

**Submission to the
Northern Ireland Human Rights Commission**

on

**“Making a Bill of Rights for
Northern Ireland”**

(Consultation document - September 2001)

January 2002

CAJ comments on “Making a Bill of Rights for Northern Ireland”

A Bill of Rights for All of Us

The Committee on the Administration of Justice (CAJ) made a preliminary submission on the Bill of Rights to the Northern Ireland Human Rights Commission (NIHRC) in March 2001. At that time, the organisation raised a number of general issues which bear repeating in this introductory section of our response to “Making a Bill of Rights for Northern Ireland” (NIHRC document dated September 2001).

1.1 The Bill of Rights exercise is an essential aspect of the process of transition in Northern Ireland. The process has the potential to initiate an inclusive and continuing discussion of human rights issues. The substantive rights included should ensure that *everyone* enjoys strong and effective human rights guarantees. An expansive and effective Bill of Rights will be a core building block of the new beginning in Northern Ireland. CAJ firmly believes the Bill of Rights should be central to creating a new human rights culture that will ensure that the rights of all are comprehensively protected.

1.2. At the same time, CAJ recognises that a Bill of Rights is a normal part of the constitutional furniture of mature democratic systems. Most societies have a document such as this, which sets out in a clear and accessible way the constitutional limits to the exercise of state power. Northern Ireland (and the UK generally) is an exception to the rule in this regard. There has long been a consensus on the need for a Bill of Rights. Political parties from across the political spectrum, and many others, have consistently expressed support for the idea. While the current Bill of Rights process springs from the Agreement, the idea long pre-dates this instrument. It is widely accepted that a Bill of Rights is something which Northern Ireland must have.

1.3. It is essential that a Bill of Rights is enacted which is a model of best international practice and that everyone can be proud of. It is equally important that the Bill of Rights reflect the particular circumstances of Northern Ireland, and thus must be drafted to take account of the specific human rights situation here. In our view, the Bill of Rights should be an attempt to identify the basic values that we are all committed to. This is particularly important in the context of a radically divided society like Northern Ireland. Recognising a common set of rights is thus an important element in building a new society, providing the possibility of common identification by all with the basic document. For this reason, it is important that the rights identified should not be too narrow in their focus. The narrower the range identified, the less likely it is that individuals will identify with the bulk of rights on the list. In particular, the more the rights specified are seen to appeal across the communities, the more likely it will be that rights can be seen as something that binds the communities together rather than divides them.

1.4 There is now extensive international experience of this function of a Bill of Rights. Archbishop Desmond Tutu, the anti-apartheid campaigner, visited Belfast in

November 2001, at the invitation of the CAJ, to lend his voice to the debate around a Bill of Rights and spoke of the South African experience: *“Then we began speaking about a Bill of Rights and a Constitution – the sorts of things that we thought we might want. Each, I suppose, initially approached it from the position of ‘well, what’s good for me?’ Then people gradually discovered: ‘hey the things that bind us, the things that are common to us, are many times more than the things that divide us’. Then, even the most prosaic of them began to be idealistic, and began to talk about values”*. CAJ believes that the debate about a Bill of Rights is an important way of developing a common vision for a future society in which the rights of all will be protected.

1.5. In CAJ’s view, the more that the Bill of Rights reflects a broad-based view of what rights are protected, one that appeals across communities, the more the Bill of Rights will “reflect the principle of mutual respect for the identity and ethos of both communities and parity of esteem.” In doing that, it will address “the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience.” Too often, in the past, rights have been thought to generate antagonism and division. We miss something valuable, however, if we do not take advantage of the opportunity for rights to encourage trust and co-operation between groups that have previously been opposed to each other. By setting out a common vision, a shared set of ideals in a Bill of Rights, we enable ownership of an important element of the Agreement across communities.

Reactions to the NIHRC draft

CAJ welcomed very much the publication of a detailed draft text for a Bill of Rights and comments on the provisions in detail below. However, CAJ was disappointed with a number of aspects of the draft prepared by the NIHRC. In particular:

2.1 The proposed text was very confused, with some clauses drawn from the European Convention, only to be on occasion amended, or even seemingly contradicted, by subsequent paragraphs. References to the “High Contracting Parties” is off-putting for the average reader and, equally confusing, is the cross-referencing to other clauses (which were sometimes clauses elsewhere in the NIHRC text and sometimes clauses from the European Convention). The confusion is not helped by the order of rights proposed by the NIHRC. The overall impression of the document is one that lacks strategy and cohesion. The final text must be clear, succinct, and – within the parameters of any legally-binding document – must be made as accessible as possible to the ordinary reader.

2.2 Some basic questions have not been addressed or, if addressed, have not received an unambiguous answer. To whom should the Bill of Rights apply? The NIHRC refers variously throughout the text to “Everyone”, “Individuals born in Northern Ireland”, “The people of Northern Ireland” and “citizens”. And to whom is the Bill of Rights addressed? CAJ argued in its preliminary submission that: *“the Bill of Rights should have both vertical and limited horizontal effect, as is the case with the Human Rights Act. The Bill of Rights will of course bind all public bodies, a definition of which will include those discharging public functions.*

Courts are public bodies and will therefore be obliged to act in accordance with the Bill of Rights. Therefore even in disputes between private individuals, the Bill of Rights is likely to have an indirect effect if such matters reach court”.

- 2.3 The draft included a number of policy recommendations (about a truth process, the age of criminal responsibility, fair employment exemptions etc) which may be very praiseworthy, but do not fit well in a Bill of Rights. We give examples of this in the detailed commentary below.
- 2.4 There were several important omissions (indeterminate sentences, labour rights, freedom of movement, etc.) that must, in our view, be remedied in the final advice to the Secretary of State.
- 2.5 The proposals in the socio-economic chapter are entirely misleading, suggesting to many readers that the NIHRC is responding positively to the almost unanimous support for the inclusion of socio-economic rights. The proposed wording, however, when read closely, undermines the very rights it is presumably intended to promote (see on). This approach is all the more disappointing in that national human rights institutions are seen to have a particularly important role in the protection of economic, social and cultural rights (UN General Comment no 10, 1998). Paul Hunt, the New Zealand member of the UN Committee on Economic, Social and Cultural Rights, visiting Belfast in October 2001 to speak at CAJ’s AGM, expressed the fervent hope that Northern Ireland would recognise in its Bill of Rights the inter-dependence and indivisibility of all rights. The current draft does not do this in a meaningful way.
- 2.6**In all the information sessions and training activities that CAJ has been involved in over the last 12-18 months, a common concern expressed by ‘non-experts’ was – are the rights going to be enforceable? Will this Bill of Rights, in other words, make any difference? The NIHRC, having argued for a separate Constitutional Court in the past, now seems to be rolling back from this position. Without a dramatic new departure in the judicial treatment of human rights breaches, it is difficult to see how any eventual Bill of Rights will in fact have the important impact that people expect of it. CAJ would urge the NIHRC to test their eventual recommendations against real problems that people on the ground have raised with them in the course of the consultation. Will the proposed draft ensure more protection for carers? Will Travellers have improved access to healthcare? Will people with disabilities have greater access to the world of work and/or politics? Will people be able to use their language of choice in their dealings with public authorities? And so on.
- 2.7**There are many statements made by the NIHRC in their accompanying detailed text and commentary with which CAJ would agree, but also many that we found contentious or indeed which we took grave exception to. We do not however consider it helpful to engage in a detailed critique of the commentaries, and we only note this point since we would not like silence on our part to be taken to mean agreement. Our detailed comments below pass over in silence many NIHRC clauses and much of the text; we have chosen to comment only when we feel specific amendments or changes are clearly required.

CAJ Commentary

Since the submission of our preliminary reactions at the end of February, CAJ has been working actively with many groups and organisations, trying with them to ensure a broad and inclusive public debate of the draft Bill of Rights. This work has helped inform our own thinking about the eventual recommendations, and we hope that the following comments do justice to the wealth of useful insights this work has given us. The one issue that we found particularly difficult to resolve was whether to mainstream or separate out the rights of women and/or people with disabilities (others have in addition argued for the rights of the elderly or of families to have separate entries). After serious consideration, we determined on a mainstreaming approach, though we respect that many will feel that an amalgam of both approaches is even better. With this caveat, we propose to the NIHRC the following comments and amendments:

Preamble

CAJ warmly welcomes the elaboration of a Preamble, but feels it should be much shorter.

We also welcome the fact that the preamble draws both on the Good Friday Agreement and the Universal Declaration of Human Rights. CAJ strongly resisted any suggestion that a theory of “rights and responsibilities” could mean that people lose their inalienable rights if they act irresponsibly. Sir Nigel Rodley, KBE, UN Special Rapporteur on Torture, and UK Expert on the UN Human Rights Committee, speaking at a CAJ event in May 2001 said: *“it is self-evident that people have a whole range of responsibilities and obligations that they must conform to. The whole legal system and the whole political system of society impose responsibilities on them, and ignorance of the law is no excuse. But that law itself must be consistent with international human rights standards for it to be worthy of respect”*. CAJ was disappointed that in much of the public consultation, NIHRC members appeared to lend credibility to the idea of a “Bill of Rights and Responsibilities”. So, we were delighted to see that this temptation has been resisted in the final text. Instead, rightly, the Commission draws on international human rights texts to note that people have duties to other individuals, and to the community in general, and a responsibility to strive for the promotion and observance of the rights of all. Rights are however inalienable, and are not foregone if one behaves irresponsibly.

Specifically, CAJ proposes that:

- The phrase “people of Northern Ireland” should be omitted, if only to avoid any suggestion that the rights that follow only apply to the “people of NI” (however that is defined). See our introductory comments – surely the NIHRC does not intend to exclude explicitly asylum seekers, tourists, temporary residents etc. from benefiting, whilst in Northern Ireland, from the fundamental protections offered by the Bill of Rights? (Consequential amendments elsewhere in the text would need to flow from this change).

- To make the text more succinct, we propose retaining the first three substantive pre-ambular paragraphs suggested, and simply conclude:

“building on the principles enshrined in the Belfast (Good Friday) Agreement, the protections of the European Convention on Human Rights, the European Union Charter of Fundamental Rights, and other international human rights conventions, the following Bill of Rights for Northern Ireland is adopted.”

Democratic Rights

In the introduction, CAJ raises questions as to the appropriate order to be followed in the proposed Bill of Rights. “Democratic rights”, especially when interpreted largely in voting terms, would, in our view, be better placed later in the text.

The opening clause (2(a)[1] is a good example of the confusion created by an intermingling of ECHR and additional rights – with references to High Contracting Parties and to articles of the ECHR (and elsewhere to other clauses in the Bill). This all needs to be significantly edited for greater clarity.

Specifically:

- In light of our concerns to mainstream issues such as gender, CAJ suggests changing article 2(b)2 to read *“The State shall take all appropriate measures to promote the right of under-represented groups, particularly women, to fair, full and equal..... “(changes to text underlined)*
- CAJ had proposed a clause in its preliminary submission which we thought important and is not fully captured in the current NIHRC text given its focus on voting and elections rather than participation *per se*. CAJ would ask the NIHRC to revisit our proposal to the effect that -*“Subject to (limitations clause elsewhere), every person has the right to take part in the public affairs of Northern Ireland, both directly and through freely chosen representatives elected (by a fair and equitable electoral system).”*

Identity and Community Rights

CAJ believes that there are a number of problems with the proposals in this chapter. The Commission is suggesting that it is following the approach taken in the Framework Convention, but appears to be doing it in an arbitrary way. Sometimes only part of the text is used, and in other instances, certain rights are overlooked entirely.

Most importantly, there is the equation of the word “minorities” with the word “communities”. The term “minorities” has a specific connotation in international human rights law and cannot be lightly dropped. The protection of rights is obviously in the interests of everyone in society, whether one is a member of a minority or a majority community. Moreover, the rights of individuals to be protected

from discrimination is obviously very important: men, white people, English speakers, heterosexuals, settled people must clearly be protected from discrimination, and must be allowed, like everyone else, to express their identity in private and in society. Special provision is rarely, if ever, however required to ensure protection for such groups - and the elaboration of the rights of “dominant” or “majority” groups do not normally figure in international human rights texts. The purpose of human rights protections are to protect the most vulnerable groups and individuals in society, precisely because they are minorities, and unlikely to secure the necessary protection if subjected to the untrammelled “tyranny of the majority”. It is quite unacceptable that the Commission undermine any of the rights that minority communities have as a result of the Framework Convention, and we believe that the current proposals do precisely that.

At the same time as seeking to change the international protections offered by the Framework, the Commission also overlooks some important provisions. For example, missing entirely from this segment is a reference to cultural minorities; proposals regarding articles 6.1 of the Convention (encouraging tolerance and intercultural dialogue in fields of education, culture and the media); article 9.2.4 (licensing for TV and other media to reflect minority interests); article 12 (education and culture including teacher training etc); and article 16 (protections against altering the populations in specific areas).

The NIHRC should give further consideration to the inclusion of these rights. CAJ would argue that at least the following changes and additions must be made to the current text:

- 3a1 should be rendered consistent with language elsewhere – ie “Everyone born in NI...” not “Individuals born in”. Moreover, CAJ proposes that this provision should follow – not precede – the other clauses in this chapter. To open with this clause is to suggest that the sole issue of identity for everyone is the question of one’s citizenship. Clearly, while extremely important to many in our society, it is for many others only one part of their community identity. CAJ is aware, for example, that concerns have been expressed by ethnic minorities (especially Travellers), and people of different sexual orientation, that their concerns about cultural identity should be fully respected alongside questions of national identity. There would be no suggestion of a “hierarchy” of this kind, if the general provisions preceded specific protections for national identity.
- 3b1 should be dropped (see on)
- 3b2 should mirror the Framework Convention directly rather than partially. Reference should also be made to the rights of people to exercise their rights both as individuals *and* as members of a particular minority. The text should therefore read as follows - *Every person belonging to a national, ethnic, religious, linguistic or cultural minority shall have the right individually and in community with other members of that minority to participate effectively in the cultural, religious, social, economic and public life of society, to enjoy his or her own culture, to profess and practise his or her own religion and to use his or her own language* (changes to NIHRC text underlined).

- 3b3 (specific recognition of nomadism) should be retained
- 3b4 should be replaced with – *Every person belonging to a national, ethnic, religious, linguistic or cultural minority has the right freely to choose to be treated or not to be treated as a member of such a minority of what might otherwise be perceived to be their national, ethnic, religious, linguistic or cultural minority and no disadvantage shall result from this choice or from the exercise of the rights which are connected to this choice. Such a right is without prejudice to the equality and positive action provisions in this Bill of Rights (or chapter 4)– changes to NIHRC text underlined. We think that the current formulation could create problems for long-established practices such as employment monitoring integrated and denominational schooling, and the more recent policing changes. We think it is vital that the final text not conflict with these provisions*
- 3b5 – clauses (a) to (c) should remain as now.
- We are aware that the NIHRC was mandated by the Good Friday Agreement to include in its Bill of Rights some reference to parity of esteem, and yet we understand the difficulties the Commission has had with the concept which has no clear resonance in international human rights law. It may be better to recognise the principle’s genesis in the Good Friday (Belfast) Agreement and note that it needs to be further defined and legislated for pursuant to the passage of the Bill of Rights. Obviously, the exploration of this principle should not in any way be undertaken in a way that waters down the commitments the UK government has already undertaken in the Framework Convention. Accordingly, we recommend the addition of a final clause to 3b5:

(d) ensure parity of esteem and just and equal treatment for the identity, ethos and aspirations of both communities as defined in the Good Friday (Belfast) Agreement. The programmatic standards in the Framework Convention provide a guide as to how aspects of this might be achieved.

It is not acceptable for the Commission to arbitrarily undercut the protections afforded to minorities in international law and their preferred option appears to do just that – CAJ believes that this must be changed in the final text.

Equality

CAJ notes that equality was one of the key issues that the NIHRC was mandated to look at by the Good Friday Agreement in its work on a Bill of Rights for Northern Ireland. We welcome the thrust and detailed proposals in this chapter. There are nevertheless, a few improvements that could be made – specifically:

- 4[1] should be omitted as confusing. If left untouched it might for example be taken to restrict interpretation of the paragraphs that follow.
- 4(3) should be omitted because, as explained elsewhere, CAJ thinks that the issue of gender should be mainstreamed throughout the text at appropriate places.
- 4(4) CAJ accepts this text with two proposed amendments “...or other opinion, convictions for offences, nomadism, national....”. We presume that the definitions of all the categories cited are intended to be broad and inclusive, as recommended to the NIHRC by its Equality Working Group. We also think that references could usefully be made elsewhere in the text to this chapter to make it clear that when a particular right or freedom (to education or from violence for example), is being asserted in a non-discriminatory way, it is intended thereby to refer to the definitions of the term given in chapter 4.
- 4(7) needs to be maintained here but harassment and bullying is not always exercised in a discriminatory manner (workplace bullying or punishment beatings might for example not be obviously discriminatory). CAJ thus agrees (question 16) that there should be explicit protection in the Bill of Rights for people’s personal and physical integrity beyond this single reference in the equality chapter (see further comments on this under “victims”).
- 4(8); CAJ believes that the clause should include the phrase “shall be required” rather than “may be adopted” when referring to positive action measures. This reflects both domestic developments and current international thinking.

Women’s Rights

While understanding the cogent arguments for having separate chapters on women, disability, and certain other constituencies which have faced particular difficulties in securing their rights in the past, CAJ would prefer to integrate the rights of specific constituencies throughout the text rather than separate them out. We therefore comment on the proposed clauses as and when they arise in the proposed text.

Right to Life etc.

This section of the Bill of Rights is obviously extremely important. It is therefore disappointing that the layout is so confusing. For example, given that the UK has abolished the death penalty, why discuss it in a Bill of Rights for Northern Ireland?

CAJ proposes deletion of all the clauses in chapter 6a, ie clauses 1-5, and proposes as a simpler and clearer alternative text our original proposals in this regard:

1. *Every person has the right to life.*
2. *Deprivation of life shall not contravene paragraph 1 of this Article when it is the result of the use of force which is no more than absolutely necessary to preserve other human life.*
3. *In no circumstances shall a court punish a person for an offence with a sentence of death.*
4. *Wherever there are reasonable grounds to believe that a violation of this provision has taken place, the close relatives and dependents of the deceased have the right to a full, prompt and thorough investigation into all the circumstances surrounding the death.*

Since these clauses were proposed, the European Court of Human Rights, drawing on UN principles, has made it clear that there is an obligation on the UK government to ensure greater transparency in the investigative process by which victims are kept informed of developments. The NIHRC should incorporate this thinking into the provisions here and/or in the victims' chapter.

With reference to clause 6b1, no explanation is given for the NIHRC excluding the prohibition on "cruel" treatment, which is provided for in international law (see Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights). CAJ thinks that "cruel" treatment should also be outlawed, and we believe that this is also the best place to integrate the right to appropriate remedies and to refer to the unacceptability of indeterminate sentences. We therefore propose deletion of 6b1 and replacing it as follows:

1. *Every person has the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*
2. *Wherever there are reasonable grounds to believe that a violation of paragraph 1 has occurred, a prompt and impartial investigation shall be carried out by the appropriate authorities.*
3. *Every person has the right not to be sentenced to an indeterminate period of imprisonment.* (additions to NIHRC text underlined)

While CAJ understands the value of including reference to the European Convention's clause relating to "freedom from slavery or forced labour", we believe that it could be shortened considerably.

Last but not least, see earlier response to question 16 on physical integrity, and our comments on the victims' chapter further on.

Criminal Justice

CAJ is essentially very positive about this chapter where the NIHRC drew extensively on international standards and the important work done by the Working Group. A few outstanding problems remain:

- Article 7a8 should have the brackets dropped, so that people arrested have the right to consult solicitors of their choice. This is a well-established international practice.
- Article 7a14 and 7b5 – In the text accompanying these clauses (see pp 48 & 50) reference is mistakenly made to the limitations clause. But, in fact, fair trial provisions are not subject to limitations in the European Convention.
- Article 7a16 – is very problematic. While we are sensitive to the difficulty the Commission is seeking to address, we are concerned that the use of the phrase “admissible evidence” will cause significant legal problems. How can admissibility be tested at a bail application? CAJ proposes a reinstatement of the wording proposed by the Working Group, which is that bail be available “unless there is a real risk to public safety”
- In direct response to question 18 about jury trials, CAJ reiterates its original proposal that the final text includes: *“Every person charged with a criminal offence has the right (amongst other things), where they are charged with an indictable offence, to be tried by a judge sitting with a jury of 12 randomly selected jurors.....”*
- In response to question 19 about double jeopardy, CAJ stands by its original proposal: *“No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been fully acquitted or convicted in accordance with the law. This shall not prevent the reopening of a case if there is new or newly-discovered evidence, or if there has been a fundamental defect in the previous proceedings, which would affect the outcome of the case”.*
- In 7d about fair trials in administrative law proceedings, CAJ welcomes clauses 7d1 and 7d2 but feels that this needs to be complemented by a further clause along the lines that we proposed in our original submission, ie. *“Legislation must be enacted to give effect to these rights, and must - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights (outlined earlier); and (c) promote an efficient administration”.*

Victims

CAJ is very concerned at some of the Commission’s proposals in this chapter which, as in a number of other areas, are simply inappropriate for inclusion in a Bill of

Rights. More worryingly in this chapter, the Commission's proposals run counter to and undercut judgements of the European Court of Human Rights, and accordingly do a serious disservice to the rights of victims.

The Commission's rejection in one paragraph of the idea of individuals seeking redress is highly unfortunate. We might have feared that government would argue that dealing with each and every case was too difficult and time-consuming; we did not expect the Commission would make this case for them. It is also now established law that the state has a duty to properly investigate at least those cases where its agents have been, or are suspected of having been, responsible for killings (Kelly, Jordan, Shanaghan and McKerr v UK, 2001). It has also been established by the European Court of Human Rights that the systems in place for dealing with such cases in Northern Ireland fell far short of Article 2 standards. Therefore the Commission's comment that some of these cases "have already been settled in civil and criminal courts" is only relevant insofar as one ignores the European judgements. It would be ironic in the extreme if the Commission intervened as a third party to get a particular decision from the Strasbourg Court, and then found its Bill of Rights proposals being used to undermine that same judgement. The Human Rights Commission cannot decide that individual families will not be able to avail of their rights under the European Convention - it is simply not the Commission's decision to take.

It is also, in our view, not appropriate for the Commission to propose some form of truth commission in the context of the Bill of Rights discussion. Victims of human rights abuses have of course a legal right to seek redress including proper accountability, and CAJ would welcome a broad public debate about the appropriate response to the past. This may take the form of a truth commission or it may not, but this is not an appropriate matter for a Bill of Rights. We are also unclear as to why the Commission came up with its objectives for victims provisions in its Bill of Rights and we are particularly surprised at the fact that the word "accountability" appears nowhere in the objectives.

Specifically, therefore CAJ suggests:

- Deletion of section 8a1. The NIHRC may well want to make this recommendation about a truth process to government, but we feel it is not appropriate to include in a Bill of Rights as such.
- Article 8a2 – CAJ proposes - "*All victims have the right to...*" (ie drop concept of restricting this paragraph only to victims of the conflict). Furthermore, this clause should be placed later in the text, after definitions etc.
- Article 8b1: CAJ is not clear why the UN definition of victims has been circumscribed and proposes the following amendment to bring the NI definition in line with international standards ie "*....criminal laws, including those laws proscribing criminal abuse of power. A person may be*". This article, as a definitional article, should precede what victims have a right to. This would mean that 8bc would also need amendment - "*the right...to have the crime or abuse of power in question...*"

- Article 8b2 – we are not certain why all the rights cited here have to be left to subsequent legislation, rather than being asserted clearly in the Bill of Rights. Surprisingly, the current formulation from the Commission also appears to disregard the comment from the Working Group to the effect that: “*all the evidence is that the first and overriding need of victims is full acknowledgement of their hurt*”. The Commission makes no explicit reference to acknowledgement other than as part of a specific truth process. Accordingly, CAJ would reiterate its original proposals:
 1. *Every victim has the right to be treated with compassion and respect for his or her dignity.*
 2. *Every victim has the right to formal acknowledgement that his or her rights have been infringed and, subject to (limitations cited elsewhere), to full disclosure of information.*
 3. *Every victim has the right to obtain redress through formal or informal procedures or mechanisms of justice that are expeditious, fair and accessible.*
- Article 8c: Without losing specific reference to gender-based violence, this might be an appropriate place in the text to integrate the state’s responsibility to take measures to protect everyone’s physical integrity. This also would be an appropriate place to allude to the particular needs of children to protection (the Commission’s draft article 10(d)1), in line with CAJ’s proposal that, wherever possible, issues of this kind be ‘mainstreamed’ rather than separated off into different constituencies of interest.

Family and Private Life

- 9(b)1: Omit “*according to the laws governing the exercise of this right*” since this may limit unintentionally the following clauses, and would anyway be covered by a general limitations clause.

Children

CAJ understands the attraction in developing a strong chapter on children’s rights, and is convinced that a specific reference to children is required. At the same time, we are not drawn to pigeon-holing the rights of different groups into distinct chapters. Accordingly, we would replace this whole section with our original and very simple proposal ie “*In all actions concerning children, a child’s best interest shall be the primary consideration. Every action concerning a child must be in accordance with the UN Convention on the Rights of the Child.*”

If the NIHRC maintains a much longer chapter on children’s rights, CAJ would argue specifically –

- That it is not wise to put a specific age of criminal responsibility in the Bill of Rights, since people may want to change this over time. The NIHRC should make its proposal (a criminal age of responsibility of 12 years old) to government, but in the Bill of Rights drop the opening sentence in clause 10e1, and retain the important reference to a review mechanism
- In 10h2 – replace “receive” with “access”.

Education

It is interesting that NIHRC has separated off education from all other rights normally alluded to as ‘socio-economic rights’. Why, for example, is education treated so differently from issues of health? We do not disagree in principle, and elsewhere we argue that all rights currently grouped in the socio-economic rights chapter of the NIHRC’s draft be treated like education, and figure on their own merits in the text, rather than ‘packaged’ in some distinct way.

As to the specific provisions, it is disappointing that there are a few important gaps in the NIHRC’s proposals. CAJ had, for example, referred to the importance of access to vocational or continuing training (which given NI’s high school academic exam failure rate is extremely important); the educational rights of linguistic minorities; the rights of children to be consulted about their education; and the right to human rights education. We would therefore reiterate our proposals in these areas:

- *Every person has the right to an effective education and to have access to vocational and continuing training or re-training.*
- *Every person has the right to full financial support for his or her primary and secondary education, and technical, professional and higher education and training shall be made generally available, and financially accessible.*
- *Every person belonging to a linguistic minority has the right to learn his or her language and, to the greatest extent possible, to receive education in that language.*
- *Every child has the right to be consulted appropriately about his or her education, and to express his or her own views in relation to matters affecting his or her education.*
- *Every child has the right to learn about human rights, democracy, religious and cultural diversity (including linguistic diversity), sexuality and disability.*

CAJ does not support the current exemption from fair employment legislation for teachers (your question 30), though we are uncertain that a Bill of Rights is the appropriate vehicle to resolve this issue, particularly given the current extensive study and consultation underway around a Single Equality Bill.

Freedom of Expression etc.

These rights are the fundamental rights that people expect to see in a Bill of Rights and which indeed trace their roots back to the very earliest versions of Bills of Rights around the world. CAJ had only two additions to recommend:

- The NIHRC appears to make no provision for freedom of movement and therefore CAJ reiterates its proposals in this regard –

“ Subject to limitations elsewhere, every person lawfully in Northern Ireland has the right to freedom of movement within Northern Ireland, and the right to leave and re-enter Northern Ireland. Subject to limitations elsewhere, no one shall be expelled from Northern Ireland, by means either of an individual or collective measure. The individual shall be permitted: (a) to submit reasons against his or her expulsion; (b) to have his or her case reviewed speedily; (c) to have effective legal representation before the competent authority; (d) access to a competent interpreter. Collective expulsions are prohibited.

- We are also unclear if sufficient protection has been afforded to the right of access to information. Apart from being important in its own right, access to information is vital to ensuring that people can secure effective remedies if they believe their rights have been infringed. CAJ therefore reiterates its proposal

“Subject to (limitations clause elsewhere), every person has the right of access to: (a) information held by the state; and (b) information that is held by another person, and that is required for the exercise or protection of any rights. Legislation must be enacted to give effect to this right”

Language Rights

With the exception of the very positive messages that the Commission gives about the diversity of Northern Ireland’s communication methods (languages, dialects, sign language, Braille, etc), CAJ thought this chapter was very problematic. The NIHRC, for example, says *“that existing international human rights law and standards do not provide extensive protection for language rights. The Commission wishes to go beyond what is currently provided in the existing international Charters and Conventions, where language rights are discussed only in relation to people who are nationals of the state but who belong to particular minorities”* (page 80). The Commission goes on to note that, in its view, more protection may be needed for the rights of members of the majority communities (sic), and the language rights of migrant communities. While the second objective is praiseworthy, the first – presumably a drive to extend the rights of English-language speakers? - is a rather unusual objective. The CAJ is unaware of any particular threat to the English language suggesting that it requires more protection than currently provided for in international human rights law, and by the non-discrimination clause proposed elsewhere by the Commission (para 4.4).

More importantly, as the NIHRC recognises, some of our language needs are particular to Northern Ireland, and it is therefore unclear why these needs are not to be afforded any additional protections, whereas English, migrant languages, and other forms of communication, are to receive such further protections? Why if the NIHRC sought to extend linguistic protections, did it reduce protection for Irish and Ulster Scots? It would be quite unacceptable if a Bill of Rights for Northern Ireland, which was seeking to reflect the particular circumstances of NI, gave less rather than more protection than is available to indigenous languages in international human rights law.

CAJ therefore proposes replacing deletion of clauses 13.1 – 13.4, and their replacement with the following:

1. *Everyone has the right to use his or her own language freely and without interference, in private and in public, orally and in writing. All languages, dialects, and others forms of communication are entitled to respect.*
2. *In compliance with the commitments made under the Belfast (Good Friday) Agreement and the European Charter for Regional or Minority Languages, particular provision should be made for the Irish language and Ulster Scots, and legislation should be drafted to this end.*
3. (use text as in Commission’s draft 13.5) amended as follows: *“Without prejudice to the foregoing provisions, legislation shall also be introduced to ensure for members...”*

Note that CAJ is retaining the Commission’s reference to “sufficient demand” but we understand this term in the way it was interpreted by the Language Working Group drawing on international human rights standards, and as commented upon in our own original submission to the NIHRC (ie by reference to concepts such as “traditional”, “substantial numbers” “real need” “legitimate interest”). It would be unacceptable to interpret this concept in quantitative terms only.

CAJ has also proposed that cultural and linguistic rights are referred to at appropriate places elsewhere in the text (eg. see criminal justice, equality etc.)

Socio-economic rights

This chapter, as it stands now, adds little to provisions already available elsewhere in the Bill of Rights.

The interpretative clause is very high sounding but it offers action only by way of “*legal remedies (to) protect the due process and equality rights of all citizens in respect of social and economic rights*”. This offers no more than is already covered in NIHRC’s proposed clauses 4.4 and 7d1. In other words, this whole chapter, if left unchanged, is irrelevant, since the protections it appears to offer are already afforded elsewhere in the text. This is totally in violation of the overwhelming cross-community support expressed to date for the inclusion of socio-economic rights in a Bill of Rights for Northern Ireland. The formulation of this clause is deeply

objectionable, suggesting that socio-economic rights are being afforded when they are not. To cite Bruce Porter (Canadian housing expert's comments to CAJ on NIHRC draft text): "*If the social and economic rights section ends up depriving the courts of authority to review substantive decisions, such as those related to the adequacy of financial assistance for people in need (as opposed to due process in decision making or discriminatory eligibility requirements) then you aren't gaining from the inclusion of social and economic rights at all*". The NIHRC should respond to the almost unanimous tenor of submissions it has received to date on this topic, and include effective socio-economic rights.

CAJ sees no particular reason why socio-economic rights should be treated differently from the other rights outlined in the Bill of Rights. It is counter-productive on a number of grounds to somehow differentiate the provisions in this chapter from rights outlined in earlier chapters. We therefore propose deletion of clause 14a1 (the general provision). We also reiterate our own proposed clauses for the various rights included in this chapter, and believe that, like education, they should be integrated at appropriate places in the text, not necessarily 'packaged' together in one place.

On health and social well-being:

1. *Every person is entitled to the highest attainable standard of physical and mental health and well-being. Recognition should be given to the fact that reproductive health is particularly central to women's lives.*
2. *On the basis of need, and in accordance with the law, every person has the right to social security, effective medical assistance, and social welfare services.*
3. *Equality of access to health promotion, treatment and prevention of ill health will be assured.*
4. *Every person has the right to be consulted about decisions which affect his or her physical and mental health.*

On standard of living

1. *Every person has the right to an adequate standard of living.*
2. *Material provision for each person should be sufficient to ensure esteem for his or her health and dignity.*

On the right to housing

1. *Every person has the right to adequate housing, appropriate to the material, social and mobility needs of the person.*

2. *Subject to (general limitations clause), every person is entitled to secure establishment in their home.*

On the right to work

1. *Every person has the right to contribute to the economic and social life of society, including the right to engage in work and to pursue a freely chosen or accepted occupation.*
2. *Every person has the right to just and favourable conditions of work.*
3. *Every worker has the right:(a) to form a trade union;(b) to participate, or refuse to participate, in the activities of a trade union;(c) subject to (limitations clause elsewhere), to strike.*
4. *Every worker has the following rights:(a) the right to safe and healthy working conditions;(b) the right to fair remuneration;(c) the right to participate in the determination and improvement of his or her working conditions and working environment; (d) the right to the protection of his or her dignity.*

Note that no reference is currently made in the NIHRC draft to basic labour rights (paras 3 & 4 above).

On the right to a clean and safe environment

1. *Every person has the right to a clean and healthy environment.*
2. *Every person has the right to have the environment protected, for the benefit of present and future generations. Legislative and other measures must seek to: (a) prevent pollution and the degradation of the environment;(b) promote conservation; and (c) ensure the active promotion of ecologically sustainable development.*

If the Commission determines that some form of interpretative clause is required, then it is quite unacceptable that it be the one on offer from the Commission (for the reasons outlined above). While far from satisfactory, CAJ would still prefer the text drafted by the Working Group ie:

The provision of economic and social rights is subject to the general principle that poverty and social exclusion represent a fundamental denial of human dignity. Legal remedies alone cannot assure the dignity of the human person. The conditions which alleviate social exclusion and deprivation include, but are not limited to, consultation and communication with the public, education and effective access to information, advancing inter-agency responsibility for the enforcement of economic and social rights, facilitating public participation in

decision making processes and acknowledging the inter-dependency of rights. Without prejudice to effective judicial and administrative remedies, and the need to allocate resources in a proportionate manner, government is encouraged to develop programmatic responses to the underlying causes of social and economic rights' violations. All the rights outlined below shall be protected equally and without discrimination on the basis of religious belief, political belief, race, ethnicity, gender, sexual orientation, disability or age. (To avoid potential confusion, it would be better in the final text to replace this last listing of non-discrimination grounds with reference to the general non-discrimination clause in the equality chapter – currently 4.4)

Interpretation

CAJ warmly welcomes this interpretative clause drawing on the South African experience in this regard.

Limitations

In CAJ's preliminary draft, we proposed a single limitations clause that was tightly drawn. This remains our position. In insisting on this stance, we think that Northern Ireland should follow the example of both Canada and South Africa in this regard. Although the NIHRC had attempted to take the same approach, the version on offer highlights three problems.

Firstly, the text as it currently stands is an amalgam of ECHR and “non Convention rights” and the Commission proposes different standards for the two sets of rights. This is extremely problematic in principle, and makes the text seriously inaccessible to anyone not steeped in international law expertise.

Secondly, the concept of “reasonableness” (one of the tests the Commission proposes for non-Convention rights) has a long history of contentious ambiguity in UK law. In recent years “reasonable” has been contrasted (negatively) with phrases such as “necessary” or “proportionate” in use at the European level. Just by way of example, domestic courts concluded that the MOD's policy of automatically dismissing gay and lesbian personnel was reasonable (since they had offered a reason), but the European Court concluded that it was not proportionate (as the MOD had not been able to refute arguments that its legitimate concerns could be met in other ways). The current Commission phrasing is therefore too loosely drawn.

Thirdly, some of the “non-Convention rights” being proposed by the NIHRC are very specific and are not, in our view, intended to be subject to a subsequent general limitations clause (look particularly at proposals in the criminal justice and children's chapters). However, the introduction of a wide-ranging limitation on non-Convention rights might allow the courts to use this provision to limit – say - the right to silence when that is not currently envisaged in the text.

CAJ would propose deletion of clause 16.1 and its replacement with -

“The rights referred to in Articles.....(to be specified) can be subject only to such limits as are shown to be:(a) absolutely necessary; and (b) prescribed by law; and (c) manifestly justifiable in a free, open and democratic society based upon human dignity, equality and human freedom”

Emergencies

CAJ has always argued against a general ‘derogations’ or ‘emergency’ clause. We would maintain this stance.

If the Commission does however determine that such a clause should be included in its advice to the Secretary of State, there are at least two major concerns in the current text that we believe should be addressed.

Firstly, the current formulation appears to provide courts only with the power to rule on the validity of the existence of the state of emergency, not on the proportionality of the measures taken. In other words, once the court has ruled that the existence of terrorist activity justified a declaration of emergency, the state could suspend all Bill of Rights guarantees, even those relating to children, without even seeking to demonstrate that this was necessary to counteract the terrorist threat. There must at least be a provision where the courts (who will rarely challenge the legislature or executive on the existence of an emergency) can at least challenge these bodies on the nature of the measures taken in response to that emergency. There are European standards that can be drawn upon to this end.

Secondly, the list of non-derogable rights is very short and reflects thinking at the European level over 50 years ago. There has been considerable discussion over this time as to the expansion of that list (see International Covenant on Civil and Political Rights and Inter American Convention also). In particular, the Geneva Conventions preserve some fair trial rights and judicial guarantees even in time of war – should these not figure in our non-derogable rights? This is surely also true of some of the children’s rights that the Commission is proposing?

Enforcement

As noted, at many stages of the Commission’s draft, the text is confusing when it puts Convention rights side-by-side with additional clauses. CAJ had argued in its preliminary submission that Northern Ireland needs a text that is accessible and rights that are enforceable. As noted in the introduction, this concern about accessibility and enforceability of the eventual text was repeatedly raised in the course of the public consultation phase. Accordingly, we proposed the repealing of the Human Rights Act 1998 in relation to Northern Ireland and its replacement by a Bill of Rights. The Bill of Rights would encompass and supplement provisions of the European Convention on Human Rights, thereby both drawing upon international human rights standards and reflecting the particular circumstances of Northern Ireland as required by the

Good Friday Agreement. CAJ furthermore proposed the establishment of a Northern Ireland Human Rights Court to act as a guardian for this Bill of Rights. We were surprised to see that the Commission did not have a definitive view on the matter of a Human Rights Court. In the Commission's response to the Criminal Justice Review, they endorsed the suggestion of creating a Constitutional Court dedicated to interpreting a Bill of Rights for Northern Ireland, and CAJ cannot see any justification for this apparent change of stance.

On the contrary, CAJ believes that creating a separate court to enforce the Bill of Rights would have a tremendously positive psychological impact. New judges sitting on a new court, entrusted as the guardians of the Bill of Rights, cannot help but take those rights seriously and endeavour to ensure that they are respected. A new court that functions as an appellate court will also influence current members of the Northern Ireland judiciary; they would know that their decisions implicating the Bill of Rights would be subject to review. Appointments to the new court could also have great symbolic significance. The current judicial arrangements do not command the respect of all sections of society in Northern Ireland. In addition senior members of the current judiciary have shown themselves on occasion to be not simply indifferent to, but even hostile to, human rights concerns. A new court, that is broadly representative of the community, would be a powerful symbol that the Bill of Rights truly belongs to everyone in Northern Ireland.

Moreover, enforcement is not solely an issue of "who" enforces. CAJ would reiterate its preliminary proposals regarding legal aid, a generous interpretation of "standing" and accessibility. These proposals are of vital importance if the very people who most need protection – the most vulnerable and the most marginalized in society – are to be in a position to benefit from the passage of a Bill of Rights. We also recommend that a right to access to information is an important tool in securing the enforcement of any Bill of Rights. We have proposed elsewhere that such a provision be integrated into the Bill of Rights on its own merits, but its existence would allow – among other things – for more media assistance in the publicising (and remedying) of breaches of the Bill of Rights.

CAJ also proposes that NIHRC's proposed clauses should be re-ordered so that 18.2 precedes 18.1.

Entrenchment

Bills of Rights are intended to be relatively 'permanent' documents – responding to major societal debates, but not subject to routine and regular amendments. CAJ is not convinced by the Commission's proposals to have amendments decided by a cross-community vote of the Assembly. The Assembly will anyway have the authority to request amendments, but CAJ believes a much wider franchise should be involved in agreeing any changes to the agreed text. We accordingly proposed, and reiterate our recommendation, that a referendum be required.

Addendum – Civil Law

The NIHRC seems not to have covered civil law concerns, and we would therefore reiterate our earlier proposals in this regard:

1. *In the determination of a person's rights or obligations under the civil law, he or she has the right to a fair and public hearing within a reasonable time by an independent and impartial court established by law.*
2. *Every person who is suing or is being sued under the civil law has the right to represent himself or herself in court and to adequate legal representations of his or her own choosing, and this legal representation must be provided free of charge, when the merits of the case and/or the means of the applicant so require.*
3. *Every person being sued or suing under the civil law has the right to examine and have examined in court witnesses who are giving evidence against him or her, and subject to Article 26, to assess the demeanour of those witnesses when they are giving evidence and, to know their names.*