

A CHARTER OF RIGHTS FOR THE ISLAND OF IRELAND

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Introduction

- 1 The Belfast (Good Friday) Agreement of 10 April 1998 requires the Joint Committee of the two Human Rights Commissions (in Northern Ireland and the Republic of Ireland) to consider, among other matters:

“the possibility of establishing a charter, open to signature by all democratic political parties, reflecting and endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland”.
- 2 The Agreement does not clearly say that the Joint Committee must produce the *draft* of such a charter, nor even that the Joint Committee must conclude that such a charter *is* possible in the first place, but so far the Joint Committee has chosen to interpret the phraseology of the Agreement in just those ways. It believes that the Committee would be failing to meet the general public’s expectations if it failed to produce such a draft and put it forward as a possible charter. The assumption must be, moreover, that the framers of the Agreement believed that a charter of rights would contribute to enhancing the protection of rights in both Northern Ireland and the Republic of Ireland. It would be hard to assess what shape this enhancement might take if a draft of the charter were not available for discussion.
- 3 It needs to be borne in mind, of course, that two related processes are currently in train in Northern Ireland and the Republic of Ireland. In Northern Ireland the Human Rights Commission is still discussing and reflecting on what rights should be protected by a Bill of Rights. It has already produced a draft Bill of Rights and it expects to be able to tender its latest thoughts on the matter to the Secretary of State later this year or early in 2004. In the Republic of Ireland work has just been completed on incorporating the European Convention on

Human Rights into domestic law, and as we have heard already today that Bill is to be commenced within six months. It is also relevant that the Belfast (Good Friday) Agreement requires the Irish Government to “ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland”. This use of the future tense (“as will pertain”) suggests that the Irish Government, when judging what is required to achieve equivalence with the North, is to take into account whatever rights will be guaranteed there by the Bill of Rights.

- 4 Clearly, any work on a charter of rights for the island of Ireland by the Joint Committee of the two Human Rights Commissions on the island needs to be conducted against this background of other developments. The Joint Committee will also have to have regard to what is happening within the European Union and the Council of Europe. From time to time the European Union issues Directives which have important human rights implications for all member states (two of these require to be implemented in member states, at least in part, by 2 December of this year) and of course the draft EU Constitution, which is currently being discussed at the inter-governmental conference in Italy, incorporates the Charter of Fundamental Rights which was agreed by the Union three years ago. The EU Charter will be of particular significance as far as the protection of economic and social rights is concerned. And the Council of Europe periodically produces international agreements which have human rights implications; some of these take the form of Protocols (*i.e.* additions) to the European Convention on Human Rights itself. The 12th such Protocol, dealing with the right not to have any rights allocated in a discriminatory way, has still to be ratified by either the UK or Ireland.

Issues raised by the wording of the Agreement

- 5 The section of the Agreement quoted in paragraph 1 above is vague. It certainly does not indicate whether the Charter is to be legally binding or merely aspirational, or somewhere in between. However the underlying idea seems to be that there should be a common foundation of fundamental rights

for both political entities in Ireland or, more precisely, for the people living in them. Importantly, the Agreement does not use the word “citizen” but the wider term “everyone”.

- 6 The Agreement refers to “agreed measures” to protect these rights. It does not specify who it is that should agree those measures (is it the two Commissions, or the democratic political parties, or the people of the island?), but it seems assume that the measures in question will have some effect in actually protecting everyone’s rights. There is no clear indication that these measures have to be *additional* to those which already exist, and some would point to the words “reflecting and endorsing” as indicators that nothing new was anticipated in this context. On the other hand, if an all-island (which presumably means “uniform”) approach is envisaged for the protection of rights, it is probably unrealistic to assume that no changes need to be made to either jurisdiction’s existing mechanisms.
- 7 Political parties sometimes sign up to declarations of principle and then do very little about them. But the use of the word “measures” in the Agreement would suggest that something more than a purely declaratory document was envisaged.
- 8 The Agreement states that the charter is to be open to signature by democratic political parties. This does not mean, of course, that it must be open to signature *only* by political parties. It could be open to signature by a range of other elements in society (*e.g.* governments, churches, trades unions, business organisations, non-governmental organisations, community and voluntary groups, *etc.*).
- 9 Of course, even if the charter were to be signed only by political parties, this does not preclude other individuals and groups from having a say in what the charter should contain. The Joint Committee of the two Commissions has therefore begun a consultation process with many other people and groups as to what the charter should look like. In May 2003 a pre-consultation document was issued asking for initial views on three competing models for

the proposed charter of rights. There may of course be other models worth considering and we asked for suggestions on that score too. The date we set as the deadline for responses was 1 September 2003 but we have recently extended that to 1 December 2003. I am not in a position to reveal what the responses received by the Committee to date have been saying, but in essence they fall into three categories – those responses which say that the Joint Committee is being premature in consulting on a Charter of Rights before the Bill of Rights project is more advanced in the North, those which say a programmatic charter is indeed the best model to pursue and those which say that a fully enforceable model is much to be preferred. A fourth point of view, expressed most recently in a public statement issued earlier this month by the Council of the Ulster Unionist Party but not directly communicated to the Joint Committee by way of response to the pre-consultation document, is that there should not be a Charter of Rights for the island of Ireland at all.

The competing models

- 10 The three models suggested by the Committee differ not so much in the way in which the rights are worded but in the way in which they can be enforced. For ease of reference I shall refer to them as (a) the declaratory model, (b) the programmatic model and (c) the fully enforceable model.

Model A – The declaratory model

- 11 It could be a charter which, like the UN's Universal Declaration of Human Rights of 1948 or the EU's Charter of Fundamental Rights of 2000, is purely declaratory in nature. For instance the Universal Declaration says, in Article 21(2) that "Everyone has the right to equal access to public service in his country", but it does not specify how this right can be claimed in practice. The EU Charter says, in Article 25, that "The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life". Such a charter, in Ireland, would declare what people's rights should be but not say how those rights are to be guaranteed.

12 The essence of this approach is that the document conferring the rights would not be at all enforceable through the courts. The political parties in Northern Ireland and the Republic of Ireland, the Northern Ireland Executive and the two governments of the United Kingdom and Ireland would be asked to commit themselves to the document and it could be cited as stating what the law *should* be, but it would not itself change the law or enable anyone to base a legal claim on what the document says.

Advantages

13 (a) It would probably be easier to reach agreement, both within the Joint Committee and amongst the political parties of both parts of Ireland, on a purely declaratory charter of rights than on those called for by Model B and Model C. This would be because the implications of reaching such an agreement would not be immediately obvious, since the resulting charter would not then be one which people could use to assert their rights in a court of law or in any other forum responsible for granting rights.

(b) As it would be easier to reach agreement on this kind of charter, it would also be quicker to do so. This would mean that the charter could be in place much sooner than if either Model B or Model C were favoured.

(c) Even though this kind of charter would have only a declaratory status, this does not mean that it would not have an inspirational effect. If the language were attractive and the sentiments very popular, the charter could provide a goal for everyone in society to aspire towards, much like the Universal Declaration in the immediate post-War years.

(d) Model A is the one traditionally used by intergovernmental organisations when they wish to initiate progress on the protection of human rights, hoping that further, more concrete, protection can be agreed in due course. The UN's Universal Declaration was added to in due course (18 years later) by the UN's International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. UN Declarations on eliminating discrimination against

women, children and racial groups were also followed by enforceable Conventions. If governments are used to this incremental approach to the protection of human rights, it would be more likely that the United Kingdom and Irish governments (and the Northern Ireland Executive) will accept it in this specific context.

Disadvantages

14 (a) There would be no guarantee that a Model A charter would make any practical difference to the protection of human rights in either part of Ireland. It would have a purely symbolic significance.

(b) There would be a danger that such a charter would give the impression that the protection of rights is not that important to the maintenance of a fair and just society, thereby undermining the message which existing laws, and the Belfast (Good Friday) Agreement seek to convey.

Model B – The programmatic model

15 It could be a charter which sets out a number of basic principles concerning rights as well as requiring a “programmatic” (*i.e.* a progressively developing) approach to their implementation. This would mean that, subject to monitoring conducted by an independent body, some discretion would be left to the governing authorities in both parts of Ireland to develop measures over time which would make the rights in question a reality for the people living there. Political parties and civil society generally could of course press for speedier implementation if they so wished. Such a charter would be comparable to the UN’s International Covenant on Economic, Social and Cultural Rights, which says what rights are to be recognized in states (*e.g.* “The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance” – Article 9) but does not provide specific standards which have to be met immediately in all states.

16 The essence of this approach would be to set out a number of basic principles as well as a programme for their implementation to which the political parties

in Northern Ireland and the Republic of Ireland, the Northern Ireland Executive and the two governments of the United Kingdom and Ireland would be asked to commit themselves. Other international “guarantors” (maybe the European Union or the USA) could be asked to give a similar commitment. The basic principles could include such matters as agreement to incorporate international human right standards into domestic law, a recognition of the rights and aspirations of all national, religious, ethnic or linguistic communities throughout Ireland and a determination to abide by democratic means when pursuing political ends. Existing documents such as the Belfast (Good Friday) Agreement, the Mitchell Principles on Non-Violence and the Code of Standards in Public Life could serve as useful sources for such principles. Another useful feature of this model would be regular monitoring of the implementation process by an independent body, akin perhaps to the work currently being done by the Committee on Economic, Social and Cultural Rights when it looks at how states are implementing the UN’s International Covenant on Economic, Social and Cultural Rights

Advantages

- 17 (a) A Model B charter more obviously follows the wording of the Belfast (Good Friday) Agreement, since it would be a charter requiring signature by *political parties* (whose commitments would require them to act in certain ways when serving in government or voting in Parliament).

- (b) The Joint Committee could draw up a charter of this kind without too much delay because the required principles are relatively few in number and many of them are already agreed.

- (c) A programmatic charter of this kind could have a more persuasive effect on court and governmental decisions than that called for by Model A and just as much of a persuasive effect as that associated with Model C.

- (d) This kind of charter would not need to be amended as often as that called for by Model C because it has a built-in flexibility which allows for new

human rights standards to be adopted as and when they are agreed internationally.

(e) Governments have favoured this kind of charter in recent years. Examples include the Programmes of Action agreed at the World Conference on Human Rights (Vienna, 1993), the World Conference on Women's Rights (Beijing, 1995), the Summit on the Protection of the Environment (Rio de Janeiro, 1992), the World Conference Against Racism etc (Durban, 2002) and the Summit on Sustainable Development (Johannesburg, 2002).

Disadvantages

18 (a) This kind of charter would not have the kind of immediate impact which the Human Rights Act 1998 had in the UK and which the Act incorporating the European Convention is likely to have in Ireland.

(b) Unless effective mechanisms are put in place for monitoring and enforcing the implementation of the Programme of Action, the rights in question may be illusory.

(c) Some would argue that such a charter would give too much discretion to political parties, when in government, not to protect rights as fully as most people would wish.

Model C – The fully enforceable model

19 It could be a charter which, like the European Convention on Human Rights, the UK's Human Rights Act 1998 and the Irish Constitution, sets out a list of rights which are to be legally enforceable in both Northern Ireland and the Republic of Ireland. Article 8 of the European Convention, for instance, says that "Everyone has the right to respect for his private and family life, his home and his correspondence". This has been interpreted and applied in hundreds of cases coming before the European Court of Human Rights, so that we now know, for example, that it protects the right of a post-operative transsexual to marry but not the right of a prisoner to have a conjugal visit. A charter like

this, for the island of Ireland, would mean that very specific disputes over its precise meaning could be settled in the courts of Northern Ireland and the Republic of Ireland.

- 20 This third model would produce a charter which would be a “higher” law operating through Northern Ireland and the Republic of Ireland. Like the European Convention on Human Rights, or EU Directives, it would constitute a set of standards which courts in both parts of Ireland would have to adhere to when applying and developing existing domestic law. Again, all the political parties in Northern Ireland and the Republic of Ireland, the Northern Ireland Executive and the two governments of the United Kingdom and Ireland would be asked to commit themselves to adhering to such a charter.

Advantages

- 21 (a) This model would offer individuals and communities in both parts of Ireland some practical guarantee that the rights included can be relied upon in local courts. Like the United Kingdom’s Human Rights Act 1998, and the Irish Constitution, this kind of charter would confer legal rights that could be publicly asserted and vindicated in the courts. It would therefore mean that the concept of human rights would gain greater credibility, especially perhaps amongst those people who stand to gain from better protection of social and economic rights.

(b) Model C would more obviously reflect the aspiration in the Belfast (Good Friday) Agreement for the common *protection* of rights throughout the island of Ireland. In so far as the Agreement saw a purpose behind the proposed charter, this was probably that it would enhance the way in which people could have their rights enforced in practice. Merely allowing people to “aspire” to more rights would not satisfy that purpose.

Disadvantages

- 22 (a) Such a charter could cause confusion with the current processes for the adoption of a Bill of Rights for Northern Ireland and for the incorporation of the European Convention into Irish law. At a time when there is already

significant change being introduced to the number of rights being protected and to the way such protection is occurring, there is a danger that putting yet another immediately enforceable document before the public would just not be politically feasible.

(b) It would be difficult to get both the United Kingdom and the Irish Governments (or the Northern Ireland Executive) to agree on what these specific rights are to be, especially if they go beyond what is already contained in the laws in force in both parts of Ireland. As well as this, both governments (and the Northern Ireland Executive) are already considering whether to agree to significant new EU Directives and new Council of Europe initiatives in the field of human rights, so it may be difficult to persuade them of the need for an enforceable all-Ireland initiative.

(c) More particularly, there might be difficulties over whether it would be desirable or necessary to distinguish between rights appropriate for Northern Ireland alone and those appropriate for the whole of Ireland. Resolving these difficulties could take a very long time and would be dependent on other steps being taken first in both jurisdictions.

(d) There would be disputes over the way in which this new charter should be enforced. Would it have a higher status than other laws and, in which case, which ones? Specifically, how would it relate to the United Kingdom's Human Rights Act 1998 and to the Northern Ireland Act 1998? And would it be subordinate to the Irish Constitution or in some way "trump" that Constitution? Would a special court be required for the enforcement process and should the involvement of some international judges be sought?

(e) This kind of charter would almost inevitably require a referendum in the Republic of Ireland to avoid being declared unconstitutional. This could be a time-consuming and divisive process.

The Joint Committee's preferred approach

- 23 Having carefully considered the pros and cons of each of the three models, the Joint Committee stated in its pre-consultation document that it was inclined to the view, for the time being at least, that the best of them was Model B. While remaining open to be persuaded that other models not considered in the document might be preferable, the Joint Committee stated that the kind of charter suggested by Model B struck the best balance between a purely declaratory approach and a detailed legalistic approach, that it would not be too difficult to secure the agreement of the political parties throughout the island of Ireland to such a charter and that its adoption would make an appreciable difference to the lives of people throughout both parts of the island.
- 24 So that the Joint Committee can be reassured that it is not failing to appreciate the attractions of other possible models for a cross-jurisdictional charter, it will be commissioning research from internationally recognised experts in the field. They will be asked to identify models in use in other parts of the world and to evaluate whether any of them can readily be transplanted to the island of Ireland.

The proposed content of a programmatic Charter of Rights

- 25 In its pre-consultation paper the Joint Committee presented an outline of some of the possible contents of the charter if Model B were adopted. It was not meant to be an exhaustive list of the rights which might ultimately be contained in the charter, but was illustrative only. If this is the generally preferred model for the charter then the Joint Committee will consult further on the actual contents of the charter.
- 26 The Joint Committee proposed that the Charter of Rights should contain the following statements of general principles and specific commitments. The Charter would require the governments responsible for each part of Ireland

(including the Northern Ireland Executive) to abide by the general principles and to comply with the specific commitments.

International human rights standards

27 The Charter should set out the principle that it is desirable to abide by internationally agreed human rights standards. There should then be specific commitments to comply with those standards which the governments have already agreed to internationally, to incorporate those standards into domestic law and to report on whether and when other international standards not yet ratified will be ratified.

Existing rights

28 The Charter should proclaim the principle that each government, the Northern Ireland Executive and all the political parties will comply with the current laws protecting human rights in, as appropriate, Northern Ireland and the Republic of Ireland.

Equivalent protection of rights

29 The Charter should repeat the principle in the Belfast (Good Friday) Agreement that the Irish Government will “ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland”. More specifically the Charter should require the Irish Government to ensure that the rights conferred by the Bill of Rights in Northern Ireland are no lower in the Republic of Ireland.

Equality

30 The Charter should endorse the principle that people should be treated equally under the law. As part of this it should ensure that there is no unjustifiable discrimination based on a person’s individual characteristics such as gender. Specific rights should be conferred on particular sectors (perhaps temporarily), if this will ensure that past inequalities are not perpetuated. The charter should also contain a commitment to the elimination of unjustifiable discrimination on the basis of sexual orientation or transgendered status.

Children and older persons

31 The Charter should contain specific provisions protecting the rights of children drawing upon the UN's Convention on the Rights of the Child. It should also protect older people from unjustifiable discrimination and, where appropriate, confer special protection and assistance upon them.

Persons with a disability

32 There is a need for greater recognition to be given to the rights of persons with a disability, whatever the nature of the disability might be. These rights should range over matters such as access to premises and services, transport, employment, education, health care and participation.

The identity and ethos of communities

33 The Charter should proclaim the principle that all national, religious, ethnic and linguistic communities on the island of Ireland – including those who wish to live in the United Kingdom and those who wish to live in a united Ireland – have the right to have their identity and ethos respected.

Rejection of violence

34 The Charter should proclaim the principle of total and absolute commitment to exclusively peaceful means of resolving differences on political issues and opposition to the use or threat of force for any political purpose. There should also be a specific commitment to the total disarmament of all paramilitary organisations.

Emergency laws

35 The Charter should set out a general principle that there should be no emergency laws unless these are absolutely necessary because of a grave crisis threatening the life of the community. There should then be more specific commitments, for example, that emergency laws must be passed by a two-thirds majority in the legislature and must lapse after three months unless renewed by a similar vote.

Criminal justice

36 The Charter should include a general principle that there should be fair trials and equal access to justice for all. There should then be specific commitments to, for example, maintain the right to jury trial for all serious offences and the right to silence, grant access to legal advice at all stages of detention including during questioning, provide audio- and video-recording at all interviews, protect lawyer/client confidentiality and ensure the dignity of prisoners and of persons held in custody. There should also be commitments to monitor the experience within the criminal justice system of vulnerable groups such as children and young people, ethnic minorities, persons with a disability and prisoners and to take remedial action where required.

Racism

37 The Charter should contain general commitments to eradicate racism and discrimination on ethnic grounds and to abide by National Action Plans Against Racism, as well as specific commitments to, for example, set up statutory bodies to promote the integration of ethnic minorities and empowered to assist with the welfare and development of ethnic minority communities and to invest in inner-city areas where ethnic tensions are high.

Asylum seekers, refugees, migrants and immigrants

38 There should be a general commitment to observe all the relevant international conventions and international best practice in the treatment of people in these categories. More specifically there should be commitments to treat them equally under the law and in regard to social welfare provision and housing (no direct provision or compulsory dispersal) and to give asylum seekers the right to work while their claims are being determined. As far as migrant workers are concerned the recently agreed UN Convention should be ratified and applied by both governments (including the Northern Ireland Executive).

Housing / accommodation

39 There should be a general commitment that all persons within the island of Ireland should be entitled to suitable and acceptable accommodation. This should be expanded by, among other things, a specific requirement to provide

a range of accommodation for Travellers, acceptable to the Traveller community themselves.

Health and poverty

- 40 There should be general commitments to improve the level of health care available throughout the island and to reduce poverty levels. More specifically there should be commitments in particular fields of health care and as regards income support.

Education

- 41 A general commitment to provide education for all should be expanded by a specific commitment to provide facilities to make that education fully accessible to persons with a disability and to provide further and continuing education to those who require it for as long as it is necessary for their development and well-being. There should also be a commitment to take measures to ensure wider participation in education at all levels for disadvantaged groups.

Language

- 42 There should be a general commitment to foster and support the indigenous languages or dialects of the island, Irish and Ulster Scots, and there should be a further commitment to make education, public documentation *etc* available in other languages where there is a need for it and to make translation facilities available as far as possible in crucial areas of the public service.

Environmental issues

- 43 There should be a general commitment to abide by internationally agreed standards in this area and more specific commitments in relation to pollution, the use of energy, conservation areas and the preservation of heritage.

Enforcement

- 44 There should be strong enforcement mechanisms in the charter to allow it to have a real impact on people's lives, even though it would not necessarily enable individuals to go to court to assert their own personal rights.

Monitoring

45 One possibility is that the Charter of Rights should confer upon the Joint Committee of the two Human Rights Commissions on the island of Ireland the responsibility for monitoring implementation of and compliance with the Charter. Another possibility is that a committee of international experts, or of Parliamentarians, should be appointed to undertake this task. Either type of committee, however comprised, could in this context operate in a similar way to the treaty-monitoring bodies established within, for example, the United Nations. The Charter could require annual reports to be submitted to the committee by each government (and by the Northern Ireland Executive) and an assessment of those reports to be published by the committee. Each Human Rights Commission should retain the power to take proceedings in courts, where appropriate, in relation to alleged failures to comply with the Charter.

Conclusion

46 This paper is heavily based on the pre-consultation document issued by the Joint Committee in May 2003. In it I have attempted to describe in some detail the work so far conducted by that Committee. The work is still very much work in progress. At present it is much too early to know what the final outcome of the process will look like.