



**Submission from the
Committee on the Administration of Justice (CAJ) to
“A Bill of Rights for Northern Ireland - Next Steps”**

February 2010

1. Introduction

The Committee on the Administration of Justice (CAJ) is an independent non-governmental human rights organisation that was established in 1981. CAJ's areas of work are extensive and include policing, emergency laws, criminal justice, equality and the protection of rights. The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize. Our activities include conducting research, publishing reports, human rights education, holding conferences, monitoring, campaigning locally and internationally, individual casework and providing legal advice.

CAJ has been an advocate of a Bill of Rights for Northern Ireland since our inception. Since that time, our specific work on a Bill of Rights has included capacity-building and education at a local community level, facilitating dialogue, developing a network of organisations from across the community dedicated to a strong and inclusive Bill of Rights, hosting conferences and events with eminent international speakers, and making contributions to consultations and policy debates, including drafting Bills of Rights.

This history and experience leaves us well placed to assess the need and desire for, and potential content of, a Bill of Rights for Northern Ireland. It is our sad conclusion that the proposals developed by the Northern Ireland Office do not come close to what is required, for the reasons outlined in this paper. We are therefore not responding to the detail of the consultation paper, since we do not consider the proposals meritorious of serious consideration.

Furthermore, the consultation document issued by the government has generated concern and anger among a broad swathe of civil society who have been engaging in good faith in the debate and process about a Bill of Rights for Northern Ireland over the course of the last twelve years. The document has also undermined the Northern Ireland Human Rights Commission by taking a minimalist approach to its advice, thus signalling that their recommendations are not to be taken seriously. While CAJ may not have agreed with all of the Commission's proposals, we believe that both the methodology and approach undertaken by the Commission were robust, and resulted in a document that met their remit of advising on supplementary rights that reflect the particular circumstances of Northern Ireland and draw on international standards.

2. Setting the context - human rights and the Belfast/Good Friday Agreement

CAJ's commitment to a Bill of Rights has been one of its contributions to seeking an end to the conflict. It has increasingly been recognised that infringing rights feeds and prolongs conflict. The lesson of past decades is that it is only when states abide by the rule of law and respect people's rights that a safe and secure society can flourish. The centrality of human rights was one of the key reasons the Agreement was possible, and why it has been successful in maintaining peace notwithstanding uncertainty over the political institutions from time to time.

As merely one example of the spirit of transformation that suffuses the Agreement and the role of rights within that transformation, it is worth quoting the declaration of support at the start of the Agreement: "*The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all.*" (emphasis added)

That human rights were at the heart of the Agreement is beyond question. A cursory search of the text of the Agreement shows that the words 'right' or 'rights' appears 61 times. As noted by the then UN High Commissioner for Human Rights, Mary Robinson: "*...the Good Friday Agreement is conspicuous by the centrality it gives to equality and human rights concerns. Few documents emerging from divisive and difficult political negotiations have so well captured the importance of fairness in creating right relationships.*"

She went on to say in the same speech that: "*equality and human rights have now moved from the margins into the mainstream of Northern Ireland life.*" This is acknowledged in the consultation paper in a quote from the then Secretary of State, Peter Mandelson, in September 2000 that Northern Ireland is now "*the sort of rights-based society that other countries will look to as a model of excellence*" (p.9).

The commitment in the Agreement to enshrining in Westminster legislation a Bill of Rights for Northern Ireland should be seen in this general context. It is not an incidental or optional extra. It is part of what brought peace to Northern Ireland; the guarantee that everyone can feel their rights will be respected and adhered to in the future.

While the formulation around the Bill of Rights in the Agreement is complex, there is no doubt that a Bill of Rights for Northern Ireland was the objective. This is confirmed in the St Andrews Agreement in 2006 which contained a commitment to progressing a Bill of Rights in the form of the Bill of Rights Forum, further demonstrating that rights have been at the core of efforts to move the peace process forward in Northern Ireland.

A Bill of Rights is one of the final parts of the Agreement's jigsaw; it ensures that rights currently enjoyed cannot be taken away at the whim of a government. It is intended to ensure, in a divided society, that whoever rules this disputed ground

cannot rule without respecting the rights of everyone who lives here. It also ensures that those who are not or do not identify primarily as part of the two main communities will have their rights respected also.

3. Missing the point - what is a Bill of Rights?

A Bill of Rights is a list of human rights that everyone is entitled to enjoy. They exist in many countries as a constitutional safeguard, to underpin legislation and policy, so as to ensure that rights are protected. As such, any exercise in developing a Bill of Rights should be an exercise in identifying fundamental human rights and in doing so should progress and enhance rights protection, particularly for the most disadvantaged in society, and not undermine or regress on existing protections.

The NIO's consultation document has undertaken an exercise in public policy analysis, and this approach has largely produced a list of unsatisfactory reasons *not* to protect rights. There are numerous references in the document to codes of practice, policies, or legislation already in place, leading government to the conclusion that rights protection is not therefore necessary. This ignores the fact that codes of practice, policies and legislation can change as a matter of political whim. The purpose of a Bill of Rights is to ensure that certain rights endure no matter what legislative, policy or practice changes take place.

As such, this document fundamentally misses the point of what a Bill of Rights should be about. The approach adopted leads to the recommendation of two rights, two general principles and one duty on public authorities. The only firm proposals in the government's consultation document are to include:

- “ a right freely to vote in and be elected at genuine periodic elections held by secret ballot (subject to reasonable restrictions).
- a general principle could be that any electoral system should provide for both main communities to be fairly represented.
- a general principle of inclusive and equitable representation in the Assembly.
- the right of the people of Northern Ireland to identify themselves and be accepted as Irish or British or both.
- a duty on public authorities to prevent sectarian violence and harassment.”

Furthermore, CAJ is of the firm view that some of the options discussed in the text of the document would in fact undermine existing protections, most notably in relation to equality. Professor Christopher McCrudden, who is quoted in the consultation document, has recently stated that the proposals “*appear to involve redrafting this [section 75] equality duty.*” He observes that this duty has been highly unpopular among civil servants in central government departments; that “*the NIO is hardly a neutral observer of the equality provisions*” and that “*at this point alarm bells should ring.*”¹

¹ “Warning over Bill of Rights proposal,” Irish News, 16th February 2010, p.14. See also <http://www.belfasttelegraph.co.uk/breaking-news/uk-ireland/warning-over-bill-of-rights-plan-14683542.html>; and “Not a Bill of Rights,” Professor Chris McCrudden, CAJ Just News February 2010

The government's proposals are also far removed from the international template for a Bill of Rights, and ignore the recommendations of various United Nations treaty monitoring bodies who have repeatedly called on the government to give domestic effect to international human rights obligations which they have freely undertaken to uphold.²

The paper produced by another government department, the Ministry of Justice, on "Rights and Responsibilities: developing our constitutional framework"³ explicitly recognises - even in the title - the link between Bills of Rights and constitution building. The text also explicitly refers to the role of a Bill of Rights in providing stability and guarantees in uncertain times.

The depth and scope of the process and debate that has taken place to date in Northern Ireland on a Bill of Rights is reflective of the importance and constitutional nature of such a document. Recent political developments have highlighted the precarious nature of the institutions set up under the Agreement on occasions. This should provide a timely reminder of the importance of giving permanent effect to the human rights and equality promises held out in the Agreement - a function best performed by a Bill of Rights.

The UK government understands the purpose of a Bill of Rights. As a result, it seems that the only conclusion that can be reached is that the approach taken in this exercise is one of deliberately misconstruing the purpose of the task.

4. Rights that unite or rights that divide? A missed opportunity

Over the last twelve years, groups working with and representing people with a disability, women, children, ethnic minorities etc have identified themselves in the human rights and equality framework provided by the Agreement. The development of a comprehensive Bill of Rights has been seen by them as a fundamental part of securing that framework and delivering on the promises of the Agreement. There is further evidence of huge cross-community support for a Bill of Rights, particularly for the protection of social and economic rights.⁴

² See most recently the concluding observations of the Human Rights Committee (which oversees implementation of the Covenant on Civil and Political Rights) in July 2008 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/433/42/PDF/G0843342.pdf?OpenElement> and the concluding observations of the Committee on Economic, Social and Cultural Rights (which oversees implementation of the Covenant on Economic, Social and Cultural Rights) in June 2009 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/429/21/PDF/G0942921.pdf?OpenElement>

³ <http://www.justice.gov.uk/publications/docs/rights-responsibilities.pdf>

⁴ See <http://billofrights.ridgedev.co.uk/MayPolling.ppt> for research commissioned by the Human Rights Consortium, carried out by independent market research agency, Millward Brown Ulster, which indicates that 83% of people here believe that it is important that Northern Ireland has a Bill of Rights. The levels of support are high among both Protestants and Catholics, with 81% of Protestants and 85% of Catholics considering a Bill of Rights important. The research also revealed consistently high levels of support (96-97%) for the inclusion of social and economic rights, such as the right to work, health, an adequate standard of living and accommodation, in a Bill of Rights, with support again consistently high across both main communities.

CAJ has always argued that it would be misguided to focus a Northern Ireland Bill of Rights only on those rights that address specifically Northern Ireland concerns in a narrow way. Such a Bill of Rights, rather than providing a vision that unites across communities, reinforces the idea that human rights are narrowly concerned as part of a trade-off between those communities. It separates rather than offering a vision of shared common values.

This seems to be acknowledged by the Secretary of State at the outset of the consultation document, where he states that: *“For too long issues of human rights and equality in Northern Ireland were seen through the prism of conflict as a kind of ‘zero sum game’ of winners and losers. As Northern Ireland emerges from conflict it is important that the terms of the debate change.”*

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

In reading the foreword, CAJ had great hopes for what lay ahead. At the end of the report, we were left wondering whether the foreword was written for a different document and by a different author. The narrow scope of the rights identified by the NIO will serve only to reinforce divisions and result in rights being seen as a “zero-sum game.” By contrast, those rights which would actually change the terms of the debate - taking rights out of a sectional interest or ‘zero-sum game’ approach and locating them in a framework for protecting and benefitting the whole community (as apparently desired by the Secretary of State) - are not even offered for discussion.

5. The particular circumstances of Northern Ireland - what is the government’s view?

Throughout the debate about a Bill of Rights since the signing of the Agreement, six words have dominated: “the particular circumstances of Northern Ireland.” It is clear that interpretations of this phrase vary, and there are many conflicting perspectives. Some of those engaging in the debate want to see the widest possible understanding of this phrase, others understand it to be very restrictive in meaning, and others take stances somewhere in between. However it is clear that those who have engaged in the debate - political parties, civil society, and the Northern Ireland Human Rights Commission (NIHRC) - have provided reasoning and rationale for positions taken.⁵

This genuine engagement is in our view in stark contrast to the approach taken by government in this consultation paper. In Chapter 3 in particular, the government disposes with over half of the rights proposed by the NIHRC and offers its “assessment” that these are equally as relevant to the people of England, Scotland and Wales as they are to the people of Northern Ireland. If this argument is taken to its logical conclusion, and the mandate is concerned with identifying only things that are

⁵ See for example positions of political parties and civil society on the Bill of Rights Forum: http://www.billofrightsforum.org/index/resources/particular_circumstances.htm and the methodology devised by the Human Rights Commission in preparation of its advice on a Bill of Rights: [http://www.borini.info/uploads/documents/Briefing%20on%20BOR%20methodology%20\(final\)%20June%202008.pdf](http://www.borini.info/uploads/documents/Briefing%20on%20BOR%20methodology%20(final)%20June%202008.pdf)

so specific, relevant or peculiar to Northern Ireland, then it is unlikely that they would be clear human rights with any endorsement or recognition in international instruments.

Throughout the text there are further references to the government believing, considering or viewing certain rights as not suitable for inclusion. However, beyond references to rights being of equal or similar importance across the UK, no evidence, reasoning or explanation is provided as to how government reached these views.

Nor is any attempt made to explain why the government has rejected out of hand the arguments made by so many consultees over the years for including many of those rights *precisely* because they are thought to reflect the “particular circumstances of Northern Ireland.”

In view of the commitments in the Belfast and St Andrew’s Agreements, it is incumbent on the government to honour, in the way it did the Patten Report, the constitutional significance of the process which has led to the advice of the NIHRC. Where there is a significant departure from that document, the government must offer a more complete and comprehensive analysis and explanation of how rights were deemed worthy of inclusion or exclusion. Failure to do so represents a total failure to engage in any meaningful way with this issue and shows a lack of respect for the engagement of others on this issue over the years, and for the Agreement itself. It is also not possible for consultees to engage effectively in this consultation since the government has not provided an evidence base for its position.

CAJ does not intend to reiterate our view on the meaning of “particular circumstances.” This has already been made clear in our submissions to the NIHRC and the Bill of Rights Forum. We believe the government has failed to address the particular circumstances of Northern Ireland, as required by the Agreement. This is not an appropriate starting point for a consultation. We request that the government review its proposals, and provide an analysis and explanation of its position on the meaning to be accorded to the phrase “particular circumstances”.

6. The ‘national’ debate

The context of the debate here has been about a specific Bill of Rights for Northern Ireland, one that builds on the European Convention on Human Rights and reflects rights particular to the circumstances of Northern Ireland. The mandate for this specific Bill of Rights came from the Belfast/Good Friday Agreement, an agreement that was drawn up in an effort to address the legacy of the conflict and build a stable and peaceful future. The conflict was particular to Northern Ireland, its legacy has been and continues to be widely felt in Northern Ireland, and as such has little if any resonance at a “national” level.

The mandate given to the Human Rights Commission in the Good Friday Agreement was directly concerned with “*rights to reflect the principles of mutual respect for the identity and ethos of both main communities and parity of esteem.*” However, the NIO paper alludes throughout to the British “nation” rather than the Irish “nation,” thus undermining respect for the identity and ethos of both main communities.

Furthermore, the Agreement had consciously sought to transcend some of these political divisions by talking of the rights of all.

The consultation document seems to disregard the unique context of the Bill of Rights debate in Northern Ireland, and wants to append it to a very different debate on a UK Bill of Rights and Responsibilities. The latter debate has had a very different genesis - motivated by differing political agendas around constitution-building, making rights more British, the linking of rights to responsibilities, and even the proposed weakening of the ECHR. The debate in Britain has been top down and led by political parties who have had no electoral base or mandate in Northern Ireland. By contrast, the debate about a Bill of Rights for Northern Ireland has been bottom-up, led by the people themselves in an effort to identify those rights - supplementary to the ECHR - that they feel are important in moving from conflict to a more peaceful society. In addition, a recent report by Justice highlights that the process of developing a UK wide Bill of Rights is likely to pose “major” legal, constitutional and political difficulties, particularly in relation to the devolved regions.⁶

It is therefore not acceptable to relegate rights that have been identified as particular to Northern Ireland to a “national” debate that has little history, relevance or meaning in Northern Ireland. Linking the Northern Ireland Bill of Rights to this debate is a retrograde attempt to fail to honour the spirit and letter of the Agreement.

7. Not a genuine consultation

Both statute and common law require genuine and meaningful consultation. The statutory obligations on the Northern Ireland Office under Section 75 of the Northern Ireland Act 1998 are quite clear. CAJ is of the view that the approach taken breaches both the letter of the law, and the principles of inclusion, participation and equality that are at the heart of section 75.

The government states in chapter 11 on impact and equality considerations that *“equality and good relations are central themes of this consultation, spanning considerations across all five [sic] categories (outlined in chapters 5 to 9 with proposals summarised at Appendix 1) and all are intended to have a positive impact on people across the section 75 categories.”*

The stark reality is that any of the rights which would have a positive impact on people across the section 75 categories are abandoned without explanation, screening or impact assessment in Chapter 3, and are thus not offered for consultation in the equality section. Likewise any remaining issues that touch on the situation of people across the section 75 categories (e.g. women, children, people with a disability, ethnic minorities, older people) are discarded throughout and views are not sought on these conclusions. The government is therefore not promoting the type of equality safeguarded by section 75 with this approach.

⁶ “Devolution and Human Rights” Justice, February 2010

Moreover, the consultation process is flawed. In common law, a number of cases over the years have outlined what is required in any consultation process, including for example what are referred to as the “Sedley Requirements”⁷, namely:

- i. it must be undertaken when proposals are still at a formative stage;
- ii. it must give sufficient reasons to permit the consultee to make a meaningful response;
- iii. it must allow adequate time for consideration; and
- iv. the results of the consultation must be conscientiously taken into account in finalising any proposals.

These requirements are also reflected in the Cabinet Office Code of Practice on Consultation,⁸ the first three of which make it clear that formal consultation should take place at a stage when there is scope to influence the policy outcome; consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible; and consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

In CAJ’s view these requirements have not been met.

- As regards (i), as outlined above, so many rights are excluded in Chapter 3 and beyond that the NIO has clearly already determined that numerous rights are being excluded from consideration. As such issues have been predetermined and the proposals cannot be said to be at a formative stage;
- As regards (ii), and as discussed in more detail above, insufficient reasoning and explanation have been provided throughout, thereby preventing consultees from engaging effectively;
- As regards (iii), this consultation is running over a holiday period and as such adequate time has not been allocated to allow sufficient consultation.

It remains to be seen whether the NIO conscientiously takes into account views received. Given the nature of this document and the high levels of support that have been voiced from across communities over the years for a strong and inclusive Bill of Rights, CAJ anticipates that the majority of submissions received will reject the approach taken in this document. A conscientious taking into account of views would therefore require the NIO to start this process again.

8. Conclusion - a Bill of Rights not worthy of the name

The case for a vibrant, meaningful and strong Bill of Rights, representing the full range of civil, political, economic, social and cultural rights has been well made and documented by the significant and substantive process and debate over so many years in Northern Ireland, culminating in the advice of the NIHRC.

⁷ R v London Borough of Barnet, ex parte B [1994] ELR 357, 372G

⁸ <http://www.berr.gov.uk/files/file47158.pdf>

What has been produced by the Northern Ireland Office does a disservice to those efforts, and to the concept and purpose of a Bill of Rights. What has been proposed is not what should be expected of a genuine and meaningful consultation about the protection of fundamental rights.

CAJ has campaigned for a Bill of Rights for many years and will continue to do so. However we cannot accept a document that does not advance human rights protection, and we must thus reject the current NIO consultation paper in its totality. We are for a Bill of Rights, but only one worthy of the name.

It is now time to implement a Bill of Rights for Northern Ireland that the vast majority of people here have clearly said they want, and that is particular to their needs following years of violent conflict. Without this, building a peaceful and shared future could be jeopardised, as recent events have all too clearly shown.