

IRISH COUNCIL for CIVIL LIBERTIES  
An Chomhairle um Chearta Daonna

**Response to the Pre-consultation on a  
Charter of Rights for the island of Ireland to  
the Joint Committee of Representatives of  
the Irish Human Rights Commission and  
the Northern Ireland Human Rights  
Commission**

**January 2004**

## **The ICCL**

The Irish Council for Civil Liberties (An Chomhairle um Chearta Daonna) is an independent, non-governmental membership organisation that works to promote and defend human rights and civil liberties. It was founded in 1976 by, among others, Mary Robinson, Kader Asmal and Donal Barrington.

The organisation first became very active in campaigning about such traditional civil liberties as freedom of expression and association, freedom from arbitrary arrest, the right to silence and to a fair trial. As the ICCL developed, its work grew to include other areas of activity, in particular the ICCL was one of the first organisations to focus on the right to equality, incorporating the right to freedom from discrimination on grounds such as socio-economic status, political opinion, gender, race, membership of the Traveller Community, family status, marital status, age, religion, sexual orientation, and disability. The ICCL is now also involved in other areas such as e-rights, mental health and disability, asylum/refugee rights and immigration issues.

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## **Executive Summary**

1. The ICCL believes the obligation to draft a Charter of Rights contained in the Good Friday (Belfast) Agreement 1998 presents a historic and important opportunity to complete the peace process and supplement it with a strong, as well as practical, human rights framework.
2. Although the obligation to draft a Charter of Rights for the island of Ireland emanates from the Good Friday Agreement, its historical development can be traced back to the Anglo-Irish Agreement of 1985. Many of the themes addressed in the Agreement reoccurred throughout the development of the peace process in Northern Ireland.
3. The Commissions have proposed three models for consideration. Model A is a declaratory model that would set out what rights existed but not make provision for how they will be enforced and is comparable to the Universal Declaration of Human Rights. Model B would provide an agreed set of programmatic rights to be realised progressively, with the option of a monitoring body. Model C, defined as 'higher law' in the pre-consultation document, would put the Charter rights on a justiciable footing, making them enforceable in the courts.
4. While Model B is the Joint Committee's preferred option, ICCL would encourage the Commissions to adopt Model C: a legally binding document incorporating civil, political, economic, social and cultural rights. The ICCL is strongly in favour of Model C. Ireland is already party to several programmatic international human rights obligations. These treaties are often selectively or inadequately implemented by government, and the courts will not enforce them. We do not believe that Ireland needs another such document. Legally binding documents carry corresponding obligations that must be translated into concrete duties. Legal accountability imposes clear duties upon decision makers, public bodies and private entities to respect, fulfil and protect rights.
5. The ICCL also believes that there needs to be broader public debate over the Charter and human rights before the Joint Committee chooses a model. There has only ever at best been a limited debate – amongst selected circles - in the Republic of Ireland about the importance of human rights, and it is essential that this debate take place amongst the wider civil society. The ICCL is also convinced that more public education and debate is needed on the relevance of human rights in civic society before a formal consultation on the Charter is initiated.

## **1.Introduction**

- 1.1 The ICCL welcomes the opportunity to respond to the pre-consultation initiated by the Joint Committee on the Charter of Rights for the island of Ireland. Developments in Northern Ireland, specifically developments post the Good Friday (Belfast) Agreement (1998) have had a significant impact on the Republic of Ireland. The Good Friday Agreement enshrines obligations and commitments to improve and enhance the system of rights protection on both sides of the border and obliges the Irish government to provide at least equivalent human rights protection. The establishment of the Northern Ireland Human Rights Commission and Irish Human Rights Commission is a direct result of the Good Friday Agreement as is the passing of the European Convention on Human Rights (ECHR) Act.
- 1.2 The ICCL believes the obligation to draft a Charter of Rights contained in the Good Friday Agreement presents a historic and important opportunity to support the peace process and supplement it with a strong, as well as practical, human rights framework. The peoples of Northern Ireland and the Republic of Ireland overwhelmingly supported the Good Friday Agreement and substantive provisions are included to ensure that everyone enjoys effective human rights guarantees. The Charter of Rights must reflect an imaginative and meaningful commitment to progressive human rights, rather than a lowest common denominator. The island of Ireland does not need more aspirational, programmatic

and persuasive human rights tools – it needs an effective and accountable framework for enforcement.

- 1.3 This document focuses on several key areas that frame the ICCL's position and which are relevant to the pre-consultation. Section 2 provides an overview of the historical development of the Charter, taking account of previous agreements, research, human rights obligations from the Good Friday Agreement, 1998 and a discussion of the Irish Constitution, 1937. Section 3 examines the Joint Committee's proposals for a Charter of Rights for the island of Ireland focusing on: (a) the Declaratory Model, (b) the Programmatic Model and (c) the Justiciable Model. Arguing for Model C, Section 4 outlines the ICCL's position and why the island of Ireland needs a legally binding Charter. This section also alludes to international experience from Finland, New Zealand, and South Africa. Section 5 briefly comments on content and Section 6 on the need for further research. Finally, Section 7 includes a commentary on the pre-consultation process itself and the need for more public education.

## **2. Historical development of a Charter of Rights**

- 2.1 Although the obligation to draft a Charter of Rights for the island of Ireland emanates from the Good Friday Agreement, its historical development can be traced back to the Anglo-Irish Agreement of 1985. Many of the themes addressed in the Agreement reoccurred throughout the development of the peace process in

Northern Ireland. Within the human rights arena, the Intergovernmental Conference established under the Agreement was intended to provide a forum for both Governments to co-operate on agreed areas, in order to respect the “rights and identities of the two traditions in Northern Ireland”. Specific issues addressed by the two Governments included discrimination, the cultural heritage of the two traditions, electoral issues and a possible Bill of Rights for Northern Ireland. While negotiations focused mainly on Northern Ireland, the Agreement also stated that the Irish Government should not be excluded from applying agreed measures in its jurisdiction, particularly in regard to human rights.

- 2.2 The Downing Street Declaration of 1993 also made a reference to the “full respect for the rights and identities of both traditions in Ireland”, not just Northern Ireland. Moreover, the Joint Framework Document adopted in 1995 by the two Governments included an “explicit undertaking” by each Government to:

*50. ... (E)qually ensure in its jurisdiction in the island of Ireland, in accordance with its constitutional arrangements, the systematic and effective protection of common specified civil, political, social and cultural rights...*

The Framework Document also mentioned that both Governments should encourage democratic representatives to adopt a Charter or Covenant reflecting

and endorsing the fundamental rights of everyone living in the island of Ireland.

- 2.3 Published in 1996, the Forum on Peace and Reconciliation commissioned a Consultancy Study on the protection of human rights in the context of peace and reconciliation in Ireland.<sup>1</sup> This study provided an overview of national and international protection regimes, specifically focusing on human rights protection in the Republic of Ireland and the United Kingdom.
- 2.4 Proposing a range of legal techniques for promoting and enforcing human rights in the island of Ireland, the authors did not consider them to be mutually exclusive:

- (1) A formal declaration of commitment to human rights as proposed by the Joint Framework Document
- (2) Direct incorporation of the ECHR and other international conventions
- (3) Entrenched constitutional protection of fundamental human rights
- (4) Comprehensive legislative protection of human rights
- (5) Protection under bilateral and multinational treaty

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<sup>1</sup> Forum for Peace and Reconciliation (1996) *Consultancy Studies – The Protection of Human Rights in the Context of Peace and Reconciliation of Ireland*, Government Stationary Office.

- 2.5 Adopted on 10 April 1998, the Good Friday Agreement brought the decades-long conflict in Northern Ireland to a close. Commentators have suggested that human rights were not at the forefront of the minds of those who engaged in the multi-party talks.<sup>2</sup> Priority was given to new arrangements for the Northern Ireland Executive and Assembly, their relationship to political institutions in Britain and the Republic of Ireland. Human rights entered negotiations towards the end of the process and resulted in a combination of commitments, sometimes unclear, to new laws.
- 2.6 Framed by an obligation to ensure “at least equivalent level of protection of human rights” North and South, the Agreement’s human rights provisions are intended to strengthen and enhance human rights protection for the peoples living in the island of Ireland. Although the UK Government was required to incorporate the ECHR, the Republic of Ireland undertook to review and consider incorporation and further develop equality guarantees. A Bill of Rights was proposed for Northern Ireland to supplement rights provided by the ECHR, together with the establishment of Human Rights Commissions North and South. The Agreement also recommended that a Joint Committee of Representatives from both commissions

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<sup>2</sup> Livingstone, S. (2001) “Human Rights in Northern Ireland: In from the Margins?” in Bacik, I. & Livingstone, S. *Towards a Culture of Human Rights in Ireland*, Cork University Press/Centre for Cross Border Studies, pp. 56.

should consider issues of human rights concern on the island of Ireland.

- 2.7 Apart from the obligation to promote ‘equivalent’ rights North and South, the Charter of Rights is important practically and symbolically. An equivalent human rights regime north and south will encourage free movement between different parts of the island. Lower degrees of protection may in fact discourage individuals relocating from the South to the North or vice versa.<sup>3</sup> On a symbolic level, equivalent human rights protections may prevent the adoption of restrictive measures in one jurisdiction infiltrating the other.
- 2.8 The ECHR was incorporated in Northern Ireland and the UK through the Human Rights Act (HRA) 1998. Adopting an interpretative model, Section 6(1) is the centrepiece of the Act, making it unlawful for a public official to act in a way that is incompatible with the ECHR. The Act applies upon the existing framework of statutory law, with several areas of public law remaining virtually unchanged including: education, public housing, social security and criminal investigation. Courts are able to rely on range of judicial remedies when a declaration of incompatibility is made and can grant relief, a remedy or make an order<sup>4</sup> and award damages/pay compensation in civil proceedings.<sup>5</sup>

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<sup>3</sup> Ibid, pp. 89.

<sup>4</sup> HRA, 1998 Section 8(1).

<sup>5</sup> HRA, 1998 Section 8(1).

2.9 The Northern Ireland Act 1998 required the Northern Ireland Human Rights Commission to advise the Secretary of State on the scope for defining a Bill of Rights for Northern Ireland to supplement the ECHR.<sup>6</sup> On this basis, the Commission launched a consultation in March 2000 and produced the results in 2001.<sup>7</sup> The purpose of the Bill of Rights is to “establish and guarantee the relationship between the state and its citizens”.<sup>8</sup> It also sets general standards for legislation and limits the government/public body powers to control the lives of ordinary people. Rights proposed for the Bill include: democratic rights; rights concerning identity and communities; equality and non-discrimination; the rights of women; rights to life, freedom from torture, inhuman or degrading treatment or punishment, freedom from slavery and freedom from forced labour; rights relating to criminal justice and administrative justice; the rights of victims; rights to family life and private life; the rights of children; education rights; rights to freedom of thought, expression, information and association; language rights and social, economic and environmental rights.

2.10 Due to a lack of collective cross-party involvement and support project, the development of the Commission’s

advice to the Secretary of State has taken longer than originally anticipated. The Commission’s work has also been hampered by a serious lack of resources.<sup>9</sup>

2.11 Pursuant to the European Convention on Human Rights Act 2003, the ECHR is now part of Irish domestic law. The ECHR has already been important for Ireland in the areas of civil legal aid, gay rights, rights of children born outside marriage, restrictions on abortion information and the right to silence in criminal cases. Giving further effect to the ECHR in Irish law, an interpretative model has been chosen for its passage, which obliges courts to interpret statutory provisions or rule of law in a manner which is compatible with Convention rights.<sup>10</sup> If a litigant pursues a case alleging a violation of a convention right, courts can only make a ‘declaration of incompatibility’ and are unable to invalidate any statutory provision or rule of law.<sup>11</sup> The Taoiseach is then informed of the declaration and the Attorney General/Government must decide whether compensation is to be awarded.<sup>12</sup> The fact that the range of judicial remedies differ in the ECHR Act 2003 from the HRA 1998 actually presents a major obstacle in promoting an

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<sup>6</sup> Provided for by Section 69(7) of the Northern Ireland Act 1998, para 4.

<sup>7</sup> Northern Ireland Human Rights Commission (2001) *Making a Bill of Rights for Northern Ireland – A Consultation by the Northern Ireland Human Rights Commission*, Northern Ireland Human Rights Commission: Belfast.

<sup>8</sup> Northern Ireland Human Rights Commission (2001), *ibid*, pp. 6.

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<sup>9</sup> Northern Ireland Human Rights Commission (2003) *Annual Report*, Northern Ireland Human Rights Commission: Belfast, pp. 4.

<sup>10</sup> Section 2(1) European Convention on Human Rights Act, 2003.

<sup>11</sup> Refer to Section 5(1) and 5(2)(a).

<sup>12</sup> Section 5(3) and 5(4)(a)(b)(c).

equivalence of rights North and South.<sup>13</sup> (note lets not give them any excuse)

- 2.12 Drafted in 1937, the Irish Constitution is derived from two very different sources: the liberal democratic tradition and Christian democratic theory.<sup>14</sup> The text of the Constitution can only be amended by way of referendum but the meaning of its provisions continually evolve as they fall to be interpreted by the judiciary. In common with the US legal system the Irish Constitution adheres to a model of entrenched rights with attendant strong powers of judicial review. Ordinary law is invalid if a court finds that it conflicts with constitutional rights and principles<sup>15</sup>. Given that it was enacted prior to the promulgation of the Universal Declaration of Human Rights (UDHR), the ECHR and other major international human rights treaties, it is to be expected that the Constitution's written catalogue of rights is seriously deficient. With an absence of specific provisions in respect of minority rights, communal rights as well as a prohibition on racism, the Constitution is very much a product of its time particularly in terms of its language

and as witnessed by articles on the family<sup>16</sup>. Further, social and economic rights in the Constitution are largely recognised as directive social policy principles, rather than rights that can be enforced by individual action in the courts. Through creative use of certain constitutional provisions the courts have sought to ensure that the Constitution does not remain static, recognising for example, some social and economic rights as stemming from Article 40.3. These developments, however, raise serious concerns of democratic legitimacy (see paragraph 2.13).

- 2.13 In 1996, the Constitution Review Group highlighted the absence of personal rights in the Constitution. Broadly worded, Article 40.3(1) provides that the "State guarantees in its laws to respect, and, far as practicable, by its laws to defend and vindicate the personal rights of the citizen". Courts have identified Article 40.3 as giving rise to a number of personal rights which are not referred to in the actual text of the Constitution. In deciding which rights ought to be conferred with constitutional status judges have drawn on disparate sources<sup>17</sup> and the law in

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<sup>13</sup> Refer to Irish Human Rights Commission (2002) *Submission on the European Convention on Human Rights Bill, 2001*, Irish Human Rights Commission, pp.10.

<sup>14</sup> Whyte, G. (2001) *Social Inclusion and the Legal System: Public Interest Law in Ireland*, Institute of Public Administration: Dublin, pp. 353.

<sup>15</sup> Morgan, D.G. (1985) *Constitutional Law of Ireland – The Law of the Executive Legislature and Judicature*, Round Hall Press: Dublin, pp.12.

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<sup>16</sup> Article 41.2(1) "In particular the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved". Article 41.2(2) "The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home".

<sup>17</sup> In some cases the courts have looked at other provisions of the Constitution for guidance e.g. the directive principles of social policy in Article 45 (refer to *Murtagh Properties v. Clearly* [1972] IR 330) or the Preamble. More often however, judges "have had to derive un-enumerated

this area has developed on an *ad hoc* by-case basis<sup>18</sup>. The Constitution Review Group argues that the courts have been given too much latitude in the identification of personal rights<sup>19</sup>. We would add that constitutional interpretation in general has proved problematic, with judges opting for various approaches to this task without any consistent rationale being advanced<sup>20</sup>.

- 2.14 Recommending the Constitution should be amended to provide a comprehensive list of fundamental rights, the Group included personal rights contained in the Irish courts, the ECHR and the International Covenant on Civil and Political Rights (ICCPR), together with extending these rights to all persons in the Republic of Ireland and not just citizens. ICCL agrees that there is a clear case for amending the Constitution to include a comprehensive code of enumerated human rights. We also assert that the production of a Charter presents the ideal opportunity to do just that. However, the ICCL agrees that the identification of rights should result from an open and accountable democratic process. Decisions as to the nature and parameters of such rights should not remain the preserve of 'experts' but should in accordance with

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rights from less concrete sources" – Casey, J. (2000) *Constitutional Law in Ireland*, Sweet and Maxwell: Dublin, pp. 396.

<sup>18</sup> Constitution Review Group (1996) *Report of the Constitution Review Group*, Government Stationary Office, pp. 253.

<sup>19</sup> Ibid, pp. 257.

<sup>20</sup> See Kelly, J.M. (1994) *The Irish Constitution*, Butterworths: Dublin at xcvi et seq.

the principles of participatory democracy<sup>21</sup> actively involve the widest possible range of persons from the island of Ireland. Such a process is essential if any constitutional change is to enjoy the support of the public. To do otherwise would undermine, rather than foster, the development of a human rights culture and devalue experiential knowledge of human rights issues. The promulgation of a Charter affords an opportunity to review best practice in this field.

- 2.15 In Ireland, adequate consultations and debate on constitutional change could afford people, for the first time in the case of the Republic, a chance to consider how Ireland's obligations under ICESCR can best be met. The Constitution Review Group's recommendation not to incorporate ESCR should also be revisited in this context. In ICCL's view the Group's consideration in this area was inadequate, in particular, it did not take into account salient developments in other jurisdictions such as Belgium, India and South Africa.<sup>22</sup> There were also internal inconsistencies that need to be explored further. For instance while the incorporation of ESCR is explicitly dismissed in one section, the Group recommends textual constitutional recognition be afforded to personal rights developed by the judiciary under Article 40.3, these include certain ESCR including

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<sup>21</sup> See Baker et al (forthcoming 2004) 'Chapter 6: The Challenge of Participatory Democracy' in *Equality From Theory to Action*, Palgrave MacMillan: London.

<sup>22</sup> See Fabre, C. (2000) *Social Rights Under the Constitution*, Clarendon Press: Oxford.

the right to health. Nor does the Group consider why the right to education, a classic ESCR, set out in Article 42, does not pose the same apparent separation of powers difficulties as other ESCR. Further the Group favoured retention of the right to private property, which many theorists regard as the core economic right.<sup>23</sup>

- 2.15 It has been demonstrated above, the concept of a Charter of Rights for the island of Ireland is not just a vague undertaking in the Good Friday Agreement. Evidently, its origins can be traced back to 1985 with the Anglo-Irish Agreement and the obligation to ensure the ‘equivalence’ of rights is firmly located in the Framework Documents of 1995. Sustained peace can only be guaranteed through the promotion of a rights-based culture and the Charter of Rights offers a real basis to work from. An aspirational, broad and weak Charter will have no credibility for people living in the island of Ireland. The Charter risks being deemed a failure if it does not guarantee human rights commitments made in earlier intergovernmental documents. The Joint Committee has already indicated it favours Model B, a broad Charter outlining programmatic rights with a possible monitoring body. The ICCL does not favour this model nor agree with many of the arguments advanced by the Committee.

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<sup>23</sup> See discussion by Daintith, T. (2004) ‘The constitutional protection of economic rights’ in *International Journal of Constitutional Law*, 2:1, pp. 56-90.

### 3. Models Proposed

- 3.1 Several models from the international human rights framework are proposed in the pre-consultation: Model A – The declaratory model, Model B – The programmatic model and Model C – The fully enforceable model.
- 3.2 Model A would declare what people’s rights should be without making clear how they will be guaranteed and is comparable to the UN Declaration of Human Rights. With no practical impact on the lived experience of people living in the island of Ireland, this model would be a pointless exercise. We already have a UN Declaration of Human Rights which functions, as an inspirational and guiding instrument for the international human rights movement, the island of Ireland does not need another one.
- 3.3 Model B as proposed in the pre-consultation document would provide for a charter outlining an agreed set of programmatic rights, with the option of a monitoring body. The ICCL is not in favour of this model given the existence of other programmatic international covenants and conventions. The Irish Government’s track record indicates that obligations to progressively realise rights often do not translate into concrete action. Ireland has already signed and ratified a raft of programmatic international and regional human rights instruments<sup>24</sup>.

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<sup>24</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), signed in 1973 and ratified in 1989; International Convention on the Rights of the Child (1989), signed in 1990 and ratified in

With respect to the ICESCR for example successive administrations have failed to comply with even the most basic obligations including the immediate implementation of a core content of ESCR rights<sup>25</sup>. Ireland has only selectively complied with its human rights obligations. For example, it has passed legislation contrary to the spirit of several human rights norms<sup>26</sup> and has even violated the principle of ‘non-regression’<sup>27</sup>. Although it

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1992; International Convention on All Forms of Discrimination Against Women (CEDAW) (1979), ratified in 1985; International Convention on All Forms of Racial Discrimination, (1965), signed in 1968 and ratified in 2000.

<sup>25</sup> As indicated by the consistent failure to incorporate justiciable ESCR, such as the right to housing, into domestic law.

<sup>26</sup> Trespass law under the Housing (Miscellaneous Provisions) Act, 2002 criminalizes individuals who do not leave an area of land with their belongings/home (referred to as ‘objects’ in the Act) if directed to by Gardaí. Individuals can be arrested without a warrant and fined up to €3,000. Apart from the fact that this Act may be unconstitutional [refer to Irish Traveller Movement (2003) ‘Forced eviction: The permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to appropriate forms of legal and other protection’], it appears to violate Article 12 of the ICCPR (the right to liberty and to choose one’s home) which incorporates the right not to be unlawfully evicted and Article 8 of the ECHR (right for respect of private and family life).

<sup>27</sup> Signatories to the ICESCR must not regress on rights protected in the Covenant. In November 2003, the Minister for Social and Family Affairs announced budgetary cutbacks in social welfare payments. Rules for granting rent supplementation were revised further limiting an individual’s right to housing. Claimants must now be in private rented accommodation for six months to be eligible for any payments. This stipulation adversely affects a whole range of different groups who do not have the resources to

would be easier for political parties and governments to reach agreement, Model B would afford political parties too much discretion and reinforce the current practice of selective compliance. Further, the Republic of Ireland already has a significant number of state funded agencies/positions<sup>28</sup> and *ad hoc* committees,<sup>29</sup> which monitor human rights standards to various degrees. If the current system of monitoring were effective then a Charter of Rights would not be required.

- 3.4 Defined as ‘higher law’ in the pre-consultation document, Model C is favoured by the ICCL. Model C would be a regional human rights instrument with justiciable rights enforceable in the courts.

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access private rented accommodation in the first place, for example: people who are homeless or living in overcrowded accommodation, lone parents, people fleeing domestic violence and convention refugees.

<sup>28</sup> The Equality Authority, the Mental Health Inspector and the Office of the Refugee Applications Commissioner.

<sup>29</sup> The National Consultative Committee on Racism and Interculturalism (NCCRI) and the Prison Visiting Committee.

#### 4. The case for Model C

4.1 The advantages of Model C far outweigh the disadvantages and are concisely described by the pre-consultation document:

*This model would offer individuals and communities in both parts of Ireland some practical guarantee that the rights included can be relied upon in local courts. Like the United Kingdom's Human Rights Act 1998, and the Irish Constitution, this kind of charter would confer legal rights that could be publicly asserted and vindicated in the courts. It would therefore mean that the concept of human rights would gain greater credibility, especially perhaps amongst those people who stand to gain from better protection of social and economic rights.*

The peoples living in the island of Ireland deserve a fully enforceable Charter of Rights. There is an indisputable long history of human rights abuses in Northern Ireland with many communities experiencing extreme economic hardship and high levels of child poverty.<sup>30</sup> Studies on poverty and social exclusion in Northern Ireland also reveal that poverty levels are extremely high and across both communities.<sup>31</sup> Ireland generally fails to incorporate

<sup>30</sup> This was recently highlighted by the UN Committee on Economic, Social and Cultural Rights in its Concluding Observations on the United Kingdom of Great Britain and Northern Ireland – 17/05/2002.

<sup>31</sup> McAuley, C., Hillyard, P., McLaughlin, E., Tomlinson, M., Kelly, G. and Patsios, D. (2003) *The Necessities of Life in Northern Ireland*, Working Paper 1, Poverty and Social Exclusion Northern Ireland Project, School of Sociology and Social Policy, Queen's University, Belfast/School of Policy Studies, University of Ulster.

international human rights norms into domestic law<sup>32</sup>, the Irish courts pay scant regard to international instruments<sup>33</sup> and the Irish government is slow to respond to human rights monitoring bodies.<sup>34</sup>

4.2 The Forum for Peace and Reconciliation's Consultancy Study was very clear on the subject enforcement of future human rights instruments. Writing in the context of the peace process in Northern Ireland, the authors were clearly unsupportive of non-binding models:

*...(The) adoption of a non-binding declaration on human rights, whether by the two Governments or by the parties involved in discussions ... this should not be regarded as a viable long-term option since it would have no legal effect and could not be relied on in the courts in the even of future disputes on its meaning...*<sup>35</sup>

<sup>32</sup> Although Ireland signed the European Convention on Human Rights in 1957, the Convention has only been partially implemented into Irish law through the European Convention on Human Rights Act 2003. Notably, Ireland is also the last ECHR signatory to give effect to the ECHR in its jurisdiction.

<sup>33</sup> For example, in none of the judgements delivered in the case of *TD v. the State (2001)* which concerned children's right to accommodation, referred to the International Convention on the Rights of the Child, 1989; see further discussion by McCrudden, C. (2000) 'Human rights: A common law of human rights? Transnational judicial conversations on constitutional rights', *Oxford Journal of Legal Studies*, 20(4), 499-532.

<sup>34</sup> The Irish Government has often failed to produce reports for international monitoring bodies at agreed and scheduled times. For example, because of Ireland's tardiness, it had to combine its second and third report to the CEDAW Human Rights Committee in 1997. This occurred again in 2003 when it combined the country's fourth and fifth report for the Committee.

<sup>35</sup> Forum for Peace and Reconciliation, *ibid*, pp. 9.

- 4.3 Concluding Observations/Comments of the UN Committee on Economic, Social and Cultural Rights on the Republic of Ireland must also be heeded by the Joint Committee. The UN Committee has repeatedly called for social, economic and cultural rights to be made justiciable in domestic law. The Republic of Ireland is currently in violation of the Covenant because it has failed to make second-generation rights justiciable.

*23. Affirming that all economic, social and cultural rights are justiciable, the Committee reiterates its previous recommendations (see paragraph 22 of the Committee's 1999 concluding observation) and strongly recommends that the State party incorporate economic, social and cultural rights in the proposed amendment to the Constitution, as well as in other domestic legislation. The Committee points out that, irrespective of the system through which international law is incorporated in the domestic legal order (monism or dualism), following ratification of an international instrument, the State party is under an obligation to comply with it and to give it full effect in the domestic legal order...*

- 4.4 The ICCL is strongly in favour of a legally binding document, requiring both jurisdictions to make enforceable, taking account of their own judicial systems and incorporating civil, political, economic, social and cultural rights, as these rights are indivisible.<sup>36</sup> A legally

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<sup>36</sup> Article 5 of the Vienna Declaration and Programme for Action (1993): "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis".

binding document carries corresponding obligations that must be translated into concrete duties. Legal accountability imposes clear duties upon decision makers, public bodies and private entities to respect, fulfil and protect rights.

- (1) The duty to respect is a negative obligation requiring parties to refrain from acting in a way which deprives people of a guaranteed right.
- (2) The duty to protect is an obligation concerning third parties. It requires responsible parties to ensure that third parties do not deprive people of a guaranteed right. For example, a government must pass and enforce laws prohibiting private companies from releasing hazardous chemical that impairs public health.
- (3) The duty to fulfil is a positive obligation, requiring parties to establish political, economic and social systems that provide access to a guaranteed right for all members of society<sup>37</sup>. This means governments must prioritise and implement essential services such as health care and housing.

Imposing a system of legal accountability would enable advocacy groups and individuals to use legal mechanisms, to vindicate and demand transparent

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<sup>37</sup> Adapted from Center for Economic and Social Rights (2000) *Resource Series 1 - Economic, Social and Cultural Rights: A Guide to the Legal Framework*, Center for Economic and Social Rights: New York, Section 4, paragraph 2.

allocation of resources and concrete remedies for policies that violate these rights.

- 4.5 Enforcement options for the Republic of Ireland include: comprehensive legislation incorporating fundamental rights, or entrenched constitutional protection.
- 4.6 Comprehensive legislation incorporating fundamental rights would enable courts to invalidate legislation, overrule government decisions and make declarations of incompatibility with the Irish Constitution. However, there is too much potential for conflict with the Constitution because it already enshrines civil and political rights, explicit socio-economic rights<sup>38</sup> and unremunerated rights<sup>39</sup>. These rights are indeed superior and previous experiences demonstrate how they can trump secondary legislation. *Re Article 26 and the Employment Equality Bill 1996* [1997]2 IR 1 (Supreme Court, 15 May 1997); is an extremely important decision, which resulted in equality legislation being struck down on two principal grounds – the disability provisions and the vicarious liability sections. Section 35 of the Bill dealt with the extent to which employers were required to make provision in workplaces for employees with a

disability. It basically stated that employers might be justified in not expending resources where this would impose an unreasonable burden. The court recognised that Section 35 was an attempt by the Oireachtas to balance the employers’ property rights (especially the right to earn a livelihood) with the ‘common good’ aim of promotion of equality within the workplace, but found that it swung too far in favour of the latter. The Supreme Court struck down the Employment Equality Bill 1996 because it deemed it infringed upon an individual’s right to property.

- 4.7 *Re Article 26 and the Matrimonial Home Bill 1993* [1994] IR 305 involved the Supreme Court in assessing the constitutionality of a bill, which purported to create automatic joint ownership by spouses of a family home. Finlay CJ (at 326) held that the bill was invalid because it did not constitute a “reasonably proportionate intervention by the State with the rights of the family” and amounted to a “failure by the State to protect the authority of the family”. The Scheme was struck down notwithstanding the presence of a clause, which enabled a spouse to renounce his/her right prior to marriage upon receipt of independent legal advice.

- 4.8 Entrenched constitutional protection of fundamental economic, social and cultural human rights would enable the Irish courts to invalidate legislation, overrule government decisions and issue judicial remedies. This ICCL envisages that this would be accompanied by

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<sup>38</sup> For example, the right to primary education (Article 42) arguably the right to property (Article 43).

<sup>39</sup> For instance, the right to earn a living (*Murphy v. Stewart 1973*), the right to marital privacy (*McGee v. Attorney General 1974*), the right to access the courts (*Macauley v. Minister for Posts and Telegraphs 1966*), the right to legal representation on criminal charges (*The State (Healy) v. Donoghue 1976*) and the right to justice and faire procedures (*Garvey v. Ireland 1980*).

equality clauses and interpretative guidelines for judicial decision-making.

- 4.9 A similar model was adopted by Finland when it incorporated the International Covenant on Economic, Social and Cultural Rights (ICESCR). Finland established a Commission on constitutional rights in 1989, which recommended that second-generation rights should be constitutionally entrenched. Finland subsequently made fundamental changes to its constitution in 1995.
- 4.10 The South African Bill of Rights and Constitution adopted in 1996, is one of the most progressive instruments of its kind in the world. Both generated keen discussion on many levels during the drafting process in South Africa's post-apartheid constitutional debate. Economic, social and cultural rights are incorporated and a Constitutional Court with wide powers of judicial review protects these rights over legislation and administrative action. The South African Constitutional Court has also dealt with the contentious issue of justiciability of socio-economic rights:

*It is true that the inclusion of socio-economic rights may result in the courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights a task is conferred upon the courts so different from the ordinarily*

*conferred upon them by a bill of rights that it results in a breach of separation of powers.*<sup>40</sup>

- 4.11 The South African Bill of Rights employs flexible proportionality analysis found in Canada's Charter of Rights and Freedoms and Germany's Basic Law. It is essentially the responsibility of the Court to determine whether an infringement of a right is proportional to the resulting societal effect. A Limitations Clause within the Bill requires the Court to balance/take account of several factors such as the nature of the right, the purpose and extent of the limitation and the possibility of employing less restrictive measures.<sup>41</sup> In addition, progressive interpretative instructions are included to guide the Court's decision-making as well resulting in sound, fair and valued judgements.
- 4.12 South Africa's first seminal socio-economic case involves the right to housing<sup>42</sup> - *Government of the Republic of South Africa v. Grootboom* 2000. Irene Grootboom lived in an informal squatter settlement with several hundred poor people which lacked basic facilities.

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<sup>40</sup> Certification of the Constitution of the Republic of South Africa Constitution Act, 1996 (10) BCLR 1253 (CC) par. 77.

<sup>41</sup> Kende, M. S. (2003) "The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective" in *Chapman Law Review*, Spring 2003 Economic Liberties Symposium, Section II, paragraph 3.

<sup>42</sup> Article 26. (1) "Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right".

Forcing the group to relocate to a nearby sports field, their settlement was bulldozed and burned by local government who had earmarked the site for a social housing project. Asserting their right to housing was violated, the group challenged and won their case in the South African Constitutional Court. Ruling that there had been an improper invasion of their right to housing, the Court assessed whether the actions of the government had been reasonable in this instance. The Court held that: “To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right”. Although the Court recognised that social housing is a worthy cause it criticised the government for having no policy on homelessness and failing to provide an alternative for the group.<sup>43</sup>

- 4.13 In *Soobramoney v. Minister for Health 1997*, the Constitutional Court ruled in favour of the Minister. The case involved a terminally ill man who needed regular dialysis services to prolong his life, and was denied this service by a state hospital. The hospital’s guidelines prioritised non-terminal patients because of scarce resources and Soobramoney claimed his right to health

care and emergency treatment had been violated.<sup>44</sup> Ruling against Soobramoney, the Court acknowledged the discretion of the medical authorities and accepted their policy was rational and justified. The Court did not agree that regular renal treatment constituted immediate emergency treatment. Treating Soobramoney would have affected the hospital’s ability to respond to many more patients because he required such intensive treatment, and the Court understood this.

- 4.13 The South African experience illustrates that no rights are absolute and inserting socio-economic rights in a Constitution does not mean that every individual is entitled to assistance on demand.<sup>45</sup> Rather it illustrates the importance of independent adjudication in vindicating these rights by scrutinising decision-making processes, actions of government and the allocation of resources. Indeed, the ICCL believes there is much to be learned from the South African model as an enforcement mechanism for a Charter for Rights for the island of Ireland.
- 4.14 The ICCL does not deem an all-Irish human rights court to be a viable option for the enforcement of a Charter of Rights. Northern Ireland could possibly have a human rights court for the Bill of Rights, and the creation of a single human rights court for the island of Ireland would

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<sup>43</sup> Refer to Kende for a fuller discussion of this case and others.

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<sup>44</sup> Article 27. (1) “Everyone has the right to have access to: (a) health care services...(3) No one may be refused emergency medical treatment”.

<sup>45</sup> Kende, *ibid*, paragraph 8.

involve significant limitations upon the Irish Supreme Court. In the case of the Republic of Ireland, the ICCL envisages the Charter should be justiciable in the ordinary courts. Of course the judiciary would require additional training on human rights and social/economic issues, together with closer scrutiny of selection processes for potential adjudicators.

Addressing the disadvantages highlighted by the pre-consultation document in relation to Model C, the ICCL makes the following points.

- (a) **Such a charter could cause confusion with the current processes for the adoption of the Bill of Rights and the European Convention into Irish law... Putting another immediately enforceable document before the public would just not be politically feasible.**

4.15 The Charter should only be drafted following the completion of a Bill of Rights for Northern Ireland, and the ICCL believes the Charter exercise could encourage the Northern Ireland Executive and British government to complete it.

4.16 The ECHR Act 2003 largely enforces more traditional civil and political rights and the rights protected in the Charter should be much broader. The Convention is weak in several areas, particularly in relation to equality and socio-economic provisions. The challenge for the Human Rights Commissions and other human rights organisations, including the ICCL, is to make both relevant to citizens and non-citizens.

4.17 Because the development of the Charter is likely to take several years, the ICCL does not foresee the existence of several immediately enforceable instruments within the public domain.

**(b) It would be difficult to get both the United Kingdom and the Irish governments (or the NI Executive) to agree on what these specific rights are to be, especially if they go beyond what is already contained in the laws in force in both parts of Ireland. As well as this, both governments (and the NI Executive) are already considering whether to agree to significant new EU Directives and the new Council of European initiatives in the field of human rights, so it may be difficult to persuade them of the need for an enforceable all-Ireland initiative.**

4.18 The ICCL acknowledges that drafting an intergovernmental charter is likely to be complex and demanding. Diversity and difference are vital in any democracy and political democratic processes in both countries are designed to accommodate and resolve such differences. However, the Irish and UK government are fortunate given the range of commonalities that exist in their respective legal systems and traditions. Both are common law jurisdictions with an adversarial system of justice, both countries are members of the European Union and have signed/ratified most major international human rights conventions. Moreover, the Irish Human Rights Commission recognised that the ECHR already provides a common basis for drafting the Charter.<sup>46</sup> In fact, both governments are in a very good position to start

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<sup>46</sup> Irish Human Rights Commission (2002) *ibid*, pp. 10.

concentrating on a Charter of Rights for the island of Ireland. Further, ICCL believes that this project should not only be about politicians. Direct input from the peoples of the island of Ireland should be sought to ensure they have some sense of ownership over the Charter.

4.19 The Joint Committee could rely on the tremendous expertise which exists in this area in particular from: scholars and researchers; local, national and international courts, and international bodies such as the Council of Europe and the Office of the United Nations High Commissioner for Human Rights. The project would also benefit from the input of a panel of international experts from Canada, the UK and South Africa.

4.20 A range of legal techniques could also be relied on for the purpose of drafting the Charter. In the case of South Africa, the Bill of Rights and the 1996 Constitution complies with all international norms and guarantees rights protected by the ICCPR and the ICESCR. While the language formulated is much simpler than in most international conventions, the drafters deliberately chose to make it more accessible to the South African people.<sup>47</sup> The Forum for Peace and Reconciliation Consultancy Study previously recommended that the best approach in this situation, which the ICCL is in agreement with, is to “incorporate precise wording of relevant international

conventions into the Charter and limit additional provisions to matters not covered in international covenants with sufficient precision”.<sup>48</sup>

4.21 It is worth mentioning that both governments recently reaffirmed their commitment to fully support human rights measures, outlined in the Good Friday Agreement in the Joint Declaration on Northern Ireland of April 2003.<sup>49</sup> Given that the Charter is one of those measures/obligations, both governments should be willing to expedite this task.

**(c) ...there might be difficulties over whether it would be desirable or necessary to distinguish between rights appropriate for Northern Ireland alone and those appropriate for the whole of Ireland. Resolving these difficulties could take a very long time and would be dependent on other steps being taken first in both jurisdictions.**

4.22 The ICCL submits there should be no difference in enforceable rights between Northern Ireland and the Republic of Ireland given the ‘equivalence of rights’ obligation in the Good Friday Agreement. Rights should not be geographically specific and privileging citizens/persons in either jurisdiction denies the universality of human rights.

**(d) There would be disputes over the way in which this new charter should be enforced. Would it have a higher status than other laws and,**

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<sup>47</sup> Dugard, J. (1994) ‘International Law and the “Final Constitution”’, *South African Journal on Human Rights* (1995) 241.

<sup>48</sup> Forum for Peace and Reconciliation, *ibid*, p. 10.

<sup>49</sup> Refer to British and Irish Governments (2003) *Joint Declaration*, British Government/Irish Government.

**in which case, which ones? Specifically, how would it relate to the UK's Human Rights Act 1998 and to the NI Act 1998?**

4.23 The citizens and government of Northern Ireland should determine how the Charter is enforced in their own jurisdiction. It is difficult for the ICCL to comment on enforcement given the failure to advance the Bill of Rights project in Northern Ireland. An interpretative model is favoured by the Northern Ireland Human Rights Commission for the Bill of Rights along the same lines as the Human Rights Act 1998, and the Commission has indicated that the Bill may be justiciable in ordinary courts or in a special human rights court.<sup>50</sup>

4.24 Rights pertaining to language, children, equality/non-discrimination (equality proofing) and victims are contained in the proposed Bill, rights which are currently not protected legally or constitutionally in the Republic of Ireland. Resulting in a huge disparity in enforceable rights between Northern Ireland and the Republic of Ireland, this was not envisaged by the Good Friday Agreement. The Charter of Rights for the island of Ireland offers an opportunity to ameliorate the situation.

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<sup>50</sup> The Northern Ireland Human Rights Commission is undecided as to whether a special court is necessary for the enforcement of the Bill of Rights. This decision has been left to the Secretary of State and UK Government. Refer to Northern Ireland Human Rights Commission (2001) *ibid*, pp. 101.

**And would it be subordinate to the Irish Constitution or in some way “trump” that Constitution?... (e) This kind of charter would almost inevitably require a referendum in the Republic of Ireland to avoid being declared unconstitutional. This could be a time-consuming and divisive process”.**

4.25 In the event of constitutional change, the ICCL is not convinced a referendum would be time-consuming and divisive. Arguably human rights have never been openly discussed by Ireland's civic society and the ECHR did not attract the level of public attention it deserved. A referendum would result in increased understanding of human rights in Ireland and directly engage the electorate. We must also remember the government was willing to hold two referendums in quick succession for the Nice Treaty, therefore government spending on referenda regarding human rights should not be an issue.

4.26 Civil society has been removed from any kind of debate on human rights. The ICCL is convinced, that more public education and debate is needed on the relevance of human rights in civic society before a formal consultation on the Charter is initiated. When a Bill of Rights was being drafted in New Zealand, there was a general lack of sympathy and public interest in a rights based approach of any kind.<sup>51</sup> New Zealand chose to keep economic, social and cultural rights out of the Bill of Rights and modelled it on the American Bill of Rights. New Zealand's legal culture was unfamiliar and suspicious of

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<sup>51</sup> Hunt, P. (1996) *Reclaiming Social Rights: International and Comparative Perspectives*, Dartmouth: Aldershot/Brookfield/Singapore/ Sydney.

a rights based approach, favouring instead the formulation of legal remedies through the courts. There was little academic discussion of the importance of economic, social and cultural rights and the initiative coincided with a political swing away from welfare state ideology towards classic liberalism. New Zealand's experience indicates that without considerable public education and debate, there will be a lack of general interest in the Charter of Rights for the island of Ireland.

## **5. Content**

- 5.1 The Preamble of the Charter of Rights should contain a further commitment to respect and enforce the ECHR in Northern Ireland and the Republic of Ireland.
- 5.2 Following a consultation of members and conducting extensive research, the ICCL would appreciate the opportunity to comment on the content of the Charter at a later stage.

## **6. Further research**

- 6.1 The Joint Committee has indicated it will commission research on comparable international human rights models, which may be transposed to the island of Ireland. It is recommended by the ICCL that this study should pay particular attention to the effectiveness of models in terms of results and concrete improvements in the rights protected. The international study should include comparisons with Canada, Finland, Norway and South Africa.

## **7. Final commentary**

- 7.1 Taking account of its historical origins and importance for the island of Ireland, the ICCL believes that there needs to be a more public and broad debate over the Charter and human rights before the Joint Committee chooses a model. We believe that there has only ever at best been a limited debate – amongst selected circles - in the Republic of Ireland about the importance of human rights, and it is essential that this debate take place amongst the wider civil society. The environment is actually unhealthy for a rights based initiative of this kind and the ICCL considers that it would be unhelpful to make final decisions on the options for the Charter now, before that debate takes place. We would note that from contact and discussion we had with some of those included in this pre-consultation, we found that many did not fully understand the issues involved in the debate. We therefore think it would be very productive to stimulate more conversation around these issues to ensure that the pre-consultation process is an informed one. Organisations need to collectively discuss and think about the implications of each option before positions are adopted. We believe that to take the time now to encourage and facilitate that debate, far from being an obstacle to choosing a model, would enhance the prospects of success for whatever model is chosen.

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