HUMAN RIGHTS COMMISSION

Submission on the European Convention on Human Rights Bill 2001 to the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights

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Preface

The Irish Human Rights Commission welcomes the Government's commitment to incorporate/give further effect to the European Convention on Human Rights in Irish law.

The European Convention was drawn up by the Council of Europe just over 50 years ago in the aftermath of the horrific abuse of human rights during the Nazi era. The Convention gave practical expression to the ideal of getting all European countries to commit themselves to a common code of human rights that would be enforced by an independent international human rights court.

Today 41 countries have ratified the Convention and it literally covers almost all of Europe from the Atlantic Ocean to the Urals and somewhat beyond. The European Court of Human Rights based at Strasbourg is the most experienced and effective human rights institution in the world and it has built up an immensely rich body of human rights jurisprudence, drawing upon the wisdom and experience of judges from all the Convention countries.

Ireland was an enthusiastic supporter of the European Convention at its inception. We were one of the 10 original parties to the Convention and one of the first countries to allow its own citizens to take cases directly to the European Commission and Court of Human Rights. In fact the first ever individual case heard by the Strasbourg Court was from Ireland, the Lawless case.

A number of important decisions have been given in cases from Ireland, notably on civil legal aid, gay rights, the rights of children born outside marriage, an unmarried father's right to be consulted about his child's welfare, the rights of persons in psychiatric hospitals, restrictions on abortion information, the right to silence in criminal cases.

But somewhere along the way we ceased to be in the forefront of countries committed to the Convention. Here in Ireland people who felt their rights under the Convention had been infringed could only raise that issue ***after*** they had exhausted all other possible legal remedies and by taking a case to Strasbourg. That put the Convention out of the reach of most Irish people. It was too costly, too far away and too long drawn out a process to offer effective protection of their rights.

All the other Council of Europe countries have now incorporated the Convention into their domestic law so that people who want to vindicate their Convention rights can do so in their own country, before their own domestic courts, at far less cost and with a much quicker result. The UK was the last country apart from Ireland to make the Convention part of its domestic law, which it did through the Human Rights Act, 1998, which came into effect in October 2000.

It is time we caught up with our fellow Convention countries and in particular with our closest neighbour the UK. Indeed the Good Friday Agreement commits us to "ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland", where the Convention has now become part of the ordinary law through the Human Rights Act.

In some ways incorporation does not mean anything very new. We are already bound by the Convention. If someone's rights are clearly violated, s/he can get a decision from the Strasbourg Court and the Government will, with varying degrees of enthusiasm, obey the ruling and change the law or practice that has been condemned. The big difference would be that when the Convention is made part of domestic law, it will be accessible to the man or woman in the street and they will not have to spend a small fortune and wait for six to eight years to get a decision from Strasbourg.

And we hope that when the Convention starts to be regularly raised in Irish courts, it will have an effect on public bodies and authorities here and make them think about the rights protected by the European Convention and how their activities and decisions will impinge upon those rights. And also we hope that members of the public will become more aware of their rights and more ready and able to assert them when required. In other words, we hope it will help to develop a culture of human rights at all levels in our public life.

There is nothing here for us to be afraid of. Our courts already have a record of defending the rights protected by the Constitution. Now we hope there will be a fruitful dialogue or interaction between the Constitution and Convention rights and jurisprudence, leaving us all the richer as a result. And hopefully, our courts' interpretation of the Convention rights, informed by those courts' own rich tradition of Constitutional jurisprudence, will also contribute to the further development of European human rights law.

For all these reasons we welcome the decision to bring the Convention more fully into Irish law and we welcomed the publication of the European Convention on Human Rights Bill, 2001.

We would have preferred a more robust and effective form of incorporation; indeed strictly speaking the Bill does not propose actually to ***incorporate*** the Convention into Irish law, only to give it more effect here. For that reason we made a submission to the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights on how we felt the Bill could be improved and made more effective.

The debate on the Bill has gone on longer than expected and the parliamentary process has been slower than expected. Though disappointing, that has at least allowed more time for a fuller public debate on the method of incorporation, or giving further effect to the Convention. We have decided to publish our submission to the Oireachtas Committee as a contribution to what we hope will be a vigorous discussion on this major step in strengthening the rights of everyone in this State.

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INTRODUCTION

It is possible to identify three different ways whereby the European Convention on Human Rights could have been adopted as part of our domestic law -

1. It could, by means of a Referendum, have been adopted directly as part of our Constitution.

2. It could have been adopted directly as part of our legislation.

3. It could have been adopted indirectly as a means of governing administrative practice.

The Human Rights Commission, while recognising that further effect is being given in Irish law to the Convention, regrets that the Bill does not directly make the Convention part of Irish domestic law.

Constitutional Incorporation

So far as the first option is concerned, the Commission is of the view that it would be quite wrong to reject it out of hand and that, on the contrary, it merits serious consideration. The Convention is a rich source of human rights protection which in many ways can supplement the protection afforded by the Constitution. There is much to be gained from Ireland's active participation in the developing community of legal rights in Europe and contributing to improving the jurisprudence on the Convention's provisions.

If the Bill proceeds on the basis currently proposed, which excludes direct incorporation by way of constitutional amendment, the Commission is of the view that it should contain a provision expressly committing the Oireachtas, five years after the enactment of the present Bill, to review the effectiveness of the legislation, including revisiting the issue of incorporation of the Convention by way of constitutional amendment.

As between the options of direct incorporation by legislation and indirect incorporation, the Commission strongly favours the former and recommends that the Bill be amended accordingly.

Legislative Incorporation

The Commission finds it difficult to understand why the Bill stopped short of giving full direct legislative effect to the Convention. The fact that in Britain the Human Rights Act 1998 did not give such effect to the Convention is not a reason for our following suit. The British have a peculiar problem in adopting the Convention. Central to their Constitution is the doctrine of the unfettered sovereignty of Parliament and they have stopped short therefore of giving full legislative effect to the Convention as they consider that this might be inconsistent with the doctrine of Parliamentary sovereignty. We have no such problem. Under our system the Oireachtas is subject to the Constitution and the law and we are accustomed to the courts exercising the power of judicial review of legislation.

The Commission is therefore surprised and disappointed at the minimalist approach adopted by the Bill. For example, under Section 5, the High Court (or the Supreme Court) may "where no other legal remedy is adequate" make a declaration that a piece of legislation is incompatible with the European Convention on Human Rights. But the litigant can obtain no other legal redress and the legislation remains in force.

The Taoiseach must draw the making of the order to the attention of the two Houses of the Oireachtas and the litigant may apply to the Attorney General for compensation, but the Government is under no obligation to pay compensation, though it may (or may not) make an *ex gratia* payment. The Government may, it is true, appoint an advisor to advise them as to the amount of such compensation (if any) and may in their discretion make a payment of the amount aforesaid, or of such other amount as they consider appropriate in the circumstances.

This procedure may be appropriate to a Constitution which is based on the unfettered supremacy of Parliament, but it appears to us to be quite inappropriate under a Constitution with a Charter of Rights and judicial review of legislation. It clearly contemplates a situation where a litigant may have gone all the way to the Supreme Court to obtain a declaration of incompatibility, which may be of no practical use to him or her and which may not entitle him or her to any other relief. The litigant may still have to go to the European Court at Strasbourg to obtain an effective remedy and the whole object of domesticating the European Convention, so as to give quick relief to our citizens in our own courts, will have been defeated. It would be strange if the courts were left in a position where they had to say to a litigant that they accepted that his or her rights under the European Convention had been violated, but that they could give no effective relief, beyond declaring that the Act under which these rights had been adversely affected was incompatible with the European Convention on Human Rights.

Where there is a right there is a remedy

It is perhaps worth emphasising that the legal dictum *Ubi Jus Ibi Remedium* – where there is a right, there is a remedy – is a basic principle of Irish Constitutional Law. It is enshrined in Article 40, Section 3 of the Constitution which (so far as relevant) provides as follows:

"1 The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2 The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

It is unacceptable to place the courts in a position where they can identify a breach of human rights and not be in a position to give an effective remedy. The whole procedure set out in Section 5 of the Bill is of questionable constitutional validity. Moreover, the Commission finds it difficult to understand how one can purport to incorporate Article 13 of the European Convention, which requires the provision of an effective remedy at national level, into domestic law while withholding a domestic judicial remedy for a breach of the Convention. Strasbourg case-law establishes the principle that a discretionary remedy is no remedy.

If consulted by litigants likely to find themselves in the position described above – where the Court identifies a breach of human rights but cannot give an effective remedy – the Commission might eventually be forced to conclude that the complainants should ignore the Bill (when law) and go straight to Strasbourg and that the Commission should help them do so. The philosophy of the Bill seems to be that it is a precondition for a declaration of the incompatibility of an Irish law or rule of law with the ECHR that no other remedy is available. The assumption seems to be that where a litigant's rights are violated, the Constitution will provide a remedy. The result is that complainants should first look to the Constitution and seek to have the statute or rule of law which breaches their rights under the ECHR interpreted consistently with the Constitution. Only in the (unanticipated) eventuality of an inability by the Supreme Court, on appeal from the High Court, to find that the breach of the ECHR rights was also a violation of the complainants' rights under the Constitution, would the Court specifically make a finding that there was a breach of the ECHR. This acknowledgement, in the form of a declaration of incompatibility, would not be an adjudication of a legal entitlement. It would merely open up the possibility of the exercise by the Government of a discretion to compensate. The complainant might subsequently get some compensation but could never claim it as of right.

It is to be noted that the Evaluation Group to the Committee of Ministers of the Council of Europe on the European Court of Human Rights (chaired by Ireland's Permanent Representative to the Council of Europe, Ambassador Justin Harman) in its report published on 27 September 2001, recommended that member states ensure the availability of effective remedies to prevent and redress violations of the Convention.

European Time Limits

Strasbourg case law establishes that the only remedies that need to be exhausted before complaining to Strasbourg are effective ones. A declaration of incompatibility does not purport to remedy effectively the situation complained of.

This leaves the complainant with the possibility of a Constitutional action in order to obtain an effective remedy. However, there is no financial assistance for declaratory Constitutional actions. The Legal Aid Board in practice does not fund them, and at a time where there is a 9 month waiting list for its primary work, which concerns family law cases, there is no prospect of its showing more flexibility. The cost of a Constitutional action appealed to the Supreme Court could be £50,000. The total budget allocated to the Human Rights Commission for all of its functions, including administration and staffing, is less than £1.5 million. It would be difficult for the Commission to justify spending sums of up to £50,000 funding individual constitutional actions.

These considerations render it not unlikely that if the IHRC was approached to assist someone seeking to vindicate his/her rights under the ECHR, it would decide that in the end the best method for it to fulfil its statutory functions would be to help applicants to go directly to Strasbourg, citing the above considerations and the personal circumstances of the applicant as a reason. Not to complain early to Strasbourg might risk the complainant's wasting time trying to get some domestic proceedings under way and, on being dissatisfied one way or the other with the result, being too late to complain to Strasbourg, since its six-month time limit dates from the decision complained of.

If, on the other hand, direct incorporation by legislation were adopted, these problems would be avoided and it would give greater centrality to the Convention as part of our domestic law, without compromising the primacy of the Constitution. Moreover, the problem of restrictive remedies or ineffective remedies would not arise under this approach.

The constitutional validity of legislative incorporation

The question arises as to whether direct incorporation of the Convention, subject to the Constitution, by legislation presents any fundamental constitutional problem. It has been argued that to adopt this course of incorporation, whereby the corpus of domestic Irish law – legislative and judicially created – would be assessed in the light of the requirements of the Convention would indeed be problematic in that it would insert an ersatz Constitution – or at least an *ersatz* Bill of Rights – into the Constitution. According

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to this argument, courts have the function of assessing the validity of the corpus of Irish law in the light of constitutional norms; to impose on courts a related, ancillary, function in respect of a similar, but not identical, normative cluster of rights would not be permissible. In any legal system, there can be only one coherent philosophy of human rights protection and of calibration of the relationships between the respective organs of State and between the State and the citizen.

The Commission is satisfied that there is no constitutional or other judicial objection to direct incorporation of the Convention by legislation.

Article 29.6 of the Constitution specifically envisages the incorporation into domestic law of international treaties. A characteristic of many such treaties is that they set out principles or rules of general application, which are presumed to be harmonious with, or similar to, principles at the core of the Constitution. Moreover, the Oireachtas is free to introduce legislation containing broad principles of this character. For example, the Guardianship of Infants Act 1964 contains a definition of "welfare" which is clearly derived from Article 42.1 of the Constitution.

If the principles incorporated by legislation were in conflict with the Constitution, then, of course, the legislation would be invalid but this would be on account of that conflict and not because the principles prescribed in the legislation were similar to though not identical with, those in the Constitution.

One can envisage the possibility that the legislature might enact a law containing a set of principles which are to guide the courts where those principles are so uncertain in their scope as to be void for vagueness. That difficulty has not, however, been claimed to attach to the principles set out in the European Convention by those who oppose the strategy of direct incorporation by legislation.

So far as coherence of philosophies is concerned, in point of fact the fundamental rights section of the Constitution and the ECHR do adhere well and could be taken as two complementary expressions of the one foundational philosophy. The doctrine of the 'margin of appreciation', which is regularly applied by the Strasbourg Court, is generally elastic enough to allow for local variations.

Some opponents of legislative incorporation have also argued that it would offend against the principle of separation of powers by allowing the courts to interfere with legislation passed by the Oireachtas. But if it is constitutional for the Courts to have recourse to the Convention in judging administrative actions why is it unconstitutional for them to have regard to the Convention in judging legislative action? If one is not a violation of the discretion of the Courts under the Constitution neither is the other.

It is, in the Commission's view, quite unconvincing to argue that the infusion into domestic law of the Convention would contaminate our law so as to render the legislation unconstitutional. On the contrary, the Commission considers that our jurisprudence would be greatly enriched. The Convention, and the body of law that has been developed under the European Convention of Human Rights, represent a treasury of human rights protection. The Commission does not argue that this corpus of human rights protection has to be regarded as better in every respect than what is provided by the Irish Constitution. Clearly no such contention could be sustained. The Commission is, however, firmly of the view that its incorporation by legislation, subject to the Constitution, would strengthen the protection of human rights measurably.

The effect of legislative incorporation on future legislation

The question of the impact of the legislative incorporation of the Convention on future legislative policy might now be considered. It has been argued that even if the Convention was incorporated legislatively, it could not govern future legislation. It is an accepted element of the legislative power that the Oireachtas has not the power to bind itself as regards future legislation. It is, of course, perfectly free to pass a law purporting to curtail its power in the future to act in a particular way but it is just as free in the future to pass a law permitting itself to act contrary to the earlier legislation. The Oireachtas is always free to change its mind and introduce a law that contradicts an earlier law, even one explicitly professing to restrict its power to change its mind.

The manner in which legislative incorporation of the Convention takes place does not therefore present any problem in principle. Such incorporation, even if it were to profess to apply the incorporating legislation to future legislation, thus subjecting the future legislation to the requirement of compatibility with the Convention, would not constitute an impermissible restriction on the power of the Oireachtas to legislate. The Oireachtas would remain free to act inconsistently with the restriction if it consciously decided to do so. Ultimately the only question that would arise in respect of any subsequent legislation would be whether it should be interpreted as unlocking the Oireachtas from the restriction. That is simply a matter of drafting, not of principle.

On the question whether the incorporating legislation should seek to cover future legislation, the Commission is of the firm view that it should. There would otherwise be an entirely unjustified anomaly, which would worsen with the passage of time. We reiterate that such a legislative policy presents no constitutional difficulty and that the Oireachtas would retain its entitlement to amend the incorporating legislation.

The impact of legislative incorporation on certain existing laws

It has been objected that legislative incorporation of the Convention might undermine the basis for the Special Criminal Court and the Criminal Assets Bureau. The Human Rights Commission cannot follow the logic of this view which fails to understand the current position in relation to the Convention. If there is any threat to these institutions it arises from the fact that we have ratified the Convention as a matter of International Law and granted the right of individual petition. No successful challenge to either of these institutions has yet been made before the Strasbourg Court. If, however, a future challenge were to be made it would be desirable that the case should have been fully argued before the Irish Courts so that the Strasbourg Court would have the benefit of the opinion of Irish judges based on their detailed

knowledge of the Irish situation. This is not to say of course that it may not be desirable, at some point in the future, to do away with one or both of these institutions.

Specific recommendations in respect of the Bill

We have made clear our strong preference for legislative incorporation of the Convention rather than the model adopted in this Bill. If, however, this view is not accepted, we consider that it may be helpful to offer some comments on the provisions of the present Bill.

Extending the scope of "organs of the State" for the purposes of section 3, which obliges such organs to perform their functions in a manner compatible with the Convention

The Commission considers that the definition of organ of the State, contained in section 1(1) of the Bill, should be expanded to encompass the courts and semi-public authorities, such as regulatory bodies, privately-owned hospitals and schools. The crucial test should relate to whether the organ is engaging, in part or in whole, in public functions.

So far as the courts are concerned, while clearly judicial independence must be preserved, the Convention obligations extend to the performance of judicial functions. Thus, judicial delay or failure to give adequate reasons for decisions, for example, can constitute a breach of the Convention's provisions.

Two objections have been raised to bringing the courts within the scope of section 3. The first is that this would create a right of action by citizens against the courts for breach of statutory duty. Judges may not be sued for defamation or negligence at common law; it would be wrong that they should be exposed to civil liability in respect of the discharge of their duties as judges. Arguably this would offend against the independence of the judiciary and would in any event be an unwelcome restraint.

To this objection, the Commission considers it appropriate to point out that the State is already liable under the Convention for the defaults of judges. Introducing such liability into domestic law would not therefore be a huge change in the legal landscape. If it were considered desirable to specifically protect judicial immunity from suit, the legislation can so provide, whilst retaining the availability of remedies against the State (such as damages or release from prison).

The second objection that has been raised is that the effect of bringing the courts within the scope of section 3 might be to introduce a new judicial series of relationships between citizens *inter se* rather than between the citizen and the State, as the Convention prescribes. This spectre, or promise, of 'horizontality', i.e., making the State responsible for breaches of one individual's Convention rights by another individual or private body, has been widely canvassed in Britain.

The Commission notes by way of introduction to considering this issue that the Convention contains a considerable element of indirect horizontality in rendering States liable for their failure to provide appropriate protection - legal and otherwise - to citizens against violation of their rights by other citizens. The Commission also notes that the Irish Constitution - uniquely - has been interpreted as presenting horizontal protection for fundamental rights, wider in scope than has so far been recognised in the case law under the Convention. The jurisprudence on this matter has not developed very fully over the three decades since the case of Meskell v CIE [1973] IR 121. On this issue the Commission takes the view that it is not in any way necessarily connected with bringing the courts within the scope of section 3. It raises a distinctive policy choice which the legislation incorporating the Convention will have to resolve, one way or the other. The Commission's own preference is that the legislation should prescribe that it does not have direct horizontal effect. What need not happen is that the issue should be left unresolved and thus generate an academic debate as to the effect of the legislation. The Oireachtas can revisit the question, perhaps in five years' time, after the provisions of the Convention have become familiar to Irish lawyers and the courts.

Extending the scope of remedies under the Bill

Even within the existing scheme of the Bill, i.e., an interpretative or indirect incorporation, the Commission recommends that the scope of the remedies under the Bill should be radically expanded. The court should have power under section 3 of

the Bill to make orders other than simply an order for damages. These should include injunctions (including mandatory injunctions) and orders for the release of a person from custody, for example.

The Commission recommends that, in cases of incompatibility with the Convention, the power to make a declaration of incompatibility under section 5, raising the possibility (but not certainty) of an *ex gratia* payment by the Government, should be replaced by compensation as of right. The Commission does not consider that there is any legal obstacle to the power of a court to make an order for monetary payment or an injunction or order for release from custody consequent on a finding of such incompatibility. The Oireachtas has undoubted competence to give a court such a judicial function. The only area where a constitutional difficulty can arise is in a case where the incompatibility springs from a constitutional imperative: in other words, where the Constitution, properly interpreted, requires such incompatibility. In such a case, as the Long Title to the Bill makes plain, the Convention's provision would not "trump" the constitutional provision.

It has been stated that the *ex gratia* procedure set out in Section 5 is necessary because even if the courts find that a piece of legislation is incompatible with the Convention, they have no power or authority to sanction, in any respect, the Oireachtas for having enacted it or allowed it to remain on the statute book. This argument may appear superficially attractive. But the anomaly arises from the format of the Bill itself. It is because the European Convention has not been made part of our domestic law and has not been made binding on the legislature that this anomaly arises. Had the Convention been properly made part of our domestic law and binding on all organs of government there would be nothing anomalous about awarding compensation to a person who could prove that his or her rights were violated as a result of a statute passed by the Oireachtas. The amount of damages awarded could, if necessary, be limited to the amount which the European Court of Human Rights would allow in a similar situation.

Development of a charter of rights for the island of Ireland

A further aspect of the matter, of particular concern to this Commission, should also be noted.

It has been argued that, because section 5 of the Bill allows the courts only to make a declaration of incompatibility without awarding damages in respect of a breach of the Convention, the effect will be to encourage judges to grant relief under the Constitution rather than under the Convention. This may well be correct as any judge convinced of a breach of human rights would naturally prefer to give effective relief if he or she can. It is suggested that this may encourage the judges to find new depth in the Constitution.

However, to the extent that this may be intended to confine the courts to finding remedies only in the Constitution, it would seem to defeat the objectives of incorporation which are to allow our domestic jurisprudence to draw upon and be enriched by the jurisprudence of the European Court of Human Rights.

Moreover, if Human Rights Law in the Republic were to develop only in the context of the Irish Constitution, this might create some difficulties for the work of this Commission. This Commission is entrusted, in conjunction with its sister Commission in Northern Ireland, to draft a Charter of Rights for the whole island and to encourage the development of an identical system of human rights throughout the island of Ireland. The European Convention on Human Rights provides a common basis on which both Commissions can work and it would not be helpful if, in the Republic, the development of Human Rights Law appeared to be based exclusively on the Constitution and not on the Convention.

Assisting the Litigation Process

The Commission considers that the provisions of the Bill could be modified to assist the litigation process in relation to proceedings under the Bill.

Avoiding duplication of proceedings

It seems desirable that proceedings under section 3 or section 5 should not have to be taken in isolation from other proceedings under domestic law and that the Bill should clarify that the option of taking proceedings in tandem is permissible. It would be wasteful of the time of the court and the litigants, as well as causing unnecessary legal costs, to force a litigant taking proceedings under either of these sections to do so separately from other proceedings. It seems from the manner in which section 3 is drafted that an entitlement to institute proceedings under that section is premised on there already having been established that no other remedy in damages is available. A litigant who proceeds under section 3 without having previously established the absence of availability of such a remedy could find that the section 3 proceedings are dismissed because, in some cases quite unforeseeably, the Court holds that indeed there was such an alternative remedy. The Commission recommends that these uncertainties can be removed by providing that claims under the Bill may be instituted in conjunction with other proceedings.

Time Limits

The Commission considers that the one-year limitation period, prescribed by section 3(5), should be extended to six years. This is the general limitation period for tort claims. The claim prescribed by section 3 is analogous to a claim in tort for breach of statutory duty. It will be recalled that the Supreme Court, in McDonnell v Ireland [1998] IR 34 characterised the action for damages for infringement of a constitutional right, for the purposes of the Statute of Limitations, as a tort. A right to take a claim for failure to respect the positive obligations under the Convention (such as the failure of the Oireachtas to introduce legislation providing an appropriate remedy for breach of a Convention right by private individuals) should also be expressly guaranteed, with its own appropriate limitation period. The normal six year requirement would need, of course, to be relaxed in cases where the applicant did not know, or could not reasonably be expected to know, that a cause of action had accrued under the Act.

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Legal Aid

Legal aid is an important element in translating rights in theory into rights in practice. Up to now legal aid has not generally been available for constitutional-type actions. The Commission recommends that the Minister for Justice, Equality and Law Reform should issue a policy directive under section 7 of the Civil Legal Aid Act 1995 to the effect that applications for legal aid will be considered in suitable cases under the Bill. Consequential amendments of sections 24 (a) and 28 (c) may be necessary in the light of the practice of the Legal Aid Board in interpreting these provisions and the dearth of constitutional actions which have been legally aided. If a constitutional-type action is necessary under the Human Rights Commission Acts, 2000 and 2001 and the present Bill, it is essential to establish who has the primary responsibility for funding the action.

Enlarging the duty to Report

Section 5(3) of the Bill requires the Taoiseach to lay before each House of the Oireachtas a copy of an order containing a declaration of incompatibility. The Commission considers that this obligation should go further: the Taoiseach should also have to say what the Government proposes to do about it. Section 5(3) should accordingly be amended to include such a requirement.

The need for Human Rights proofing for legislative proposals

In Britain, Government Ministers introducing legislative proposals must disclose the advice they have received as to whether or not the Bill is compatible with the Convention. The Commission recommends that the Bill should contain a similar requirement.

Extending the notice requirement under section 6

In view of the Attorney General's somewhat ambiguous role of acting as defender of the People's interests while also acting as advocate for the validity of Bills on which he has advised, the Commission recommends that it should be made a notice party under section 6. This would enable the Commission to perform its functions under the Human Rights Commission Acts, 2000 and 2001 especially under section 8, paragraph (h).

It is desirable that a litigant should be enabled, if he or she wishes, to claim relief under the existing law, the Constitution, and the Convention as alternative reliefs in the one action and that he or she should not have to exhaust the procedures under the law and the Constitution before raising the question of a breach of the Convention. At the same time it does appear that if a litigant wishes to challenge the validity of an act of the Oireachtas he or she should only be allowed to do so in the High Court or the Supreme Court and on notice to the Attorney General. If the litigant wishes to challenge a statute in the light of the European Convention he or she should also be obliged to notify the Human Rights Commission.

The need for an ongoing monitoring obligation

The Commission recommends that section 3 should include an obligation resting on organs of the State to monitor periodically and report on their compliance with the provisions of the Convention in the performance of their functions. This monitoring requirement should include an anti-discrimination clause.

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The position of the Circuit Court and the District Court

Sections 3 and 5 of the Bill exclude the District Court as a forum where a remedy can be sought for breaches of the Convention and section 5 also excludes the Circuit Court. The Commission believes that it should be possible to raise Convention points in all courts and it should be possible to plead breach of the Convention as a general shield in the lower courts. To facilitate this, the Bill should provide for a case stated procedure when this raises a new issue not previously decided, and on which the lower court may wish to seek guidance from the Superior Courts.

Judicial Notice

The Commission has identified a drafting flaw in relation to the requirement to take judicial notice of Article 31 opinions of the former European Commission on Human Rights in the last line of section 4. An 'advisory opinion' is quite different from the 'opinion' (under former Article 31) referred to in section 4 (b).