



Northern Ireland
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Fiona O'Connell

Justice Related Issues in a UK Bill of Rights

1 Introduction

In March 2011, the UK Government established an independent Commission on a Bill of Rights. The terms of reference of the Commission are:¹

- To investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures these rights continue to be enshrined in UK law and protects and extends our liberties;
- To examine the operation and implementation of these obligations and consider ways to promote a better understanding of the true scope of these obligations and liberties;
- To provide advice to the Government on the ongoing Interlaken process to reform the Strasbourg court ahead of and following the UK's Chairmanship of the Council of Europe;²

¹ Commission on a Bill of Rights "Discussion paper: Do we need a UK Bill of Rights?" August 2011

² The Interlaken Process is a process considering the reform of the European Court of Human Rights.

- To consult, including with the public, judiciary and devolved administrations and legislatures, and aim to report no later than by the end of 2012.

The Commission published a discussion paper “Do we need a UK Bill of Rights?” in August 2011. This paper will examine issues in the paper relevant to Northern Ireland. The discussion paper should not be confused with advice given by the Northern Ireland Human Rights Commission (NIHRC) to the Secretary of State for Northern Ireland on a Bill of Rights for Northern Ireland published in 2008³ or the subsequent discussion paper by the Northern Ireland Office on a Bill of Rights for Northern Ireland published in 2009.⁴ The paper also provides information on justice issues emerging in the context of the UK Bill of Rights debate, particularly the report of the Westminster Joint Committee on Human Rights’ inquiry on the UK Bill of Rights and the Government’s Green Paper on rights and responsibilities.

The key points from this paper are:

- The Commission on a Bill of Rights has published a discussion paper on a UK Bill of Rights. The paper does not set out justice related proposals but generally poses the question as to what rights should be included;
- There has been ongoing debate about a Bill of Rights for Northern Ireland. The NIHRC in its advice to the Secretary of State on a Bill of Rights for Northern Ireland recommended that a number of justice related rights be considered. These related to liberty and security, the right to a fair trial and the rights of victims.
- The NIO indicated in its response to the NIHRC’s advice that many of the NIHRC’s recommendations had a UK wide relevance. The NIO recognised there may be some NI specific considerations relating to dealing with suspects, witnesses and members of the legal professions.
- The Joint Committee on Human Rights at Westminster has indicated that there are a number of justice related rights that could be included in a UK Bill of Rights. These include: the right to a jury trial in serious cases in England, Wales and Northern Ireland; access to court and legal aid where it is in the interests of justice; and possible provisions for specific groups including children and victims of crime.
- The previous Government in response to the Joint Committee’s report did not make any commitment relating to the right to jury trial, suggesting that Article 6 of the ECHR and domestic legislation provide protections. However the Government left open the possibility of specific provisions for specific groups such as children and victims of crime to be included in a future UK Bill of Rights. The 2009 Green Paper on “Rights and Responsibilities” suggested that the former Government would not include a right to jury trial in a Bill of Rights.

³ NIHRC “A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland”, December 2008, http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/51/A_Bill_of_Rights_for_Northern_Ireland_%28December_2008%29.pdf

⁴ Northern Ireland Office “A Bill of Rights for Northern Ireland: Next Steps” November 2009, http://www.nio.gov.uk/consultation_paper_-_a_bill_of_rights_for_northern_ireland_next_steps.pdf

2 UK Bill of Rights Discussion Paper

The discussion paper published by the Commission on a Bill of Rights sets out four questions for consultation:⁵

1. Do you think we need a UK Bill of Rights?
2. If so, what do you think a Bill of Rights should contain?
3. How do you think it should apply to the UK as a whole, including its four component countries of England, Northern Ireland, Scotland and Wales?
4. Having regard to our terms of reference, are there any other views which you would like to put forward at this stage?

The paper provides background information on the UK's human rights framework. The framework includes:

- The UK Constitution –The UK unlike most other democratic countries does not have a written constitution or a charter of fundamental rights. Therefore no British rights are fundamental in that they enjoy special protection against Parliament. The principle of the liberties of the subject is derived from two principles. The first is that we do as we please provided we do not transgress the substantive law or the legal rights of others; the second is the requirement that the Crown and public authorities need legal authorisation to act;
- Parliamentary Sovereignty- the power to legislate can only be exercised by Parliament and Parliament cannot limit the power of a future Parliament to amend or repeal legislation;
- The Rule of Law- it is the responsibility of the independent judiciary to interpret and apply the law impartially and fairly, free from the interference of Government;
- International Human Rights Declarations and Conventions including, the Universal Declaration on Human Rights (UDHR), adopted by the UN General Assembly in 1948 and two UN Covenants- on Civil and Political Rights and on Economic, Social and Cultural Right, both of which came into force in 1976. There are several other UN human rights conventions, against torture, race discrimination, and sex discrimination, protecting the rights of the child and persons with disabilities. These are binding in international law on the UK but have not been incorporated into domestic legislation.
- The European Convention on Human Rights (ECHR) which was ratified by the UK in 1951. The convention contains mainly civil and political rights such as the right to life (Article 2), freedom from torture, inhuman and degrading treatment (Article 3), the right to liberty (Article 5) and the right to a fair trial (Article 6).

⁵ Commission on a Bill of Rights "Discussion paper: Do we need a UK Bill of Rights?" August 2011. 4

However it also contains some social-economic rights such as the right to form trade unions in Article 11, the right to legal aid in Article 6, the rights to education and property in Protocol 1 and the prohibition of forced labour in Article 4. The ECHR has been partially incorporated into domestic legislation by the Human Rights Act 1998 which terms the ECHR rights 'convention rights'. Furthermore, Northern Ireland Act 1998 provides that Ministers or Departments cannot make legislation which is incompatible with convention rights.

The discussion paper also provides information on scrutiny mechanisms in the UK to ensure compliance with convention rights and other international human rights treaties. These include the Parliamentary Joint Committee on Human Rights and the Equality and Human Rights Commission.

3 Northern Ireland

The UK Bill of Rights discussion paper does not set out any proposals on how a UK Bill of Rights would relate to the devolved jurisdictions. It asks for responses to the question about this relationship (question 3, above).

The discussion paper makes a number of background points on Northern Ireland. These are as follows:⁶

- The Northern Ireland Act 1998 provides that Ministers and Departments are not permitted to make acts that are incompatible with convention rights and the Northern Ireland Assembly is not permitted to legislate in a way that is incompatible with the ECHR;
- The Northern Ireland Human Rights Commission (NIHRC) is required by statute to advise the Secretary of State for Northern Ireland on the scope of defining, in a Bill of Rights for Northern Ireland to be enacted by the Westminster Parliament rights supplementary to those in the convention. The Belfast (Good Friday) Agreement states that the Bill should reflect the particular circumstances of Northern Ireland drawing on international law and experience;
- In December 2008, the NIHRC presented its advice on a Bill of Rights for Northern Ireland to the Government.
- The Government published its paper "A Bill of Rights for Northern Ireland: Next Steps" for consultation and the NIHRC submitted a written response to that paper.

⁶ Commission on a Bill of Rights "Discussion paper: Do we need a UK Bill of Rights?" August 2011,10.

In this context, it may be useful to consider the NIHRC advice mentioned in the discussion paper and the subsequent NIO consultation, highlighting the justice relevant issues.

The NIHRC advice to Government on a Bill of Rights for Northern Ireland published in December 2008 contained a number of recommendations on provisions that should be included in a Bill of Rights for Northern Ireland that are relevant to the area of criminal justice. The NIHRC suggested the following rights should be incorporated into a Bill of Rights for Northern Ireland under the right to liberty and security in addition to Article 5 of the ECHR:⁷

- Everyone who is arrested or detained has the right to consult promptly or privately with a legal representative and of prompt access to a medical examiner;
- Everyone who is arrested or detained has the right to be visited by a family member;
- 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;
- Public authorities must take all appropriate measures to reintegrate into society those in detention or alternative care by providing support, prior to or after discharge, towards independent living;
- Every child or vulnerable adult under arrest, held in detention without charge or being charged, has the right to a legal representative and appropriate adult present to represent their best interests;
- Every child alleged to, accused or proven to have committed a criminal offence has the right to be treated in a manner which pays due regard to the child's age, understanding, and needs and is directed towards the child's reintegration into society;
- Every child has the right not to be detained except as a measure of last resort, in which case the child may be detained for the shortest 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.
- 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 NIHRC also recommended the following rights should be incorporated in a Bill of Rights for Northern Ireland relating to the right to fair trial and no punishment without law in addition to Article 6 of the ECHR:⁸

⁷ NIHRC "A Bill of Rights for Northern Ireland : Advice to the Secretary of State for Northern Ireland" December 2008, 24-5

⁸ NIHRC "A Bill of Rights for Northern Ireland : Advice to the Secretary of State for Northern Ireland" December 2008, 27

- Everyone has the right to a trial by jury for serious offences and the right to waive it;
- Evidence obtained through torture, inhuman or degrading treatment must be excluded. Evidence obtained through the breach of any other right in a Bill of Rights for Northern Ireland must be excluded unless it is established that the admission of evidence would not render the trial unfair or otherwise be detrimental to the interests of justice;
- 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 their desirability of promoting rehabilitation;
- Every witness has the right to support and protection before and after giving evidence and support as is appropriate to their needs as witnesses;
- Every juror has the right to such protection and support to allow them to fulfil their role properly;
- Every member of the judiciary and legal profession has the right to such protection so as to allow them to fulfil their role properly.

The NIHRC also included provisions on the rights of victims of crime supplementary to convention rights including the right to appropriate material, medical, psychological and social support and the right to be informed about the progress of the investigation and relevant proceedings.⁹

The Northern Ireland Office (NIO) published its consultation “A Bill of Rights for Northern Ireland: Next Steps” in December 2009. Much of the NIHRC’s advice on recommendations for a Bill of Rights is not reflected in the NIO’s consultation paper. The NIO highlighted that some of the issues might be more appropriately considered as part of the wider UK Bill of Rights debate. The NIO indicates in its consultation paper that recommendations relating to the treatment of children are not unique to Northern Ireland but are of similar importance across the UK and should therefore find their place in the national debate.¹⁰ The Government also suggested that recommendations made by the NIHRC on proposed rights on evidence procured through torture and court procedures for children and vulnerable adults are of equal significance throughout the UK.¹¹ However the Government acknowledged in the paper that there are issues around the treatment of suspects or prisoners, trial by jury and the security of judges and lawyers which may have particular resonance in Northern Ireland due to the history of the conflict.¹² The consultation paper proposed to consider whether there was any provision that might be made about the treatment of suspects and access to lawyers and medical practitioners, to help allay concerns arising from the past. The consultation

⁹ NIHRC “A Bill of Rights for Northern Ireland : Advice to the Secretary of State for Northern Ireland” December 2008, 43

¹⁰ Northern Ireland Office “A Bill of Rights for Northern Ireland: Next Steps”, November 2009, 66

¹¹ Northern Ireland Office “A Bill of Rights for Northern Ireland: Next Steps”, November 2009, 76

¹² Northern Ireland Office “A Bill of Rights for Northern Ireland: Next Steps”, November 2009, 65

also proposed to consider whether any further measures are needed to provide support and protection to witnesses, jurors, judges and lawyers.¹³ To date there has been no progress made on the implementation of the proposals set out in the NIO consultation paper.

4 What justice related rights should be included in a UK Bill of Rights?

The discussion paper on the UK Bill of Rights does not set out any proposals relating to justice issues in a UK wide or in a Northern Ireland context.

However the Joint Committee on Human Rights at Westminster conducted an inquiry on a Bill of Rights for the UK in 2008. The Committee recommended that a Bill of Rights for the UK should include a right to trial by jury in serious cases in England, Wales and Northern Ireland. There is no tradition of jury trial in Scotland's criminal justice system.¹⁴ The Committee emphasised that limitations on this right would be possible if they can be shown to be justified. Therefore Parliament could continue to look at the questions of limitations on the right and would be entitled to restrict it where it can be shown to be necessary to meet another important objective.¹⁵ The Joint Committee identified other possible candidates for inclusion in a Bill of Rights which are already recognised by common law such as access to court. Another area identified as a candidate for inclusion and associated with the common law right of access to court is the right to legal aid where the interests of justice require it.¹⁶ The Committee indicated there was a strong case for any Bill of Rights to include detailed provisions for certain vulnerable groups such as children and also recommended there should be a consultation as to whether to include specific rights for other groups including victims of crime, amongst others.¹⁷

The previous government's response to the Joint Committee's recommendations did not make any explicit undertaking about the right to a jury trial but highlighted that Article 6 of the ECHR protects the rights of the accused to a fair trial and much domestic legislation complements these rights.¹⁸ The government left open the possibility that a

¹³ Northern Ireland Office "A Bill of Rights for Northern Ireland: Next Steps", November 2009, 102.

¹⁴ House of Lords House of Commons Joint Committee on Human Rights "A UK Bill of Rights? Twenty- Ninth report of session 2007-2008.HL Paper 165-1, HC 1501-1, 10 August 2008 ,38

¹⁵ House of Lords House of Commons Joint Committee on Human Rights "A UK Bill of Rights? Twenty- Ninth report of session 2007-2008.HL Paper 165-1, HC 1501-1, 10 August 2008.38

¹⁶ House of Lords House of Commons Joint Committee on Human Rights "A UK Bill of Rights? Twenty- Ninth report of session 2007-2008.HL Paper 165-1, HC 1501-1, 10 August 2008 39

¹⁷ House of Lords House of Commons Joint Committee on Human Rights "A UK Bill of Rights? Twenty- Ninth report of session 2007-2008.HL Paper 165-1, HC 1501-1, 10 August 2008 42

¹⁸ House of Lords House of Commons "A Bill of Rights for the UK: Government Response to the Committee's Twenty Ninth Report of Session 2007-2008". Third Report of Session 2008-2009. HL paper 15, HC 145, 17.
<http://www.publications.parliament.uk/pa/lt200809/jtselect/jtrights/15/15.pdf>

future UK Bill of Rights could make special provision for vulnerable groups such as children and victims of crime.¹⁹

Subsequently the Lord Chancellor and Secretary of State for Justice published a Green Paper: "Rights and Responsibilities developing our constitutional framework" in 2009.²⁰ The then government indicated it was open to considering including victims' rights in a bill of rights.²¹ The Green Paper acknowledged that some people thought habeas corpus²² and jury trial should be included in a bill of rights; however the Government did not think the case was made out for these.²³

The Green Paper also suggested including responsibilities relating to criminal justice matters, such as reporting on criminal activity and playing roles in the criminal justice system.²⁴

¹⁹ House of Lords House of Commons "A Bill of Rights for the UK: Government Response to the Committee's Twenty Ninth Report of Session 2007-2008". Third Report of Session 2008-2009. HL paper 15, HC 145,19

²⁰ Secretary of State for Justice and the Lord Chancellor, *Rights and Responsibilities: Developing our constitutional framework* (Ministry of Justice, London 2009) Cm 7577

²¹ Secretary of State for Justice and the Lord Chancellor, *Rights and Responsibilities: Developing our constitutional framework* (Ministry of Justice, London 2009) Cm 7577, paragraph 3.17-3.23.

²² Habeas Corpus is a legal writ which allows an individual to seek relief from unlawful detention

²³ Secretary of State for Justice and the Lord Chancellor, *Rights and Responsibilities: Developing our constitutional framework* (Ministry of Justice, London 2009) Cm 7577, paragraph 3.31.

²⁴ Secretary of State for Justice and the Lord Chancellor, *Rights and Responsibilities: Developing our constitutional framework* (Ministry of Justice, London 2009) Cm 7577, paragraphs 2.28-2.30.