

Conference Report

Getting the Bill Right – An Update Panel 1: Preamble, Enforceability & Implementation

Aideen Gilmore Committee on the Administration of Justice (CAJ) / Convenor of Forum Working Group:

This group was tasked with looking at preamble, enforceability and implementation, which essentially means the beginning, the middle, and the end of the Bill of Rights. The preamble sets out what the Bill of Rights is about, enforcement is how you make the rights real and implementation is at the end of the process - how you make it effective, how you give a Bill of Rights effect on the ground.

Our Working Group was different from other Working Groups in that we were not looking at substance. We were not looking at the content of rights. We were looking at how we would make the rights enforceable. We initially looked at areas of enforcement but could not really make any decisions until we saw the rights that were coming through from the other groups. So, we were having plenary discussions for a large part of our life.

The group itself had lots of lawyers in it which was an advantage in many ways because there are a lot of legal issues, but we also had lots of non-lawyers representing some of the sectors that are represented here today, in terms of disability, older people and so on. I think it was one of the values of the Forum in general and the Working Groups, in terms of being able to mix that legal and political debate and analysis of rights with issues from the people who are actually working on the coal face.

We had seventeen meetings in total. We identified a list of issues that we worked our way through and reached tentative agreement. We found ourselves, like the Forum itself, under intense time pressure at the end because a number of the other Working Groups were late. Because we were dependent upon waiting on their reports, we could not progress our work further. And, we were left without time to look in detail at the substance of the rights that were recommended by the other groups. We could just do a quick skim through in terms of what some of the implications might be for enforcement.

Our report is available on the Forum's website. I encourage people to read it because I think it is a fascinating read, because it set out a range of recommendations and the value of the report was the rationale and the analysis that it set alongside those recommendations. It gives a real flavour of the discussions that took place and the parties. And, the various advantages, disadvantages, pros and cons of approaching the issues from a variety of ways. The format actually then allowed all the members of the Working Group to support the report of the Working Group and indeed the report was then adopted by the Forum as the template for its recommendations on enforcement and implementation.

In our report, the first issue is the relationship with the Human Rights Act. The terms of reference talked about rights supplementary to the ECHR, the European Convention on Human Rights and Human Rights Act. So, one of the fundamental questions then is how do the rights supplement? There were a number of models provided. You could repeal the Human Rights Act and introduce the single Bill of Rights, as has been advocated here today. You could amend the Human Rights Act and add to it or you could simply add. This was actually key and central to lots of other discussions because the approach you took to that actually then impacted upon the approach we would take to lots of other enforcement issues.

Another area under discussion was limitations because very few rights are absolute. So, which rights should be limited and how should you limit them? Which are absolute, which are not, how should they be limited? How would you have one overall limitations clause, would you tailor limitations clauses to the various rights?

Linked to that was the issue of derogation. That opens up questions like what constitutes an emergency and who decides when it is an emergency and which rights then could or would be suspended under an emergency.

Another topic of discussion was entrenchment and amendment. Entrenching and amending is really about how permanent could or should a Bill of Rights be and how could you change it? How do you make it more difficult to change it essentially? There are various ideas like referenda and votes of the people and so on.

Application is looking at who the Bill of Rights binds. Who does it apply to? Traditionally, Bills of Rights and Charters of Rights bind the state. Questions that then arise from that is, what is the state? What are its various forms? What about when the state is perhaps performing its duties through private contractors and so on. Then there is a question around whether a Bill of Rights should bind individuals.

An interesting discussion was around devolution. You can take a Bill of Rights for Northern Ireland because of the kind of complex nature of some things which are governed here by the Assembly, some things are governed by the Westminster. How should the Bill of Rights apply in those situations? In terms of enforcement could, for example, Northern Ireland Courts be able to strike down legislation that applied throughout the UK that has been passed by Westminster?

In terms of Enforcement, do you mainstream rights through the courts? Do you set up a special court? Where would that sit in the court system that we have?

The focus on justiciability really focused around social and economic rights. Are they capable of justiciable enforcement?

What are the remedies that should be available for a breach of the Bill of Rights, be they before a breach in order to prevent a breach happening or afterwards?

Regarding the preamble, should there even be a preamble? If so, long, short, should it have legal effect, should it be inspirational?

Implementation is a really key area which actually had the highest level of consensus among the Working Group. There was a series of recommendations around the education programmes that need to go with a Bill of Rights about the financial assistance that needs to be available, about the need for government to take ownership and responsibility in implementing the Bill of Rights through providing that finance and education. That was one of the strongest sections of the report and, ultimately, of the Forum report.

Catherine Donnelly Trinity College Dublin / Legal Advisor to Working Group:

It was true that we were not really dealing with those sorts of issues that invite immediate emotional responses in the way that the substantive rights might. But, the term 'technical' might have underestimated in some ways the work of the group. I prefer the kinder term of 'foundational provisions' because one thing I would say about the work of the group is that regardless of how generous the substantive recommendations might be and regardless of how beautifully crafted they end up being, the reality is that the impact of any Bill of Rights on the people of Northern Ireland, in a practical level, in their day to day lives, is hugely dependent on how these provisions that Aideen described are drafted.

The issue of standing is really a question about the benefits of the rights. Who enjoys the benefits of any new rights that are introduced? Who can bring a legal action to enforce a claim to complain about a human rights violation or human rights incompatibility?

Generally speaking, there are two interpretations of standing. It can be narrow or it can be broad. An example of a narrow understanding of standing would be in the HRA. The Human Rights Act adopts a victim test and this means that the only individuals who can bring actions to seek redress of human rights violations are the immediate victims of the human rights violation. There are some exceptions and some identified that organisations do have standings which is the NIHRC, but, generally, it is only victims who can bring actions.

Another understanding is a broad interpretation of standing and this would enable organisations, NGOs, bodies that have not been specifically listed to bring actions in court, to complain about violations or human rights incompatibilities. This is one issue that the group reached consensus on and made a unanimous proposal on. The group was agreed that standing should be generous. It should be broad. And the test that the group proposed was a

sufficient interest test. So any group with a sufficient interest in the claim, and this is to be determined having regard to the need to ensure access to justice, should be able to bring a cause of action for violations of the new Bill of Rights as supplementary rights. This is a test that has been borrowed from judicial review proceedings and one that the courts are familiar with and one that they have interpreted generously in the past.

Application is almost the opposite question. On whom does the burden of complying with rights fall? There was the example of private landlords advertising housing but saying 'no DHSS' or those with disabilities who are unable to go into banks and conduct their banking. This is precisely the question of application. So, who is bound by human rights standards?

Bills of Rights always apply against the state or public actors, i.e. vertical application of a Bill of Rights. There may be positive obligations on the state to provide protection from other private actors such as banks or private landlords. Another option is horizontal enforceability of a Bill of Rights. That would mean that there would be full enforcement of human rights violations against other private actors, against private landlords, for instance, against private banks etc.

The HRA is a vertical application. It uses this term of a public authority. The PEI Group decided to adopt a vertical understanding, or to propose a vertical application for the new Bill of Rights of the supplementary rights. But once one decides that a Bill of Rights will be enforceable against the state, the question comes - what is the state? What is a public authority? How generous is the scope of that definition? This becomes particularly complex in the context, for instance, of privatisation, where government is contracting out performance of functions to private actors and not performing these functions itself.

In the Human Rights Act, the language of public authority is used. Included within the understanding of a public authority is a person certain of whose functions or functions of a public nature. There has been a very controversial House of Lords judgment last year in the context of the Human Rights Act where it was held that a private care home providing accommodation to residents who had been placed there by a local authority, pursuant to a contract—so these were publicly funded residents—nonetheless, the private care home was not considered to be a public authority. Now, this meant that this private care home was not bound by European Convention standards.

There is legislation afoot to try and redress the impact of that judgement but really what the PEI Group was trying to decide was whether or not, in the context of the Bill of Rights for Northern Ireland, this problem should be rectified. Largely, there was support for rectifying it. There were some reservations but the group did discuss the idea of specifically stating that government contractors would be bound - they would be deemed to be public authorities. In that way the group, the majority of the group in any event, was keen to expand the notion of a public authority and expand the scope of application of any rights in Northern Ireland.

The next question that arises under application is what is the obligation? It is not just about who bears the obligation, but what is the nature of that obligation? There are two options here. One might be an outcome-based obligation and that might mean that it is only when a public authority actually violates a right and that there is a cause of action. Another option, and this is one that is very familiar to everyone in Northern Ireland because something akin to this is found in Section 75 of the Northern Ireland Act, this would require public authorities to pay 'due regard' to human rights in their decision making. Currently, Section 75 only applies in the context of equality, but the group did consider whether or not that obligation should be expanded to encompass all of the rights that might be included in a Bill of Rights.

The advantage with a due regard or process obligation is that it leads to mainstreaming of human rights. It can help build a culture of rights. The disadvantages are that it may be unduly onerous for public authorities if they have to give detailed explanations in every meeting of how they have given due regard to human rights. On the other hand, and this is a concern that was expressed in the context of the Human Rights Act which incidentally does not have a process-based obligation, there might be a concern about the obligation being meaningless. Those were the sort of complex counter arguments the group considered in the context of this issue. No consensus was reached on these application questions.

Interpretation relates to the impact and the content of the rights. One issue is that of interpreting all legislation in light of the supplementary rights. The group reached a very easy and quick agreement that, yes, legislation so far as it possible to do so, should be interpreted to be compatible with supplementary rights or the Bill of Rights.

A more difficult question then related to interpreting the content of the rights themselves. One very striking aspect of the reports of all of the other Working Groups was the heavy reliance on international standards. There is a huge number of international treaties and instruments and reports of international committees were cited in all of these Working Group reports. The issue then considered by the PEI Group was whether or not there should be a clause which either imposes an obligation on courts to consider international law when interpreting supplementary rights, or else at least permitting them and encouraging them to do so. That was another question we had to consider in the context of interpretation.

Regarding the issue of the relationship between any supplementary rights or Northern Ireland Bill of Rights and the Human Rights Act, the rights are meant to be supplementary to the European Convention. The European Convention has been implemented by the Human Rights Act.

The previous NIHRC identified three potential models that could be used in this context. Model one involved repealing the Human Rights Act in its entirety as it applies to Northern Ireland and introducing new legislation which includes both the Convention rights and the supplementary rights. Clearly for litigants, this would have the advantage of accessibility and transparency and it would also result in better enforcement mechanisms because it would provide an opportunity to rectify some of the weaknesses that I identified in the Human Rights Act, such as the narrow understanding of the victim test and also the narrow understanding of a public authority. The main disadvantage would be opting out of the Human Rights Act.

Model two would be to introduce the new supplementary rights for Northern Ireland in legislation and at the same time to amend the Human Rights Act as it applies to Northern Ireland. This would lead to better enforcement. It may, however, have the disadvantage of weakening the Human Rights Act, of opening the Human Rights Act to amendment by politicians in the future, perhaps for policy reasons and not necessarily to improve human rights standards.

The third model was retaining the Human Rights Act in its current form and introducing supplementary rights in separate legislation entirely. That may mean that the supplementary rights would be accompanied by a different set of enforcement mechanisms to that of the HRA. This has the advantage of retaining the Human Rights Act intact, but it has the disadvantage of

inaccessibility for litigants in that there would be two different sources of rights - two different pieces of legislation.

There may also be problems of overlap. If, for instance, there are better enforceability mechanisms - more generous standing provisions - to accompany the supplementary rights, there may be issues of trying to squeeze Convention claims into the supplementary rights claims. There would be complex jurisdictional issues that would arise.

Those are the three options. No consensus was reached. On enforcement, the group discussed a human rights court. There was some support for it. The advantages of symbolism and expertise were recognised, but the disadvantages of, perhaps, jurisdictional difficulties, creating very burdensome litigation and requiring litigants to go to several different courts in order to make human rights claims and other claims. It is fair to say there was not a huge appetite in the group for this.

A Bill of Rights, yes, but not any price and do no harm and make sure that you do no harm in the process of introducing it.

The group did reach consensus that there should be a non-retrogression clause, that anything that the Bill of Rights does, should, at the very least, not undermine current international standards and obligations that the government has committed to. At the very least, the Bill of Rights should do that and there was consensus reached on that point.

Francesca Klug, London School of Economics:

Enforcement is a little less technical than it appears on the surface, or at least it should be because enforcement should be rooted in philosophy, in political context and what it takes to bed down a Bill of Rights in the specific context in which it arises.

On the outside, Bills of Rights look like simple statements of individual rights - accessible to all but when you start to peel back the layers you discover there is much more to them.

I mean rights like free speech, assembly, trade union membership, they also signal, do they not, the principles of a democratic society? Others define the spirit of a nation, which shines even when the rights themselves are not being

observed. We are seeing this in the United States now. The 'who are we' 'what are we' question reflected in their Bill of Rights. A Bill of Rights can symbolise values shared by society as a whole, not just a state, such as tolerance, pluralism, justice, equal esteem, and in that context, in my view, they should legitimately encourage a sense of solidarity and mutual responsibilities.

A preamble is much more important than it sounds. That is why most international treaties and domestic Bills of Rights do have them. No matter how strong the enforcement provisions, if a Bill of Rights does not touch an emotional chord with the people it is there to serve, its impact will be limited.

The preamble is an opportunity to establish the values which underline the Bill of Rights - dignity, respect, parity of esteem, etc. It has historical and cultural roots, which is very significant here in Northern Ireland and the vision of society going into the future that the Bill of Rights represents which should be - the Universal Declaration of Human Rights tells us - more than just a collection of unconnected individuals who all claim their different rights, but a society in which we respect and understand the notion of the common good and we all look out for each other.

A Bill of Rights can signal that it is there to protect the victims of crimes and those who would harm them, or the victims of terrorism, or, indeed, customers of recalcitrant banks. It is there to protect us all from the harm others might cause us but not by being able to sue each other directly, in a very litigious vision of society, but of one in which the responsibility is put fairly on the state to do something about private bodies who harm other human beings.

An interpretive clause is directed at the courts but also at legislatures and policy makers. An interpretive clause has an additional role to preamble because what it is trying to do is say, this is how you who are charged with enforcing this Bill of Rights, this is how you should interpret it. And it needs to suggest that the interpretation should be generous and purposed and not narrow and technical and getting bogged down in the specific words on the piece of paper.

It is essential that it links in with international human rights standards as they evolve because Bills of Rights have to last for a long time. They should not be encouraging a society to look backwards, but to move with the future. An

interpretation clause that links the Bill of Rights with human rights standards as they evolve can help to serve that purpose.

Enforcement covers a multitude of areas. First is the relationship with the Human Rights Act, second is the issue of justiciability and third is the issue of remedies and, in particular, strike-down powers.

Starting with the relationship with the Human Rights Act, two of the three proposed models involve repealing or amending the Human Rights Act. The third proposes leaving the Human Rights Act intact and introducing a new Bill of Rights with additional rights - particular rights that are not in the European Convention on Human Rights e.g. social and economic rights and these two documents would form one Bill of Rights.

There is anxiety about the inelegance of having two statutes. As far as consumers are concerned, as far as children in school are concerned, there is absolutely no reason why you could not bring the contents of these two bills together and present them as one. It is also possible, down the road, to introduce a consolidation act which would amalgamate the two statutes and make them one.

However, like all Bills of Rights, you are introducing this into a political and philosophical context and I think you need to think very hard before you start using words like 'repeal' the Human Rights Act. There is not a Bill of Rights that I am aware of worth its name anywhere in the world, in any time in history, which has been introduced on the back of repealing an earlier Bill of Rights or international human rights treaty. When the Human Rights Act was introduced we did not talk about repealing the 1689 Bill of Rights or repealing the Magna Carta and there are some very significant inadequacies in both of them.

When the Canadian Charter was introduced in 1982, they did not repeal their earlier Bill of Rights. If the earlier Bill of Rights has no function anymore it will gradually wither away. You do not call for the repeal of something until you are absolutely, one hundred percent sure, cooper bottom guarantee, that what you are going to replace it with is better. Clauses in a Bill of Rights that say non-regression - that only applies when you have actually delivered the goods.

The political leaders who have talked about the repeal or amendment of the Human Rights Act in Westminster perhaps come from a very different

persuasion politically than those who have called for it here. They have called for the repeal of the Human Rights Act and I am quoting directly, “to qualify the absolute prohibition on torture in the European Convention on Human Rights or to omit Gypsies and Travellers from the provisions which protect private and diverse ways of life in the European Convention.” They are not calling for the repeal of the Human Rights Act to strengthen or build upon it, as you are mandated in the Good Friday Agreement. Of course, they will always say that whatever they propose will be European Convention on Human Rights compliant. Well, as someone once said, they would, wouldn't they?

If we talk about repeal, we need to be sure where we are going. The options might not be as stark as actually expressed in the Forum report. I think it would be possible through the new Bill of Rights to amend some of the process provisions of the Human Rights Act and still keep the Human Rights Act on the statute book. And, I am thinking particularly of the two points that Catherine raised, which I think, there is a head of steam growing in the whole of the UK for some further movement. One is the scope of application of the Bill of Rights to cover, basically, private bodies that provide public services. In a way it is that simple. I would go further than just private bodies in a contractual relationship with the state, which is what you propose in your report. I think, quite simply, that any private body which performs a function that the state would otherwise, should be directly included in a Bill of Rights. I think the scope to amend the Human Rights Act through the provisions of a new Bill of Rights to that effect. Similarly withstanding, who can take cases under the Human Rights Act. I think there would be scope to use a new Bill of Rights to amend the Human Rights Act to include anyone with an interest in the issue. That would include victims' groups, children's groups, business groups, and not just direct victims.

Justiciability refers to the extent to which it is suitable to enforce rights through courts, in particular, social and economic rights. South Africa has demonstrated that it is possible for individuals to directly enforce their economic, social, and cultural rights through courts, which are mandated to take account of resource issues through a formula, which allows for these rights to be progressively realised. Even in a country with a degree of inequality that South Africa unfortunately has, this has not lead to decisions that are beyond the capacity of that government to deliver.

However, I take the view that there are legitimate philosophical reasons why some might consider that rights which involve decisions about competing

priorities over finite resources should remain the province of elected politicians; that it should be they who design the housing policy, or how the NHS should develop. Even if the politicians and all decision makers are themselves mandated to comply with or at least have regard to the rights in a Bill of Rights.

This approach is known as 'interpretative principles' or, as 'directive principles of state policy' in the few countries like Ghana, India, and, indeed, the Republic of Ireland which have them. But, it is only in the Republic where the courts are ousted altogether from this process. Even in systems which employ interpretative principles like this, some social and economic rights, like the right of the homeless to housing or to greater equality or children to education, can still be justiciably enforceable by the individuals themselves. Whereas, others would be interpretative principles that the decision makers from the state to the local government officer would be required to take into account. The courts themselves would be mandated to take those principles into account in their jurisdictional sphere.

There is growing speculation that social and economic rights are creeping up the Westminster agenda. This may or may not be of interest to you, but only if they are enforced through interpretative principles that I have just described. In your report, and I understand why you have shied away from political feasibility, but the danger is if you go on shying away from political feasibility you may end up, may I say so, with political oblivion. So, it is an opportunity to take stock and consider whether the approach that is now being discussed actively at Westminster of introducing social and economic rights through interpretative principles, is one you may want to consider in your final report.

Regarding remedies, even where rights are legally enforceable by individuals or justiciable, there are still philosophical and political questions about what the court's power should be. Under the Human Rights Act, strike down powers were issued for what is known as the dialogue model in which all branches of the state are engaged in a dialogue about where the balance between rights lie. Courts are mandated to interpret all laws compatibly with the Human Rights Act, where it is possible to do so, but where it is not possible to do so, they can declare that legislation is incompatible.

This has proved a much more effective mechanism for rights protection than predicted. There have been 25 declarations of incompatibility so far and 17 of them are still standing. Most famously, when the courts said that indefinite

detention without charge—we are not just talking 42 or 90 days here—but indefinite detention for foreign nationals was declared incompatible with the Human Rights Act and was abandoned by the government.

A view is expressed in your papers that a strike down power is necessarily a stronger approach to enforcement than this dialogue model in the Human Rights Act. And, that as it is already available to the courts in relation to Northern Ireland Acts and Orders and Council, it should be adopted to your new Bill of Rights.

Truth be told, this strike down power for Assembly legislation was only conferred on the courts because Westminster viewed Assembly Acts, like their Scottish and Welsh equivalent, as subordinate legislation as eligible for quashing as a statutory instrument or tomato. I would urge you before you take the preconceived view that strike down powers—good, declaration of incompatibility—bad, you take note of the fact that in Canada, New Zealand, in the new states in Australia which have adopted the Human Rights Act model, there is a kind of convergence in international thinking. That a declaration of incompatibility or dialogue approach which allows all the organs of the state to be involved in human rights compliance has merit.

Regarding implementation, there is no denying you consulted and engaged tremendously on your ten-year journey. The ethical values and historical purpose of the Northern Ireland Bill of Rights, as set out in the Good Friday Agreement, must be immediately apparent and transparent in your Bill if it is to bed down where it matters most, which is in the hearts and minds of the people of Northern Ireland.

If you can achieve that, then you can become a beacon and show the way to those of us in Britain, Australia and a few remaining democracies who are still struggling with the first principles of this debate. And, if you can do that, we would be very grateful indeed.

QUESTIONS

Patricia McKeown, UNISON: We think that the approach which is being taken in Westminster to Social and Economic rights is a lowest common denominator approach and there was a lot of discussion over time inside the Forum and the Social and Economic Rights Working Group on that. Is this right?

Francesca Klug: Around the world, there are different approaches to enforcing social and economic rights. There are very few Bills of Rights, having said that, which have direct social and economic rights in them because there are lots indirect social and economic rights, even through the Human Rights Act. In terms of direct catalogue of social and economic rights, it is the minority of Bills of Rights that have them.

But, those that do have different approaches, we heard about one this morning. There are others. And, there is a spectrum between saying, as in fact the Republic of Ireland does, which is ousting the courts altogether from the process of enforcement, to saying individuals should be able to say that they think that the health policies should be run differently because they have an interest in this issue and be able to challenge directly, individually through the courts the way that services are provided.

The more surprising thing to you, I think, should be me saying that social and economic rights are even the tiniest glimmer of an eye on the agenda in Westminster. That should be utter amazement to you because it is not the way I think that our fusty Westminster Parliament has tended to think.

What I am suggesting is that for the very first time there is a bit of a head of steam; a bit of debate about social and economic rights. The Prime Minister has made the odd indirect reference to this and there was a Green Paper, which is going to be followed up by a White Paper we are told before the recess, which may discuss this issue. I think that there is no appetite for increasing the litigiousness of our society at its seam, where individuals—and it is usually well resourced individuals, so there is an immediate distortion that is built into that—can claim, economic and social and cultural rights. And yet, it is on the agenda.

Catherine Donnelly: On the issue of composition of the judiciary, meritocracy and transparency are the two key issues at stake there in terms of appointing judges. There are moves already in place in the UK to broaden and make the appointment process more transparent. For instance, a Judicial Appointments Commission that is reflective of society represents members of society and at least in that way we are able to gradually build up over time an input into the appointment procedure which can, in turn, lead to a more reflective judiciary. I think that is something that needs to be thought about.

Regarding the judiciary, it goes to that interpretation clause. It was at the heart of the issue of that discussion in the PEI Group, about whether or not the courts need to be directed to take into account international standards and in that way to build up their human rights expertise. Certainly the proponents for such a clause was really part of the thinking. But, if there are to be supplementary rights, they are not taken from the Convention.

It is actually two of the Human Rights Acts already directed the courts to take into account Convention jurisprudence. But these supplementary rights whether derived, or will be inspired shall we say, by all sorts of international standards and I think there is a real question there about whether or not the judiciary needs to be directed and at the very least, guided, towards taking into account those international standards and principles which again will assist in the human rights decision making process.

In relation to the institution of a separate court, while I accept the symbolism and while I also accept that expertise can maybe be concentrated in such a court, I would be slightly wary about isolating off human rights into separate courts. I think there is a merit to mainstreaming human rights. That is an important consideration and needs to be taken into account.

For litigants, it can often be better to be able to combine their contract claims or their human rights claims and their judicial review claims. I think it could lead to greater usage, in fact, of human rights claims if it is not burdensome jurisdictionally - if litigants do not have to go elsewhere to court. But, that would be one perspective in the argument. That is something which would need to be carefully considered before opting immediately or thinking that a human rights court and a separate court would necessarily be better.

Frank Tipping, BURC: If the vertical model of application is adopted, does that leave adequate recourse for people who have their rights abused by private actors, like the private sector?

Elizabeth Zammit, REAL Network: Regarding the enforcement and implementation, in trying to enforce the DDA discrimination against me and other people like me, the response is that the building is listed. It is under a Heritage Order and therefore the façade of the building could not be amended. So therefore all they have to do is give me due access—reasonable adjustment is the technical term. So, I mean, is the same going to be here? It

has to be enforceable; otherwise it is not worth the paper it is written on. And, at the moment the DDA is not worth anything.

Catherine Donnelly: Vertical application relates to the issue of how widely we define the state if we are going to use the vertical model and that was discussed in the PEI Group. The definition above a state authority or public authority needs to be broad. If it is broad then we can catch a very broad range of situations.

The issue of horizontality or full enforceability against private actors, this is a model that is used to a limited extent in the Republic of Ireland, in particular. It also has some potential for application in South Africa. It does not often work particularly well or particularly clearly. We have to bear in mind that there is a balancing between the rights of different private actors when we start introducing horizontal models. It may sound like it is a wonderful idea in terms of creating a culture of rights, but in practice can often be very difficult to monitor and to apply and there can be so much balancing. And, the way that the courts have used this horizontal model, particularly in the Republic of Ireland, has been very difficult and fraught with uncertainties.

Regarding the vertical model, if there is a generous definition of public authority then that would include anyone who is a contractor with the state and others who are performing important public services or important public functions.

There is also a notion of positive obligations on the state that can be developed and to impose obligations on the state to protect us from violations of each other. So, at the very least, there is a sanction or some sort of remedy if our rights are violated by private actors.

Francesca Klug: I think the difficulty is where you do get full application for one individual or one individual against a private party as in the Republic of Ireland and South Africa. The reason why it is barely used is if it is used there is a danger it would work too well. So, it tends to not be in use. What I was suggesting about the preamble, it is hugely important, I think it is one of the definite roles for the preamble, to signal that a Bill of Rights provides protection for one group of people in relation to others who have the power to do them harm by putting the onuses on the state. At this very moment the Equality and Human Rights Commission in London is trying to intervene in two cases where the police did not act to protect someone that they knew was in

danger of being murdered. One was actually a witness in a trial and, indeed, was murdered. This case is being taken through the Human Rights Act saying the state had a duty to protect one individual from another and did not take it. So, that is the indirect application of the protection law suggesting is needed but it needs to be signalled, in my view, through the preamble.

The whole point of Bills of Rights is to test all the other pieces of legislation that come and go with the years against fundamental, enduring principles that stand for what a society represents in a Bill of Rights. A DDA should be tested against this Bill of Rights, if this Bill of Rights is to be worth anything. If it is to go further than the Human Rights Act, in my personal view, there should be a fully judicially enforceable right to equality in this Bill of Rights which you should fight for very, very hard.

But, that does not mean that every single right is best pursued or can only be pursued along that route. Some rights may make more sense to mainstream in terms of the thinking of the decision maker. Some rights need to be there for the individual, who is not allowed in the bank, and not allowed to live properly in their own home. That individual needs to be directly able to challenge that inequality through this new Bill of Rights and test out legislation, like the DDA, under it.