Bill of Rights Forum

Preamble, Enforceability and Implementation (PEI) Working Group

Final Report
March 2008

Contents

Membership of the PEI Group

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[1] Shannonbrooke Murphy substituted for Martina Anderson from Meeting 12 onwards.
[2] Barry Fitzpatrick replaced Jean Gould as the Older People's Sector representative from Meeting 5 onwards.
[3] Colin Harper replaced Alan Sheeran as the Disability Sector representative from Meeting 5 onwards.
[4] Lisa Coyle substituted for Alban Maginness on occasion.

Process and Approach of the PEI Group

The PEI Working Group was set up by the Bill of Rights Forum to consider issues relating to the preamble (introductory text) to a Bill of Rights/Supplementary Rights,[5] how a Bill of Rights/Supplementary Rights can be enforced (how the rights can be made effective) and how a Bill of Rights/Supplementary Rights can be implemented (how the rights can be made meaningful).

The Group has held seventeen meetings in total. Notes of all the meetings and discussions that have taken place around all the issues addressed in this report are available on the Forum's website, and we would encourage people to read these to get a fuller flavour of some of the issues. The members of the Group have committed themselves fully to this process, have had an excellent attendance record and have made significant and meaningful contributions at every stage.

At its first two meetings, the Group considered the report that had been originally produced by a Working Group of experts set up by the NI Human Rights Commission (NIHRC) in 2000 on issues of implementation and agreed to use the topics they identified as the basis for our discussions. We addressed each of these topics in turn, as well as a number of additional issues that were identified in the course of the work.

The approach of the Group was to have a preliminary discussion of the issue at hand, and where possible reach a tentative agreement to be revisited on receipt of the recommendations of other Groups.

At the end of the process, and in the preparation of this Final Report, we examined the reports of the other Working Groups to identify matters relevant to the preamble, enforcement and implementation. In doing so, we were not concerned with the substance of the recommendations made by other Groups, but rather with their implications for enforcement and implementation.

[5] The Belfast/Good Friday Agreement (Rights, Safeguards and Equality of Opportunity, para. 4) states that the NIHRC will be 'invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights…'. These 'additional rights…taken together with the ECHR' are intended 'to constitute a Bill of Rights for Northern Ireland'. Given the lack of consensus at this stage on whether the 'supplementary rights' should be enacted in legislation separate from the HRA, or whether the Convention rights and the 'supplementary rights' should be combined in new legislation constituting a Bill of Rights, we refer throughout to both the Bill of Rights and Supplementary Rights.

However, it has not been possible in the time allocated to us to prepare a robust and thorough analysis of all the matters relating to preamble, enforcement and implementation that arise from the other reports. Therefore, we attempt in this report to provide overall recommendations and identify issues and examples from other reports that pose challenges for those recommendations.

We also had the benefit of an analysis of the submissions received by the Forum as they relate to the topics under our remit, and we have considered these as part of our deliberations. This analysis is provided in Annex 2.[6]

In accordance with the recommendation made by the Forum plenary, we have identified in each section the recommendation/proposal, the rationale behind it and the level of support or range of views in relation to it.

Many of the issues we discuss are quite legal, but we have sought in this report to keep them as accessible as possible, recognising that the Supplementary Rights/Bill of Rights must ultimately be accessible as well as legally sound. Where necessary, legal papers that were used to inform and explain decisions are included in appendices.

Schedule of Meetings

Meeting 1	Interpoint Centre	27/7/07
Meeting 2	Interpoint Centre	23/8/07
Meeting 3	Parliament Buildings	6/9/07
Meeting 4	Parliament Buildings	18/9/07
Meeting 5	Parliament Buildings	2/10/07
Meeting 6	Parliament Buildings	16/10/07
Meeting 7	Parliament Buildings	30/10/07
Meeting 8	Parliament Buildings	13/11/07
Meeting 9	Parliament Buildings	27/11/07
Meeting 10	Parliament Buildings	4/12/07
Meeting 11	Parliament Buildings	15/1/08
Meeting 12	Parliament Buildings	22/1/08
Meeting 13	Parliament Buildings	29/1/08
Meeting 14	Parliament Buildings	5/2/08
Meeting 15	Parliament Buildings	18/2/08
Meeting 16	Parliament Buildings	26/2/08
Meeting 17	Parliament Buildings	28/2/08

[6] Our thanks are noted to Mari O'Donovan for her work in the preparation of this analysis.

Abbreviations used in this Report

In this Report, the following abbreviations are used:

EC law – European Community law

ECHR/Convention - European Convention on Human Rights

HRA - Human Rights Act 1998

ICCPR - International Covenant on Civil and Political Rights

NI – Northern Ireland

NIA - Northern Ireland Act 1998

NIHRC - Northern Ireland Human Rights Commission

CRC - UN Convention on the Rights of the Child

1. Preamble

Recommendations

- If there is to be a preamble, it should be short and at the beginning of the legislation.
- Any preamble should be agreed at the end of the process by the Forum as a whole, when it is clear what the nature of the Forum's recommendations will be.

Rationale

1.1 A preamble is an introduction which sets out the relevant purpose, context and principles underpinning a legal document such as a constitution or international treaty or statute. While unusual in domestic legislation, inclusion of a preamble is not unknown. However, preambles are particularly common in bills of rights. While not strictly legally binding, a preamble in a document such as a bill of rights may have a degree of legal effect, in that it can be used to guide the courts and others as to the intention behind the bill of rights and thus how the rights it contains should be interpreted. Where present, preambles in domestic statutes may be invoked for interpretive purposes. A preamble to a bill of rights may also have a useful educational role in presenting rights to the public.

1.2 In discussing the preamble, the majority of the PEI Group considered and rejected the possibility of a preamble applying to *both* any Supplementary Rights/Bill of Rights *and* the Convention rights contained in the HRA (assuming the two schemes of rights remain separate).[7] Members of the Group, including those who prefer the single document option (whereby Convention rights and Supplementary Rights would be enacted in one piece of legislation)[8] suggested in the alternative that any preamble to the Supplementary Rights/Bill of Rights could accept or acknowledge the preamble to the ECHR.

1.3 The PEI Group recognised that some Working Groups had expressed expectations that there would be a preamble, and indeed certain groups have proposed preambular text.[9]

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[7] See discussion of Model 3 at para. 2.4 in section 2(i) below.
[8] See discussion of Model 1 at para. 2.2 section 2(i) below.
[9] See, e.g., Children and Young People Working Group Report (pp. 6-7); Economic and Social Rights Working Group Report (p. 63); Criminal Justice and Victims Working Group Report (pp. 3, 28).

However, some members of the PEI Group were unconvinced of the merits of a preamble and pointed in particular to the difficulties that might arise in trying to agree wording to define the politics and context of Northern Ireland, as is common in preambles.

1.4 It was agreed, however, that a short form of text might be found. One example suggested in discussion[10] was:

> '*These supplementary rights are founded on our belief in the supremacy of human dignity and our common vision for the future.*'[11]

1.5 In any event, if there is to be a preamble, the final text should be agreed by the Forum as a whole at the end of the process when the exact nature of the recommendations is known.

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[10] This suggestion was not supported by all Working Group members. Another proposal was that the preamble could be expressed similarly to para. 2 of the Declaration of Support for the Belfast/Good Friday Agreement, as representing a new beginning for '*the achievement of reconciliation, tolerance, and mutual trust, and [for] the protection and vindication of the human rights of all.*' It was also suggested that the preamble should refer to the Belfast/Good Friday Agreement and to the 'Troubles'.

[11] A range of other examples was discussed by the Group. For example, the preamble to the Canadian Charter of Rights and Freedoms reads: '*Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:*' The preamble to the New Zealand Bill of Rights Act 1990 reads as follows: '*An Act— (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights*'. The Group also considered the preamble to the ECHR, which is longer than these examples and reads as follows:

The Governments signatory hereto, being Members of the Council of Europe,
Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948;
Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;
Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which the aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms;
Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;
Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration;
Have agreed as follows:

1.6 The PEI Group was in total agreement that for reasons of consistency, there should only be one preamble at the beginning to apply to the entirety of the Supplementary Rights/Bill of Rights, and not in different places in the text for particular sections, as has been proposed by a number of other Working Groups. It was suggested however that where preambular text has been drafted by other Groups, the Forum may make such text available as 'rationale' within its final report.

Level of Support

v While there were a range of views in the Group in relation to the merits of a preamble, there was consensus on the recommendations set out above.

2(i) Relationship with the Human Rights Act

Recommendation

- The Working Group recognises and brings to the Forum's attention three possible options that exist as regards the relationship between the HRA and the Supplementary Rights/Bill of Rights, as follows:[12]

- Model 1:
  - Repeal the HRA as it applies to Northern Ireland and adopt a new Bill of Rights that incorporates *both* rights contained within the HRA and any newly proposed Supplementary Rights.
- Model 2:
  - Pass legislation to introduce new rights for Northern Ireland and in the process amend the HRA to address what may be regarded as its present shortfalls (e.g. standing, application, enforcement and substantive rights).
- Model 3:
  - Retain the HRA in its present form and introduce Supplementary Rights in separate legislation for Northern Ireland. Enforceability/implementation proposals beyond those in the HRA would only be applicable to the Supplementary Rights contained in the separate statute.

Rationale

2.1 The Belfast/Good Friday Agreement (from which the Forum's terms of reference are drawn), tasks the NIHRC with identifying '*rights supplementary to those in the European Convention on Human Rights (ECHR)*.' It was therefore necessary for the Group to consider the appropriate relationship between the ECHR, as set out in the HRA, and the Supplementary Rights that are recommended for the Bill of Rights. The previous NIHRC working group identified three possible models.

2.2 The first model involves repealing the HRA as it applies to Northern Ireland and adopting a new Bill of Rights that incorporates *both* rights contained within the HRA and any newly proposed Supplementary Rights. This single-document option leaves open the possibility of implementing different

[12] The levels of support within the Group for these various options are laid out under the 'Level of Support' section below.

and potentially more robust rights enforcement mechanisms than those which currently exist in the HRA. This option would also be more accessible to people making a claim. The primary disadvantage with this model however would be in 'opting out' of the HRA.

2.3 The second model involves passing legislation to introduce new rights for Northern Ireland and in the process amending the HRA to address what may be regarded as its present shortfalls (e.g. standing, application, enforcement and substantive rights). The advantage of this model is that legislation could provide for a range of enforcement mechanisms appropriate to the *nature* of the rights. Further, it would create the appearance of continuity with present legal structures and it could provide for a coherent enforcement of a broad range of rights. One major concern with this model is that with two pieces of legislation, the pre-existing HRA might tend to dictate how some rights (e.g. new fair trial rights) would be enforced. Another disadvantage would be that conceding amendments (even for good reason) to the HRA now could increase the possibility of future governments tinkering with the HRA for policy reasons. For some, the possibility of future governments adjusting the HRA for policy reasons strengthens the case for Model 1, since ECHR and Supplementary Rights would be entrenched in a separate Bill of Rights from the HRA. A further disadvantage with Model 2 is its potential complexity and inaccessibility to the ordinary/non-legal user.

2.4 The third model involves retaining the HRA in its present form and introducing Supplementary Rights/Bill of Rights in separate legislation for Northern Ireland. Enforcement mechanisms other than those in the HRA (such as a more generous standing provision - if agreed as feasible) would only be applicable to the Supplementary Rights/Bill of Rights contained in the separate statute. This model has the advantage of leaving the HRA intact. However, ruling out any amendment to the HRA would make it difficult to provide a coherent and accessible structure for the enforcement of the rights contained within the two pieces of legislation, adding to problems of inaccessibility. Difficulties may also arise over which piece of legislation to use (and therefore which enforcement mechanism to apply) where Supplementary Rights and the ECHR overlap. In particular, the Group notes that a number of Working Groups have proposed variations on Convention rights for inclusion in the list of Supplementary

Rights/Bill of Rights.[13] If the enforcement mechanisms available for Supplementary Rights/Bill of Rights are more effective than those found in the HRA for similar Convention rights, there is a practical risk that this third model would result in diminished usage of the HRA in Northern Ireland. Concerns were also expressed in this respect regarding the potential relationship between Convention rights and Supplementary Rights/Bill of Rights. For some members of the Group, it was important that the two schemes of rights be interpreted harmoniously and that the ECHR not be undermined by the Bill of Rights/Supplementary Rights (see further Section 2(xii)).

2.5 In addition, with all three models, questions arise as to how Supplementary Rights/Bill of Rights exclusive to Northern Ireland would affect UK-wide legislation and whether it would be feasible for Northern Ireland courts to invalidate or declare as incompatible legislation that would remain valid throughout the rest of the UK. This particular question is considered below in Section 2(viii).

Level of Support

v A range of views were expressed in the Group on the three models:

SDLP – favoured Model 1, with Model 3 as a second preference
Sinn Féin – favoured Model 1, with Model 2 as a second preference
Women's Sector – favoured Model 2
Disability Sector – favoured Model 2
Older People's Sector – favoured Model 2
UUP – favoured Model 3
Alliance – favoured Model 3
Business Sector – favoured Model 3
Ethnic Minority Sector – favoured Model 3
DUP – favoured Model 3

[13] This is most obviously the case in the Report of the Civil and Political Rights Working Group. However, other (non-exhaustive) examples include: Civil and Political Rights Recommendations of the Culture, Identity and Language Report (pp. 6-11); Recommendations 10 and 11 (prohibition on torture and on slavery) of the Women's Working Group Report (pp. 14-16); and recommendations of the Criminal Justice and Victims Working Group Report regarding the rights to life, privacy, liberty and fair trial, and the freedom from torture (pp. 31-33, 35-37, 39-42).

2(ii) Limitations

Recommendations

- Limitations to the Supplementary Rights / rights in a Bill of Rights should be on a right-by-right basis and uniform to the extent possible. These limitations should be narrowly defined, similar to the model of limitation found in the ECHR, to ensure that the rights cannot be unduly restricted.
- It is beyond the remit of this group to propose limitations clauses for every recommendation made by other Working Groups.
- However, in general, and taking account of comparative and international experience, we recommend that every proposed limitation clause must require that the limitation on the right be: prescribed by law, not adversely affect current domestic or international human rights obligations, and be necessary in a democratic society, taking into account all relevant factors, including but not necessarily limited to:
    a. the nature of the right;
    b. the importance of the purpose of the limitation;
    c. the nature and extent of the limitation;
    d. the relation between the limitation and its purpose; and
    e. less restrictive means to achieve the purpose.

Rationale

2.6 Very few human rights are absolute as contained in bills of rights. Most are limited in some way, normally when it is necessary for the greater public interest or for the protection of the rights of others. The Group discussed two options for limiting rights: either a general limitations clause that applies across all the rights, or a limitation clause drafted specifically for each right.

2.7 The former option is found in certain domestic bills of rights such as in Section 1 of the Canadian Charter of Rights and Freedoms, Section 5 of the New Zealand Bill of Rights Act 1990, and Section 36 of the South African Constitution. In both the Canadian Charter and in the New Zealand Bill of Rights, rights and freedoms are '*subject only to such reasonable limits prescribed by law as can be demonstrably*

justified in a free and democratic society.'[14] Section 36 of the South African Constitution states that rights:

> '*may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including*
> *a. the nature of the right;*
> *b. the importance of the purpose of the limitation;*
> *c. the nature and extent of the limitation;*
> *d. the relation between the limitation and its purpose; and*
> *e. less restrictive means to achieve the purpose.*'

2.8 The latter approach, entailing a limitation clause specifically drafted for each right, is adopted in the ECHR, the Irish Constitution, and in a number of other international human rights instruments. Examples include:

- Article 19(3) of the International Covenant on Civil and Political Rights, which restricts the rights to hold opinions and freedom of expression, where limitations are provided by law, and are necessary for the respect of the rights or reputations of others, or for the protection of national security or of public order (ordre public), or of public health or morals;
- Article 14(3) of the Convention on the Rights of the Child, which restricts freedom to manifest religion or beliefs, where limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others;
- Article 43.2.2° of the Irish Constitution, which establishes that the State may limit the property rights to reconcile their exercise '*with the exigencies of the common good*'.

2.9 To make the Supplementary Rights/Bill of Rights accessible and to keep the rights in line with the ECHR both in style and substance, it was decided that the right-by-right approach was generally preferable.

2.10 The PEI Group notes that the extent to which other Working Groups considered right-by-right limitations appears to have

[14] The leading interpretation of this limitation is found in the Canadian case of: *R v Oakes* [1986] 1 SCR 103.

varied.[15] It is beyond the remit of the PEI Group to propose limitation clauses for every recommendation made by other Working Groups.

2.11 However, in general, and taking account of comparative and international experience, the PEI Group concluded that every proposed limitation clause must require that the limitation on the right be: prescribed by law, not adversely affect current domestic or international human rights obligations, and be necessary in a democratic society, taking into account all relevant factors including but not necessarily limited to:

a. the nature of the right;
b. the importance of the purpose of the limitation;
c. the nature and extent of the limitation;
d. the relation between the limitation and its purpose; and
e. less restrictive means to achieve the purpose.

Level of Support

v There was consensus in the Group on these recommendations.

[15] For example, the Report of the Civil and Political Rights Working Group largely follows the scheme of the ECHR, with right-by-right limitations. Similarly, the Economic and Social Rights Working Group Report also imposes progressive realisation limitations on a right-by-right basis. By contrast, the Report of the Criminal Justice and Victims Working Group indicates (at p. 49) that careful consideration is required to determine limitation clauses for the rights proposed by it.

2(iii) Derogation

Recommendation

- The group recognises that there are a number of options in relation to derogation:[16]

  Convention rights:
  1. Convention rights, as contained in the HRA, left as they are, that is, subject to derogation; or
  2. Derogation removed from Convention rights as contained in the HRA and subjected only to appropriate limitations clauses.

  Supplementary Rights/Bill of Rights:
  3. Supplementary rights non-derogable but subject to appropriate limitations clauses; or
  4. Supplementary rights subject to derogation, with listed exceptions.

- The group recommends that any supplementary rights corresponding with non-derogable international rights which the UK has ratified must not be derogable in the Supplementary Rights/Bill of Rights.

- If the Forum agrees that a derogation clause is necessary, it is for the Forum to identify non-derogable Supplementary Rights/rights in the Bill of Rights, if any, additional to those that are already non-derogable as a matter of international law.

- If a derogation clause is agreed by the Forum, the Group draws to the Forum's attention the following possibilities (which are not mutually exclusive) in relation to a process for the exercise of derogation power: [17]

  - Westminster legislation
  - Cross-community vote of the NI Assembly
  - Judicial scrutiny
  - Setting of time limits
  - Review mechanism after the derogation has been in place for some time

[16] The levels of support within the Group for these various options are laid out under the 'Level of Support' section below.
[17] Sinn Féin proposed that the relevant requirements should at least meet the standards of Article 4 of the ICCPR.

Rationale

Introduction

2.12 Some bills of rights contain what is known as a 'derogation' clause, which allows the government to suspend certain human rights in times of emergency. The ECHR (and thus the HRA) already contains the option to derogate from certain rights '*in time of war or public emergency threatening the life of the nation*.' Most of the Convention rights that would be subject to derogation are contained in the HRA.

2.13 The PEI Group considered the following issues in relation to derogations:

- Whether certain Convention rights should remain subject to derogation, (insofar as they apply in Northern Ireland), as is currently the case;
- Whether Supplementary Rights should be subject to derogation (or just limitations), and if so, which rights should be exempt from derogation;
- If derogation is to be available in respect of Supplementary Rights/Bill of Rights, by which processes the power of derogation should be exercised.

Convention Rights

2.14 Insofar as Convention rights are concerned, for some, altering the current position was undesirable as it would entail amending Sections 14 and 16 of the HRA, which raises concerns (similar to those articulated above in para. 2.3 of Section 2(i)) regarding encouraging excessive future amendment to the HRA. In addition, clearly the UK government may wish to derogate from certain rights of the ECHR in the interests of UK-wide concerns, which would be jeopardised if the derogations did not apply in Northern Ireland.

2.15 Against this, concern was expressed about facilitating too easy resort to derogation, particularly given the current international climate. The point was made that removing the possibility of derogation from a Convention right in Northern Ireland would have the effect of supplementing ECHR protection in Northern Ireland by protecting people from derogation. It was observed that derogation clauses in existing international regimes, such as in the International Covenant on Civil and Political Rights and the ECHR did not adequately protect people from human rights violations. It

was also argued that rights should never be derogable, since derogations aggravate and prolong conflict, and in any event, limitation clauses provide adequate flexibility to accommodate necessary interferences with rights in times of genuine emergency.

Supplementary Rights/Bill of Rights

a. General Question

2.16 On the general question of whether Supplementary Rights/Bill of Rights should be derogable, it was noted that there are different suppositions within the Working Group and on the Forum plenary as to the extent/reach of Supplementary Rights, which will have an impact on any decisions taken in this and other areas. For some, it was considered unnecessary to derogate from a Bill of Rights/Supplementary Rights at all, given that appropriate limitation clauses can provide governments with sufficient flexibility. For others, however, a derogation clause is a pragmatic necessity, providing a safety valve in a time of emergency. It was also argued by some that a derogation clause could help to preserve the Bill of Rights/Supplementary Rights for the future; without such a clause, there would be a greater danger that those in authority would use the occasion of the emergency to revoke the Bill of Rights/Supplementary Rights in entirety.

b. Proposed Supplementary Rights which are Non-derogable as a Matter of International Law

2.17 Of the rights proposed by other Working Groups, certain rights are non-derogable as a matter of international law. Non-exhaustive examples include:

- The right to life, proposed by the Civil and Political Rights Working Group[18] (see Articles 4 and 6 ICCPR; Articles 2 and 15 ECHR (in the latter case, subject to the exception of deaths resulting from lawful acts of war));
- The prohibition on torture and cruel, inhuman or degrading treatment or punishment, as proposed by the Criminal Justice and Victims Group,[19] the Civil and Political Rights Group[20] and the Women's Working Group[21] (see Articles 3 and 15 ECHR; Articles 4 and 7 ICCPR);
- The right not to be held in slavery or servitude, proposed by the Civil and Political Rights Group,[22] and the Women's

[18] Civil and Political Rights Working Group Report, Recommendation 3 (p. 5).
[19] Criminal Justice and Victims Working Group Report, pp. 4, 32.
[20] Civil and Political Rights Working Group Report, Recommendation 4 (p. 6).
[21] Women's Working Group Report, Recommendation 10 (p. 15)
[22] Civil and Political Rights Working Group Report, Recommendation 5(1) (p. 7). Note that the reference in Recommendation 5(1) relating to domestic servitude may be derogable as a

Working Group[23] (see Article 4(1) and 15 ECHR; Articles 4 and 8 ICCPR);

- The right to be free of punishment without law, proposed by the Civil and Political Rights Group;[24] (see Articles 7 and 15 ECHR; Articles 4 and 15 ICCPR)
- The right to freedom of thought, conscience and religion, proposed by the Civil and Political Rights Group[25] (see Articles 4 and 18 ICCPR);
- In part, the recommendation of the Civil and Political Rights Group in Recommendation 7(7)[26] that: '*No one shall be deprived of their liberty on the ground of failure to pay maintenance or a debt, fine or tax, unless the court considers that the person has wilfully refused to pay despite having the means to do so*.' (Article 11 of the ICCPR is a non-derogable provision which states that, '*No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation Article 11*.')

2.18 In addition, Article 16 of the ICCPR, the 'right to recognition everywhere as a person before the law', is non-derogable; while Article 4(1) also specifies that derogations must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Other international human rights agreements such as CEDAW, the International Covenant on Economic and Social Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the UN Convention on the Rights of the Child do not contain derogation clauses. To the extent that supplementary rights correspond directly with rights contained in such international instruments, they would be deemed to be non-derogable as a matter of international law.

2.19 The Group therefore agreed that any supplementary rights corresponding with non-derogable international rights which the UK has ratified must not be derogable for the purpose of the Bill of Rights/Supplementary Rights.

c. Proposed Supplementary Rights which are not Non-Derogable as a Matter of International Law

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matter of international law. This right could, of course, be deemed non-derogable for the purposes of the Supplementary Rights/Bill of Rights.

[23] Women's Working Group Report, Recommendation 11 (p. 15). Again, the reference to domestic servitude may be derogable as a matter of international law. This right could, of course, be deemed non-derogable for the purposes of the Supplementary Rights/Bill of Rights.

[24] Civil and Political Rights Working Group Report, Recommendation 9 (p. 13).

[25] Civil and Political Rights Working Group Report, Recommendation 11 (p. 15).

[26] Civil and Political Rights Working Group Report, p. 10.

2.20 Certain other proposed Supplementary Rights, while not strictly speaking non-derogable as a matter of international law, are nonetheless derived from rights which are non-derogable in international law. A number of examples are found in the Children and Young People Working Group Report, which bases certain of its recommendations on the UN Convention on the Rights of the Child ('the CRC'). For example, Recommendation 3 on the best interests of the child, has a non-derogable international counterpart in Article 3 of the CRC. However, by contrast with Article 3 of the CRC, Recommendation 3 of the Children and Young People Working Group Report imposes an obligation which is both broader (applying to 'public or private institutions' as opposed to just 'public or private *social welfare* institutions') and higher (requiring that the best interests of the child be 'the *paramount* consideration' as opposed to 'a *primary* consideration'). Clearly, elements of the obligation in Recommendation 3 are non-derogable as a matter of international law; but the Recommendation as a whole is not.

2.21 On the one hand, following in the spirit of the international regime, it could be argued that it would be desirable for children's rights to be deemed non-derogable in the supplementary rights context also. On the other hand, obligations, such as ensuring that in decisions impacting on children, the best interests of the child are 'the *paramount* consideration' could, in times of emergency, unduly constrain governmental action in the general interest. Other constitutions deem *certain* but not all children's rights to be non-derogable, such as in South Africa, where the following children's rights are non-derogable: the right of the child to be protected from maltreatment, neglect, abuse or degradation; to be protected from exploitative labour practices; the right not to be detained except as a measure of last resort and only for the shortest appropriate period of time, to be segregated from persons over the age of 18 and to be treated in a manner and kept in conditions that take account of the child's age; and the right not to be used directly in armed conflict insofar as children are under the age of 15.[27] The equivalent to Recommendation 3 of the Children and Young People Group (that the best interests of the child are 'paramount'), although having an equivalent in the South African Constitution, is derogable.[28]

[27] See, Sections 28 and 37(5), South African Constitution.
[28] See, Sections 28(2) and 37(5), South African Constitution.

2.22 In addition, the Group noted that rights, in addition to those which are non-derogable as matter of international law, could be deemed to be non-derogable as a matter of domestic law.[29]

2.23 The Group concluded that, if the Forum decided to incorporate a derogation clause, it was for the Forum to determine which Supplementary Rights, additional to those deemed non-derogable as a matter of international law, should be deemed to be non-derogable for the purposes of the Bill of Rights.

Derogation: Process

2.24 If the Forum agrees that Supplementary Rights/Bill of Rights should be subject to derogation, on the issue of process, the constitutional principle of Parliamentary sovereignty renders it impossible to entirely rule out enactment of laws which would require derogations from pre-existing human rights legislation. For similar reasons, some bills of rights which do not provide for invalidation of primary legislation do not include derogation clauses: e.g. the Victoria Charter of Human Rights and Responsibilities Act 2006; the Australian Capital Territory Human Rights Act 2004;[30] and the New Zealand Bill of Rights Act 1990. It could be argued therefore that a derogation clause is legally unnecessary, as Westminster could override Supplementary Rights/Bill of Rights in any event, should it wish to do so.

2.25 As against this, Westminster, although free to legislate as a matter of law, can nonetheless be politically constrained from legislating, by such conventions as the Sewel Convention,[31] or, by particular entrenchment of any Bill of Rights/Supplementary Rights (e.g. by cross-community Assembly vote, as to which see para. 2.29 in Section 2(iv) below). Consequently, an express derogation clause could be politically necessary. A derogation clause was also considered

[29] See, e.g., Section 37(5), South African Constitution.

[30] Save to note in Section 26(3)(b) that '*work or service required because of an emergency or calamity threatening the life or wellbeing of the community*' will not be treated as servitude or slavery.

[31] In the House of Lords on July 21, 1998 Lord Sewel said: 'we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament' (H.L. Deb., Vol. 592, col. 791, July 21, 1998). What became known as the Sewel Convention is restated in the Memorandum of Understanding with the devolved administrations, which states that 'the U.K. government will proceed in accordance with the convention that the U.K. Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature' (Cm. 4806 (2000), para. 13). The convention was supported by the House of Commons during a debate on the procedural consequences of devolution on October 21, 1999 (H.C. Deb., Vol. 336, cols 606-674).

by some to serve the useful purpose of imposing rigorous requirements on the derogation process to discourage undue usage of derogations.

2.26 The possibility of requiring both Westminster and cross-community Assembly support for a derogation was considered. It was noted by some that devolution complicated the question of derogation (see further below Section 2(viii)). In discussion, for example, some argued that insofar as derogation might be required due to issues arising under transferred matters, it would be necessary for the NI Assembly to exercise the derogation power; and if the derogation was required due to concerns relating to excepted matters, the derogation power should be exercised by Westminster alone.

2.27 The Group also considered the importance of safeguards such as judicial scrutiny of any proposed derogation; time limits on derogations; and subsequent review after the derogation has been in place for some time.

Level of Support

- The levels of support for the various options were as follows:

- *Derogation from Convention Rights:*
  Alliance – favoured Option 1
  Business Sector – favoured Option 1
  DUP – favoured Option 1
  UUP – favoured Option 1
  Older People's Sector – favoured Option 1
  Ethnic Minority Sector – favoured Option 2
  SDLP – favoured Option 2
  Sinn Féin – favoured Option 2
  Women's Sector – favoured Option 2
  Disability Sector – no preference

- *Derogation from Supplementary Rights:*
  Ethnic Minority Sector – favoured Option 3
  Older People's Sector – favoured Option 3
  SDLP – favoured Option 3
  Sinn Féin – favoured Option 3
  Women's sector – favoured Option 3
  Alliance – favoured Option 4 (but could compromise to accept 3)
  Business Sector – favoured Option 4

DUP – favoured Option 4
UUP – favoured Option 4
Disability Sector – no preference

v *Rights which are Non-Derogable as a Matter of International Law*

There was consensus in the Group that any supplementary rights corresponding with non-derogable international rights which the UK has ratified must not be derogable in the Supplementary Rights/Bill of Rights.

v *Additional Non-Derogable Rights*

If the Forum agrees that a derogation clause is necessary, the Group agreed that it was for the Forum to identify non-derogable Supplementary Rights/rights in the Bill of Rights, if any, additional to those which are already non-derogable in international law.

v *Derogation Process*

The Group did not agree on a specific process of derogation; and presents its options to the Forum.

A preference for Westminster and cross-community support in the Assembly before exercising a derogation clause was expressed by: Older People's Sector; Ethnic Minority Sector; and Alliance.

A preference for the NI Assembly to exercise derogation power in the sphere of transferred matters was expressed by the Business Sector. The view of the Business Sector is also that the exercise of any derogation power by the Assembly should be subject to judicial scrutiny and a time limit.

Though opposed to derogation provisions in principle, in the event that a derogation clause is agreed, Sinn Féin will insist on the inclusion of safeguards, including judicial scrutiny, time limits and subsequent review as minimum requirements.

UUP and DUP reserved their positions, depending on the specific content of the Supplementary Rights/Bill of Rights.

2(iv) Entrenchment and Amendment

Recommendations

- The adoption and amendment of the Bill of Rights/Supplementary Rights should require cross-community approval in the NI Assembly.
- A further option is the requirement of a referendum; there are a range of views in the Group in relation to this option.[32]
- The option of an intergovernmental treaty was raised, but there was no extensive discussion of this and thus no consensus view.

Rationale

2.28 A bill of rights normally contains the expression of fundamental rights. As such these should not be altered by later decisions of government or parliament. Consequently, it is common for a bill of rights to be 'entrenched' or made semi-permanent so as to ensure they cannot be easily changed. The Bill of Rights/Supplementary Rights will be enacted by Westminster as primary legislation, and in the current constitutional system, there is a doctrine of Parliamentary sovereignty which means that no Parliament can prevent a future Parliament from legislating as it wishes. This means that a future Parliament could decide to amend or even to repeal any Supplementary Rights/Bill of Rights. As was discussed above at para. 2.25 in Section 2(iii) on derogations, Parliament may however be politically constrained by conventions, such as the Sewel Convention. Within this framework, the Group discussed a number of options.

2.29 The Group considered that requiring cross-community approval in the NI Assembly for both the adoption and amendment of the Supplementary Rights/Bill of Rights may make it politically more difficult for a future Parliament to legislate against the will of the Assembly.

2.30 Another common method of adopting and amending Bills of Rights is to hold a referendum of the people. There were a range of views in the Group as to whether this was desirable. Some felt that it was important in building ownership of, and reflecting the will of the people in, the Bill of

[32] The levels of support within the Group for this option are laid out under the 'Level of Support' section below.

Rights/Supplementary Rights. Others felt that a referendum may act as a deterrent for improvement; may be too costly and impractical; and that a referendum was not a necessary or appropriate way of entrenching Supplementary Rights/Bill of Rights. It was also noted that referenda campaigns can be dominated by single issue groups or by those who are better informed.

2.31 Another option that had been proposed was an intergovernmental treaty guaranteeing the Bill of Rights/Supplementary Rights between the British and Irish governments.

Level of Support

- There was consensus in the Group, apart from Sinn Féin, on the recommendation regarding cross-community voting in the NI Assembly.

- On the requirement for a referendum, the levels of support were as follows:

  Business Sector – supportive
  Ethnic Minority Sector – supportive
  Women's sector – supportive
  Sinn Féin – reserved
  Alliance – sceptical
  Disability Sector – sceptical
  DUP – sceptical
  SDLP – sceptical
  Older People's Sector – sceptical
  UUP – sceptical

- Sinn Féin is reserving its position on a cross-community requirement pending further consideration, would favourably consider a referendum and the intergovernmental treaty option, but is also reserving position on these options pending further consideration.

- Alliance expressed its support for an intergovernmental treaty.

2(v) Application

Recommendations

Supplementary Rights/Bill of Rights

- Supplementary Rights/Bill of Rights should be enforceable against 'public authorities'.
- Courts should be included within the definition of 'public authority' to ensure indirect horizontal effect of Supplementary Rights/Bill of Rights.
- The Group draws the Forum's attention to its general position and recommends that careful consideration be given to the issue in the drafting of the Forum's Recommendations.

There are a number of other issues in relation to application of Supplementary Rights/Bill of Rights:[33]

- The definition of 'public authority' should be more generous than that found in the HRA.
- Obligations should be outcome and process based.
- To achieve these ends, the following Proposed Provision should be included in legislation giving effect to supplementary rights:[34]

> '*(1) It is unlawful for a public authority to act in a way which is incompatible with the Bill of Rights/ Supplementary Rights* *[or, in making a decision, to fail to give due regard to a relevant right.]*
>
> *(2) Subsection (1) does not apply to an act if—*
>
> *(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or*
>
> *(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the supplementary rights, the authority was acting so as to give effect to or enforce those provisions.*
>
> *(3) In this section "public authority" includes—*
>
> *(a) a court or tribunal, and*
>
> *(b) any person certain of whose functions are functions of a public nature,*

[33] The levels of support within the Group for these options are laid out in the 'levels of support' section below.

[34] Those sections underlined and in square brackets are the proposals on which there are a range of views.

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In subsection (3) "Parliament" does not include the House of Lords in its judicial capacity.

[(5) In subsection (3)(b), a "function of a public nature" includes a function performed pursuant to a contract or other arrangement with a public authority which exercises a power or is under a duty to perform that function.

(6) In relation to subsection (3)(b), a person will only be a public authority in respect of those acts performed pursuant to the function of a public nature/ In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(7) "An act" includes a failure to act but does not include a failure to—

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.]'

Convention rights – HRA Interpretation Proposal:

There is a possibility to extend the application of the definition of public authority within the Human Rights Act:[35]

v [Insofar as it applies to Northern Ireland, the inclusion within the Section 6(3)(b) definition of "public authority" of '*any person certain of whose functions are functions of a public nature*', must be subject to the following interpretation:

'*In subsection 6(3)(b), a "function of a public nature" includes a function performed pursuant to a contract or other arrangement with a public authority which exercises a power or is under a duty to perform that function.*'**]**

Rationale

2.32 When discussing the application of Supplementary Rights/Bill of Rights, the Group was required to consider both: the *reach*

[35] Again, the range of views on this are recorded in the levels of support section below, and the underlined text above is indicative only at this stage.

of the Supplementary Rights/Bill of Rights compliance obligation; and the *nature* of the Supplementary Rights/Bill of Rights compliance obligation.

Reach of the Obligation

a. Introduction

2.33 Bills of rights always apply vertically – that is between private persons and the state. Certain rights within a vertical bill of rights may impose what are known as 'positive obligations' on the state to protect private persons from violations of their rights by other private persons. However, in a vertical bill of rights, there will only be legal causes of action for breaches of the right against the state. By contrast, some bills of rights also apply horizontally – that is between private persons (including businesses and other organisations). With horizontal bills of rights, legal causes of action for breaches of rights will be available against both the state and against other private persons.

b. Vertical Application: Subsections (1), (3)(b), (5), and (6) of the Proposed Provision and HRA Interpretation Proposal

2.34 *Subsection (1):* The HRA applies vertically, and certain Convention have been interpreted to contain 'positive obligations'. The Group therefore agreed that the Bill of Rights/Supplementary Rights should also apply vertically, binding 'public authorities'. Consequently, the above provision is largely based on Section 6 of the HRA.

2.35 *Subsections (3)(b) and (5):* It is quite generally accepted, however, that a gap has arisen in relation to the application of the HRA. Section 6 of the HRA binds public authorities and bodies '*certain of whose functions are functions of a public nature*'. In practice, the Courts have defined this more narrowly than appears to have been originally intended when the Act was being debated in Parliament.[36] Formerly, as was evidenced by the PEI Group's Interim Report,[37] it was agreed by the PEI Group that this should be addressed in the Bill of Rights/Supplementary Rights. The solution proposed in subsection (5) of the recommended provision is a slightly amended version of a proposal made by the Joint Committee on Human Rights.[38] However, on review of the

[36] In particular, in the case of *YL v Birmingham City Council* [2007] UKHL 27; [2007] 3 WLR 112, the House of Lords found that residents of private care homes placed there by local authorities do not have Convention rights against the care home due to the fact that the latter does not exercise a public function for the purposes of Section 6 of the HRA.

[37] PEI Working Group Interim Report, November 2007, p.10.

[38] The Joint Committee on Human Rights defined 'function of a public nature' as including 'a function performed pursuant to a contract or other arrangement with a public authority which

Supplementary Rights proposed by other Working Groups, consensus in the Group on this issue waned.

2.36 *Subsection (6):* The Group discussed the wording of subsection (6) of the proposed provision, which only imposes rights obligations on those entities performing '*functions of a public nature*' insofar as they are actually performing these functions and not otherwise. This would mean, for example, that a government contractor would be required to comply with Supplementary Rights/Bill of Rights in all acts performed pursuant to the function of a public nature; but not in its private contracts with other private actors. By contrast, section 6(5) of the HRA excludes entities performing '*functions of a public nature*' from Convention compliance where '*the nature of the act is private*'. The difficulty of determining whether an act is '*private*' in '*nature*' was discussed; and it was suggested that the proposed wording in subsection (6) may provide a clearer means of delineating the reach of Supplementary Rights/Bill of Rights obligations. Consensus was not reached in the Group on this proposal.

2.37 *HRA Interpretation Proposal:* The Group was in agreement that the lacuna in protection should be addressed insofar as the HRA applies in Northern Ireland. However, the Group did not achieve consensus on whether it was appropriate to address this problem in the Supplementary Rights/Bill of Rights.

c. Horizontal Application: Subsections (1) and (3)(a) of the Proposed Provision

2.38 As regards the horizontal application of human rights, it is broadly accepted that there are two main types of horizontal application: direct and indirect. The former arises where direct causes of action against private parties for human rights violations are created under the Supplementary Rights/Bill of Rights. Indirect effect arises where judges are required to develop the common law in line with the Supplementary Rights/Bill of Rights. There are in turn two forms of indirect horizontal effect. First, a weaker form, whereby the courts are required to develop the common law in line with the rights and values in the Supplementary

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is under a duty to perform that function': see Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act*, Ninth Report of Session 2006–07, para. 150. This definition was also proposed in Section 1 of the Human Rights Act 1998 (Meaning of a Public Authority) Bill (subsequently abandoned). Some members of the PEI Group were concerned that the definition excluded functions performed pursuant to statutory *powers* and amended the provision accordingly.

Rights/Bill of Rights, but new causes of action are not created. In the UK, Section 6(1) of the HRA does this by including the courts within the definition of a core public authority, thus requiring them to develop existing common law in accordance with Convention rights. Second, a strengthened form of indirect effect whereby the common law is directly affected by the Supplementary Rights/Bill of Rights and the creation of new common law causes of action is allowed. The PEI Group has agreed that there is no need to deviate from the type of indirect horizontal application that applies under Section 6(1) of the HRA. This should therefore also apply to the Supplementary Rights/Bill of Rights, as proposed by the inclusion of 'courts' in the definition of 'public authority' in subsection (3)(a) above.

d. Legislation in Parliament: Subsection (7) of the Proposed Provision

2.39 Subsection (7) of the proposed clause is based on Section 6(6) of the HRA. Certain members of the Group expressed the view that a failure to introduce legislation to the Assembly should be added to this defence, in order for Supplementary Rights/Bill of Rights not to interfere with Assembly proceedings. However, others pointed out that such an addition, (and indeed subsection (7) in its current form), would have far-reaching negative implications for the programmatic duties imposed by certain of the proposed Supplementary Rights (as to which, see Section 2(ix) below), particularly, where, as is frequently the case, such duties include the duty to take legislative measures. Consensus was not reached on this issue.

e. Recommendations of Other Working Groups

2.40 The PEI Group notes that most proposals made by Working Groups permit the PEI Group's preferred model of application to operate. For example, the Economic and Social Rights Working Group Report queries whether private healthcare providers of emergency medical treatment could be bound by the obligation not to refuse emergency medical treatment and raises other questions regarding non-discrimination duties on landlords and employers.[39] The PEI Group notes that where such emergency medical treatment is provided pursuant to an arrangement with a public authority, and the public authority enjoys a power or is under a duty to provide such emergency medical treatment, the private healthcare provider will be required to comply with Supplementary Rights/Bill of Rights. Likewise, whether private landlords would be bound under the

[39] Economic and Social Rights Working Group Report, pp. 23, 58.

PEI Group's formulation would depend on the capacity in which they were exercising their functions.[40]

2.41 However, certain Working Group proposals would bind a narrower group of 'public authority' than that proposed by the PEI Working Group. While many recommendations of the Criminal Justice and Victims Group impose obligations on '*Police/ all criminal justice personnel and those delegated to fulfil any criminal justice function on behalf of the state*' – which is broadly in keeping with the PEI Group's proposal – other recommendations made by the Criminal Justice and Victims Group refer only to '*The Police*'.[41]

2.42 Other Working Group proposals suggest that certain rights will be capable of direct horizontal application. Non-exhaustive examples include the following:

- Recommendation 3 of the Report of the Children and Young People Working Group, which proposes that '*[i]n all actions and decisions, concerning or impacting on children, whether undertaken by public or private institutions. . .the best interests of the child shall be the paramount consideration*';
- Recommendation 7 of the Right to Work of the Economic and Social Rights Working Group Report which states that '*Derogations in private contracts of employment from this principle of equality of treatment are prohibited*.'

2.43 Where a right-obligation is imposed on a narrower category of 'public authority' than that proposed by the PEI Working Group, the PEI Working Group recommends that the Forum re-draft to allow for the possibility of a more generous understanding of 'public authority'.

2.44 Where horizontal application is at issue, an assessment of whether the *particular* right at issue requires horizontal as well as vertical application in order to be effective is for the Working Group that proposed it. It may be that the right can be sufficiently well protected through imposition of a positive obligation on the Assembly, for example, to legislate to prohibit derogation from the principle of equality in private contracts of employment. The PEI Working Group draws the Forum's attention to its general position and recommends that

[40] Sinn Féin has expressed concerns about this restriction, particularly in the context of the proposed clause (7). Note also that if the courts developed a doctrine of 'positive obligations' (see para. 2.33), there would be an onus on public authorities to protect against the actions of private landlords.

[41] Contrast Criminal Justice and Victims Report, p. 29-30, Recommendation 4 and Recommendation 7.

careful consideration be given to the issue in the drafting of the Forum's Recommendations, for example, by use of term/s such as 'including' or 'in particular'.

Nature of the Obligation

2.45 The Group considered whether the obligation imposed on public authorities should be both outcome and process based, or only outcome based. In recent decisions of the House of Lords, it has been clarified that the obligations imposed by the HRA are outcome-based.[42] This means that provided the outcome of a public authority's decision complies with the ECHR, it is not necessary for the public authority to have given due regard to the ECHR in the process of making a decision. What matters is that the practical *outcome* of the decision be ECHR compliant.

2.46 Human rights obligations can also be *process*-based. Duties to eliminate discrimination and promote equality are frequently process-based, as found for example, in Section 75 of the Northern Ireland Act 1998; Section 49A of the Disability Discrimination Act 1995 (as amended); Section 71(1) Race Relations Act 1976 (as amended); and Section 76A(1) of the Sex Discrimination Act 1975 (as amended). Section 38 of the Victoria Charter of Human Rights and Responsibilities Act 2006 imposes a process duty, not only in respect of non-discrimination duties, but in respect of all the rights contained in the Charter. In addition, although as noted above, the House of Lords has now determined that Convention obligations are to be outcome-based only, prior to this, Northern Ireland courts had imposed process-based Convention obligations, thereby suggesting that Northern Ireland courts consider themselves well-placed to review such obligations.[43]

2.47 The advantage with process obligations is that they can provide an effective means of mainstreaming rights and of creating a 'culture of rights'. Disadvantages include either the imposition of onerous duties on public authorities to prove, not only that they acted compatibly with the right, but also that they gave due regard to the right; or indeed the converse, that the public authority might be able to provide a

[42] *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19; [2007] 1 WLR 1420; *R. (Begum) v Denbigh High School Governors* [2006] UKHL 15, [2007] 1 AC 100.
[43] See, e.g., *AR v Homefirst Community Trust* [2005] NICA 8**;** *Miss Behavin' Ltd v Belfast City Council* [2005] NICA 35.

'*formulaic incantation*' to indicate compliance, thereby rendering the duty meaningless.[44]

Level of Support

Reach of the Obligation

- There was consensus in the Group on the recommendations that Supplementary Rights/Bill of Rights should be enforceable against 'public authorities' and that courts should be included within the definition of 'public authority' to ensure indirect horizontal effect of Supplementary Rights/Bill of Rights.

- On the broadening of the definition of public authority for Supplementary Rights/Bill of Rights, the levels of support were as follows:
  Alliance – supportive
  Disability Sector – supportive
  Ethnic Minority Sector – supportive
  Older People's Sector – supportive
  SDLP – supportive
  Sinn Féin – supportive
  Women's sector – supportive
  Business Sector – supportive
  UUP – position reserved
  DUP –position reserved

- Sinn Féin is open to provision for direct horizontal effect, but is reserving final position pending further consideration. Sinn Féin is also reserving support for clause (7) at this time pending further consideration.

- These positions were largely repeated in relation to the broadening of the definition of public authority for Convention rights.[45]

Nature of the Obligation

[44] This was the concern expressed by Lord Hoffmann in *R. (Begum) v Denbigh High School Governors* [2006] UKHL 15, [2007] 1 A.C. 100, [13].

[45] The Business Sector representative notes however that while he is supportive in principle of the proposal for broadening the definition of 'public authority' in the HRA, he considers this question to fall outside the Terms of Reference for the Supplementary Rights/Bil of Rights as set by the Belfast/Good Friday Agreement.

v On the inclusion of an outcome *and* process-based obligation, the levels of support were as follows:

Alliance – supportive
Disability Sector – supportive
Ethnic Minority Sector – supportive
Older People's Sector – supportive
SDLP – supportive
Women's Sector – supportive
Sinn Féin – supportive
UUP – opposed
Business Sector – opposed
DUP – opposed

2(vi) Standing

Recommendation

v The Group recommends that standing in relation to the Supplementary Rights/Bill of Rights is such as to enable access to justice which is sufficiently resourced and accessible, and proposes a clause based on the current sufficient interest test used for judicial review cases, as follows:

> *(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section ... may—*
>
> *(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or*
>
> *(b) rely on the right or rights concerned in any legal proceedings,*
>
> *but only if that person has (or would have) a sufficient interest in the unlawful act.*
>
> *(2) In subsection (1), whether a person has a 'sufficient interest' in the unlawful act must be determined having regard to the need to ensure access to justice.*
>
> *(3) In subsection (1)(a) 'appropriate court or tribunal' means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.*

Rationale

2.48 Standing refers to a person's ability to make a claim under a Bill of Rights/Supplementary Rights or other legislation. There are potentially two main interpretations of standing. The first interpretation is narrow, and would accept that only individuals and sometimes businesses and other legal bodies (victims), whose rights have been directly violated (and where applicable in the case of individuals their guardians or those who act under a power of attorney for them) can take human rights cases. The second is broader and would recognise the right of interest groups to take human rights cases on behalf of others. The latter category may in turn be interpreted in a narrow or broad manner – it could be restricted so as to only acknowledge the right of the NIHRC for example, to pursue public interest cases

or it could also allow a wider range of organisations to pursue such cases. The HRA adopts a narrow victim-based definition, although the NIHRC (and the Equality and Human Rights Commission) can rely on the HRA in taking judicial review proceedings in their own name.

2.49 The Group has agreed that the victim-based definition (as contained in the HRA) is too narrow for the purposes of any Supplementary Rights/Bill of Rights for Northern Ireland. However, the majority of the Group does not agree with widening the definition of standing too broadly. It tasked its Legal Advisor with devising text which would ensure that standing in relation to the Supplementary Rights/Bill of Rights is such as to enable access to justice which is sufficiently resourced and accessible, while also not unduly constraining the discretion of the courts. The advisor's recommendation is that the test of 'sufficient interest' - which applies already to judicial review and is thus well understood by the courts - be the relevant test.

Level of Support

v There was consensus in the Group on this recommendation.[46]

[46] Sinn Féin prefers the broadest possible interpretation of standing (on the South African model) but is prepared to join the consensus on this recommendation. SDLP suggested allowing class action lawsuits under the Bill of Rights, but this was not discussed in any detail by the Group. Sinn Féin would also be supportive of this proposal.

2(vii) Interpretation

Recommendation

- The Group proposes an interpretation clause for the Bill of Rights/Supplementary Rights similar to that contained in the HRA, as follows:

  '(...) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Supplementary Rights/Bill of Rights.'

- An optional addition to the interpretative clause is as follows:[47]

  '*International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right [must/may] be considered in interpreting Supplementary Rights/Bill of Rights.*'

Rationale

General Interpretive Duty

2.50 Many bills of rights contain clauses to assist the courts in interpreting the bill of rights. For example, Section 3 of the HRA provides guidance to the courts on reading and giving effect to legislation in a way which is compatible with the ECHR rights. The Group has agreed that this should also apply to the Supplementary Rights/Bill of Rights.

International and Comparative Interpretive Clause

2.51 The Group has also discussed whether a wider interpretative clause might be devised to provide further assistance to the court. While recognising that the court itself must be the ultimate arbiter of the meaning of any clause in the Supplementary Rights/Bill of Rights, the Group considered whether it would be helpful if the Bill of Rights/Supplementary Rights contained a clause which would guide or direct the courts towards certain principles which they should apply when considering the meaning of any provision in the Supplementary Rights/Bill of Rights. Some members of the Group are of the

[47] The levels of support within the Group for this option are laid out under the 'Level of Support' section below.

view that a Preamble could fulfil this function. The Group also discussed whether the courts could be guided towards international human rights law and law from other countries. Two options were considered: the first, a directive clause, which would *require* courts to consider international instruments; and the second, a *permissive* clause, that would *enable, but not require* courts to consider international instruments.

2.52 It is argued by some that a clause referring to international instruments would be particularly important in the context of Supplementary Rights/Bill of Rights particular to the circumstances of Northern Ireland reflecting the principles of mutual respect and parity of esteem for which there are no or few precedents on which the courts can rely. However, it is also argued that this opens the door to international law seeping into domestic law, and that since the courts can already in appropriate circumstances refer to international law there is no need and/or it would be undesirable to include any further provision relating to international law.

2.53 The Group considered the extensive range of international instruments invoked in the Reports of other Working Groups, which included both the international treaties and conventions, and recommendations and reports made by international committees. Non-exhaustive examples include the following:

International Instruments

- UN Convention on the Rights of the Child;[48]
- International Covenant on Economic, Social and Cultural Rights[49];
- International Covenant on Civil and Political Rights;[50]
- EU Charter of Fundamental Rights;[51]
- Framework Convention for the Protection of National Minorities;[52]
- European Charter for Regional or Minority Languages[53]
- UN Declaration on the Rights of Minorities[54]

[48] See, e.g., Culture, Identity and Language Working Group Report, pp. 4, 15-17; Children and Young People Working Group Report, pp. 10, 21, 27.
[49] See, e.g., Culture, Identity and Language Working Group Report, pp. 16; Economic and Social Rights Working Group Report (throughout).
[50] See, e.g., Women's Working Group Report, p. 20; Culture, Identity and Language Report, p. 12.
[51] See, e.g., Culture, Identity and Language Working Group Report, p. 17.
[52] See, e.g., Culture, Identity and Language Working Group Report (throughout).
[53] See, e.g., Culture, Identity and Language, pp. 4, 20, 32, 25.
[54] See, e.g., Culture, Identity and Language Working Group Report, pp. 4, 12.

- European Social Charter[55]
- The Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Geneva, 1955)[56]

Comments/Recommendations/Reports of International Committees/Organisations

- Comments of the UN Human Rights Committee;[57]
- Recommendations of the CEDAW Committee;[58]
- Comments of the Committee on Economic, Social and Cultural Rights (2005)[59];
- 1999 Report of the UN Special Rapporteur on Violence on Trafficking in Women, Women's Migration and Violence against Women;[60]
- OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly.[61]

2.54 Certain Working Groups have also proposed interpretation clauses that refer to particular international instruments, such as the recommendation of the Culture, Identity and Language Working Group that courts, tribunals and public authorities '*should have regard to relevant international instruments, including the OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly*',[62] and the recommendation of the Economic and Social Rights Group that a permissible interpretation clause referencing international and comparative experience, as well as a preambular reference to international human rights standards.[63]

Level of Support

v There was consensus in the Group on the HRA style interpretation clause.

[55] See, e.g., Economic and Social Rights Working Group Report, pp. 19, 52, 60.
[56] See, e.g., Women's Working Group Report, p. 38.
[57] See, e.g., Women's Working Group Report, p. 20.
[58] See, e.g., Women's Working Group Report, pp. 9, 26, 28.
[59] See, e.g., Women's Working Group Report, pp. 26-27.
[60] See, e.g., Women's Working Group Report, p. 13.
[61] See, e.g., Culture, Identity and Language Working Group Report, p. 10.
[62] Culture, Identity and Language Working Group Report, p. 10.
[63] Economic and Social Rights Working Group Report, p. 63.

v The levels of support in relation to the additional clause on international instruments were as follows:

Alliance – supportive
Business Sector – supportive
Ethnic Minority Sector[64] – supportive
Older People's Sector – supportive
SDLP – supportive
Disability Sector – prefer directive clause but supportive of permissive as compromise
Sinn Féin – prefer directive clause but supportive of permissive as compromise
Women's Sector – prefer directive clause but supportive of permissive as compromise
UUP – opposed
DUP – opposed

[64] The Ethnic Minority Sector has also proposed a purposive clause referring to the Belfast/Good Friday Agreement.

2(viii) Devolved and Non-Devolved issues

Recommendation

v There are a range of possibilities that exist in relation to transferred, reserved and excepted matters which are presented in tabular form in Appendix One.

Rationale

Introduction

2.55 Responsibility for issues relating to human rights that could be affected by the Bill of Rights/Supplementary Rights lies both with UK central Government and Parliament and with the Executive and Assembly in Northern Ireland. The Supplementary Rights/Bill of Rights could therefore apply to issues that may be entirely within Westminster's remit, some that may be entirely within the NI Assembly's remit and some that may be a combination of both. Three tables are provided in Appendix One, setting out in detail the range of acts and instruments which may apply in Northern Ireland, and possible ways of subjecting the different acts and instruments to Bill of Rights/Supplementary Rights compliance.

2.56 A brief summary of the Group's discussion of Appendix One is provided below; but for the sake of clarity, the premise of those deliberations requires explanation.

2.57 Normally sub-national Bills of Rights can only bind sub-national authorities and apply to sub-national legislation, as is the practice, for example, in Australia, Canada and the United States. This is because, usually, sub-national Bills of Rights are enacted by sub-national legislatures, which are not competent to bind national legislatures or authorities. This would be the case if the Supplementary Rights/Bill of Rights were to be enacted by the NI Assembly.

2.58 However, the Belfast/Good Friday Agreement stipulates that supplementary rights will be defined '*in Westminster legislation*'.[65] Some argued that this was intended as a mechanism of entrenching the Supplementary Rights/Bill of

[65] Belfast/Good Friday Agreement, Rights, Safeguards and Equality of Opportunity, Article 5.

Rights, and therefore, should not have any implications for its application. It can also be argued though that this feature distinguishes the Supplementary Rights/Bill of Rights from the Australian, Canadian and United States models. Unlike state, territorial or provincial human rights legislation in these jurisdictions, the Bill of Rights/Supplementary Rights will be enacted by Westminster, the central legislature. As a matter of constitutional principle, Westminster has the legal power to give the Supplementary Rights/Bill of Rights broader legal effect than would usually be the case for a sub-national Bill of Rights.

2.59 Many of the recommendations made by other Working Groups have implications for reserved and excepted matters. Non-exhaustive examples include:

- Recommendation 14 of the Children and Young People Working Group on youth justice, and many of the proposals of the Criminal Justice and Victims Group, which have implications for criminal law, a reserved matter pursuant to NIA, Schedule 3, para. 9;
- Recommendation 12(1)-(2) of the Children and Young People Working Group to prohibit conscription and recruitment into the armed forces of those below the age of 18, the armed forces being an excepted matter pursuant to NIA, Schedule 2, para. 4;
- Recommendation 15 of the Civil and Political Rights Group regarding the right to participation and good governance, which has implications for electoral law, an excepted matter pursuant to NIA, Sch. 2, paras. 2 and 12-13;
- Recommendation 7 of the Women's Working Group Report that '*public authorities must take active measures to facilitate full participation of women in political and public life including, where appropriate, by the use of temporary special measures to achieve balance in men and women holding domestic and international public positions and the equal representation of men and women in the formulation of government policy*', which could potentially have indirect implications for electoral law, an excepted matter pursuant to NIA, Sch. 2, paras. 2 and 12-13.
- Recommendation 3 of the Civil and Political Rights Group, indicating that '*no one should be involuntarily returned or extradited* … ', which falls within the competence of international relations, an excepted matter pursuant to NIA, Sch. 2, para. 3.

2.60 It is clear that these rights have been recommended by other Working Groups due to their accepted importance. However, in many cases, particularly where programmatic duties are involved (such as Recommendation 7 of the Women's Working Group Report, reproduced above), NI institutions will not necessarily have the capacity to deliver on these rights, given that competence for the relevant activity lies with Westminster or the UK government. Thus, if the Bill of Rights/Supplementary Rights are not capable of binding the Westminster/UK government institutions which enjoy the relevant competence to act, the Supplementary Rights/Bill of Rights could be rendered ineffective in practice.

2.61 The Group therefore discussed the following options:

Transferred Matters

2.62 The Group was agreed that the NI Assembly, the NI Executive and all other NI public authorities should be bound by the Supplementary Rights/Bill of Rights. This is in keeping with the Belfast/Good Friday agreement which states that neither the Assembly nor public bodies can infringe any Bill of Rights/Supplementary Rights for Northern Ireland,[66] and that the Assembly's legislative authority is '*subject to … any Bill of Rights for Northern Ireland*'.[67] This also gives the Bill of Rights/Supplementary Rights the same status as is currently accorded to Convention rights.[68]

2.63 Courts should have the power to interpret NI Assembly legislation and NI subordinate legislation '*so far as it is possible to do so*' to be compatible with the Bill of Rights/Supplementary Rights, in keeping with Section 3 of the HRA.

2.64 Courts should also have the power to invalidate Northern Ireland Assembly legislation and Northern Ireland subordinate legislation which is incompatible with Supplementary Rights/Bill of Rights.

2.65 Even though Assembly legislation can be declared invalid if contrary to any Bill of Rights/Supplementary Rights, the Group also considered it desirable, in the interests of promoting '*dialogue*' between the Assembly and the courts, that the Assembly issue statements of compatibility of its legislation with

[66] Belfast/Good Friday Agreement, Strand One, Article 5.
[67] Belfast/Good Friday Agreement, Strand One, Article 26(a).
[68] See Section 6(2)(c), Northern Ireland Act 1998.

Supplementary Rights/Bill of Rights (in the style of Section 19 of the HRA). Provision is already partially made by Sections 9 and 10 of the Northern Ireland Act 1998, requiring a ministerial statement and Presiding Officer scrutiny of legislative competence (which would implicitly include statements/scrutiny of Bill of Rights/Supplementary Rights compliance given that the Assembly does not have competence to legislate in conflict with Bill of Rights/Supplementary Rights).

Reserved Matters/Excepted Matter that is Ancillary to a Reserved or Transferred Matter

a. Legislative Instruments

2.66 Insofar as reserved matters/matters ancillary to reserved or excepted matters are concerned, legislation may be enacted at either Westminster/central government or Assembly level (provided the Secretary of State has given consent (s.8 NIA 1998)). This means that the following legislative measures may exist: Westminster primary legislation; Westminster subordinate legislation; Assembly legislation; and Northern Ireland subordinate legislation.

Westminster Primary Legislation: *General Issues*

2.67 For some, in order for Supplementary Rights/Bill of Rights to be considered to be of equal status to Convention rights, provision should be made for a Minister of the Crown, in charge of a Bill in either House of Parliament, to either make a statement of compatibility with Supplementary Rights/Bill of Rights, or indicate that such a statement cannot be made and that the Bill will nonetheless proceed (in line with Section 19 HRA). Again, with a view to ensuring equal status between Convention and Supplementary Rights/Bill of Rights, it was proposed by some that courts of Northern Ireland should have the power to interpret Westminster legislation '*so far as it is possible to do so*' to be compatible with the Bill of Rights/Supplementary Rights (in line with Section 3, HRA); and should have the power to issue declarations that Westminster legislation is incompatible with Supplementary Rights/the Bill of Rights (Section 4, HRA). Provision could also be made for expedited procedures, modelled on Section 19 of the HRA, for Westminster legislation to be amended to render it compatible with the Bill of Rights/Supplementary Rights, whether in so far as the legislation applies in Northern Ireland or with general UK-wide application if considered preferable.

2.68 However, while, these options are constitutionally and legally possible since, as noted above, the Supplementary Rights/Bill of Rights will be enacted by Westminster, some members of the Group were concerned that these proposals could create significant political and practical challenges. In particular, although a declaration of incompatibility merely initiates dialogue with central government about compatibility of Westminster primary legislation with Supplementary Rights/Bill of Rights and does not affect its continued applicability or validity, it may be politically unacceptable for Northern Ireland courts to be declaring Westminster legislation incompatible with rights which only apply in Northern Ireland. Moreover, the interpretive obligation could result in Westminster primary legislation being applied in a slightly different way in Northern Ireland than elsewhere in the UK.[69]

Westminster Primary Legislation: Invalidation/Disapplication

2.69 A proposal was made by Sinn Féin to either invalidate Westminster primary legislation or disapply Westminster primary legislation insofar as it is incompatible with the Bill of Rights/Supplementary Rights, in the way that Westminster primary legislation is disapplied if not compatible with European Community ('EC') law.[70] The argument was made that remedies such as invalidation and disapplication would be necessary to ensure effective remedy for violations of the Bill of Rights/Supplementary Rights; and that declarations of incompatibility are insufficiently protective of rights. It was also argued that the particular circumstances of Northern Ireland and the Belfast/Good Friday Agreement could constitute a unique justification for Westminster to voluntarily accept disapplication of Westminster primary legislation in Northern Ireland, in the way that has sometimes been reasoned in the context of EC law,[71] thereby preserving the principle of Parliamentary sovereignty.

2.70 Invalidation of Westminster primary legislation was ruled out as a feasible constitutional option. The Legal Advisor was also of the view that, from a constitutional perspective, disapplication of

[69] Sinn Féin did not share this concern.
[70] See *R v Secretary of State for Transport, ex parte Factortame Ltd* (No. 2) [1991] 1 A.C. 603 (HL).
[71] See comments of Lord Bridge in *R v Secretary of State for Transport, ex parte Factortame Ltd* (No. 2) [1991] 1 A.C. 603, 658-59 (HL).

Westminster primary legislation would be extremely problematic, given that disapplication of Westminster primary legislation for EC purposes involved a unique constitutional accommodation between the supremacy of EC law and the principle of Parliamentary sovereignty, that is not capable of easy extension. In the current constitutional framework, bearing in mind that Convention rights are protected through declarations of incompatibility and not disapplication, extension of the disapplication remedy would carry a heavy burden of justification. The disapplication proposal would also create further difficulties: if disapplication is applied only to Supplementary Rights/Bill of Rights, such rights would be given greater protection than is currently given to Convention rights; in the alternative, if disapplication is applied to Convention rights and Supplementary Rights/Bill of Rights in Northern Ireland, it would mean that different protection is given to Convention rights in Northern Ireland than elsewhere in the UK. It was also noted that disapplication would create significant practical and political disruption, particularly in the case of Westminster primary legislation of UK-wide application.[72]

Westminster Subordinate Legislation

2.71 A number of views were expressed in regard to Westminster subordinate legislation which was incompatible with the Bill of Rights/Supplementary Rights. Currently, Westminster subordinate legislation can be declared invalid for incompatibility with Convention rights. For some, again, in order for Supplementary Rights/Bill of Rights to be considered to be of equal status to Convention rights, it was essential that Westminster subordinate legislation, which is incompatible with Bill of Rights/Supplementary Rights, not be capable of legal effect in Northern Ireland.

2.72 For others, however, Westminster subordinate legislation should either not be subject to Supplementary Rights/Bill of Rights at all, or at best, only subject to declarations of incompatibility with the Bill of Rights/Supplementary Rights.

2.73 The majority of the Group noted that a remedy of invalidation of Westminster subordinate legislation for incompatibility with the Bill of Rights/Supplementary Rights would create conceptual difficulties: the declaration would suggest that the legislation

[72] Sinn Féin did not share this concern

was devoid of any legal effect, when in fact, the legislation would continue to apply elsewhere in the UK.[73] Consequently, the Group considered the possibility of a remedy of 'disapplication' of Westminster subordinate legislation. As noted above at para. 2.69, the remedy of 'disapplying' legislation is currently used by courts across the UK where Westminster primary legislation is incompatible with EC law.

2.74 Again, while legally and constitutionally feasible, the majority of the Group acknowledged the political and practical challenges of 'disapplying' Westminster subordinate legislation in Northern Ireland, and particularly the concern about jeopardizing the uniformity of UK-wide government programmes.[74]

Assembly Legislation:

2.75 The Group agreed that Assembly legislation in this area should be treated according to the proposals recommended above in respect of transferred matters (see paras. 2.62-2.65).

Northern Ireland Subordinate Legislation

2.76 The Group agreed that Northern Ireland subordinate legislation in this area should be treated according to the proposals recommended above in respect of transferred matters (see paras. 2.63-2.64).

b. Implementing Measures

2.77 In the context of reserved matters, the following measures may be taken to implement legislation (whether of Westminster or the NI Assembly and whether primary or subordinate): acts of NI public authorities, including the NI executive; and acts of UK central government.

Acts of NI Public Authorities

2.78 The Belfast/Good Friday Agreement clearly states that public bodies must not infringe the Bill of Rights/Supplementary Rights.[75] Consequently, the Group recommends that Northern Ireland public authorities should be under a duty to act compatibly with the Bill of Rights/Supplementary Rights in *all* their activities, including when acting pursuant to Westminster primary or secondary legislation. This duty will not be unduly

[73] Sinn Féin did not share this concern.
[74] Sinn Féin did not share this concern.
[75] Belfast/Good Friday Agreement, Strand One, Article 5(b).

onerous (in the sense of attributing responsibility where the relevant public authority did not have competence to devise the policy), given that, as has already been proposed by the Group in its Application Recommendation (see above Section 2(v), subsection (2) of Proposed Provision),[76] public authorities may avail themselves of a defence that they were acting pursuant to legislation and could not have acted otherwise.

Acts of UK Government in Northern Ireland

2.79 Insofar as UK government actors operate in Northern Ireland, for some, such actors could also be required to comply with the Bill of Rights/Supplementary Rights, subject again to the defence noted in para. 2.78 of acting pursuant to legislation). For others, this was an unacceptable proposal.

Excepted Matters (not Ancillary to Reserved or Excepted Matters)[77]

2.80 Insofar as excepted matters are concerned, legislation can only be enacted at central government level. In this context, the Group refers to its discussion outlined above relating to: Westminster primary legislation (paras. 2.67-2.70); Westminster subordinate legislation (paras. 2.71-2.74); and NI public authorities and central government authorities implementing legislation (paras. 2.78-2.79).

Level of Support

v Please see the third column of the tables in Appendix One.

[76] Subsection (2) of the Proposed Provision on p. 27.
[77] Section 6(2)(b).

2(ix) Justiciability

Recommendation:

- The PEI Group notes that a range of language has been used by Working Groups in their recommendations, and recommends that the Forum conduct an audit of justiciability of all its final proposals to ascertain:
    - Whether they confer immediately enforceable rights on individuals (and corresponding, immediate duties on public authorities);
    - Whether they impose programmatic or target obligations on public authorities.

- The option exists for programmatic rights to also be legally enforceable.[78]

Rationale

2.81 The justiciability of a right refers to the extent to which it is suitable for enforcement by courts. It is not for the PEI Group to second-guess justiciability proposals made in relation to specific rights by other Working Groups.

2.82 However, the PEI Group notes that a range of language has been used by Working Groups in their recommendations, and broadly speaking, the PEI Working Group has identified two categories of recommendation: first, recommendations that appear to confer immediately enforceable rights on individuals (and corresponding, immediate duties on public authorities); and second, recommendations that appear to impose programmatic or target obligations on public authorities.

2.83 Examples of recommendations clearly intended to impose immediately enforceable rights and duties include the following:

- Recommendation 5(1) of the Children and Young People Working Group Report: '*Every child has the right to education.'*
- Health Recommendation 5 of the Economic and Social Rights Working Group that '*No one shall be refused emergency medical treatment and essential primary healthcare.*'

[78] The levels of support within the Group for this option are laid out under the 'Level of Support' section below.

2.84 Examples of recommendations that appear to impose programmatic duties include the following:

- Recommendation 1(c) of the Civil and Political Rights Working Group Report, stating that '*Laws, programmes or activities aimed at achieving and sustaining full and effective equality … shall be required …* '.
- Recommendation 7 of the Women's Working Group Report: '*Public authorities must take active measures to facilitate full participation of women in political and public life …* .'
- Recommendations in the Economic and Social Rights Working Group Report that public authorities '*must take all appropriate measures, including legislative measures, to achieve the progressive realisation of [rights], to the maximum of [their] available resources*'.[79]

2.85 While international and foreign courts, perhaps most notably the South African courts, have treated programmatic obligations as fully justiciable, domestic courts have often been reluctant to permit individuals to enforce such statutory duties or to exercise very strict scrutiny when examining the extent to which such duties have been fulfilled.

2.86 Some members of the Group contended that, based on the South African experience and experience elsewhere, courts are clearly capable of giving judicial effect to programmatic obligations, without encroaching unduly on the competences of the executive or the legislature or other public authorities. Granting justiciability to programmatic rights was regarded by some as necessary to ensure effective realisation of the rights.

2.87 Others were of the view that such discretionary duties should not be enforceable by courts: programmatic obligations usually entail the expenditure of resources, which is more appropriately determined by executive and legislative actors. In addition, some pointed to the difficulties of courts enforcing and monitoring the implementation of programmatic rights and concerns were raised regarding excessive litigation which would stymie effective decision-making by public authorities.

[79] Economic and Social Rights Working Group Report: Health (para. 3); Housing (paras. 3-4), Education (para. 2); Adequate Standard of Living (para. 2); Right to Social Security (para. 3).

Level of Support

- There was consensus in the Group on the recommendation that the Forum conduct a justiciability audit of its final proposals.

- The levels of support for legal enforceability of programmatic rights were as follows:

  Business Sector – qualified support[80]
  Disability Sector – supportive
  SDLP – supportive
  Sinn Féin – supportive
  Women's Sector – supportive
  Ethnic Minority Sector – supportive
  Alliance – position reserved
  Older People's Sector – sceptical about justiciability of programmatic rights and in favour of an Assembly Committee to oversee their realisation
  DUP – opposed
  UUP – opposed

[80] Depending on the nature of the rights.

2(x) Enforcement Mechanisms

Recommendation

Legal Institutions:

- There are a number of options for how the Supplementary Rights/Bill of Rights could be enforced in the Courts:[81]

    1. A dedicated Human Rights Court
    2. A Human Rights Tribunal
    3. The creation of a Human Rights Division of the High Court
    4. Rights enforced through existing court system

Other Institutions:

- The statutory powers of the NIHRC should include bench-marking, monitoring and auditing of compliance with the ECHR and Supplementary Rights/Bill of Rights, and in particular with programmatic rights.
- An Assembly committee should perform a similar role to that performed at Westminster level by the Joint Committee on Human Rights, namely to monitor compliance of Assembly legislation with the Bill of Rights/Supplementary Rights; to conduct consultations; and to publish reports.[82]

Remedies

- The Group also cross-refers in this regard to Section 2(viii) above (recommendations on particular remedies in devolution context) and Section 2(x) (recommendations on general remedies).

Rationale

2.88 The Group discussed both legal institutions and other (political/non-judicial) institutions that would be required to give effect to the Bill of Rights/Supplementary Rights.

[81] The levels of support within the Group for these options are laid out under the 'Level of Support' section below.

[82] There are two further options in relation to this – that a new Committee be created or that these be subsumed within the remit of the OFMDFM committee. There was no extensive discussion of these options and thus no consensus view.

Legal Institutions

a. Human Rights Court/Mainstreaming through Existing Courts

2.89 The possibility of establishing a Human Rights Court for Northern Ireland was examined. Various proposals were considered regarding the potential role of such a court in the current judicial system: whether it would be a court of first instance; a referral court; or a specialist court at the level of the Court of Appeal. Some members of the Group observed that a human rights court could have an important symbolic impact in the particular circumstances of Northern Ireland. In addition, the Group noted that one third of the civil society submissions to the Forum that addressed the question of enforcement, indicated a preference for a Human Rights Court.[83] However, the majority of the Group was concerned about jurisdictional difficulties, and the risk of creating burdensome litigation procedures if Bill of Rights/Supplementary Rights claims had to be segregated from other claims, particularly judicial review claims. Some members of the Group also observed that to date, the courts had proved themselves adept at handling ECHR cases under the HRA.

b. Human Rights Division and Human Rights Tribunal

2.90 Concerns about separating human rights claims, and creating administrative costs and inconvenience without any corresponding tangible human rights benefits, led to the majority of the Group rejecting other legal institutional proposals such as, a Human Rights Division of the High Court or a Human Rights Tribunal. Although a Human Rights Tribunal might have the advantage of being composed of panels of expert human rights academics, practitioners, or activists, a tribunal had the potential to de-value the importance of the Bill of Rights/Supplementary Rights by removing adjudication of such rights from the main court system. Nonetheless, a tribunal may be valuable for certain types of claim, provided judicial enforcement is also available. The majority of the Group was not persuaded about the effectiveness of a Human Rights Division of the High Court.

Other Institutions

a. NIHRC

2.91 In terms of the political institutions required to give appropriate enforceability to the Bill of Rights/Supplementary Rights, the

[83] See Appendix Two, Section III, n. 114.

Group notes that the Belfast/Good Friday Agreement requires '*arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for Northern Ireland*'.[84] This function is currently performed in part by the NIHRC, pursuant to Section 69 of the Northern Ireland Act 1998.[85] The Group considered the option of expanding the remit of the NIHRC to encompass monitoring of Supplementary Rights/Bill of Rights.

b. Joint Committee on Human Rights

2.92 The Group noted the work of the Joint Committee on Human Rights in Westminster and agreed that an equivalent Assembly Committee would be desirable.[86]

c. Additional Proposal

2.93 The Group also considered the possibility of establishing a Supplementary Rights/Bill of Rights committee, along the models of the European Committee on Social Rights. It was argued that such a committee, if established by the Assembly, would constitute a form of 'political adjudication' of what are perceived to be 'policy-laden' rights. This also would go further than the present remit of the Joint Committee on Human Rights. Consensus was not reached on this proposal however.

Auditing Duty

2.94 The group notes the recommendation of the ESR group in relation to the auditing duty etc but has not reached a view on this proposal.

Level of Support

v Legal Institutions:

Ethnic Minority Sector – Option 1
SDLP – Option 1

[84] Good Friday/Belfast Agreement, Strand One, para. 5(c).
[85] See also Sections 9 and 10, Northern Ireland Act 1998.
[86] The DUP was sceptical about the need for such a Committee.

Sinn Féin – Option 1, with Option 3 as a second preference, and Option 2 as a potential provided it is complementary to judicial enforcement
Alliance – Option 4
Business Sector – Option 4
Disability Sector – Option 4
DUP – Option 4
UUP – Option 4
Women's Sector – Option 4
Older People's Sector – Option 4

v Other Institutions:

- There was consensus in the Group as regards the recommendations in relation to the NIHRC and the majority of the Group agreed with the role of an Assembly Committee, but not in relation to its exact form or remit.[87]
- The Older People's Sector was in favour of an Assembly Committee to which the NIHRC (and possibly NGOs, as with the collective complaints procedure at the European Committee on Social Rights) could bring complaints when programmatic rights are not being realised.

[87] The DUP was sceptical about the need for an Assembly Committee.

- 2(xi) Remedies

Recommendation

- The following provision should be included in the Bill of Rights/Supplementary Rights:

    - '*Courts shall grant to any person or body whose rights and freedoms under the Supplementary Rights/Bill of Rights have been or may be violated an effective remedy and for this purpose may grant such relief or remedy, including compensation, or make such order, as they consider just and appropriate.*

    - *The legal aid system should be such as to ensure access to justice via the Supplementary Rights/Bill of Rights.*'

- In addition, the Group brings the Forum's attention to the range of possibilities in relation to legislative incompatibility, invalidity and disapplication discussed in Section 2(viii) and in the tables in Appendix One.

Rationale

Introduction

2.95 There are a number of remedies available for breaches – potential and actual – of human rights, for example, compensation, provision for amending legislation, public apology etc. The issue of remedies is obviously linked to how rights are enforced and interpreted.

2.96 Generally, remedies can be granted both before and after a breach of rights.

2.97 Before breach, the following remedies are relevant:

- Proactive referral procedure where compatibility of draft legislation with the Supplementary Rights/Bill of Rights is in doubt;
- Injunction.

2.98 After a breach, the following remedies are relevant:

- Statement of vindication of rights;
- Public apology, including public acknowledgement of the facts and acceptance of responsibility;
- An accurate account of the violations which occurred, also to be included in future training and education materials;
- Other restorative justice type remedies (e.g. tributes to victims);
- Recommendations as to measures which would help to prevent future breaches;
- Compensation (different types) or other reinstatement;
- Costs (including punitive);
- Voiding laws and decisions, or statement of incompatibility and fast track amendment;
- Fair trial safeguards excluding, in principle, evidence taken in violation of rights (can be subjected to exceptions);
- Complex constructive injunctions (requiring that remedial action be taken, e.g. US examples of affirmative action and bussing);
- Ensuring public access to information about rights.

2.99 The rationale for a number of remedies has already been set out above in the discussion on devolution (see Section 2(viii) and Appendix One): namely, invalidation of NI legislation; the declaration of incompatibility in respect of, or disapplication of Westminster primary legislation; and declarations of inapplicability or disapplication of Westminster subordinate legislation.

2.100 Beyond listing any 'special' remedies, such as invalidation, disapplication or a declaration of incompatibility and a general statement regarding 'effective' remedies, bills of rights often do not contain lists of particular remedies. Such lists are found more commonly in administrative procedure acts or civil procedure rules. The Group therefore agreed that a general remedies clause would be preferable to a specific list.

Level of Support

v There is consensus in the Group on these recommendations.

2(xii) Outstanding Legal Issues

A. Harmonisation and non-diminution

Recommendation:

v The following clauses are proposed:

'The Supplementary Rights/Bill of Rights shall be interpreted harmoniously with the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. This provision shall not prevent the Supplementary Rights/Bill of Rights providing more extensive protection than is provided by the ECHR.

Nothing in this Bill shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by international law and by international agreements to which the UK is a party, including but not limited to the European Convention for the Protection of Human Rights and Fundamental Freedoms.'

Rationale

2.101 The Bill of Rights/Supplementary Rights should be interpreted in a way that ensures harmony, to the extent possible, between the ECHR and Supplementary Rights/Bill of Rights. Although Section 3 of the HRA requires that all legislation (which would include legislation enacting Supplementary Rights/Bill of Rights), should be read '*so far as it is possible to do so*', to be compatible with Convention rights, the Group thought it desirable to reiterate this obligation in the Supplementary Rights/Bill of Rights legislation. Reiteration of the obligation stresses the importance of harmony between the two human rights schemes: ECHR and Supplementary Rights/Bill of Rights.

2.102 It was also considered necessary to propose a non-retrogression clause, with the aim of ensuring that there would be no diminution of current international standards, including the ECHR. In particular, the Group was concerned that certain Working Group recommendations may fall below current international minimum standards. For example: Recommendation 3 of the Civil and Political Rights Report, states

that no one '*should*' be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution. The use of '*should*' rather than '*shall*' appears to impose a less mandatory obligation on public authorities than is found in the existing ECHR case law.[88]

Level of Support

There was consensus in the Group on these recommendations.

B. Legal personality

Recommendation

v The Group recommends a qualified reference to 'legal persons' (for instance, stating that 'legal persons' enjoy Supplementary Rights/rights in the Bill of Rights depending on the nature of the right and the nature of the legal person, etc), since not all of the Supplementary Rights/rights in the Bill of Rights will be appropriate for enjoyment by 'legal persons'.

Rationale

2.103 For some, while companies should be entitled to economic entitlements and market-related freedoms, such entitlements and freedoms are conceptually distinct from human rights, which have their foundation in respect for individual human dignity and autonomy. There may also be concerns that companies, with significant resources at their disposal, will be disproportionately represented in human rights litigation. Others observe that human rights litigation by companies can generate human rights observance that is beneficial to other private persons or society in general, while practical experience, for instance, in litigation involving ECHR claims, indicates that litigation asserting companies' rights constitute an extremely small proportion of overall ECHR applications. Additionally, litigation involving

[88] See *Soering v UK* (1989) 11 EHRR 439, paras. 90-91; *Chahal v UK* (1996) 23 EHRR 413, para. 74.

companies tends to focus on particular rights, due process guarantees, property rights, and freedom of expression claims.

2.104 In light of these arguments, the Group agreed that the best approach was to adopt a qualified reference to legal persons.

Level of Support

- There was consensus in the Group on this recommendation.[89]
- The Business Sector representative is however opposed to any restriction on the rights of legal persons which would depart from the established jurisprudence of the ECHR and would be liable to infringe the proper rights of all categories of legal persons.

[89] The Sinn Féin position is that it prefers that human rights apply only to human beings. However it is content to join the consensus on this issue, in the context of its support for the non-retrogression principle and given that current international instruments, such as the ECHR, are sometimes applied to companies.

v 3. Implementation

Recommendations:

- v Supplementary Rights/Bill of Rights should be added to the Human Rights Act in current human rights education programmes.
- v Those tasked with implementing a Bill of Rights/Supplementary Rights (lawyers, judges, civil servants etc) also need to be trained on its implementation.
- v As with the Human Rights Act, a period of time should be allowed before the legislation to come into effect to allow public authorities to make necessary preparations.
- v There should be wider promotional and public awareness-raising of the Bill of Rights/Supplementary Rights.
- v There should be some kind of central/governmental responsibility for and co-ordination of these activities.
- v Priority should be given to vulnerable and hard to reach groups.
- v Supplementary Rights/Bill of Rights must be as accessible as possible.
- v The Supplementary Rights/Bill of Rights and any accompanying promotional or educational materials should be produced in alternative formats, including child-friendly, plain English, different languages, Braille, large print etc.
- v The lead responsibility for co-ordinating and funding this lies with government.
- v Money should be ring-fenced in the budget on an ongoing basis for promotion of the Supplementary Rights/Bill of Rights.
- v The legal aid system should be such as to ensure access to justice via the Supplementary Rights/Bill of Rights.
- v Other non-legal remedies/alternatives to litigation could be identified and funding prioritized for these.
- v There should be a delay between enactment of the Bill of Rights/Supplementary Rights and the coming into force of the Bill of Rights/Supplementary Rights (similar to the period in respect of the HRA) to ensure adequate preparation for its introduction.

A further option is:

- v A copy of the Bill of Rights/Supplementary Rights [may/must] be [available/sent] to every household in Northern Ireland.

Rationale

3.1 After a Bill of Rights has been introduced, there should be a programme of work to ensure that it can be implemented and that the rights are made meaningful and accessible to those who need them. Otherwise it risks being an instrument with legal effect but with little actual meaning or significance to ordinary people.

3.2 Having reviewed the experience of other jurisdictions, the Group agreed effective implementation measures are key to making rights real and ensuring access to justice. The measures proposed are those which have provided useful benefits elsewhere, and the Group concluded that such measures would be have positive effects in Northern Ireland also.

Level of Support

- v There was consensus in the Group on all the proposals listed apart from the final option.

- v There were a range of views on whether the final proposal to send a copy to every household in Northern Ireland should be directive or permissive.

APPENDIX ONE
SUPPLEMENTARY RIGHTS / BILL OF RIGHTS AND DEVOLUTION: LEGAL OPTIONS

Introduction

Three tables are provided in this Appendix. These tables outline possible methods of enforcing the Supplementary Rights/Bill of Rights in three spheres: first, in the sphere of transferred matters; second, in the sphere of reserved matters and excepted matters ancillary to reserved or transferred matters; and third, in the sphere of excepted matters.

For the sake of clarity:

- Transferred matters are those matters in respect of which the Northern Ireland Assembly exercises legislative competence. They are not listed in the Northern Ireland Act 1998.
- Reserved matters and excepted matters ancillary to reserved or transferred matters are those matters in respect of which Westminster can legislate or the Northern Ireland Assembly may legislate with the consent of the Secretary of State (see: s. 8, Northern Ireland Act 1998). These matters are listed in Sch. 3 of the Northern Ireland Act 1998. Examples include criminal law and the maintenance of public order.
- Excepted matters are those matters in respect of which only Westminster can legislate. These matters are listed in Sch. 2 of the Northern Ireland Act 1998. Examples include the armed forces and electoral law.

Many of the options proposed in these tables are premised on the fact that the Bill of Rights/Supplementary Rights will be enacted by Westminster legislation (as required by the Belfast/Good Friday Agreement). As a matter of constitutional and legal principle, this means that the Bill of Rights/Supplementary Rights may be capable of more far-reaching legal effects than might normally be the case with sub-national bills of rights. For example, the Westminster legislation enacting Supplementary Rights could provide that future Westminster legislation be interpreted compatibly with Supplementary Rights/Bill of Rights or be subject to declarations of incompatibility with Supplementary Rights/Bill of Rights.

The purpose of these tables is purely to outline the options available within the current constitutional framework of the United Kingdom.[90] The tables are not intended to be exhaustive and have not attempted to set out every procedural detail that would have to be decided to give effect to these legal options. It is recognised that where the content of Supplementary Rights/Bill of Rights has implications for reserved or excepted matters, proper vindication of the Bill of Rights/Supplementary Rights will be undermined if they have no legal enforceability in these areas. However, it is also accepted that significant political and practical challenges may be raised by, for instance, Northern Ireland courts reviewing, for compliance with the Bill of Rights/Supplementary Rights, legislation or public programmes of UK-wide application. The presentation of legal options in these tables does not seek to underestimate those challenges.

Comment on Orders in Council made pursuant to Section 84, Northern Ireland Act 1998

Orders in Council made pursuant to s.84 NIA are treated as 'primary legislation' for the purposes of the Human Rights Act 1998. While it does not necessarily follow that such Orders must be treated as Westminster 'primary legislation' for the purposes of any Bill of Rights/Supplementary Rights, it would have to be considered whether this status should be extended to such Orders in any Bill of Rights/Supplementary Rights. Section 21 of the Human Rights 1998 also treats other legal instruments, normally considered 'subordinate', as 'primary' (Prerogative Orders in Council and those that amend an Act of a kind mentioned in the definition of primary legislation).

Dr Catherine Donnelly
10 March 2008

[90] It is the Legal Advisor's view that one of the options (disapplication of Westminster primary legislation) is extremely problematic from the perspective of the current constitutional framework of the UK for reasons set out in Section 2(viii) above. Please refer to paras. 2.69-2.70 for discussion of this issue.

TABLE 1: SUPPLEMENTARY RIGHTS AND TRANSFERRED MATTERS

In the area of transferred matters, competence for legislation and implementation rests with the NI institutions.

Relevant Action	Bill of Rights/Supplementary Rights ('BR/SR') Enforceability Options	Level of Support
Assembly Legislation	- Assembly declaration of compatibility with BR/SR (akin to s.19 HRA) *Note: Not strictly necessary (particularly given the obligation found in s.9 NIA on Minister to issue statement of competence, which would imply compliance with BR/SR) but possibly desirable to promote BR/SR dialogue between Assembly and courts* - Interpretive obligation on courts to interpret Assembly legislation insofar as it is possible to do so to be compatible with BR/SR (akin to s.3 HRA) - Invalidation of incompatible Assembly legislation *Note: This is required by the Belfast /Good Friday Agreement.*	Consensus on all
NI Subordinate Legislation (rules/other measures made pursuant to Acts of the Assembly)	- Interpretive obligation on courts to interpret Assembly legislation insofar as it is possible to do so to be compatible with BR/SR (akin to s.3 HRA) - Invalidation of incompatible measures (see also s.	Consensus on all

	6(1) HRA and s. 24 NIA 1998)	

Table 1 - Transferred Matters Continued

Acts of NI Public Authorities	- Obligation on public authorities to act compatibly with BR/SR (akin to s.6(1) HRA) *Note: This obligation is required by the Belfast/Good Friday Agreement*. - This obligation would be subject to an inability to act otherwise, either due to primary legislation, or primary or secondary legislation which cannot be read or given effect to be compatible with BR/SR etc (akin to defence found in s.6(2) HRA).	Consensus on all

TABLE 2: SUPPLEMENTARY RIGHTS AND RESERVED MATTERS AND EXCEPTED MATTERS WHICH ARE ANCILLARY TO RESERVED / TRANSFERRED MATTERS

In both the areas of reserved matters and of excepted matters which are ancillary to reserved or transferred matters, legislative competence exists at both central government level, and at Assembly level (with the consent of the Secretary of State pursuant to s.8 NIA). NI public authorities may also be required to implement legislation (whether Assembly, Westminster or Westminster) in these areas; while central government authorities may engage in activities implementing legislation in reserved matters in NI.

Relevant Action	Bill of Rights / Supplementary Rights ('BR / SR') Enforceability Options	Level of Support
Westminster Primary Legislation	1. Westminster primary legislation in the area of reserved matters could be excluded entirely from the reach of BR/SR. 2. Alternatively, if BR/SR are to have effects for Westminster primary legislation in reserved matters, the following options could be adopted:[91] - Obligation to make a statement of compatibility with BR/SR (akin to s.19 HRA) - Interpretive obligation on courts to interpret compatibly with BR/SR ('so far as it is possible to do so') (akin to s.3 HRA) - Disapplication if compatible interpretation not possible[92] - Declaration of incompatibility with BR/SR (akin to s.4, HRA) (safeguard: only available in the NI High Court and Court of Appeal) - Expedited remedial procedure (akin to s.10, HRA)	DUP and UUP support Option 1 All other members support Option 2 (although Business, Older People's and Ethnic Minorities Sectors do not support disapplication in this situation).

[91] The remedies listed in Option 2 could generally be combined. However, in any individual case, it would be necessary to decide between disapplication and a declaration of incompatibility, since these remedies cannot co-exist; and it would be preferable to either indicate a remedial choice in the legislation or to issue clear guidelines for the use of each remedy.

Table 2 - Reserved and Ancillary Excepted Continued:

Westminster Subordinate Legislation	1. Westminster subordinate legislation could be excluded entirely from the reach of BR/SR. 2. Alternatively, if BR/SR are to have effects for Westminster subordinate legislation, the following options could be adopted: - Obligation to make a statement of compatibility with BR/SR (akin to s.19 HRA) *Note: This option is deemed unnecessary in the context of the HRA since subordinate legislation can be invalidated and is not included in the 'dialogue' established by ss. 19, 3, 4, and 10 of the HRA. However, if a declaration of incompatibility with supplementary rights is the chosen remedy, it may be desirable to add this requirement to the procedures for subordinate law-making.* - Interpretive obligation on courts to interpret compatibly with BR/SR ('so far as it is possible to do so') (akin to s.3 HRA) - Declaration of incompatibility with BR/SR (akin to s.4, HRA) OR disapplication of central subordinate legislation insofar as it applies to NI (safeguard: only available in the NI High Court and Court of Appeal)[93] *Note: The remedy of 'disapplying' legislation is currently used to disapply Westminster primary legislation that is incompatible with European Community law. Options considered in respect of central subordinate legislation included invalidation. Disapplication would*	DUP and UUP support Option 1 All other members support Option 2

[92] This option was proposed by Sinn Féin. The Legal Advisor is of the view that this is extremely problematic for reasons outlined in Section 2(viii) above. Please refer to paras. 2.69-2.70 for discussion of this issue.

[93] See also n 91 above.

	be more appropriate than invalidation, given that the central subordinate legislation would continue to apply in the rest of the UK. - Expedited remedial procedure (akin to s.10, HRA) *Note: This option is not necessary under the HRA since subordinate legislation can be invalidated. If invalidation for incompatibility with BR/SR is not available; it may be desirable to adopt this option.*	

Table 2 - Reserved and Ancillary Excepted Continued:

Assembly Legislation with Consent of Secretary of State (s. 8 NIA)	- Assembly declaration of compatibility with BR/SR (akin to s.19 HRA) *Note: Not strictly necessary (particularly given the obligation found in s.9 NIA on Minister to issue statement of competence, which would imply compliance with BR/SR) but possibly desirable to promote BR/SR dialogue between Assembly and courts* - Interpretive obligation on courts to interpret Assembly legislation insofar as it is possible to do so to be compatible with BR/SR (akin to s.3 HRA) - Invalidation of incompatible Assembly legislation *Note: This is required by the Belfast /Good Friday Agreement.*	Consensus on all
NI Subordinate Legislation (rules/other measures made pursuant to Acts of the Assembly)	- Interpretive obligation on courts to interpret Assembly legislation insofar as it is possible to do so to be compatible with BR/SR (akin to s.3 HRA) - Invalidation of incompatible measures (see also s. 6(1) HRA and s. 24 NIA)	Consensus on all
Acts of NI public authorities implementing Westminster primary	- Obligation on public authorities to act compatibly with BR/SR (akin to s.6(1) HRA) *Note: This obligation is required by the Belfast/Good Friday Agreement*. - This obligation would be subject to an inability to act otherwise, either due to primary legislation, or primary or secondary legislation which	Consensus on all

legislation, Westminster subordinate legislation, NI Assembly legislation/NI subordinate legislation in reserved/ancillary matters	cannot be read of given effect to be compatible with BR/SR etc (akin to defence found in s.6(2) HRA)	

Table 2 - Reserved and Ancillary Excepted Continued:

Acts of central government authorities in NI implementing Westminster primary, Westminster subordinate legislation in reserved matters	1. Acts of central government in NI in the area of reserved matters could be excluded entirely from the remit of supplementary rights. 2. Alternatively, if BR/SR are to have effects for acts of central government in reserved matters, the following options could be adopted: - Obligation on public authorities to act compatibly with BR/SR (akin to s.6(1) HRA) - This obligation would be subject to an inability to act otherwise, either due to primary legislation, or primary or secondary legislation which cannot be read of given effect to be compatible with BR/SR etc (akin to defence found in s.6(2) HRA).	UUP and DUP support option 1 All other members support Option 2

TABLE 3: SUPPLEMENTARY RIGHTS AND EXCEPTED MATTERS

In the area of excepted matters, legislative competence rests at Westminster level. However, NI public authorities may be required to implement legislation in this area; while central government authorities may also undertake activities in NI in furtherance of legislation/policies in these areas.

Relevant Action	Bill of Rights/Supplementary Rights ('BR/SR') Enforceability Options	Level of Support
Westminster Primary Legislation	1. Westminster primary legislation on the area of excepted matters could be excluded entirely from the reach of BR/SR. 2. Alternatively, if BR/SR are to have effects for Westminster primary legislation in excepted matters, the following options could be adopted:[94] - Obligation to make a statement of compatibility with BR/SR (akin to s.19 HRA) - Interpretive obligation on courts to interpret compatibly with BR/SR ('so far as it is possible to do so') (akin to s.3 HRA) - Disapplication if compatible interpretation not possible[95] - Declaration of incompatibility with BR/SR (akin to s.4, HRA) (safeguard: only available in the NI High Court and Court of Appeal) - Expedited remedial procedure (akin to s.10, HRA)	UUP and DUP support Option 1 All other members support Option 2 (although Business, Older People's and Ethnic Minorities Sectors do not support disapplication in this situation).

[94] The remedies listed in Option 2 could generally be combined. However, in any individual case, it would be necessary to decide between disapplication and a declaration of incompatibility, since these remedies cannot co-exist; and it would be preferable to either indicate a remedial choice in the legislation or to issue clear guidelines for the use of each remedy.

Table 3 - Excepted Matters Continued

Westminster Subordinate Legislation	1. Westminster subordinate legislation on excepted matters could be excluded entirely from the reach of BR/SR. 2. Alternatively, if BR/SR are to have effects for Westminster subordinate legislation on excepted matters, the following options could be adopted: - Obligation to make a statement of compatibility with BR/SR (akin to s.19 HRA) *Note: This option is deemed unnecessary in the context of the HRA since subordinate legislation can be invalidated and is not included in the 'dialogue' established by ss. 19, 3, 4, and 10 of the HRA. However, if a declaration of incompatibility with supplementary rights is the chosen remedy, it may be desirable to add this requirement to the procedures for subordinate law-making.* - Interpretive obligation on courts to interpret compatibly with BR/SR ('so far as it is possible to do so') (akin to s.3 HRA) - Declaration of incompatibility with BR/SR (akin to s.4, HRA) OR disapplication of central subordinate legislation insofar as it applies to NI (safeguard: only available in the NI High Court and Court of Appeal) [96] *Note: This remedy of 'disapplying' legislation is currently*	UUP and DUP support Option 1 All other members support Option 2

[95] This option was proposed by Sinn Féin. The Legal Advisor is of the view that this is extremely problematic for reasons outlined in Section 2(viii) above. Please refer to paras. 2.69-2.70 for discussion of this issue.

[96] See also n 94 above.

	used to disapply Westminster primary legislation that is incompatible with European Community law. Options considered in respect of Westminster subordinate legislation included invalidation. Disapplication would be more appropriate than invalidation, given that the Westminster subordinate legislation would continue to apply in the rest of the UK. - Expedited remedial procedure (akin to s.10, HRA) *Note: This option is not necessary under the HRA since subordinate legislation can be invalidated. If invalidation for incompatibility with BR/SR is not available; it may be desirable to adopt this option.*	
Acts of NI public authorities implementing Westminster primary or Westminster subordinate legislation in excepted matters	- Obligation on public authorities to act compatibly with BR/SR (akin to s.6(1) HRA) *Note: This obligation is required by the Belfast/Good Friday Agreement*. - This obligation would be subject to an inability to act otherwise, either due to primary legislation, or primary or secondary legislation which cannot be read of given effect to be compatible with BR/SR etc (akin to defence found in s.6(2) HRA)	Consensus on all
Acts of central government authorities in NI implementing	1. Acts of central government in NI giving effect to excepted matters could be excluded entirely from the remit of supplementary rights. 2. Alternatively, if BR/SR are to have effects for such acts, the following options could be adopted: - Obligation on public authorities to act compatibly with	UUP and DUP support Option 1 All other members support Option 2

Westminster primary or Westminster subordinate legislation in excepted	BR/SR (akin to s.6(1) HRA) - This obligation would be subject to an inability to act otherwise, either due to primary legislation, or primary or secondary legislation which cannot be read of given effect to be compatible with BR/SR etc (akin to defence found in s.6(2) HRA).	

Appendix Two: Analysis of Submissions Received by the Forum as they relate to Preamble, Enforceability and Implementation

I. The Total Amount of Submissions Made to the Forum

While the Bill of Rights Forum website originally listed 48 submissions, 4 of these were in fact duplicates.[97] Also, a submission from *An Munia Tober* Women's Group has not yet been posted on the website. Thus, in effect, it is accurate to say that a total of *45* submissions were made to the Forum.[98] The following statistics were calculated on the basis of this latter figure.

II. Preamble

Approximately 16% of the submissions received by the Forum address the issue of a preamble.[99] Circa 29% of these explicitly state that the preamble should be written in accessible, plain, and simple language.[100] One submission seems to suggest that such language would be instrumental in securing people's sense of ownership over the Bill of Rights.[101] Although Dr Catherine Donnelly noted in her paper on preambles that the Australian Capital Territory's Consultative Committee recommended that its preamble be simply written in plain English, members of the Working Group made no specific comment on the nature of the language that

[97] Carers NI submitted the same paper to 4 working groups and the Loyal Orange Institution submitted the same paper to 2 working groups.
[98] In comparison, 340 submissions were made to the Northern Ireland Human Rights Commission in its 2001 consultation.
[99] That is, 7 submissions.
[100] Rasharkin Community Association (BS16) and COSTA (BS20).
[101] Rasharkin Community Association (BS16).

should be employed in the preamble. However, the Group did agree during discussions on implementation that the Bill of Rights in general should be made as accessible as possible.

Approximately 57% of the submissions that address the issue of a preamble express the need for it to set out the *context* of the Bill of Rights. They suggest that the preamble should acknowledge the past[102] and state how the Bill of Rights came about.[103] One submission further recommends that reference should also be made in a 'non-political statement' to the victims of the conflict.[104] Similar points have also been advanced by some members of the Working Group.

43% of submissions on a preamble suggest it should refer to a future shared and equal society – the use of words and phrases such as 'Northern Ireland's shared society,'[105] 'the principles of equity, diversity and interdependence,'[106] 'interdependence, equality, inclusion and tolerance,'[107] and 'shared neighbourhoods'[108] are advocated. Further, one submission suggests that the preamble should affirm the democratic values of human dignity, and freedom.[109] Similar sentiments have also been expressed by some members of the Working Group.

Finally, 29% of submissions that address a preamble suggest that it should set out rights in the context of *responsibilities*.[110] One of these states that this is important because "an overly strong

[102] Communities in Transition Programme (BS18) and WAVE (BS01).
[103] Ballynafeigh Community Development Association (BS40); COSTA (BS20);
[104] WAVE (BS01).
[105] Communities in Transition Programme (BS18).
[106] Ibid.
[107] Cross-Border Cross-Community Youth Project (BS31).
[108] Ballynafeigh Community Development Association (BS40).
[109] Communities in Transition Programme (BS18).
[110] Ballynafeigh Community Development Association (BS40); Evangelical Alliance BS47.

emphasis on individualism has the potential to further fracture society rather than bring it together." This issue was never raised in Working Group papers or discussions.

III. Enforcement

Approximately 27% of the submissions made to the Forum address the issue of enforcement.[111] One such submission states that an enforcement mechanism "must not only be easily accessible, but capable of building confidence. Strong and effective guardianship of the Bill of Rights, with a strong emphasis on enforcement and compatibility, will be the touchstone for community confidence.'[112] Approximately 42% of the submissions on enforcement advocate a complaints system without making any specific recommendations as to the type of bodies that should be included within it,[113] while approximately 33% of submissions that address the issue recommend the establishment of a special Human Rights Court.[114] One in the latter group notes that such a court would be necessary in order to 'guarantee the rights in practice and to embed the Bill of Rights,'[115] and another suggests that it 'should include judges from other countries.'[116] On the other hand, one submission on enforcement states that it may be 'unrealistic to look for a special court here in NI.'[117] Only one submission specifically mentions the need to mainstream the Bill of Rights within the current court system.[118]

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[111] That is, 12 submissions.
[112] The Future Together Initiative (BS09).
[113] The Future Together Initiative (BS09); Foyle Youthbank (BS11); (BS04); Newtownabbey Borough Shadow Youth Council (BS23); and Loup Women's Group (BS35)..
[114] Star Neighbourhood Centre (BS08); Cross-Border Cross-Community Youth Project (BS31); Communities in Transition Programme (BS18); Drumcree Community Trust (BS21).
[115] Star Neighbourhood Centre (BS08).
[116] Drumcree Community Trust (BS21).
[117] Rasharkin Community Association (BS16).
[118] Communities in Transition Programme (BS18).

25% of submissions on enforcement propose other enforcement bodies such as political sub-groups and forums, a Bill of Rights Ministry, and independent commissions.[119] One of these specifically states that the 'progress of the Bill of Rights should be closely monitored by an *ongoing review process* by an independent body,'[120] while another states that 'statutory bodies should develop a '*rights-ometer*' to assess when the allocation of resources is required so as to comply with their duties under rights legislation or government commitment.'[121]

In their discussions to date on the matter of enforcement, most Working Group members rejected as unnecessary the need to establish a special human rights division of the High Court, and only one member supported the establishment of a Constitutional Court similar to that which exists in South Africa. Most Working Group members acknowledged the merits of a human rights parliamentary committee. They seemed unconvinced, however, about the notion of a Human Rights Tribunal that would consist of human rights experts.

Approximately 17% of the submissions that address enforcement mention the need for timely resolutions to complaints[122] and approximately 17% mention the need for specialized lawyers/panels of lawyers.[123] Finally, 25% of submissions on enforcement suggest that a legal aid fund should be made available to enable individuals

[119] Cross-Border Cross-Community Youth Project (BS31); Carrowshee Park & Sylvan Hill Community Development Association (BS33); and Ballynafeigh Community Development Association (BS40).
[120] Ballynafeigh Community Development Association (BS40).
[121] Carrowshee Park & Sylvan Hill Community Development Association (BS33)
[122] Communities in Transition Programme (BS18) and Newtown abbey Borough Shadow Youth Council (BS23).
[123] Rasharkin Community Association (BS 16) and Cross-Border Cross-Community Youth Project (BS31).

to pursue their human rights claims.[124] The latter was also advocated by a member of the Working Group during discussions on the issue of standing.

IV. Entrenchment and Amendment

Approximately 9% of submissions to the Forum specifically state that the Bill should be entrenched.[125] This is stated as being important 'to ensure and protect democracy,'[126] as well as to protect the Bill from repeal and/or amendment by future governments.[127] Approximately 12% of the submissions to the Forum directly address amendment.[128] They believe that there should be scope to amend the Bill of Rights in order to allow for changing circumstances and ideas. Only one submission proposes how amendment should take place – it states that 'the mechanism for amendment must reflect broad consensus and so should take the form of a referendum or agreement among 80% or more of the Assembly's representatives.'[129] The Working Group has agreed that there should be cross-community Assembly approval for amending the Bill of Rights.

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[124] Star Neighbourhood Centre (BS08); Cross-Border Cross-Community Youth Project (BS31); and Communities in Transition Programme (BS18). While the submission from *An Munia Tober* does not mention enforcement, it states that financial support is necessary so that people can take cases.
[125] Ballynafeigh Community Development (BS40); Communities in Transition Programme (BS18); Rasharkin Community Association (BS16); and (BS04).
[126] Rasharkin Community Association (BS16).
[127] Communities in Transition Programme (BS18).
[128] Communities in Transition Programme (BS18); COSTA (BS20); Loup Women's Group (BS35); Ballynafeigh Community Development Association (BS40); and Loyal Orange Institution (BS25).
[129] Communities in Transition Programme (BS18).

V. Justiciability

Approximately 78% of submissions to the Forum support the inclusion of various types of socio-economic rights within the Bill of Rights.[130] While most of these submissions do not discuss the justiciability of this type of rights, 6 of them[131] include comments that seem to indicate that they believe the social and economic rights they propose should be justiciable.[132] The first of these submissions states that the Bill of Rights must "move beyond human rights rhetoric" and be capable of "delivering tangible outcomes" and "making real" the rights to healthcare, employment and affordable housing, and must "positively and robustly protect the social and economic rights of everyone in accordance with Section 75 guidelines."[133] The second states that the entitlements in the Bill of Rights "should be real and not merely aspirational; that is they are capable of being achieved in every day life and enforceable within the law."[134] The third informs that the international experts with whom its authors consulted "advised that a culture of rights can only be created through actions and assertions," and that "rhetoric about rights that are not enforced can be counter-

[130] That is, 35 submissions: An Munia Tober; (BS05); (BS06); Victim Support NI (BS03); The Future Together Initiative (BS09); Drumcree Community Trust (BS21); Loup Women's Group (BS35); Teach na Failte (BS38); Star Neighbourhood Centre (BS08); Newry and Mourne Senior Citizens Consortium (BS10); Foyle Youthbank (BS11); Carers NI (BS12); Rasharkin Community Association (BS16); Communities in Transition Programme (BS18); ASCONI (BS19); Bogside and Brandywell Women's Group (BS22); Newtownabbey Borough Shadow Youth Council (BS23); Lower Shankill Community Association (BS24); Equality 2000 (BS27); East Down RCN & Trust Youth Council (BS28); Ex-Prisoners Outreach Programme (BS29); CAW 2000 (BS30); Cross-Border Cross-Community Youth Project (BS31); Cross-Border Cross-Community (BS32); Carrowshee Park & Sylvan Hill Community Development Association (BS33); Lisburn Drugs Watch (BS34); The Rainbow Project (BS37); The Villages Together (BS39); Ballynafeigh Community Development Association (BS40); Ederney Community Development Trust (BS41); Latinoamerica Unida Association (BS42); Include Youth (BS44); Cairde (BS45); Belfast Central Branch, Carers UK (BS46); Craigavon & District TUC/Lurgan Branch TGWU (BS48).
[131] That is, approximately 12%.
[132] The Future Together Initiative (BS09); Drumcree Community Trust (BS21); Loup Women's Group (BS35); and Teach na Failte (BS38).
[133] The Future Together Initiative (BS09).
[134] Loup Women's Group (BS35).

productive."[135] The fourth acknowledges that "it is easier to argue in favour of basic human rights than of social" rights. It states that it recognizes "a need for caution" in that "the wider a Human Rights Bill becomes the less focus there is on particular rights" and that there is "a greater danger of legal decisions which bring rights into ridicule." It continues that "making a wish list into a Bill of Rights may be problematic because "it does not take account of budgetary issues," and "there are dangers with giving courts greater powers than parliament." It nonetheless concludes that, despite its reservations, it would prefer to give more power to courts, and thus proposes that consideration should be given to the inclusion of equal access to health, medicine and organ transplants, employment, affordable housing and childcare in a NI Bill of Rights.[136] The fifth states that "appropriate treatment" and "individual assessment" in relation to healthcare should be rights that are "unqualified and not subject to 'aspirational' law."[137]

Approximately 9% of submissions to the Forum suggest that the Bill of Rights should be merely aspirational.[138] One of these states that "only the basic fundamental human rights should be enshrined in law" and that the "main body of the Bill of Rights should be aspirational."[139] Another expresses its concerns about "the scope of the proposed Bill." It states that the inclusion of "social and welfare issues will create considerable difficulties and could lay the foundations intentionally or not, for social engineering," and that it "may also allow the State and elements of the private sector to

[135] Teach na Failte (BS38).
[136] Drumcree Community Trust (BS21).
[137] Foyle Youthbank (BS11). Note also that the Craigavon & District TUC/Lurgan Branch TGWU (BS48) suggests that the British Government should ratify the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families. This includes socio-economic rights.
[138] That is, 4 submissions: Place Initiatives (BS36); Loyal Orange Institution (BS25); and COSTA (BS20): Evangelical Alliance (BS47).
[139] COSTA (BS20).

divorce themselves from addressing vital areas of societal need at any given time in the future."[140] Another expresses concern about the undermining of parliamentary democracy and thus recommends that the Bill of Rights should be "an aspirational, ethical statement."[141] The fourth reasons that an overly restrictive "piece of legislation" could hinder attempts to protect rights "owing to unnecessary litigation (result of 'rights culture') and bureaucracy," and that a "minimalist approach would also help avoid cross-over between issues that can be dealt with within a Bill of Rights and those that should remain in the domain of the democratic political process." It recognizes the latter as "especially important" given "the infancy of shared power for devolved matters in Northern Ireland."[142]

VI. Standing

Only two of the submissions made to the Forum address the issue of standing.[143] One of these states that "both groups and individuals must be able to access courts about violations,"[144] and the other states that "complaints should be able to be taken by individuals, those acting on behalf of others (with their consent), as well as class action complaints."[145] All of these options were considered by the Working Group and a draft clause on standing has been written by Dr Donnelly.

VII. Implementation

[140] Loyal Orange Institution (BS25).
[141] Place Initiatives (BS36).
[142] Evangelical Alliance (BS47).
[143] That is, approximately 5% of submissions.
[144] Rasharkin Community Association.
[145] Communities in Transition Programme (BS18).

Approximately 16% of submissions on the Bill of Rights address the issue of implementation.[146] One submission suggests that campaigns should be established to educate both the general population and statutory bodies about rights.[147] Another suggests that "full implementation would require an awareness raising strategy involving newspapers, TV, radio, internet and other media,' and that the Bill of Rights 'should be celebrated in adverts, be promoted by celebrity rights ambassadors, community and youth rights ambassadors, and should be made part of the NI schools curriculum.'[148] Another strongly recommends that a copy of Bill Of Rights be sent to all employers and each household "so as to leave no one in N. Ireland in any doubt of their rights and responsibilities."[149] Finally, one submission states that "user-friendly language" should be used in the Bill of Rights.[150] The Group acknowledged the importance of education and accessibility during its discussions on implementation.

VIII. Remedies

Approximately 9% of submissions made to the Forum state that compensation should be available as a remedy for violations of

[146] That is, 7 submissions: Craigavon & District TUC/Lurgan Branch TGWU (BS48); Newtownabbey Borough Shadow Youth Council (BS23); Cross-Border Cross-Community Youth Project (BS31); Equality 2000 (BS27); The Future Together Initiative (BS09); Ballynafeigh Community Development Association (BS40); and *An Munia Tober*. While the latter three submissions state that the Government needs to promote the Bill of Rights once it has been agreed upon, they neither specify whether particular groups should be targeted nor suggest any particular methods of awareness-raising. Equality 2000 merely states that user friendly language should be used in the Bill of Rights.
[147] Newtownabbey Borough Shadow Youth Council (BS23).
[148] Cross-Border Cross-Community Youth Project (BS31).
[149] Craigavon & District TUC/Lurgan Branch TGWU (BS48).
[150] Equality 2000 (BS27).

human rights.[151] Other remedies suggested in submissions are public apologies,[152] restorative justice,[153] and fines.[154]

IX. Interpretation

None of the submissions contains a specific section that discusses the interpretation of the Bill of Rights. However, two submissions state that the Bill of Rights should reflect and adhere to specified international human rights standards.[155] A non-diminution clause and an interpretive clause that allows courts to consider international law have been considered by the Group.

X. Application

None of the submissions, including those that include rights that clearly implicate the actions of private actors, enter into discussions on whether the Bill of Rights should have both vertical and horizontal application.

XI. Devolution

Many of the submissions propose rights that concern non-devolved issues. None of them, however, consider whether different judicial remedies should apply to devolved and non-devolved matters.

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[151] That is, 4 submissions: Rasharkin Community Association (BS16); Communities in Transition Programme (BS18); (BS04); and Victim Support NI (BS03). The latter two only discuss compensation in the context of victims of the 'troubles.'
[152] Rasharkin Community Association (BS16) and Communities in Transition Programme (BS18).
[153] Rasharkin Community Association (BS16).
[154] Communities in Transition Programme (BS18).
[155] Victim Support NI (BS03) and Foyle Youthbank (BS11).

XII. Legal Persons

While all the rights proposed in submissions seem to be discussed in the context of natural persons, none of the submissions asserts that other types of legal persons should not be allowed to invoke them.

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