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SETTING THE CONTEXT FOR PUBLIC INTEREST LAW AND LITIGATION IN IRELAND

The Draft Bill of Rights in Northern Ireland

INTRODUCTION

Thank you for inviting me to speak at this conference. As the new Chief Commissioner of the Northern Ireland Human Rights Commission, I have listened with considerable interest to the views expressed so far. My purpose today is to set out how the public interest law work of the Northern Ireland Human Rights Commission has developed in its first six years of existence, and then to discuss how that might change if and when we secure the enactment of a comprehensive Bill of Rights in our jurisdiction.

First, the work of the Commission.
Through our casework function we provide independent specialist advice on human rights matters to individuals. The Commission also has the power to provide assistance to individuals for help in relation to proceedings involving law and practice concerning the protection of human rights. The Northern Ireland Act specifies that the Commission may grant assistance if the case raises a question of principle; if it would be unreasonable to expect the person to deal with the case without assistance, for example because of its complexity; or if there are other special circumstances.

The Commission has developed detailed criteria to guide us in making these decisions. We are in the process of developing a new Strategic Plan, and while aspects of the right to life are sure to feature, we will look at defining new priorities for casework, possibly around themes such as access to justice. This will, as before, be linked into the campaigning and investigations work of other parts of the Commission. We would much rather secure a change in law, policy or practice through lobbying, where we can rely on the whole

corpus of human rights law, than challenge it in the courts, where the only instrument that has any real weight is the European Convention.

In a given year, we have around 600 complainants come to us alleging that their human rights have been violated. We therefore have to be very selective about the cases that we even think about litigating. The vast majority of complainants are provided with advice, referrals and informal mediation-type work, so that only a very small proportion of cases actually come to be assessed formally by our Casework Committee. We nevertheless believe that the great majority of those whose complaints we resolve at these initial stages are satisfied with the expert service that our caseworkers deliver. Last year, the Commission considered 49 applications for assistance from individuals and granted assistance in 11 cases. Of those assisted four cases involved an alleged violation of Article 2 of the European Convention on Human Rights. More recently, the Commission has, for example, supported legal action to improve the conditions for women prisoners in Northern Ireland.

The Commission has launched cases in its own name. For example, the Commission recently sought judicial review of the decision of the Northern Ireland Office not to grant access to the Juvenile Justice Centre in Rathgael, Bangor. The case was eventually settled, with the Commission gaining access in 2005. In 2004, we took a case against the Prison Service after its refusal to supply the Commission with documents relating to deaths of prisoners in custody. On this occasion the Prison Service agreed to supply the information sought and the proceedings were withdrawn. These cases suggest that litigation, or simply the threat of it, if used strategically can achieve results.

There is one public law technique available to us that is proving increasingly cost-effective, and that allows us more freedom to argue broader human rights points. The Commission is empowered to intervene in legal proceedings, as a third party or amicus. Of course we had to go as far as the House of Lords to vindicate our right to do so, after the Northern Ireland courts challenged our standing as an intervenor. I am happy to say that we now meet very little resistance to the concept that we can bring an added value to the thinking of the courts. The Commission has intervened in several cases, for example, in July 2003 in the Amin case in the House of Lords. Here the Commission was able to set out its views on the scope of Article 2 of

the European Convention in the context of deaths of persons held in custody. And only last month, we were given leave to review papers in one of the most opaque areas of our judicial system – the family law courts – to allow us to make up our minds whether to intervene in a particular matter.

These are just some examples of what we do. But they show how Commissions can assist in using law to achieve change. Our experience is that a strategic approach to human rights litigation can work.

A BILL OF RIGHTS FOR NI

I want to turn to my second main theme: the Bill of Rights process in Northern Ireland. As many of you know, the Bill of Rights process has now been ongoing for over five years. In that time:

- **The Commission received over 300 submissions from individuals and groups in the first consultation exercise, and 368 in the second phase. Some of these were themselves the outcome of consultations within interest groups.**
- **Some 150 experts took part in nine thematic working groups around such issues and language rights, enforcement and women's rights.**
- **Over 400 facilitators were trained in the first phase, with 580 participants in second-phase training. We believe that the meetings that they organised, and those the Commission itself held, meant that we had in the region of 10,000 participants in public meetings.**
- **In addition over 1,350 children took part in a special consultation.**

The new Commission has made the Bill of Rights a priority. The new Commission plans to take forward the process. But we will not be rushed. We want to get this right. We want to reflect fully on the views advanced. The strength of those views indicate how important this process is. We, as a new Commission, want to reach our own conclusions on the best way forward. We will look at the evidence, we will listen and we will decide. What I will say is this: We expect any Bill of Rights for Northern Ireland to be judged on how it advances the protection of vulnerable and marginalised groups. Strategic litigation will – I am certain – be a key factor in making the Bill of Rights function in practice.

Just a few days ago we had the fifth anniversary of the entry into effect of the Human Rights Act 1998. As I said in a press statement to mark the occasion, the Act is unfinished business: it has often been used as a risk management tool rather than placing human rights values at the centre of policy formulation and decision making. It is extraordinary to many of us that the 55-year-old minimum standards set out in the European Convention as the benchmark for a modern democracy are still resented, contested, and subject to derogations and restrictive interpretations. The Bill of Rights has to offer us more than that.

As I said earlier with only two of our ten members having served in the outgoing Commission, we have essentially a new team of people coming to grips with the debates around the purpose, scope and enforcement of a Bill of Rights. It may therefore be a year or more before we are able to formulate our final advice to the Secretary of State, which is the task entrusted to us by the Belfast/Good Friday Agreement and by the Northern Ireland Act. And when we reach that point, we have another and perhaps even greater task facing us, to try to get the vision into the black letter of the law.

We need to engage with elected representatives, and with the two governments, to secure as much understanding and as much support as we can. Those of course are not synonyms. Not everyone who understands what a Bill of Rights is about will support it. Legislators, in particular, may be suspicious about the extent to which any proposals to make economic and social rights judiciable may restrict their own freedom to direct public resources in accordance with their democratic mandate.

If those of us in the human rights community, and those in the judicial and legal professions, see in the Bill of Rights a weapon with which to go to war with parliaments and assemblies, we have already lost the argument. We depend on Parliament to give us this Bill, and the Bill must give Parliament its place. It has to be framed in a way that respects the constitutional separation of powers, and that gives government substantial leeway in terms of spending decisions.

There are, of course, bottom lines, and those will be found in the same places where public interest litigation already occurs. The state has duties to its people. The state must guarantee the liberty and safety of the person; it must guarantee access to justice, and remedies

for the violation of rights. In the economic and social spheres, no person must be denied their basic needs, their human dignity, their rights to shelter, warmth, health and education. The Bill of Rights may codify this in terms of what the Irish constitution and many others set out as "guiding principles" of state policy. But it may not be feasible to secure enactment of a Bill of Rights that allows individuals to sue the state for any and every failure to meet their individual entitlements. A more likely outcome, following the splendid South African model, would be the option of interest groups suing the state over a systemic failure to deliver economic, social or cultural rights, for example by a failure to make adequate or any budgetary provision in an essential area affecting the rights of very many people, or a very vulnerable class of people.

Of course, the individual rights in the civil and political arena need to be litigable by and for individuals. Nothing in the Bill of Rights will water down any protections already contained in the Human Rights Act, or in our wide range of anti-discrimination provisions.

Many of you will know that the essence of the South African Bill of Rights, which I mentioned a moment ago, was sketched out on a kitchen table in Dublin by two people whose credentials for the job went well beyond their legal qualifications. Albie Sachs and Kader Asmal between them knew what it meant to be disabled, to be displaced, to be a refugee, to be a member of an ethnic minority, to be a victim of state persecution, to suffer violent attack, to be committed to challenging racism and oppression. They are now, respectively, prominent in the judicial and executive branches of government in the new democratic dispensation and both of them have helped us at different times in Northern Ireland.

Just as human rights protections were at the heart of the South African settlement, so they were to the fore in the long negotiations that led to our own Agreement. Our task, as a Human Rights Commission, is to ensure that we, with all the energy, resources and public participation that we have at our disposal, do at least as sound as job as was done on that Dublin kitchen table.