

COMMENTS BY BRITISH IRISH RIGHTS WATCH ON THE NORTHERN IRELAND OFFICE CONSULTATION PAPER "A BILL OF RIGHTS FOR IRELAND - NEXT STEPS"

"In my opinion the rigidity of the first alternative is contrary to the Agreement's most fundamental purpose, namely to create the most favourable constitutional environment for cross-community government."

Lord Hoffman in *Robinson v Secretary of State for Northern Ireland and Others* [2002] UKHL 32 at paragraph 30

1. Introduction

- 1.1 British Irish RIGHTS WATCH (BIRW) is an independent non-governmental organisation that has been monitoring the human rights dimension of the conflict, and the peace process, in Northern Ireland since 1990. Our vision is of a Northern Ireland in which respect for human rights is integral to all its institutions and experienced by all who live there. Our mission is to secure respect for human rights in Northern Ireland and to disseminate the human rights lessons learned from the Northern Ireland conflict in order to promote peace, reconciliation and the prevention of conflict. BIRW's services are available, free of charge, to anyone whose human rights have been violated because of the conflict, regardless of religious, political or community affiliations. BIRW take no position on the eventual constitutional outcome of the conflict.
- 1.2 BIRW had advocated a Bill of Rights for Northern Ireland long before the welcome all-party commitment- made under the Belfast/Good Friday Agreement, later re-affirmed in the St Andrews Agreement. We note the recent Hillsborough Castle Agreement on the devolution of policing and justice signed on 5 February 2010 where a further commitment was made: "The First Minister and Deputy First Minister will oversee an exercise of examining the St Andrews Agreement and identifying all matters contained within it which have not been faithfully implemented or actioned. The First Minister and Deputy First Minister will provide a report to the Executive by the end of February detailing the level of progress made on each outstanding matter." This exercise would, of course, include the implementation of a Bill of Rights for Northern Ireland.
- 1.3 BIRW's advocacy over many years for a Bill of Rights for Northern Ireland has included hosting conferences, bringing international experience to bear on the issue, and contributing to innumerable consultations and policy debates, including most recently commenting on the Northern Ireland Human Rights Commission's draft Bill of Rights Advice. We, together with many other civil society organisations, are therefore in a good position to assess the need and desire for, and content of, a Bill of Rights for Northern Ireland.
- 1.4 It is with regret that we have concluded that the Northern Ireland Office has failed to engage with the Advice offered by the Northern Ireland Human Rights Commission, and that we are not prepared to

dignify it with a response. Together with our colleagues at the Committee on the Administration of Justice it should be noted that, “Whilst we are responding to the consultation, we are not responding to the detailed proposals of the consultation paper since we do not consider it to be a document that genuinely engages with the human rights commitments set out in the Belfast/Good Friday Agreement twelve years ago. The legitimate expectations of the people of Northern Ireland have been failed by the Government.”¹ We fully endorse this statement by the Committee on the Administration of Justice and are certain that it reflects the opinion of many civil society organisations including the Northern Ireland Human Rights Consortium and the Northern Ireland Human Rights Commission itself.

2. **The Belfast/Good Friday Agreement**

2.1 The Belfast/Good Friday Agreement has been the foundation of peace in Northern Ireland since 1998. There is a commitment to rights in the Agreement as noted in the declaration of support:

“The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to *the protection and vindication of the human rights of all.*” (our emphasis)

The best mechanism to maintain the rule of law when it is under threat is to strengthen respect for rights. To do otherwise is to locate power with the state as opposed to the people whom the state serves. In a society as divided as Northern Ireland with a fragile political culture and an immature democracy, where violence continues just below the surface, the guarantee of rights is a central mechanism in continuing to maintain the peace. It is also essential for helping society to move forward and away from its violent past. A Bill of Rights is both a positive piece of the architecture of reconciliation with the past, in that it replaces conflict with positive values, and a crucial building block for the future, in that it represents a shared set of values which will cement the peace.²

¹ Submission by the Committee on the Administration of Justice (CAJ) on “A Bill of Rights for Northern Ireland – Next Steps” February 2010. The Commission’s own position is clearly states in its press release accompanying its own response: “The NIO consultation paper is an inadequate response to what should be in a Bill of Rights for Northern Ireland. The Commission believes the consultation: Demonstrates a lack of understanding of the purpose and functions of a Bill of Rights, fails to take appropriate account of international human rights standards, appears to be suggesting the lowering of existing human rights standards in Northern Ireland, fails to satisfy the minimum common law consultation requirements, and misrepresents the advice given by the Commission” (17 February 2010).

² See the comment of then Secretary of State for Northern Ireland Peter Mandelson in September 2000 at paragraph 2.3 page 9 of the Consultation that

2.2 Therefore, a Bill of Rights for Northern Ireland as a fundamental commitment made within the Agreement was a move toward the central tenet of protecting the rights of all in the future. Understanding this link between the peace and rights is crucial, as is a recognition that it represents a compact with the population of Northern Ireland, which should not be broken lightly. As we have noted, the centrality of a Bill of Rights to the peace process was confirmed in the St Andrews Agreement of 2006.

2.3 A Bill of Rights for Northern Ireland is mandated by the Belfast/Good Friday Agreement and any failure to fulfil this vital element of that mandate can only undermine the peace process

3. **'Convention Plus'**

3.1 We do not accept that a Bill of Rights for Northern Ireland would undermine the supremacy of the executive or the legislature³. It should not be interpreted in this manner but rather as a source of protection of rights for all those in a fractured community, both minority and majority, from the authority of the state. It should also be seen as supplementing the human rights already available to the people of Northern Ireland in a way which takes account of their particular circumstances, as laid down by the Belfast/Good Friday Agreement. This is why the giving effect in domestic law to the European Convention on Human Rights through the Human Rights Act 1998 is practically and symbolically central to the human rights platform and why the Bill of Rights for Northern Ireland is both the opportunity to fulfil a mandate and to go beyond the 1998 Act for the first time as noted in the Agreement.⁴

3.2 There is huge cross-community consensus for a Bill of Rights for Northern Ireland, and not just a Bill of Rights which is Convention compliant. Rather it is a consensus for a Bill of Rights as an opportunity to protect a range of rights incorporating those fundamental human rights of the Convention and those economic, social and cultural rights reflected in international conventions to which the UK is a signatory and by which it

these and other steps have helped to give Northern Ireland "the sort of rights-based society that other countries will look to as a model of excellence".

³ As suggested at paragraph 4.4. of the Consultation.

⁴ And as most recently supported by Committee on Economic, Social and Cultural Rights Concluding Observations 'The Committee notes the draft Bill of Rights for Northern Ireland, which includes economic, social and cultural rights which are justiciable and calls for its enactment without delay.' See The Committee on Economic, Social and Cultural Rights (E/C.12/GRB/5) and (E/C.12/2008/SR.14-16)

is therefore legally bound.⁵ This is the opportunity for change and to entrench a wide range of justiciable rights for the people of Northern Ireland.

- 3.3 The Secretary of State appeared to acknowledge this when he wrote:
“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 winners and losers. As Northern Ireland emerges from conflict it is important that the terms of the debate change.”

He concluded,

“It is a sign of a maturing democracy that issues around human rights and equality are no longer seen as sectional interests but as part of a necessary framework which is there to protect and benefit the whole community.”⁶

- 3.4 However, the Secretary of State's noble rhetoric swiftly appeared empty leaving little or nothing to consult on, let alone a serious dialogue for a human rights debate. To reduce the Northern Ireland Human Rights Commission's Advice to a mere five positive proposals is an insult to the intelligence of the Commission, who put such care and dedication into their Advice; to the members of the Human Rights Consortium, who worked so hard to inform the debate; to all those who responded to the wide-ranging and inclusive consultations conducted by both bodies; and ultimately, to the people of Northern Ireland.

4. **The Blanket Rejection of Supplementary Rights**

- 4.1 It is important to establish that the Agreement is about a commitment to a Bill of Rights for Northern Ireland, and only Northern Ireland. In a draconian move the Consultation Paper disposes of half the rights suggested on the basis that they are either not suitable for inclusion or apply to England, Wales and Scotland also, while failing to provide evidence for either claim. The Paper also fails to engage in coherent dialogue with the Advice or even to envisage it as a potential blueprint for change. Moreover it ignores the many years of consultation and debate in Northern Ireland. Nor has any attempt been made by government to explain why they have rejected out of hand the arguments made by so many consultees over so many years for including many of those rights *precisely* because they are thought to reflect the “particular circumstances of Northern Ireland.”⁷

⁵ BIRW suggests that having endorsed international conventions and covenants the UK government therefore creates a legitimate expectation of incorporation. The Agreement refers to the Commission's task of advising on Supplementary Rights ‘drawing as appropriate on international instruments and experience’.

⁶ From the Secretary of State's Foreword to the Consultation.

⁷ We note the comment of the Ministry of Justice in its Green Paper on “Rights and Responsibilities: Developing our Constitutional Framework” at paragraph 4.38 page 60 that “Importantly, the Government does not wish the public debate around a UK instrument to detract from the process relating to a potential Bill relating to the particular circumstances of Northern Ireland.” the Ministry of Justice Green Paper has

- 4.2 It is incumbent upon the government to offer a more complete and comprehensive analysis and explanation of how rights were deemed worthy of inclusion or exclusion. Neglect to do so represents a total failure to engage in any meaningful way with this issue and shows a high level of disrespect and disdain both for the process of engagement of others on this issue over the years and for the Belfast/Good Friday Agreement. It also makes it impossible for consultees to engage effectively in this consultation since no guidance is given as to the evidential basis for the government's contentions and thus how they could be responded to or, indeed, countered.
- 4.3 It should have come as no surprise to the government what the Advice from the Commission would look like. The Commission approached its task purposively (with agreed principles and an agreed methodology) and offered sound human rights advice reflecting Northern Ireland's particular circumstances and anchored in international instruments and experience. Had they failed to take such an approach, they would have laid themselves open to justified criticism. The government's failure to engage with that Advice cannot but lay the government open to criticism, not only in relation to that failure but also that it has cynically wasted substantial sums of public money on an exercise which it never had any intention of implementing.
- 4.4 We concur with the Committee on the Administration of Justice that the government that has entirely failed to address the particular circumstances of Northern Ireland, as required by the Agreement. We request that the government reviews its proposals in this regard, and at the very least, be respectful of the work undertaken to date on this issue. All international experience on the transition from conflict suggests that the people best qualified to find solutions to the problems inherent in such transitions are the people most closely affected. In other words, Northern Ireland needs Northern Irish solutions. International experience also suggests that externally imposed solutions simply do not work. We urge the government to accept that the people of Northern Ireland are best placed to decide what constitute "the particular circumstances of Northern Ireland", and to find measures that will meet those circumstances. We also strongly advise the government to look at the Advice in its proper, local context and to cease trying to shoehorn Northern Ireland into a wider political picture which does not address Northern Ireland's history, the fragility of the peace process, or the pain of the victims of the conflict.

5. **The Peace, the Past and the Future**

- 5.1 The history of the Bill of Rights for Northern Ireland debate since the signing of the Belfast/Good Friday Agreement has been one where it

also 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.

has always been clear that a Bill of Rights was specifically for Northern Ireland and would reflect the particular circumstances of Northern Ireland. The mandate of the Agreement ensures a Bill of Rights for Northern Ireland is seen as a commitment to peace and a mechanism to maintain the peace by offering protection to both the rights of the minority and the majority after a sustained period of violent conflict. Therefore a Bill of Rights for Northern Ireland is constructed in part as a mechanism for dealing with the past and ensuring the future of the peace. The conflict was particular to Northern Ireland, the Bill of Rights for Northern Ireland cannot therefore be disengaged from this legacy.⁸ This should be the foundation through which the context of this discussion on a Bill of Rights should be seen and not as some wider national debate on a Bill of Rights for the UK, for England, for Wales or for Scotland. What the Advice offers is a framework within which to work but one which reflects the particular circumstances of Northern Ireland. The Consultation does not consider this.

- 5.2 In addition, this matter is linked to the broader idea underlying the Belfast/Good Friday Agreement of a Charter of Rights for the island of Ireland as distinct from Northern Ireland as part of the British nation, which reflects an aspect the originating source of the conflict. This is an important concept because, at the heart of the Agreement is the commitment that the contested future of Northern Ireland – whether it remains within the United Kingdom or becomes part of a united Ireland – is ultimately a matter for the people on both sides of the border to decide. An island-wide Charter of Rights permits both unionists and nationalists to have confidence that, whatever the eventual outcome of the constitutional position of Northern Ireland, certain rights will be guaranteed. Thus the Charter underpins the possibility of stability, whether constitutional change occurs or not, and makes it more likely that any decision about the future of Northern Ireland will be made in the context of a peaceful, democratic process, rather than being determined by violence. To take the Bill of Rights out of this equation is to risk seriously undermining the core of the Belfast/Good Friday peace accord which, at a time when dissidents are trying to destabilise Northern Ireland once again, is reckless.

6. **A Deliberate Misunderstanding**

- 6.1 Because the Advice was offered at a period of national political engagement with the idea of constitutional change, and conflated with the ideological drive to link rights to responsibilities and to weaken our commitment to the European Convention on Human Rights, the

⁸ As the Bill of Rights Forum noted “Because of the '[particular circumstances](#)' of Northern Ireland's past, people here have seen a need for a new law to protect our rights and freedoms as a basic building block of a fresh start for everyone. In this, the people of Northern Ireland are like other peoples who have emerged from periods of intense violence and conflict. A Bill of Rights can help ensure that the injustices of the past are never repeated and that the future provides equality and freedom for all.” See <http://www.billofrightsforum.org/>.

polemic clouds hanging over the Consultation are far removed from the Advice and the expectations of the people of Northern Ireland. The rights dialogue in Northern Ireland was driven by the people of Northern Ireland through an intensive period of consultation as opposed to any party political agenda. That context is very different to the national context but any recognition of that fact is deliberately evaded in the Consultation. In the context of devolution, which is mentioned just once in the Consultation Paper, a Bill of Rights for Northern Ireland would be an important mechanism of trust and reliance is maintaining the stability of the fragile political institutions of Northern Ireland.

- 6.2 The government seems intent on deliberately misunderstanding what a Bill of Rights is: a list of human rights that everyone is entitled to enjoy and as a mechanism of enlightened rights protection and development as is clear in the Advice. What a Bill of Rights is not, despite what some political leaders on both sides of the spectrum appear to believe, is a charter for the protection of the anti-social, or terrorists, and a means of providing lawyers with an undeserved source of income.
- 6.2 The government raises the spectre⁹ of the courts becoming involved in resource allocation without regard to the affordability of social, economic and cultural rights – but especially economic rights – were to be included in a Bill of Rights and were to become justiciable. This is to deliberately miss the point. In the first place, civil and political rights are far from being cost-free. The right to a fair trial, for example, implies a whole system of criminal justice, from policing to courts and prisons. Secondly, in the 21st century in a developed democracy, people have the right to expect housing, a health service, social security, and employment. Indeed, it is recognition of those expectations that successive governments have made provision for those and other economic rights. All of those matters are already regulated by law, and already justiciable. Thirdly, the judiciary frequently makes decisions which have resource implications. Since the Human Rights Act 1998 came into force, those decisions have been informed by human rights considerations. There is therefore nothing to fear from giving legal effect to those international covenants and norms to which the UK is already committed.
- 6.3 The exercise which the government has conducted is a piece of political cynicism where the philosophical principles underlying rights based discourse have been ignored. For fundamentally a Bill of Rights reflects the attitude of a society toward the protection of rights and in the particular circumstance of Northern Ireland reflects the social compact with or promise to the people expressed through the

⁹ Page 20 of the Consultation.

Agreement to bring the conflict to an end. Public policy analysis, as prayed in aid by the government in its Consultation, is a very different exercise in the armoury of political rhetoric masked as technological, managerial and bureaucratic reasoning fuelled by cost-benefit considerations. It is also an analysis which is subject to flux by political whim; a Bill of Rights is a justiciable entrenchment of rights which supersedes the political and marks the moral ethos of a nation.

- 6.4 We do not deny that public policy considerations play an important role in the process of implementation, but only after the decision has been made in principle to protect rights in agreement with the people. The Commission itself noted this in its consideration of progressive realisation strategies¹⁰. By wilfully misunderstanding the import of a Bill of Rights for Northern Ireland, the government betrays its deeply entrenched fear of the fettering of the power of the state and its sovereignty and a distrust of the judiciary to enforce the Bill. What the government fails to recognise is that the particular circumstances of Northern Ireland, with their commitment to the Bill of Rights project as part of the legacy of the past and as a part of the architecture of the future, and where the notions of state and sovereignty run very differently than in the rest of the UK, renders their fears groundless.

7. **A Non-Consultation**

- 7.1 It took almost a year from the presentation of the Advice to the government's launch of its 'consultation'. As we now approach a General Election and enter into a period of political purdah, the idea that this was ever going to be a meaningful consultation was always going to be remote.
- 7.2 The Consultation clearly seeks to identify reasons not to protect rights on the basis of an unexplained public policy analysis. It therefore fails to convince us that it is intended to be an authentic consultation process. This is because there is a demonstrably closed mind at work and no evidence that this document is seen by the government as taking the process forward. These two aspects mean there has been a breach of the basic consultation principles, that a consultation it must take place at a stage where there is scope to influence the policy outcome and be conducted with an open mind:-
- 7.3 We remind the government that in statute and common law there is requirement for meaningful and open minded consultation. First, there has been a failure to undertake a section 75 Northern Ireland Act 1998 equality screening and an equality impact assessment. The need for this is clear in the range of rights being proposed in relation to a range of minority groups. Second, the common law principles of consultation as set out in *R v London Borough of Barnet, ex parte B* [1994] ELR 357, 372G (the "Sedley requirements") require that consultation must be undertaken when proposals are still at a formative stage and the

¹⁰ See for example page 50 of the Commission's Advice.

government must give sufficient reasons to permit the consultees to make a meaningful response and allow adequate time for consideration and that the results of the consultation must be conscientiously taken into account in finalising any proposals. BIRW consider that none of these requirements has been satisfied in this consultation.¹¹

8. Conclusion

- 8.1 We summarise our position thus. First, there is an expectation under the Belfast/Good Friday Agreement that there will be a Bill of Rights for Northern Ireland as a meaningful part of the peace process and as guarantor of peace and security in the future. Second, this Bill of Rights must reflect the particular circumstances of Northern Ireland and is directly linked to the conflict of the past. Third, a Bill of Rights for Northern Ireland is an important mechanism in maintaining trust in and the credibility of the fragile political institutions of Northern Ireland. Fourth, the Advice of the Commission was within its remit and presented after exhaustive and inclusive grassroots consultation. Fifth, the Bill of Rights is 'Convention-plus' as it should be and encompasses and entrenches a justiciable range of rights including economic, social and cultural rights already accepted by the UK's ratification of a range of international standards and in fact provided for in UK society.
- 8.2 The government's 'consultation' is a failure to engage with the Advice it was given. The government's 'consultation' response is, we believe, a part of a larger ideologically driven political retreat from rights discourse. The government's 'consultation' deliberately fails to understand the Agreement or the particular circumstances of Northern Ireland. The government's 'consultation' is a negative exercise in policy process masking the vested interests of the state. The timing and the conduct of the exercise is in breach of both statutory and common law consultation requirements. BIRW will therefore not engage in this consultation in its present form.

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¹¹ See also the words of the Court of Appeal in *R (Coughlan) v North and East Devon Health Authority* [2001] QB 213 at paragraph 18 "To be proper, consultation must...include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response." In *R v Secretary of State ex parte Doody* [1994] 1 AC 531 it is stated that : "Since the person affected cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer." In addition a consultation paper should not be misleading: *R v Secretary of State for Transport ex parte Richmond upon Thames Council*[1995] Env LR 390