Introduction

Since its foundation in 1976 the Irish Council for Civil Liberties (ICCL) has called for the incorporation of the European Convention on Human Rights into domestic law. We welcomed the Government's decision to incorporate the Convention but the European Convention on Human Rights Bill, 2001 is not a bill to incorporate the ECHR into Irish law. It will not give the provisions of the Convention the force of law in Ireland. For that reason the bill, as initiated, is minimalist and disappointing.

Ireland was one of the original ten states to sign the Convention in 1950 and we were very enthusiastic then about the ideal of a new European democratic order based on the legal protection of human rights. Since then the adoption of additional Protocols to the Convention and the decisions of the European Court of Human Rights at Strasbourg (the Strasbourg Court) have extended the protections provided by the Convention into almost every area of life, not just the traditional areas of criminal law and political rights.

The Convention has become particularly important in the areas of family law and privacy rights as well and the Strasbourg Court has built up a great wealth of jurisprudence drawn from the collective wisdom of judges from every country in the Council of Europe. Unfortunately, we have been somewhat cut off from these developments because our courts have, by virtue of an understanding of particular provisions of the Irish Constitution (Articles 15.2 and 29.6), by and large disregarded the Convention and the decisions of the Strasbourg Court.

It has been beyond the pockets and the patience of most Irish litigants to take the long and costly road to Strasbourg after exhausting their domestic remedies here. As a result the rights protected by the Convention have been beyond the reach of most of our citizens. The new rights-based order is developing very rapidly across the whole continent of Europe and it is time that our citizens were enabled to share fully in the increased protections it makes available.

This should also be a two-way process. Up to now, apart from the judges we sent to Strasbourg, our courts and judiciary have had no real input into the developing European human rights order. Incorporation should mean that our courts can contribute to the development and interpretation of the Convention by considering the Convention rights in the light of the fundamental rights in our own Constitution and the rights jurisprudence we have developed over the last 50 years. That way if our protection of certain rights is stronger than in the continental countries, we can help to
raise standards in those countries as well. The Convention specifically provides (Article 53) that it should not be used to discourage any member State from providing a higher level of protection of rights in its own legal system.

We also favour incorporation because, following the enactment of the UK Human Rights Act, 1998, the Convention is now part of the domestic law in Northern Ireland. Incorporation here would help to develop a common standard of human rights protections through the island of Ireland, as envisaged by the Good Friday Agreement.

Incorporation of the Convention is an exciting prospect for everyone interested in the protection of human rights. We would like to see it done in a way which would give everyone the fullest possible access to their rights under the Convention and the most effective remedies for any breach of those rights. We would also like it to infuse every area of administration and public life here with the principles of the Convention.

Sadly, we are very disappointed by the current Bill, which we believe is minimalist in its approach and fails to provide truly effective remedies for breaches of the Convention. This is most obvious in Section 5 of the Bill, which provides that where an existing statute is found to be incompatible with the Convention, all that the Irish courts can do is to issue a declaration of incompatibility, which "shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made". This falls well short of an effective remedy.

In our view the most effective way in which to incorporate the Convention would be by constitutional amendment or reference adding the Convention's key articles to the fundamental rights provisions in the Constitution. The Government has clearly taken a different view but we would urge that the Bill should provide for a review of its effectiveness in five years time and that the review should include consideration of the possibility of constitutional incorporation whether in the form of a single constitutional amendment or through a process of progressive moderation of the Constitution by a series of piecemeal amendments. These options were discussed in some detail by the Constitution Review Group in its 1996 Report and are currently being considered in generality by the All-Party Oireachtas Committee on the Constitution.

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Legislative Incorporation:

While the immediate possibility of constitutional incorporation is remote other models ought to be examined. The problem with the Bill as published is that the Convention is only afforded the status of an interpretative tool and will carry less weight than ordinary legislation. This could be resolved by "legislative incorporation", i.e. the inclusion of a section in the Bill providing that the Convention would have the force of law within the State, notwithstanding any contrary provisions of any other statute. That would effectively repeal any incompatible provisions of other statutes to the extent only that they are in conflict with the Convention.

Such a section would be a more wide-ranging version of the "notwithstanding" clauses common in other statutes (e.g. Section 10, Criminal Assets Bureau Act, 1996) and would eliminate the necessity for the cumbersome and ineffective procedure provided for in the existing Section 5. Any such provision would be subject to the Constitution and would not affect legislation whose constitutionality had been upheld on a reference to the Supreme Court or which was specifically required by the Constitution.

We now set out below some more detailed concerns with specific sections of the Bill:

Section 1:
Protocols

It is not proposed to include Protocol 12 (the new free-standing and greatly strengthened anti-discrimination provision) among the Convention provisions covered by the Bill. Protocol 7 is included despite the fact that it has not yet been ratified by Ireland. The distinction is justified on the grounds that Protocol 12 is not yet in force as it has not yet been ratified by the requisite number of member states of the Council of Europe. Ireland has, however, signed Protocol 12 so we have clearly signalled our intention to be bound by it when it comes into force. In the circumstances, we would suggest that Protocol 12 should be included, with a clause giving the Minister power to appoint the day when it would come into operation - i.e. when it actually comes into force by being ratified by the requisite number of member states of the Council of Europe.

Organ of the State

The definition of an "organ of the State" specifically excludes the courts - unlike the UK Act. We feel this is a serious flaw. The courts should also conform to Convention standards, in relation to e.g. giving reasons for their decisions, dealing with cases within a reasonable time, giving all parties a fair hearing etc. A duty to perform their functions compatibly with the Convention would also put a duty on the courts to consider the Convention aspects of a case on their own motion. Courts clearly perform public functions and it is anomalous to exclude them from the definition of public authorities.

It is unclear whether the definition of an organ of the State includes private or semi-private bodies carrying out public functions, e.g. hospitals, schools etc. The UK definition does include such bodies and we feel our definition should do so as well.

Generally in relation to public authorities, as the UK standard applies in Northern Ireland we feel that an equivalent standard should apply in the Republic given the undertaking in the Good Friday Agreement to provide equivalent levels of human rights protection in both parts of Ireland. Indeed it is arguable that the absence of such equivalence is a breach of the Agreement.

Section 3:

We feel that it should be possible to raise Convention issues in all courts, not just the higher courts and it should be possible to do so at the same time as raising other issues. The present provision would seem likely to create twin-track litigation at unnecessary cost. It is also important that the courts can provide remedies other than damages, e.g. to order the release of a person in custody or detention or to grant an injunction to prevent some action which is contrary to the Convention from continuing etc.

The same time limits should apply to litigation on Convention points as to other litigation. Anything else would cause unnecessary confusion.

Section 5:

We have already indicated that this core provision is very unsatisfactory. It allows the court to decide "where no other legal remedy is adequate" that a statutory provision or "rule of law" and any actions taken thereunder are incompatible with the Convention. But then the actions can continue! This seems to fly in the face of the purpose of the Bill as set out in its long title, i.e. to enable further effect to be given to the Convention. This is why, in our view, it is so important to make the Convention provisions part of Irish law.
If this scheme is to be kept, we feel that compensation should be put on a legal rather than an ex gratia basis (similar to the provisions in the Residential Institutions Redress Bill, 2001). Remedies other than damages should also be available.

We feel that the Taoiseach should have to notify the Oireachtas, not just that such an Order has been made by the courts, but also to indicate within 90 days what action the Government proposes to take to remedy the situation.

The essential practical difficulty with Section 5 is that individuals may still have to make applications under the Convention to the Strasbourg court to fully vindicate their Convention rights where an Irish court finds that an impugned provision is incompatible with the Convention. This will be even more complicated where a contradictory finding is made to the effect that a provision is consistent with the Constitution but incompatible with the Convention. In situations where the Government fails to take remedial action on foot of a declaration of incompatibility the Strasbourg route will be the only option available to an individual who wishes to force the Government to bring Irish law into line with the Convention. To that extent, Section 5 does little to change the current position and arguably adds to the burden of an individual litigant in terms of his/her obligation to exhaust all domestic remedies before making an application to the European Court.

Section 6:

We agree that the Attorney General should be a notice party in proceedings to which this section refers and would further suggest that the Human Rights Commission should, given its particular role as a potential amicus curiae under the Human Rights Commission Act, 2000, also be a notice party to represent the interest of upholding the general protection of human rights. This would also serve to overcome potential conflicts in the respective roles of the Attorney General as legal adviser to the Government and guardian of the public interest.

Section 7:

ICCL is strongly of the view that the immediate establishment of the Human Rights Commission should be dealt with by means of a separate short piece of legislation before the summer recess. It is a cause of tremendous disappointment that the Commission still only exists on an interim basis more than two years after its Northern Ireland counterpart has been full established. This has prevented the establishment of a Joint Committee of both Commissions which is required under the Good Friday Agreement and is impeding the Irish Commission in the full exercise of its powers and functions under the Human Rights Commission Act, 2000. A separate short bill should take account of the expanded membership of the Irish Commission and make a statutory reference to the use of an independent selection committee in the future in the making of appointments to and filling of casual vacancies on the Commission.

We wish to further point out that the acknowledgement in Section 7 of the need to amend Section 11 of the Human Rights Commission Act, 2000 amply demonstrates the basic point made in this submission to the effect that this bill does not give the Convention force of law in Ireland and therefore falls short of the commonly understood standard of domestic incorporation.

General:

The UK Human Rights Act, 1998 contains a provision that a Minister proposing any legislation must indicate to Parliament that a bill is compatible with the Convention, or that it is not but the UK government wants to pass it anyway. We feel that it would be useful if an Irish Minister was
similarly required to certify that proposed legislation conformed to the Convention. This “health certificate” procedure would ensure that, at the drafting stage, each Department would have to consider carefully whether all the provisions of the Bill would be compatible or not. It would also provide a useful basis upon which the Dail and Seanad could debate the compatibility of proposed legislation with Convention obligations. There is clearly a public demand for intensified parliamentary scrutiny of European obligations and the use of such a mechanism would greatly facilitate such a process.

We assume that Government would not seek to pass any measure which they believed to be incompatible with the Convention.

The UK government put significant resources into a programme of education for the public service, the legal profession and the judiciary to prepare them for the effects of incorporation. We believe that a similar programme should be set in place here and would hope the Government would outline its plans in that regard.

 Provision should be made for legal aid for the purposes of proceedings under this Bill by the insertion of appropriate amendments to the Civil Legal Aid Act, 1995.