Articles of the European Convention on Human Rights already incorporated in the Human Rights Act 1998, and to be incorporated in a Bill of Rights for Northern Ireland

Article 4 – Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article, the term “forced or compulsory labour” shall not include:
 - a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
 - b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
 - c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
 - d) any work or service which forms part of normal civic obligations.

The right to liberty and security

Articles of the European Convention on Human Rights already incorporated in the Human Rights Act 1998, and to be incorporated in a Bill of Rights for Northern Ireland

Article 5 – Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - a) the lawful detention of a person after conviction by a competent court;
 - b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention

shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Articles of the European Convention on Human Rights not incorporated in the Human Rights Act 1998, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure the incorporation in a Bill of Rights for Northern Ireland of –

The Fourth Protocol, Article 1 of the European Convention on Human Rights, which declares:

No one shall be deprived of his liberty merely on the ground of the inability to fulfil a contractual obligation.

Rights supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure that –

1. Everyone who is arrested or detained has the right to consult promptly and privately with a legal representative and of prompt access where appropriate to a medical practitioner.
2. Everyone who is arrested or detained has the right to be visited by a family member under appropriate supervision.
3. Everyone who is questioned under arrest has the right to have a legal representative present during the questioning and to have it aurally and visually recorded.
4. Public authorities must take all appropriate measures to reintegrate into society those in detention or alternative care by providing support, prior to and after discharge, towards independent living.
5. Every child or vulnerable adult who is questioned under arrest, held in detention without charge, or being charged, has the right to have a legal representative and appropriate adult present to represent their best interests.

6. Every child alleged to, accused of, or proven to have infringed the criminal law has the right to be treated in a manner that pays due regard to the child's age, understanding, and needs and is directed towards the child's reintegration in society.
7. Every child has the right not to be detained except as a measure of last resort, in which case, the child may be detained only for the shortest appropriate period of time, and has the right to be:
 - a) kept separately from detained persons over the age of 18 years; and
 - b) treated in a manner, and kept in conditions, that pays due regard to the child's age.
8. No child in the criminal justice system shall be subject to the use of force or methods of restraint unless it is absolutely necessary to avoid serious injury to the child or another person.

The right to a fair trial and no punishment without law

Articles of the European Convention on Human Rights already incorporated in the Human Rights Act 1998, and to be incorporated in a Bill of Rights for Northern Ireland

Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b) to have adequate time and facilities for the preparation of his defence;
 - c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7 – No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure that –

1. Everyone has the right to trial by jury for serious offences and the right to waive it.
2. Evidence obtained through torture or inhuman and degrading treatment must be excluded. Evidence obtained through breach of any other right in a Bill of Rights for Northern Ireland must be excluded, unless it is established that the admission of the evidence would not render the trial unfair or otherwise be detrimental to the administration of justice.
3. In the case of children and vulnerable adults accused of a criminal offence, the procedures must be such so as to pay due regard to their age, their understanding and the desirability of promoting their rehabilitation.
4. Every witness has the right, prior to and after giving evidence, to such protection and support as is appropriate to their needs as witnesses.
5. Every juror has the right to such protection and support as to allow them to fulfil their role properly.
6. Every member of the judiciary and legal profession has the right to such protection as to allow them to perform their duties properly.

The right to respect for private and family life

Articles of the European Convention on Human Rights already incorporated in the Human Rights Act 1998, and to be incorporated in a Bill of Rights for Northern Ireland

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Freedom of thought, conscience and religion

Articles of the European Convention on Human Rights already incorporated in the Human Rights Act 1998, and to be incorporated in a Bill of Rights for Northern Ireland

Article 9 – Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Freedom of expression

Articles of the European Convention on Human Rights already incorporated in the Human Rights Act 1998, and to be incorporated in a Bill of Rights for Northern Ireland

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Freedom of assembly and association

Articles of the European Convention on Human Rights already incorporated in the Human Rights Act 1998, and to be incorporated in a Bill of Rights for Northern Ireland

Article 11 – Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

The right to marriage or civil partnership

Articles of the European Convention on Human Rights already incorporated in the Human Rights Act 1998, and to be incorporated in a Bill of Rights for Northern Ireland

Article 12 – Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure that –

1. Everyone who is married has the right to legal termination of marriage in accordance with the laws governing the exercise of this right.
2. Everyone has the right to enter civil partnership and the right to legal termination of civil partnership in accordance with the laws governing the exercise of these rights.

The right to equality and prohibition of discrimination

Articles of the European Convention on Human Rights already incorporated in the Human Rights Act 1998, and to be incorporated in a Bill of Rights for Northern Ireland

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure that –

1. Everyone is equal before and under the law and has the right to equal protection and equal benefit of the law, including the full and equal enjoyment of all rights and freedoms.
2. No one shall be unfairly discriminated against by any public authority on any ground such as:
race, membership of the Irish Traveller community, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender, identity, age, disability, health status, genetic or other predisposition toward illness, irrelevant criminal record, property or a combination of any of these grounds, on the basis of characteristics associated with any of these grounds, or any other status.
3. Unfair discrimination consists of any provision, criterion or practice which has the purpose or effect of impairing the ability of any person to participate on an equal basis with others in any area of economic, social, political, cultural or civil life.
4. Without prejudice to the immediate effect of recommendations on the Right to Equality and Prohibition on Discrimination, legislation must be enacted to prevent or prohibit unfair discrimination.

5. Public authorities must take all appropriate measures, to eliminate unfair discrimination and where circumstances so warrant and in accordance with the law, must take all appropriate and proportionate measures to ameliorate the conditions of disadvantaged groups, including those individuals or groups disadvantaged because of the prohibited grounds in Recommendation 2.
6. Nothing in a Bill of Rights for Northern Ireland shall preclude any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those individuals or groups disadvantaged because of the prohibited grounds in Recommendation 2, and is a proportionate means of achieving this objective.
7. Public authorities must take all appropriate measures to promote the rights of older persons and those who are disabled to lead a life of independence, enjoy social, cultural and occupational integration, and to participate in the life of the community.

Democratic rights

Articles of the European Convention on Human Rights already incorporated in the Human Rights Act 1998, and to be incorporated in a Bill of Rights for Northern Ireland

Article 16 – Restriction on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

The First Protocol

Article 3 – Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure that –

1. Everyone has the right and the opportunity, without any of the distinctions mentioned in Recommendation 2 of the Right to Equality and Prohibition on Discrimination section of this Advice and without unreasonable restriction, to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and to be elected at genuine periodic elections, which must be by universal and equal suffrage, and must be held by secret ballot, guaranteeing the free expression of the will of the electors.
2. Everyone has the right to have access, on general terms of equality, to public service.
3. Elections must be subject to proportional representation at both regional and local level.
4. A Bill of Rights for Northern Ireland recognises the safeguards contained in the Belfast (Good Friday) Agreement 1998 for inclusive, proportionate and equitable participation in regional government and recommends, by means to be determined in legislation, equivalent safeguards for local government.

5. Public authorities must take effective measures to facilitate the full and equal participation of women in political and public life, including, where appropriate, the use of temporary special measures.
6. The membership of public bodies must, as far as practicable, be representative of society in Northern Ireland.
7. There must be an independent electoral authority to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with laws which are compatible with a Bill of Rights for Northern Ireland.

Property rights

Articles of the European Convention on Human Rights already incorporated in the Human Rights Act 1998, and to be incorporated in a Bill of Rights for Northern Ireland

The First Protocol

Article 1 – Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Education rights

Articles of the European Convention on Human Rights already incorporated in the Human Rights Act 1998, and to be incorporated in a Bill of Rights for Northern Ireland

The First Protocol

Article 2 – Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure that –

1. Education in all its forms must be directed towards the promotion of human rights, equality, dignity of the person, respect for diversity and tolerance.
2. No child shall be denied the right to access the full Northern Ireland education curriculum.

Freedom of movement

Articles of the European Convention on Human Rights not incorporated in the Human Rights Act 1998, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure the incorporation in a Bill of Rights for Northern Ireland of –

The Fourth Protocol of Article 2 (1,4) of the European Convention on Human Rights, which declares:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

Freedom from violence, exploitation and harassment

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure that –

1. Everyone has the right to be free from all forms of violence and harassment, from either public or private sources, including but not limited to:
 - a) domestic violence or harassment;
 - b) sexual violence or harassment;
 - c) gender-related violence or harassment;
 - d) sectarian violence or harassment; and
 - e) violence or harassment motivated by hate on any prohibited ground of discrimination.
2. Everyone has the right to be protected from sexual exploitation and sexual and other forms of trafficking.
3. Public authorities must take all appropriate measures to ensure protection of the rights in Recommendations 1 and 2.

The right to identity and culture

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure that –

1. The right of the people of Northern Ireland to identify themselves and be accepted as Irish or British or both, as they may so choose, with no detriment or difference of treatment of any kind. This right would not be affected by any future change in the status of Northern Ireland.
2. The right of the people of Northern Ireland to hold British or Irish citizenship or both in accordance with the laws governing the exercise of this right, with no detriment or differential treatment of any kind. This right would not be affected by any future change in the status of Northern Ireland.
3. Public authorities must fully respect, on the basis of equality of treatment, the identity and ethos of both main communities in Northern Ireland. No one relying on this provision may do so in a manner inconsistent with the rights and freedoms of others.
4. Everyone belonging to a national, ethnic, religious, linguistic or cultural minority in Northern Ireland has the right, individually and in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public. No one exercising these rights may do so in a manner inconsistent with the rights and freedoms of others.
5. Public authorities must encourage a spirit of tolerance and dialogue, taking effective measures to promote mutual respect, understanding and co-operation among all persons living in Northern Ireland, irrespective of those persons' race, ethnicity, language, religion or political opinion.
6. No one may be compelled in Northern Ireland to take an oath, or 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.

Language rights

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure that –

1. Everyone belonging to a linguistic minority has the right to learn or be educated in and through their minority language where there are substantial numbers of users and sufficient demand.
2. Everyone has the right to access services essential to life, health or security through communication with a public authority, assisted by interpretation or other help where necessary, in a language (including sign language) and a medium that they understand.
3. Public authorities must, as a minimum, act compatibly with the obligations undertaken by the UK Government under the European Charter for Regional or Minority Languages in respect of the support and development of Irish and Ulster-Scots.

The rights of victims

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure that –

1. Every victim of crime has the right to appropriate material, medical, psychological and social assistance.
2. Every victim of crime has the right to be informed about the progress of the investigation and relevant legal proceedings.
3. 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.

The right to civil and administrative justice

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure that –

1. Everyone has the right of access to any information held by public authorities, in accordance with laws governing the exercise of this right.
2. Everyone has the right to administrative action that is lawful, procedurally fair, rational, proportionate and taken within a reasonable time.
3. Public authorities must give reasons for their decisions and, where feasible, provide appropriate mechanisms for internal review or appeal of their decisions.

The right to health

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure that –

1. Everyone has the right to the highest attainable standard of physical and mental health. Public authorities must take all appropriate measures, including legislative measures, to the maximum of their available resources, with a view to achieving progressively the full realisation of this right.
2. No one shall be refused emergency medical treatment and essential primary healthcare.
3. Everyone has the right to appropriate healthcare and social care services free at the point of use and within a reasonable time. Public authorities must take all appropriate measures, including legislative measures, to the maximum of their available resources, with a view to achieving progressively the full realisation of this right.
4. Women and girls have the right to access gender-sensitive and appropriate healthcare services and information.

The right to an adequate standard of living

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure that –

1. Everyone has the right to an adequate standard of living sufficient for that person and their dependents. Public authorities must take all appropriate measures, including legislative measures, to the maximum of their available resources, with a view to achieving progressively the full realisation of this right.
2. No one shall be allowed to fall into destitution.

The right to accommodation

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure that –

1. Everyone has the right to adequate accommodation appropriate to their needs. Public authorities must take all appropriate measures, including legislative measures, to the maximum of their available resources, with a view to achieving progressively the full realisation of this right.
2. No one may be forced out of their home by threats or harassment or evicted without an order of a court. Public authorities must take all appropriate measures to ensure the protection of this right.
3. Everyone has the right to appropriate emergency accommodation.

The right to work

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure that –

1. Everyone has the right to work, which includes the right to the opportunity to gain their living by work which they freely choose or accept. Public authorities must take all appropriate measures, including legislative measures, to the maximum of their available resources, with a view to achieving progressively the full realisation of this right.
2. Everyone has the right to enjoyment of just and favourable conditions of work irrespective of the status of the worker, including:
 - a) remuneration which provides all workers, as a minimum with:
 - i. fair wages and equal remuneration for work of equal value without distinction of any kind, in particular, women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - ii. decent living for themselves and their families;
 - b) safe and healthy working conditions;
 - c) freedom from all forms of unfair discrimination and from harassment including taking all appropriate measures to eliminate discrimination against women in the field of employment, including on the grounds of pregnancy or maternity;
 - d) rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.
3. Workers have the right to strike and the right to engage in collective bargaining.
4. Everyone with caring responsibilities has the right to appropriate respite from those responsibilities. Public authorities must take all appropriate measures, including legislative measures, to the maximum of their available resources, with a view to achieving progressively the full realisation of this right.

Environmental rights

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure that –

1. Everyone has the right to have the environment protected so as to foster the health and well-being of present and future generations, while promoting justifiable economic and social development.
2. Public authorities must adopt legislative and other measures to:
 - a) limit pollution and ecological degradation;
 - b) promote conservation and biodiversity; and
 - c) secure the sustainable development and use of natural resources.

Social security rights

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

A provision should be drafted to ensure that –

1. Everyone has the right to social security, including social assistance, social insurance and pension. Public authorities must take all appropriate measures, including legislative measures, to the maximum of their available resources, with a view to achieving progressively the full realisation of this right.

Children's rights

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure that –

1. For the purpose of benefiting from any of the specific rights of the child in a Bill of Rights for Northern Ireland, a child means every human being below the age of eighteen years.
2. The rights in a Bill of Rights for Northern Ireland must be guaranteed to every child, without discrimination on any of the grounds listed in Recommendation 2 of the Right to Equality and Prohibition on Discrimination, whether the ground of discrimination applies in respect of the child or the child's parents or legal guardians.
3. Public authorities must ensure that, in all actions concerning the child, whether undertaken by public authorities or private institutions, the best interests of the child shall be the primary consideration. In adoption, or any other child placement proceedings, the best interests of the child shall be the paramount consideration.
4. Public authorities must take all appropriate measures to ensure the right of every child to access safe and appropriate play and leisure facilities.
5. Every child who is temporarily, or permanently, deprived of his or her family environment has the right to special protection and assistance for as long as they need it.
6. Public authorities must take all appropriate legislative, administrative, social and educational measures to protect every child from all forms of violence, maltreatment, neglect, exploitation and harassment.
7. Public authorities must take all appropriate measures to ensure the right of every child to be informed of their rights and to have his or her views respected, considered and given due regard in all matters affecting the child, taking into consideration the child's age, level of understanding and evolving capacities.
8. Public authorities must take all appropriate measures to ensure the right of every child to be protected from direct involvement in any capacity in armed conflicts or civil hostilities including their use as intelligence sources.

Enforcement and implementation

Relationship with the Human Rights Act

The Human Rights Act 1998 should be retained in its present form, and the rights contained in Schedule 1 of the Human Rights Act 1998 should be re-enacted, alongside Supplementary Rights, in separate legislation for Northern Ireland. This new legislation, which shall exist alongside the Human Rights Act 1998, shall constitute a Bill of Rights for Northern Ireland. The title of the legislation shall be the Northern Ireland Bill of Rights Act.

Limitations

A general limitation provision should be drafted to apply to those Supplementary Rights in a Bill of Rights for Northern Ireland which are immediately realisable.

A provision should be drafted to ensure that –

Supplementary Rights may be subject only to reasonable limits which are prescribed by law to the extent that the limits are necessary in a society based on the values of human dignity, democracy, liberty and equality, taking account of all relevant factors, including:

- a) the nature of the right;
- b) the importance and legitimacy of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the relation between the limitation and its purpose; and
- e) the availability of less restrictive means to achieve the purpose that the limitation seeks to achieve.

For the avoidance of doubt, where a Bill of Rights for Northern Ireland imposes an obligation to enact legislation or an obligation on public authorities to take all appropriate or effective measures to achieve a result, those obligations are not subject to this limitation clause.

Derogation

Provisions should be drafted to ensure that –

1. No derogation from any rights in a Bill of Rights for Northern Ireland shall be lawful unless a state of emergency has first been declared and confirmed by Parliament.

2. A state of emergency may be declared only when there is a public emergency threatening the life of the nation.
3. Any legislation enacted in consequence of a declaration of a state of emergency:
 - a) may derogate from any right or freedom in a Bill of Rights for Northern Ireland only to the extent that the derogation is strictly required by the emergency and is consistent with the UK's international obligations pursuant to international treaties and customary international law;
 - b) must be published as soon as reasonably possible; and
 - c) must not indemnify public authorities or any person in respect of an unlawful act.
4. Any person or body who has a sufficient interest in the matter may bring legal proceedings in the appropriate court or tribunal challenging the validity of:
 - a) a declaration of a state of emergency; or
 - b) any legislation enacted, or other action taken, in consequence of a state of emergency.
5. A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, shall be effective only:
 - a) prospectively from the date of the Act of Parliament making the declaration; and
 - b) for no more than three months from the date of the declaration.
6. No legislation enacted in consequence of a declaration of a state of emergency may permit or authorise any derogation from rights which are non-derogable as a matter of international law, including but not limited to the following rights:
 - a) the right to life in Article 2 of the European Convention on Human Rights;
 - b) the prohibition on torture and cruel, inhuman or degrading treatment or punishment in Article 3 of the European Convention on Human Rights;
 - c) the right not to be held in slavery or servitude in Article 4 of the European Convention on Human Rights;
 - d) the right to be free of punishment without law in Article 7 of the European Convention on Human Rights;

- e) the right to freedom of thought, conscience and religion in Article 9 of the European Convention on Human Rights insofar as it corresponds with Article 18 of the International Covenant on Civil and Political Rights;
- f) the right to challenge the legality of detention in Article 5(4) of the European Convention on Human Rights insofar as it corresponds with Article 9(3) of the International Covenant on Civil and Political Rights;
- g) the right of everyone charged with a criminal offence to a fair trial contained in Article 6 of the European Convention on Human Rights insofar as it corresponds with Article 14(2)-(3) of the International Covenant on Civil and Political Rights;
- h) the Recommendations in the Right to Equality and Prohibition on Discrimination insofar as they correspond with Articles 1 and 2 of the Convention on the Elimination of All Forms of Racial Discrimination, Articles 1 and 2 of the Convention on the Elimination of All Forms of Discrimination against Women, and Article 4 of the International Covenant on Civil and Political Rights;
- i) Recommendations 1 and 3 of the Right to be Free from Violence, Exploitation and Harassment insofar as it corresponds with Article 4(a) of the Convention on the Elimination of All Forms of Racial Discrimination;
- j) Recommendations 2 and 3 of the Right to be Free from Violence, Exploitation and Harassment insofar as they correspond with Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women;
- k) the right to health insofar as it corresponds with Article 12 of the International Covenant on Economic, Social and Cultural Rights;
- l) the right of women and girls to gender-sensitive and appropriate healthcare services and information in Recommendation 4 of the Right to Health insofar as it corresponds with Article 12(2) of the Convention on the Elimination of All Forms of Discrimination against Women;
- m) the right to an adequate standard of living sufficient for that person and their dependents in Recommendation 1 of the Right to an Adequate Standard of Living insofar as it corresponds with Article 11(1) of the International Covenant on Economic, Social and Cultural Rights;
- n) the right to work and the right to enjoyment of just and favourable conditions of work irrespective of the status of the work in Recommendations 1 and 2 of the Right to Work insofar as they correspond with Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights;

- o) the right to social security insofar as it corresponds with Article 9 of the International Covenant on Economic, Social and Cultural Rights;
- p) any rights which protect children insofar as they correspond with rights in the Convention on the Rights of the Child.

Entrenchment and amendment

1. The adoption of a Bill of Rights for Northern Ireland should be undertaken by Westminster in accordance with the Belfast (Good Friday) Agreement 1998.

A provision should be drafted to ensure that –

2. Amendment of a Bill of Rights for Northern Ireland should only be undertaken by Westminster with the cross-community approval of the Northern Ireland Assembly.

Application

Provisions should be drafted to ensure that –

1. Public authorities must:
 - a) act compatibly with the rights in a Bill of Rights for Northern Ireland;
 - b) in making a decision, have due regard to a relevant right in a Bill of Rights for Northern Ireland; and
 - c) take active steps to respect, protect, promote and fulfil the rights in a Bill of Rights for Northern Ireland.
2. The term 'public authority' includes:
 - a) a court or tribunal; and
 - b) any person or body performing a public function.
3. In determining whether a function is a 'public function', the factors to be taken into account include:
 - a) the extent to which the executive, legislature or judiciary, whether local, regional or UK-wide, has assumed responsibility for the function in question;
 - b) the role and responsibility of the executive, legislature or judiciary, whether local, regional or UK-wide, in relation to the subject matter in question;

- c) the nature and extent of the public interest in the function in question;
 - d) the nature and extent of any statutory power or duty in relation to the function in question;
 - e) the extent to which the executive, legislature or judiciary, whether local, regional or UK-wide, directly or indirectly, regulates, supervises and inspects the performance of the function in question;
 - f) the extent to which the executive, legislature or judiciary, whether local, regional or UK-wide, makes payment for the function in question;
 - g) whether the function involves or may involve the use of statutory coercive powers;
 - h) the extent of the risk that improper performance of the function might violate a right or freedom in a Bill of Rights for Northern Ireland.
4. For the avoidance of doubt, the existence of a contract as the basis for performance of the public function shall not preclude the person performing the public function from being considered to be a 'public authority'.
5. Where a person or body is a 'public authority' due to the performance of a public function, the person or body shall only be treated as a public authority in respect of those acts performed pursuant to the public function.
6. A public authority shall not be bound to comply with Recommendation 1 where the public authority could not have acted otherwise due to Westminster primary legislation and could not have interpreted or given effect to the Westminster primary legislation such as to ensure compatibility with a Bill of Rights for Northern Ireland.

Standing

Provisions should be drafted to ensure that –

1. Any person or body who has a sufficient interest in the matter may bring legal proceedings claiming that a public authority has acted incompatibly with a Bill of Rights for Northern Ireland.
2. The question of whether a person or body has a 'sufficient interest' will be determined having regard to the need to ensure access to justice.

Interpretation

Provisions should be drafted to ensure that –

1. Any court, tribunal or other person or body interpreting a Bill of Rights for Northern Ireland:
 - a) must strive to achieve the purpose of a Bill of Rights for Northern Ireland and to give practical effect to the fundamental values underpinning it, as set out in the Preamble to such a Bill;
 - b) must pay due regard to any:
 - i) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
 - ii) opinion of the Commission given in a report adopted under Article 31 of the European Convention on Human Rights,
 - iii) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
 - iv) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given;
 - c) must pay due regard to other international human rights law; and
 - d) may consider the relevant judgments of foreign and international courts and tribunals.
2. So far as it is possible to do so, legislation and common law must be read and given effect in a way which is compatible with the rights in a Bill of Rights for Northern Ireland.

Devolved and non-devolved issues

Provisions should be drafted to ensure that –

1. Within the territory of Northern Ireland, the Supplementary Rights in a Bill of Rights for Northern Ireland must be enforceable in the same way as Convention Rights.

Public authorities

2. Northern Ireland public authorities must be bound by the Recommendations set out above concerning the Application of a Bill of Rights for Northern Ireland.
3. Central government public authorities, insofar as they perform their functions either in Northern Ireland or in relation to Northern Ireland, must be bound by the Recommendations set out above concerning the Application of a Bill of Rights for Northern Ireland.

Proposing or enacting legislation

4. When a Bill is presented to the Northern Ireland Assembly, the Minister responsible for the Bill shall make a statement of compatibility with a Bill of Rights for Northern Ireland to the Assembly.
5. When a Bill applying to Northern Ireland is presented to either House of Parliament, the Minister responsible for the Bill shall make a statement of compatibility with a Bill of Rights for Northern Ireland to the House. A statement of compatibility must state:
 - a) whether, in the Minister's opinion, the Bill is compatible with a Bill of Rights for Northern Ireland and, if so, how it is compatible; and
 - b) if, in the Minister's opinion, any part of the Bill is incompatible with a Bill of Rights for Northern Ireland, the nature and extent of the incompatibility. Where the Bill is incompatible with a Bill of Rights for Northern Ireland, the Minister must make a statement to the effect that, notwithstanding the lack of compatibility with a Bill of Rights for Northern Ireland, the Government wishes the House to proceed with the Bill.

Interpreting legislation

6. All legislation – Westminster legislation, Westminster subordinate legislation, Assembly legislation and Northern Ireland subordinate legislation – must be interpreted and given effect, so far as it is possible to do so, to be compatible with a Bill of Rights for Northern Ireland.

Incompatible legislation

7. Where it is incompatible with a Bill of Rights for Northern Ireland, Assembly legislation and Northern Ireland subordinate legislation must be declared invalid.
8. Where Westminster subordinate legislation is incompatible with a Bill of Rights for Northern Ireland, it must be disapplied insofar as it relates to Northern Ireland.
9. Where Westminster primary legislation is incompatible with a Bill of Rights for Northern Ireland, a declaration of incompatibility must be issued insofar as that legislation applies in Northern Ireland. Where a declaration of incompatibility is issued, a Minister may, by order, make such amendments to the legislation as they consider necessary to remove the incompatibility.

Justiciability

Provisions should be drafted to ensure that –

1. All rights in a Bill of Rights for Northern Ireland, both Convention Rights and Supplementary Rights, are justiciable.
2. Rights subject to progressive realisation will have a minimum core obligation which is not subject to progressive realisation.
3. Where rights are subject to progressive realisation, the Northern Ireland Executive shall report annually to the Northern Ireland Assembly, and the UK Government shall report annually to Parliament, on the progress made during the previous year in realising these rights in Northern Ireland.

Enforcement mechanisms

Legal institutions

Provisions should be drafted to ensure that –

1. A Bill of Rights for Northern Ireland should be enforced through the existing judicial system.
2. Judicial appointments must be such as to ensure an independent and diverse judiciary, which is, as far as practicable, broadly representative of society in Northern Ireland.
3. The statutory powers of the Northern Ireland Human Rights Commission should include monitoring and auditing of compliance with a Bill of Rights for Northern Ireland.
4. A committee of the Northern Ireland Assembly shall be invited to perform a similar role in the context of Northern Ireland to that performed at Westminster level by the Joint Committee on Human Rights on a UK-wide level. Included in the functions of this Assembly Committee shall be: pre-legislative scrutiny of legislation for compliance with a Bill of Rights for Northern Ireland; conducting consultations; publishing reports; and drawing up departmental guidance to government for compliance with a Bill of Rights for Northern Ireland in respect of statements of compatibility.
5. There should be a periodic review, before independent reviewers, of the implementation of a Bill of Rights for Northern Ireland, which should take place on average every five years. The report of the

review must be laid before the Assembly and each House of Parliament.

Remedies

Provisions should be drafted to ensure that –

1. Courts must grant to everyone whose rights and freedoms under a Bill of Rights for Northern Ireland have been, or may be, violated an effective remedy and for this purpose may grant such relief or remedy, including compensation, or make such order, as they consider just and appropriate.
2. The legal aid system must be such as to ensure access to justice through a Bill of Rights for Northern Ireland.

Outstanding legal issues

Harmonisation and non-diminution

Provisions should be drafted to ensure that –

1. Insofar as a Bill of Rights for Northern Ireland contains rights which correspond to rights guaranteed by the European Convention on Human Rights, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent a Bill of Rights for Northern Ireland providing more extensive protection than is provided by the Convention.
2. Nothing in a Bill of Rights for Northern Ireland denies the existence or restricts the scope of any other rights or freedoms recognised or conferred by common law, statute, EU law, or international law and international agreements to which the UK is a party, to the extent that they are consistent with the rights in a Bill of Rights for Northern Ireland.

Legal persons

A provision should be drafted to ensure that –

3. A legal person is entitled to the rights in a Bill of Rights for Northern Ireland to the extent required by the nature of the rights and the nature of that legal person.

CHAPTER 3: EXPLAINING THE ADVICE AND ADDITIONAL RECOMMENDATIONS

This Chapter outlines how the Commission arrived at each of the rights recommended for inclusion in a Bill of Rights for Northern Ireland. It draws upon the methodology contained in Chapter 1 and explains how the rights meet the particular circumstances of Northern Ireland, how they are supplementary to the European Convention on Human Rights and how they are in compliance, where appropriate, with international instruments and experience. In addition, the Commission offers further advice that addresses key issues of concern that were raised during the consultation process on a Bill of Rights for Northern Ireland.

The right to life

How this recommendation arises from the particular circumstances of Northern Ireland

The conflict in Northern Ireland resulted in widespread and systematic violations of the right to life by state and non-state actors. As a direct consequence of the conflict 3,703 people have been killed³⁷ and many more have suffered injury, illness or loss that has inevitably led to premature death.³⁸ The lack of effective investigation of unsolved killings has, itself, been a source of conflict in Northern Ireland,³⁹ along with cross-border aspects, including issues around the 'disappeared'.⁴⁰ In acknowledging these concerns, the Government established the Consultative Group on the Past. This recommendation is necessary to guarantee that any mechanism intended to deal with the past is compliant with international human rights law and legislated for accordingly.

³⁷ Northern Ireland Affairs Committee (2008) *Policing and Criminal Justice in Northern Ireland: The Cost of Policing the Past*, Third Report of Session 2007-08, TSO, London, para 8.

³⁸ From 1968 to September 2008, 50,241 persons were injured as a result of the security situation (source: PSNI (2008) *Persons Injured as a Result of the Security Situation in Northern Ireland 1968 – 2008*. Available at: http://www.psni.police.uk/persons_injured_cy_to_date.pdf.

³⁹ Committee of Ministers of the Council of Europe, Cm/Inf/DH(2008)2 22 February 2008.

⁴⁰ *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland Establishing the Independent Commission for the Location of Victims' Remains*, Dublin 27 April 1999, Cm 4473 Treaty Series No 70, 1999; and the *Northern Ireland (Location of Victims' Remains) Act 1999*.

A provision should be drafted to ensure that –

1. Legislation must be enacted to ensure that all violations of the right to life relating to the conflict in Northern Ireland are effectively investigated. Any mechanisms established must be fully in compliance with international human rights law.

How this recommendation is a supplementary protection to the European Convention on Human Rights⁴¹

The jurisprudence on Article 2 of the European Convention on Human Rights (right to life) of the European Court of Human Rights has evolved to impose extensive positive obligations on Contracting States to take measures to protect the right to life⁴² and to effectively investigate suspicious deaths.⁴³ This Recommendation seeks to supplement the European Convention on Human Rights by imposing a specific requirement that legislation be enacted with the purpose of giving effect to the protections provided by Article 2. Such a specific legislative obligation is currently not imposed by Article 2. Moreover, in the domestic implementation of Article 2, a lacuna has arisen in the protection provided. It has been held that, since the *Human Rights Act 1998* does not operate retrospectively, different standards for investigations into deaths apply depending on whether the death occurred before or after the coming into force of the Human Rights Act on 2 October 2000.⁴⁴ The aim of this Recommendation – focussed on the legacy of the conflict in Northern Ireland – is to ensure that there will be a statutory scheme addressing the positive obligations that have been established by Article 2 and, in particular, ensure that investigations conducted into deaths which occurred prior to 2 October 2000 are conducted according to the same procedural standards as those conducted after 2 October 2000.

⁴¹ Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ETS No 5; 213 UNTS. 221.

⁴² See, for example: *McCann and Others v UK* (1995) 21 EHRR 97, paras 146-7 (planning and control of security forces' operations); *Osman v UK* (2000) 29 EHRR 245, para 151 (protective policing measures); *Anguelova v Bulgaria* (2004) 38 EHRR 31, para 109.

⁴³ *Kelly and Others v UK* [2001] ECHR 528, para 154; *Ergi v Turkey* (2001) 32 EHRR 18, para 98; *Salman v Turkey* (2000) 34 EHRR 425, para 123; *McKerr v UK* (2002) 34 EHRR 20, para 111.

⁴⁴ *In re McKerr* [2004] UKHL 12, [2004] 1 WLR 807, paras 21-26. Contrast the position of the European Court of Human Rights: *McKerr v UK* (2002) 34 EHRR 20, para 108.

How this recommendation is compliant with international instruments and draws upon international experience

The duty imposed here is to provide supplementary protection – through domestic legislation – to Article 2 of the European Convention on Human Rights. As such, the compliance of this legislative obligation with an international instrument, namely the Convention itself, cannot be questioned.

The right to liberty and security

How these recommendations arise from the particular circumstances of Northern Ireland

The Belfast (Good Friday) Agreement recognised the need for normalisation and review of the criminal justice system.⁴⁵ Reintegration of prisoners into society was a particular concern.⁴⁶ Outside the criminal justice system, there has been an over-reliance on long-stay hospitals⁴⁷ and resettlement has been slow compared to the rest of the UK.⁴⁸ These recommendations will help remove a source of conflict, build confidence in the criminal justice system,⁴⁹ and make certain that the vulnerabilities of children are effectively addressed.⁵⁰ The distinct conditions of, and reasons for, detention⁵¹ and imprisonment, as well as the general treatment of suspects⁵² has led to persistent human rights concerns in Northern Ireland.

Provisions should be drafted to ensure the incorporation in a Bill of Rights for Northern Ireland of –

The Fourth Protocol, Article 1 of the European Convention on Human Rights, which declares:

⁴⁵ Belfast (Good Friday) Agreement, p 22.

⁴⁶ As above, p 25.

⁴⁷ Programme for Government 2008-11 (2007), Northern Ireland Executive, Belfast, p 12.

⁴⁸ Review of Mental Health and Learning Disability Northern Ireland [Bamford Review] (2005), *Equal Lives: Review of Policy and Services for People with a Learning Disability in Northern Ireland*, Chapter 6; and (2007) *Promoting the Social Inclusion of People with a Mental Health Problem or a Learning Disability*, RMHLDNI, Belfast.

⁴⁹ Belfast (Good Friday) Agreement, p 22.

⁵⁰ Convery U and Moore L (2006) *Still in Our Care: Protecting Children's Rights in Custody in Northern Ireland*, Update Report, NIHRC, Belfast.

⁵¹ NIHRC (2008) *Response to Northern Ireland Office Consultation on Fine Default in Northern Ireland*.

⁵² *The Special Powers Act 1921, Northern Ireland (Emergency Powers) Act 1973*, Scraton P and Moore L (2005) *The Hurt Inside: Imprisonment of Women and Girls in Northern Ireland*; and (2007) *The Prison Within: The Imprisonment of Women at Hydebank Wood 2004-06*, NIHRC, Belfast.

No one shall be deprived of his liberty merely on the ground of the inability to fulfil a contractual obligation.

How this recommendation is a supplementary protection to the European Convention on Human Rights

As was outlined in Chapter 1, the Commission has defined the term 'European Convention on Human Rights' as referring to the text of the Convention itself and not the Additional Protocols to the Convention. As such, Article 1 of the Fourth Protocol is by definition supplementary to the Convention.

How this recommendation is compliant with international instruments and draws upon international experience

Article 1 of the Fourth Protocol is directly drawn from an international instrument, namely a Protocol to the European Convention on Human Rights. The protection from deprivation of liberty merely on the ground of inability to fulfil a contractual obligation is also found in Article 11 of the International Covenant on Civil and Political Rights.⁵³

A provision should be drafted to ensure that –

1. Everyone who is arrested or detained has the right to consult promptly and privately with a legal representative and of prompt access where appropriate to a medical practitioner.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Insofar as it relates to access to a legal representative, Recommendation 1 provides supplementary protection to the European Convention on Human Rights in the following ways. First, there is a general right to prompt and private access to a legal representative. At present, the extent of protection of the right of pre-trial access to a legal representative is dependent on the particular circumstances. A violation of Article 6(3) of the Convention was found where access was denied to a detainee during the first 24⁵⁴ and 48⁵⁵ hours of police interrogation in circumstances where the individual was faced with a 'fundamental dilemma',⁵⁶ having been informed that he had a right to remain silent

⁵³ Adopted by the UN General Assembly Resolution 2200A (XXI), 21 UN GAOR Supp. (No 16) 52, UN Doc A/6316 (1966), 999 UNTS 171.

⁵⁴ *Averill v UK* (2001) 31 EHRR 36 ECHR, paras 57-58.

⁵⁵ *Murray v UK* (1996) 22 EHRR 29, paras 72-74.

⁵⁶ *Murray v UK* (1996) 22 EHRR 29, para 66.

but that adverse consequences would be drawn from the silence. By contrast, no violation of Article 6(3) was found where an applicant made no incriminating statements during the 24-hour period in which access to legal representation was denied and no inferences had been drawn.⁵⁷ Unlike the protection provided by Article 6(3) of the Convention, the right of access to legal representation provided by Recommendation 1 is not dependent on the consequences of the denial of such access. Second, insofar as it requires prompt access to a medical practitioner where appropriate, Recommendation 1 supplements the protection provided by the Convention by extending the right of detainees to access adequate medical assistance. Currently, pursuant to Article 3 of the European Convention on Human Rights, there is an obligation on Contracting States to provide medical treatment for detainees if refusing to provide such medical treatment would result in inhuman or degrading treatment. Refusal to provide access to medical treatment, however, must go beyond a 'threshold of severity' before Article 3 is engaged.⁵⁸ The purpose of Recommendation 1 is to facilitate access to a medical practitioner where appropriate, and not only where necessary to avoid inhuman or degrading treatment, and to strengthen the requirement of promptness.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 1 draws upon, and strengthens, the recommendation regarding access to a legal representative found in Principle 17 of the United Nations' Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment,⁵⁹ which provides that a detained person shall be informed of his right to legal assistance "promptly after arrest" and provided with "reasonable facilities for exercising it". Recommendation 1 is also drawn from Section 10(b) of the Canadian Charter of Rights and Freedoms, which provides that on arrest or detention, a person shall have the right "to retain and instruct counsel without delay". Insofar as it relates to access to a medical practitioner, Recommendation 1 draws upon and strengthens the recommendation in Principle 24 of the United Nations' Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, which requires that a proper medical examination be offered to a detained or imprisoned person as promptly as possible after his or her admission to the place of detention or imprisonment and, thereafter, medical care and treatment shall be provided whenever necessary. In addition, Principle 24 recommends that this care and treatment shall be free of charge. This Recommendation is also derived

⁵⁷ *Brennan v UK* [2002] ECHR 507, paras 44-48.

⁵⁸ See, for example: *Holomiov v Moldova* (2008) 47 ECHR 12, paras 121-122.

⁵⁹ Adopted by the UN General Assembly Resolution 43/173, 9 December 1988.

from Conduct C, Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, paragraph 3.5(c).

A provision should be drafted to ensure that –

2. Everyone who is arrested or detained has the right to be visited by a family member under appropriate supervision.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Insofar as it relates to those who are detained, Recommendation 2 overlaps with Article 8 of the European Convention on Human Rights.⁶⁰ However, Recommendation 2 extends the protection of family visits to those who are arrested. The overlap with current Convention protection in relation to detainees is stated in this Recommendation for the sake of clarity.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 2 reflects Principle 19 of the United Nations' Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment,⁶¹ which provides that a detained person has the right to be visited by, and to correspond with, in particular, members of his family.

A provision should be drafted to ensure that –

3. Everyone who is questioned under arrest has the right to have a legal representative present during the questioning and to have it aurally and visually recorded.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 3 is supplementary, as neither Article 5 of the European Convention on Human Rights (liberty), nor Article 6 (fair trial), confers the specific right to have a legal representative present during questioning. The supplementary nature of this protection has also been explained in respect of Recommendation 1, above. In addition, the Convention does not require that the interview be aurally and visually recorded.

⁶⁰ *Dickson v UK* (App No 44362/04) Judgment, ECtHR, 18 April 2006.

⁶¹ Adopted by the UN General Assembly Resolution 43/173 of 9 December 1988.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 3 draws upon the rules of international tribunals, such as Rule 43, Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda,⁶² and Rule 43, Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia.⁶³ Both of these rules provide that “[w]henver the Prosecutor questions a suspect, the questioning shall be audio-recorded or video-recorded,” and set out a procedure for the audio- or video-recording.

A provision should be drafted to ensure that –

4. Public authorities must take all appropriate measures to reintegrate into society those in detention or alternative care by providing support, prior to and after discharge, towards independent living.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Article 3 of the European Convention on Human Rights imposes positive obligations on public authorities in respect of those in detention, including provision of acceptable conditions of detention,⁶⁴ and provision of adequate medical care.⁶⁵ However, Recommendation 4 is supplementary as there is no obligation imposed by the Convention to prepare a person in detention for re-integration into society.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 4 is in accordance with Article 10 of the United Nations’ Basic Principles for the Treatment of Prisoners,⁶⁶ which envisages that “favourable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible conditions”.

⁶² UN Doc ITR/3/Rev.1 (1995), entered into force 29 June 1995.

⁶³ UN Doc IT/32/Rev 7 (1996), entered into force 14 March 1994, amendments adopted 8 January 1996.

⁶⁴ *Dougoz v Greece* (2002) 34 EHRR 61, para 46; *Peers v Greece* (2001) 33 EHRR 51, para 75.

⁶⁵ *Ilhan v Turkey* (2002) 34 EHRR 36, para.87, *Keenan v UK* (2001) 33 EHRR 913, para 99.

⁶⁶ Adopted and proclaimed by UN General Assembly Resolution 45/111 of 14 December 1990.

A provision should be drafted to ensure that –

5. Every child or vulnerable adult who is questioned under arrest, held in detention without charge, or being charged, has the right to have a legal representative and appropriate adult present to represent their best interests.

How this recommendation is a supplementary protection to the European Convention on Human Rights

While in domestic law, it has been accepted that the absence of an appropriate adult or legal advisor may have the potential, in certain specific circumstances, to undermine a person's right, under Article 6 of the European Convention on Human Rights, to a fair trial,⁶⁷ the Convention does not actually impose a requirement that a child or vulnerable adult should have an appropriate adult and legal representative present during questioning. The supplementary nature of Recommendation 5, insofar as it relates to access to a legal representative, is also explained in respect of Recommendation 1 above.

How this recommendation is compliant with international instruments and draws upon international experience

Although compatible with international law, Recommendation 5 is primarily drawn from the *Police and Criminal Evidence Act 1984*, Code of Conduct C, Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers.

A provision should be drafted to ensure that –

6. Every child alleged to, accused of, or proven to have infringed the criminal law has the right to be treated in a manner that pays due regard to the child's age, understanding, and needs and is directed towards the child's reintegration in society.

How this recommendation is a supplementary protection to the European Convention on Human Rights

The age of an individual is relevant to the question of determining whether there has been inhuman or degrading treatment in the conditions of detention of that individual such as to violate Article 3 of the European Convention on Human Rights.⁶⁸ Recommendation 6 is supplementary in two ways. First, the obligation contained in Recommendation 6 is not only to avoid inhuman or degrading treatment

⁶⁷ *R v Aspinall (Paul James)* [1999] 2 Cr App R 115, Crim LR 115, 122 (CA (Crim Div)).

⁶⁸ *Ireland v UK* (1978) 2 EHRR 25, para 162.

in detention, but requires positive accommodation of the child's needs from the time the child is alleged to have infringed the criminal law. Second, in particular, Recommendation 6 requires treatment of a child in such a way as to ease the re-integration of the child into society.

How this recommendation is compliant with international instruments and draws upon international experience

This Recommendation reflects and strengthens the obligation in Article 37(c) of the Convention on the Rights of the Child, to ensure that every child deprived of liberty has the right to be treated in a manner which takes into account the needs of persons of his, or her, age.

A provision should be drafted to ensure that –

7. Every child has the right not to be detained except as a measure of last resort, in which case, the child may be detained only for the shortest appropriate period of time, and has the right to be:

- a) kept separately from detained persons over the age of 18 years; and
- b) treated in a manner, and kept in conditions, that pays due regard to the child's age.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 7 is supplementary to the European Convention on Human Rights in three ways. First, it requires detention of a child only as a measure of last resort. The European Court of Human Rights has observed that a punishment to detention for life imposed on children would raise "serious problems under Article 3 of the Convention",⁶⁹ but has not required that detention only be used against children as a measure of last resort. In addition, to eliminate a Convention violation, it is not necessary to eliminate detention of children, but rather "review by a court of the continued existence of grounds of detention [is] required" to satisfy Article 5(4).⁷⁰ Second, Recommendation 7 requires separation of children in detention from detained persons over the age of 18 years. No such obligation has been imposed by the European Court of Human Rights and pursuant to the European Convention on Human Rights, separation of prisoners is only required in certain limited circumstances, such as, for example, if a prisoner can be considered to pose a risk to others.⁷¹ Third, while an obligation is imposed by Article 3

⁶⁹ *Stafford v UK* (2002) 35 EHRR 32, para 74.

⁷⁰ *Stafford v UK* [(2002) 35 EHRR 32, para 74. See also: *Hussain and Singh v UK* (1996) 22 EHRR 1, paras 59-62.

⁷¹ *Edwards v UK* (2002) 35 EHRR 19, paras 62 and 64.

of the Convention to ensure that children in detention are not subject to inhuman or degrading treatment – which will be judged taking account of the age of the child⁷² – there is no particular obligation to go beyond this and provide age-appropriate treatment and conditions.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 7 is drawn from Article 37(c) of the Convention on the Rights of the Child and Rule 13 of the United Nations' Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and adopts the articulation of this right found in Section 28(1)(g) of the South African Constitution.

A provision should be drafted to ensure that –

8. No child in the criminal justice system shall be subject to the use of force or methods of restraint unless it is absolutely necessary to avoid serious injury to the child or another person.

How this recommendation is a supplementary protection to the European Convention on Human Rights

The European Court of Human Rights has held that in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the European Convention on Human Rights.⁷³ Article 3, however, is subject to a “minimum level of severity” threshold.⁷⁴ The protection conferred by Recommendation 8 is supplementary to the Convention, as it prohibits the use of force or methods of restraint, and does not require “the minimum level of severity” threshold to be crossed, unlike the requirement in Article 3. Rather, it prohibits use of force or methods of restraint unless absolutely necessary to avoid serious injury to the child or another person.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 8 is drawn from Articles 19, 28(2) and 37 CRC. In its *General Comment No. 8 on corporal punishment of children*, the United Nations' Committee on the Rights of the Child has observed that if

⁷² *Ireland v UK* (1978) 2 EHRR 25, para 162.

⁷³ *Keenan v UK* (2001) 33 EHRR 913; *Mathew v The Netherlands* (2006) 43 EHRR 23, para 113.

⁷⁴ *Dougoz v Greece* (2002) 34 EHRR 61, para 44.

methods of restraint are to be used on children, the “principle of the minimum necessary use of force for the shortest necessary period of time must always apply”.⁷⁵

Additional recommendations to Government, not to be included in a Bill of Rights for Northern Ireland

Single-sex custodial institutions

In Northern Ireland, all adult women prisoners are held in one location, the Ash House women’s unit at Hydebank Wood Young Offenders’ Centre and Prison. The Commission has concluded that this is not a suitable environment for women and girl prisoners.⁷⁶

The Commission recommends that all appropriate measures are taken to provide single-sex custodial institutions and gender-specific services in Northern Ireland.

Restorative justice

Community-based restorative justice has an important role in Northern Ireland and, in particular, in those communities where there has been a lack of confidence in policing.⁷⁷

The Commission recommends that appropriate access to restorative justice mechanisms should be ensured by legislation and that all restorative justice mechanisms should be compatible with a Bill of Rights for Northern Ireland.

⁷⁵ UN Committee on the Rights of the Child, *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment* (Articles 19 and 28, para 2; and 37, *inter alia*) (2006), para 15.

⁷⁶ *Report on an Unannounced Inspection of the Imprisonment of Women in Northern Ireland*, Ash House, Hydebank Wood Prison, 28-30 November 2004, HM Chief Inspector of Prisons and Chief Inspector of Criminal Justice in Northern Ireland; and Scraton P and Moore L (2005) *The Hurt Inside: Imprisonment of Women and Girls in Northern Ireland*; and (2007) *The Prison Within: The Imprisonment of Women at Hydebank Wood 2004-06*, NIHRC, Belfast; and House of Commons Northern Ireland Affairs Committee (2007) *The Northern Ireland Prison Service: Government Response to the Committee’s First Report of Session 2007–08* (2008), HC 386, TSO, London.

⁷⁷ NIHRC (2006) *Response to Consultation on Draft Protocol for Community-based Restorative Justice Schemes*, NIHRC, Belfast.

The right to a fair trial and no punishment without law

How these recommendations arise from the particular circumstances of Northern Ireland

The law and practice relating to the conduct of trials has raised distinct human rights concerns in Northern Ireland.⁷⁸ Judges and legal professionals have been intimidated and murdered.⁷⁹ Only in Northern Ireland were defendants tried for certain offences without the right to a trial by jury.⁸⁰ It is still the case that defendants can be tried without a jury under circumstances in Northern Ireland that are not applicable to the rest of the UK.⁸¹ These recommendations will help create a fair and impartial criminal justice system in which all have confidence by providing additional protections for those involved in the trial process and guaranteeing that the vulnerabilities of children are effectively addressed.⁸²

A provision should be drafted to ensure that –

1. Everyone has the right to trial by jury for serious offences and the right to waive it.

How this recommendation is a supplementary protection to the European Convention on Human Rights

This Recommendation supplements the European Convention on Human Rights, as the Convention does not provide a right to trial by jury, or the right to waive it.

How this recommendation is compliant with international instruments and draws upon international experience

International instruments tend not to oblige States Parties to choose between the adversarial mode of criminal proceedings, which involves a jury trial, and the non-adversarial mode of proceedings, which does not use jury trial. Mostly, international instruments create an obligation of

⁷⁸ *Northern Ireland (Emergency Provisions) Act 1973*; and NIHRC (2007) *Briefing on the Justice and Security (Northern Ireland) Bill*, NIHRC, Belfast.

⁷⁹ Cumaraswamy P (1998) *Report on the Mission to the United Kingdom of Great Britain and Northern Ireland*, 5 March 1998, Report of the Special Rapporteur on the Independences of Judges and Lawyers, submitted pursuant to the Commission on Human Rights resolution 1997/23, E/CN.4/1998/39/Add.4.

⁸⁰ *Northern Ireland (Emergency Provisions) Act 1973*.

⁸¹ *Justice and Security (Northern Ireland) Act 2007*; cf. *Criminal Justice Act 2003*, part 7, section 44.

⁸² Convery U and Moore L (2006) *Still in Our Care: Protecting Children's Rights in Custody in Northern Ireland*, Update Report, NIHRC, Belfast.

result, namely, a fair trial, and each state should comply with this obligation within the framework of its own criminal justice procedures. However, a right to trial by jury can be considered to be in line with international practice derived from common law countries, and for example, Section 11(f) of the Canadian Charter of Rights and Freedoms provides that any person charged with an offence has the right to trial by jury where the maximum punishment for the offence is imprisonment for five years or more, except in the case of an offence under military law tried before a military tribunal.

A provision should be drafted to ensure that –

2. Evidence obtained through torture or inhuman and degrading treatment must be excluded. Evidence obtained through breach of any other right in a Bill of Rights for Northern Ireland must be excluded, unless it is established that the admission of the evidence would not render the trial unfair or otherwise be detrimental to the administration of justice.

How this recommendation is a supplementary protection to the European Convention on Human Rights

This exclusionary rule of evidence is supplementary to the European Convention on Human Rights in three ways. First, while pursuant to the Convention, evidence obtained through torture is inadmissible (and for the sake of clarity, that part of Recommendation 2 repeats the Convention protection as developed through case law),⁸³ the European Court of Human Rights has held that whether the admissibility of evidence obtained through inhuman or degrading treatment will result in an unfair trial will be dependent upon “weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial”.⁸⁴ By contrast, Recommendation 2 requires automatic exclusion of evidence obtained through inhuman and degrading treatment. Second, although Article 6 of the European Convention on Human Rights does not lay down rules on admissibility of evidence as such,⁸⁵ there have been a number of European Court of Human Rights cases addressing admissibility of evidence obtained in breach of Convention Rights in the context of assessing whether admission of such evidence resulted in an unfair trial contrary to Article 6.⁸⁶ However, the second sentence of Recommendation 2 applies the admissibility rule to evidence obtained in breach of rights in a Bill of Rights (thereby extending beyond evidence obtained in breach of

⁸³ *Jalloh v Germany* (2007) 44 EHRR 32, para 105.

⁸⁴ *Jalloh v Germany* (2007) 44 EHRR 32, para 106.

⁸⁵ *Khan v UK* (2001) 31 EHRR 45, para 34.

⁸⁶ *Khan v UK* (2001) 31 EHRR 45; *Allan v UK* [2003] 36 EHRR 143.

Convention Rights). Third, Recommendation 2 strengthens the protection against evidence obtained in breach of rights, since such evidence is inadmissible, not only when it would render the trial unfair, but also if it would be detrimental to the administration of justice more generally. In other words, if admissibility of the evidence would be seen to sanction egregious human rights violations, the evidence should not be admitted.

How this recommendation is compliant with international instruments and draws upon international experience

Insofar as it requires automatic inadmissibility of evidence obtained through inhuman or degrading treatment, Recommendation 2 mirrors the protection conferred by Article 12 of the United Nations' Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁸⁷ Insofar as it relates to evidence obtained in violation of other rights in a Bill of Rights, this Recommendation reflects international practice and provides a qualified inadmissibility rule. Recommendation 2 draws most heavily from Section 35 of the South African Constitution, but also reflects the following standards: Section 138 of the Australian Uniform Evidence Acts; Article 69(7) of the Rome Statute, which is partly based on Rule 95 of the International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure, and provides for the conditional exclusion of evidence obtained by means of a violation of either internationally recognized human rights or the Statute if the violation is of sufficient gravity; and Section 24(2) of the Canadian Charter of Rights and Freedom.

A provision should be drafted to ensure that –

3. In the case of children and vulnerable adults, accused of a criminal offence, the procedures must be such so as to pay due regard to their age, their understanding and the desirability of promoting their rehabilitation.

How this recommendation is a supplementary protection to the European Convention on Human Rights

The European Court of Human Rights has held that, to ensure a child's fair trial pursuant to Article 6 of the European Convention on Human Rights, it is essential that proceedings take full account of age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his or her ability to understand and participate, including conducting the hearing in such a way as to reduce, as far as

⁸⁷ Adopted by UN General Assembly Resolution 3452 (XXX), 9 December 1975.

possible, his feelings of intimidation and inhibition.⁸⁸ Recommendation 3 provides supplementary protection by adding a requirement that promotion of rehabilitation also be considered in respect of children and vulnerable adults.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 3 draws upon Article 14(4) of the International Covenant on Civil and Political Rights and in respect of a vulnerable adult, adds a reference to 'understanding'. Insofar as it refers to rehabilitation, Article 14(4) – as has been explained by the Human Rights Committee, in *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*⁸⁹ – requires, where appropriate, not just modification of criminal proceedings, but measures "other than criminal proceedings" to be considered, such as mediation, family conferences, counselling, community service or educational programmes.

A provision should be drafted to ensure that –

4. Every witness has the right, prior to and after giving evidence, to such protection and support as is appropriate to their needs as witnesses.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 4 is supplementary as it refers to the need for 'support' of witnesses such as to enable them to fulfil their roles properly. At present, the rights of witnesses stemming from Articles 2, 3, 5 and 8 of the European Convention on Human Rights will be protected in the context of giving evidence. Anonymity of a witness may be justified as protecting the witness's right to respect for private life and, more seriously, as protecting the witness from the risk of intimidation, physical attack or risk to life.⁹⁰ The Article 3 and Article 8 rights of witnesses may be engaged by a particular style of questioning. For example, if medical records of a witness are produced in court by the prosecution, at the trial of another, Article 8 may be engaged.⁹¹ Recommendation 4, however, envisages more extensive support for witnesses both before and after they give evidence, for example, requiring counselling or other forms of assistance where appropriate.

⁸⁸ *SC v UK* (2005) 40 EHRR 10, para 28.

⁸⁹ CCPR/C/GC/32, 23 August 2007.

⁹⁰ *Doorson v The Netherlands* (1996) 22 EHRR 330, para 70; *Osman v UK* (2000) 29 EHRR 245; *Re Officer L* [2007] UKHL 36; [2007] 1 WLR 2135.

⁹¹ *Z v Finland* (1998) 25 EHRR 371, paras 62-65.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 4 is a general articulation of a specific principle found, for instance, in Article 68(1) the Rome Statute of the International Criminal Court,⁹² which states that the Court shall “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”, while Article 68(4) requires that the Victims and Witnesses Unit of the Court may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance.

A provision should be drafted to ensure that –

5. Every juror has the right to such protection and support as to allow them to fulfil their role properly.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Currently, jurors can expect that appropriate measures will be taken to ensure their rights to life, security and privacy, stemming from Articles 2, 3, 5 and 8 of the European Convention on Human Rights (see also, the discussion in respect of Recommendation 4, above, and Recommendation 6, below). Recommendation 5 will supplement these protections by requiring protection for jurors, from, for example, threats by employers to discharge, intimidate, or coerce any employee by reason of such employee's jury service.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 5 is compatible with international law, but draws upon domestic and comparative protection of jurors. For example, the *Juries Act 1974* allows a juror to recover for financial loss including any loss of earnings.⁹³ There is similar protection in the *Irish Juries Act 1976*,⁹⁴ Section 29(2) of which voids any clause in contract of employment which has the effect of excluding or limiting the payment of wages during jury service by an employer. Protection of jurors is also found, for example, in US federal law, in Title 28 on the Judiciary and Judicial Procedure at 28 USC 1875 (which protects their employment) and 28 USC 1877 (which protects their entitlements to receive pay).

⁹² 2187 UNTS 90; UN Doc A/CONF 183/9 (1998).

⁹³ Section 19(1)(b).

⁹⁴ No 4 of 1976.

A provision should be drafted to ensure that –

6. Every member of the judiciary and legal profession has the right to such protection as to allow them to perform their duties properly.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Currently, the European Convention on Human Rights imposes positive obligations, pursuant to Articles 2⁹⁵ and 3,⁹⁶ to take appropriate measures to prevent risks to the life and security of the judiciary and legal profession. In addition, offices of judges and lawyers are entitled to Article 8 protection, as are other business premises.⁹⁷

Recommendation 6 would extend the protection guaranteed to lawyers and judges to obligations on government to ensure, for example: that lawyers are able to perform their professional functions without intimidation, hindrance, harassment or improper interference; that lawyers are able to travel to consult with clients; and that judges and lawyers shall not suffer or be threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 6 reflects Principles 16, 17, 18 and 20 of the United Nations' Basic Principles on the Role of Lawyers,⁹⁸ adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders in 1990. These principles outline protections for the functioning of lawyers.

⁹⁵ See, for example: *Osman v UK* (2000) 29 EHRR 245, para 115.

⁹⁶ *Z and Others v UK* (2002) 34 EHRR 3, para 70.

⁹⁷ *Niemitz v Germany* (1993) 16 EHRR 97, paras 29-31.

⁹⁸ UN Doc A/CONF144/28/Rev 1 at 189 (1990).

The right to marry or civil partnership

How these recommendations arise from the particular circumstances of Northern Ireland

Homosexuality was not decriminalised in Northern Ireland until 1982, 15 years after similar legislation in England and Wales.⁹⁹ Significant opposition to the rights of gay and lesbian people¹⁰⁰ and civil partnership remains in Northern Ireland. In these particular circumstances, it is necessary that the right to civil partnership and to termination of both it and marriage be given additional protection in a Bill of Rights. In contributing, with other rights, to a fully inclusive and equal society, this additional protection will help promote respect and equality.

A provision should be drafted to ensure that –

1. Everyone who is married has the right to legal termination of marriage in accordance with the laws governing the exercise of this right.

How this recommendation is a supplementary protection to the European Convention on Human Rights

This Recommendation is supplementary to the European Convention on Human Rights as there is no right to dissolution of marriage pursuant to the Convention. The Court has recognised that protection of private life may sometimes necessitate means whereby spouses can be relieved from the duty to live together¹⁰¹ and, if national law provides for divorce, divorced persons should be able to remarry without unreasonable restrictions.¹⁰² However, the right to marry protected by Article 12 of the Convention does not include its corollary, the right to dissolve or formally end a marriage.¹⁰³ Moreover, Article 5 of Protocol 7 of the Convention¹⁰⁴ does not confer the right to divorce, and paragraph 39 of the Explanatory Report to the Protocol states that the words “in the event of its dissolution” in Article 5 “do not imply any obligation on a State to provide for dissolution of marriage or to provide any special forms of dissolution”.¹⁰⁵

⁹⁹ After a finding by the European Court of Human Rights that the law was in breach of Article 8 of the Convention in *Dudgeon v UK* (1981) 4 EHRR 149.

¹⁰⁰ Jarman N and Tenant A (2003) *An Acceptable Prejudice? Homophobic Violence and Harassment in Northern Ireland*, Institute of Conflict Research, Belfast.

¹⁰¹ *Airey v Ireland* (1979-80) 2 EHRR 305, para 33.

¹⁰² *F v Switzerland* (1987) 10 EHRR 411, para 38.

¹⁰³ *Johnston v Ireland* (1986) 9 EHRR 203, paras 52-54, 57.

¹⁰⁴ ETS No 117.

¹⁰⁵ *Johnston v Ireland* (1986) 9 EHRR 203, para 54.

How this recommendation is compliant with international instruments and draws upon international experience

The right to terminate marriage is derived from domestic law (for example, the *Matrimonial Causes (Northern Ireland) Order 1978*). It is also compatible with international human rights law. That provision might be made for the right to terminate marriage at national level, is recognised by international instruments. Article 5 of Protocol 7 to the European Convention on Human Rights recognises that spouses shall enjoy equality of rights “during marriage and in the event of its dissolution. Similar provision is made by Article 23(4) of the International Covenant on Civil and Political Rights and Article 16(1) of the Universal Declaration of Human Rights.

A provision should be drafted to ensure that –

2. Everyone has the right to enter civil partnership and the right to legal termination of civil partnership in accordance with the laws governing the exercise of these rights.

How this recommendation is a supplementary protection to the European Convention on Human Rights

There is no right to enter into civil partnership (or consequently to terminate such civil partnership) provided by the European Convention on Human Rights. Article 8 of the Convention has not been interpreted, at least to date, to require the option of civil partnership, while Article 12 of the Convention has been confined to protection of married persons, or persons who wish to marry. The European Court of Human Rights has also rejected the suggestion that Article 12 of the Convention requires that “all the legal effects attaching to marriage should apply equally to situations that are in certain respects comparable to marriage”.¹⁰⁶

How this recommendation is compliant with international instruments and draws upon international experience

The right to enter into civil partnership draws upon Principle 24 of the Yogyakarta Principles, in extending the benefit of legal recognition to same-sex partnerships. In accordance with Principle 24(e) of the Yogyakarta Principles, the benefit of the right to dissolve the relationship is extended to civil partnership.

¹⁰⁶ *Marckx v Belgium* (1979) 2 EHRR 330, para 67; see also: *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam) [2006] HRLR 36, para 88.

The right to equality and prohibition of discrimination

How these recommendations arise from the particular circumstances of Northern Ireland

Inequality between the two main communities and discrimination has been a source of conflict in Northern Ireland.¹⁰⁷ The way in which government has responded to further inequalities suffered by individuals outside of the two main communities is also particular to Northern Ireland. For example, it has taken longer to provide equivalent protections to that in force throughout the rest of the UK.¹⁰⁸ These recommendations encompass both the principles and provisions required to combat discrimination experienced by anyone in the public and private sector.¹⁰⁹ They directly address the need to promote mutual respect and parity of esteem between the two main communities.

A provision should be drafted to ensure that –

1. Everyone is equal before and under the law and has the right to equal protection and equal benefit of the law, including the full and equal enjoyment of all rights and freedoms.

How this recommendation is a supplementary protection to the European Convention on Human Rights

This Recommendation enshrines a freestanding equality provision, which is supplementary to those provisions of the European Convention on Human Rights, which have been ratified by the UK government or incorporated into national law by the *Human Rights Act 1998*. Unlike many other international human rights instruments, the main text of the Convention contains no freestanding guarantee of equal treatment without discrimination. Rather, Article 14 of the Convention is what is sometimes referred to as a ‘parasitic’ prohibition of discrimination in relation only to the substantive rights and freedoms set out elsewhere in the Convention. Unlike the current situation under the Convention, there would no longer be a requirement to demonstrate that the facts “fall within the ambit” of one or more of the substantive Convention provisions.¹¹⁰

¹⁰⁷ Belfast (Good Friday) Agreement, p 17.

¹⁰⁸ *Race Relations Act 1976* cf. *Race Relations (NI) Order 1997*.

¹⁰⁹ Belfast (Good Friday) Agreement, p 16.

¹¹⁰ *Vilho Eskelinen v Finland* (2007) 45 EHRR 43, para 92.

How this recommendation is compliant with international instruments and draws upon international experience

A freestanding equality clause is compatible with international standards, and many international human rights instruments contain such clauses. Article 26 of the International Covenant of Civil and Political Rights states that, “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law”. Specific freestanding non-discrimination obligations are imposed by Article 2 of the Convention on the Elimination of All Forms of Racial Discrimination¹¹¹ and by Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (‘CEDAW’).¹¹² In addition, the aim of Protocol 12 of the European Convention on Human Rights is to create freestanding equality protection. Recommendation 1 draws upon the language in Section 15(1) of the Canadian Charter of Rights and Freedoms and Section 9(1)-(2) of the South African Constitution.

A provision should be drafted to ensure that –

2. No one shall be unfairly discriminated against by any public authority on any ground such as:
race, membership of the Irish Traveller community,
colour, ethnicity, descent, sex, pregnancy, maternity, civil,
family or carer status, language, religion or belief, political or
other opinion, birth, national or social origin, nationality,
economic status, association with a national minority,
sexual orientation, gender, identity, age, disability,
health status, genetic or other predisposition toward illness,
irrelevant criminal record, property or a combination of any
of these grounds, on the basis of characteristics
associated with any of these grounds,
or any other status.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 2 is supplementary to Article 14 of the European Convention on Human Rights, in that it operates as a freestanding non-discrimination provision and is not parasitic on rights, as is Article 14 of the Convention. In addition, Recommendation 2 adopts a more expansive list of prohibited grounds of discrimination than is found in Article 14 and in Protocol 12 of the Convention.

¹¹¹ Adopted by the UN General Assembly Resolution 2106 (XXX), 21 December 1965; 660 UNTS 195, 5 ILM 352.

¹¹² Adopted by the United Nations General Assembly Resolution 34/180, 18 December 1979; 19 ILM 33 (1980).

How this recommendation is compliant with international instruments and draws upon international experience

This Recommendation is derived from the articulation of the obligation found in Article 2 of Protocol 12 of the European Convention on Human Rights¹¹³ itself, but expands the definition by including a reference to “unfair discrimination”, which is then explained in Recommendation 3. The list of prohibited grounds of discrimination is more extensive than that found in many international human rights instruments. Consequently, the scope of the non-discrimination obligation supplements international protections.

A provision should be drafted to ensure that –

3. Unfair discrimination consists of any provision, criterion or practice which has the purpose or effect of impairing the ability of any person to participate on an equal basis with others in any area of economic, social, political, cultural or civil life.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 3 is supplementary to Article 14 of the European Convention on Human Rights and Protocol 12, by providing a definition of ‘unfair discrimination’ for the purposes of the freestanding protection granted by Recommendation 2.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 3 is derived from Articles 1 and 5 of the Declaration of Principles of Equality of the Equal Rights Trust.

A provision should be drafted to ensure that –

4. Without prejudice to the immediate effect of Recommendations on the Rights to Equality and Prohibition on Discrimination, legislation must be enacted to prevent or prohibit unfair discriminate.

¹¹³ ETS No 177.

How this recommendation is a supplementary protection to the European Convention on Human Rights

An obligation to enact legislation to prevent or prohibit unfair discrimination is not imposed by the European Convention on Human Rights.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 4 makes it clear that the other recommendations in this section are to be self-executing and not dependent upon the enactment of legislation. However, this Recommendation imposes an additional obligation to enact legislation to address unfair discrimination. This requirement for legislation to be enacted is derived from Section 9(4) of the South African Constitution and Article 11 of the Declaration of Principles of Equality of the Equal Rights Trust.¹¹⁴

A provision should be drafted to ensure that –

5. Public authorities must take all appropriate measures to eliminate unfair discrimination, and where circumstances so warrant and in accordance with the law, must take all appropriate and proportionate measures to ameliorate the conditions of disadvantaged groups, including those individuals or groups disadvantaged because of the prohibited grounds in Recommendation 2.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 5 imposes a positive obligation on public authorities to take appropriate measures not only to eliminate unfair discrimination, but also to take measures to ameliorate the conditions of disadvantaged individuals and groups where the circumstances so warrant and in accordance with law, including a Bill of Rights. Positive discrimination will not violate Article 14 of the European Convention on Human Rights if it has an objective and reasonable justification,¹¹⁵ and it has been held that Article 14 does not prohibit a State from treating groups differently in order to correct “factual inequalities”.¹¹⁶ Clearly, however, pursuant to Recommendation 5, there is a requirement to engage in positive discrimination where circumstances so warrant and in accordance with law, which supplements the Convention.

¹¹⁴ *Declaration of Principles on Equality* (2008) The Equal Rights Trust, London, Article 11, p 9.

¹¹⁵ *Belgian Linguistic Case (No 2)* (1979-1980) 1 EHRR 252, para 10.

¹¹⁶ *STEC v UK* (2006) 43 EHRR 47, para 51.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 5 permits positive discrimination and it is accepted that discrimination, which has the positive purpose or effect of promoting participation of a disadvantaged group, is permitted by international law. Summarising the position of the International Covenant of Civil and Political Rights, the Human Rights Committee has noted that “the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant”.¹¹⁷ Article 2(1) of the Convention on the Elimination of All Forms of Racial Discrimination contains an express obligation on States to adopt affirmative action measures, while the Committee on the Elimination of Discrimination against Women has often advocated the use of positive discrimination.¹¹⁸ In addition, Recommendation 5 reflects Article 3 of the Declaration of Principles of Equality of the Equal Rights Trust, which states that “[t]o be effective, the right to equality requires positive action”.

A provision should be drafted to ensure that –

6. Nothing in a Bill of Rights for Northern Ireland shall preclude any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those individuals or groups disadvantaged because of the prohibited grounds in Recommendation 2, and is a proportionate means of achieving this objective.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 6 supplements the European Convention on Human Rights in a similar way to Recommendation 5. It is also drawn from Section 15(2) of the Canadian Charter of Rights and Freedoms.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 6 is compatible with international law in the same way as Recommendation 5. It is also drawn from Section 15(2) of the Canadian Charter of Rights and Freedoms.

¹¹⁷ Human Rights Committee, *General Comment No 18: Non-discrimination*, 10 November 1989, para 10.

¹¹⁸ See, for example: Human Rights Committee, *General Comment No 23: The rights of minorities (Art 27)*, CCPR/C/21/Rev1/Add5, 8 April 1994, para 29.

A provision should be drafted to ensure that –

7. Public authorities must take all appropriate measures to promote the rights of older persons and those who are disabled to lead a life of independence, enjoy social, cultural and occupational integration, and to participate in the life of the community.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 7 is supplementary to the protection found in the European Convention on Human Rights. For example, both the Commission and the Court have ruled that an obligation to ensure access to facilities for disabled persons at beaches went beyond the legal obligation inherent in the idea of “respect” for private life contained in Article 8 of the Convention.¹¹⁹

How this recommendation is compliant with international instruments and draws upon international experience

The rights to independent living, integration and full participation of older persons and those suffering from disabilities are increasingly recognised in international law. In 1991, the United Nations General Assembly adopted the UN Principles for Older Persons which espoused the values captured in this provision, namely, independence, participation, self-fulfilment and dignity.¹²⁰ The rights of those with disabilities to independent living and full participation are recognised by Article 15 of the Revised European Social Charter.¹²¹ Important underpinning principles of the United Nations’ Convention on the Rights of Persons with Disabilities¹²² include independence and full participation: Articles 3(a) and (c) and 19.

¹¹⁹ *Botta v Italy* (1998) 26 EHRR 241, para 28 (ECommHR’s view) and para 35 (European Court of Human Rights’ view).

¹²⁰ Adopted by UN General Assembly Resolution 46/91, 16 December 1991.

¹²¹ ETS 163 (1996), 36 ILM 31 (1997).

¹²² Adopted by the UN General Assembly Resolution 61/106, 13 December 2006.

Democratic rights

How these recommendations arise from the particular circumstances of Northern Ireland

In a divided society, it is necessary to protect the basic components of democracy so as to ensure that the procedures and institutions of government are reflective of the society they serve and in whose name decisions must be made. This has been affirmed in the Belfast (Good Friday) Agreement and the St Andrews Agreement.¹²³ To strengthen democracy, a Bill of Rights should include guarantees that elections will be conducted in a free and fair manner, with independent electoral oversight. It should also provide assurances of inclusive and equitable government and participation in public bodies. These recommendations are fundamental to the promotion of mutual respect and parity of esteem.

A provision should be drafted to ensure that –

1. Everyone has the right and the opportunity, without any of the distinctions mentioned in Recommendation 2 of the Right to Equality and Prohibition on Discrimination section of this Advice and without unreasonable restriction, to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and to be elected at genuine periodic elections, which must be by universal and equal suffrage, and must be held by secret ballot, guaranteeing the free expression of the will of the electors.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 1 is supplementary to the European Convention on Human Rights in two ways. First, it grants a right to take part in the conduct of public affairs, which is not included within the scope of Article 3 of the First Protocol to the Convention. Second, Recommendation 1 grants a right to vote¹²⁴ and to be elected¹²⁵ at “genuine periodic elections”. By contrast, the rights to vote and be elected provided by Article 3 of the First Protocol to the Convention apply to elections “in the choice of the legislature”. This has been held not to include referenda;¹²⁶ presidential elections, if the president does not exercise legislative power or a role in the legislative process;¹²⁷ former elections

¹²³ Belfast (Good Friday) Agreement; and St Andrews Agreement.

¹²⁴ *Santoro v Italy* [2004] ECHR 309, (2006) 42 EHRR 38, paras 54-60.

¹²⁵ See: *Mathieu-Mohin and Clerfayt v Belgium*, para 52.

¹²⁶ *X v Germany* (1975) 3 DR 98; *X v UK* (1975) 3 DR 165.

¹²⁷ *Guliyev v Azerbaijan* (App No 35584/02) 27 May 2004 (admissibility decision), para 5; *Boškoski v Former Yugoslav Republic of Macedonia* (App No 11676/04) 2 September

to metropolitan county councils in the UK;¹²⁸ or elections to local authorities.¹²⁹

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 1 is based on, and apart from the cross-reference to the more extensive list of prohibited grounds of discrimination contained in the Equality and Non-Discrimination Recommendations, replicates Article 25(a)-(b) of the International Covenant on Civil and Political Rights.¹³⁰

A provision should be drafted to ensure that –

2. Everyone has the right to have access, on general terms of equality, to public service.

How this recommendation is a supplementary protection to the European Convention on Human Rights

The European Court of Human Rights has held that rules governing elections and the composition of the legislature should not be such as to exclude some persons or group of persons from participating in the political life of the country;¹³¹ but no obligation to ensure or facilitate access to public service on general terms of equality has been imposed.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 2 is drawn from Article 25(c) of the International Covenant on Civil and Political Rights.

A provision should be drafted to ensure that –

3. Elections must be subject to proportional representation at both regional and local level.

2004 (admissibility decision); *Baskauskaitė v Lithuania* (App No 41090/98) 21 October 1998 (admissibility decision); *Matthews v UK* (1999) 28 EHRR 361, paras 34, 63-66.

¹²⁸ *Booth-Clibborn v UK* (1986) 8 EHRR CD99, (1985) 43 DR 236, p 248.

¹²⁹ *Cherepkov v Russia* [2001] ECHR 1.

¹³⁰ Adopted by the UN General Assembly Resolution 2200A (XXI), 16 December 1966, 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966); 999 UNTS 171, 6 ILM 368 (1967).

¹³¹ *Aziz v Cyprus* (2005) 41 EHRR 11, para 28.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 3 is supplementary as Article 3 of the First Protocol to the European Convention on Human Rights does not require proportional representation.¹³² The Convention does not require any particular system of voting,¹³³ and a wide margin of appreciation is granted in this context to accommodate the political evolution of each Contracting State.¹³⁴

How this recommendation is compliant with international instruments and draws upon international experience

While proportional representation is not *required* by the European Convention on Human Rights, the European Court of Human Rights has accepted that proportional representation is compatible with Article 1 of the First Protocol to the Convention, on the basis that it “will lead to the minority being represented in situations where people vote generally on ethnic or religious lines and one group is in a clear minority throughout electoral districts”.¹³⁵ As such, proportional representation can be considered to be compatible with international practice.

A provision should be drafted to ensure that –

4. A Bill of Rights for Northern Ireland recognises the safeguards contained in the Belfast (Good Friday) Agreement 1998 for inclusive, proportionate and equitable participation in regional government and recommends, by means to be determined in legislation, equivalent safeguards for local government.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 4 is supplementary as Article 3 of the First Protocol to the European Convention on Human Rights does not require recognition – at either regional or local level – of the safeguards contained in the Belfast (Good Friday) Agreement, that elected representatives be guaranteed inclusive, proportionate and equitable participation in government.¹³⁶

¹³² *Mathieu-Mohin and Clerfayt* [1987] ECHR 1, para 54.

¹³³ *Lykourazos v Greece* (2008) 46 EHRR 7, para 52; *Liberal Party and Others v UK* (1982) 4 EHRR 106, para 11, ECommHR; *X v UK* (1976) 7 D&R 95.

¹³⁴ *Zdanoka v Latvia* (2007) 45 EHRR 17 (Grand Chamber), para 106.

¹³⁵ *Lindsay and Others v UK* [1979] 3 CMLR 166, ECommHR, para 9.

¹³⁶ See, for example: Belfast (Good Friday) Agreement, Strand One: ‘Democratic institutions in Northern Ireland, para 1.

How this recommendation is compliant with international instruments and draws upon international experience

The Human Rights Committee has observed in its interpretation of Article 25 of the International Covenant of Civil and Political Rights as follows: “Where citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit in Article 25 that those representatives do in fact exercise governmental power and that they are accountable through the electoral process for their exercise of that power”.¹³⁷ By requiring that elected representatives are guaranteed inclusive, proportionate and equitable participation in government, Recommendation 4 reflects this principle.

A provision should be drafted to ensure that –

5. Public authorities must take effective measures to facilitate the full and equal participation of women in political and public life, including, where appropriate, the use of temporary special measures.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Article 3 of the First Protocol of the European Convention on Human Rights, read with Article 14, may provide protection against under-representation; however, it does not impose a positive obligation to take effective measures to ensure the participation of women in political and public life.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 5 is reflective of the international standard set by Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women,¹³⁸ which requires States to take all appropriate measures to eliminate discrimination against women in political and public life.

A provision should be drafted to ensure that –

6. The membership of public bodies must as far as practicable be representative of society in Northern Ireland.

¹³⁷ Human Rights Committee, *General Comment 25: Article 25 (Participation in public affairs and the right to vote)*, CCPR/C/21/Rev1/Add7, 12 July 1996, para 7.

¹³⁸ Adopted by the UN General Assembly Resolution 34/180, 18 December 1979; 19 ILM 33 (1980).

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 6 is supplementary as the European Convention on Human Rights does not impose any requirements regarding the composition of public bodies.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 6 is not drawn from an international standard, but reflects a principle currently used in appointments to public bodies in Northern Ireland, as is found, for example, in Section 68(3) *Northern Ireland Act 1998* (in respect of the Commission) and in Section 73 (the Equality Commission for Northern Ireland).

A provision should be drafted to ensure that –

7. There must be an independent electoral authority to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with laws which are compatible with A Bill of Rights for Northern Ireland.

How this recommendation is a supplementary protection to the European Convention on Human Rights

No requirement of the establishment of an independent body to oversee elections has been imposed pursuant to the European Convention on Human Rights.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 7 reflects the requirements of Article 25 of the International Covenant on Civil and Political Rights. The Human Rights Committee on Civil and Political Rights has noted that Article 25 of the Covenant requires that an independent electoral authority be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant.¹³⁹

¹³⁹ Human Rights Committee, *General Comment 25: Article 25 (Participation in public affairs and the right to vote)*, CCPR/C/21/Rev1/Add7, 12 July 1996, para 20.

Additional recommendations to Government, not to be included in a Bill of Rights for Northern Ireland

Prisoners' right to vote

The rights of prisoners are currently violated by their disqualification from voting.¹⁴⁰

The Commission recommends that prisoners be afforded voting rights.

Education rights

How these recommendations arise from the particular circumstances of Northern Ireland

Schools, regardless of type, play a powerful and positive role in normalising society, helping to make it sustainable and vibrant, and enabling sharing among often divided communities.¹⁴¹ It is appropriate that a Bill of Rights includes a provision that will ensure education promotes human rights¹⁴² and, given the particular circumstances of Northern Ireland, mutual respect and parity of esteem for both main communities. One specific difficulty in the delivery of education has been ensuring that all children have access to the full statutory curriculum. For example, the Home Office Crime Action Plan which moves responsibility for the delivery of education to children in detention from the prison service to the Department for Children, Schools and Families does not extend or have an equivalent in Northern Ireland.¹⁴³ A Bill of Rights should provide assurances that this will no longer be the case.

A provision should be drafted to ensure that –

1. Education in all its forms must be directed towards the promotion of human rights, equality, dignity of the person, respect for diversity and tolerance.

¹⁴⁰ *Hirst v UK* (2005) 19 BHRC 546: The UK's current law and policy was declared to be in breach of Article 3. UN Human Rights Committee (2008) *Concluding Observations of the Human Rights Committee, United Kingdom Of Great Britain And Northern Ireland*, CCPR/C/GBR/CO/6 21 July 2008, Geneva, para 28.

¹⁴¹ Department of Education (2007) *A Consultation on Schools for the Future: A Policy for Sustainable Schools*, p 5; and (2006) *Independent Strategic Review of Education*, p 158, DENI, Belfast; and NIHRC, (2007) *Response to Consultation on Schools for the Future: A Policy for Sustainable Schools*, NIHRC, Belfast.

¹⁴² See: www.nicurriculum.org.uk.

¹⁴³ *The Home Office Youth Crime Action Plan 2008*, pp 57 and 58.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Pursuant to the European Convention on Human Rights, education must be pluralist.¹⁴⁴ Recommendation 1 supplements the standard in Article 2 of the First Protocol to the Convention by specifying in greater detail what is understood by this notion, and in that respect, imposes a supplementary obligation to that found in the Convention.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 1 reflects the principle enshrined in Article 29(1)(d) of the Convention on the Rights of the Child,¹⁴⁵ which requires that education should seek to prepare the child for responsible life in a free society, "in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin".

A provision should be drafted to ensure that –

2. No child shall be denied the right to access the full Northern Ireland education curriculum.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 2 is supplementary to the European Convention on Human Rights in that, while Article 2 of the First Protocol to the Convention states that no child shall be denied the right to education, it does not guarantee the right to access the full Northern Ireland education curriculum, regardless of the circumstances of the child. Thus, while the European Court of Human Rights has frequently noted that "[t]he right to education does not in principle exclude recourse to disciplinary measures, including suspension or expulsion from an educational institution in order to ensure compliance with its internal rules",¹⁴⁶ the aim of Recommendation 2 is to ensure that such suspended or expelled children will still be ensured access to the full Northern Ireland curriculum. In addition, the Court has held that where applicants were prevented, during the period corresponding to their lawful detention after conviction, from continuing their full-time

¹⁴⁴ *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, para 50.

¹⁴⁵ Adopted by UN General Assembly Resolution 44/25, 20 November 1989, 1577 UNTS 3, 28 ILM 1456.

¹⁴⁶ See, for example: *Şahin v Turkey*, (2007) 44 ECHR 5, para 156; see also *Ali v Lord Grey School Governors* [2006] UKHL 14; [2006] 2 AC 363 (HL), para 12 (that it was not contrary to Article 2 for pupils to be suspended or expelled from a school).

education, there was no violation of Article 2 of Protocol 1.¹⁴⁷ Recommendation 2 ensures that children in detention will continue to benefit from access to the Northern Ireland curriculum.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 2 reflects the obligation contained in Article 2 of the European Convention on Human Rights, but strengthens it by identifying the content of the education which shall not be denied to children.

Freedom of movement

How these recommendations arise from the particular circumstances of Northern Ireland

As recognised in the Belfast (Good Friday) Agreement, persons should have the right to freely choose their place of residence.¹⁴⁸ Exceptional powers for the police service and army,¹⁴⁹ the existence of peace walls and gates and the threat of sectarian violence have all restricted people's freedom of movement and residence in ways particular to this society.¹⁵⁰ Given the patterns of movement and residency, and the extent to which they have impacted on individuals, there is clear need to address these concerns. A Bill of Rights should give domestic effect to the provisions of Protocol 4, Article 1 of the European Convention on Human Rights.

Provisions should be drafted to ensure the incorporation in a Bill of Rights for Northern Ireland of –

The Fourth Protocol Article 2 (1,4) of the European Convention on Human Rights, which declares:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

¹⁴⁷ *Durmaz, Isik, Unutmaz and Sezal v Turkey* (App Nos 46506/99, 46569/99, 46570/99 and 46939/99) Decision, 4 September 2001.

¹⁴⁸ Belfast (Good Friday) Agreement, p 16.

¹⁴⁹ *Terrorism Act 2000*; and *Justice and Security (Northern Ireland) Act 2007*.

¹⁵⁰ Office of First Minister and deputy First Minister (2007) *Good Relations Indicators Baseline Report*, OFMdFM, Belfast.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Given the Commission's interpretation of the European Convention on Human Rights as referring to the main body of the Convention, this right, found in Article 2(1)-(2) of the Fourth Protocol, is supplementary to the Convention.

How this recommendation is compliant with international instruments and draws upon international experience

This right, derived directly from the European Convention on Human Rights itself, is clearly in compliance with international human rights law. The right is also found in Article 12(1) of the International Covenant on Civil and Political Rights.

Freedom from violence, exploitation and harassment

How these recommendations arise from the particular circumstances of Northern Ireland

The levels of violence and harassment suffered in Northern Ireland are unparalleled in the rest of the UK.¹⁵¹ The experience of violence was not limited to expressions of sectarianism or exclusive to the public sphere. Sectarian incidents still continue and some forms of abuse, for example, violence against women and hate crime, are increasing.¹⁵² The Belfast (Good Friday) Agreement acknowledges the importance of effectively tackling these issues.¹⁵³ Sharing a land border with another European Union state makes Northern Ireland unique from the rest of the UK. It is susceptible to illicit cross-border activity including human trafficking. A Bill of Rights must protect the most vulnerable from such exploitation.

¹⁵¹ Northern Ireland Affairs Committee (2008) *Policing and Criminal Justice in Northern Ireland: The Cost of Policing the Past*, Third Report, 2007-08, TSO, London, para 8 - From 1968 to September 2008, 50,241 persons were injured as a result of the security situation (source: PSNI (2008) *Persons Injured as a Result of the Security Situation in Northern Ireland 1968 – 2008*. Available at:

http://www.psni.police.uk/persons_injured_cy_to_date.pdf

¹⁵² Recorded crime and clearances statistics from PSNI. See:

http://www.psni.police.uk/index/statistics_branch.htm.

¹⁵³ Belfast (Good Friday) Agreement pp 1 and 16.

A provision should be drafted to ensure that –

1. Everyone has the right to be free from all forms of violence and harassment, from either public or private sources, including but not limited to:
 - a) domestic violence or harassment;
 - b) sexual violence or harassment;
 - c) gender-related violence or harassment;
 - d) sectarian violence or harassment; and
 - e) violence or harassment motivated by hate on any prohibited ground of discrimination.

How this recommendation is a supplementary protection to the European Convention on Human Rights

While freedom from violence and harassment is secured by Articles 3 and 8 of the European Convention on Human Rights, Recommendation 1 can be considered to supplement the protection of the Convention in two ways. First, engagement of Recommendation 1 would not be dependent on reaching the same minimum level of severity – albeit assessed according to the context – which pertains in the context of Article 3 of the Convention.¹⁵⁴ For example, the European Court of Human Rights has held that certain forms of corporal punishment do not engage Article 3 or violate Article 8 of the Convention.¹⁵⁵ Second, Recommendation 1 strengthens the protection of the individual from harassment and when read with Recommendation 3, clearly imposes positive obligations on public authorities in respect of protecting individuals from harassment. This aspect of the jurisprudence of the Court has been evolving,¹⁵⁶ and it has been suggested that the Convention “may” create positive obligations to protect against harassment.¹⁵⁷ By contrast, Recommendation 1, read with Recommendation 3, clearly imposes such a positive obligation.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 1, read with Recommendation 3, draws upon a number of international instruments which focus on particular types of violence. For example, with regard to racial violence, Article 4(a) of the Convention on the Elimination of All Forms of Racial Discrimination

¹⁵⁴ *Dougoz v Greece* (2002) 34 EHRR 61, para 44.

¹⁵⁵ *Costello-Roberts v UK* (1993) 19 EHRR 112, para 36.

¹⁵⁶ *Whiteside v UK* (1994) 18 EHRR CD 126, ECommHR, p 130 and 134; *Von Hannover v Germany* (2005) 40 EHRR 1.

¹⁵⁷ *Sheffield and Horsham v UK* (1999) 27 EHRR 163, 185.

imposes an obligation on States to declare an offence “all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin”. With regard to domestic and sexual violence against women, the United Nations’ General Assembly Declaration on the Elimination of Violence against Women 1993,¹⁵⁸ in its Article 4, requires States Parties to pursue by “all appropriate means and without delay a policy of eliminating violence against women”. In particular, Article 4(c) urges States to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or private persons”. In Recommendation Rec (2002)5 of the Committee of Ministers of the Council of Europe, the Council of Europe stated, *inter alia*, that Member States should introduce, develop and/or improve where necessary national policies against violence based on maximum safety and protection of victims, support and assistance, adjustment of the criminal and civil law, raising of public awareness, training for professionals confronted with violence against women and prevention.¹⁵⁹ In his third report, of 20 January 2006, to the Commission on Human Rights of the United Nations’ Economic and Social Council, the Special Rapporteur on violence against women suggested that there was a rule of customary international law that “obliges States to prevent and respond to acts of violence against women with due diligence”.¹⁶⁰

A provision should be drafted to ensure that –

2. Everyone has the right to be protected from sexual exploitation and sexual and other forms of trafficking.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Article 4 of the European Convention on Human Rights includes an obligation on States to criminalise ‘trafficking’ and other forms of ‘forced labour’.¹⁶¹ More extensive positive obligations have not been identified by the European Court of Human Rights as being required by Article 4 and, consequently, Recommendation 2, read with Recommendation 3, would require more extensive positive efforts to be made by public authorities to protect those at risk of sexual exploitation and sexual and other forms of trafficking, such as the protective policing duties currently found in Article 2.

¹⁵⁸ Adopted by the UN General Assembly Resolution 48/104, 20 December 1993.

¹⁵⁹ See: Appendix to Recommendation (2002)R, section 3(a)-(f).

¹⁶⁰ Commission on Human Rights (2006), *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women*, Report of Dr Yakin Ertürk, E/CN.4/2006/61, 20 January 2006, p 8, para 25.

¹⁶¹ *Siliadin v France* (2006) 43 EHRR 16, para 148.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 2, read with Recommendation 3, is in accordance with international standards. In 2000, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children¹⁶² was adopted to supplement the United Nations' Convention against Transnational Organized Crime.¹⁶³ Article 5 obliges state parties to this Protocol to make trafficking and related acts criminal offences under national law. Article 9 requires States to take measures to prevent trafficking, while Article 10(1) requires States to co-operate with law enforcement agencies in other countries. Other international instruments focus specifically on trafficking of women. Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women requires States to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women".¹⁶⁴ The United Nations' Declaration on Violence against Women includes trafficking and forced prostitution within its description of forms of violence against women.¹⁶⁵

A provision should be drafted to ensure that –

3. Public authorities must take all appropriate measures to ensure protection of the rights in Recommendations 1 and 2.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 3 is intended to make it clear that extensive positive obligations are intended to be imposed on public authorities by Recommendations 1 and 2, as part of the supplementary protection provided by these Recommendations.

¹⁶² Adopted by UN General Assembly Resolution 55/25, 15 November 2000, (2001) 40 ILM 335.

¹⁶³ UN Doc A/55/383 (Annex I, p 25).

¹⁶⁴ Adopted by the UN General Assembly Resolution 34/180, 18 December 1979; 19 ILM 33 (1980).

¹⁶⁵ Adopted by UN General Assembly Resolution 48/104, 20 December 1993, Article 2(b).

How this recommendation is compliant with international instruments and draws upon international experience

In respect of Recommendation 3, the compatibility of imposing positive obligations in the context of Recommendations 1 and 2 with international instruments and experience has already been outlined above.

Additional recommendations to Government, not to be included in a Bill of Rights for Northern Ireland

Physical punishment of children

The United Nations' Committee on the Rights of the Child¹⁶⁶ has concluded that the Government should remove the application of the defence of reasonable chastisement with regard to children.¹⁶⁷

The Commission recommends that the Government responds accordingly.

The right to identity and culture

How these recommendations arise from the particular circumstances of Northern Ireland

The Belfast (Good Friday) Agreement recognises the right to British and Irish identities and citizenship, and mandated the Commission to consider for inclusion in a Bill of Rights an obligation on public authorities to respect the identity and ethos of both communities.¹⁶⁸ Given the historic and continuing division between the two main communities, and the co-existence of British and Irish identities, the Commission concludes that such an obligation is necessary and desirable in order to promote mutual respect and parity of esteem. There is also need, however, to protect other linguistic, cultural and ethnic minorities so as to prevent the creation or reinforcement of a hierarchy of rights protections. These recommendations will provide necessary protection for identity and culture while recognising that, to build a stable and lasting peace, it is necessary to promote mutual respect, understanding and co-operation among all the people of Northern Ireland.¹⁶⁹

¹⁶⁶ Concluding Observations, UN Committee on the Rights of the Child, Forty-Ninth Session CRC/C/GBR/CO/4 unedited version, October 2008, paras 40-42.

¹⁶⁷ *Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2006*, Article 2.

¹⁶⁸ Belfast (Good Friday) Agreement p 2 and p 17.

¹⁶⁹ Belfast (Good Friday) Agreement.

A provision should be drafted to ensure that –

1. The right of the people of Northern Ireland to identify themselves and be accepted as Irish or British or both, as they may so choose, with no detriment or difference of treatment of any kind. This right would not be affected by any future change in the status of Northern Ireland.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Although Article 8 of the European Convention on Human Rights protects certain rights to identify oneself – for example, the right to identity in respect of one's gender¹⁷⁰ and a right to official recognition of a name¹⁷¹ – no particular protection is extended to the ability to identify oneself as British or Irish, or both.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 1 does not reflect any international human rights standard, but it is drawn from the Belfast (Good Friday) Agreement.¹⁷²

A provision should be drafted to ensure that –

2. The right of the people of Northern Ireland to hold British or Irish citizenship or both in accordance with the laws governing the exercise of this right, with no detriment or differential treatment of any kind. This right would not be affected by any future change in the status of Northern Ireland.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Although Article 8 of the European Convention on Human Rights protects the right to personal identity and Article 6 requires procedural fairness in proceedings determining citizenship, the Convention does not specifically protect choice of citizenship. In addition, Article 14 of the Convention does not include citizenship as a prohibited ground of discrimination.

¹⁷⁰ *B v France* (1993) 16 EHRR 1, paras 45-48 and 62-6; *Goodwin v UK* (2002) 35 EHRR 18, paras 77, 90 and 93.

¹⁷¹ *Burghartz v Switzerland*, (1994) 18 EHRR 101, para 24.

¹⁷² Belfast (Good Friday) Agreement, Constitutional Issues, p 2, para 1(vi).

How this recommendation is compliant with international instruments and draws upon international experience

The question of citizenship is one which is generally left to the discretion of States; and international instruments do sometimes permit discrimination on grounds of citizenship, as, for example, in Article 1(2) of the Convention on the Elimination of All Forms Racial Discrimination (distinctions between citizens and non-citizens). This protection in respect of citizenship is derived directly from the Belfast (Good Friday) Agreement.¹⁷³

A provision should be drafted to ensure that –

3. Public authorities must fully respect, on the basis of equality of treatment, the identity and ethos of both main communities in Northern Ireland. No one relying on this provision may do so in a manner inconsistent with the rights and freedoms of others.

How this recommendation is a supplementary protection to the European Convention on Human Rights

The European Convention on Human Rights contains many rights which would be relevant to the identities and ethos of individuals of both main communities in Northern Ireland, such as freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), freedom of assembly and association (Article 11), and non-discrimination (Article 14 and Protocol 12). However, unlike Recommendation 3, the Convention does not protect group rights and, in this respect, Recommendation 3 is supplementary to the Convention.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 3 is not drawn from an international instrument, although a similar – albeit narrower – example is found in Section 16(1) of the Canadian Charter of Rights and Freedoms, which grants equality of treatment to English and French. However, the first sentence of Recommendation 3 is derived directly from the Belfast (Good Friday) Agreement.¹⁷⁴ The second sentence of Recommendation 3 reflects the similar limitation on rights of those belonging to particular groups in Section 31 of the South African Constitution.

¹⁷³ As above.

¹⁷⁴ Belfast (Good Friday) Agreement, Rights, Safeguards and Equality of Opportunity, para 4.

A provision should be drafted to ensure that –

4. Everyone belonging to a national, ethnic, religious, linguistic or cultural minority in Northern Ireland has the right, individually and in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public. No one exercising these rights may do so in a manner inconsistent with the rights and freedoms of others.

How this recommendation is a supplementary protection to the European Convention on Human Rights

The European Convention on Human Rights contains many rights which are of importance to minorities, such as the right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), freedom of assembly and association (Article 11), and non-discrimination (Article 14 and Protocol 12). However, the European Court of Human Rights has, itself, acknowledged that while there is an emerging international consensus among the Contracting State of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle for the purpose of safeguarding the interests of minorities themselves and the cultural diversity of value to the whole community, that consensus is not sufficiently concrete to derive any guidance as to desirable conduct or standards in any particular situation.¹⁷⁵

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 4 is compatible with international law and closely mirrors the language found in Article 27 of the International Covenant on Civil and Political Rights and Article 2(1) of the United Nations' Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992).¹⁷⁶ The reference to the enjoyment of the right "individually and in community with others" is derived from Article 3(2) of the Framework Convention for the Protection of National Minorities.¹⁷⁷ The second sentence of Recommendation 4 reflects the limitation on rights (in a very similar clause) of those belonging to particular groups in Section 31 of the South African Constitution.

¹⁷⁵ *Chapman v UK* (2001) 33 EHRR 399, paras 93-94.

¹⁷⁶ Adopted by the UN General Assembly Resolution 47/135, 18 December 1992.

¹⁷⁷ CETS No 157.

A provision should be drafted to ensure that –

5. Public authorities must encourage a spirit of tolerance and dialogue, taking effective measures to promote mutual respect, understanding and co-operation among all persons living in Northern Ireland, irrespective of those persons' race, ethnicity, language, religion or political opinion.

How this recommendation is a supplementary protection to the European Convention on Human Rights

A positive obligation equivalent to that found in Recommendation 5 has not been imposed by the European Court of Human Rights.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 5 reflects the obligation contained in Article 1 of the United Nations' Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), which requires States to protect the existence and identity of minorities and to encourage conditions for the promotion of that identity.

A provision should be drafted to ensure that –

6. No one may be compelled in Northern Ireland to take an oath, or 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.

How this recommendation is a supplementary protection to the European Convention on Human Rights

While Articles 9 and 10 of the European Convention on Human Rights provide some protection from having to swear an oath contrary to one's belief,¹⁷⁸ on occasion, the European Court of Human Rights has upheld an interference with the right without subjecting the public interest interference to rigorous scrutiny.¹⁷⁹ Recommendation 6 will be subject to the general limitation clause which applies to all Supplementary Rights. However, the aim of articulating this right as a separate right is to emphasise that it should be less open to interference for public interest than is sometimes the case under the Convention.

¹⁷⁸ *Buscarini and others v San Marino* (2000) 30 EHRR 208, para 34.

¹⁷⁹ *McGuinness v UK* (App No 39511/98) Admissibility Decision of the European Court of Human Rights (Third Section), 8 June 1999.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 6 seeks to strengthen the protection granted by the European Convention on Human Rights and, in that respect, complies with international instruments and experience. However, Recommendation 6 draws primarily on Section 77 of the *Northern Ireland Act 1998*.

Additional recommendations to Government, not to be included in a Bill of Rights for Northern Ireland

Assemblies and parades

The Commission has highlighted the need to ensure the independence and impartiality of bodies which make decisions on parades and assemblies.¹⁸⁰

The Commission recommends that any mechanism for decision-making on assemblies and parades in Northern Ireland is compliant with Article 6 of the European Convention on Human Rights, the right to a fair trial in relation to determinations on civil rights.

Language rights

How these recommendations arise from the particular circumstances of Northern Ireland

Particular to Northern Ireland is the dispute over language rights and this has been directly related to the political conflict. The importance of respect, understanding and tolerance in relation to linguistic diversity, the Irish language, Ulster-Scots, and the languages of the various ethnic communities has been recognised in the Belfast (Good Friday) Agreement.¹⁸¹ As a party to the European Charter for Regional or Minority Languages, the Government is obliged to protect and promote Irish and Ulster-Scots. Enshrining language protections, including Sign language, within a Bill of Rights is crucial so as to ensure respect and equality for all and the promotion of parity of esteem between the two main communities.

¹⁸⁰ NIHRC (2008) *Response to the Strategic Review of Parading Body's Interim Consultative Report*, NIHRC, Belfast.

¹⁸¹ Belfast (Good Friday) Agreement, p 19 paras 3 and 4 (the list is not exclusive a further particular circumstance being is the use of both British [BSL] and Irish [ISL] sign language).

A provision should be drafted to ensure that –

1. Everyone belonging to a linguistic minority has the right to learn or be educated in and through their minority language where there are substantial numbers of users and sufficient demand.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Article 14 of the European Convention on Human Rights (which includes a prohibition on discrimination on grounds of language), read in conjunction with Article 2 of the First Protocol to the Convention (which guarantees respect for the “right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”), has been used to give limited protection to parents wishing to educate their children in a certain language.¹⁸² However, it has been held that there is no right to be educated in the language of one’s parents by public authorities or with their aid, and there is no right to obtain instruction in a language of choice.¹⁸³

How this recommendation is compliant with international instruments and draws upon international experience

Support for Recommendation 1 can be found in a number of international instruments. The fulfilment of the basic human right of persons belonging to national minorities to “use their language”, found in Article 27 of the International Covenant on Civil and Political Rights, also depends upon their ability to know the language.¹⁸⁴ Paragraph 1 of the 1996 Hague Recommendations Regarding the Education Rights of National Minorities states that “[t]he right of persons belonging to national minorities to maintain their identity can only be fully realised if they acquire a proper knowledge of their mother tongue during the educational process”. Article 8(1) of Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights, although not adopted, recognises the right of every person belonging to a national minority to learn their mother tongue. Paragraph 34 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe¹⁸⁵ includes an obligation on States to ensure that those belonging to national

¹⁸² *Belgian Linguistic Case* (1979-80) 1 EHRR 252, para 13.

¹⁸³ As above, para 11.

¹⁸⁴ Organization for Security and Co-operation in Europe (1999) *Report on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area*, OSCE, The Hague, p 1.

¹⁸⁵ CSCE (1990) 29 ILM 1305.

minorities “have adequate opportunities for instruction of their mother tongue”.

A provision should be drafted to ensure that –

2. Everyone has the right to access services essential to life, health or security through communication with a public authority, assisted by interpretation or other help where necessary, in a language (including sign language) and a medium that they understand.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 2 supplements the European Convention on Human Rights protection, since it extends the protection found in Articles 5(2) and 6(3)(a) of the Convention – in the context of arrest¹⁸⁶ and criminal justice,¹⁸⁷ respectively, – to all situations in which an individual is communicating with a public authority to seek access to services essential to life, health or security.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 2 is in accordance with international law, which increasingly imposes obligations on States to require use of minority languages by public authorities in certain circumstances. For example, paragraph 34 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe recommends that States endeavour to ensure that persons belonging to national minorities have adequate opportunities for use of their mother tongue before public authorities “wherever possible and necessary” and “in conformity with applicable national legislation”.¹⁸⁸ Article 10(2) of the Framework Convention for the Protection of National Minorities¹⁸⁹ requires States to endeavour to ensure the use of a minority language by administrative authorities “in areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need”. A similar right is found in Article 10(2) of the European Charter for Regional or Minority Languages.

¹⁸⁶ See, for example: *Van der Leer v The Netherlands* (1990) 12 EHRR 567, para 31.

¹⁸⁷ *Luedicke, Belkacem and Koç v Germany* (1978) 2 EHRR 149, para 48.

¹⁸⁸ Conference on Security and Cooperation in Europe (1990) *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, held in Copenhagen on 29 June 1990, para 34. Available at:

http://www.osce.org/documents/odihr/1990/06/13992_en.pdf

¹⁸⁹ ETS No 157.

A provision should be drafted to ensure that –

3. Public authorities must, as a minimum, act compatibly with the obligations undertaken by the UK Government under the European Charter for Regional or Minority Languages in respect of the support and development of Irish and Ulster-Scots.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 3 supplements European Convention on Human Rights protection, since the obligations imposed by the European Charter for Regional or Minority Languages,¹⁹⁰ in respect of regional and minority languages are significantly more extensive than those contained in the Convention. To give a specific example: while the Convention does not provide a right to be educated in the language of one's parents,¹⁹¹ insofar as regional or minority languages are concerned, Article 8 of the European Charter for Regional or Minority Language does confer such a right.

How this recommendation is compliant with international instruments and draws upon international experience

By directly invoking the European Charter for Regional or Minority Languages,¹⁹² Recommendation 1 complies with international standards.

The rights of victims

How these recommendations arise from the particular circumstances of Northern Ireland

The Belfast (Good Friday) Agreement acknowledges the need to address the suffering of victims of the conflict to make this a necessary element of reconciliation.¹⁹³ The special needs of victims have been recognised in the Programme for Government,¹⁹⁴ the draft Victims and Survivors Strategy,¹⁹⁵ and the appointments of the Victims Commission and the Consultative Group on the Past.

¹⁹⁰ 5 November, 1992, ETS No 148; 2044 UNTS 575.

¹⁹¹ *Belgian Linguistic Case*, (1979-80) 1 EHRR 252, para 11.

¹⁹² 5 November, 1992, ETS No 148; UNTS Vol 2044, p 575, reg 35358.

¹⁹³ Belfast (Good Friday) Agreement, p18.

¹⁹⁴ *Programme for Government 2008-11 (2007)*, Northern Ireland Executive, Belfast, p 36.

¹⁹⁵ Office of the First and deputy First Minister (2008), *Outline draft strategic approach for Victims and Survivors*, Consultation paper, OFMdFM, Belfast.

For a long time in Northern Ireland, the focus of the criminal justice system was “directed primarily at the interests of the state in dealing with criminal behaviour and gave less attention to victims who were directly affected by criminal behaviour”.¹⁹⁶ The Belfast (Good Friday) Agreement has provided the underpinning for policy development and modernisation of practices in relation to the needs of victims of crime.¹⁹⁷ “The status of the victims has yet to be elevated beyond past practice and a stronger focus on the individual victim’s actual needs has to be developed”.¹⁹⁸ These recommendations will help secure confidence in a more balanced system of justice.

A provision should be drafted to ensure that –

1. Every victim of crime has the right to appropriate material, medical, psychological and social assistance.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 1 is supplementary to the European Convention on Human Rights, which does not impose an obligation to provide the sort of assistance listed in Recommendation 1 to victims of crime.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 1, provision of relevant social care, draws upon Principle 14 of the United Nations’ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

A provision should be drafted to ensure that –

2. Every victim of crime has the right to be informed about the progress of the investigation and relevant legal proceedings.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 2 is supplementary to the European Convention on Human Rights, which does not specifically recognise the rights of victims of crime, although the rights of victims, stemming from Articles 2, 3, 5

¹⁹⁶ Justice Oversight Commissioner, Sixth Report 2006, para 2.18.

¹⁹⁷ Criminal Justice Inspection Northern Ireland (2005) *Improving the Provision of Care for Victims and Witnesses within the Criminal Justice System within Northern Ireland*, p 73, CJINI, Belfast.

¹⁹⁸ Justice Oversight Commissioner, Sixth Report 2006, para 2.18.

and 8 of the Convention are recognised as a legitimate ground for implying limitations into the Article 6 rights of the accused.¹⁹⁹

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 2 is in accordance with Principle 6 of the United Nations' Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which seeks to facilitate the responsiveness of judicial and administrative processes to the needs of victims, and Guidelines 3, 6 and 9 of the Council of Europe's Recommendation on The Position of the Victim in the Framework of Criminal Law and Procedure.²⁰⁰

A provision should be drafted to ensure that –

3. 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.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 3 is supplementary to the European Convention on Human Rights. The Convention extends a right to an effective remedy to victims of the Northern Ireland conflict, insofar as their Convention Rights may have been violated, but not otherwise, and, in particular, Convention protection does not extend to access the various forms of assistance listed in Recommendation 3. In addition, the Convention does not require a particular legislative scheme to be introduced to ensure the protection of victims' rights.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 3 draws on international instruments which increasingly require action to be taken to acknowledge and protect victims of crime and human rights abuses – which pertain to the victims of the Northern Ireland conflict – such as, the United Nations' Declaration of Basic Principles of Justice for Victims of Crime and Abuse

¹⁹⁹ See, for example: *Doorson v The Netherlands* (1996) 22 EHRR 330, para 70; *Osman v UK* (2000) 29 EHRR 245; *Re Officer* [2007] 1 WLR 2135; *Z v Finland* (1998) 25 EHRR 371, paras 62-65.

²⁰⁰ R(85)11E of 28 June 1985.

of Power,²⁰¹ the European Convention for the Compensation of Victims of Violent Crimes²⁰² and the Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law.²⁰³

The right to civil and administrative justice

How these recommendations arise from the particular circumstances of Northern Ireland

Holding public authorities to account and ensuring all reasonable requests for information are met openly and with transparency, is vital for ensuring confidence in the system of civil and administrative justice. Enabling members of the public to review the stewardship of public funds and the extent to which key government objectives have been met is central to the operation of democratic institutions.²⁰⁴ A Bill of Rights should include such guarantees given the contested nature of political and public life in Northern Ireland.

A provision should be drafted to ensure that –

1. Everyone has the right of access to any information held by public authorities, in accordance with laws governing the exercise of this right.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 1 supplements the European Convention on Human Rights protection by providing a freestanding right to access information held by public authorities. The right of access to information has been recognised in a number of specific contexts by the European Court of Human Rights, particularly if lack of information may result in an interference with private life, for example, where there has been a failure to provide safety and environmental information,²⁰⁵ a failure to provide information integral to an individual's sense of personal identity,²⁰⁶ or a failure to provide information about governmental

²⁰¹ Adopted by the UN General Assembly Resolution 40/34 of 29 November 1985, UN GAOR Supp (No 53) 214.

²⁰² ETS No 116.

²⁰³ Adopted by the UN General Assembly Resolution 60/147, 16 December 2005.

²⁰⁴ Belfast (Good Friday) Agreement, p 10.

²⁰⁵ *Guerra and Others v Italy* (1998) 26 EHRR 357, para 60.

²⁰⁶ *Gaskin v UK* (1990) 12 EHRR 36, para 49.

programmes posing a risk to health of those involved.²⁰⁷ However, it has been held that the right to freedom to receive information found in Article 10 of the Convention prohibits government from restricting a person from receiving information that others wish, or may be willing, to impart to him,²⁰⁸ but does not embody a general obligation on Contracting States to impart information.²⁰⁹

How this recommendation is compliant with international instruments and draws upon international experience

The right to information in Recommendation 1 is in accordance with the right to hold opinions without interference, contained in Article 19 of the International Covenant on Civil and Political Rights, which includes the right to seek information and ideas. It is also in accordance with United Nations' General Assembly Resolution 59(I), which states that "[f]reedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated".²¹⁰ The Consultative (Parliamentary) Assembly of the Council of Europe has adopted a resolution advocating that the right to freedom of expression shall include freedom to "seek receive, impart, publish and distribute information and ideas," with "a corresponding duty for the public authorities to make available information on matters of public interest within reasonable limits".²¹¹ A right to information which is given effect through national legislation is also conferred by Section 32 of the South African Constitution.

A provision should be drafted to ensure that –

2. Everyone has the right to administrative action that is lawful, procedurally fair, rational, proportionate and taken within a reasonable time.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Although the substance of the protections contained in Recommendation 2 broadly overlap with the substantive protections of Article 6 of the European Convention on Human Rights, the scope of protection provided by Recommendation 2 is supplementary, since this Recommendation

²⁰⁷ *McGinley and Egan v UK* (1999) 27 EHRR 1, para 98.

²⁰⁸ *Leander v Sweden* (1987) 9 EHRR 433, para 74.

²⁰⁹ *Gaskin v UK* (1990) 12 EHRR 36, para 52; *Leander v Sweden* (1987) 9 EHRR 433, para 74; *Guerra and Others v Italy* (1998) 26 EHRR 357, para 60.

²¹⁰ First Session of the United Nations, 14 December 1946.

²¹¹ Res 428 (1970), Council of Europe, Containing a Declaration on Mass Media and Human Rights, Cons, Ass, Twenty-First Ordinary Session (Third Part), 22-30 January 1970, *Texts Adopted*, para A(3).

confers freestanding rights to the relevant protections. Access to the Convention's Article 6 procedural fairness is conditioned on "the determination of ... civil rights and obligations or of any criminal charge".²¹² Thus, unlike in the case of Article 6, there is no need to show "civil rights and obligations" or a "criminal charge" in order to trigger the protection of Recommendation 2.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 2 is in accordance with international standards, and, for example, a freestanding right to impartial and fair administration in a reasonable time is provided by Article 41(1) European Charter of Fundamental Rights, in respect of acts of EU institutions and bodies.

A provision should be drafted to ensure that –

3. Public authorities must give reasons for their decisions and, where feasible, provide appropriate mechanisms for internal review or appeal of their decisions.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Insofar as it imposes a duty to give reasons, Recommendation 3 is supplementary to Article 6 of the European Convention on Human Rights in not being dependent upon "the determination of ... civil rights and obligations or of any criminal charge".²¹³ Recommendation 3 is also supplementary to Article 6 as it imposes an obligation on public authorities to ensure, where feasible, appropriate mechanisms for internal review and appeal of their decisions.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 3 draws on Article 41(2) of the European Charter of Fundamental Rights, which imposes an obligation on the administration to give reasons for its decisions. Insofar as it imposes an obligation to provide appropriate internal review and appeal mechanisms, Recommendation 3 is compatible with international human rights law, but primarily draws on best domestic practice in respect of internal

²¹² See, for example: *Pierre-Bloch v France* (1997) 26 EHRR 202, paras 50-51 (right to stand for election did not engage Article 6); *Maaouia v France* (2001) 33 EHRR 42, para 35 (asylum application did not engage Article 6); *Charalambos v France* (App No 49210/99) Admissibility Decision of 8 February 2000 (determination of tax liability did not engage Article 6).

²¹³ As above.

review and appeal, as found for instance in Section 202 of the *Housing Act 1996*.

The right to health

How these recommendations arise from the particular circumstances of Northern Ireland

The conflict has directly impacted on the health of the people of Northern Ireland. Loss of life, injury and trauma has had a profound effect on the physical and mental health of individuals and their families. The secondary effects, often involved, reduced standards of life for dependents²¹⁴ with the Government acknowledging that there is a correlation between poor health and high levels of violence.²¹⁵

The Government has recognised that the overall health status of the population requires attention and it has set itself a programme of action to reduce health inequalities in Northern Ireland.²¹⁶ One strategic objective in health planning is to ensure the use of gender-sensitive decision-making and access to appropriate services.²¹⁷ A Bill of Rights should ensure that no one will be denied emergency and essential healthcare. It should also ensure the ongoing improvement of the provision and accessibility of services.

A provision should be drafted to ensure that –

1. Everyone has the right to the highest attainable standard of physical and mental health. Public authorities must take all appropriate measures, including legislative measures, to the maximum of their available resources, with a view to achieving progressively the full realisation of this right.

How this recommendation is a supplementary protection to the European Convention on Human Rights

In certain exceptional circumstances, the European Court of Human Rights has recognised a right to health, in the form of a right which

²¹⁴ Sir Kenneth Bloomfield KCB (1998) *We Will Remember Them: Report of the Northern Ireland Victims Commissioner*, TSO, Belfast, para 2.10.

²¹⁵ Northern Ireland Social Services Inspectorate (1998) *Living with the Trauma of the Troubles*, TSO, Belfast, p 4.

²¹⁶ *Programme for Government 2008-11 (2007)*, Northern Ireland Executive, Belfast, p 12 and 37.

²¹⁷ Office of the First Minister and deputy First Minister (2006) *Gender Equality Strategy: a Strategic Framework for Action to Promote Gender Equality for Women and Men 2006-2016*, OFMdFM, Belfast, p 19.

imposes positive obligations on the State, as opposed to an obligation on the State not to interfere with physical or mental health. Examples include: an obligation pursuant to Article 3 to provide adequate medical treatment for detainees;²¹⁸ an obligation not to deport an individual if to do so would deprive the person of medical treatment and result in inhuman or degrading treatment;²¹⁹ and an obligation not to put an individual's life at risk by denying health care which the Contracting State has undertaken to make available to the population generally.²²⁰ However, there is no freestanding protection of health in the European Convention on Human Rights and, in that respect, Recommendation 1 is supplementary.

How this recommendation is compliant with international instruments and draws upon international experience

The first sentence of Recommendation 1 is based on Article 12 of the International Covenant on Economic, Social and Cultural Rights.²²¹ In keeping with the standard in the Covenant, this right is subject to progressive realisation. The right to health is recognised in a significant number of other international instruments, including: Article 24 of the Convention on the Rights of the Child;²²² Article 5(e)(iv) of the Convention on the Elimination of All Forms Racial Discrimination;²²³ Articles 11(1)(f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women.²²⁴ It is also found in a number of regional human rights instruments including: Article 11 of the Revised European Social Charter;²²⁵ Article 16 of the African Charter on Human and Peoples' Rights of 1981²²⁶ and Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988.²²⁷

²¹⁸ *L v Lithuania* (2008) 46 EHRR 22, para 59 (in the particular circumstances, there was a violation of Article 8 in not regulating for transgender surgery, which meant that the State could be required to fund operative treatment abroad).

²¹⁹ *D v UK* (1997) 24 EHRR 423, para 49.

²²⁰ *Cyprus v Turkey* (2002) 35 EHRR 30, para 219.

²²¹ Adopted by UN General Assembly Resolution 2200A(XXI), 21 UN GAOR Supp (No 16) 49; 993 UNTS 3, 6 ILM 360.

²²² Adopted by UN General Assembly Resolution 44/25, 20 November 1989, 1577 UNTS 3, 28 ILM 1456.

²²³ Adopted by the UN General Assembly Resolution 2106 (XX), 21 December 1965; 660 UNTS 195, 5 ILM 352.

²²⁴ Adopted by the UN General Assembly Resolution 34/180, 18 December 1979; 19 ILM 33 (1980).

²²⁵ ETS No 163, 529 UNTS 89, (1997) 36 ILM 31.

²²⁶ Adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, (1982) 21 ILM 58.

²²⁷ 'Protocol of San Salvador', O.A.S. Treaty Series No 69 (1988), (1989) 28 ILM 156.

A provision should be drafted to ensure that –

2. No one shall be refused emergency medical treatment and essential primary healthcare.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 2 is supplementary for the same reasons as Recommendation 1 is supplementary.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 2 is based on Section 27(3) of the South African Constitution, which creates an immediately realisable obligation to provide “emergency medical treatment”. The reference to “essential primary health care” is reflective of the obligation identified by the Committee on Economic, Social and Cultural Rights, that the right to health in the International Covenant on Economic, Social and Cultural Rights imposes a “core obligation” on States “to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care”.²²⁸

A provision should be drafted to ensure that –

3. Everyone has the right to appropriate healthcare and social care services free at the point of use and within a reasonable time. Public authorities must take all appropriate measures, including legislative measures, to the maximum of their available resources, with a view to achieving progressively the full realisation of this right.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 3 is supplementary for the same reasons as Recommendation 1 is supplementary.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 3 bolsters the international standard of protection of health. For example, Article 12(2) of the International Covenant on

²²⁸ CESCR, *General Comment No 14: The right to the highest attainable standard of health (Art. 12)*, 11 August 2000, E/C12/2000/4, para 43.

Economic, Social and Cultural Rights lists steps to be taken by States in complying with the right in Article 12(2), to enjoyment of the “highest attainable standard of physical and mental health”. One of the steps to be taken includes Article 12(2)(d), which refers to “[t]he creation of conditions which would assure to all medical service and medical attention in the event of sickness”. Recommendation 3 draws on this standard, but reformulates it in a way which is more in keeping with current practice in Northern Ireland, and the rest of the UK. The reformulation also adopts the proposal of the Joint Committee on Human Rights in its Outline of a UK Bill of Rights and Freedoms.²²⁹

A provision should be drafted to ensure that –

4. Women and girls have the right to access gender-sensitive and appropriate healthcare services and information.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 4 is supplementary for the same reasons as Recommendation 1.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 4 entails an adaptation and broadening of Article 12(2) of the Convention on the Elimination of All Forms of Discrimination against Women,²³⁰ which provides that parties “shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary”. In addition, Recommendation 4 promotes the aim of Article 12(2) of the Convention, which seeks to eliminate discrimination against women in the field of healthcare in order to ensure, on a basis of equality of men and women, access to healthcare services, including those related to family planning. According to paragraph 11 of *General Recommendation No. 24* of the Committee, dealing with Article 12: “Measures to eliminate discrimination against women are considered to be inappropriate if a health care system lacks services to prevent, detect and treat illnesses specific to women”.²³¹

²²⁹ Joint Committee on Human Rights, *A Bill of Rights for the UK?*, Twenty-ninth Report of Session 2007-08, HL Paper 165-1, HC 150-1, 10 August 2008, p 112.

²³⁰ Adopted by the UN General Assembly Resolution 34/180, 18 December 1979; 19 ILM 33 (1980).

²³¹ Twentieth Session, 1999.

Additional recommendations to Government, not to be included in a Bill of Rights for Northern Ireland

Termination of pregnancy

The issue of women's rights in respect of reproduction, and especially the issue of termination of pregnancy, has been one of the most controversial in the Commission's consultations on a Bill of Rights for Northern Ireland. Forceful and deeply felt submissions have been made, in respect of a right to life for unborn children and in respect of a right of choice for women. There is no clear widely accepted international standard in respect of the underlying issues. The United Nations' Committee on the Elimination of Discrimination against Women has directed the UK to consult widely on this issue in Northern Ireland.²³² The Commission has, therefore, concluded that it would be inappropriate for it to suggest that the matter can be resolved by a Bill of Rights.

The Commission recommends that the Government responds to the concluding observations of the United Nations' Committee on the Elimination of Discrimination against Women.

The right to an adequate standard of living

How these recommendations arise from the particular circumstances of Northern Ireland

The Government has acknowledged that grievances concerning social and economic discrimination had substantial foundation in Northern Ireland.²³³ The Belfast (Good Friday) Agreement recognises that tackling economic disadvantage and promoting social inclusion are key components of building a lasting peace.²³⁴ The Government has also stated that it is committed to "proactively change the existing patterns of social disadvantage by using increased prosperity and economic growth to tackle ongoing poverty".²³⁵ Such a commitment should be enshrined in a Bill of Rights. The Government should also guarantee immediate protection for the most vulnerable and marginalised members of society.

²³² Concluding observations of the UN Committee on the Elimination of Discrimination Against Women, CEDAW/C/GBR/CO/6 July 2008, para 42.

²³³ Report by Lord Cameron (1969) *Disturbances in Northern Ireland: Report of the Commission Appointed by the Governor of Northern Ireland*; Chapter 16, (a)1 para 126/127.

²³⁴ Belfast (Good Friday) Agreement, p 19.

²³⁵ *Programme for Government 2008-11 (2007)*, Northern Ireland Executive, Belfast, p 7.

A provision should be drafted to ensure that –

1. Everyone has the right to an adequate standard of living sufficient for that person and their dependents. Public authorities must take all appropriate measures, including legislative measures, to the maximum of their available resources, with a view to achieving progressively the full realisation of this right.

How this recommendation is a supplementary protection to the European Convention on Human Rights

To a very limited extent, the right not to fall into destitution or to an adequate standard of living has been implied into the European Convention on Human Rights. In *R (on the application of Limbuela) v Secretary of State for the Home Department*,²³⁶ it was held that the withdrawal of support from asylum-seekers as penalty for late application for asylum, accompanied by not permitting them to work, crossed the threshold of inhuman and degrading treatment and resulted in a violation Article 3 of the Convention. This, however, was an exceptional case; and the level of severity of treatment to engage Article 3 is high. As such, Recommendation 1 can be considered to be supplementary to the Convention.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 1 draws upon Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, and is formulated in accordance with the proposal of the Joint Committee on Human Rights in its Outline of a UK Bill of Rights and Freedoms.²³⁷

A provision should be drafted to ensure that –

2. No-one shall be allowed to fall into destitution.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 2 is supplementary to the European Convention on Human Rights for the same reason as Recommendation 1, and identifies a minimum core obligation of Recommendation 1.

²³⁶ [2005] UKHL 66, [2006] 1 AC 396, paras 57, 78 and 101.

²³⁷ Joint Committee on Human Rights, *A Bill of Rights for the UK?*, Twenty-ninth Report of Session 2007-08, HL Paper 165-1, HC 150-1, 10 August 2008, p 112.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 2 reflects the minimum core obligation of the broader right to an adequate standard of living. For example, the Committee on Economic, Social and Cultural Rights has noted that a State party to the Covenant on Economic, Social and Cultural Rights in which any significant number of individuals is deprived of essential foodstuffs, of essential primary healthcare, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.²³⁸

The right to accommodation

How these recommendations arise from the particular circumstances of Northern Ireland

Segregated patterns of residency caused by intimidation remain a problem in Northern Ireland, and discrimination in the allocation of social housing was a contributing factor in the conflict.²³⁹ Addressing the first of these issues, and enshrining a guarantee that the second will not reoccur, is fundamental to promoting mutual respect and parity of esteem between the both main communities. It is essential that a Bill of Rights places a duty on relevant government agencies to allocate housing without discrimination. Increasing social and affordable housing is one important aspect of delivering this outcome.²⁴⁰ However, it is also crucial that agencies protect persons from intimidation and harassment in their own homes²⁴¹ and provide emergency shelter for those in need.

A provision should be drafted to ensure that –

1. Everyone has the right to adequate accommodation appropriate to their needs. Public authorities must take all appropriate measures, including legislative measures, to the maximum of their available resources, with a view to achieving progressively the full realisation of this right.

²³⁸ CESCR, *General Comment 3 (Fifth session, 1990): The Nature of States Parties Obligations (Art 2, par 1)*, E/1991/23, 14 December 1990, 83, para 10.

²³⁹ Report by Lord Cameron (1969) *Disturbances in Northern Ireland: Report of the Commission Appointed by the Governor of Northern Ireland*; Chapter 16, (a) 1.

²⁴⁰ *Programme for Government 2008-11 (2007)*, Northern Ireland Executive, Belfast, p 12, 25 and 41.

²⁴¹ Belfast (Good Friday) Agreement, p 16.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 1 provides supplementary protection to that guaranteed by the European Convention on Human Rights. In certain, very limited circumstances, a duty to provide housing may arise under Article 8 of the Convention where, for example, an individual suffers from a severe disease or severe disability;²⁴² or if the State has been implicated in the destruction of the claimants' home.²⁴³ Article 3 of the Convention may be engaged if the living conditions are of a sufficiently low standard to reach the minimum level of severity required by that Article, or are exacerbated by, for example, a racially discriminatory motive,²⁴⁴ or an intention to debase and humiliate.²⁴⁵ However, Article 8 "does not in terms recognise a right to be provided with a home".²⁴⁶

How this recommendation is compliant with international instruments and draws upon international experience

The right to adequate housing forms part of the right to an adequate standard of living under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights and Article 25(1) of the Universal Declaration of Human Rights. An obligation on States to promote access to housing of adequate standard is also found in Article 31 Revised European Social Charter.²⁴⁷

A provision should be drafted to ensure that –

2. No one may be forced out of their home by threats or harassment or evicted without an order of a court. Public authorities must take all appropriate measures to ensure the protection of this right.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 2 is supplementary to the European Convention on Human Rights in that, while deprivation of a home requires a fair and public hearing and the other procedural requirements which have

²⁴² *Marzari v Italy* (1999) 28 EHRR CD 175.

²⁴³ *Moldovan v Romania (No2)* (2007) 44 EHRR 16, paras 102-104.

²⁴⁴ *Nachova and Others v Bulgaria* (2006) 42 EHRR 43, para. 160 and *Šečić v Croatia* [2007] ECHR 1159, para 67.

²⁴⁵ *R (Bernard) v Enfield LBC* [2002] EWHC 2282 Admin QBD, [2003] HRLR 111, paras 28-29.

²⁴⁶ *Chapman v UK* (2001) 33 EHRR 339; *O'Rourke v UK*, App No 39022/97 26 June 2001, p 6.

²⁴⁷ ETS 163 (1996), 36 ILM 31 (1997).

developed from the jurisprudence of Article 6 of the Convention,²⁴⁸ an actual 'order of a court' before eviction is not required by the Convention. In addition, Article 8 of the Convention has not, as yet, been interpreted to impose a positive obligation on public authorities to take measures to protect individuals from being forced from their homes due to threats or harassment.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 2 is based on Section 26(3) of the South African Constitution and reflects the interpretation of Article 11(1) of the International Covenant on Economic, Social and Cultural Rights taken by the Committee on Economic, Social and Cultural Rights, as articulated in its *General Comment No. 7 on forced evictions*²⁴⁹ and *General Comment No. 4 on the Right to Adequate Housing*.²⁵⁰ The reference to an obligation on public authorities to take "all appropriate measures" to protect this right emphasises that there is a broad range of positive obligations attaching to this right, and that public authorities have duties to act in respect of threats, harassment or forced evictions by private actors, as indicated by the Committee in its *General Comment No. 7*.²⁵¹

A provision should be drafted to ensure that –

3. Everyone has the right to appropriate emergency accommodation.

How this recommendation is a supplementary protection to the European Convention on Human Rights

The European Convention on Human Rights does not impose an obligation to provide appropriate emergency accommodation.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 3 draws upon and strengthens obligations contained in Article 31 Revised European Social Charter "to prevent and reduce homelessness with a view to its gradual elimination". It also relies upon current domestic protections, such as Section 175-218, dealing with homelessness, of the *Housing Act 1996*.

²⁴⁸ See, for example: *Connors v UK* (2004) 40 EHRR 9, paras 92-95.

²⁴⁹ (1997) UN Doc HRI/GEN/1/Rev 7, 12 May 2004.

²⁵⁰ CESCR, *General Comment No 4 (Art 11.1) on the Right to Adequate Housing*, 13 December 91, para 8(a).

²⁵¹ CESCR, *General Comment No 7 (Art 11.1) on the Right to Adequate Housing*, 20 May 1997, para 9.

The right to work

How these recommendations arise from the particular circumstances of Northern Ireland

Exclusion from, and discrimination in, employment contributed to the conflict in Northern Ireland.²⁵² Separated labour markets, intimidation in the workplace and sectarian discrimination were, and remain, particular to this society.²⁵³ The Belfast (Good Friday) Agreement contained a commitment to “combating unemployment and progressively eliminating the differential in unemployment rates between the two communities by targeting objective need”.²⁵⁴ These Recommendations will ensure that a Bill of Rights guarantees the opportunity for equal access to work under just and favourable conditions, including respite for carers, since they can be seen as requisites to addressing discrimination and social disadvantage. Where just and favourable conditions are not safeguarded, it is necessary that workers are protected in a Bill of Rights so that they can engage with employers or withdraw their labour to ensure rights protections.

A provision should be drafted to ensure that –

1. Everyone has the right to work, which includes the right to the opportunity to gain their living by work which they freely choose or accept. Public authorities must take all appropriate measures, including legislative measures, to the maximum of their available resources, with a view to achieving progressively the full realisation of this right.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 1 is supplementary to the European Convention on Human Rights. While the European Court of Human Rights has

²⁵² Report and Recommendations of the Working Party on Discrimination in the Private Sector of Employment (1973) HMSO, Belfast; and Fair Employment in Northern Ireland (1988) Presented to Parliament by the Secretary of State for Northern Ireland by Command of Her Majesty May 1988, HMSO, London.

²⁵³ In answering an Assembly question, the OFMdFM Ministers quoted from the results of the Northern Ireland Life and Times Survey, stating that nine per cent of Protestants said that, if applying for a job they would definitely avoid workplaces situated in a mainly Catholic area, and a further 20 per cent said that they would probably avoid such workplaces. The figures for Catholics who said that they would avoid workplaces situated in a mainly Protestant area were nine per cent (definitely) and 25 per cent (probably); Northern Ireland Assembly Written Answers, OFMdFM, 4 August 2008.

²⁵⁴ Belfast (Good Friday) Agreement, p 19.

recognised the right not to be discriminated against in access to work,²⁵⁵ and Article 4 of the European Convention on Human Rights prohibits slavery and servitude, the Convention generally does not contain protections in respect of the right to work.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 1 is an adaptation of Article 6 of the International Covenant on Economic, Social and Cultural Rights,²⁵⁶ and captures the core elements of this Article. The substance of Recommendation 1 is also found in Article 1(2) of the Revised European Social Charter.²⁵⁷

A provision should be drafted to ensure that –

2. Everyone has the right to enjoyment of just and favourable conditions of work irrespective of the status of the worker, including:
 - a) remuneration which provides all workers, as a minimum with:
 - i) fair wages and equal remuneration for work of equal value without distinction of any kind, in particular, women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - ii) decent living for themselves and their families;
 - b) safe and healthy working conditions;
 - c) freedom from all forms of unfair discrimination and from harassment including taking all appropriate measures to eliminate discrimination against women in the field of employment, including on the grounds of pregnancy or maternity;
 - d) rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

²⁵⁵ *Sidabras and Džiautis v Lithuania* (2004) 42 EHRR 104, para 61 (a violation of Article 14, read alongside Article 8, was found where a Lithuanian law banned former members of the KGB [and other organisations characterised as criminal] from taking up a wide range of jobs in the public and private sector for 10 years after the entry into force of the law).

²⁵⁶ Article 6 reads: "1. The State Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right." "2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual."

²⁵⁷ ETS 163 (1996), 36 ILM 31 (1997).

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 2 is supplementary for the same reason that Recommendation 1 is supplementary.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 2(a), insofar as it guarantees fair wages and equal pay for work of equal value, corresponds with Article 7(a)(i) of the International Covenant on Economic, Social and Cultural Rights. The reference in Recommendation 2(a) to women, is derived from Article 7(a)(ii). The requirement in Recommendation 2(a) of “equal pay for work of equal value” for women is also enshrined in Article 2(1) of the International Labour Organisation’s Equal Remuneration Convention, 1951,²⁵⁸ which ensures “the application to all workers of the principle of equal remuneration for men and women workers for work of equal value”. This is also in: the International Labour Organisation’s Discrimination (Employment and Occupation) Recommendation 1958²⁵⁹ at paragraph 2(b)(v); its Social Policy (Basic Aims and Standards) Convention, 1962²⁶⁰ at Article 14.1(i) and 14.2; and in the Universal Declaration of Human Rights at Article 23.2. Similarly, Article 11(1)(d) of the Convention on the Elimination of All Forms of Discrimination against Women requires “[t]he right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work”.²⁶¹ The right is also protected by Article 4(3) of the Revised European Social Charter and Article 141(1) of the EC Treaty. The reference in Recommendation 2(a) to decent living conditions is drawn from Article 7(a)(iii) of the International Covenant on Economic, Social and Cultural Rights.

Recommendation 2(b) on safe and healthy work conditions corresponds with Article 7(b) of the International Covenant on Economic, Social and Cultural Rights, and is also protected by Article 3 of the Revised European Social Charter.²⁶²

Recommendation 2(c), insofar as it refers to unfair discrimination, involves an adaptation of Recommendation 7(c) which requires equal opportunity for promotion. The specific reference to the needs of

²⁵⁸ ILO No C100, 165 UNTS 303.

²⁵⁹ ILO No 111.

²⁶⁰ ILO No C117.

²⁶¹ Adopted by the UN General Assembly Resolution 34/180, 18 December 1979; 19 ILM 33 (1980).

²⁶² ETS 163 (1996), 36 ILM 31 (1997).

women in Recommendation 2(c) draws from the obligation on States in Article 11(2) of the Convention on the Elimination of All Forms of Discrimination against Women, to take appropriate measures to “introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances”.²⁶³ Recommendation 2(c) also reflects the right to equal opportunities and the right of women to protection of maternity found in Articles 20 and 8 of the Revised European Social Charter respectively. The right to be free from harassment at work, including sexual harassment, is recognised by Article 26(1) of the Revised European Social Charter. More specifically, that women should be free from harassment at work because of their maternal role towards disabled children, has recently received particular recognition in EC law.²⁶⁴

Recommendation 2(d) corresponds with Recommendation 7(d) of the International Covenant on Economic, Social and Cultural Rights and reflects Article 31 of the European Charter of Fundamental Rights.

A provision should be drafted to ensure that –

3. Workers have the right to strike and the right to engage in collective bargaining.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 3 is supplementary to the European Convention on Human Rights. The freedom to form and join a trade union protected by Article 11(1) of the Convention does not guarantee any particular treatment of trade unions or their members, such as the right to collective bargaining²⁶⁵ or to strike.²⁶⁶

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 3 reflects the rights to engage in collective bargaining and strike action found in Article 28 of the European Charter of Fundamental Rights, and right to collective bargaining found in Article 6 of the Revised European Social Charter.

²⁶³ Adopted by the UN General Assembly Resolution 34/180, 18 December 1979; 19 ILM 33 (1980).

²⁶⁴ *Coleman v Attridge Law* [2008] 3 CMLR 27, ECJ.

²⁶⁵ *Schmidt and Dahlström v Sweden* (1979-1980) 1 EHRR 632, para 39; *Swedish Engine Drivers' Union v Sweden* (1976) 1 EHRR 617, para 40; *Gustafson v Sweden* (1996) 22 EHRR 409, paras 52-53.

²⁶⁶ *Schmidt and Dahlström v Sweden* (1979-1980) 1 EHRR 632, para 36.

A provision should be drafted to ensure that –

4. Everyone with caring responsibilities has the right to appropriate respite from those responsibilities. Public authorities must take all appropriate measures, including legislative measures, to the maximum of their available resources, with a view to achieving progressively the full realisation of this right.

How this recommendation is a supplementary protection to the European Convention on Human Rights

The European Convention on Human Rights does not provide any particular protection to carers.

How this recommendation is compliant with international instruments and draws upon international experience

The precise formulation of Recommendation 4 is not derived from any international instrument, but seeks to convey a general statement of more specific protections that have been recognised in international instruments. For example, Article 14(1) of the Convention on the Elimination of All Forms of Discrimination against Women recognises the work of rural women in “non-monetized sectors of the economy”. Article 5(b) of the Convention seeks to ensure that “family education includes a proper understanding of maternity as a social function”. In 1992, and in commemoration of the tenth anniversary of the adoption of the Vienna International Plan of Action by the Conference on Agency, the United Nations’ General Assembly adopted the Proclamation on Ageing,²⁶⁷ in which it urged (at Principle 1(k)) that families “are supported in providing care for the elderly and all family members are encouraged to cooperate in care-giving”.

²⁶⁷ Adopted by UN General Assembly Resolution 47/5, 47 UN GAOR Supp (No 49) 13, UN Doc A/47/49 (1992).

Environmental rights

How these recommendations arise from the particular circumstances of Northern Ireland

Environmental protection in Northern Ireland has suffered from underinvestment.²⁶⁸ Northern Ireland is the only part of the UK not to have an independent environmental regulator. Environmental protection is also different because of the unique circumstance in sharing a land border with another European Union state. This is recognised in the Belfast (Good Friday) Agreement by the provision for a North-South Ministerial Council, the responsibilities of which include protection of the environment, pollution control, water quality, and waste management.²⁶⁹ The Government recognises it is vitally important to protect the environment, not only to promote Northern Ireland as a place to live, work and visit, but also in enhancing well-being and the quality of life for everyone.²⁷⁰ Provisions are needed in a Bill of Rights in order to protect and enhance the environment for present and future generations.

A provision should be drafted to ensure that –

1. Everyone has the right to have the environment protected so as to foster the health and well-being of present and future generations, while promoting justifiable economic and social development.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 1 supplements the European Convention on Human Rights by providing a freestanding right to environmental protection. A degree of environmental protection has been guaranteed by the Convention, but only where the right is directly linked to Article 8, protection of the home or health, such as in the following circumstances: noise pollution, whether under flight paths²⁷¹ or nightclubs;²⁷² noxious emissions;²⁷³ and pollution.²⁷⁴ However, the

²⁶⁸ Independent Water Review Panel (2008) Strand Two Report: Management, Governance and Delivery, Department for Regional Development, Belfast.

²⁶⁹ Belfast (Good Friday) Agreement, p 13.

²⁷⁰ Office of the First Minister and deputy First Minister (2007) *Programme for Government 2008-11*, OFMdFM, Belfast, p 14.

²⁷¹ *Hatton and Others v UK* (2003) 37 EHRR 28, paras 96-97; *Powell and Rayner v UK* (1990) 12 EHRR 355, para 40; *Dennis v Ministry of Defence* [2003] EWHC 793 (QB), para 61

²⁷² *Moreno-Gómez v Spain* (2005) 41 EHRR 40, para 53.

²⁷³ *Lopez-Ostra v Spain* (1994) 20 EHRR 277, para 55; *Guerra v Italy*, (1998) 26 EHRR 357, para 58.

European Court of Human Rights has held that the Convention does not include a freestanding right to environmental protection and that environmental issues can only be investigated within the context of the individual rights contained in Article 8.²⁷⁵

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 1 draws heavily from Section 24 of the South African Constitution.

A provision should be drafted to ensure that –

2. Public authorities must adopt legislative and other measures to:
 - a) limit pollution and ecological degradation;
 - b) promote conservation and biodiversity; and
 - c) secure the sustainable development and use of natural resources.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 2 is supplementary for the same reasons as Recommendation 1.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 2 draws heavily from Section 24(b) of the South African Constitution.

Social security rights

How these recommendations arise from the particular circumstances of Northern Ireland

Northern Ireland has had different welfare provisions from elsewhere in the UK. These were based on residency requirements to reflect its unique geographical location in sharing a land border with another

²⁷⁴ *Fadeyeva v Russia* (2007) 45 EHRR 10, paras 87-88; *Taşkin v Turkey* (2006) 42 EHRR 50, para 117.

²⁷⁵ *Fadeyeva v Russia*, (2007) 45 EHRR 10, para 68; *Kyrtatos v Greece* (2005) 40 EHRR 16, para 52.

sovereign jurisdiction.²⁷⁶ Special measures were also introduced to deal with debt recovery following refusals to pay rent and rates as a form of political protest.²⁷⁷ Both, the Belfast (Good Friday) Agreement and the St Andrews Agreement make reference to issues of social exclusion and economic disadvantage and the need to address these.²⁷⁸

The particular circumstances of Northern Ireland have led to a high proportion of people receiving out-of-work benefits, high numbers of people without paid work, or in low paid work, and high numbers of people receiving Disability Living Allowance for mental health reasons.²⁷⁹ There is also a recognised and substantive correlation between those areas most directly impacted by the conflict and levels of relative poverty.²⁸⁰ For these reasons, Northern Ireland requires the inclusion of social security protections in a Bill of Rights.

A provision should be drafted to ensure that –

1. Everyone has the right to social security, including social assistance, social insurance and pension. Public authorities must take all appropriate measures, including legislative measures, to the maximum of their available resources, with a view to achieving progressively the full realisation of this right.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Very limited protection has been given to social security benefits pursuant to the European Convention on Human Rights. The focus has been on non-discrimination in the payment of such benefits,²⁸¹ or fair procedures in the administration of such benefits,²⁸² rather than on providing access to the substantive benefit itself, which the Convention does not do.

²⁷⁶ *Supplementary Benefits (Northern Ireland) Order 1977*, Article 8.

²⁷⁷ *Payments for Debt (Emergency Provisions) Act (Northern Ireland) 1971*.

²⁷⁸ Belfast (Good Friday) Agreement; and St Andrews Agreement, Annex B.

²⁷⁹ February 2006 figures from the Department of Social Development and Department of Work and Pensions indicate respectively that the Northern Ireland figure was three times higher than Great Britain.

²⁸⁰ NISRA (2004) *Equality and Inequalities in Health and Social Care in Northern Ireland: A Statistical Overview 2004*, Department for Health, Social Services and Public Safety, Belfast.

²⁸¹ *Gaygusuz v Austria* (1997) 23 EHRR 364, para 52.

²⁸² See, for example: *Lombardo v Italy* (1992) 21 EHRR 188, paras 14-17 (pension linked to employment); *Salesi v Italy* (1993) 26 EHRR 187, para 19; *Schuler-Zraggen v Switzerland* (1993) 16 EHRR 405; *Mennitto v Italy* (2002) 34 EHRR 48, para 28, *Tsfayo v UK* [2007] ECHR 656, para 40 ; *R (Husain) v Asylum Support Adjudicator* [2001] EWHC Admin 852, [2002] ACD 61, para 25, (termination of asylum support engaged Article 6).

How this recommendation is compliant with international instruments and draws upon international experience

This provision is an adaptation of Article 9 of the International Covenant on Economic, Social and Cultural Rights (social security and social insurance); while the right to the forms of social assistance listed here is also protected by Articles 8 (social security), 12 (social security and insurance), 13 (social assistance) of the Revised European Social Charter.²⁸³ In particular, Recommendation 1 reflects the substantive meaning of the right to social security under international law, which has been explored over time, particularly in the Committee on Economic, Social and Cultural Rights' *General Comment No. 19 on the Right to Social Security*.²⁸⁴ There have also been a number of International Labour Organisation social security conventions: *Convention concerning Social Security (Minimum Standards) (1952)*²⁸⁵ and *Convention concerning Invalidity, Old-Age and Survivors' Benefits (1967)*,²⁸⁶ which require States to secure provision of old-age benefits. The requirement, in respect of a pension, is derived from the Committee on Economic, Social and Cultural Rights' *General Comment No. 6 (1995) on the Economic, Social and Cultural Rights of Older Persons*.²⁸⁷

Children's rights

How these recommendations arise from the particular circumstances of Northern Ireland

The trans-generational impact and continuing legacy of the conflict has had serious consequences for children in Northern Ireland.²⁸⁸ Almost 300 children were killed and thousands were affected as a result of having family and friends injured, killed or imprisoned.²⁸⁹ There is now evidence of trauma affecting the children of those who grew up during

²⁸³ ETS 163 (1996), 36 ILM 31 (1997).

²⁸⁴ E/C 12/GC/19, 4 February 2008.

²⁸⁵ ILO No C102.

²⁸⁶ ILO No C128.

²⁸⁷ UN Doc E/1996/22.

²⁸⁸ Office of the First Minister and deputy First Minister (2005) *Our Children and Young People: Our Pledge, A Ten Year Strategy for Children and Young People in Northern Ireland 2006- 2016*, OFMdfM, Belfast; Templer S and Radford K (2007) *Hearing the Voices: Sharing the Perspectives in the Victim/Survivor Sector*, Community Relations, Belfast, p 18.

²⁸⁹ Department of Health, Social Services and Public Safety (2004) *Inequalities and Unfair Access Issues Emerging from the DHSSPS (2004) "Equality and Inequalities in Health and Social Care: A Statistical Overview" Report*, DHSSPS, Belfast, p 1.

the conflict.²⁹⁰ Children were abused by both state and non-state actors, and some were subject to so-called punishment violence by armed groups.²⁹¹ One of the most explicit differences between the lives of children in Northern Ireland compared to the rest of the UK is the lasting impact of segregation within communities, housing, education, play and leisure facilities.²⁹² In order to repair the damage of the past and protect future generations, it is of significant importance that children in Northern Ireland are afforded additional protections.²⁹³ Ensuring a common system of protection of the rights for all our children will, together with other rights, promote mutual respect and parity of esteem between the two main communities.²⁹⁴

A provision should be drafted to ensure that –

1. For the purpose of benefiting from any of the specific rights of the child in a Bill of Rights for Northern Ireland, a child means every human being below the age of eighteen years.

How this recommendation is a supplementary protection to the European Convention on Human Rights

This recommendation is supplementary to the European Convention on Human Rights, which does not contain a definition of a 'child' and which does not contain any rights specifically designed for the protection of the child.

How this recommendation is compliant with international instruments and draws upon international experience

This recommendation is in accordance with Article 1 of the Convention on the Rights of the Child.

²⁹⁰ Review of Mental Health and Learning Disability Northern Ireland [Bamford Review] (2005) *Vision of a Comprehensive Child And Adolescent Mental Health Service*, Consultation Document, RMHLDNI, Belfast.

²⁹¹ House of Commons Northern Ireland Affairs Committee (2005) *Ways of Dealing with Northern Ireland's Past: Interim Report - Victims and Survivors*, Tenth Report of Session 2004–05, Volume II Oral and written evidence, TSO, London, p 60.

²⁹² Office of the First Minister and deputy First Minister (2005) *A Shared Future: Policy and Strategic Framework for Good Relations in Northern Ireland*, OFMDFM, Belfast.

²⁹³ Minister Denis Haughey, *Having Faith in Children" - Children's Rights and the Commissioner for Children*, OFMDFM, 8 October 2001. Available at: <http://www.allchildrenni.gov.uk/index/relevant-speeches/speech-childrens-rights.htm>

²⁹⁴ Office of the First Minister and deputy First Minister (2005) *Our Children and Young People: Our Pledge, A Ten Year Strategy for Children and Young People in Northern Ireland 2006- 2016*, OFMDFM, Belfast, p 21.

A provision should be drafted to ensure that –

2. The rights in a Bill of Rights for Northern Ireland must be guaranteed to every child, without discrimination on any of the grounds listed in Recommendation 2 of the Right to Equality and Prohibition on Discrimination, whether the ground of discrimination applies in respect of the child or the child's parents or legal guardians.

How this recommendation is a supplementary protection to the European Convention on Human Rights

This Recommendation is supplementary to the European Convention on Human Rights in a number of respects. First, it applies the non-discrimination principle to all rights in a Bill of Rights for Northern Ireland, whereas Article 14 of the Convention applies the non-discrimination principle to rights in the Convention. Second, Recommendation 2 is supplementary to both Article 14 and Protocol 12 of the Convention, in that the listed prohibited grounds of discrimination are more extensive than those either listed in these provisions or recognised in the jurisprudence of the European Court of Human Rights. Third, Recommendation 2 protects children from discrimination which may be directed at their parents.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 2 is based on the non-discrimination principle found in Article 2(1) of the Convention on the Rights of the Child. The first part of Recommendation 2 overlaps with Recommendation 2 of the Equality Rights Recommendations for a Bill of Rights; however, the second part of Recommendation 2, in accordance with Article 2(1) of the Convention, expands the non-discrimination principle and makes it clear that a child should not be discriminated against because of the status of his or her parents or legal guardians.

A provision should be drafted to ensure that –

3. Public authorities must ensure that, in all actions concerning the child, whether undertaken by public authorities or private institutions, the best interests of the child shall be the primary consideration. In adoption, or any other child placement proceedings, the best interests of the child shall be the paramount consideration.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 3 provides supplementary protection to children as the principle of the 'primacy' of the child's best interests is not adopted by the European Court of Human Rights. Instead, the Court grants equal weight to the Article 8 rights of all family members. For example, in European Convention on Human Rights jurisprudence, where alternative care is being considered, the State is obliged to deal with children in a way that is consistent with "the ultimate aim of reuniting the natural parents and child".²⁹⁵ In addition, on occasion, significant weight has been given to the interests of the parent, even if the child appears to be at risk.²⁹⁶

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 3 strengthens the "best interests" standard established in Article 3(1) of the Convention on the Rights of the Child, and draws from Section 28(2) of the South African Constitution, requiring that the best interests of the child shall be the 'paramount' consideration in adoption proceedings. That the interests of the child be paramount is also found in domestic legislation, for example, in Article 3 of the *Children (Northern Ireland) Order 1995*; Section 1(2) of the *Adoption and Family Act 2002*; and Regulation 12(4) of the *Residential Family Centres Regulations (Northern Ireland) 2007*.

A provision should be drafted to ensure that –

4. Public authorities must take all appropriate measures to ensure the right of every child to access safe and appropriate play and leisure facilities.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 4 supplements the European Convention on Human Rights, which does not impose a positive obligation of this nature on Contracting States.

²⁹⁵ *Olsson v Sweden (No 1)* (1988) 11 EHRR 259, para 81; *Scozzari and Giunta v Italy* (2002) 35 EHRR 12, para 178; *Haase v Germany*, 2005) 40 EHRR 19, [2004] 2 FLR 39, para 93; *K and T v Finland* [2001] 36 EHRR 18, para 178; *Eriksson v Sweden* (1989) 12 EHRR 183, para 71; *Olsson v Sweden (No 2)* (1992) 17 EHRR 134, para 90.

²⁹⁶ See, for example: *K and T v Finland* [2001] 36 EHRR 18, para 168 (the Grand Chamber was not persuaded that a care order removing a new born child from a mentally ill mother immediately after birth on the ground that the child was at risk justified such a serious interference with the mother's Article 8 rights).

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 4 draws on Article 31 of the Convention on the Rights of the Child.

A provision should be drafted to ensure that –

5. Every child who is temporarily, or permanently, deprived of his or her family environment has the right to special protection and assistance for as long as they need it.

How this recommendation is a supplementary protection to the European Convention on Human Rights

While Article 3 of the European Convention on Human Rights²⁹⁷ requires that children at risk of ill-treatment be protected by state authorities, the obligation imposed by Recommendation 5 is more extensive. It requires that special protection and assistance be granted to children deprived of a family environment, regardless of the reason for that deprivation. Recommendation 5 requires the provision of suitable alternative care for children through institutions which are either controlled, licensed or supervised by public authorities. In addition, Recommendation 5 envisages “programmes in order to offer improved protection of the rights of children without parental care”²⁹⁸ to ensure that such children obtain the benefit of the rights guaranteed to them by a Bill of Rights for Northern Ireland.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 5 is based on Article 20 of the Convention on the Rights of the Child.

A provision should be drafted to ensure that –

6. Public authorities must take all appropriate legislative, administrative, social and educational measures to protect every child from all forms of violence, maltreatment, neglect, exploitation and harassment.

²⁹⁷ *Z and Others v UK* (2002) 34 EHRR 3, para 73.

²⁹⁸ See, for example: Committee on the Rights of the Child, 37th Session, Recommendation 7, ‘Children without Parental Care’, 10/2004.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 6 seeks to raise the standard of protection from ill-treatment that is required for children. While there is an obligation on the state, pursuant to Article 3 of the European Convention on Human Rights, to protect individuals from inhuman and degrading treatment, a minimum level of severity of treatment is necessary to engage Article 3. For example, the 'slipping' of a seven-year-old boy was not considered by the European Court of Human Rights to attain that level of severity.²⁹⁹

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 6 amalgamates the protections conferred by Article 3(2), Article 6, Articles 32-34 and Article 37 of the Convention on the Rights of the Child.

A provision should be drafted to ensure that –

7. Public authorities must take all appropriate measures to ensure the right of every child to be informed of their rights and to have his or her views respected, considered and given due regard in all matters affecting the child, taking into consideration the child's age, level of understanding and evolving capacities.

How this recommendation is a supplementary protection to the European Convention on Human Rights

Recommendation 7 provides procedural protection to children in decision-making involving the child, which has not been required by the European Convention on Human Rights.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 7 draws upon Article 12 of the Convention on the Rights of the Child.

²⁹⁹ *Costello-Roberts v UK* (1993) 19 EHRR 112, para 32.

A provision should be drafted to ensure that –

8. Public authorities must take all appropriate measures to ensure the right of every child to be protected from direct involvement in any capacity in armed conflicts or civil hostilities including their use as intelligence sources.

How this recommendation is a supplementary protection to the European Convention on Human Rights

The European Convention on Human Rights does not speak to the involvement of children in the armed forces.

How this recommendation is compliant with international instruments and draws upon international experience

Recommendation 8 draws upon and develops the protection provided by Article 38(2) of the Convention on the Rights of the Child, and raises the international age requirement from 15 to 18. This obligation is further developed in the Optional Protocol to the Convention, on the involvement of children in armed conflict.³⁰⁰

Additional recommendations to Government, not to be included in a Bill of Rights for Northern Ireland

Age of criminal responsibility

The age of criminal responsibility in Northern Ireland is ten.³⁰¹ The United Nations' Committee on the Rights of the Child has concluded that, a minimum age of criminal responsibility below the age of 12 is not internationally acceptable. It further recommended that State parties, of which the UK is one, to the Convention on the Rights of the Child, should consider raising the age of criminal responsibility to 14 or 16 years of age.³⁰²

The Commission recommends that the Government responds accordingly.

³⁰⁰ May 25, 2000, UN GAOR, UN Doc A/RES/54/RES/263 (entered into force 12 February 2002).

³⁰¹ *Criminal Justice (Northern Ireland) Order 1998*.

³⁰² General Comment No 10 (2007) *Children's rights in Juvenile Justice*, Committee On The Rights Of The Child, Forty-fourth session, Geneva, 15 January-2 February 2007, para 16.

Age of recruitment into the armed forces

The UK recruits minors from the age of 16 into the armed forces. The Committee on the Rights of the Child has encouraged the UK to consider reviewing its position and raise the minimum age for recruitment to 18.³⁰³

The Commission recommends that the Government responds accordingly.

³⁰³ Concluding observations on UK: Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 17 October 2008 UN Committee on the Rights of the Child.

CHAPTER 4: EFFECTIVE ENFORCEMENT AND IMPLEMENTATION

This chapter explains the recommendations regarding enforcement and implementation of a Bill of Rights for Northern Ireland.

Relationship with the Human Rights Act

The Human Rights Act 1998 should be retained in its present form, and the rights contained in Schedule 1 of the Human Rights Act 1998 should be re-enacted, alongside Supplementary Rights, in separate legislation for Northern Ireland. This new legislation, which shall exist alongside the Human Rights Act 1998, shall constitute the Bill of Rights for Northern Ireland. The title of the legislation shall be the Northern Ireland Bill of Rights Act.

The Belfast (Good Friday) Agreement 1998 tasks the Commission with identifying “rights supplementary to those in the European Convention on Human Rights (ECHR) ... These additional rights ... – taken together with the ECHR – to constitute a Bill of Rights for Northern Ireland”.³⁰⁴ It was therefore necessary for the Commission to consider the appropriate relationship between the Convention Rights, as set out in the Human Rights Act, and the Supplementary Rights that are recommended for a Bill of Rights.

The model of relationship proposed by the Commission would entail leaving the Human Rights Act intact, but re-enacting the Convention Rights contained in Schedule 1 of the *Human Rights Act 1998*, alongside Supplementary Rights in a separate piece of legislation, with its own enforcement and implementation mechanisms. This separate legislation would constitute a Bill of Rights for Northern Ireland.

The Human Rights Act is not subject to implied repeal, and as such, would not be undermined by an overlap with a Bill of Rights for Northern Ireland. This is due to what the courts have recently described as the status of the Act – as a “constitutional statute”.³⁰⁵ In any event, it would be possible to include a provision in a Bill of Rights to the effect that nothing in a Bill of Rights would affect the continuation in force of the Human Rights Act. It would also be necessary to incorporate the jurisprudence of the Act into a Bill of Rights. This could be achieved by providing, for example, that insofar as courts interpret the re-enacted

³⁰⁴ Belfast (Good Friday) Agreement, Rights Safeguards and Equality of Opportunity, para 4.

³⁰⁵ *Thoburn v Sunderland City Council* [2002] EWHC 195, [2003] Q.B. 151, para 62.

Convention Rights in a Bill of Rights, they are bound by the normal rules of precedent in respect of the decisions of other UK courts, while a provision could be included in similar terms to Section 2 of the Human Rights Act 1998, requiring the courts to pay due regard to the jurisprudence of the European Court of Human Rights (and this is proposed below in the Interpretation Section).

Given that a Bill of Rights would contain more generous enforcement mechanisms than are found in the Human Rights Act, it would be necessary to state that nothing in the Act prevented litigants from relying on various sections of a Bill of Rights, for example, the section defining standing more generously, the more expansive definition of public authority, or the more restrictive derogation clause.

There are precedents for keeping one bill of rights on the statute book, while enacting a subsequent bill of rights, which contains similar and overlapping rights to the earlier legislation. The most notable example is that of Canada. The *Canadian Bill of Rights Act 1960* (the 1960 Bill) continues in force, alongside the Canadian Charter of Rights and Freedoms 1982 (the 1982 Charter). There is substantive overlap in terms of the protections. For example, section 1(e) of the 1960 Bill contains the right to freedom of assembly and association, while section 2(d)-(e) of the 1982 Charter contains freedom of peaceful assembly and freedom of association. The two pieces of legislation are of a different order of course: the 1960 Bill is a statute, while the 1982 Charter forms part of the Canadian constitution. However, litigants can bring claims under both systems of human rights protection.³⁰⁶ Courts in Canada have observed that the 1960 Bill continues in “full force and effect”,³⁰⁷ and have commented that the cumulative effect of retaining the 1960 Bill on the statute books, even after the adoption of the Charter, has had a positive impact on human rights protection.³⁰⁸ While the 1982 Charter, of constitutional order, clearly trumps the 1960 Act, of statutory order, the relationship between the *Human Rights Act 1998* and a Bill of Rights for Northern Ireland could be managed equally well by the provisions suggested above.

³⁰⁶ See, for example: *Re Charkaoui* 280 DLR (4th) 736 (Federal Court of Appeal, 2007); *Authorson (Litigation Guardian of) v Canada (Attorney General)* 227 DLR (4th) 385 (Supreme Court of Canada, 2003); *Taylor v Canada (Minister of Citizenship & Immigration)* 286 DLR (4th) 385 (Supreme Court of Canada).

³⁰⁷ *Singh v Canada (Minister of Employment and Education)* [1985] 1 SCR 177, para 50.

³⁰⁸ As above, (Beetz J noting as follows at para 5: “Thus, the Canadian Bill of Rights retains all its force and effect, together with the various provincial charters of rights. Because these constitutional or quasi-constitutional instruments are drafted differently, they are susceptible of producing cumulative effects for the better protection of rights and freedoms”).

This model ensures that the *Human Rights Act 1998* continues to have legal force in Northern Ireland. By unifying enforcement mechanisms across all rights, this model avoids having different enforcement mechanisms for Supplementary Rights and Convention Rights in different pieces of legislation. This model would have the advantage of linking Convention Rights to Supplementary Rights in a way that would protect the people of Northern Ireland, even if a future UK government decided to repeal or diminish the Human Rights Act (although of course, the UK government is under an international Treaty obligation pursuant to the Belfast (Good Friday) Agreement in respect of the domestic effect of the European Convention on Human Rights in Northern Ireland).

The practical impact of this model would be that, where the enforcement mechanisms in a Bill of Rights are more effective than those contained in the *Human Rights Act 1998*, the Human Rights Act would most likely be used to a much lesser extent, with increasing resort to the new legislation. However, if, as was suggested above, courts are compelled to follow the Human Rights Act jurisprudence, insofar as it relates to the re-enacted Convention Rights, this would guarantee the continued relevance and vibrancy of the substantive jurisprudence of the Human Rights Act in Northern Ireland.

Limitations

A general limitation provision should be drafted to apply to those Supplementary Rights in a Bill of Rights for Northern Ireland which are immediately realisable.

Provisions should be drafted to ensure that –

1. Supplementary Rights may be subject only to reasonable limits which are prescribed by law to the extent that the limits are necessary in a society based on the values of human dignity, democracy, liberty, and equality, taking account of all relevant factors, including:
 - a) the nature of the right;
 - b) the importance and legitimacy of the purpose of the limitation;
 - c) the nature and extent of the limitation;
 - d) the relation between the limitation and its purpose; and
 - e) the availability of less restrictive means to achieve the purpose that the limitation seeks to achieve.
2. For the avoidance of doubt, where A Bill of Rights for Northern Ireland imposes an obligation to enact legislation or an obligation on public authorities to take all appropriate or effective measures to achieve a result, those obligations are not subject to this limitation clause.

Very few human rights contained in bills of rights are absolute. Most are limited, normally when it is necessary for the greater public interest or for the protection of the rights of others. The Commission has drawn upon the experience of recent human rights instruments, and opted for a general limitation that applies across all the rights (apart from where otherwise indicated).

General limitation clauses are found in certain domestic bills of rights, such as in Section 1 of the Canadian Charter of Rights and Freedoms 1982, Section 5 of the *New Zealand Bill of Rights Act 1990*, and Section 36 of the South African Constitution 1996. In the Canadian Charter and in the New Zealand Bill of Rights, rights and freedoms are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.³⁰⁹ Section 36 of the South African Constitution states that rights:

“may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

- a. the nature of the right;*
- b. the importance of the purpose of the limitation;*
- c. the nature and extent of the limitation;*
- d. the relation between the limitation and its purpose; and*
- e. less restrictive means to achieve the purpose.”*

General limitation clauses are also found in Section 7 of the Victorian *Charter of Human Rights and Responsibilities Act 2006* and in Section 28 of the *Australian Capital Territory Human Rights Act 2004*.

Certain provisions of a Bill of Rights for Northern Ireland are already articulated in language which suggests an inherent limitation, in particular, those provisions which impose an obligation on government to take ‘all appropriate measures’ to achieve a result. Other rights are subject to progressive realisation. This general limitation clause is directed to those provisions which are expressed as immediately realisable rights.

While both a general limitation clause and a right-by-right limitation clause operate equally effectively, it was decided that a general limitation clause is more reflective of recent international practice in drafting bills of rights, as can be seen from the examples of Canada, New Zealand, South Africa, Victoria and the Australian Capital Territory.

³⁰⁹ The leading interpretation of this limitation is found in the Canadian case of *R v Oakes* [1986] 1 SCR 103.

The formulation of the limitation clause proposed by the Commission draws on Section 36 of the South African Constitution, the jurisprudence of the New Zealand and Canadian courts, and the recent Report of the Joint Committee on Human Rights, *A Bill of Rights for the UK?*³¹⁰

Derogation

Provisions should be drafted to ensure that –

1. No derogation from any rights in A Bill of Rights for Northern Ireland shall be lawful unless a state of emergency has first been declared and confirmed by Parliament.
2. A state of emergency may be declared only when there is a public emergency threatening the life of the nation.
3. Any legislation enacted in consequence of a declaration of a state of emergency:
 - a) may derogate from any right or freedom in A Bill of Rights for Northern Ireland only to the extent that the derogation is strictly required by the emergency and is consistent with the UK's international obligations pursuant to international treaties and customary international law;
 - b) must be published as soon as reasonably possible;
 - c) must not indemnify public authorities or any person in respect of an unlawful act.
4. Any person or body who has a sufficient interest in the matter may bring legal proceedings in the appropriate court or tribunal challenging the validity of:
 - a) a declaration of a state of emergency; or
 - b) any legislation enacted, or other action taken, in consequence of a state of emergency.
5. A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, shall be effective only:
 - a) prospectively from the date of the Act of Parliament making the declaration; and
 - b) for no more than three months from the date of the declaration.

³¹⁰ Joint Committee on Human Rights, *A Bill of Rights for the UK?*, Twenty-ninth Report of Session 2007-08, HL Paper 165-1, HC 150-1, 10 August 2008, p. 106.

6. No legislation enacted in consequence of a declaration of a state of emergency may permit or authorise any derogation from rights which are non-derogable as a matter of international law, including but not limited to the following rights:
- a) the right to life in Article 2 of the European Convention on Human Rights;
 - b) the prohibition on torture and cruel, inhuman or degrading treatment or punishment in Article 3 of the European Convention on Human Rights;
 - c) the right not to be held in slavery or servitude in Article 4 of the European Convention on Human Rights;
 - d) the right to be free of punishment without law in Article 7 of the European Convention on Human Rights;
 - e) the right to freedom of thought, conscience and religion in Article 9 of the European Convention on Human Rights insofar as it corresponds with Article 18 of the International Covenant on Civil and Political Rights;
 - f) the right to challenge the legality of detention in Article 5(4) of the European Convention on Human Rights insofar as it corresponds with Article 9(3) of the International Covenant on Civil and Political Rights;
 - g) the right of everyone charged with a criminal offence to a fair trial contained in Article 6 of the European Convention on Human Rights insofar as it corresponds with Article 14(2)-(3) of the International Covenant on Civil and Political Rights;
 - h) the Recommendations in the Right to Equality and Prohibition on Discrimination insofar as they correspond with Articles 1 and 2 of the Convention on the Elimination of All Forms of Racial Discrimination, Articles 1 and 2 of the Convention on the Elimination of All Forms of Discrimination against Women, and Article 4 of the International Covenant on Civil and Political Rights;
 - i) Recommendations 1 and 3 of the Right to be Free from Violence, Exploitation and Harassment insofar as it corresponds with Article 4(a) of the Convention on the Elimination of All Forms of Racial Discrimination;
 - j) Recommendations 2 and 3 of the Right to be Free from Violence, Exploitation and Harassment insofar as they correspond with Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women;
 - k) the right to health insofar as it corresponds with Article 12 of the International Covenant on Economic, Social and Cultural Rights;
 - l) the right of women and girls to gender-sensitive and appropriate healthcare services and information in Recommendation 4 of the Right to Health insofar as it

- corresponds with Article 12(2) of the Convention on the Elimination of All Forms of Discrimination against Women;
- m) the right to an adequate standard of living sufficient for that person and their dependents in Recommendation 1 of the Right to an Adequate Standard of Living insofar as it corresponds with Article 11(1) of the International Covenant on Economic, Social and Cultural Rights;
- n) the right to work and the right to enjoyment of just and favourable conditions of work irrespective of the status of the work in Recommendations 1 and 2 of the Right to Work insofar as they correspond with Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights;
- o) the right to social security insofar as it corresponds with Article 9 of the International Covenant on Economic, Social and Cultural Rights;
- p) any rights which protect children insofar as they correspond with rights in the Convention on the Rights of the Child.

Some bills of rights contain what is known as a 'derogation' clause, which allows the government to suspend certain human rights in times of emergency. The European Convention on Human Rights (and thus the *Human Rights Act 1998*) already contains the option to derogate from certain rights "in time of war or public emergency threatening the life of the nation". Most of the Convention Rights that would be subject to derogation are contained in the Human Rights Act.

The following issues were considered in relation to derogations:

- Whether the re-enacted Convention Rights and the Supplementary Rights in a Bill of Rights for Northern Ireland should be subject to derogation;
- If derogation is to be available in respect of a Bill of Rights, whether there were any rights which should be considered to be non-derogable;
- If derogation is to be available in respect of a Bill of Rights, by which processes the power of derogation should be exercised.

Subjecting re-enacted Convention and Supplementary Rights to derogation

The constitutional principle of Parliamentary sovereignty renders it impossible to entirely rule out enactment of laws which would require derogations from pre-existing human rights legislation. However, the Commission recognises that Westminster, although free to legislate as a matter of law, can nonetheless be politically constrained from

legislating, by such conventions as the Sewel Convention.³¹¹ Consequently, the Commission decided that it was desirable to include a restrictive derogation clause in a Bill of Rights.

From the perspective of human rights enforcement, a derogation clause may be considered to serve the useful purpose of imposing rigorous requirements on the derogation process to discourage undue usage of derogations. The argument may also be made that a derogation clause could help to preserve a Bill of Rights for the future; without such a clause, there would be a greater danger that those in authority would use the occasion of the emergency to revoke a Bill of Rights in entirety. A derogation clause would also have the benefit of permitting the listing of those rights which are non-derogable as a matter of international law, thereby strengthening and highlighting the protection to be given to those particular rights.

Non-derogable rights

The Commission was of the view that even a strictly-circumscribed derogation clause could not apply to any rights, whether re-enacted Convention Rights or Supplementary Rights, which are non-derogable as a matter of international law if the UK has ratified the relevant international instrument. The provision is drafted to ensure flexible evolution in the future so that if the UK ratifies other international instruments with non-derogable rights which overlap with the rights in a Bill of Rights, these non-derogable rights shall also be non-derogable within a Bill of Rights.

Rights which are non-derogable as a matter of international obligation are identified in the Recommendations. These Recommendations are non-derogable, either because expressly stated to be so in international human rights instruments with derogation clauses, or because they correspond with rights in international human rights instruments which do not contain a derogation clause.

³¹¹ In the House of Lords on 21 July 1998, Lord Sewel said: *"We would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament"* (HL Deb, Vol 592, col 791, 21 July 1998). What became known as the Sewel Convention is restated in the Memorandum of Understanding with the devolved administrations, which states that *"the UK government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature"* (Cm 4806 (2000), para13). The convention was supported by the House of Commons during a debate on the procedural consequences of devolution on 21 October 1999 (HC Deb, Vol 336, cols 606-674).

The rights included currently are as follows:

- the right to life: see Articles 4 and 6 of the International Covenant on Civil and Political Rights; and Articles 2 and 15 of the European Convention on Human Rights (in the latter case, subject to the exception of deaths resulting from lawful acts of war);
- the prohibition on torture and cruel, inhuman or degrading treatment or punishment: see Articles 3 and 15 of the European Convention on Human Rights; and Articles 4 and 7 of the International Covenant on Civil and Political Rights;
- the right not to be held in slavery or servitude: see Article 4(1) and 15 of the European Convention on Human Rights; and Articles 4 and 8 of the International Covenant on Civil and Political Rights;
- the right to be free of punishment without law: see Articles 7 and 15 of the European Convention on Human Rights; and Articles 4 and 15 of the International Covenant on Civil and Political Rights;
- the right to freedom of thought, conscience and religion: see Articles 4 and 18 of the International Covenant on Civil and Political Rights;
- the right to challenge the legality of detention contained in Article 5(4) of the European Convention on Human Rights, insofar as it corresponds with Article 9(3) of the International Covenant on Civil and Political Rights. The Human Rights Committee has stated that the protection in Article 9(3) is non-derogable;³¹²
- the right of everyone charged with a criminal offence to a fair trial contained in Article 6 of the European Convention on Human Rights, insofar as it corresponds with Article 14(2)-(3) of the International Covenant on Civil and Political Rights. The Human Rights Committee has stated that the protection in Article 14(2)-(3) of the International Covenant on Civil and Political Rights is non-derogable;³¹³
- the Recommendations in the Right to Equality and Prohibition on Discrimination, insofar as they correspond with Article 1 of the Convention on the Elimination of All Forms of Racial Discrimination; and Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women ; and Article 4 of the International Covenant on Civil and Political Rights;
- Recommendation 1 and 3 of the Right to be Free from Violence, Exploitation and Harassment insofar as it corresponds with Article 4(a) of the Convention on the Elimination of All Forms of Racial Discrimination;
- Recommendations 2 and 3 of the Right to be Free from Violence, Exploitation and Harassment, insofar as they correspond with Article

³¹² Human Rights Committee, *General Comment No 29 (States of Emergency)*, CCPR/C/21/Rev1/.

Add 11, 31 August 2001, para 16.

³¹³ Human Rights Committee, *General Comment No 29 (States of Emergency)*, CCPR/C/21/Rev1/.

Add 11, 31 August 2001, para 16.

- 6 of the Convention on the Elimination of All Forms of Discrimination against Women;
- the right to health, insofar as it corresponds with Article 12 of the International Covenant on Economic, Social and Cultural Rights;
 - the right of women and girls to gender-sensitive and appropriate healthcare services and information in Recommendation 4 of the right to health, insofar as it corresponds with Article 12(2) of the Convention on the Elimination of All Forms of Discrimination against Women;
 - the right to an adequate standard of living, insofar as it corresponds with Article 11(1) of the International Covenant on Economic, Social and Cultural Rights;
 - the right to work and the right to enjoyment of just and favourable conditions of work irrespective of the status of the work in Recommendations 1 and 2 of the right to work, insofar as they correspond with Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights;
 - the right to social security, insofar as it corresponds with Article 9 of the International Covenant on Economic, Social and Cultural Rights; and
 - any rights for children insofar as they correspond with rights in the Convention on the Rights of the Child.

Process

Having decided that a derogation clause should be included, it was considered imperative that the clause should be drafted in a way which only permitted derogation in very limited circumstances and in accordance with transparent and fair procedures. A number of derogation clauses were examined, such as Article 15 of the European Convention on Human Rights, Article 4 of the International Covenant on Civil and Political Rights, Section 37 of the South African Constitution, Section 33 of the Canadian Charter of Rights and Freedoms, and the proposal contained in Section 13 of the Outline of a UK Bill of Rights and Freedoms, set out in the recent Report of the Joint Committee on Human Rights, *A Bill of Rights for the UK?*³¹⁴ The derogation clause proposed by the Joint Committee on Human Rights is a more stringent derogation clause than that currently found in Section 14 of the *Human Rights Act 1998* and it was decided that a slightly modified version of this proposal should be adopted.

The standard for declaring derogation proposed by the Joint Committee on Human Rights, namely, an “emergency threatening the life of the nation”, reflects the standard found in Article 15 of the European

³¹⁴ Joint Committee on Human Rights, *A Bill of Rights for the UK?*, Twenty-ninth Report of Session 2007-08, HL Paper 165-1, HC 150-1, 10 August 2008, p 106.

Convention on Human Rights and provides a higher threshold to that found in the South African Constitution and the Canadian Charter of Rights and Freedoms. In addition, by requiring a declaration of Parliament, as opposed to locating the power of derogation primarily with the Secretary of State, the Joint Committee on Human Rights, in its Report, proposes to:

*“enhance the role of Parliament in the process by requiring that a state of emergency must first be declared and confirmed by Parliament before any derogations from rights or freedoms in the Bill can be made. It could also enhance Parliament’s role by stipulating a strict time limit on the duration of such a declaration of a state of emergency and of any emergency legislation.”*³¹⁵

It was considered that the proposal of the Joint Committee on Human Rights was also preferable to Section 14 of the Human Rights Act, insofar as the duration of any derogation was limited to three months, rather than what was considered to be the excessively long period of five years.

The Recommendation set out above bolsters the proposal of the Joint Committee on Human Rights, by requiring in Recommendation 3(b)-(c) that a declaration of a state of emergency and any legislation enacted or other action taken in consequence of that declaration must be published as soon as reasonably possible; and must not indemnify public authorities or any person in respect of an unlawful act. The publication and indemnification requirements in paragraphs 3(c) and 3(d) of the Recommendation are derived from Section 37 of the South African Constitution.

Finally, it was decided that the power to derogate should remain solely at Westminster level. At present, derogation from Convention Rights can only be entered into by the UK government (using Section 14 of the Human Rights Act), even if the derogation has an impact on transferred matters and it was considered preferable to retain that position, particularly given that the Human Rights Act will continue in force.

³¹⁵ As above, p 116.

Entrenchment and amendment

1. The adoption of a Bill of Rights for Northern Ireland should be undertaken by Westminster in accordance with the Belfast (Good Friday) Agreement 1998.

A provision should be drafted to ensure that –

2. Amendment of a Bill of Rights for Northern Ireland should only be undertaken by Westminster with the cross-community approval of the Northern Ireland Assembly.

Adoption

Recommendation 1 is derived directly from the Belfast (Good Friday) Agreement, which stipulates that supplementary rights will be defined “in Westminster legislation”.³¹⁶

Amendment

In respect of Recommendation 2, a bill of rights normally contains the expression of fundamental rights. As such, these should not be altered, at least too easily, by later decisions of government or the legislature. Consequently, it is common for a bill of rights to be ‘entrenched’ or made semi-permanent so as to ensure that it cannot be easily changed. A Bill of Rights for Northern Ireland will be enacted by Westminster as primary legislation, and in the current constitutional system, there is a doctrine of Parliamentary sovereignty which means that no Parliament can prevent a future Parliament from legislating as it wishes. This means that a future Parliament could decide to amend or even to repeal any Bill of Rights.

As was discussed above, however, in the discussion on derogations, Parliament may be politically constrained by conventions, such as the Sewel Convention.³¹⁷ The Commission has considered that requiring

³¹⁶ Belfast (Good Friday) Agreement, Rights, Safeguards and Equality of Opportunity, Article 5.

³¹⁷ In the House of Lords on 21 July 1998, Lord Sewel said: “*We would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament*” (HL Deb, Vol 592, col 791, 21 July 1998). What became known as the Sewel Convention is restated in the Memorandum of Understanding with the devolved administrations, which states that “*the UK government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature*” (Cm 4806 (2000), para13). The convention was supported by the House of Commons during a debate on the procedural consequences of devolution on 21 October 1999 (HC Deb, Vol 336, cols 606-674).

cross-community approval in the Northern Ireland Assembly for the amendment of a Bill of Rights would provide an appropriate degree of political constraint, which assists in protecting the rights in a Bill of Rights from being undermined or amended.

Application

Provisions should be drafted to ensure that –

1. Public authorities must:
 - (a) act compatibly with the rights in a Bill of Rights for Northern Ireland;
 - (b) in making a decision, have due regard to a relevant right in a Bill of Rights for Northern Ireland; and
 - (c) take active steps to respect, protect, promote and fulfil the rights in a Bill of Rights for Northern Ireland.
2. The term 'public authority' includes:
 - a) a court or tribunal; and
 - b) any person or body performing a public function.
3. In determining whether a function is a 'public function', the factors to be taken into account include:
 - a) the extent to which the executive, legislature or judiciary, whether local, regional or UK-wide, has assumed responsibility for the function in question;
 - b) the role and responsibility of the executive, legislature or judiciary, whether local, regional or UK-wide, in relation to the subject matter in question;
 - c) the nature and extent of the public interest in the function in question;
 - d) the nature and extent of any statutory power or duty in relation to the function in question;
 - e) the extent to which the executive, legislature or judiciary, whether local, regional or UK-wide, directly or indirectly, regulates, supervises and inspects the performance of the function in question;
 - f) the extent to which the executive, legislature or judiciary, whether local, regional or UK-wide, makes payment for the function in question;
 - g) whether the function involves or may involve the use of statutory coercive powers;

- h) the extent of the risk that improper performance of the function might violate a right or freedom in a Bill of Rights for Northern Ireland.
4. For the avoidance of doubt, the existence of a contract as the basis for performance of the public function shall not preclude the person performing the public function from being considered to be a 'public authority'.
 5. Where a person or body is a 'public authority' due to the performance of a public function, the person or body shall only be treated as a public authority in respect of those acts performed pursuant to the public function.
 6. A public authority shall not be bound to comply with Recommendation 1 where the public authority could not have acted otherwise due to Westminster primary legislation and could not have interpreted or given effect to the Westminster primary legislation such as to ensure compatibility with a Bill of Rights for Northern Ireland.

When discussing the application of a Bill of Rights for Northern Ireland, the Commission was required to consider the *reach* of a Bill of Rights compliance obligation and the *nature* of a Bill of Rights compliance obligation.

Reach of the obligation

a) Introduction

Bills of rights always apply vertically – that is between private persons and the state. Certain rights within a vertical bill of rights may impose what are known as 'positive obligations' on the state to protect private persons from violations of their rights by other private persons. However, in a vertical bill of rights, there will only be legal causes of action for breaches of the right against the state. By contrast, some bills of rights also apply horizontally – that is between private persons (including businesses and other organisations). With horizontal bills of rights, legal causes of action for breaches of rights will be available against both the state and against other private persons.

b) Vertical application: Recommendations 1-5

The *Human Rights Act 1998* applies vertically and, as is seen in Recommendations 1 and 2, the Commission decided that a Bill of Rights for Northern Ireland should also apply vertically, binding "public authorities". The term 'public authority' is used in Section 6 of the

Human Rights Act, and includes within the definition of 'public authority', bodies "certain of whose functions are functions of a public nature". However, concerns have been raised about the fact that, in practice, the courts have defined the term 'public authority' more narrowly than appears to have been originally intended when the Act was being debated in Parliament³¹⁸ and, in particular, persons performing functions pursuant to contractual arrangements with government have generally not been considered to fall within the Section 6 definition of 'public authority'.³¹⁹

The definition of 'public authority' proposed here seeks to make it clear, beyond doubt, that the term 'public authority' must be interpreted more broadly than has been the case pursuant to the *Human Rights Act 1998*. Recommendation 3 is modelled on Section 6 of the Outline of a UK Bill of Rights and Freedoms proposed by the Joint Committee on Human Rights in its recent Report, *A Bill of Rights for the UK?*³²⁰ As the Joint Committee explains, the factors listed here are derived from the dissenting judgments of Lord Bingham and Baroness Hale in the *YL* case³²¹ and from the judgment of Lord Nicholls in the *Aston Cantlow* case.³²² A factor-based approach has also been adopted in Section 4(2) of the Victorian *Charter of Rights and Responsibilities Act 2006*, albeit that the factors listed in that legislation are slightly different from those listed here.

Recommendation 4 modifies the Joint Committee on Human Rights' proposal by stating explicitly that the existence of a contractual basis for the performance of the function will not preclude it from being recognised as a 'public function'. This is to respond to the majority House of Lords judgments in the *YL* case, in which the existence of a contract between a private care home and a local authority appeared to influence their Lordships to find that no public function was being performed.³²³

³¹⁸ See, for example: Hansard (HC Debates) 16 February 1998, col 773, Mr Jack Straw, Second Reading of the Human Rights Bill (noting that: "*The Bill had to have a definition of a public authority that ... took account of the fact that, over the past 20 years, an increasingly large number of private bodies, such as companies or charities, have come to exercise public functions that were previously exercised by public authorities*").

³¹⁹ See, for example: *YL v Birmingham City Council* [2007] UKHL 27.

³²⁰ Joint Committee on Human Rights, *A Bill of Rights for the UK?*, Twenty-ninth Report of Session 2007-08, HL Paper 165-1, HC 150-1, 10 August 2008, p 106.

³²¹ See: *YL v Birmingham City Council* [2007] UKHL 27.

³²² *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, para 12.

³²³ See, for example: [133], [167] (Lord Neuberger), [120] (Lord Mance), [31] (Lord Scott).

In order not to impose a burden which is too onerous on those who are performing public functions in a limited context, for example, pursuant to a specific government contract, Recommendation 5 indicates that the obligation to comply with a Bill of Rights applies only in respect of the performance of the public function.

c) Horizontal application: Recommendation 2(a)

As regards the horizontal application of human rights, it is broadly accepted that there are two main types of horizontal application: direct and indirect. The former arises where direct causes of action against private parties for human rights violations are created under a Bill of Rights. Indirect effect arises where judges are required to develop the common law in line with a Bill of Rights. There are, in turn, two forms of indirect horizontal effect. First, there is a weaker form, whereby the courts are required to develop the common law in line with the rights and values in a Bill of Rights, but new causes of action are not created. In the UK, Section 6(1) of the *Human Rights Act 1998* does this by including the courts within the definition of a core public authority, thus requiring them to develop existing common law in accordance with Convention Rights. Second, there is also a strengthened form of indirect effect whereby the common law is directly affected by a Bill of Rights and the creation of new common law causes of action is allowed. The Commission agreed that there was no need to deviate from the type of indirect horizontal application that applies under Section 6(1) of the Human Rights Act. This should, therefore, also apply to a Bill of Rights, as proposed by the inclusion of 'courts' in the definition of 'public authority' in Recommendation (2)(a), above.

Nature of the obligation

a) Process and outcome obligations: Recommendation 1(a)-(b)

The question of whether the obligation imposed on public authorities should be, both, outcome and process based, or only outcome based was examined. In recent decisions of the House of Lords, it has been clarified that the obligations imposed by the *Human Rights Act 1998* are outcome-based.³²⁴ This means that provided the outcome of a public authority's decision complies with the European Convention on Human Rights, it is not necessary for the public authority to have given due regard to the Convention in the process of making a decision. What matters, is that the practical *outcome* of the decision be compliant with the European Convention on Human Rights.

³²⁴ *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19; [2007] 1 WLR 1420; *R (Begum) v Denbigh High School Governors* [2006] UKHL 15, [2007] 1 AC 100.

Human rights obligations can have implications for *process*. Duties to eliminate discrimination are frequently process-based, as found for example, in Section 75 of the *Northern Ireland Act 1998*; Section 49A of the *Disability Discrimination Act 1995* (as amended); Section 71(1) *Race Relations (Northern Ireland) Order 1997*; and Section 76A(1) of the *Sex Discrimination (Northern Ireland) Order 1976* (as amended 1988). Section 38 of the Victorian *Charter of Human Rights and Responsibilities Act 2006* imposes a process duty (to "give proper consideration"), not only in respect of non-discrimination duties, but in respect of any relevant right contained in the Charter. In addition, although as noted above, the House of Lords has now determined that Convention obligations are to be outcome-based only. Prior to this, Northern Ireland courts had imposed process-based Convention obligations, thereby suggesting that Northern Ireland courts consider themselves well-placed to review such obligations.³²⁵

The advantage with process obligations is that they can provide an effective means of mainstreaming rights and of creating a 'culture of rights'. Disadvantages include either the imposition of onerous duties on public authorities to prove, not only that they acted compatibly with the right, but also that they gave due regard to the right; or indeed the converse, that the public authority might be able to provide a 'formulaic incantation' to indicate compliance, thereby rendering the duty meaningless.³²⁶

On balance, given the importance of promoting a culture of rights in Northern Ireland, it was agreed that the obligation imposed by a Bill of Rights should be *both* outcome and process based. In addition, the formulation of the obligation proposed in Recommendation 1(b) avoids the disadvantages of a process-based obligation set out above. The obligation is not excessively onerous, since it extends to 'a relevant right', rather than to the entirety of the rights in a Bill of Rights. Conversely, the public authority cannot satisfy this obligation by reference to a 'formulaic incantation' and what is a 'relevant right' will most likely vary depending on the particular decision.

b) Positive obligations: Recommendation 1(c)

It is widely-accepted, in the jurisprudence of the European Court of Human Rights interpreting Convention Rights, that obligations imposed by the European Convention on Human Rights often include 'positive obligations'. Broadly speaking, negative obligations require Contracting States 'to refrain from action', while positive obligations require

³²⁵ See, for example: *AR v Homefirst Community Trust* [2005] NICA 8; *Miss Behavin' Ltd v Belfast City Council* [2005] NICA 35.

³²⁶ This was the concern expressed by Lord Hoffmann in *R (Begum) v Denbigh High School Governors* [2006] UKHL 15, [2007] 1 AC 100, [13].

Contracting States 'to take action'.³²⁷ Examples of positive obligations include the obligation to investigate a killing,³²⁸ to protect vulnerable persons from serious ill-treatment inflicted by others,³²⁹ to provide free legal assistance for impecunious criminal defendants,³³⁰ and to deploy reasonable police resources to protect media organisations from unlawful violence directed at curbing the legitimate exercise of free expression.³³¹ In Section 6(1)(b) of its Outline of a UK Bill of Rights and Freedoms, in its recent report, *A Bill of Rights for the UK*, the Joint Committee on Human Rights proposed that the positive obligations inherent in human rights be given 'better effect'.³³² It was considered by the Commission that the formulation adopted by the Joint Committee on Human Rights would be suitable for inclusion in a Bill of Rights for Northern Ireland.

c) Public authority defence: Recommendation 6

Recommendation 6 provides a defence to public authorities if they are unable to act compatibly with a Bill of Rights due to conflicting Westminster legislation (for which they are not responsible) and replicates Section 6(2) of the *Human Rights Act 1998*. In these circumstances, the litigant should seek to have Westminster legislation interpreted to be compatible with a Bill of Rights if possible, and if this is not possible, a declaration of incompatibility may be issued. These options are discussed further below in the section on devolution.

Standing

Provisions should be drafted to ensure that –

1. Any person or body who has a sufficient interest in the matter may bring legal proceedings claiming that a public authority has acted incompatibly with a Bill of Rights for Northern Ireland.
2. The question of whether a person or body has a 'sufficient interest' will be determined having regard to the need to ensure access to justice.

³²⁷ *Gül v Switzerland* (App No 23218/94) (1996) 22 EHRR 93, ECtHR, Dissenting Opinion of Judge Martens, para 7.

³²⁸ See, for example, *Kelly v UK* (App. No. 30054/96) (4 May 2001, unreported).

³²⁹ See, for example, *Z and Others v UK* (2002) 34 EHRR 97, ECtHR.

³³⁰ See, for example, *Artico v Italy* (1977) 8 DR 73, ECommHR.

³³¹ See, for example, *Özgür Gündem v Turkey* (App No 23144/93) (2001) 31 EHRR 1082, ECtHR.

³³² Joint Committee on Human Rights, *A Bill of Rights for the UK?*, Twenty-ninth Report of Session 2007-08, HL Paper 165-1, HC 150-1, 10 August 2008, p 115.

Standing refers to a person's ability to make a claim under a bill of rights or other legislation. There are potentially two main interpretations of standing. The first interpretation is narrow and would accept that only individuals and, sometimes, businesses and other legal bodies (victims), whose rights have been directly violated (and where applicable in the case of individuals their guardians or those who act under a power of attorney for them) can take human rights cases. The second is broader and would recognise the right of interest groups to take human rights cases on behalf of others. The latter category may, in turn, be interpreted in a narrow or broad manner – it could be restricted so as to only acknowledge the right of the Commission, for example, to pursue public interest cases, or it could also allow a wider range of organisations to pursue such cases. The Human Rights Act adopts a narrow victim-based definition, although the Commission (and the Equality and Human Rights Commission in Great Britain) can rely on the Human Rights Act and take proceedings in its own name without being a 'victim'.³³³

It has been agreed that the victim-based definition (as contained in the Human Rights Act) is too narrow for the purposes of a Bill of Rights for Northern Ireland. The test of 'sufficient interest' – which applies already to judicial review and is thus well understood by the courts – is appropriate as a relevant test. It is also in accordance with that proposed by the Joint Committee on Human Rights in Section 8 of its Outline of a UK Bill of Rights and Freedoms,³³⁴ in its recent report.

Interpretation

Provisions should be drafted to ensure that –

1. Any court, tribunal or other person or body interpreting a Bill of Rights for Northern Ireland:
 - a) must strive to achieve the purpose of a Bill of Rights for Northern Ireland and to give practical effect to the fundamental values underpinning it, as set out in the Preamble to such a Bill;
 - b) must pay due regard to any:
 - i) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
 - ii) opinion of the Commission given in a report adopted under Article 31 of the European Convention on Human Rights,

³³³ See Section 71(2B) of the *Northern Ireland Act 1998*, as inserted by the *Justice and Security (Northern Ireland) Act 2007*.

³³⁴ Joint Committee on Human Rights, *A Bill of Rights for the UK?*, Twenty-ninth Report of Session 2007-08, HL Paper 165-1, HC 150-1, 10 August 2008, p 107.

- iii) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
 - iv) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given;
 - c) must pay due regard to other international human rights law; and
 - d) may consider the relevant judgments of foreign and international courts and tribunals.
2. So far as it is possible to do so, legislation and common law must be read and given effect in a way which is compatible with the rights in a Bill of Rights for Northern Ireland.

Interpretation in line with Preamble, the European Convention on Human Rights, international and comparative law: Recommendation

While recognising that the court itself must be the ultimate arbiter of the meaning of any clause in a Bill of Rights for Northern Ireland, it was concluded that it would be helpful if a Bill of Rights contained a clause, which would guide or direct the courts towards certain principles, which they should apply when considering the meaning of any provision in a Bill of Rights.

This guidance would be particularly important insofar as it relates to the Preamble. Preambles are no longer a common feature of Westminster legislation and, for example, the *Human Rights Act 1998* does not contain a preamble. Consequently, it would be important to clarify for the courts that the Preamble of a Bill of Rights for Northern Ireland could be used as a source of interpretive values. This is compatible with current practice, and it has been accepted that a Preamble in Westminster legislation, “[w]hen present, ... is thus a useful guide to the legislative intention”.³³⁵ In addition, in the context of bills of rights, it has been held by the European Court of Human Rights that the European Convention on Human Rights “must be interpreted in the light of the Preamble to the Convention”.³³⁶ This proposal is also in accordance with Section 2(a) of the Outline of a UK Bill of Rights and Freedoms of the recent report, *A Bill of Rights for the UK?*, by the Joint Committee on Human Rights.

Recommendation 1(b) reiterates and strengthens the obligation found in Section 2 of the *Human Rights Act 1998* and should be included in order to indicate to courts that they have a duty to pay due regard to the case

³³⁵ FAR Bennion *Statutory Interpretation* (Butterworths, 4th edn, 2002), Section 246.

³³⁶ See, for example: *Macovei v Moldova* (App. No. 19253/03) (2007) 45 EHRR 48, para 41.

law of the European Court of Human Rights when interpreting the re-enacted Convention Rights in a Bill of Rights for Northern Ireland.

The question of whether courts should be guided towards international human rights law and law from other countries was also considered. Given that in defining the scope of rights for inclusion in a Bill of Rights, the Commission is required to draw "as appropriate on international instruments and experience", and given that many of the formulations of proposed rights contained in this Advice are, in fact, derived from international instruments, it was agreed that there should be a directive clause requiring the courts to 'pay due regard' to international human rights law when interpreting a Bill of Rights for Northern Ireland. This is modelled on Section 2(b) of the Outline of a UK Bill of Rights and Freedoms in the Joint Committee on Human Rights' report, but is narrower in its scope: rather than requiring courts to pay due regard to international law, in general, as the Joint Committee suggested, this clause is specifically focused on international human rights standards. With regard to the human rights jurisprudence of foreign and international courts and tribunals, it was agreed that a permissive clause would be more appropriate. Such a clause would enable, but not require courts to consider foreign and international jurisprudence. This balance follows that proposed in Section 2(b)-(c) of the Outline of a UK Bill of Rights and Freedoms in the Joint Committee's report.

General interpretive duty: Recommendation 2

Many bills of rights contain clauses to assist the courts in interpreting their provisions. For example, Section 3 of the *Human Rights Act 1998* provides guidance to the courts on reading and giving effect to legislation in a way which is compatible with the rights in the European Convention on Human Rights. The inclusion of the common law in Recommendation 2 reflects and confirms the obligation imposed on the courts by Recommendation 2 of the Application provisions, above. In addition, this provision follows the recommendation in Section 3 of the Outline of a UK Bill of Rights and Freedoms in the Joint Committee on Human Rights' report.

Devolved and non-devolved issues

Provisions should be drafted to ensure that –

1. Within the territory of Northern Ireland, the Supplementary Rights in a Bill of Rights for Northern Ireland shall be enforceable in the same way as Convention Rights.

Public authorities

2. Northern Ireland public authorities must be bound by the Recommendations set out above concerning the Application of a Bill of Rights for Northern Ireland.
3. Central government public authorities, insofar as they perform their functions either in Northern Ireland or in relation to Northern Ireland, must be bound by the Recommendations set out above concerning the Application of a Bill of Rights for Northern Ireland.

Proposing or enacting legislation

4. When a Bill is presented to the Northern Ireland Assembly, the Minister responsible for the Bill shall make a statement of compatibility with a Bill of Rights for Northern Ireland to the Assembly.
5. When a Bill applying to Northern Ireland is presented to either House of Parliament, the Minister responsible for the Bill shall make a statement of compatibility with a Bill of Rights for Northern Ireland to the House. A statement of compatibility must state:
 - a) whether, in the Minister's opinion, the Bill is compatible with a Bill of Rights for Northern Ireland and, if so, how it is compatible; and
 - b) if, in the Minister's opinion, any part of the Bill is incompatible with a Bill of Rights for Northern Ireland, the nature and extent of the incompatibility. Where the Bill is incompatible with a Bill of Rights for Northern Ireland, the Minister must make a statement to the effect that, notwithstanding the lack of compatibility with a Bill of Rights for Northern Ireland, the Government wishes the House to proceed with the Bill.

Interpreting legislation

6. All legislation – Westminster legislation, Westminster subordinate legislation, Assembly legislation and Northern Ireland subordinate legislation – must be interpreted and given effect, so far as it is

possible to do so, to be compatible with a Bill of Rights for Northern Ireland.

Incompatible legislation

7. Where it is incompatible with a Bill of Rights for Northern Ireland, Assembly legislation and Northern Ireland subordinate legislation must be declared invalid.
8. Where Westminster subordinate legislation is incompatible with a Bill of Rights for Northern Ireland, it must be disapplied insofar as it relates to Northern Ireland.
9. Where Westminster primary legislation is incompatible with a Bill of Rights for Northern Ireland, a declaration of incompatibility must be issued insofar as that legislation applies in Northern Ireland. Where a declaration of incompatibility is issued, a Minister may, by order, make such amendments to the legislation as they consider necessary to remove the incompatibility.

Introduction: Recommendation 1

a) Relevance of Westminster enactment of a Bill of Rights for Northern Ireland

Normally, sub-national Bills of Rights can only bind sub-national authorities and apply to sub-national legislation, as is the practice, for example, in Australia, Canada and the United States. This is because, usually, sub-national Bills of Rights are enacted by sub-national legislatures, which are not competent to bind national legislatures or authorities. This would be the case if a Bill of Rights were to be enacted by the Northern Ireland Assembly.

However, the Belfast (Good Friday) Agreement stipulates that supplementary rights will be defined "in Westminster legislation".³³⁷ It can be argued that this was intended as a mechanism of entrenching a Bill of Rights and, therefore, should not have any implications for its application. It can also be argued, though, that this feature distinguishes a Bill of Rights for Northern Ireland from the Australian, Canadian and United States models. Unlike state, territorial or provincial human rights legislation in these jurisdictions, a Bill of Rights for Northern Ireland will be enacted by Westminster, the central legislature. As a matter of constitutional principle, Westminster has the

³³⁷ Belfast (Good Friday) Agreement, Rights, Safeguards and Equality of Opportunity, Article 5.

legal power to give a Bill of Rights for Northern Ireland broader legal effect than would usually be the case for a sub-national bill of rights.

b) Devolution: Categories of competence

The *Northern Ireland Act 1998* identifies three categories of competence:

- Transferred matters are those matters in respect of which the Northern Ireland Assembly exercises legislative competence. They are not listed in the *Northern Ireland Act 1998*.
- Reserved matters and excepted matters, ancillary to reserved or transferred matters, are those matters in respect of which Westminster can legislate or the Northern Ireland Assembly may legislate with the consent of the Secretary of State (see: section 8, *Northern Ireland Act 1998*). These matters are listed in Schedule 3 of the *Northern Ireland Act 1998*. Examples include criminal law and the maintenance of public order.
- Excepted matters are those matters in respect of which only Westminster can legislate. These matters are listed in Schedule 2 of the *Northern Ireland Act 1998*. Examples include the armed forces and electoral law.

Responsibility for issues relating to human rights that could be affected by a Bill of Rights for Northern Ireland lies both with UK central Government and Parliament, and with the Executive and Assembly in Northern Ireland. A Bill of Rights could, therefore, apply to issues that may be entirely within Westminster's remit, some that may be entirely within the Northern Ireland Assembly's remit, and some that may be a combination of both.

c) Devolution and supplementary rights recommendations

Recommendations made by the Commission will have potential implications for reserved and excepted matters:

- There are proposals on youth justice and criminal proceedings, which have implications for criminal law (see the Right to Liberty and Security and the Right to a Fair Trial and No Punishment without Law) a reserved matter pursuant to the *Northern Ireland Act 1998*, Schedule 3, paragraph 9; and
- There are proposals regarding democratic rights, which will have implications for electoral law, an excepted matter pursuant to Northern Ireland Act, Schedule 2, paragraphs 12-13;

Any rights that have implications for excepted or reserved matters will be recommended by the Commission because they are considered to be

rights which reflect the particular circumstances of Northern Ireland and are in need of protection in this jurisdiction. However, in many cases, Northern Ireland institutions will not necessarily have the capacity to deliver on these rights, given that the competence for the relevant activity lies with Westminster or the UK government. Thus, if a Bill of Rights for Northern Ireland is not capable of reaching the Westminster/UK government institutions which enjoy the relevant competence to act, a Bill of Rights could be rendered ineffective in practice.

Obviously, particularly in federal systems, it is not uncommon for federal or central legislation to override state or provincial bills of rights. The particular concern that might be raised in the context of a Bill of Rights for Northern Ireland, however, is that if a number of the Supplementary Rights proposed can only be given legal effect by Westminster because they affect reserved/excepted competences, the whole enterprise of proposing Supplementary Rights to reflect the particular circumstances of Northern Ireland is undermined.

Consequently, the Commission has agreed the general principle found in Recommendation 1, that Supplementary Rights should be enforceable in Northern Ireland in the same way as Convention Rights.

Public authorities: Recommendations 2-3

a) Northern Ireland public authorities

The Commission has agreed that the Northern Ireland Assembly, the Northern Ireland Executive and all other Northern Ireland public authorities must be bound by a Bill of Rights. This is in keeping with the Belfast (Good Friday) Agreement, which states that neither the Assembly nor public bodies can infringe any Bill of Rights for Northern Ireland.³³⁸

For the avoidance of doubt, the obligation to comply with a Bill of Rights will apply when Northern Ireland authorities are performing functions or implementing policy in the area of transferred, reserved and excepted matters. Given that, as just noted, the Belfast (Good Friday) Agreement clearly states that public bodies must not infringe a Bill of Rights,³³⁹ Northern Ireland public authorities must be under a duty to act compatibly with a Bill of Rights in *all* their activities, including when acting pursuant to Westminster primary or secondary legislation.

³³⁸ Belfast (Good Friday) Agreement, Strand One, Article 5.

³³⁹ Belfast (Good Friday) Agreement, Strand One, Article 5(b).

This duty will not be unduly onerous (in the sense of attributing responsibility where the relevant public authority did not have competence to devise the policy), given that, as has already been proposed by the Commission in Recommendation 6 of its Application section,³⁴⁰ public authorities may avail themselves of a defence that they were acting pursuant to legislation and could not have acted otherwise.

b) Central government public authorities

At present, designated UK-wide public authorities, such as the Electoral Commission,³⁴¹ operating in, and in relation to Northern Ireland in the areas of reserved and excepted matters, comply with the Section 75 duty contained in the Northern Ireland Act 1998.³⁴² By extension of that principle, the Commission recommends that central government public authorities are also bound by a Bill of Rights, insofar as they perform their functions either in Northern Ireland or in relation to Northern Ireland.

Proposing or enacting legislation: Recommendations 4-5

a) Assembly legislation

Even though Northern Ireland Assembly legislation can be declared invalid if contrary to any Bill of Rights, the Commission considers desirable, in the interests of promoting 'dialogue' between the Assembly and the courts, that the Assembly issue statements of compatibility of its legislation with a Bill of Rights (in the style of Section 19 of the *Human Rights Act 1998*). Provision is already partially made by Sections 9 and 10 of the Northern Ireland Act 1998, requiring a ministerial statement and Presiding Officer scrutiny of legislative competence (which would implicitly include statements/scrutiny of Bill of Rights compliance given that the Assembly does not have competence to legislate in conflict with Bill of Rights).

b) Westminster legislation

In order for the Supplementary Rights in a Bill of Rights for Northern Ireland to be considered to be of equal status to Convention Rights, provision should be made for a Minister of the Crown, in charge of a Bill in either House of Parliament, to either make a statement of compatibility with a Bill of Rights for Northern Ireland, or indicate that such a statement cannot be made and that the legislative Bill will

³⁴⁰ Subsection (2) of the Proposed Provision on p 27.

³⁴¹ Article 2, *Northern Ireland Act 1998 (Designation of Public Authorities) Order 2004*

³⁴² See also; *Northern Ireland Act 1998 (Designation of Public Authorities) Order 2001*; and *Northern Ireland Act 1998 (Designation of Public Authorities) Order 2003*.

nonetheless proceed (in line with Section 19 of the *Human Rights Act 1998*).

c) Requirements of statements of compatibility

The requirements for the statement of compatibility are derived from Section 28(3) of the Victorian *Charter of Human Rights and Responsibilities Act 2006*. The need to ensure sufficient detail in statements of compatibility also reflects concerns which have been expressed by the Joint Committee on Human Rights in relation to current practice under the *Human Rights Act 1998*.³⁴³ As is clear from the remainder of the proposals, the statement of compatibility, similarly to that provided for in Section 19 of the *Human Rights Act 1998* is not binding on any court or tribunal.

Interpretive obligation: Recommendation 6

In accordance with the obligation contained in Section 3 of the *Human Rights Act 1998*, the Commission recommends that courts have the power to interpret all legislation – Westminster legislation, Westminster subordinate legislation, Assembly legislation and Northern Ireland subordinate legislation – so far as it is possible to do so to be compatible with the rights in a Bill of Rights.

Incompatible legislation: Recommendations 7-9

a) Incompatible Assembly legislation and Northern Ireland subordinate legislation

The Assembly's legislative authority is "subject to ... any Bill of Rights for Northern Ireland".³⁴⁴ This also gives the Supplementary Rights the same status as is currently accorded to Convention Rights pursuant to the *Human Rights Act 1998*.³⁴⁵ Consequently, courts must have the power to invalidate Northern Assembly legislation and Northern Ireland subordinate legislation which is incompatible with a Bill of Rights. This should be the case where the Assembly is enacting legislation in the context of transferred matters or reserved matters with the consent of the Secretary of State.

³⁴³ Joint Committee on Human Rights, Joint Committee on Human Rights, *The Work of the Committee in 2007 and the State of Human Rights in the UK*, Sixth Report, Session 2007-08, HL 38/HC 270, 1 February 2008, paras 24-30.

³⁴⁴ Belfast (Good Friday) Agreement, Strand One, Article 26(a).

³⁴⁵ See Section 6(2)(c), *Northern Ireland Act 1998*.

b) Incompatible Westminster subordinate legislation

Currently, Westminster subordinate legislation can be declared invalid for incompatibility with Convention Rights. In a Bill of Rights for Northern Ireland, in order for Supplementary Rights to be considered to be of equal status to Convention Rights, Westminster subordinate legislation, which is incompatible with a Bill of Rights, should not be capable of legal effect in Northern Ireland.

A remedy of invalidation of Westminster subordinate legislation for incompatibility with a Bill of Rights for Northern Ireland would potentially create conceptual difficulties: the declaration would suggest that the legislation was devoid of any legal effect when, in fact, the legislation would continue to apply elsewhere in the UK. Consequently, the Commission considered the possibility of a remedy of 'disapplication' of Westminster subordinate legislation. The remedy of 'disapplying' legislation is currently used by courts across the UK where Westminster primary legislation is incompatible with EC law.³⁴⁶ A remedy of disapplication will achieve the result of ensuring that the incompatible subordinate legislation does not have legal effect in Northern Ireland.

c) Incompatible Westminster primary legislation

Based on the principle of equal protection for Supplementary Rights and Convention Rights, courts should have the power to issue declarations that Westminster legislation is incompatible with a Bill of Rights for Northern Ireland, a power currently provided in Section 4 of the *Human Rights Act 1998*. Such declarations of incompatibility would initiate dialogue about compatibility of Westminster primary legislation with a Bill of Rights for Northern Ireland and would not affect its continued applicability or validity. When a declaration of incompatibility is issued, the recommendation for an expedited remedial procedure is derived from Section 10 of the Human Rights Act.

Justiciability

Provisions should be drafted to ensure that –

1. All rights, a Bill of Rights for Northern Ireland, both Convention Rights and Supplementary Rights, are justiciable.
2. Rights subject to progressive realisation will have a minimum core obligation which is not subject to progressive realisation.

³⁴⁶ See *R v Secretary of State for Transport, ex parte Factortame Ltd* (No 2). [1991] 1 AC 603 (HL).

3. Where rights are subject to progressive realisation, the Northern Ireland Executive shall report annually to the Northern Ireland Assembly, and the UK Government shall report annually to Parliament, on the progress made during the previous year in realising these rights in Northern Ireland.

Justiciability: Recommendation 1

The justiciability of a right refers to the extent to which it is suitable for enforcement by courts. The Commission has taken the position that all rights in a Bill of Rights for Northern Ireland are capable of judicial enforcement.

a) Immediately realisable rights

Certain recommendations made by the Commission confer immediately enforceable rights on individuals (and corresponding, immediate duties on public authorities). Examples of such immediately enforceable rights include:

“Everyone who is arrested or detained has the right to consult promptly and privately with a legal representative and of prompt access where appropriate to a medical practitioner.”

b) Programmatic obligations

Other recommendations for a Bill of Rights for Northern Ireland impose programmatic obligations on public authorities. Examples include:

“Public authorities must take all appropriate measures to reintegrate into society those in detention or alternative care by providing support, prior to and after discharge, towards independent living.”

Where an obligation requires “all appropriate measures” to be taken, the fulfilment of this duty is immediately enforceable and justiciable by a court. The articulation of the duty as one to take “all appropriate measures” is intended to signal that, although these provisions grant some flexibility to public authorities, nonetheless, there is a clear duty to take targeted steps towards achieving the outcome identified.

Rights subject to progressive realisation: Recommendation 2

Certain recommendations made by the Commission’s for possible inclusion in a Bill of Rights for Northern Ireland are subject to progressive realisation. It is widely accepted in international law and in other

jurisdictions,³⁴⁷ that economic and social rights cannot always impose immediate obligations on states and that economic and social rights frequently impose an obligation of 'progressive realisation' rather than one of immediate effect. Rights such as those to health, education and work, may require extra commitments on the part of the state in terms of resources. For that reason, states are allowed some flexibility in ensuring the realisation of socio-economic rights.

While progressive realisation does not require that the result sought by the particular right be achieved immediately, it does, however, require that 'all appropriate measures' be taken towards achieving the full effectiveness of the right. This obligation 'to take all appropriate measures', in itself, is not qualified. Thus, while the full realisation of any rights subject to progressive realisation may be achieved progressively, steps must be taken with a view to achieving that objective as soon as a Bill of Rights for Northern Ireland enters into force. Such steps must be "deliberate, concrete and targeted" as clearly as possible towards meeting the obligations recognised in a Bill of Rights.³⁴⁸ A duty to 'progressively realise' a right also imposes an obligation to move as expeditiously and effectively as possible towards that goal; and any deliberately retrogressive measures would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in a Bill of Rights, and in the context of the full use of the maximum available resources.³⁴⁹

It is important to remember that each right which is subject to progressive realisation will contain what has been described as a 'minimum core obligation' which is immediately realisable.³⁵⁰ Where possible, the 'minimum core obligation' of each economic, cultural and social right recommended for inclusion in a Bill of Rights for Northern Ireland has been identified. The minimum core obligation will not be subject to progressive realisation.

Reporting duty: Recommendation 3

Finally, the reporting duty mentioned in this provision entails a domestic reformulation of the reporting obligations imposed on States in Part IV of the International Covenant on Economic, Social and Cultural Rights.

³⁴⁷ See, for example: Article 2(1) of the International Covenant on Economic, Social and Cultural Rights; Article 4 of the Convention on the Rights of the Child; Sections 26 and 27, South African Constitution.

³⁴⁸ See CESCR *General Comment No 3 (1990) on the Nature of States Parties Obligations (Article 2(1) of the Covenant)*, para 2.

³⁴⁹ As above, para 9.

³⁵⁰ As above, para 10.

Enforcement mechanisms

Legal institutions

Provisions should be drafted to ensure that –

1. A Bill of Rights for Northern Ireland should be enforced through the existing judicial system.
2. Judicial appointments must be such as to ensure an independent and diverse judiciary, which is, as far as practicable, broadly representative of society in Northern Ireland.
3. The statutory powers of the Northern Ireland Human Rights Commission should include monitoring and auditing of compliance with a Bill of Rights for Northern Ireland.
4. A committee of the Northern Ireland Assembly shall be invited to perform a similar role in the context of Northern Ireland to that performed at Westminster level by the Joint Committee on Human Rights on a UK-wide level. Included in the functions of this Assembly Committee shall be: pre-legislative scrutiny of legislation for compliance with a Bill of Rights for Northern Ireland; conducting consultations; publishing reports; and drawing up departmental guidance to government for compliance with a Bill of Rights for Northern Ireland in respect of statements of compatibility.
5. There should be a periodic review, before independent reviewers, of the implementation of a Bill of Rights for Northern Ireland, which should take place on average every five years. The report of the review must be laid before the Assembly and each House of Parliament.

The Commission has discussed the legal institutions and other (political/non-judicial) institutions that would be required to give effect to a Bill of Rights for Northern Ireland.

Mainstreaming through existing courts: Recommendation 1

Following extensive examination of all the relevant evidence, including the strong arguments in favour of a new judicial body, the Commission decided that the best method of enforcing a Bill of Rights would be by mainstreaming through existing courts. The possibility of establishing a Human Rights Court for Northern Ireland was examined and the need for reform of existing arrangements accepted. Various proposals were considered regarding the potential role of such a court in the current judicial system; whether it would be a court of first instance; or a

specialist court at the level of the Court of Appeal. Consideration was also given to the question of whether a Constitutional Court, with competence going beyond human rights should be established.

The advantage with a Human Rights Court would be the establishment of a final and clear authority on all Bill of Rights issues. The court would have a psychological impact whereby judges sitting on a new court, and indeed in lower courts, could not help but take those rights seriously and develop clear rights-based jurisprudence. It would also usefully help deal with the issue of appointments to the judiciary – a new court could have new appointment mechanisms. A new court with representative judges would have important symbolism in heralding a new era for human rights in Northern Ireland. Although it would require some thought, the relationship between the Human Rights Court, the Northern Ireland Court of Appeal, the Supreme Court and the Privy Council, could be worked out.

On the other hand, from the perspective of human rights enforcement, the advantage of enforcing rights through the existing courts is that the risk of burdensome litigation procedures is avoided, as would be the case if Bill of Rights claims had to be separated from other claims, particularly judicial review claims, and diverted to a different court.

On balance, the Commission has decided that the approach of mainstreaming human rights through existing judicial enforcement mechanisms, when combined with the Commission's judicial appointment Recommendation, would contribute to embedding a human rights culture in Northern Ireland. The Commission regards the embedding of this culture as absolutely essential to the success of a Bill of Rights. The Commission, however, recognises that the legal culture into which this bill is received will be vital in ensuring its enforcement. The Commission would emphasise that its Recommendation regarding the existing judiciary (Recommendation 1) is entirely dependent upon, and interlinked with, its Recommendation regarding judicial appointments (Recommendation 2).

Judicial appointments: Recommendation 2

The Commission emphasises that there must be a truly independent and diverse judiciary in order to ensure the success of a Bill of Rights for Northern Ireland. This is an issue which has received significant attention recently. In its recent report, *A Bill of Rights for the UK?*,³⁵¹ the Joint Committee on Human Rights cited an extract from a lecture

³⁵¹ Joint Committee on Human Rights, *A Bill of Rights for the UK?*, Twenty-ninth Report of Session 2007-08, HL Paper 165-1, HC 150-1, 10 August 2008, p 66, para 245.

given by Baroness Hale in 2003, *Equality in the Judiciary: A Tale of Two Continents*, which is of relevance. Baroness Hale noted that:

“Judicial appointments have traditionally been dominated by the assumption that those best fitted for appointment – and thus fitted for the best appointments – are those who have done best in independent practice as barristers. This has excluded large numbers of very able lawyers from consideration and limits selection to a comparatively small and homogenous group. ... That homogenous group is very largely male, almost all white ... and from a comparatively narrow range of social and educational backgrounds.”

The Commission considers it to be essential to the success of a Bill of Rights that the judiciary be drawn not just from those who are successful in practice at the independent bar, but also from tribunal chairs, solicitors and academia. Appointment procedures must also ensure full participation of women and minorities in judicial life.

Other institutions: Recommendations 3 and 4

a) Northern Ireland Human Rights Commission

The Belfast (Good Friday) Agreement requires “arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the European Convention on Human Rights and any Bill of Rights for Northern Ireland”.³⁵² Under the *Northern Ireland Act 1998*, the Northern Ireland Human Rights Commission has a statutory duty to keep under review the adequacy and effectiveness of law and practice relating to the protection of human rights, and to advise the Assembly whether a Bill is compatible with human rights. It also has a statutory power to conduct investigations and institute, or intervene in human rights proceedings.³⁵³ As the human rights institution constituted under the terms of the Belfast (Good Friday) Agreement, the Commission must monitor and audit compliance with a Bill of Rights.

b) Assembly Committee on Human Rights

The Commission is firmly of the view that all branches of Government have a role in the protection and promotion of human rights. The Northern Ireland Assembly has a leading role to play in building a culture of rights.

³⁵² Belfast (Good Friday) Agreement, Strand One, p 5, para 5 (c).

³⁵³ Section 69 of the *Northern Ireland Act 1998*, as amended by sections 14 and 15 of the *Justice and Security (NI) Act 2007*.

Currently, the Scottish Parliament has a Standing Equal Opportunities Committee and the Welsh Assembly has a Standing Equality Committee. Noting the good practice of other UK devolved institutions and the work of the Joint Committee on Human Rights in Westminster, the Commission agreed that the Assembly should be invited to have its own Standing Committee on Human Rights and Equality.

The Commission restates the recommendations made in 2001, that such a Committee should have a mandate to examine and report on all human rights and equality issues coming within the competence of the Northern Ireland Assembly, including the compatibility of Bills within relevant human rights standards. The Committee should also be empowered to conduct inquiries into human rights issues.³⁵⁴ The proposal that the Committee devise guidance for government departments in drafting statements of compatibility mirrors the decision taken by the Joint Committee on Human Rights to draw up a guidance for departments, setting out what the Committee expects from Departments in the explanatory material dealing with the human rights issues raised by a bill.³⁵⁵

Periodic review: Recommendation 5

The recommendation in relation to periodic review is derived from Section 44 of the Victorian Charter of Human Rights and Responsibilities, which requires the Attorney General to cause a review to be made of the first four years of operation of the Charter and to lay a copy of the report of the review before each House of Parliament. It was also recommended by the Joint Committee on Human Rights, in *A Bill of the Rights for the UK?*³⁵⁶ The Commission is of the view that this would provide an effective means of ensuring proper implementation of a Bill of Rights for Northern Ireland over time.

³⁵⁴ Northern Ireland Human Rights Commission (2001) *The Northern Ireland Assembly's Standing Orders and Human Rights Protection*, NIHRC, Belfast.

³⁵⁵ House of Lords House of Commons Joint Committee on Human Rights (2008) *The Work of the Committee in 2007 and the State of Human Rights in the UK*, Sixth Report, Session 2007-08, HL 38/HC 270, TSO, London, para 29.

³⁵⁶ Joint Committee on Human Rights, *A Bill of Rights for the UK?*, Twenty-ninth Report of Session 2007-08, HL Paper 165-1, HC 150-1, 10 August 2008, p 63.

Remedies

Provisions should be drafted to ensure that –

1. Courts must grant to everyone whose rights and freedoms under a Bill of Rights for Northern Ireland have been, or may be, violated an effective remedy and for this purpose may grant such relief or remedy, including compensation, or make such order, as they consider just and appropriate.
2. The legal aid system should be such as to ensure access to justice through a Bill of Rights for Northern Ireland.

Recommendation 1

Beyond listing any 'special' remedies, such as invalidation, disapplication or a declaration of incompatibility and a general statement regarding 'effective' remedies, bills of rights often do not contain lists of particular remedies. Such lists are found more commonly in administrative procedure acts or civil procedure rules. It was therefore agreed that a general remedies clause would be preferable to a specific list. The Commission does, however, draw attention here to the remedies proposed in the specific context of devolved and non-devolved matters in its discussion of devolution, set out above. Recommendation 1 draws upon Section 8 of the *Human Rights Act 1998*, but seeks to strengthen a litigant's access to compensation for violation of a right in a Bill of Rights for Northern Ireland from that found in Section 8 of the Act.

Recommendation 2

Recommendation 2 seeks to ensure that the legal aid system will reflect the importance of a Bill of Rights for Northern Ireland and claims brought pursuant to a Bill of Rights.

Outstanding legal issues

Harmonisation and non-diminution

Provisions should be drafted to ensure that –

1. Insofar as a Bill of Rights for Northern Ireland contains rights which correspond to rights guaranteed by the European Convention on Human Rights, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent a Bill of Rights for Northern Ireland providing more extensive protection than is provided by the Convention.
2. Nothing in a Bill of Rights for Northern Ireland denies the existence or restricts the scope of any other rights or freedoms recognised or conferred by common law, statute, EU law, or international law and international agreements to which the UK is a party, to the extent that they are consistent with the rights in a Bill of Rights for Northern Ireland.

Legal persons

A provision should be drafted to ensure that –

3. A legal person is entitled to the rights in a Bill of Rights for Northern Ireland to the extent required by the nature of the rights and the nature of that legal person.

Harmonisation and non-diminution

A Bill of Rights for Northern Ireland should be interpreted in a way that ensures harmony, to the extent possible, between the Convention Rights and the Supplementary Rights. As indicated by Recommendation 1, the Supplementary Rights shall not preclude more extensive protection being granted than is currently given by the European Convention on Human Rights. Recommendation 1 is drawn from Article 52(3) of the European Union Charter of Fundamental Rights and Section 11 of the UK Bill of Rights and Freedoms, proposed by the Joint Committee on Human Rights, in *A Bill of Rights for the UK?*³⁵⁷

The Commission is also of the view that a non-retrogression clause should be included with the aim of ensuring that there would be no diminution of current human rights protection. Recommendation 2 is based on Section 12 of the Outline of a UK Bill of Rights and Freedoms,

³⁵⁷ As above, p 106.

proposed by the Joint Committee on Human Rights, in its report, *A Bill of Rights for the UK?*³⁵⁸

Legal persons

The Commission notes that pursuant to the European Convention on Human Rights, companies are sometimes entitled to assert rights. Given that the Commission does not wish to undermine current human rights protection therefore, it has decided to recommend a qualified reference to legal persons in a Bill of Rights for Northern Ireland. This reference is modelled on Section 8(4) of the South African Constitution. It grants authority to the courts to determine when it is appropriate to permit legal persons to rely on a Bill of Rights. This also mirrors the position currently adopted by the European Court of Human Rights which has held, for example, that while Article 5 of the European Convention on Human Rights, freedom from arbitrary detention cannot be relied upon by a legal person,³⁵⁹ a legal person can rely on Article 6(1) of the European Convention, the right to fair trial.³⁶⁰

³⁵⁸ As above, p 106.

³⁵⁹ *Boucharas and Groupe Information Asiles v France* (1991) 69 DR 236.

³⁶⁰ *Pressos Compania Naviera SA v Belgium* (1996) 21 EHRR 301.

CHAPTER 5: REALISING A BILL OF RIGHTS FOR NORTHERN IRELAND

In this chapter, the Commission recommends the steps that now need to be taken for a Bill of Rights for Northern Ireland to be effectively delivered. The constituent elements required for this must address public authorities and society as a whole.

In its report of March 2008, the Bill of Rights Forum concluded that:

“The Bill of Rights will be most effective for ordinary people if they are well aware of it, and understand what it is. Its development will also be stifled if those responsible for its implementation – namely legislators, public officers, civil servants, judges and lawyers – do not fully comprehend it and their obligations under it. Human rights education and training form a fundamental part of good practice in the implementation of human rights.

“Education and training must clarify what human rights are and how they can be used, and address misinformation about human rights. They require the examination of the relevant human rights instruments and the promotion of critical reflection and inquiry. They should be directed at both the community at large, and at those charged with the responsibility of safeguarding the Bill of Rights. If conducted properly, human rights education can contribute to the reduction of human rights violations and to fostering a sense of community ownership of the Bill of Rights.”³⁹⁴

The Commission endorses the view that a programme of action is necessary to ensure awareness of the provisions in a Bill of Rights and how those provisions can be used most effectively. Education and training should be made available for those with responsibilities for raising public awareness of a Bill of Rights, including the formal education sector, as well as assisting community and voluntary organisations who deliver training and offer information and support to the public. This work should draw upon the 1993 Vienna Declaration and Programme of Action, which defined appropriate educational activities as encompassing learning about human rights and mechanisms for their protection, as well as acquiring skills to apply them in daily life; developing values and reinforcing attitudes and behaviour

³⁹⁴ Sidoti C (2008) Bill of Rights Forum Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland, Bill of Rights Forum, Belfast, p 181 and 182.

which uphold human rights; and taking action to defend and promote human rights.³⁹⁵

A programme of activities should also be directed towards informing public authorities about their duties under this legislation. This programme must build knowledge and skills, as well as develop the mechanisms fundamental to ensuring that a Bill of Rights is enforced. To achieve this objective, the Commission believes that public authorities will require effective assessment and monitoring guidelines. The envisaged programme of activities should result in the empowerment of service providers so that they can have sense of ownership of a Bill of Rights for Northern Ireland and awareness of how to take actions in order to give its provisions effect.³⁹⁶

To assist education and training on a Bill of Rights, building on the precedent of preparation for the *Human Rights Act 1998*, the Commission recommends the establishment of a taskforce. This will enable public authorities to fully implement and act in compliance with their statutory duties. The taskforce should include a broad representation of key stakeholders. Proposals for the taskforce, detailing its remit, composition and reporting deadlines, should be included in a public consultation on the content of a Bill of Rights undertaken by the Northern Ireland Office.³⁹⁷ The taskforce must have sufficient resources to enable it to carry out its work effectively and it could report directly to the Secretary of State for Northern Ireland and the Northern Ireland Assembly.

Particular planning is required in relation to support for the judiciary, legal profession and legal system. There is a precedent in the provision of the planning period prior to the commencement of the Human Rights Act in 2000. The Judicial Studies Board and the Magistrates' Court Committees undertook an extensive programme of training in preparation for the Act, for all full-time and part-time members of the judiciary across the UK, including 3,500 judges and 30,000 lay magistrates. A similar programme should be delivered in Northern Ireland and the proposed Bill of Rights taskforce could oversee a programme of:

³⁹⁵ *Vienna Declaration and Programme of Action*, 1993, section D, paras 78-82.

³⁹⁶ *Vienna Declaration and Programme of Action*, 1993, section D, paras 78-82.

³⁹⁷ The composition of the Taskforce should, in the Commission's view, be drawn from a wide range of stakeholders which could include the Lord Chief Justice's office, Law Society, Bar Council, Judicial Studies Board, Council for Legal Education, Northern Ireland Human Rights Commission, Equality Commission for Northern Ireland, Northern Ireland Commissioner for Children and Young People, institutions dealing with justice, policing and detention, academic experts, civil society representatives, Northern Ireland Court Service, Northern Ireland office, Department of Education, Department for Employment and Learning, Education and Skills Authority (ESA), OFMdfM, MLAs and any new Ministry of Justice for Northern Ireland.

- supporting appropriate training for all members of the judiciary and the legal profession;
- supporting appropriate training on a Bill of Rights for students attending the Institute of Professional Legal Studies at Queen's University Belfast and the Graduate School of Professional Legal Education at the University of Ulster;
- establishing appropriate procedures for handling cases involving a Bill of Rights for Northern Ireland; and
- providing information for court users on the procedural requirements arising from a Bill of Rights, and putting in place systems for evaluating and monitoring cases involving the interpretation and application of a Bill of Rights.

The Commission has asked the Secretary of State for Northern Ireland to provide an assurance that the Government will respond fully to the advice contained in this report. The Secretary of State has given that assurance and has indicated that a public consultation will be undertaken. A document from the Northern Ireland Office outlining the Government's response to the Commission's advice should be issued as soon as possible. The process of public consultation should take place across Northern Ireland, be wide-ranging and extensive, with a particular focus on targeting marginalised and hard-to-reach communities.

On 10 April 1998, the participants in the multi-party negotiations reached an agreement that offered "a truly historic opportunity for a new beginning".³⁹⁸ That beginning included a commitment to reflect on a Bill of Rights for Northern Ireland. The participants promised a future of partnership, equality and mutual respect, and "the protection and vindication of the human rights for all".³⁹⁹ The St Andrews Agreement further recognised the centrality of ensuring the development of effective human rights protections.⁴⁰⁰ Today, in 2008, the Government and political parties should reaffirm their commitment to the people by realising a Bill of Rights for Northern Ireland.

³⁹⁸ Belfast (Good Friday) Agreement 1998, p 1.

³⁹⁹ As above.

⁴⁰⁰ St Andrews Agreement, Human Rights, Equality, Victims and Other Issues, Annex B.

APPENDIX 1

A BRIEFING ON THE METHODOLOGY USED IN PREPARING THE ADVICE OF THE COMMISSION TO GOVERNMENT ON A BILL OF RIGHTS

In the course of its work, the Commission has reviewed its mandate, under the Northern Ireland Act 1998, to advise the Secretary of State for Northern Ireland on the scope for defining rights, supplementary to the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, which, taken together with the Convention, would constitute a Bill of Rights for Northern Ireland.

The Commission has consulted widely on this process and fully considered the Final Report of the Bill of Rights Forum. In fulfilling its mandate, the Commission developed guidelines to inform its discussion on what rights should be included in its advice to the Secretary of State. These guidelines have been informed by the experience and work of the Commission since its inception, recent submissions,⁴⁰¹ the Final Report of the Bill of Rights Forum⁴⁰² and further discussions, including legal advice, around the process of discharging its statutory duty to advise the Secretary of State on a Bill of Rights for Northern Ireland. This paper describes these guidelines.

The guidelines for discussion of each proposed right

In the case of each proposed right, the Commission has applied the following guidelines in its discussion:⁴⁰³

The particular circumstances

1. Is the case made that the need for this proposed right arises out of the particular circumstances of Northern Ireland?⁴⁰⁴

The legal aspects

⁴⁰¹ NIHRC (2006) Response of the Northern Ireland Human Rights Commission to the Northern Ireland Office Consultation Paper: A Forum on a Bill of Rights for Northern Ireland, NIHRC, Belfast (available on www.nihrc.org).

⁴⁰² Including reference to the reports of the Working Groups of the Forum, where appropriate.

⁴⁰³ With the exception of the last two questions, the enumeration is for convenience and does not imply a sequential process.

⁴⁰⁴ See below for supplementary guidelines for the discussion of the "particular circumstances of Northern Ireland" to which the Commission may have regard.

2. Is the proposed right:
 - a) supplementary to the *Human Rights Act 1998*
 - b) supplementary to those provisions of the European Convention on Human Rights not reproduced in schedule 1 to the Human Rights Act 1998, and
 - c) compatible with their existing provisions?
3. Is the case made that the right is not adequately protected under the European Convention on Human Rights and the Human Rights Act?
4. Is the proposed right in line with best practice according to international instruments and experience?

The principles of mutual respect and parity of esteem

5. Will the proposed right help to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem?⁴⁰⁵

The interests of the people of Northern Ireland

6. In light of the above, taking into account what the consequences might be (positive and negative) of including this proposal in the Bill of Rights, the content of the Forum's Final Report, the support and opposition regarding the proposal, the context of human rights in the UK and on the island of Ireland and any submissions made to the Commission on the subject, does the Commission believe it would be in the interests of the people of Northern Ireland?

The content of the Commission's advice

7. Taking into account all the above and having regard to the totality of rights considered for inclusion in a Bill of Rights, does the Commission consider: a) that this proposed right should be included in its advice to the Secretary of State; and b) that any amendments or additions are necessary or desirable in order to ensure the coherence and effectiveness of the Bill of Rights as a whole?

⁴⁰⁵ See below for an interpretation of this formulation.

Particular elements of the guidelines to which the Commission may have regard in its discussions

Whether a proposed right answers a need for extra protection arising out of the particular circumstances of Northern Ireland⁴⁰⁶

- A. Are there grounds for the belief that the right has been abused, neglected or restricted by state or non-state actors in Northern Ireland to an extent greater than or in a manner distinct from any abuse, neglect or restriction in other parts of the UK?
- B. Has the area of political, social, cultural or economic life that the proposed right covers been a cause, source or location of conflict and division between the two main communities in Northern Ireland?
- C. Is there a reasonable apprehension that the proposed right might be violated in the future to a particularly significant extent or in a particular way compared to other parts of the UK?
- D. Is the proposed right considered necessary or beneficial in enhancing mutual respect for the identity and ethos of both main communities and parity of esteem between them?
- E. Does the proposed right fall under the "issues for consideration by the Commission" listed in the Belfast (Good Friday) Agreement? These are: "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".⁴⁰⁷
- F. Is the proposed right one of those which "against the background of the recent history of communal conflict", the parties affirmed in particular in the Agreement?⁴⁰⁸
- G. Is the proposed right relevant to:
 - i. a matter to which significant reference is made in the Agreement, or
 - ii. one of the "general references to issues that have a human rights basis" in the Agreement?⁴⁰⁹

⁴⁰⁶ In its submission to the Forum, the Commission recognised that *"its mandate rises from a peace agreement reached after a period of protracted conflict and a political process which established a set of principles and structures for the future governance of Northern Ireland. The mandate, when read in this general context, provides helpful guidance on the circumstances which are particular to Northern Ireland"*.

⁴⁰⁷ Belfast (Good Friday) Agreement, p 17.

⁴⁰⁸ Belfast (Good Friday) Agreement, p 16.

An interpretation of “reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem”

The Belfast (Good Friday) Agreement says: “These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem”. The text does not say “each additional right”, but, nor does it say “these additional rights taken as a whole”. The Commission believes, therefore, that the test for any particular proposed right is, first, that it does reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem or, second, that it could make a contribution, with other additional rights, to the expression of these principles.

The principles themselves are not defined in the Agreement. The following points indicate an interpretation of the principles to which the Commission may have regard:

- The identity and ethos of each community, including their distinctive elements, should be considered, recognised and respected
- Mutual respect and parity of esteem should be ensured – in so far as it is possible in a rights context – through a common commitment to fairness, equality and justice in all circumstances
- Government and public bodies have an obligation fully to respect, on the basis of equality of treatment, the identity and ethos of both communities.

9 June 2008

⁴⁰⁹ Final Report of the Forum, p 13 (the summary of the Chair’s Analysis of the Agreement).

APPENDIX 2

GLOSSARY OF TERMS

Article: Human rights protected by the European Convention on Human Rights are divided into Articles.

Common law: Law which has been built up over the course of time on the basis of decisions taken by judges (sometimes called 'precedents'). It can be contrasted with legislation, which is law made by, or under the authority of, Parliament at Westminster.

Compatibility: The ability of domestic (UK) law to be read together with European law without having to be specially modified.

Declaration of incompatibility: A power granted by the Human Rights Act 1998 to Northern Ireland's High Court (and equivalent courts elsewhere in the UK) to read primary legislation (see below for definition) as inconsistent with the rights protected by the European Convention on Human Rights.

Derogation: The process by which a government formally declares that an international standard set down in a treaty is not binding on the state concerned. Under Article 15 of the European Convention on Human Rights, member states may derogate from adhering to certain Convention Rights in a time of emergency threatening the life of the nation.

Devolution: The transfer of rights, powers and responsibility to another body. In Northern Ireland, the Assembly has the devolved power to legislate on matters 'transferred' to it by the Parliament at Westminster. The UK Parliament has retained the power to legislate over 'excepted' and 'reserved' matters, such as taxation, foreign relations and national defence.

Enforcement: The act of ensuring observance of a law.

Entrenchment: The legal process of establishing rights firmly so as to prevent their future removal.

Freestanding provision: A right or obligation which is not dependent upon any other right or obligation.

Inalienable rights: Rights which cannot be given up or taken away.

Judicial review: A legal process whereby a person who is aggrieved by a decision of a public authority can seek a ruling from a High Court judge that the decision in question was taken without following the correct procedures.

Jurisdiction: The power of a court to interpret and apply laws.

Jurisprudence: The body of court decisions, as distinguished from legislation, which set out the principles used by judges when deciding cases.

Justiciable: Rights which can be considered in a court of law.

Limited rights: Rights that are not absolute and which may be limited in certain strictly defined circumstances.

Mainstreaming rights: The process of incorporating equality rights into the everyday policy-making and practice of public and private bodies.

Non-derogable rights: Rights which states must always observe and which may at no time be qualified, for example, because of a public emergency. In the European Convention on Human Rights the non-derogable rights are the right to life (Article 2), the right not to be tortured or subjected to inhuman or degrading treatment or punishment (Article 3), the right not to be enslaved or forced to work (Article 4(1)) and the right not to be punished for something which was not unlawful at the time it was done (Article 7).

Non-regression: This principle requires that human rights norms already adopted should not be undone at a later date – in other words, we should not go backwards in the standards of protection of the individual.

Primary legislation: Legislation enacted by Parliament at Westminster. Under the Human Rights Act 1998, the High Court of Northern Ireland may declare primary legislation to be incompatible with the European Convention on Human Rights, but it cannot declare such legislation to be invalid.

Qualified rights: Rights that are not absolute and may be interfered with providing the interference is (1) lawful, (2) for a legitimate purpose, (3) necessary, and (4) proportionate.

Statutory mandate: Obligations imposed by primary or subordinate legislation.

Subordinate legislation: Legislation made by authorities (such as government ministers) under a power delegated to them by Parliament at Westminster. Also called 'secondary' or 'delegated' legislation.

APPENDIX 3

CONSULTATIONS ON A BILL OF RIGHTS FOR NORTHERN IRELAND

In several phases of consultation on the Bill of Rights, the Commission received approximately 650 formal submissions, as well as many informal expressions of opinion in the form of artwork, CDs, DVDs, views collated at training events and many public and private meetings. The Commission gave careful consideration to the views received throughout the process, which included:

Bill of Rights consultation activities carried out by the Commission:

- These activities are summarised in the introduction to this report and more fully described in our Annual Reports and Bill of Rights publications, available on the Commission's website, www.nihrc.org and an associated website, www.borini.info.

Submissions from the first consultation phase of the Bill of Rights consultation (1 March 2000 to August 2001):

- These are listed in *Making a Bill of Rights for Northern Ireland: A Consultation* (September 2001).

Submissions received by the Commission in response to its first consultation document (*Making a Bill of Rights for Northern Ireland: A Consultation, 2001*):

- These are listed in the publication, *A Summary of Submissions on a Bill of Rights* (July 2003). A searchable database is available on the above websites, which contains the majority of the submissions received.

Submissions in response to the progress report, *Progressing a Bill of Rights for Northern Ireland: An Update* (April 2004):

- Approximately fifty responses were received. Responses are available on the website, www.borini.info.

Submissions from the Children and Young People's consultation exercise (2001-2002):

- While views from children, young people, schools and youth organisations are included among the submissions above, views obtained through a parallel consultation with over 1,000 children and young people, were published in the booklet, *What you Said* (NIHRC, May 2002).

Other consultations:

- After its formal consultations were finished, the Commission continued to receive a number of documents, including copies of submissions provided to the independent Bill of Rights Forum. The Commission met with all the sectors represented on the Bill of Rights Forum, and carefully considered their views and the reports provided by the Forum's outreach workers, working groups and legal advisers.
- During 2006-2008, a number of independent organisations also consulted on a Bill of Rights for Northern Ireland. These included, for example, the Human Rights Consortium, the Community Foundation for Northern Ireland (CFNI) and the Northern Ireland Council for Ethnic Minorities (NICEM).
- The Commission took note of these views as far as possible, given that its own formal consultation processes had been completed. The Commission engaged with as many key stakeholders as possible after the Bill of Rights Forum had reported, and notes that Government has promised to consult further once the Commission's advice is received.

Submissions to, and from, the above organisations can be viewed on their websites:

Bill of Rights Forum:	www.billofrightsforum.org
Human Rights Consortium:	www.billofrightsni.org
CFNI:	www.communityfoundationni.org
NICEM:	www.nicem.org.uk

The above is an illustrative list of the many individuals and agencies involved in the consultation processes. The Commission acknowledges the hard work, hopes and enthusiasm of all involved and thanks them for their views on a Bill of Rights for Northern Ireland.

APPENDIX 4

TIMELINE OF MAIN DEVELOPMENTS IN THE COMMISSION'S WORK ON A BILL OF RIGHTS

10 April 1998	Belfast (Good Friday) Agreement signed
1 March 1999	Commission is established
July 1999	First opinion survey (RES)
1 March 2000	Bill of Rights consultation launched in Belfast and Derry/Londonderry; booklet with opinion survey summary published
July 2000	Nine independently chaired Working Groups are established to examine proposals for possible inclusion in a Bill of Rights
January 2001	Working Group reports are published
September 2001	First consultation document, <i>Making a Bill of Rights for Northern Ireland: A Consultation</i> published
October 2001	Second opinion survey (RES) published
May 2002	Children's Bill of Rights consultation; <i>What you Said</i> booklet published
July 2003	<i>Summary of Submissions</i> published
January – March 2004	Third opinion survey
May 2004	Third Opinion Survey (MRNI) published
April 2004	Second consultation document, <i>Progressing a Bill of Rights for Northern Ireland: An Update</i> , published
October 2004	<i>Bill of Rights in Schools (BORIS): A Resource for Post-primary Schools</i> , published on behalf of the BORIS Project

February 2005	<i>Taking Forward a Bill of Rights for Northern Ireland</i> working paper published
1 September 2005	New Commissioners appointed
January 2006	Commission establishes a formal Bill of Rights Working Group, involving all Commissioners; 54 meetings of the Working Group and many other meetings take place in preparing this advice
18 December 2006	Inaugural meeting of the independent Bill of Rights Forum; Commission observes all meetings
8 May 2007	Devolution restored following suspensions of the Assembly and elections in March
31 March 2008	Bill of Rights Forum presents its final report to the Commission
9 June 2008	Commission publishes its methodology on developing its advice on a Bill of Rights and meets with key stakeholders
10 December 2008	Commission presents its final advice to Government

APPENDIX 5

FORMER COMMISSIONERS

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Professor Christine Bell
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Rev Harold Good OBE
Professor Tom Hadden
Ms Angela Hegarty
Ms Paddy Kelly
Ms Inez McCormack
Dr Christopher McGimpsey
Mr Frank McGuinness
Mr Patrick Yu

Recent Commissioners

Lady Christine Eames OBE (2001–2007)
Mr Kevin McLaughlin (2001–2007)

APPENDIX 6

ACKNOWLEDGEMENTS

The Commission would like to thank and acknowledge the support provided by a range of advisers and experts in this work. These include:

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Ms Maggie Beirne, Chair, Equality

Professor Christine Bell, Chair, Implementation

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Ms Paula Keenan, Chair, Children and Young People

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A Bill of Rights for Northern Ireland



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

An important consultation about the future rights of everyone in Northern Ireland has begun. The government is inviting views on A Bill of Rights for Northern Ireland and this is your chance to say what you think.

The proposal for a Bill of Rights for Northern Ireland was a key commitment of the 1998 Belfast (Good Friday) Agreement. It was further endorsed by our local politicians at St Andrews in 2006. The idea, however, had been around for much longer. Throughout our troubled history all shades of political opinion have at one time or another advocated a Bill of Rights.

The reason why this idea has been around for so long is because having our rights guaranteed and gathered together in one document, where everyone can see them, is crucial for peace and democratic stability. While the Agreement set out how politicians should behave towards one other, a Bill of Rights will set out how, in a new Northern Ireland, the government should behave towards us, the people.

When the Human Rights Commission was created, it was asked to advise the government on whether there should be a Bill of Rights and, if so, what it ought to include. We consulted widely on this question with all sections of our society, young and old, women and men, Protestant and Catholic, ethnic minorities, disabled people and many others.

Taking into account the full diversity of views, the Commission gave its advice to the Secretary of State on 10 December 2008.

We recommended that there should be a Bill of Rights for Northern Ireland, reflecting the particular circumstances of our society, and that it should provide an extensive set of protections. You can find more details in this special supplement, which also summarises what we think should be in a Bill of Rights, how it ought to work and what the outcomes would be if our recommendations are implemented.

The government has now responded to the Commission's advice and wants to know what you think. The Northern Ireland Office is conducting a public consultation and it is important that as many people as possible respond.

Inside...

- Background to the Bill of Rights?
- Q&A
- What a Bill should protect
- Example of how a Bill could work

Background to the Bill of Rights

Over a decade since the Belfast (Good Friday) Agreement, community divisions and the legacy of violent conflict remain. The history of Northern Ireland continues to influence many aspects of our daily lives. What happened here has an impact on the human rights of everyone. Even today, when it might not always be so obvious, your rights are affected.

In 1998, the Agreement provided for an independent body tasked with promoting an awareness of the importance of human rights in Northern Ireland, to review existing law and practice and to advise the government on what steps need to be taken to fully protect people living here.

With this purpose in mind, the **Northern Ireland Human Rights Commission** was created. One particular job we were asked to do, was to advise the Secretary of State on the possibility of there being a Bill of Rights. We were told to consider the particular circumstances of Northern Ireland, and identify rights that would supplement those already contained in the European Convention on Human Rights. Where appropriate, we were also to draw on international instruments and experience.



To ensure that the government received the best and most considered advice possible, we engaged in a comprehensive consultation. This began on 1 March 2000, and, in the intervening years, over 650 formal submissions were made by individuals and groups, with many hundreds more letters and oral evidence received.

In 2006, following the St Andrews Agreement, a forum was established to help the Commission's process. All of the main political parties, community and voluntary organisations, trade unions, the main churches and business sector were represented on the forum. There was much expected disagreement, but the forum did nonetheless successfully conclude on 31 March 2008 and recommended that a Bill of Rights "is needed to provide strong legal protection for human rights for all the people of Northern Ireland; should be in accordance with universal human rights standards, reflecting the particular circumstances. . . must be effective, realistic and implementable; must address the needs of the poorest and most marginalised. . . should be aspirational and look to the future".

Having received these recommendations, we announced that we would complete the process before the end of 2008. A detailed methodology, was formulated to explain how any conclusions would be reached. **On 10 December 2008 (International Human Rights Day and the 60th Anniversary of the Universal Declaration of Human Rights), we gave our advice to the government. This supplement explains our advice.**

Q What are human rights?

A Human rights are the protections and freedoms that everyone should have.

Q Who has rights?

A Everyone.

Q Can my rights be taken away?

A No, but they can be limited. If, for example, you break the law you may be imprisoned restricting your right to liberty.

Q Who has the duty to protect my rights?

A The government and public authorities, such as schools, hospitals, the police and local councils. A recent change in the law also means that voluntary organisations and private companies funded by the government to provide residential care for older people have a duty to protect human rights.

Q Where can I find human rights?

A Human rights are found in domestic laws, like the Human Rights Act; European laws, like the European Convention on Human Rights; and international laws like the United Nations Convention on the Rights of the Child.

Q What is a Bill of Rights?

A A Bill of Rights is an agreement between the people and their government which lists the protections and freedoms everyone is entitled to have. It sets out how the government and public authorities should treat people.

A Bill of Rights for Northern Ireland should protect...

It is usual for an introductory section, called a Preamble, to be included in a Bill of Rights. The preamble describes the values on which a Bill of Rights is based.

Preamble

Founded on the principles of full respect for, and equality of, civil, political, economic, social, and cultural rights and of freedom from discrimination it:

Recognises that a just and equal society is best maintained by a stable and functioning democracy and the common observance of human rights;

Acknowledges the dignity and worth of every person and the equal and inalienable rights of all;

Reiterates an absolute commitment to exclusively peaceful means of resolving differences;

Addresses the legacy of the past and the special needs of victims and survivors of the conflict;

Enshrines the entitlement of all to the full range of human rights and fundamental freedoms, safeguarded by the rule of law;

Strives to ensure that every child will grow up safe and secure;

Values the role of women in public and political life and their involvement in advancing peace and security;

Cherishes our common humanity and advocates freedom from fear and want;

Seeks to protect our common heritage and natural environment for future generations;

Accepts the commitment to mutual respect and the religious and civil rights of everyone;

Welcomes the rich variety of languages, beliefs and traditions which is the cultural wealth of our society;

Upholds the existing rights and protections of individuals and groups especially those that guarantee free and fair participation in economic, social and political life; and

Is dedicated to the achievement of reconciliation and the vindication of the human rights of all.

The Commission advised that there should be a Bill of Rights for Northern Ireland. It set out recommendations for rights to be included that reflect the particular circumstances of our society. It also advised how the rights could work in practice. These are the recommendations.

1 the **right to life** and ensure all deaths relating to the Northern Ireland conflict are effectively investigated, complying with international law.

2 the **right to freedom from torture, inhuman or degrading treatment**

3 **democratic rights** to vote in free and fair elections, subject to proportional representation for the Assembly and local councils, overseen by an independent authority. There should be equal opportunity to take part in public service. Public authorities should be representative of society and take effective steps to enable full and equal participation of women in political and public life.

4 the **right to equality and prohibition of discrimination.**

Affirmative action should be allowed. Public authorities should help older and disabled people to live independently and take a full part in community life.

5 **children's rights**, ensuring that everyone under 18 years old, without discrimination, has their best interests protected and given the highest consideration in all actions concerning them. The government must take all necessary measures to protect children from all forms of abuse and exploitation as well as from the dangers posed by conflict. Special protection and assistance should be given to children who don't live with their family. Children should have access to safe play and leisure facilities. Government must ensure that children know their rights and that their views are taken seriously in all relevant matters.

6 the **right to health**, ensuring that everyone has the highest possible standard of physical and mental health, including free, prompt, appropriate services.* No one should be refused emergency medical treatment and essential primary healthcare. Women and girls should have gender-sensitive and appropriate healthcare and information.

7 the **right to an adequate standard of living.*** No one should be allowed to become destitute.

8 the **right to respect for private and family life**

9 the **right to education** and ensure all children can access the full curriculum. Education should promote human rights, dignity of the person, equality, respect for diversity and tolerance.

10 **freedom from violence, exploitation and harassment** including domestic, sexual, gender-related or sectarian violence, sexual exploitation and trafficking. All appropriate steps should be taken to ensure these protections.

11 the **right to found a family**

12 the **rights of victims**, ensuring access to appropriate material, medical, psychological and social help. They must be kept informed about investigations and legal proceedings. These rights must also be protected in separate legislation for victims of the Northern Ireland conflict.

13 **freedom of thought, conscience and religion**

14 the **right to a fair trial or public hearing and no punishment without law** and ensure trial by jury for serious offences and the right to waive it. Evidence obtained through torture or inhuman and degrading treatment or by breaching any of the rights in the Bill of Rights cannot be used in the trial. The best interests of children and vulnerable adults should be specially protected. Witnesses, jurors, the judiciary and lawyers should be protected in carrying out their duties.

15 **liberty of movement and freedom to choose where to live**

16 the **right to identity and culture** including a choice to be Irish or British or both without discrimination. Public authorities should treat the identity and ethos of both main communities equally and encourage mutual respect, understanding and co-operation. Minorities should be able to enjoy their culture, practice their religion and use their language, in private and public. No one should be made to take an oath in Northern Ireland contrary to their religion or belief.

17 **environmental rights**, including a duty on public authorities to limit pollution, promote conservation and secure sustainable development.

18 the **right to civil and administrative justice** including access to information held by public authorities. Public authorities must make fair decisions within a reasonable time, provide reasons and allow for the decision to be appealed.

19 **freedom of assembly and association**

20 **language rights**, ensuring that minorities can learn or be educated in their own language, when there is enough demand. Essential services should be accessible by communicating in a language (including sign language) you understand. Public authorities should support Irish and Ulster-Scots, as committed to under the European Charter for Regional and Minority Languages.

21 the **prohibition of slavery or forced labour**

22 the **right to accommodation**, appropriate to your needs.* Public authorities should take all appropriate steps to ensure no one is forced out of their home by threats or harassment or evicted without a court order. No one should be denied emergency accommodation.

23 the **right to own property and peaceful enjoyment of possessions**

24 **freedom of expression**

25 **social security rights**, including access to social assistance, social insurance and a pension*.

26 the **right to work.*** Just and favourable working conditions without discrimination should be protected. Workers should be able to strike and to bargain collectively. Carers should have respite from their caring responsibilities.

27 the **right to marry or to enter civil partnership** and to end both.

28 the **right to liberty and security** and ensure that anyone arrested or detained can speak privately with a solicitor and have them present during questioning, which must be recorded. A family member should be able to visit under supervision. Medical help, if needed, should be given without delay. Anyone detained or in care should be helped to reintegrate into society. No one should be imprisoned because of their inability to fulfil a contractual obligation. Children or vulnerable adults who are arrested or detained should have special protections. Children should be treated in a way that considers their age, needs and understanding. They should only be detained as a last resort for the shortest time possible, separately from adults, in conditions appropriate to their age. When a child is the victim of crime they should be given special assistance to help them give evidence and supported throughout the process.

* Government must take steps to ensure that these rights are realised over time as fully as possible.

All these rights can be limited if it is fair, reasonable and proportionate to do so.

Example of how a Bill could work

Supporting the victims of crime

The Commission has recommended that every victim of crime should have his or her rights protected by a Bill of Rights. Consider, for example, a victim of child abuse. In Northern Ireland, there are currently more children on the child protection register, per head of population, than anywhere else in the United Kingdom. The number of incidents recorded is high in Northern Ireland and research has also shown that the number of children being abused is much higher because many cases are never reported.



Even when a child does report a crime, they face the possibility of being re-traumatised by the investigation and any subsequent court case.

So what could a Bill of Rights do?

A Bill of Rights should include a guarantee that if you are a victim of crime you will be provided with appropriate support services. If, for instance, a girl is raped, the Bill should guarantee that she has the right to receive necessary specialist health care and information.

The police and prosecution service should be required to keep her informed of any developments throughout their investigation. If the case goes to trial, the victim should be supported to give evidence, if necessary, using video link, as well as receiving any appropriate material, medical, psychological and social assistance afterwards.

What the Commission says

- The government should take all necessary measures to protect children from all kinds of abuse.
- Women and girls should have the right to specialist health care and information.
- Every victim of crime should have the right to be informed throughout the case and to have any decisions explained to them by the authorities.
- Every witness should have the right to necessary support at all stages of the court process.
- Every victim of crime should have the right to a range of support measures.

Q Who would be protected by a Bill of Rights for Northern Ireland?

A Everyone.

Q Why have a Bill of Rights for Northern Ireland?

A A Bill of Rights will enable everyone to know what rights they have by referring to one document. Northern Ireland should have its own Bill because it will help us deal with the legacy of conflict and build peace for the future by ensuring that everyone is treated fairly and guaranteeing protections that reflect the particular circumstances of our society.

Q What is the Northern Ireland Human Rights Commission's role in this?

A Following the Belfast (Good Friday) Agreement, the Human Rights Commission was asked to provide advice to the government on whether there should be a Bill of Rights for Northern Ireland and what should be in it.

Q Will there be a new human rights court?

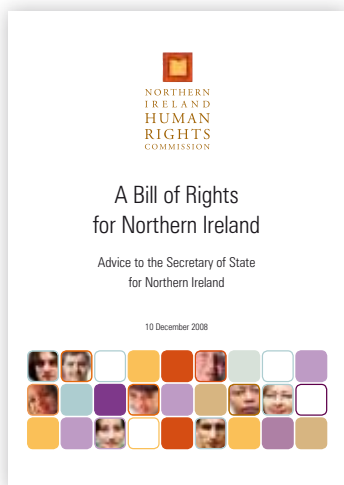
A The Commission does not believe this is necessary. At the moment, human rights cases are brought within the existing court and tribunal system. The same process should apply to a Bill of Rights.

Q Will a Bill of Rights result in lots more court cases?

A Similar fears were raised when the Human Rights Act was introduced. These fears were proved wrong. There is no reason to suggest that a Bill of Rights would be different.

Consultation now on

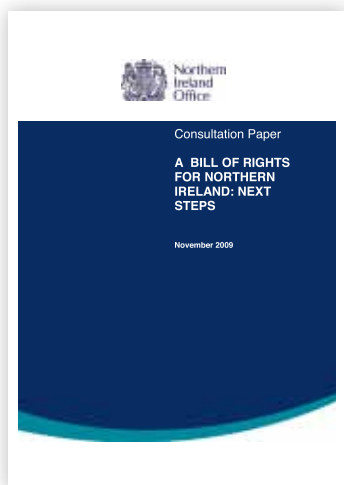
How to find out more and tell the government what you think about a Bill of Rights



To find out more about the Human Rights Commission's advice on a Bill of Rights for Northern Ireland

www.nihrc.org/bor

or contact: NIHRC, Temple Court,
39 North Street,
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To find out more about the government's consultation

www.nio.gov.uk

(select Public Consultation)

or contact: Bill of Rights Consultation,
Northern Ireland Office,
Stormont House, Stormont
Estate, Belfast BT4 3SH
Tel: (020) 7210 6584
Fax: (020) 7210 6565
Textphone: (028) 9052 7668
Email: billofrights@nio.x.gsi.gov.uk

Q In a recession, how realistically can the government spend more money on protecting rights?

A In a recession, threats to public expenditure make interference with your rights more likely. It is exactly at times like these that we need to reaffirm and strengthen human rights to ensure that increasingly vulnerable people and families are protected.

Q What is the role of politicians in this process?

A The Westminster Parliament will make the law creating a Bill of Rights for Northern Ireland. On devolved issues, such as education or health care, the Northern Ireland government may be asked for its views. The Commission has recommended that once a Bill is created any changes should require cross-community support in the Northern Ireland Assembly.

Q What about responsibilities?

A A Bill of Rights, like all human rights instruments, holds states accountable for their actions. However, individuals asserting their rights must recognise the rights of other people. Not respecting the rights of others could mean that you are breaking the law. Some of your own rights may be limited as a consequence.

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Protecting and promoting your rights

**A BILL OF RIGHTS FOR NORTHERN IRELAND:
NEXT STEPS**

Response to the Northern Ireland Office



NORTHERN
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February 2010

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SUMMARY

It remains the view of the Northern Ireland Human Rights Commission (the Commission) that a Bill of Rights for Northern Ireland, drafted in accordance with its mandate, should include all of the recommendations provided to Government on 10 December 2008.

The Commission notes that in the Northern Ireland Office (NIO) consultation paper Government has committed “to bringing forward legislation” (2.5) for a separate Bill of Rights for Northern Ireland.

Beyond this welcome commitment, the tone and content of the NIO consultation paper is disappointing. The Commission finds itself in the position of analysing a paper that:

- 1. demonstrates a lack of understanding of the purpose and functions of a Bill of Rights**
- 2. fails to take appropriate account of international human rights standards**
- 3. appears to be suggesting the lowering of existing human rights standards in Northern Ireland**
- 4. fails to satisfy the minimum common law consultation requirements, and**
- 5. misrepresents the advice given by the Commission.**

The Commission has concluded that it is not possible for a national human rights institution to accept the NIO consultation paper as a genuine effort to increase human rights protections in Northern Ireland.

INTRODUCTION

On 10 December 2008, the Northern Ireland Human Rights Commission (the Commission) in accordance with Paragraph 4, in the Rights, Safeguards and Equality of Opportunity section, of the Belfast (Good Friday) Agreement, and section 69(7) of the Northern Ireland Act 1998, provided Government with advice on a Bill of Rights for Northern Ireland. In 1999, the Secretary of State wrote formally to the Commission inviting it to consult and provide advice on a Bill of Rights for Northern Ireland. The Commission accepted this invitation and consulted widely on whether there should be a Bill and, if so, what it ought to include. The advice was not a legislative draft, but nonetheless did set out in detail a set of specific recommendations. Government has now responded to the Commission's advice and is now, for the first time, consulting on what should be included in a Bill of Rights for Northern Ireland. This is of course a separate process to the one conducted by the Commission previously. It remains the view of the Commission that a Bill, drafted in accordance with its mandate, should include all of the recommendations it provided to Government in 2008.

The Commission notes in the Northern Ireland Office (NIO) consultation paper that Government has committed "to bringing forward legislation" (2.5) for a separate Bill of Rights for Northern Ireland. It is justified and desirable to enshrine existing protections in a single, dedicated legislative document, and for that legislation also to include rights supplementary to the European Convention on Human Rights (ECHR), reflecting the particular circumstances of this jurisdiction. The Commission notes that, in principle, there is "no incompatibility" (3.7) between a possible UK instrument and the proposal for Northern Ireland. It welcomes the fact that Government has on a number of occasions,

including in the Green Paper on Rights and Responsibilities¹ (the Green Paper), repeated this view.

However, the Commission is extremely disappointed at both the tone and content of the NIO consultation paper. It had expected by now to be in a position to provide Government with detailed feedback on how it ought to take forward the proposals for a Bill of Rights for Northern Ireland. Instead, it finds itself in the position of analysing a paper that:

- 1. demonstrates a lack of understanding of the purpose and functions of a Bill of Rights**
- 2. fails to take appropriate account of international human rights standards**
- 3. appears to be suggesting the lowering of existing human rights standards in Northern Ireland**
- 4. fails to satisfy the minimum common law consultation requirements, and**
- 5. misrepresents the advice given by the Commission.**

This response will provide some examples under the headings outlined above and demonstrate why Government must re-think its position in relation to what is needed in a Bill of Rights for Northern Ireland.

¹ Ministry of Justice, *Rights and Responsibilities: Developing our Constitutional Framework*, TSO, London, March 2009 (Cm 7577).

1. Demonstrates a lack of understanding of the purpose and functions of a Bill of Rights

The primary function of a bill of rights in any jurisdiction is to enshrine protections. Government itself acknowledges in the NIO consultation paper that the Human Rights Act 1998 (HRA) operates as a “foundational document” (4.5) Consequently, the fact that a protection may be found in existing legislation, policy documents or existing governmental practice is not a reason to exclude that protection from what should be a “foundational” document. The question of the content of a Bill of Rights is not determined by whether or not protections currently exist in common law or statute or elsewhere. Rather, the question is to decide which values to “draw” from existing protections and give them “expression at a constitutional level”.

In the NIO consultation paper, there is no indication that Government has understood this basic point. Repeatedly it explains that some rights should not, in the view of Government, be included in a Bill of Rights for Northern Ireland, because they are already sufficiently protected by existing legislation or, even more worryingly, by policy guidance or existing practice. Unlike the NIO consultation paper, the Ministry of Justice Green Paper has understood and regularly refers to the distinction that must be drawn between the question of existing protection and the question of whether a particular provision should find its way into a constitutional document such as a bill of rights.

The Green Paper correctly refers to a bill of rights having “enduring value”; being a new instrument that “draw[s] on key principles from current common law or statutory sources”. Some of these sources

may, we are told, be: “entrenched features of the legal systems of the UK. Others, such as those derived from the UK’s complex and well-established welfare system, have not traditionally been framed as rights, but are areas to which Government has been, and remains, firmly committed through its legislative programme. Their importance in the national culture may be such as to merit expression at a constitutional level”.²

In contrast to this approach, the Commission’s proposal “to ensure the right of every child to be protected from direct involvement in any capacity in armed conflicts or civil hostilities including their use as intelligence sources” is rejected on the basis that, even though the Regulation of Investigatory Powers Act 2000 does not prohibit the use by public authorities of children as covert human intelligence sources, there is a Code of Practice, and a piece of secondary legislation (the Regulation of Investigatory Powers (Juveniles) Order 2000), overseen by the Intelligence Services Commissioner, which provide “appropriate safeguards” of use of children as intelligence sources (8.11 and 8.12).

This argument for exclusion is entirely unsatisfactory on a number of levels. First, it fails to directly address the Commission’s proposal that children should not be used as intelligence sources at all. Second, it attempts to justify exclusion of the recommended protection in a Bill of Rights on the basis that secondary legislation (which can be amended at ease) and a Code of Practice (which can also be easily amended and which does not even have any legal force) provide “appropriate safeguards”.

The examples of reasoning similar to this are numerous.

² Above, para 3.13.

In respect of protection of victims (8.8), reference is made to the Victims and Survivors Order 2006, the Commission for Victims and Survivors created in 2008, and the Victims and Survivors Forum which met for the first time in September 2009. None of these innovations legally enshrine protections for victims.

The Commission's recommendation relating to the right of someone who is arrested or detained to consult a legal representative and a medical practitioner (9.6, 9.8 and 9.11) is rejected in part on the basis that the issue is dealt with in legislation and "associated Codes of Practice", such as the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE), the Terrorism Act 2000 (TACT).

In terms of the Commission's proposal on the right to silence (9.9), Government again refers to secondary legislation, including the Criminal Evidence (Northern Ireland) Order 1988 (as amended by Article 36 of the Criminal Evidence (Northern Ireland) Order 1999).

Insofar as the proposed right of prisoners to have family visits is concerned, we are informed (9.14) that "Codes currently permit visits where possible, subject to the discretion of the custody officer, the availability of staff to supervise any visit and the need to minimise hindrance to the investigation". These Codes have no legal force and are discretionary. They do not even come close to answering the Commission's proposal for enshrinement of a right.

The NIO consultation paper states that the Northern Ireland Prison Service (NIPS) "recognises the importance to the prisoner of maintaining contact with the outside world so normal practice is for the prisoner to receive four visits a month" (9.15). Again, this is irrelevant since Government has not demonstrated that it has

considered the question of whether the protection should be enshrined.

We are also informed that the NIPS “encourages family contact by providing support through the Assisted Prison Visit Scheme” (9.15). But encouraging family contact for prisoners is a far cry from enshrining it as a right.

On the question of children in detention, Government maintains that the Juvenile Justice Centre pays “special attention” “to the maintenance of the relationship between a child in custody and his or her family” (9.16). Yet again, this does not answer the question of whether such protection should be enshrined in a Bill of Rights.

In respect of the proposal to have “a legal representative present during questioning, and to have the questioning aurally and visually recorded”, Government concludes (9.20), that “the right proposed by the Commission in this area is already very largely met by existing statutory and policy schemes”. But this observation is irrelevant. The existing statutory and policy schemes do not create a legally enforceable ‘right’ for prisoners in the same way that inclusion of protection in a Bill of Rights for Northern Ireland would.

The Commission’s recommendation regarding reintegration into society of those in detention or alternative care is rejected on the basis that the NIPS and the Probation Board for Northern Ireland currently co-ordinate with statutory and voluntary partners to “combat crime among released prisoners and boost community safety” (9.21). The NIO consultation paper also concludes (9.24) that the “substantive areas” underpinning the right “are therefore already being addressed through significant policy and operational measures”. In this case, first, Government does not even attempt

to explain the basis of the co-ordination so that it can be examined by consultees. Second, the fact that co-ordination is currently in place does not enshrine that protection on a long-term basis. Third, it seems that the focus of the co-ordination is on the community rather than on the prisoners, as would be the case if a right of prisoners to be re-integrated were to be enshrined.

The Commission's proposal on witness protection is rejected on the basis that the Northern Ireland Criminal Justice Board has established a multi-agency sub-group, the Victim and Witness Task Force, which has produced a policy document ("Bridging the Gap"), and which is planning to finalise and publish a Code of Practice (9.34-9.36). Other reasons for rejecting a right to protection for witnesses include the fact that there is a witness protection programme organised under the Serious Organised Crime and Police Act 2005 and the Northern Ireland Office Limited Home Protection Scheme (9.28). Similar justifications are suggested for not enshrining protection of lawyers or jurors.

Government does not seem to have realised that the fact that a protection currently offered by a code of practice, order or statute does not provide stable and enduring basis for that protection. The protection afforded can be amended easily: for example, the Police and Criminal Evidence (Northern Ireland) Order 1989 (on which Government relies to make a number of arguments) was amended in 2007.³ As such, protection in codes and secondary legislation is not pertinent to the question of whether that protection should be enshrined at a constitutional level in a Bill of Rights. The Commission is left wondering if Government is actually aware of the constitutional significance of such an instrument and rationale for its creation.

³ Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2007.

2. Failure to take appropriate account of international human rights standards

The Belfast (Good Friday) Agreement 1998 clearly refers to the relevance of international human rights standards,⁴ and for every proposal the Commission made in its advice there was a detailed explanation as to how it had considered the relevance of those standards. In contrast, the NIO consultation paper does not indicate that these standards have been considered in any depth, let alone show any cognisance of the concluding observations of the international treaty monitoring bodies, some of which have made specific reference to a Bill of Rights for Northern Ireland and what it ought to include.⁵

The NIO consultation paper refers (3.5) to the international human rights instruments to which the UK is a party: “for example, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the UN Convention on the Rights of Persons with Disabilities”.

However, Government barely refers to the protections set down in these instruments (with rare exceptions being found at 5.21 and 7.2).

⁴ The Belfast (Good Friday) Agreement 1998 tasked the Commission with advising on supplementary rights, “drawing as appropriate on international instruments and experience”, see: Rights, Safeguards and Equality of Opportunity, para 4.

⁵ Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland* (CRC/C/GBR/CO/4), 20 October 2008; and Committee on Economic, Social and Cultural Rights, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland* (E/C.12/GBR/CO/5), 22 May 2009.

3. Appears to be suggesting the lowering of existing human rights standards in Northern Ireland

In the context of equality, it is arguable that Government's proposals may undermine existing protections.

Government appears to be insinuating that expanding the list of protected groups will lead to "significantly diluted" protection for the relevant groups⁶ and a loss of "focus".⁷

The first point to make here is that Government's thinking on this issue is unclear: is it actually proposing that if the list of protected groups is expanded, the *quid pro quo* will be a lowering of the substantive protection? If this is the case, Government should be open and direct about it. Second, contrary to what Government seems to be suggesting, it is not inevitable that expanding the list of protected groups must result in lowering of the protection offered. For example, in the context of the European Convention on Human Rights (ECHR), over the years, the European Court of Human Rights has expanded the list of protected groups under Article 14, without lowering the protection required for each group. It is troubling that Government should assume that expanding human rights protections to new groups must result in a lowering of the content of those protections.

The Secretary of State asserts in his Foreword that "for too long issues of human rights and equality in Northern Ireland were seen through the prism of conflict as a kind of 'zero sum game' of

⁶ NIO consultation paper, para 5.14.

⁷ Above, para 5.15. See also, para 5.18.

winners and losers. As Northern Ireland emerges from conflict it is important that the terms of the debate change". But it appears that Government's thinking in fact perpetuates the notion that more rights for one group means less for another. In this consultation document, it is any individual belonging to any community other than the established communities who is to be denied protections in the form of rights enshrined in a Bill. For example, the Commission's advice in relation to equality provisions is questioned on grounds that:

While section 76 [of the Northern Ireland Act 1998] is only one of a range of pieces of legislation setting out carefully designated grounds on which discrimination is unlawful (e.g. race and gender), there could be a serious risk that, if the reach of anti-discrimination provisions becomes unlimited, the focus of the core issues identified in the Agreement, and in the other anti-discrimination legislation, could be lost and existing levels of protection against discrimination might, paradoxically, be significantly diluted. (5.14)

The Commission has not advised an unlimited reach of anti-discrimination law. Rather, it has specifically mentioned groups which are at risk of facing discrimination. The concluding words in the Commission's recommendation – "or any other status" (5.2) – are perfectly in-keeping with the language of Article 14 ECHR and evolving jurisprudence as well as Article 26 International Covenant on Civil and Political Rights (ICCPR). To suggest otherwise is to renege on recognising the universality of human rights protections by attempting to confine them to certain groups. This is problematic in itself, but the suggestion, above, that those groups already protected to some extent under existing legislation are in danger of losing that level of protection should the list be widened is misleading.

4. Inadequate consultation: common law

As was observed by Munby J in *R (Montpeliers & Trevors Association) v City of Westminster*,⁸ public consultation processes are underpinned by the following “well-established principles of law”:

First, where a public authority decides to embark upon a non-statutory process of consultation, the applicable principles are no different from those which apply to statutory consultation.⁹

Second, any consultation process must satisfy what are referred to as the ‘Sedley requirements’.¹⁰

The Sedley requirements are such that a public consultation must:

- a. be undertaken when proposals are still at a formative stage
- b. give sufficient reasons to permit the consultee to make a meaningful response
- c. allow adequate time for consideration and response, and
- d. the results of the consultation must be conscientiously taken into account in finalising any proposals.¹¹

It has to be seriously doubted whether the NIO consultation paper complies with the first three Sedley requirements. Whether it

⁸ [2005] EWHC 16 (Admin); [2006] LGR 304, at [25].

⁹ *R (Partingdale Lane Residents Association) v Barnet London Borough Council* [2003] EWHC 947 (Admin), [2003] All ER (D) 29 (‘Partingdale’), [45]; *R (Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438, [24]. See also: *R (Medway Council and others) v Secretary of State for Transport* [2002] EWHC 2516 (Admin), [2002] All ER (D) 385, at [28], for the proposition that, as, Maurice Kay J, put it, “consultation, whether it is a matter of obligation or undertaken voluntarily, requires fairness”.

¹⁰ *R v London Borough of Barnet, ex parte B* [1994] ELR 357, 372G.

¹¹ See *R (Wainwright) v Richmond upon Thames London Borough Council* [2001] EWCA Civ 2062, [2001] All ER (D) 422, [9]-[10]; *Bovis Homes Ltd v New Forest District Council* [2002] EWHC 483 (Admin), [111]-[114]; *R v North and East Devon Health Authority, Ex parte Coughlan* [2001] QB 213, [108].

complies with the fourth Sedley requirement can only be determined after the Government responds to the consultation.

4.1 The first ‘Sedley Requirement’: has consultation been undertaken at a ‘formative’ stage?

4.1.1 The scope of the requirement

In *Montpeliers*, Munby J explained the first Sedley Requirement’ as follows:

[t]he crucial point, as the Deputy Judge expressed it in *Partingdale* at para [47], is that “consultation must take place at a stage when a policy is still at a formative stage ... a proposal cannot be at a formative stage if the decision maker does not have an open mind on the issue of principle involved”.¹²

In *Montpeliers* itself, it was held that a consultation process on traffic flow was vitiated because an option of central significance “had already been excluded from further consideration”.¹³ The consultation paper at issue in that case explained why the excluded option was being excluded from consideration, and only sought to consult on the alternatives.¹⁴ Munby J explained: “[f]airness ... required that there should be a process of consultation in which those being consulted could express their views on all the various options”.¹⁵

¹² [2005] EWHC 16 (Admin); [2006] LGR 304, at [25].

¹³ Above.

¹⁴ Above, at [8].

¹⁵ Above, at [29].

Likewise, in the case of *R (Medway Council and others) v Secretary of State for Transport*,¹⁶ it was held to be unfair and indeed irrational, to exclude Gatwick from the options presented in a consultation exercise relating to the future development of air traffic in the South East.¹⁷

In addition, as well as being a common law requirement, consultation at a formative stage is recommended in the Government's Code of Practice on Consultation.¹⁸ This Code sets out seven "consultation criteria", the first criterion of which is that "[f]ormal consultation should take place at a stage when there is scope to influence the policy outcome". This means, as Government notes in the Code, "there is no point in consulting when everything is already settled".¹⁹

4.1.2 The lack of compliance

In the NIO consultation paper, Government suggests that it would "welcome general views on all the issues" covered.²⁰ The problem is that it appears, however, to have pre-determined a large number of extremely important questions.

The most notable example of pre-determination is found in Chapter 3, which indicates that there is to be no consultation on the appropriateness of inclusion of a large number of rights in any Bill of Rights legislation for Northern Ireland. The excluded rights listed in Chapter 3 are:²¹

¹⁶ [2002] EWHC 2516 (Admin), [2002] All ER (D) 385.

¹⁷ Above, at [12]-[18] and [29]-[31].

¹⁸ HM Government, Code of Practice on Consultation [Online] Available: <http://www.berr.gov.uk/files/file47158.pdf>, July 2008.

¹⁹ Above, para 1.2.

²⁰ NIO consultation paper, para 4.2.

²¹ Above, para 3.14.

- a. right to marriage or civil partnership
- b. education rights
- c. freedom of movement
- d. right to civil and administrative justice
- e. right to health
- f. right to an adequate standard of living
- g. right to work
- h. environmental rights, and
- i. social security rights.

The NIO consultation paper explains²² that its “initial assessment”,²³ and then “view”,²⁴ is that these rights are equally as relevant to the people of England, Scotland and Wales as they are to the people of Northern Ireland; that they fall to be considered in a UK-wide context; that their introduction would either be “unworkable in practice, or could give rise to unjustified inequalities across the UK”. Accordingly, Government has concluded that:

The subject of this consultation paper is a Bill of Rights for Northern Ireland, and Government does not propose to address in detail in this paper those rights that it considers to fall outside the scope of such a Bill.²⁵

In other words, even though Government is supposed to be consulting the people of Northern Ireland on the content of a Bill of Rights for Northern Ireland, it is stating expressly that it will not consult on any rights “it” (not the people of Northern Ireland)

²² Above, paras 3.14, 3.15 and 3.20.

²³ Above, para 3.14.

²⁴ Above, para 3.15.

²⁵ Above, para 3.16.

“considers” should not be in that Bill of Rights. As such, this proposal can hardly be described as being at a “formative stage”.

This phenomenon of pre-determination is repeated throughout the NIO consultation paper. To give two further examples:

Government explains (5.5) that an obligation proposed by the Commission requiring public authorities to take all appropriate measures to promote the rights of older persons and those who are disabled, and enable them to enjoy social, cultural and occupational integration, should not be addressed because it “appears to be of equal importance across the UK rather than having a distinctive resonance in Northern Ireland alone”.

Government similarly explains (6.4), that the rights protecting cultural, linguistic and ethnic minorities (outside the two main communities) is part of the national debate and “is therefore not considered further here”.

Views are not sought on rights that Government has concluded to be of equal relevance throughout the UK, and as such, it is very difficult to conclude that the proposals being offered are at a “formative” stage.

4.2 The second Sedley Requirement: insufficient explanation of the proposals

4.2.1 The scope of the requirement

With regard to the second Sedley Requirement, it has been held that what is required is a “candid disclosure of the reasons for what

is proposed".²⁶ For example, in *R (Greenpeace Ltd) v Secretary of State for Trade and Industry*,²⁷ a consultation was invalidated where the consultation paper contained only "thumbnail sketches" of issues related to the question of nuclear new build as part of the UK's future electricity generating mix.²⁸

4.2.2 The lack of compliance

The NIO consultation paper does not provide adequate explanation for its proposals to facilitate a "meaningful response" by consultees. In other words, even though Government is supposed to be consulting on the content of a Bill of Rights for Northern Ireland, it has failed to provide a "candid disclosure" of the reasons for what is being proposed. To give two examples of where this is the case: (i) there is no explanation of 'particular circumstances'; and (ii) only minimal explanation is given for the exclusion of a large list of rights in Chapter 3 (see above at 1.1.2).

i. The particular circumstances of Northern Ireland

Nowhere is there an explanation of the factors Government regards as relevant in determining the 'particular circumstances' of Northern Ireland. More particularly, it is apparent that Government has not even applied a consistent understanding to the question of particular circumstances. Thus, there is often reference in general terms to the concept of particular circumstances without explaining what is meant.

²⁶ *R (Lloyd) v Dagenham London Borough Council* [2001] EWCA Civ 533; (2001) 4 CCLR 196, [13].

²⁷ [2007] EWHC 311 (Admin); [2007] Env LR 623.

²⁸ Above, at [68].

For example, when discussing the right to health (3.17), Government notes "...there would need to be evidence that the case for this particular right within Northern Ireland is demonstrably greater or different in nature to that in the rest of the UK, due to the particular circumstances of Northern Ireland". This may be so; but the question is, if the consultee is to respond in a "meaningful" way, how does Government envisage such a case being made? Similarly, we are informed that 32 of the rights proposed in the Commission's Advice (4.1) can, "in the Government's view", be argued to reflect the particular circumstances of Northern Ireland. But we are not told why.

The proposed right of access, on terms of equality, to public service (5.20), we are told, "would appear to be potentially relevant across the UK, and there is no evidence that it reflects the particular circumstances of Northern Ireland". But what evidence would Government be interested in hearing? How should the consultee respond if they wish to persuade Government that such evidence does, indeed, exist?

Seven of the children's rights proposed by the Commission (8.10) are, we are told, regarded as of "equal importance" across the rest of the UK'. Yet this is presented as a *fait accompli*, with no reasoning offered.

Again, on the question of criminal justice (9.4), it is concluded that that such rights do not have "unique significance in Northern Ireland", but are "of similar importance across the UK" and should therefore "find their place in the national debate".

When addressing rights for children and vulnerable adults relating to evidence procured through torture and court procedures (9.26),

it is suggested that these “appear to be of equal significance throughout the UK”. But still there is no explanation as to why this is the case.

On other occasions throughout the consultation paper, references are made to criteria which Government seems to interpret as being relevant to the ‘particular circumstances’ of Northern Ireland, but its referencing is inconsistent and the onus is left on the consultee to try to deduce the factors which Government regards as having importance.

For example, the consultation paper states (3.19): “Clearly, the legacy of the conflict forms a part of the particular circumstances of Northern Ireland, and Government accepts that measures to address the impact of this legacy should be considered for inclusion in a Bill of Rights for Northern Ireland”. Thus, can we deduce that the ‘legacy of the conflict’ must be relevant?

Proposals on the right to identity and culture are generally found to reflect the particular circumstances of Northern Ireland (6.3). Presumably (although again, it is not explained), this must be because it “was a central theme in the Belfast Agreement” (see 6.2), and was specifically referred to in the Commission’s mandate.

The question of the rights of cultural, ethnic and religious minorities (6.4) is described as being “very much part of the national debate started by the Green Paper”.²⁹ This suggests, although it is not clear, that Government regards inclusion within the Green Paper as a relevant criterion for determining that a right falls outside the ‘particular circumstances’ of Northern Ireland.

²⁹ Ministry of Justice, *Rights and Responsibilities: Developing our Constitutional Framework*, Ministry of Justice, TSO, London, March 2009 (Cm 7577).

Victims rights (8.7) are not regarded as part of the 'particular circumstances', on this occasion, because "policies to meet them are being pursued, not only in Northern Ireland but across the UK".

Meanwhile, children's rights (8.10) are excluded because "such rights are of equal importance across the rest of the UK". Thus, a criterion appears to be whether rights are of "equal importance" across the rest of the UK.

The contrast between the NIO consultation paper and the Commission's advice³⁰ is stark. The Commission provided a detailed methodology to explain the factors it regards as important in identifying 'particular circumstances'.³¹ No such methodology is provided by Government. Thus, statements regarding 'particular circumstances' are conclusive and do not provide sufficient detail to enable a 'meaningful' response, as is required by the common law.

ii. Excluded rights

Nine categories of rights from the Commission's advice are effectively excluded from the NIO consultation paper. Even though dialogue about inclusion of these rights has been part of the debate around rights in Northern Ireland since 2000,³² Government has, apart from one exception, not given an explanation as to why they are excluded. The only right it considers in any detail is the right to health. The NIO consultation paper even accepts that it is not

³⁰ *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland*, NIHRC, 10 December 2008 (Commission's advice).

³¹ Above, at p14 and Appendix 1.

³² Most of these rights are found in the Commission's first consultation paper, *Making a Bill of Rights for Northern Ireland: A Consultation Summary* (2001) and the *Bill of Rights Forum Final Report*, 31 March 2008.

prepared to offer in depth reasoning for its conclusions (3.16) on the other excluded categories of rights.

Government proceeds to explain (3.17-3.18) the factors for excluding the right to health, with an emphasis primarily on the inappropriateness of involving courts in the expenditure implications of a right to health (3.18 and 3.20). Yet, the other rights listed for exclusion do not obviously involve such resource implications, for example, the right to marriage or civil partnership, freedom of movement, and the right to civil and administrative justice. On what basis are these rights excluded for further consideration? It is not clear. How, in accordance with the second Sedley Requirement, is the consultee to respond to Government's proposal for exclusion in a meaningful way?

In brief, just as in the Greenpeace case, where setting out a thumbnail sketch of the issue was regarded as inadequate, the setting out of an example of reasoning, when the issues at stake are so important, must be regarded as inadequate. This simply does not satisfy the requirement of "candid disclosure".

4.3 The third 'Sedley Requirement': Adequate time for consideration and response

4.3.1 The scope of the requirement

With regard to the third 'Sedley Requirement', the courts require that any public consultation is conducted in a framework that allows adequate time for consideration and response.

4.3.2 The lack of compliance

Consulting on a bill of rights is not a straightforward process. It is complex and requires sufficient time.

Although not determinative, the second consultation criterion in Government's Code of Practice on Consultation³³ (mentioned above) suggests allowing a minimum of 12 weeks for written consultation, with "consideration given to longer timescales where feasible and sensible".

This consultation has been conducted over the Christmas/New Year break (2009-2010); and, as such, barely complies with the minimum suggestion given by Government in its Code of Practice on Consultation.

Given the complexity of the issues at stake, it would have been "feasible and sensible" to have allowed more time for consultation.

³³ HM Government, Code of Practice on Consultation [Online] Available: <http://www.berr.gov.uk/files/file47158.pdf>, July 2008.

5. Misrepresentations of the advice given by the Commission

The NIO consultation paper often grossly misrepresents the advice given by the Commission in a number of important respects.

5.1 The number of recommended rights

In the NIO consultation paper, it is suggested that the Commission proposed 78 new substantive rights (2.7) in its advice to the Secretary of State. This is accurate insofar as the Commission has advised Government to enshrine 78 rights in primary legislation in the form of A Bill of Rights for Northern Ireland Act. However, for many of the recommended rights no other legislative change would be required. As Government rightly points out, existing legislation in a number of areas already gives effect to the proposed rights. The message being presented here is confused. On the one hand, there is an impression that the Commission posed Government with an insurmountable task in terms of change to existing legislation that would radically alter the legal, social and political framework of Northern Ireland. On the other hand, Government rejects much of the advice provided by the Commission on grounds that the protections already exist.

5.2 The Commission's mandate

Not only is Government's own responsibility in terms of the mandate given to the Commission unclear in the consultation document, but it also seems, in fact, to have misrepresented that mandate in the first place. This would appear to be particularly the case in the sections discussing the Commission's advice in relation

to the need to respect the identity and ethos of the two main communities. The tone is critical of the Commission in not attempting to define the concepts of "identity and ethos" "so as to enable the courts to address them effectively". Yet, it was not in the Commission's mandate to define these concepts, but simply to consider "the formulation of a general obligation on government and public bodies to fully respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland".

5.3 Dilution of the proposals

On a number of occasions, Government has diluted and narrowed the Commission's proposals in subtle ways that will, nonetheless, have extensive impact on the rights in question if they are included in a Bill of Rights. For example, the Commission advised that a right should be drafted so that:

Public authorities must encourage a spirit of tolerance and dialogue, taking effective measures to promote mutual respect, understanding and co-operation among all persons living in Northern Ireland, irrespective of those persons' race, ethnicity, language, religion or political opinion.

After discussing over a number of paragraphs existing measures it believes are relevant to this recommendation, Government, under "Summary of Proposals", proposes only to "consider extending the duty on public authorities around promoting good relations, so that public authorities would also have regard to the need to promote a spirit of tolerance, dialogue and mutual respect; and to the need to respect the identity and ethos of the two main communities". There is no explanation or proper discussion as to why Government has reduced a provision that would protect the members of all

communities in Northern Ireland to one that would only protect members of the two main communities. The information is so minimal that there is a risk readers might be led to believe the Commission actually proposed the latter or indeed sees no major difference between the two.

5.4 The frame of reference

The Commission must comment on the way in which the NIO consultation paper has framed the terms of the debate. For example, the reference to Sharia law (6.4) is both incorrect and irresponsible. Islamophobic sentiment is well documented in Western Europe and racist hate crimes are evident in an increasingly multi-cultural Northern Ireland. It is particularly unfortunate that Government has decided therefore to make an ill-conceived attempt to prey on fears of what Islam brings to the UK, and xenophobic sentiments. The NIO should be well aware that the concepts of citizenship and shared values are the subject of volumes of Islamic theological, philosophical and political literature dating back centuries. To claim in one sentence that Sharia law is incompatible with European law and culture is, at best, contestable. Moreover, to suggest that the Commission's advice would give rise to the remotest possibility of any laws that might be incompatible with international human rights standards being introduced in this jurisdiction, given the qualifications and limitations recommended, amounts to either a fabrication and wilful misrepresentation of the Commission's work or demonstrable ignorance of the practical operation of domestic human rights legislation. The Commission calls on Government to retract this statement.

Frequent reference is made to the Northern Ireland Act 1998, and Government appears to be using it as model of sorts against which

to evaluate the Commission's advice. Where the advice goes beyond that currently provided for by the Act, Government questions the validity or practicality of recommendations. So, for example, in discussing the free-standing equality provision, the NIO consultation paper states that under section 76 of the Northern Ireland Act 1998, the term 'public authority' refers to a specific set of bodies defined in that section, while the Commission intends that the proposed new provisions apply to the wider range of bodies which are public authorities for the purposes of the Human Rights Act 1998 (5.12). Government is surely fully aware that the Commission correctly took as its frame of reference the domestic application of the ECHR via the HRA. It is misleading to suggest that the Commission has somehow gone beyond the domestic norm, when the mandate explicitly required that the Commission consider rights supplementary to the ECHR.

5.5 Equality

The discussion of the Commission's equality proposals provides a very misleading summary of those proposals in a number of respects. The Commission's recommendation is characterised (5.11) as a "freestanding and unlimited protection against discrimination [which] would be a new step in UK law".

Government then goes on to state (5.12): "[i]t is not clear from the Commission's proposals whether a difference in treatment would be unlawful if it could be justified on public policy or other grounds"; and points to voting eligibility as being potentially affected by the Commission's proposal.

This suggestion is a completely unjustified conclusion which could lead an uninformed consultee to believe, for example, that the Commission had actually proposed that two-year-old children

should be permitted to vote. When choosing between the Commission's proposal and Government's proposal, an uninformed consultee could easily be misled into assuming that the Commission's proposal led to absurd consequences. However, this is not the case. As the NIO consultation paper notes at a later stage (10.9), the Commission's advice proposed a general limitation clause to govern the rights it proposed (a proposal which, incidentally, the Government supports, 10.9). Such a limitation clause means that the Commission envisaged that its equality provisions could be limited by public policy and other grounds; yet Government omits this entirely from the consultation paper.

The equality provisions proposed by the Commission do not offer "unlimited" protection against discrimination.

5.6 Democratic rights

The Commission's proposal on democratic rights is similarly mischaracterised (5.21). Government suggests that the Commission has proposed a right to vote without distinction on grounds of age and adds that "[i]t would need to be clear that [the] ... right [to vote] could be subject to reasonable restrictions". Here again, Government inaccurately reflects the content and impact of the Commission's proposal, and disregards the application of the Commission's limitation clause, which would cover the situation described.

5.7 Jury trial

Similar to the previous examples, the NIO consultation paper suggests (9.30) that the Commission proposed an "unqualified right to jury trial" which would create risks of "juror intimidation, the

collapse of trials, a decrease in public confidence, perverse acquittals and a potential breach of Article 6 of the ECHR (e.g. if in particular cases the system was not able to deliver a fair trial)".

This is incorrect. The Commission did not create an "unqualified" right to jury trial and its limitation clause would have accommodated all the concerns raised.

5.8 Sufficient interest test

Government opposes the adoption of a "sufficient interest" test as an appropriate standing test for any Bill of Rights for Northern Ireland (10.19). Here, again, the NIO consultation paper is misleading. It states that the sufficient interest test would result "in satellite litigation to determine if persons or groups do indeed have 'sufficient interest' in the matter". But Government omits to mention that the sufficient interest test is actually already used on a daily basis by the courts in the context of judicial review (indeed, this motivated the Commission to propose this test).³⁴ Courts are already adept and have well-established guidelines for dealing with the sufficient interest test and its parameters are well understood.

5.9 Public authorities

Government suggests (9.24) that it is not appropriate to place an obligation to reintegrate prisoners "on **all** public authorities, since many public authorities will have no involvement with the reintegration of offenders into society".³⁵

³⁴ Commission's advice, p155.

³⁵ Emphasis in original.

It makes the same point in relation to placing an obligation on all public authorities to protect individuals from sectarian harassment (7.11), suggesting “it would not necessarily be appropriate to place such a duty on all public authorities covered by s.75 of the Northern Ireland Act 1998, or indeed all those individuals or organizations who are public authorities for the purposes of the HRA. Not all those carrying out public functions will be in a position to take such steps”.³⁶

These comments are misleading. The fact is that currently, pursuant to the Human Rights Act 1998, all public authorities have an obligation to act compatibly with Convention rights, whether or not the likelihood of violating a particular right falls within their area of competence.

But, more significantly, the Commission’s proposal would have imposed an obligation to take “all appropriate measures”.³⁷ It is clear from the language that the obligation reflected the nature of the public authority and, of course, public authorities with no involvement in the reintegration of offenders would not, in practice, have had any obligation to take measures.

5.10 Victims

Government misrepresents the Commission’s proposal on victims (8.5). The effect of the Commission’s proposal is not to make Article 2 retrospective (as Government suggests); this is a distortion. Rather, the purpose of the Commission’s proposal was to fill a particular gap – related to the particular circumstances of Northern Ireland – in the application of the European Convention on

³⁶ Commission’s advice, p40.

³⁷ Above, p24 and p40.

Human Rights (8.5). It therefore was clear that the proposal applied to effective investigation only of conflict related deaths occurring prior to 2000. The specific recommendation made by the Commission was a directive principle to bring forward legislation separate to the Bill of Rights in relation to victims of the conflict. There is no suggestion in the Commission's advice that this could lead to retrospective application of all ECHR rights and this is an irrational and unfounded suggestion on the part of Government.

5.11 Implementation and enforcement

Chapter 10, in particular, of the NIO consultation paper is very confusing.

Government rejects the Commission's proposal in respect of the relationship between the HRA and any Bill of Rights for Northern Ireland (namely, re-enacting the Convention Rights and Supplementary Rights in new legislation, while maintaining the HRA on the statute book) (10.8). Thus, a consultee may respond by agreeing or disagreeing with Government's rejection of the Commission's advice; but what alternative does Government have in mind? No proposal is even made on this fundamentally important issue.

Even more confusingly, having rejected the option of a unified legislative scheme for Convention Rights and Supplementary Rights, Government then makes criticisms of the Commission's advice which would only apply if the Commission's proposal was actually adopted. In fact, the remainder of the comments assumes that there will be a unified legislative scheme for Convention Rights and Supplementary Rights; but this is nonsensical as Government has rejected the unified scheme (10.8).

For example, on the question of the “reach” of Convention rights, at (10.15), Government states that it believes that “the reach of the Convention rights is unquestionably an area in which a single statutory framework and interpretive regime must apply across the whole of the UK”. But this concern would only make sense if unified legislation were adopted; and Government has rejected this.

Similarly, it notes (10.17) that the effect of a “process-based” obligation would be to “create a distinctly separate regime for enforcing Convention rights in Northern Ireland compared with the rest of the UK”. Again, this is premised, however, on there being a unified scheme, which Government has already rejected. It is not clear, therefore, on what basis this criticism has been made.

Furthermore, when speaking about an interpretive obligation, Government says that the Commission proposes an interpretation framework for the Bill of Rights drawing both on the Preamble (10.2 and 10.3) and on a wider and more purposive duty placed on the courts (including the obligation to take international human rights law into account). Government agrees in principle with the idea of a Preamble, but has some concerns that the wider duty (covering the common law as well as statutory provisions) could lead to different lines of authority emerging in the interpretation of the Convention rights. Subject to any views expressed during the consultation, it believes that any developments in this area should be consistent with current interpretive conventions relating to human rights.

This comment does not make sense within the framework of Government’s own proposal, that it will not re-enact Convention Rights and Supplementary rights together because, if the

Supplementary Rights and the Convention Rights are not in the same legislative framework, how could the interpretive proposal have any impact on the interpretation of Convention Rights at all?

Likewise, the consultation question Government poses on standing is broad (10.19) and refers to “human rights actions against public authorities”, without identifying which human rights (when, again, under its own terms Government has rejected a uniform legislative scheme for Convention Rights and Supplementary Rights).

A similar criticism can be made in the context of remedies (10.25), where Government notes “this is an area in which it is particularly important to have a consistent national approach; and Government would be concerned that establishing different provisions for remedies in Northern Ireland could have unintended consequences across the rest of the UK”.

Again, this is a consequence that could only follow if Supplementary Rights and Convention Rights were enacted in a single legislative scheme, which Government has already rejected.

In short, Government cannot have it both ways: having rejected the Commission’s advice on the relationship between the HRA and the Supplementary Rights, it cannot then criticise the Commission’s other implementation and enforcement proposals using a critique that would only apply if it had, in fact, accepted the Commission’s advice on the relationship between the HRA and the Supplementary Rights. All in all, the reasoning of Government in this Chapter is so confused that the question has to be posed as to whether it even understood the issues.

CONCLUSION

A Bill of Rights for Northern Ireland and the UK process

While the Commission agrees with Government that some recommendations contained in its advice may be equally applicable to the people of England, Scotland and Wales (3.14), it fails to see the significance of this observation. The mandate did not ask the Commission to recommend rights that might be considered relevant to the circumstances of the UK. Rather, it asked the Commission to justify rights supplementary to the ECHR on the basis of the particular circumstances of Northern Ireland. The implication that protections justified in accordance with the mandate should only be capable of having meaningful effect in Northern Ireland and not in other jurisdictions (UK or otherwise) is certainly not in keeping with the Commission's mandate.

The Commission agrees that any rights proposed for inclusion in a Bill of Rights for Northern Ireland must be justified on the basis of the particular circumstances of this jurisdiction, but disagrees that such a basis must be determined by demonstrating that the need for such protections is unique, greater than or different in nature to that in the rest of the UK (3.17). No such requirement was stipulated in the Commission's mandate.

Government has used only one example, that of health provision (3.17), to justify the exclusion of numerous categories of rights, recommended by the Commission for inclusion in a Bill of Rights. Yet, the Commission's recommendations were made having been tested against an agreed methodology clearly laid out in its advice.

That methodology was shared with Government, political parties and civil society prior to the Commission completing its task in 2008. No correspondence was received to suggest that Government considered the methodology to be inappropriate. On the contrary, Government has stated that there is no reason to believe that the Commission had exceeded its mandate.³⁸

A Bill of Rights for Northern Ireland has been committed to by Government since 1998. The idea of a UK-wide bill is a relatively recent one, and indeed the motives for it were very different to the Northern Ireland context. Moreover, there was no mention of a Bill of Rights and Responsibilities in the Belfast (Good Friday) Agreement 1998, the Joint Declaration of 2003 or the St Andrews Agreement of 2006. It is therefore extremely problematic from the perspective of an international peace treaty, as well as the resultant public expectation, for Government to be suggesting now that because some of the rights needed in Northern Ireland *might* also be needed elsewhere in the UK that this jurisdiction will have to wait until that happens.

The NIO consultation paper is an insufficient document on which to embark on a discussion about what should be in a Bill of Rights for Northern Ireland. It pays little cognisance of the international human rights bodies, numerous individuals and organisations that have contributed to the Commission's advice. Legislation of such significance in the context of a peace process, and the constitutional position of Northern Ireland within the UK, is deserving of greater consideration and analysis than appears to have been invested in the NIO consultation paper. As a national human rights institution,

³⁸ Correspondence received by the Commission from the Secretary of State for Northern Ireland, 19 May 2009.

the Commission does not accept this as a genuine effort to increase human rights protections in Northern Ireland.