

Equality Commission

FOR NORTHERN IRELAND

EQUALITY COMMISSION FOR NORTHERN IRELAND

Response to the Commission on a Bill of Rights' Consultation: *'Do we need a UK Bill of rights?'*

November 2011

Introduction

1. The Equality Commission for Northern Ireland ('the Equality Commission') is an independent public body established under the Northern Ireland Act 1998. The Equality Commission is responsible for implementing the legislation on age, fair employment and treatment, sex discrimination and equal pay, race relations, sexual orientation and disability. The Equality Commission's remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998, and the disability duties under the Disability Discrimination Act 1995.
2. Further, the Equality Commission has been designated to act as an 'independent mechanism' jointly with the Northern Ireland Human Rights Commission, to promote awareness of, and monitor the implementation of the United Nations Convention on the Rights of Persons with Disabilities with regard to Government's obligations in relation to Northern Ireland.
3. The Equality Commission welcomed the opportunity to recently meet with the Commission on a Bill of Rights to discuss the Equality Commission's response to the discussion paper: *'Do we need a UK Bill of Rights?'*¹

¹ Commission on a Bill of Rights, Discussion Paper, UK Commission on a Bill of Rights, August 2011

4. By way of preliminary remarks, it is clear that the European Convention on Human Rights has made a major contribution to the democratic environment of Europe's post-war development. It has become an essential part of the institutional architecture that sustains and protects individual rights across Europe in our modern democracies. The extent of the UK's involvement in drawing up the Convention is an important part of the story of the State's engagement with the development of human rights in Europe. The Convention's relevance and importance are no less significant now than when first proclaimed. That reality is less adequately reflected than one would have hoped or expected in the discussion document.
5. Public debate and understanding of the European Convention have been muddled and diminished by the conflation of the debate on human rights with that of the UK's future in the European Union. They are distinctly separate matters. The Convention was a key element of our arrangements for almost thirty years before the UK became a member of the European Union.
6. That truth should be clarified constantly in any discussion on a UK Bill of Rights and the Commission has a real opportunity - which we urge it to grasp - to situate the debate within its proper context given its Terms of Reference which mandate it to consider ways to promote a better understanding of the true scope of the obligations and liberties under the European Convention on Human Rights.
7. The Commission on a Bill of Rights will be aware that in November 2009, the Northern Ireland Office (NIO) commenced a consultation on a Bill of Rights for Northern Ireland², setting out its response to the Northern Ireland Human Rights Commission's (NIHRC) advice³.

² NIO Consultation Paper: *A Bill of Rights for Northern Ireland: Next Steps*: November 2009, www.nio.gov.uk.

³ NIHRC, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland*, Dec 2008, www.nihrc.org.uk

8. In February 2010, the Equality Commission submitted a response to the NIO's consultation.⁴ A copy of our response is attached. The Equality Commission considers that a number of the points which we raised in our response to the NIO consultation on a Bill of Rights for Northern Ireland are relevant to the questions posed in the discussion paper. We have outlined below our response to each of the four questions raised.

Response to specific questions

Question 1

9. Question 1 seeks views on whether a UK Bill of Rights is needed.
10. There is much to recommend the adoption of a UK Bill of Rights. But there is no little reason for apprehension that such a development might not be entirely without risk in terms of the extent to which Convention Rights would continue to be available. This apprehension is despite the fact that the Terms of Reference for the work of the Commission directs it 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 that these rights continue to be enshrined in UK law, and protects and extends our liberties.
11. Is there any reassurance that there could be a constitutional mechanism that could put a Bill of Rights beyond the sovereign reach of Parliament? Were a UK Bill of Rights to replace the Human Rights Act, would the Convention be engaged within UK domestic law in its entirety? In short, is there any risk, however small, that the capacity of individuals and courts to embrace the full range of Convention provision would be diminished?
12. In the same way that the Equality Commission has clearly stated that its support for the adoption of a Northern Ireland Bill of

⁴ ECNI response to NIO consultation on NI Bill of Rights, 2010
http://www.equalityni.org/archive/pdf/ECNIResponse_to_NIO_Bill_of_RightsCnslt.pdf

Rights was contingent on ensuring that its introduction would limit neither the application or enjoyment of any rights and entitlements enshrined in current law and would not be a source of confusion for individuals, so, too, the Commission takes the view that the introduction of a UK Bill of Rights must not act to diminish the extent to which the Convention and the Human Rights Act have their current effect. Were that assurance available, the Commission would see merit in the introduction of a UK Bill of Rights. In the absence of such assurance, the Commission would not favour a UK Bill of Rights.

13. Conscious of the difficulty of finding a constitutional mechanism that would place a Bill of Rights beyond the normal sovereign reach of Parliament, the Equality Commission's apprehension is that any change to the extent of application of the Convention or the HRA would be a retrograde and irrecoverable step.
14. It will be noted from the attached response to NIO consultation, that, in principle, we support the adoption of a Bill of Rights for Northern Ireland, reflecting the particular circumstances in Northern Ireland. In our response, we made it clear that a Bill of Rights which has the support of the people of Northern Ireland could play an important role in underpinning the peace, prosperity and political progress of Northern Ireland.
15. We consider that a Bill of Rights for Northern Ireland has 'the potential to be an important opportunity to strengthen human rights protection afforded to all, including the most vulnerable and marginalised people in Northern Ireland society, and to increase protection where existing law is inadequate.'⁵ If a Bill of Rights for Northern Ireland were to be introduced, then it is important that no steps taken in the wider-UK context should undermine or diminish its protections.
16. The Equality Commission is also clear that it is essential that, in the event that a UK Bill of Rights is brought forward, there should be a policy of '**non-regression**' from current levels of protection

⁵ See paragraph 2.2

under the Human Rights Act 1998 and other ratified human rights instruments.

17. The Human Rights Act 1998 incorporated, in part, the European Convention on Human Rights (ECHR) into UK law. The impact of the Human Rights Act 1998 on, for example, the protection of rights relating to equality and non-discrimination, the rights of children, disabled people and lesbian, gay, bisexual, and transsexuals (LGBT) communities has been substantial.⁶
18. In Northern Ireland, there have been a number of important cases where individuals have successfully challenged the actions of public authorities as being contrary to their rights under the Human Rights Act 1998.⁷ In addition, its impact has been enhanced by the fact that, unlike the equality legislation, it applies to Acts of Parliament and cannot be overridden by other legislation.

Question 2

19. Question 2 seeks views on, if a UK Bill of Rights is needed, what a UK Bill of Rights should contain.
20. In addition to recommending 'non-regression' from current levels of protection under the Human Rights Act 1998, we support the conclusions of the Joint Committee on Human Rights⁸ which highlighted that there was also considerable scope for a Bill of Rights to **supplement** important rights and values already protected by the Human Rights Act 1998; in particular, through the inclusion of an equality clause, additional rights for groups

⁶ We note that the *Human Rights Inquiry* undertaken by the Equality and Human Rights Commission (EHRC)⁶ has highlighted the benefits of the Human Rights Act 1998 in terms of its very positive impact on individuals' lives, driving systemic change in public services and providing a structure within which public bodies can plan and deliver public services; grounded in and underpinned by the values and law of human rights. The *Inquiry* also highlighted evidence showing a positive effect in a range of public sector areas, including health, local authority services, policing, schools and regulatory authorities. www.ehrc.org.uk

⁷ See for example, *RG (Adoption; unmarried couple)* [2008] UK House of Lords 38, involving restrictions in Northern Irish law on the ability of unmarried partners to adopt children.

⁸ Joint Committee on Human Rights, *A Bill of Rights for the UK?*, 29th Report of Session 2007-08 www.publication.parliament.uk

covered by the equality legislation, and social and economic rights.

Equality clause

21. As set out in our response to the NIO consultation, the Equality Commission recommends the inclusion of a freestanding equality clause in a Bill of Rights (see paragraphs 3.1 – 3.6).
22. We recommend the inclusion of a **general statement** that 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. We are of the view that this general statement would underpin the Northern Ireland equality legislation which provides the detail in terms of respective equality rights and responsibilities.
23. The inclusion of a right to equality in a Bill of Rights would afford this right the same status as other human rights and ensure that when legislation is being developed and implemented that it is done so in manner that is compatible with this right.
24. As regards current provisions on equality in the Human Rights Act 1998, the latter incorporated Article 14 of the ECHR; which makes it clear that the rights and freedoms set forth in the ECHR shall be secured without discrimination on a range of grounds. However, this protection against discrimination cannot be invoked unless another Convention right is engaged. In addition, whilst Optional Protocol 12 to the ECHR does contain a freestanding right to equality, this Protocol has not been either signed or ratified by the UK.
25. In general, equality legislation in Northern Ireland does not take priority over other legislation. Apart from Section 76 of the Northern Ireland Act 1998, the equality legislation does not apply to the making, confirmation or approval of subordinate legislation by the Northern Ireland Assembly.

26. Under Section 76 of the Northern Ireland Act 1998, it is unlawful for a public authority when carrying out its functions relating to Northern Ireland to discriminate, or to aid or incite another person to discriminate, against a person or class of persons on the ground of religious belief or political opinion.
27. Importantly, this provision applies to the making, confirmation or approval of subordinate legislation by the Northern Ireland Assembly and prohibits it from legislating in a manner that unlawfully discriminates on the grounds of religious belief or political opinion. However, this important safeguard only applies to the grounds of religious belief and political opinion and not to other equality grounds, such as race, disability, sex, sexual orientation or age.
28. In addition, as highlighted in our response to the NIO consultation, the Equality Commission is clear that any provisions in a Bill of Rights relating to equality and good relations must not weaken or undermine existing levels of protection under current legislation.
29. Indeed, rather than weakening current levels of protection, it is essential that a right to equality in a Bill of Rights is underpinned by robust equality legislation which sets out in detail how the right to equality is protected in domestic legislation.
30. The Equality Commission has consistently highlighted the need for reform of Northern Ireland equality legislation in order to strengthen protection against unlawful discrimination and to keep pace with, and reflect, societal changes. The Equality Commission has, for example, raised with Ministers and officials of the Office of the First Minister and deputy First Minister (OFMdFM) its proposals for legislative reform in a number of equality areas including age, disability and race equality.⁹

⁹ ECNI Proposals for legislative reform, 2009, available at:- http://www.equalityni.org/sections/default.asp?secid=5&cms=The+Law+Legislative+Reform&cmsid=4_2_85&id=285

31. The need for reform of Northern Ireland equality law is heightened by developments in Great Britain; in particular the enactment of the Equality Act 2010. It is of note that the Joint Committee of Human Rights in its report on the Equality Bill heralded the Bill as ‘one of the most significant human rights measures introduced into Parliament in recent years’; indicating that ‘many of the measures contained will enhance the protection of human rights in the UK’.¹⁰
32. In summary, in addition to supporting the right to equality in a Bill of Rights, the inclusion of such a right must be coupled with steps by the Northern Ireland Executive to address deficiencies within the equality legislation in order to ensure an effective framework for equality that underpins this right.
33. We would draw the Commission on a Bill of Rights’ attention to the recent Concluding Observations of the Committee on the Convention on the Elimination of all forms of Racial Discrimination (CERD) on the UK issued in September 2011.¹¹
34. The Committee made it clear that it regretted that the Equality Act 2010 did not apply to Northern Ireland and expressed concern at the UK Government’s response that Northern Ireland is responsible for developing its own equality legislation framework. The Committee reminded the UK Government that the obligation to implement the provisions of the Convention (which sets out the human rights obligations on the UK Government in relation to racial minorities) in all parts of its territory **is borne by the State Party**. It recommended that the UK Government take immediate steps to ensure that a single equality law is adopted in Northern Ireland or that the Equality Act 2010 is extended to Northern Ireland.

Rights for vulnerable groups

¹⁰ Joint Committee on Human Rights: *Legislative Scrutiny :Equality Bill*, Nov 2009, www.publication.parliament.uk

¹¹ *Concluding Observations of the Committee on the Convention on the Elimination of all forms of Racial Discrimination (CERD) on the UK*, September 2011, <http://www2.ohchr.org/english/bodies/cerd/>

35. In addition, we consider that a Bill of Rights affords the opportunity to supplement the current provisions relating to the rights of vulnerable groups. We support the recommendation of the Joint Committee on Human Rights that the UK Government incorporate into UK law provisions in human rights treaties where protection offered by national law is inadequate, for example, in relation to certain provisions in the UN Convention on the Rights of the Child.¹²
36. In particular, the Human Rights Act 1998 has no discrete provisions for children, women or disabled people. We support the views of the Joint Committee on Human Rights in its Report on a UK Bill of Rights that there is a strong case for any Bill of Rights to include detailed rights for certain vulnerable groups, such as children.

Economic and social rights

37. Our response to the NIO consultation also recalled that although socio-economic inequality is not numbered among the categories in Section 75 of the Northern Ireland Act, we see that there is an inescapable obligation on public authorities to take it into account in discharging their statutory obligations. Not to do so would be to miss a crucial dimension of assessing equality of opportunity.
38. We note that the Joint Committee on Human Rights in its report on a Bill of Rights for the UK, has called for the inclusion in a UK Bill of Rights of a duty on the Government to achieve the progressive realisation of economic and social rights, by legislative or other measures, within available resources and to report to Parliament on progress made.¹³ The Commission considers that this may be a fruitful avenue for consideration.

Question 3

¹² Joint Committee on Human Rights, *a Bill of Rights for the UK?*, 29th Report of Session 2007-08 www.publication.parliament.uk

¹³ See footnote 10.

39. Question 3 of the consultation documents seeks views on how a Bill of Rights should apply to the UK as a whole, including its four component countries of England, Northern Ireland, Scotland and Wales.
40. It is clear that there are a number of legal and political implications that need to be considered in developing a UK Bill of Rights, in light of the responsibilities of the devolved administrations. We note, for example, that research commissioned by the EHRC *Developing a Bill of Rights for the UK*¹⁴ highlights that ‘it appears highly likely that if the Human Rights Act 1998 were amended or repealed, and/or a Bill of Rights were enacted covering the devolved jurisdictions, there would be a need for amendments to the devolution statutes. Further, such a decision would almost certainly require the consent of the devolved legislators in Scotland and Northern Ireland’.
41. There need be - and should be - no collision between a UK Bill of Rights and the existence of a NI Bill of Rights, either as a stand alone measure or as a formal part of a UK Bill of Rights. The particular circumstances of Northern Ireland will continue to endure for some time. The issues we addressed in the NIO consultation continue to have merit. What is clear is that any enactment of the UK Bill of Rights must not act to preclude the introduction of a Northern Ireland Bill of Rights.
42. We also note the conclusions of the Joint Committee on Human Rights who indicated that whilst the ‘devolution settlement creates certain difficulties for a UK Bill of Rights’, it did not accept that it created ‘insuperable obstacles’ to such a Bill. It was of the view that ‘provided the hierarchy between these levels is clear, there is a positive virtue in the broadly defined rights in the international standards being fleshed out in more concrete norms and standards at the regional, national and sub-national level’.
43. In addition, it was of the view that each Bill of Rights from the global through the regional to the national and sub-national

¹⁴ *Developing a Bill of Rights for the UK*, EHRC, 2011, www.equalityhumanrights.com

levels, becomes more specific and detailed in its provisions, and is free to be more generous but must not fall below the minimum floor of the higher level of protection.¹⁵

44. We recognise the complicated issues that arise within the four nations of the UK where three distinct jurisdictions co-exist, when considering the introduction of a UK Bill of Rights. There will be a division of opinion in Northern Ireland, deriving from its particular circumstances, on this very issue.
45. The Equality Commission does not have, nor will it take, a political view on this matter. It will look at the question of whether a UK Bill of Rights should exist side by side with a Northern Ireland Bill of Rights, or whether the former should incorporate the latter as a distinct and separate Part, from the perspective of what is best for the promotion of equality of opportunity and good relations and what will most effectively assist the individual in challenging unlawful discrimination.
46. Further, whilst we support the adoption of a Bill of Rights for Northern Ireland, we are also of the view that a number of rights can be brought forward in a UK Bill of Rights. Such rights can include rights relating to older people, children, disabled people and women, as well as social and economic rights.
47. However, in the event that a UK Bill of Rights is not enacted within a specific timeframe, consideration should be given to a broader base for those rights to be embraced within a Bill of Rights for Northern Ireland.
48. In addition, it is at least arguable that some of these rights have a particular significance in Northern Ireland and could be considered to relate to the particular circumstances of Northern Ireland. These might include issues that have a distinct relevance in a society that is emerging from years of violence - the position of women, the impact on children, disability – where

¹⁵ Joint Committee on Human Rights, *A Bill of Rights for the UK?*, 29th report of Session 2007-08, August 2008. www.publication.parliament.uk

their application in Northern Ireland might take a different form from elsewhere in the United Kingdom.

49. As highlighted in our attached response, we propose, as a way forward, that consideration is given to the inclusion in a Northern Ireland Bill of Rights of a set of interpretative principles which reflect human rights standards and international law, and to which courts and public authorities must have regard, together with an obligation on government to achieve the progressive realisation of the relevant rights.
50. This would include specific reference to the particular instruments which sets standards in the areas of civil and political rights; economic, social and cultural rights; discrimination against women, elimination of racial discrimination; children's rights; and the rights of persons with disabilities.

Question 4

51. Question 4 asks, having regard to the Commission's terms of reference are there any other views which respondents would like to put forward at this stage.
52. We recommend that any future Bill of Rights framework ensures the continued existence of independent national bodies to promote understanding of and protect human rights in the UK.
53. In addition, we support the key principles which should underpin a process of developing a Bill of Rights highlighted in research commissioned by the EHRC *Developing a Bill of Rights for the UK*.¹⁶
54. In particular, we emphasise the need for the process to be transparent, independent, democratic and inclusive. We stress the importance of ensuring that the process in developing a Bill of Rights is inclusive, in particular those whose human rights are most vulnerable to being breached.

¹⁶ See footnote 13

55. In addition, opportunities should be sought to encourage the participation of under-represented groups (such as disabled people) in the process. The Commission on a Bill of Rights will, for example, be aware that the UNCRPD (Article 29) places an obligation on the UK Government to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others. As highlighted in the research *Developing a Bill of Rights for the UK*, the process of creating a Bill of Rights should be consistent with human rights principles.
56. Further, in order to build and maintain public confidence in the process, we recommend that there is a clear timescale set for concluding deliberations of the process; particularly in light of the fact that extensive discussion and consultation has already taken place in Northern Ireland on the creation of a Bill of Rights for Northern Ireland.
57. We also support the recommendation of the Joint Committee on Human Rights which highlights the need for the process to be 'adequately resourced, in particular to ensure that harder to reach and less financially able or established groups or communities are able to contribute to the discussions in a meaningful way'.
58. Finally, we emphasise the need to raise awareness of, and actively promote understanding of, the rights contained within a Bill of Rights and to address any misconceptions in relation thereto.

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