

Submission to Northern Ireland Assembly Ad Hoc Committee on a Bill of Rights

by

Lady Trimble

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I was a member of the Northern Ireland Human Rights Commission which presented its advice on a Bill of Rights for Northern Ireland to the then Secretary of State for Northern Ireland on 10 December 2008. I dissented from the advice, and separately submitted my own note of dissent to the Secretary of State. The Government agreed with my view and rejected the advice. As the issues are all still live, I attach my note of dissent as an appendix.

Human rights of course long predate the twentieth century international declarations and Conventions on human rights, going back through the American Declaration of Independence to Magna Carta and beyond. The concept of individual freedom has been central to the unwritten British constitution as it has evolved over centuries.

Following the carnage of two world wars there was an appetite to set out basic rights for individuals which would guarantee for every individual in a state certain basic minimum standards.

The European Convention on Human Rights was first agreed in 1950, with various protocols added in subsequent years. The Convention created a European Court of Human Rights, having jurisdiction as between signatory countries, and jurisdiction to hear applications from individuals. The procedure for cases to be brought by individuals was complex and slow.

In 1998, after the Belfast Agreement, the provisions of the European Convention were incorporated into domestic law as the Human Rights Act 1998. Thereafter any alleged breach of human rights law could be decided by domestic courts. As a consequence two separate bodies of case law, those cases decided by the ECHR, and domestic cases fall to be taken into consideration.

It is important to consider the practical implications of including any particular provision in a Bill of Rights for Northern Ireland.

By its very nature a Bill of Rights is intended to be a fundamental document, underpinning and overarching all other legislation. The effect of this is that legislation, whether enacted in the future by the Northern Ireland Assembly or by Westminster, or existing legislation will be justiciable; that is any person may bring a legal case to argue that a particular piece of legislation or a particular method of implementation of any legislation is contrary to any particular human right in a Bill of Rights.

This means that decision making in these cases shifts from elected members of the legislature to unelected members of the judiciary. But the judges do not rule on

legislation as a whole. They can only rule on the particular facts of a case brought before them.

We know from experience that many cases involving existing human rights law are brought with the assistance of NGOs, some of which have deep pockets, or wealthy individuals, who seek out individuals who might have a case to bankroll their case. These cases will be designed to forward the political views of the funder. This is not speculation, it has already happened.

The effect of human rights legislation is to remove power from elected politicians, and give that power in perpetuity to unelected judges. And it follows that the funding NGOs become more powerful.

It also follows that elected politicians find their ability to act is circumscribed, and consequentially the ability of the voter to decide what happens in the country is diminished significantly.

By their very nature, NGOs are undemocratic.

So let us be very clear, any additions to human rights, never mind whether the particular provisions are desirable or not, has the effect of removing that issue from the control of our elected representatives and giving control to the judiciary, and by extension to the group of funding bodies with deep pockets. In other words, we diminish democracy by adding to human rights legislation.

One very particular problem that we in Northern Ireland have had with human rights legislation is that it is designed to apply to state actors, while the majority of the human rights abuses during what I still refer to as the 'Troubles' were committed by non-state actors. Committee members will be well aware of all the thorny issues in our community around legacy, victims, survivors, inquiries that continue to be very real problems. These are the 'particular circumstances' that the Human Rights Commission should have been addressing, but failed to.

The Commission wanted to include socio-economic rights in a Bill of Rights. I will refer only to one of them, healthcare. The Commission proposed this:

*'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.'*

In the UK all individuals who lawfully reside in the country are entitled to healthcare from the NHS free at the point of delivery. It is not set out in any Human Rights Act, or Bill of Rights, but it is the ethos that has underpinned government policy and healthcare legislation since the inception of the NHS. The NHS has become part of the fabric of society, almost a religion. Yet we all know in these pandemic days that the NHS is stretched as never before, and has had to make choices around delivery of planned healthcare which impact on individuals. Resources are finite. If the

above health clause was incorporated in current legislation, we would likely find the NHS, and possibly the Minister for Health being sued by someone whose cancer operation had been cancelled. A judge would have to inquire into the allocation of resources leading to such a decision, and potentially give directions as to future allocation of resources.

Politicians are the ones who are elected to make these decisions. Members of this committee know very well that if they don't do the job well enough, the electorate will give them their marching orders at the next election.

Allocating resources and ensuring that they are used appropriately is the task of government. Committee members will understand through their own experience just how difficult that is. Do we want to make that task even more difficult?

The committee will also want to consider the effect there would be on our society of having different Human Rights laws in Northern Ireland from the rest of the UK, or indeed from the rest of Europe. Northern Ireland is not a large economic region. Do we want to become so different in these regards?

There are practical questions too. What would be the extra workload for our legal system? Would our courts have the capacity to cope? What would happen to decision making when a particular issue was awaiting trial? I don't have answers, but these practical outworkings all need to be considered in advance of any changes.

## APPENDIX

### **Note of Dissent to NIHRC's advice to Secretary of State on a Bill of Rights for Northern Ireland**

#### INTRODUCTION

The Belfast Agreement is the foundation document for our current political arrangements. It required the Northern Ireland Human Rights Commission to advise the Secretary of State on the scope for defining in legislation rights, which the Agreement explicitly states are (a) supplementary to those currently protected under the European Human Rights Convention and the UK Human Rights Act, and (b) to reflect the particular circumstances of Northern Ireland. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem.

A fundamental difference arose in the Commission concerning its remit. In my view the rest of the Commission misinterpreted its mandate and many of the additional rights suggested by the majority have nothing to do with the required "principles of mutual respect for the identity and ethos of both communities and parity of esteem. I

am firmly of the opinion that the Agreement does not ask the Commission to draft a Bill of Rights for Northern Ireland. The other members of the Commission, however, took the view that they could go beyond the terms of the Agreement and proceeded to work towards providing detailed drafting instructions on possible Bill of Rights clauses, effectively drafting such a bill. I disagree with this approach. I have found myself also in disagreement with many aspects of the detailed clauses proposed by the Commission.

Consequently I am unable to endorse the report of the majority of the Commission.

I thought that the Commission's report should include some reference to the views of the minority. But the majority on the Commission decided that there should be no minority report. The report now notes my dissent.

I am now publishing what is essentially the minority report that I offered to the Commission. I am doing this so that the Secretary of State and the public debate on this matter, should be better informed as to the views of all the members of the Commission.

I do acknowledge the doctrine of collective responsibility. However, the large number of disputed proposals and the scale of the disagreement meant that I could not offer my support to the document. This is regrettable. The Report being issued by the Commission is the Report of the Commission, and I shall do nothing to gainsay that. However I firmly believe that human rights requires in cases such as this a fair balance between the competing and legitimate rights – and that is all I seek in publishing this Dissent.

Publication has been the accepted mode previously. The Standing Advisory Commission on Human Rights (SACHR) – our predecessor body – published a “Note by Dissenting Member” in its 1997 report *Employment Equality: building for the future*. Similarly in its original report on a Bill of Rights published in 1977 and entitled *The protection of human rights by law in Northern Ireland*, it allowed a “short Note of Dissent.” In its 1987 document *Religious and political discrimination and equality of opportunity in Northern Ireland: report on fair employment*, SACHR permitted a substantial “Dissenting View” by three members to be published.

It is surely right that any organisation should permit any member who is in a minority to express his or her views on matters of principle by way of a Minority Report to be published with the Report of the majority. I deprecate in the strongest possible terms that I am denied by the majority on the Commission this reasonable right to express views on the matters of principle on which I differ from the majority of members. I have given freely of my time for very many months to this process but now find myself in a position where I cannot find any proper reconciliation between my views and the majority view.

#### THE COMMISSION'S REMIT

The Agreement is underwritten by an international treaty and it was endorsed at a referendum in Northern Ireland by 71% of those voting, with a turnout of just over

80%. (A similar referendum was held in the Republic of Ireland and the people there voted by an even more massive majority in favour.)

That result is the bulwark for the system which underpins the continuing peace in Northern Ireland. We must therefore give the utmost respect to what the people voted for, and that means affirming the integrity of the Agreement, and its text. If it is to be implemented in full, it is the terms set out in the Agreement which are to be implemented. That remit within the Agreement, endorsed in section 69(7) of the Northern Ireland Act 1998 required us:

“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 – to constitute a Bill of Rights for Northern Ireland.”  
[Rights, Safeguards and Equality of Opportunity, para. 4]

That passage ends with a reference to a Bill of Rights for Northern Ireland. It is clear, however, that the Bill is to be constituted by the European Convention and by additional rights which reflect the “particular circumstances of Northern Ireland”, and must reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem. The remit of the advice is limited by these conditions. I am of the view that the Commission’s advice goes beyond the remit of this guidance. So the Commission should accept the ECHR - the language quoted makes it clear it is not entitled to change any part of the Convention – as it has done in its advice - and add only matters reflecting the particular circumstances of Northern Ireland and reflecting the principles of mutual respect for the identity and ethos of both communities and parity of esteem. Note too that it is not **any** circumstance that is relevant, but only **particular** circumstances. Clearly there is scope for discussion as to what comes within that definition. But there is no justification for disregarding completely the clear words of the Agreement.

I think the relevant particular circumstances are to be found by looking at the Agreement and its context. The Agreement addresses the decades of conflict within Northern Ireland between people divided on ethnic, religious and political grounds, with their mutual hostility leading to a near boycott of the “other” in political, economic and social life. The Agreement sets out constitutional, political and administrative arrangements as a modus vivendi and prevents a continuation of unbridled paramilitarism. Consequently when the participants agreed the phrases they were contemplating that bitter division and asking the Commission to consider if there were rights which could contribute to the alleviation of that division. This view is reinforced by the statement that those rights are to reflect mutual respect for the two communities, their identity and ethos and parity of esteem.

My point is reinforced by the fact that many of the societal problems identified by the Commission (and by the Forum) and addressed by the suggested clauses in the Commission’s advice are not arising from the “particular circumstances of Northern Ireland” but are in fact common problems across the UK, Ireland and many other countries all over the world. The socio-economic problems of housing, poverty and

deprivation are replicated in disadvantaged communities across all parts of the UK. These are fundamentally social problems to be addressed through government not through a Bill of Rights.

For solemn agreements to mean anything, their words must receive a proper and reasonable interpretation. When the words "Implement the Agreement in full" are used, they do not mean "Go way beyond the terms of the Agreement". The latter seems to be the position of the Commission majority and, when exercised by a nominated body to override choices properly within the scope of elected representatives, creates the danger of a new authoritarianism in Northern Ireland. Too free an approach to interpretation ends up with the interpreter displacing the original author's intent. *"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean – neither more nor less.....The question is, which is to be master – that's all."*<sup>1</sup>

## COMMENT ON SPECIFIC PROPOSALS

There are many comments I could make on the details of the report, a few of which I want to highlight.

### Equality rights

The non discrimination clause goes far beyond current legislation and the particular circumstances of Northern Ireland. The proposed categories expand significantly those contained in article 14 of the ECHR. I am of the view that the extension of this list is in no way connected to the "particular circumstances of Northern Ireland". The list also goes far beyond those contained in s.75 of the Northern Ireland Act. In addition to this, the Commission are proposing making these rights free standing rights. This approach was firmly rejected by the House of Commons during the passage of the Human Rights Act 1998 for good reason; I believe the Commission should abide by the democratically elected chamber on this issue.

### Democratic rights

The report proposes to enshrine proportional representation and inclusive participation in regional government in the bill of rights. The Agreement, of course already provides for this. Putting them in a bill of rights would be contrary to the agreement which by providing for reviews of its provision contemplates the possibility of the parties changing these provisions. The commission has no right to forbid our elected representatives from making changes in the future. The extension to local government is equally egregious.

I take particular objection to the Commission's apparent suggestion to enshrine the principle of so called "positive "discrimination in a bill of rights.

### Identity and culture

The commission was specifically tasked by the agreement to consider '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'. The

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<sup>1</sup> *'Through the Looking Glass'* Lewis Carroll

report merely repeats what the commission was asked to consider. The remit has not been fulfilled.

#### Socio-economic rights

“Rights” relating to health, standard of living, accommodation, work, the environment and social security simply do not specifically appear in the European Convention on Human Rights. To include them for Northern Ireland only separates us in human rights legislation from every other European country. Their inclusion in the Bill of Rights for Northern Ireland is to give the judiciary a role in government which is properly a role for elected representatives, namely, over the allocation of resources and is a denial of the rights of democratically elected representatives. The rightful democratic role of the Northern Ireland Assembly needs to be respected. These additional rights do not arise from the “particular circumstances of Northern Ireland” nor do they reflect mutual respect and parity of esteem between the two communities in accordance with the remit set by the Agreement. The matters specified are common societal problems across the UK and all other countries and as I have indicated are the responsibility of democratically elected representatives rather than for the Courts.

Opportunities for addressing the social, economic, health, housing and environmental needs of our communities, in human rights terms, are the proper concern of the Commission and it is entitled, as it has done and intends to do under section 69(3)(b) of the Northern Ireland Act 1998, to separately provide advice to the Secretary of State on ways to address them.

Progressive realisation is a very recent concept in human rights law, originally considered for use in developing countries, where resources are scarce. No European country includes this concept in its human rights legislation. It fetters the powers of government, and it will not give relief to an individual litigant, but it will give the public the false impression that a right has been created. It is wholly outwith our mandate.

These are just some of my many objections to the detail of the recommendations.

#### Implementation

The report is to be legislated by Westminster, yet it recommends amendment only by Westminster **and** the Assembly on a cross community vote. I sincerely hope that this will be rejected by Parliament. In any event, it would require a special procedure in Northern Ireland to amend that which Northern Ireland had no say in enacting – this is obviously unfair, and is clearly intended to make the bill of rights unamendable in practice. The Commission did not realise that this could prevent us from benefiting from subsequent advances in human rights provisions.

The more restrictive derogation clause, the expanded definition of public authority, the expanded definition of persons or bodies who will have standing to bring an action, will apply to all the existing provisions of the Human Rights Act proposed to

be incorporated in the Bill of Rights – so these rights will be applied differently in Northern Ireland from the rest of the United Kingdom, making the existing Human Rights Act effectively redundant in Northern Ireland. I am of the view that this will create serious difficulties in the interpretation and jurisprudence of the Human Rights Act 1998, This has the potential to have a significant impact on human rights jurisprudence, not only in the Northern Ireland but across the UK. These matters all go far beyond our terms of reference.

The responsible Northern Ireland Office Minister, Des Browne, criticised the previous Commission's 2001 report as follows:

*“The consultation document rightly makes the point that the Agreement said that any supplementary rights were to reflect the particular circumstances of Northern Ireland. However, there are a number of areas where proposals appear to be made without reference to this test. For example:*

- the recommendations on elections;*
- the question of a right to accountable and transparent government;*
- the proposed rights in respect of access to data;*
- the recommendations relating to the rights of children;*
- the recommendations in respect of social and economic rights.....*

*“There are a number of rights which in my view would be difficult to make justiciable, for example:*

- ‘everyone is entitled to an adequate standard of living sufficient for that person and those dependent on him or her’;*
- people being entitled to the ‘highest attainable standard of physical and mental health and well-being’....”*

*“The restriction of access to victims, rather than other interested parties was clearly an important principle in framing the Convention. It is right that denials or abuses of rights are dealt with at the level at which they are felt most – the level of the individual.”*

Unwisely this Commission has taken no cognisance of what the government's last known position on its work was.

## THE WASTED OPPORTUNITY

I believe that in our advice, properly respectful of our mandate, we should have focused on the scope for defining supplementary and additional rights to the ECHR relating to the particular circumstances of Northern Ireland and which would reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem. If we had properly engaged in that exercise we would have dealt thoroughly with the areas of language, education, citizenship, emergency laws, and parades. I remain to be persuaded that other areas properly come within the remit.



The majority of the Commission synthesised the Consultation Document of 4 September 2001 (and its April 2004 Update) of the previous Commission with much of the Bill of Rights Forum Report of 31 March 2008, introducing some elements from the report of the joint committee of the House of Lords and House of Commons of July 2008. But as the Bill of Rights Forum Report itself noted, there were deep divisions between the political representatives of the two communities on a wide range of issues. On the Forum Report too there was sharply divided political opinion on almost all its proposals. Both those documents were also based on the very same and serious misinterpretation of the remit in the Belfast Agreement which the majority in this Commission seeks to perpetuate. Consequently, both these documents are erroneous and terribly flawed.

The Forum report was rejected in the Assembly. The motion carried there by a vote of 51 to 33 in April 2008, the majority including the Alliance Party, reads "That this Assembly expresses its grave concern at the lack of cross-community support for the recommendations contained in the Report of the Bill of Rights Forum; and strongly urges the Northern Ireland Human Rights Commission to ensure cross-community support for its advice to the Secretary of State." Regrettably that motion was given minimal, if any, consideration during the Commission's drafting process.

It is notable that the majority view on the Commission's remit differs from the advice contained in counsel's opinion commissioned from John Larkin QC.

I tried to achieve, by compromise, an effective consensual Report. But as time progressed the project has shown few signs of falling within our remit. Rather the opposite, as several areas of particular reference to our conflict were put to one side, such as parades, and at the same time the majority sought to impose a maximalist agenda.

## MY MINORITY POSITION

I am committed to human rights or I would not be on the Commission. That I am in the minority does not entitle the majority to claim that they are better protectors of human rights. On the contrary they endanger human rights because they weaken respect for the rule of law and agreements when the latter are not respected.

Some rights, like some laws, are far from popular, and it is the strength of our rights-based democratic system that minorities, the vulnerable, the law breaker and those who abide by the law have access to due process and equal protection under the law. However human rights are not an alternative to politics even if their introduction through legislation will often be highly political.

I also record a great sense of sadness at the opportunity that this Commission and the previous Commission have wasted and thrown away by failure to respect, observe and faithfully follow our proper mandate. The Commission was asked to address our particular circumstances, namely those arising from the distressing fault line between our "two communities". There is little if anything in the majority Report to address these - if anything, they have been avoided - I instance the right to

freedom of peaceful assembly and parading and issues relating of the display of flags and emblems.

I do not claim that we would have reached a solution facilitating the exercise of these or the proclamation of new rights. But at least we would have been doing what we were asked to do by the Agreement: and detailed debate and consideration of such issues could of itself have been a positive contribution.

In conclusion, the Agreement was asking us to consider whether there could be any additional human rights that could help to bring the two communities at least closer or create 'common ground' in some mutual respect for some specific human rights addressing the causes of our divisions. To me it is a matter of the deepest regret that the majority of the Commission has failed to face up to this task.

Commissioner Daphne Trimble

10 December 2008