

5 February 2021

Submission to the Ad Hoc Bill of Rights Committee on the right to equality and non-discrimination

Rationale

This submission highlights the need for a provision on equality and non-discrimination in any Bill of Rights for Northern Ireland.

The right to equality and non-discrimination does not neatly fall into any one or more categories or sets of rights. Rather it is a 'cross-cutting' right which applies across all civil, cultural, economic, social and political rights and other categories of right. Important reasons to provide for a strong and comprehensive equality and non-discrimination clause include the following:

- Whatever rights, privileges or legal entitlements people have in our society, they should be available to and enjoyed equally by everyone; in particular no one should be denied the equal benefit of these rights, privileges and legal entitlements because they belong to a group that has been or is likely to be systematically disadvantaged.
- The right to equality and non-discrimination is especially relevant in the context of the COVID-19 pandemic. The pandemic has highlighted and exacerbated existing inequalities in society. While everyone has been affected by the pandemic, not everyone has been affected equally. The pandemic has disproportionately affected racial and ethnic minorities, women, children, elder persons, people with caring responsibilities, persons with disabilities and health conditions, the economically less-well off, LGBTQ+ persons, and no doubt other groups. A strong commitment to equality and non-discrimination must be central to any effort to rebuild after the pandemic.
- The right to equality and non-discrimination is embedded in human rights treaties that the UK has ratified and a strong and comprehensive provision on equality and non-discrimination would help respect those obligations. Those international obligations take different forms: some deal with discrimination against specific groups (eg women) or on different grounds (eg race).¹ Others deal with the discrimination in the enjoyment of all rights in a treaty

¹ Convention on the Elimination of Discrimination against Women, the Convention on the Elimination of Racial Discrimination, the Convention on the Rights of the Child. 1

(‘accessory protection’).² Other equality provisions require equality in the enjoyment of all rights set forth by law.³ A strong and comprehensive provision on equality and non-discrimination would advance respect for these different international obligations.

- As well as the pandemic and the international obligations there are reasons rooted in the particular circumstances of Northern Ireland that make it relevant and urgent to address equality. The right to equality and non-discrimination is important in the context of a society emerging from conflict and in particular in a society whose constitutional future may take different paths. The impact of the conflict means that Northern Ireland is home to some of the regions of the UK with the highest levels of deprivation; the conflict has left a legacy of physical and mental health problems; and we have a divided society with de facto segregation in education and housing.
- The right to equality and non-discrimination should protect everyone no matter which state is sovereign in Northern Ireland.
- An overarching provision on equality and non-discrimination would also provide some potential coherence to understanding, respecting and teaching equality law in this jurisdiction. In the absence of a Single Equality Bill, equality and non-discrimination provisions are spread across dozens of instances of primary and secondary legislation. A provision in a Bill of Rights would provide a primary reference point for these measures and future developments.
- The right to equality and non-discrimination has a long history of judicial interpretation in different jurisdictions and so judges are well used to dealing with such cases. There are well-developed bodies of case-law and especially so in countries which have more recently adopted equality provisions eg Canada, South Africa and indeed the UK.

For the avoidance of doubt, the right to equality and non-discrimination should be part of a strong and inclusive bill of rights, and in particular one which protects the economic, social and cultural rights of everyone in this society.

Models

There are some models of good practice as to what a right to equality and non-discrimination might look like.

Equality scholars frequently refer to the texts of the 1982 Canadian Charter of Rights and Freedoms and the 1996 South African Constitution.

Section 15 of the 1982 Canadian Charter provides:

² Article 2 International Covenant on Economic Social and Cultural Rights, Article 2 International Covenant on Civil and Political Rights, Article 14 European Convention on Human Rights.

³ Article 26 of the International Covenant on Civil and Political Rights.

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

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

Section 9 of the 1996 South African Constitution reads:

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

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

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

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

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

Drawing on international and comparative examples and inspired by provisions in the Belfast/Good Friday Agreement the NI Human Rights Commission recommended in 2008 that provisions on equality and non-discrimination:

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.

The NIHRC advice has been influenced by these earlier examples, as well as drawing on the particular circumstances of Northern Ireland. All of these models are more developed than earlier more laconic equality provisions eg the 14th Amendment to the US Constitution (ratified 1868):

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.* (italics added).

And the 1937 Irish Constitution is also brief:

Article 40(1)

All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

Key points from these models

There are several points that stand out from the more recent constitutional provisions and the NIHRC advice:

- The equality guarantee should be comprehensive; it should not be limited to equality 'before' or 'under' the law but should extend to the equal benefit and protection of the laws. Canadian and South African drafters have adopted this language because of a concern that the earlier language might only ensure 'formal' equality. To paraphrase Anatole France, formal equality is that majestic equality which prohibits the rich as well as the poor from sleeping under bridges and stealing bread. Incorporating the equal benefit and equal protection of the laws would better respect more substantive models of equality.

- As well as including a right to equality, the provision should prohibit unfair discrimination against on certain grounds. The non-discrimination provision should name those grounds highlighting the most important types of inequality we need to address in this society.
- The non-discrimination provision should be open-ended so that it can be adapted to deal with new forms of discrimination. International treaty texts on equality frequently do this by finishing any enumerated list with 'any other status' and the NIHRC proposal incorporates this.
- The SA provision refers explicitly to the prohibition on direct and indirect discrimination. It would be valuable to make this explicit in any NI Bill of Rights; the NIHRC proposal deals with this by the formulation about 'purpose or effect' in its clause 3.
- There should be an explicit clause to protect proportional measures aimed to improve equality and in particular measures to address the needs of the least well-off, marginalised and disadvantaged. The international treaty provisions typically allow for temporary special measures to promote equality, while recognising that some measures may need to be permanent (eg sign-language provision for people seeking to access services). This should immediately follow the first section on equality to show it is integral to realisation of equality.

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