Submission to the Commission on a Bill of Rights
Discussion Paper: Do you think we need a UK Bill of Rights?

Summary

This submission addresses the questions put by the UK Commission on a Bill of Rights in its discussion paper. The questions explore the need for a UK Bill of Rights and what it should contain. This submission asserts that the Human Rights Act 1998 must be ring fenced and that a Bill of Rights for Northern Ireland must be enacted as envisaged in the Belfast (Good Friday) Agreement 1998 and the Agreement at St Andrews 2006. The UK Commission is referred to the NIHRC’s Advice to the Secretary of State for Northern Ireland on A Bill of Rights for Northern Ireland. It also offers initial thoughts on what might be contained in a UK wide Bill of Rights focusing in particular on the need for economic and social rights in the UK’s domestic law.

1. The Northern Ireland Human Rights Commission (NIHRC) pursuant to Section 69 (1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of Human Rights. In accordance with this function the following statutory advice is submitted to the Commission on a Bill of Rights on the discussion paper: Do you think we need a UK Bill of Rights?

2. The NIHRC notes that the Commission on a Bill of Rights has been established as independent of Government and

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1 Northern Ireland Act 1998, s.69 (1).
welcomes its remit to conduct a widespread consultation with ‘the public, judiciary and devolved administrations and legislatures.’

3. It is not within NIHRC’s functions to provide advice on UK wide matters unless they do or are likely to, impact on human rights in Northern Ireland. This submission is therefore restricted to considering the potential impact that any such proposals may have if implemented within the devolved jurisdiction for which NIHRC has competence.

4. The NIHRC maintains that the Human Rights Act 1998 must be ring-fenced; and that a Bill of Rights for Northern Ireland should be enacted as envisaged in the Belfast (Good Friday) Agreement 1998 and the Northern Ireland Act 1998. In this response the NIHRC also offers initial thoughts on what might be contained in a UK wide Bill of Rights focusing in particular on the need for economic and social rights in the UK’s domestic law.

5. The NIHRC takes this opportunity to submit its view on a UK Bill of Rights recognising the human rights commitments made by the UK Government in both the Belfast (Good Friday) Agreement 1998 and the Agreement at St Andrews 2006. Those commitments included the completion of the incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule legislation from the Northern Ireland Assembly on grounds of inconsistency.

6. The Commission will be aware that the incorporation of the ECHR into Northern Ireland law via the Human Rights Act 1998 was partial. The Belfast Agreement did not suggest that this would be the case; the NIHRC, therefore, takes this opportunity to advise that that full incorporation of the ECHR is outstanding and recommends that this matter should be addressed by the UK Government.

7. The Commission will also be aware of the outstanding issue of a Bill of Rights for Northern Ireland. The UK Government is ‘committed to bringing forward legislation at Westminster

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2 http://www.justice.gov.uk/about/cbr/index.htm
5 ibid., para. 4.
where required to give effect to rights supplementary to the ECHR\(^6\) to reflect the particular circumstances of the devolved jurisdiction. The commitment to a Bill of Rights for Northern Ireland must not be lost in the Commission’s deliberations on a possible UK wide instrument. The NIHRC recommends that the Commission reaffirms the need for the UK Government to fulfil its commitment to a Bill of Rights for Northern Ireland.

**Do you think we need a UK Bill of Rights?**

8. In March 2010 the NIHRC and the Scottish Human Rights Commission (SHRC) agreed, that the ‘Human Rights Act 1998 should be ring fenced and built upon as part of further progress in the promotion and protection of human rights within and across all jurisdictions including devolved, excepted and reserved areas.’\(^7\)

9. In addition, the two institutions also agreed that any process towards establishing a UK Bill of Rights, or other similar statute, ‘for the UK or any of its constituent parts, which seeks to repeal the UK Human Rights Act 1998 in part or whole would be retrogressive in terms of the promotion and protection of human rights.’\(^8\) They have stated their opposition to any such process and have judged that their positions are ‘consistent with adherence to the United Nations’ Paris Principles and the responsibilities and mandates of both national human rights institutions.’\(^9\)

10. Whilst adhering to the above stated position, the NIHRC welcomes the Terms of Reference for the current consultation and, in particular, the inclusion of a remit to investigate the ‘creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extends our liberties.’\(^10\). The NIHRC believes this must mean retaining our obligations under the ECHR in the form of the Human Rights Act 1998.

11. As the Parliamentary Joint Committee on Human Rights stated in its inquiry into a Bill of Rights for the UK, ‘there must be no question of weakening the existing machinery in the Human


\(^8\) ibid.

\(^9\) ibid.

\(^10\) http://www.justice.gov.uk/about/cbr/index.htm
Rights Act for the protection of Convention rights... any weakening of that framework would create space in our legal system for violations of Convention rights to take place with greater ease and frequency.’

What do you think a UK Bill of Rights should contain?

12. When deciding what rights should be contained within any proposed UK Bill of Rights the NIHRC would ask the Commission to consider advice already received by Government. In 2008, the NIHRC concluded that further domestic effect should be given to a number of ECHR provisions currently excluded from Schedule 1 of the Human Rights Act 1998, including Protocol 4, Articles 1 and 2 (1,4).12

13. In addition, the NIHRC is of the view that Northern Ireland would further benefit from domestic effect being afforded to other outstanding ECHR provisions, including Protocol 12, Article 1 (1).13

14. The question of how best to ‘build upon all our obligations... and protect and extend our liberties’,14 suggests that the Commission can consider matters beyond the ECHR. So for example, the UK ought now to ratify the Revised European Social Charter and draw on its provisions in considering how, in its domestic law, to frame economic and social rights.

15. Schedule 1 of the Human Rights Act 1998 and the ECHR focus for the most part on the protection of civil and political rights.15 Domestic jurisprudence and the decisions of the European Court of Human Rights (ECtHR) have, however, extended the scope of application to include instances where social and economic needs are of a primary concern. For example, Protocol 1, Article 1 has been held to apply to the provision of welfare benefits.16 Similarly, under certain

11 Joint Committee on Human Rights, A Bill of Rights for the UK, Twenty-ninth Report of Session 2007-2008, Volume 1
14 http://www.justice.gov.uk/about/cbr/index.htm
15 The exception is Protocol 1, (2) ‘the right to education’.
circumstances the House of Lords has held that destitution may constitute a violation of Article 3 ECHR.\textsuperscript{17}

16. In recommending the inclusion of social and economic rights within any proposed Bill of Rights the NIHRC is aware of criticisms which suggest that such measures risk passing disproportionate power to the unelected judiciary. The NIHRC is of the view that the allocation of the State’s resources is a matter for elected politicians to determine within the Executive and legislative bodies of Westminster and the devolved jurisdictions. In a functioning democracy, the executive, legislature and independent judiciary each has a role to play in the promotion, protection and fulfilment of human rights. The NIHRC acknowledges that a balance of power across the branches of government must be struck.

17. The NIHRC advises the Commission that legislation for the protection of economic and social rights is not, however, new; it is required, and is workable. The UK judiciary, as previously cited, reaches judgements on a wide range of issues involving the allocation of resources under the scope of the Human Rights Act and ECHR. It must also be remembered that the UK is a party to International Covenant on Economic Social and Cultural Rights (ICESCR) and obligated to implement its provisions. Indeed, since 2009 the United Nations’ examining Committee has called on the UK to give the treaty full domestic force.\textsuperscript{18}

18. The NIHRC would draw attention to the fact that many Civil law countries consider international treaties, including ICESCR, as enforceable in their domestic courts, whilst both Finland and Brazil have given domestic effect to the principles of the UN Convention on the Rights of the Child (UNCRC) (which enshrines economic and social rights as well as civil and political). Moreover, both South Africa and India have economic and social rights enshrined within their constitutions and have given them effect without threatening or restricting the power of elected representatives to formulate legislation and make policy decisions.

19. The UK Government has ratified the following:

\textsuperscript{17} Pretty v UK (2002) 35 EHRR 1, para 52. R v Secretary of State for the Home Department (Appellant) ex parte Adam; R v Secretary of State for the Home Department (Appellant) ex parte Limbuela; R v Secretary of State for the Home Department (Appellant) ex parte Tesema (Conjoined Appeals) [2005] UKHL 66 (Bingham LJ, para 7).
\textsuperscript{18} E/C.12/GBR/CO/5, 12 June 2009
- International Covenant on Civil and Political Rights (ICCPR)\(^\text{19}\);
- International Covenant on Economic, Social and Cultural Rights (ICESCR)\(^\text{20}\);
- Convention on the Rights of the Child (CRC)\(^\text{21}\);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)\(^\text{22}\);
- International Convention on the Elimination of All forms of Racial Discrimination (ICERD)\(^\text{23}\);
- Convention on the Elimination of All forms of Discrimination Against Women (CEDAW)\(^\text{24}\);
- Convention on the Rights of Persons with Disabilities (CRPD).\(^\text{25}\)

The opportunity now exists to deliberate upon the benefits of giving further domestic effect to the above mentioned treaties.

**How do you think it should apply to the UK as a whole, including its four component countries of England, Northern Ireland, Scotland and Wales?**

20. To reiterate, consistent with the advice provided to Government since 2008,\(^\text{26}\) the NIHRC maintains that the ‘Human Rights Act 1998 should be ring fenced and built upon as part of further progress in the promotion and protection of human rights within and across all jurisdictions including devolved, excepted and reserved areas.’\(^\text{27}\)

21. The NIHRC has also concluded that any proposed UK Bill of Rights should be adopted by the Westminster Parliament and applied with equal force in Northern Ireland as elsewhere in the UK. The UK wide provisions should be in accordance, as a minimum, with the existing implementation and enforcement mechanisms set out in the Human Rights Act 1998 and contained in the devolution statute.\(^\text{28}\)

\(^{19}\) Ratified on 20 May 1976.

\(^{20}\) Ratified on 20 May 1976.

\(^{21}\) Ratified on 16 December 1991.

\(^{22}\) Ratified on 8 December 1988.

\(^{23}\) Ratified on 6 April 1969.

\(^{24}\) Ratified on 7 May 1986.

\(^{25}\) Ratified on 8 June 2009


\(^{28}\) Northern Ireland Act 1998
22. The NIHRC would also direct the Commission, by way of example, to the relevant sections of the advice provided to the UK Government on a Bill of Rights for Northern Ireland. There the Commission will find how new protections might be progressive and the Human Rights Act enhanced by increasing the application of the definition of public authority, the reach of its obligations and widening the standing of those who may bring legal proceedings.

23. **Having regard to our terms of reference, are there any other views which you would like to put forward at this stage?**

24. The NIHRC, as required by the Belfast (Good Friday) Agreement and the Northern Ireland Act 1998 advised the UK Government on a Bill of Rights for Northern Ireland. In November 2009 the Northern Ireland Office published *A Northern Ireland Bill of Rights: Next Steps* a consultation document which sought views on the Commission’s advice.

25. Within Northern Ireland the debate on how ECHR rights can be given further domestic effect by the Human Rights Act and how they might appropriately be supplemented within the devolved jurisdiction is significantly advanced compared to the rest of the UK. Community and voluntary groups and individuals engaged extensively in the debate which informed the NIHRC’s advice to Government.

26. In 2010 a joint statement issued from the Equality and Human Rights Commission in Great Britain, the SHRC and the NIHRC made clear to Government that the ‘three UK National Human Rights Institutions (NI, Scotland and Great Britain) agree that the establishment of a UK Commission to investigate the possible creation of a British [UK] Bill of Rights must not delay the process of implementing a separate Bill of Rights for Northern Ireland.’

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29 *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland*, (10 December 2008) NIHRC.


27. The Commission will also note that United Nations Committee on Economic, Social and Cultural Rights published its Concluding Observations on the UK in May 2009 acknowledging the advice to Government on the Bill of Rights for Northern Ireland, which ‘includes economic, social and cultural rights which are justiciable and [calling] for its enactment without delay.’ This has been followed by the Concluding Observations of the United Nations Committee for the Elimination of Racial Discrimination in September 2011, in which the Committee stated its regret ‘that Northern Ireland does not have a Bill of Rights notwithstanding the provisions of the Belfast (Good Friday) Agreement of 1998 and recommendations from the Northern Ireland Human Rights Commission.’ The Committee thereafter recommended that the ‘the State party should take immediate steps to ensure... a Bill of Rights [is] adopted in Northern Ireland.”

28. In submitting its view on a UK Bill of Rights, NIHRC does so, wholly without prejudice to the commitments made in both the Belfast (Good Friday) Agreement 1998 and the Agreement at St Andrews 2006. Reflecting those commitments the Commission should, in the view of NIHRC, conclude on the continuing need to legislate for a Bill of Rights for Northern Ireland and advise the UK Government accordingly.

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35 Committee on the Elimination of Racial Discrimination Seventy-ninth session 8 August-2 September 2011, Consideration of reports submitted by States parties under article 9 of the Convention, para. 19.
36 ibid.