

EQUALITY ISSUES

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The Equality Working Group (Working Group) established by the Northern Ireland Human Rights Commission (NIHRC) was a model of consensual working practices. The group was quite mixed in terms of gender, religious and political opinion, age, and professional occupations, but there was extensive agreement, both as to the problems of inequality in Northern Ireland currently, and the measures that a Bill of Rights should include to counter these inequalities. People were also fortunate enough to be able to draw upon an extensive body of international and regional good practice, so that the group did not have to develop its own thinking entirely from scratch. There was a strong sense that, though the ways that questions of discrimination, disadvantage, and inequalities are experienced are unique to each society, there are also many universal factors, which can be usefully drawn upon.

However, before addressing the NIHRC's draft Bill of Rights, and making comparisons between its proposals and the proposals received from the Working Group established to advise the NIHRC in its work, it would be worth exploring, albeit briefly, why the Working Group made the specific proposals it did.

At its first meeting, the members of the group explored the problem of inequality in Northern Ireland. Leaving aside temporarily the fact that the Belfast Agreement explicitly argued that equality be included in the Bill of Rights, did members of the group feel that it was important to include equality provisions in Northern Ireland's Bill of Rights? The answer was an unequivocal 'yes'. Members of the group spoke from their own experience of people in Northern Ireland who suffer deprivation and inequality, whether because of their class, their gender, their political or religious beliefs, their disability, their sexual orientation, their status as ex-prisoners, and /or their status as victims of violence. It was clear that inequalities continue to scar society, and that a Bill of Rights could be of some use in responding to issues of discrimination and disadvantage.

A second question addressed by the Working Group related to the fact that the Belfast Agreement asked the NIHRC to consult on the scope of a Bill of Rights which, while drawing on international standards, would "reflect the particular circumstances of Northern Ireland". Did this formulation mean that one should just discuss equality and inequality in terms of the political conflict?

Disability, for example, is a factor that can create conditions of inequality and attract discrimination, but it is by no means peculiar to Northern Ireland, nor is it directly allied to the political conflict. The group discussed if the NIHRC should explicitly include or exclude issues such as disability from its purview. Everyone in the Working Group was very clear in concluding that disability should be addressed in any Bill of Rights for Northern Ireland.

On the one hand, the situation of people with disabilities in Northern Ireland is quantitatively different to that in Britain. In Northern Ireland, one in six

people have a disability; this very high proportion is due in part to the conflict itself and, in part, the very close link between disability and poverty. Northern Ireland has a long legacy of greater poverty levels when compared to Britain. On the other hand, the situation of people with disabilities in Northern Ireland is also qualitatively different. As one member of the Working Group pointed out – disability has never been taken seriously on any political agenda, as issues of nationalism and unionism have always “trumped” all other concerns. The conflict, and responses to it, has meant that long-term inequalities relating to disability have never received the attention they deserve.

Somewhat similar arguments were made in relation to gender, youth, carers, gays and lesbians, and so on. In most instances, people can point to quite different experiences as between Northern Ireland and Britain, and they could all provide evidence of issues that have received insufficient attention or resourcing because of the emergency demands imposed by the political conflict. While it is vital that the eventual Bill of Rights addresses issues that everyone would agree are particular to the conflict in Northern Ireland – religious and political discrimination, the treatment of ex-prisoners, the rights of victims etc. – there was an equally strong feeling that any Bill of Rights for Northern Ireland must address *all* the people of Northern Ireland. Everyone in Northern Ireland has been affected by the conflict, and a Bill of Rights which is intended to address a vision of an inclusive future must therefore address all these different needs in all their diversity. No-one argued for a “Bill of Rights for some people in Northern Ireland”!

A third concern for the Working Group was to draw on the latest good practice at regional and international level. The Belfast Agreement had mandated the NIHR to draw “as appropriate on international instruments and experience”. Moreover, the United Kingdom is required to comply with its international human rights commitments, and cannot therefore authorise domestic provisions that would somehow undermine those international undertakings. Fortunately there is a wealth of international experience to be drawn upon in the field of equality. A short background note was prepared to accompany the Working Group’s final report highlighting the main texts that had been drawn upon in our debates. These included:

The Universal Declaration of Human Rights

The International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights

The UN Declaration on the Elimination of all Forms of Racial Discrimination (and subsequent Convention), the Convention on the Elimination of Discrimination Against Women, the Convention on the Rights of the Child, the Declaration on the Rights of Disabled Persons, and the UN Principles for Older Persons

The European Convention on Human Rights (and protocol 12)

The Framework Convention for the Protection of National Minorities

The African Charter on Human and Peoples’ Rights

The Constitutions of the US, South Africa and the Republic of Ireland, and the Canadian Charter of Rights and Freedoms

And, most recent of all, the European Union's Charter of Fundamental Rights.

Perhaps most useful of all, given its very recent origin, was a major UK wide study on anti-discrimination law that had just been completed by Professor Bob Hepple and others. This study had immediate relevance to a discussion about the protection of equality rights in Northern Ireland, since it consisted of a detailed comparison between current anti-discrimination laws, both in Britain and Northern Ireland, and drew out best practice across the various regimes. Definitions of discrimination (direct and indirect), harassment, victimisation, etc. were all developed as part of the Hepple study, and reflected the latest best practice at the European level. Accordingly, this work provided a very important baseline from which the Working Group was able to develop its own thinking.

So much for the background to the work of the group: what did it actually advise the NIHR, and to what extent did the NIHR accept that advice?

Firstly, the group recommended that there be a Preamble to the Bill of Rights which would be more aspirational in tone; it should "seek to enunciate some common values that people in Northern Ireland could share". Hopefully, this Preamble could then provide some guiding principles for judges to use when interpreting detailed clauses in the text. The NIHR received similar suggestions from other Working Groups, and presumably from individual submissions, and proposed a detailed Preamble that responds to the thrust of the Equality Working Group's suggestion.

Secondly, the Working Group proposed that there be a general equality clause. The text proposed drew on international texts such as the International Covenant on Civil and Political Rights, and more recent formulations – to be found in the Canadian and South African constitutions. The NIHR made one textual amendment by proposing in their draft clause that "equality includes full and equal access to . . ." as well as the enjoyment of rights. The Working Group had not explicitly referred to "access" and, coming as an addition to the text, this would presumably be considered by the Working Group as a very positive amendment.

Thirdly, the Working Group proposed a general non-discrimination clause that would, in particular, give substance to the preceding general equality clause. Both direct and indirect discrimination were to be outlawed, and these terms were clearly defined to that end. Debate around this clause engaged the Working Group for some time, as there were a number of issues that had to be resolved.

The Working Group had initially to determine the best definitions of direct and indirect discrimination, and the studies alluded to earlier were of particular importance in this regard. The Working Group discussed the issue of institutionalised discrimination, but found it difficult to determine whether explicit reference should be made to this problem in the text. Definitions have been explored in the wake of the MacPherson Inquiry into the Stephen Lawrence murder, but the Working Group understood that these definitions are far from 'fixed' and have little grounding as yet in international law. As far as members of the Working Group understood the current thinking about

institutionalised discrimination, this could be said to occur where there had been a “collective failure” on the part of an institution to recognise that its “processes, attitudes and behaviour amount to discrimination through unwitting prejudice, ignorance, thoughtlessness or (racist/sexist/sectarian....) stereotyping”. While there was no clear agreement to include reference to this in the final text, there was agreement that “only a combination of positive action (to compensate for past disadvantage), anti-discriminatory legislation, and anti-harassment policies could begin to tackle this much more complex form of unwitting prejudice.” Accordingly, the other recommendations (about including indirect discrimination, positive action measures, defining harassment etc.) would all go some way towards addressing institutionalised discrimination, whether or not it was explicitly alluded to in the Bill of Rights.

The other major debate for the group was the naming of grounds on which discrimination was to be outlawed. The Working Group spent some considerable time on this, looking to see what references were made in other texts (national and international), and to examine what were the particular needs for Northern Ireland. As part of the final report to the NIHRC, the Working Group appended a detailed explanation as to why it had included certain named grounds, and omitted others, and what interpretation it was proposing for the categories included. To sum up its position, the Working Group decided that the eventual list should:

“a) include at least some of the groups likely to benefit from protection; (b) relate directly to equality issues of particular relevance to Northern Ireland; and (c) not make pretensions to be entirely comprehensive”.

To this end, it argued that indirect and direct discrimination should be outlawed on grounds of race or ethnic origin, colour, sex, marital or family status, language, religion or belief, political or other opinion, possession of a criminal or political conviction, national or social origin, birth, disability, age, sexual orientation or other status. The Working Group commented that it had not referred to “status as a victim” as a possible ground purely because this was something that the Victims’ Working Group were presumably discussing in detail and would want to comment upon.

The NIHRC added “nationality”, “residence”, and “parentage”, and they replaced the word “sex” with the word “gender”. Presumably it was felt that these were all sufficiently important to be made explicit rather than included within concepts already listed, or indeed to be covered by the “any other status” provision. The Working Group – if it were re-convened – would probably have little difficulty with these changes. While trying to keep the list as short as possible, it was intended that each inclusion in the list be interpreted broadly, so the addition of some additional categories for the purpose of clarity is unlikely to be very problematic to any of the Working Group members.

However, one omission from the initial list would presumably have been strongly resisted by the Working Group. The NIHRC has proposed the protection of prisoners with “a criminal conviction” from discrimination but has made no specific reference to the many prisoners who consider themselves to have been political prisoners rather than criminals. The Working Group had considered international experience on this issue and

had found some useful references in the Canadian provincial statutes (Yukon and Quebec). Trying to address concerns in this domain, whilst respecting the sensibilities on all sides, the Working Group argued that “possession of a criminal or political conviction” be included as one of the non-discrimination grounds. The decision of the NIHRC to omit this reference clearly indicates their unwillingness to engage with the oft-cited concerns of people who were in prison for conflict-related reasons, and the kinds of discrimination they allege. While in principle anyone could claim the attention of the courts since “any other status” is included as one of the grounds, the very fact that the NIHRC explicitly disregarded the Working Group’s advice in this area might be seized on later by others to insist that people who consider themselves political prisoners are not intended to benefit from these provisions.

Fourthly, the Working Group had proposed definitions of “direct discrimination”, “indirect discrimination”, and “harassment”, which should also be understood as a form of discrimination. All of these were accepted without amendment by the NIHRC and, if eventually accepted, will give Northern Ireland some very good equality standards. The Working Group wanted to move away from the idea of having to find a specific comparator to prove discrimination. It also wanted to avoid definitions which required that there be a specific intention to discriminate. The NIHRC also accepted without amendment the Working Group’s clause defining exceptions to the non-discrimination clauses. Both the Working Group, and the NIHRC, drew on the most recent European standards to develop standards around a “genuine and determining requirement, provided that the objective is legitimate and the requirement is proportionate”.

So, by and large, the NIHRC took on board the extensive research done by the Working Group into international and regional best practice, and made the Working Group’s proposals their own. There are five important areas of divergence.

Firstly, the draft text from the NIHRC takes its opening clause for the equality chapter from the European Convention on Human Rights. This approach was presumably dictated by a general determination where possible to integrate clauses from the European Convention on Human Rights alongside additional clauses specific to Northern Ireland. The Working Group had no opportunity to comment on this issue, but the whole thrust of its work was to develop a series of clauses that built upon the European Convention on Human Rights and updated these provisions with later developments at the Council of Europe and at the European Union levels. The addition of this clause therefore adds nothing and, in the opinion of the author, may merely serve to confuse matters.

Secondly, the Working Group raised a whole series of questions that were of relevance beyond the equality remit and suggested that the Implementation Group or the NIHRC address them on the basis of input from a variety of Groups. So, for example, the Working Group proposed that the text express rights in terms of “All persons”, rather than “everyone” or “every individual”, or “citizens”. This preferred option was drawn from the International Covenant on Civil and Political Rights and was thought to better recognise that equality is a right that needs to be exercised both at the individual level and by individuals as members of groups. The NIHRC does not appear to

have engaged with this debate explicitly and its own text does not explain why the equality clauses use the term “everyone”. Given that the NIHRC’s text is inconsistent in its use of language in this area (and uses a variety of terms throughout its draft with no obvious explanation), it is not clear if this change to the Working Group language was deliberate, or due to poor editing.

Thirdly, the NIHRC decided to add a specific clause about equality between men and women, which had not been in the original draft proposed by the Working Group. If asked, it is not clear what perspective the Working Group would have taken on this addition. It would be fair, however, to say that a frequently raised concern for the group was the importance of being inclusive and not separating out particular constituencies for attention on the grounds that this might appear to exclude other groups.

The fourth point of divergence was the fact that whereas the Working Group had included in its proposals a very narrow exceptions clause, this was omitted by the NIHRC and incorporated into a more general (and somewhat weaker) exceptions clause. The Working Group had argued that indirect discrimination could only be justified objectively if there were “a necessary aim, and the means of achieving that aim (were) appropriate and proportionate”. The exceptions clause on offer from the NIHRC talks of “legitimate” objectives and “proportionate” requirements, and is therefore somewhat looser.

The fifth and most major concern relates to positive action. The Working Group placed the positive action clause immediately after the general equality provision because the group wanted to denote its importance in ensuring full and effective equality. In the full report to the NIHRC, it was noted that:

“To underpin the right to equality, and in recognition of the current legal situation which already obliges the public sector to promote equality of opportunity, the WG felt that NI’s Bill of Rights must include a positive duty to actively promote equality”.

We felt that the importance of this provision lay in its ability to address group inequalities and go beyond anti-discrimination measures which are, by and large, geared at redressing unfair treatment at the individual level. Using a gender lens, the Working Group asked itself whether individual women taking cases of equal pay to the courts would ever successfully challenge the persistent link between gender and poverty, the structural impediments to women entering the labour market, the under-valuation of women’s work, the responsibility that falls to women for child-bearing and nurturing, and their consequent exclusion from many economic and social benefits? The conclusion was that a broader conception of equality was needed and that positive action measures and a more mainstreaming approach were a necessary precursor to ensuing equality.

The NIHRC was unconvinced by the arguments of the Working Group and asked contributors to comment on whether positive action should be required or merely permitted. This was a disappointing stance. As the NIHRC itself indicates, “EU law couches positive action as both a requirement and a possibility”(p 33) and refers to the Treaty of Amsterdam which requires

states to enact positive measures for combating discrimination. The Working Group made no recommendations about the nature of positive action required – that is clearly a matter that can be left to the legislators, since the action may vary over time, and will certainly need to respond to different equality concerns. The Working Group did, however, feel that it was incumbent on the state to pro-actively introduce positive action measures in response to inequality, and that the Bill of Rights should state this clearly. Indeed, the Working Group believed that if the Bill of Rights merely made positive action an option, it would not be in compliance with the government's international commitments, nor indeed with some of the proposals in the Belfast Agreement. As a matter of principle, positive action needs to be made obligatory; its operationalisation, however, will and should be left to specific government action.

One of the objections apparently raised with the NIHRC was that positive action was seen as a 'political' issue and should not be dealt with by way of legal provisions. This objection sits uncomfortably with the explanation the NIHRC gives regarding the purpose of a Bill of Rights. At the outset of their draft text (page 6), the NIHRC explains that:

“The purpose of a Bill of Rights is to establish and guarantee the relationship between the state and its citizens. That means setting some limits to the powers of the government and of public bodies to control the lives of ordinary people...But a more modern bill of rights should also set some more positive requirements for the government, such as ensuring equality for all under the law. . . .That is the focus of the increasing number of international human rights documents which now set the standard for national bills of rights. . . .”

The Working Group would doubtless share this understanding of what constitutes a Bill of Rights and it was on that understanding that they argued for strong positive action measures. It is to be hoped that the NIHRC will bear this advice in mind when finalising their own proposals to the Secretary of State.