

# Policy Submission

**Submission to the  
Human Rights Commission  
on Joint Committee Pre-Consultation Document  
on an All-Ireland Charter of Rights**

**November 2003**

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Combat Poverty Agency  
Bridgewater Centre  
Conyngham Road  
Islandbridge  
Dublin 8

Tel. 01 670 6746  
Email: [info@cpa.ie](mailto:info@cpa.ie)  
Web [www.combatpoverty.ie](http://www.combatpoverty.ie)

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## **1. Introduction**

The Combat Poverty is the statutory advisory body to the government on all aspects of economic and social planning in relation to poverty. The Combat Poverty 2002-04 Strategic Plan has a commitment to investigate and highlight the links between economic, social and cultural rights and poverty reduction. Arising from this context, Combat Poverty has just recently responded to the Human Rights Commission Strategic Plan 2003-2006 with specific reference to our mutual concern with economic, social and cultural rights.

Combat Poverty is also an Intermediary Funding Body under Peace II Programme (2000-2004), set up by the European Commission to foster peace, promote reconciliation and encourage positive growth in communities affected by the conflict on the island. Combat Poverty played a similar role under the Special Programme for Peace and Reconciliation (Peace I) established in 1995.

The Combat Poverty Agency welcomes the Joint Committee's invitation to comment on the pre-consultation document prepared by the Committee on foot of the Good Friday Agreement. The agreement required the Committee to consider "the possibility of establishing a charter...reflecting and endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland".

The Committee invites comments on whether it is right to say that there are basically three types of charter, referred to as models A, B and C, and that model B is to be preferred. If there is a sufficient consensus among consultees about this, the Joint Committee states that it will then issue what it calls a fully fledged consultation document giving greater prominence to model B while explaining why A and C are not acceptable.

Combat Poverty thinks it best at this point to confine itself to a number of general observations. These address several important issues arising from the pre-consultation document which Combat Poverty would urge the Joint Committee to clarify or discuss in more specific terms, particularly with regard to Model B. Combat Poverty hopes its observations will be of use to the Joint Committee in drafting the proposed follow-up consultation document.

The Joint Committee has also invited comments at the pre-consultation stage on whether the rights which might be covered in a model B-type charter are those suggested in the pre-consultation document. Combat Poverty believes that a charter, if one is to be eventually drafted, would be gravely deficient if it failed either to include the main social and economic rights or to address issues related to their promotion and enforcement. Combat Poverty makes some initial proposals in regard to social and economic rights further on in this submission.

## 2. Human Rights and Poverty Eradication

For Combat Poverty the main interest of the charter lies in its potential to advance the eradication of poverty by strengthening the rights-related protections available to the poor, the vulnerable and the disempowered. In recent years a concern with human rights and with rights-based approaches at policy and administrative levels has become of increasing interest and importance to Combat Poverty in relation to anti-poverty strategies. In view of their relevance to the all-Ireland charter initiative outline some of the reasons for this are worth noting:

Rights express what our society considers to be the most significant requirements of human dignity in its various facets. Poverty subverts this dignity in multiple ways. If poverty is tackled it is almost certain that the rights of the poor will thereby be strengthened and better respected. But the problem can equally be approached from the opposite direction: if their rights are better respected and fulfilled, the poor will increasingly move out of poverty.

People in poverty experience not only income inadequacy or material deprivation, but powerlessness, voicelessness and the experience of shame, humiliation and exclusion in political, social, and cultural contexts. Among the rights which poverty infringes are the rights to at the very least a basic minimum of shelter, health care, nutrition; education; the right to life itself; to privacy, to participate in society; the right to respect and to one's good name; the right not to be discriminated against and to be treated equally; and so on.

Poverty largely contributes to preventing people from being the agents of their own development. It disempowers those whose lives it blights. A rights-based approach to combating poverty confronts the issue of disempowerment head-on. To the extent that a right is an entitlement which the claimholder can substantiate independently of the grace and favour of others, a rights-based approach to combating poverty redresses the relative balance of power between the powerful and the poor, in favour of the poor. The ensuing redistribution of power must be expected to have lasting and beneficial consequences both in improving the position of those who are now poor and in preventing or inhibiting the recurrence or emergence of new manifestations of poverty in the future.

People in poverty are usually victims of discrimination based on various and often multiple grounds, such as birth, property, national or social origin, ethnic origin, color, gender and religion. In addition, as has been pointed out, the poor often suffer discrimination because they are poor<sup>1</sup>. Addressing discrimination also and often *ipso facto* addresses poverty. Frequently this may be significantly achieved or assisted by grounding anti-poverty measures in the legal and moral rights to equality and non-discrimination.

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<sup>1</sup>The Office of the High Commissioner for Human Rights, *Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water: A Background Paper*, World Summit on Sustainable Development, Johannesburg, 26 August – 4 September, 2002: Part 2, Poverty and Discrimination).

A rights-based approach is not only justifiable in, but central to, anti-poverty programmes because it provides a framework for accountability in the discharge of responsibilities.

As a recent UN document notes, an essential feature of the human rights approach in poverty eradication is a proper monitoring and accountability system, which, it should be appreciated, has as one of its functions to help distinguish not only when the State should be held responsible but when it should not.<sup>2</sup>

Under a number of international human rights treaties Ireland has voluntarily assumed obligations to comply with a wide range of human rights relevant to anti-poverty concerns and to incorporate them appropriately into domestic law and practice. The appropriateness and necessity of incorporating a human rights perspective as an integral part of anti-poverty policies is now clearly established within the UN and the Council of Europe. A rights-based approach to combating poverty is therefore called for by our obligations under international law. These obligations should be reflected in an all-Ireland charter.

A human rights perspective in anti-poverty work is both illuminating and indispensable in enabling society to define key features of a society from which poverty had been eradicated. If poverty comprises *"the non-fulfillment of a person's human rights to a range of basic capabilities"*,<sup>3</sup> then a society from which poverty had been eliminated would be one in which everyone enjoyed the right to fulfil specific capabilities, such as feeding or housing one's self and one's family, participating in public life and so forth.

As well as being a necessary complement to possible legal enforcement measures, a rights-based approach to combating poverty at the level of policy and administration commands increasing support as reasonable, feasible and justifiable in its own right. As the UN Rapporteur on Human Rights and Extreme Poverty has underlined, the substantive question, even from a legal perspective, is "not the "recognition", but the real and effective "exercise" of all human rights and fundamental freedoms by the extremely poor".<sup>4</sup>

For the above reasons Combat Poverty is interested not only in seeking the inclusion of specific economic and social rights in the proposed charter, but also and equally in requesting that a charter addresses questions of monitoring and enforcement in a substantial way.

Deprived of an adequate range of indicators, anti-poverty rights will be inhibited from

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<sup>2</sup>*Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*, Office of the UN High Commissioner for Human Rights, 2002, par. 29.

<sup>3</sup>*Ib.*, par. 45.

<sup>4</sup>*Final report on human rights and extreme poverty, submitted by the Special Rapporteur, Mr. Leandro Despouy*, E/CN.4/Sub.2/1996/13, 28 June 1996.

achieving greater legal substance and clarity. To define the content of anti-poverty rights in a satisfactorily precise way a wide range of rights-related indicators has to be developed, a work which could be undertaken on an all-Ireland basis. Such work is intrinsic to the better definition of what constitutes violations of the rights in question.

Insofar as it leads to better definitions of violations, it must contribute to the mobilisation of political will and public support for improved remedial measures and policies. Accordingly a charter should make provision for machinery to promote in appropriate ways the development of statistically and conceptually valid indicators, needed to establish a fully fledged rights-based approach within anti-poverty policies and programmes in general.

### **3. Added Value or Added Complexity**

The pre-consultation document notes that several important human rights initiatives affecting either or both parts of Ireland are already in train, notably work on preparing a Northern Ireland Bill of Rights, the implementation of the legislation incorporating the ECHR into Irish law, certain EU directives, and the Charter of Fundamental Rights of the European Union.

To this we would add the work of the Joint Oireachtas Committee on the Constitution, which has been considering the constitutional article on the right to property, including its possible implications for a right to housing and shelter. In the light of these initiatives Combat Poverty believes that before a charter text is undertaken it needs to be shown in more concrete terms how preparing yet another text at this point would add value and coherency to existing rights protections on the island rather than adding possible unnecessary elements of confusion, overlapping and complexity.

Possible areas in which the charter might contribute some element of additionality are:

- a. in establishing some equivalence of rights and their associated protections across the island;
- b. progressing more effective monitoring and enforcement systems;
- c. promoting economic, social and cultural rights in particular.

### **4. Defining the Charter More Clearly**

The pre-consultation document refers variously to the charter as a “charter of rights”, as a “set of principles”, as “programmatic measures” and (mirroring the Agreement text) as “agreed measures”. The meaning of these different terms is not clearly defined, and it would be crucial to do so. Greater precision is needed about whether the charter envisaged by the Joint Committee is to consist primarily of “rights”, “principles”, “programmes”, or “measures”, or a combination of some or each, and

how each is to be distinguished from the others in juridical, political, and operational terms.

It is difficult to extract from the pre-consultation document what exactly the Joint Committee has in mind in terms of concrete cross-border provisions and mechanisms in a charter context. The document seems to raise more questions than it answers: does the Committee envisage a single monitoring and enforcement body, for example? if so, what would its powers be in relation to interpreting and commenting on the content of the charter and in the areas of monitoring, adjudication, enforcement or sanctioning? How in practical terms is a single charter to be superimposed on two different juridical and political systems? The creation of a single all-Ireland enforcement mechanism for a single all-Ireland charter would be a highly political decision dependent on the approval of the two governments and the NI Executive. This would raise acutely sensitive issues of the separation of powers and delimitation of the respective spheres of the monitoring and enforcement mechanism vis a vis elected governments, courts, and administrative authorities. Would there, for example, be any right of appeal against a decision of the enforcement authority, and if so, to what instance?

If the Good Friday Agreement had the enumeration of rights in mind as the main task of the charter drafters, then presumably it would have said so. Yet the pre-consultation document in places refers to the proposed text as a “charter of rights”. In the ordinary meaning of this phrase, such a text would be primarily a statement or listing of rights.

However, the Good Friday Agreement describes the charter as “reflecting and endorsing *agreed measures for the protection of* the fundamental rights of everyone living in the island of Ireland” (emphasis not in original). This phrasing begs important questions as to what is meant by “the fundamental rights of everyone living on the island of Ireland”. Where is such an authoritative listing to be found? If none exists, what sources should be eligible to be drawn on to produce it? Some body has to agree such a list. Is the wording of the Agreement to be construed as meaning that the main thrust of the Charter should be not so much to produce an agreed list of rights, but rather simply to “reflect and endorse” measures which have either i) been agreed by some other unspecified source, or ii) to be agreed by the body responsible for drafting the charter? Greater clarification is needed on these points.

Another point on which clarity is essential is whether the text of the proposed charter will be definitive and non-negotiable once signed off by the Joint Committee, or whether it will be primarily a draft still subject to negotiation by the political parties.

## **5. Rights proposed for inclusion**

Potential signatories to an eventual charter cannot dispute the fact that both jurisdictions have already accepted international obligations, however, imprecise, in regard to economic and social rights.

Accordingly, in the event of the charter being taken further, the Combat Poverty

Agency proposes as a basic principle that **the economic and social rights to be included in the projected charter should be no less in substance than those contained in the main international human rights instruments to which both the Republic of Ireland and the UK are already parties.**

Including these rights in a non-legally enforceable all-Ireland charter would not appear to impose any more obligations than the respective states have already assumed internationally. If model B-type rights are not to be legally enforceable, there should be no objection to replicating in a model B-type charter the substance of rights such as those set out in the UN Covenant on Economic, Social and Cultural Rights, the Revised European Social Charter, the UN Convention on the Elimination of all Forms of Discrimination against Women amongst others. As both jurisdictions have already accepted them in an international human rights framework it would seem *prima facie* anomalous to exclude them from a charter. The pre-consultation document has already proposed that a Model B-type charter should contain specific provisions protecting the rights of children drawing on the UN Convention on the Rights of the Child. This Convention, however, already includes economic and social rights drawn from other UN human rights instruments. Moreover consistency requires that one convention should not be privileged over others (such as the ICESCR or the Revised Social Charter), at least without compelling reasons which do not seem to obtain here. The pre-consultation document also says that the proposed charter should contain provisions to protect older people from unjustifiable discrimination and where appropriate confer special protection and assistance on them. As the monitoring committee of the ICESCR has already issued a General Comment specifically on the rights of the elderly, this is an additional reason to draw on that Covenant.

### **51. A right to freedom from poverty and social exclusion and the right to housing**

Combat Poverty proposes that specific consideration is given to people living in poverty through the incorporation of a right to **‘freedom from poverty and social exclusion’**. A right to freedom from poverty could also underwrite the fact that other rights in the charter may be crucially dependent on the enjoying freedom from poverty. Notably the Council of Europe’s Revised Social Charter incorporates ‘the right to protection against poverty and social exclusion’ (Article 30) and ‘the right to housing’ (Article 31) and the latter may also be considered. The inclusion of a **right to a basic minimum of subsistence** may also be considered along the lines of the Council of Europe’s Committee of Ministers’ Recommendation No. R (2000) 3 on the *Right to the Satisfaction of Basic Material Needs of Persons in Situations of Extreme Hardship*.

The pre-consultation document notes that the Charter of Fundamental Rights (CFR) “may in due course be used by the European Court of Justice *to develop, in particular, economic and social rights*” (emphasis added). This clearly envisages that such rights could become increasingly justiciable in an EU context. With this in mind, Combat Poverty asks for the **inclusion of the substance of CFR articles or sections with relevance to economic and social rights, where these go beyond rights stated in other important international instruments.**

### **5.2 The right to free secondary education and the right to sustainable**



## **development**

The Combat Poverty also proposes consideration of two rights which the Report of the All-Party Committee on the Constitution has already recommended for constitutional enumeration in the Republic. These are a **right to free secondary education**, and a **right to sustainable development**

## **6. Comments on Model B and Model C**

According to the pre-consultation document, “governments have favoured this kind of Charter [i.e. model B] in recent years”. It cites as examples the Vienna Programme of Action (agreed at the World Conference on Human Rights 1993), the World Conference on Women’s Rights (1995), The Rio Summit on the Protection of the Environment (1992), the World Conference Against Racism (2002), and the Summit on Sustainable Development (Johannesburg, 2002).

However there seems to be a major misapprehension here, since the documents emerging from all the conferences cited are:

- a) the result of intensive international consultation and inter-state negotiation;
- b) agreed by governments/states only;
- c) preceded by enormous preparatory work over years;
- d) largely non-enforceable;
- e) the result of all sorts of compromises and watering down;
- f) set out in very considerable detail, frequently including specific and quantified targets.

If the pre-consultation document is really proposing an approach along these lines it is realistically talking about a labour of years, involving significant resources and, is in substance, as much a political programme as a statement of rights, with no guarantee that the end result would secure agreement of most political parties or governments.

The Joint Committee believes it could draw up a charter along the lines of Model B without too much delay because the required principles are “relatively few in number and many of them are already agreed”. This does not tally with the points made in the previous paragraph. The principles which the Joint Committee offers on an indicative basis seem to be of different kinds, some more akin to political commitments than rights-based obligations.

Model B would require the political parties “to act in certain ways when serving in government or voting in Parliament”. What these “certain ways” would be is left unelaborated, and therefore no comment on them is possible at this point. But to compel political parties to act in certain ways when serving in government is to compel governments as such. The pre-consultation document has not demonstrated why governments would find it more acceptable to be compelled to act generally in certain ways than to agree to legally enforceable rights. To compel governments requires far-reaching powers which in some circumstances might well be more constraining than the legally enforceable rights which the Joint Committee has said would not be feasible. This seems to be a contradiction at the heart of model B which

needs to be definitively resolved.

While the pre-consultation document states that a model B-type charter could have “just as much of a persuasive effect as that associated with model C”, it does not show why this should be so. As Model C would confer “legal rights that could be publicly asserted and vindicated in the courts” it is hard to see how B and C can be equated in terms of persuasiveness. The document suggests that a B-type charter might have a monitoring system modelled on the International Covenant on Economic, Social and Cultural Rights. If model B is non-enforceable, the added value of proposing another set of monitoring mechanisms akin to those of the ICESCR is not immediately apparent, particularly when it is recalled that the Covenant monitoring committee has itself recommended giving ESC rights constitutional and therefore legally enforceable status in Ireland. In the light of the Irish experience with the ICESCR examination system to date, the Joint Committee needs to set out more convincingly why it thinks a national-level monitoring body would be more successful in compelling or persuading governments than the UN Committee, which after all was established under the terms of a major international human rights treaty to which both states have voluntarily adhered.

As already noted, the UN Committee on Economic, Social and Cultural Rights has itself recommended that ESC rights be given constitutional status in the Irish Constitution, in other words that they be made legally enforceable. It would be desirable for the Committee to comment on this recommendation in its next consultation document. Not to do so could reinforce the impression that the ICESCR has limited impact in practice.

Model B involves a leap from basic principles to “a programme for their implementation”, a phrase which seems to imply a major advance into policy and administrative areas. It would be important to establish whether the Good Friday Agreement intended or envisaged that the scope of the proposed charter would extend into these areas since to do so could mean giving political power to a non-elected monitoring body, but without the clarity and universal access to the courts which legally enforceable rights entail.

The pre-consultation document emphasises that the divide between its models B and C center on the presence or absence of enforceability. The document rightly points out that there would be disputes over the way in which a Model C-type charter would be enforced. It asks whether such a charter would have a higher status than other laws and if so, which ones; it queries how it would relate to the UK’s Human Rights Act 1998 and the NI Act 1998 or to the Irish Constitution, and whether the latter would be subordinate to it. It asks whether a special court would be required for the enforcement process and whether the involvement of some international judges should be sought. These are weighty questions and illustrate why politically the idea of an all-Ireland charter of legally enforceable rights is fraught with difficulty. Nonetheless and somewhat confusingly the document also observes with regard to model B that “unless effective mechanisms are put in place for monitoring and enforcing the implementation of the Programme of Action the rights in question may be illusory”. To this extent enforceability appears to be a feature of B as well as of C.

After stating that “the Charter should set out the principle that it is desirable to abide by internationally agreed human rights standards”, the pre-consultation document

says that there should then be “specific commitments to comply with those standards which the governments have already agreed to internationally, to incorporate those standards into domestic law...”. If the governments were agreeable to incorporate them, would this not be to make them legally enforceable in some substantive manner? And if legally enforceable, what remains of the difference between models B and C? If the Joint Committee believes that it is politically feasible to somehow compel the Irish and UK governments to incorporate into domestic law international human rights standards they have so far refused to adopt despite ratifying the instruments in question, there seems not much difference between doing so and drafting a list of enforceable rights in the first place. To elucidate this fundamental question the Joint Committee needs to explain much more precisely what each model entails in terms of scope, nature, monitoring and especially enforcement.

## **7. Democratic Legitimacy**

How the democratic legitimacy of any of the proposed models is to be established needs to be demonstrated. To avoid being declared unconstitutional, Model C would have to be approved in the Republic by referendum, which in the view of the Joint Committee could be time-consuming and divisive. But a failure to put Model B to the test of securing democratic approval could be equally divisive, not to speak of being less credible, if not both. In any event, both electorates will have to approve the EU’s Charter of Fundamental Rights, if and when included in the proposed EU constitution. Even for the B model, approval by referendum would make for a weightier charter.

## **8. Avoiding Selectivity**

In several places the Joint Committee proposes commitments to particular groups or of specific kinds: the disabled, vulnerable groups within prisons, the eradication of racism, or the establishment of statutory bodies to promote the integration of ethnic minorities. While these are all meritorious, the Joint Committee needs to give satisfactory grounds for selecting people in one set of circumstances but not in others such as homelessness, otherwise a charter could be open to the charge of selectivity.

## **9. Next Consultative Phase**

Given the pre-consultative status of the Joint Committee’s document, it is reasonable to presume another more extensive consultation phase. Combat Poverty believes that the development of an all-island charter should be informed by a broad-based public education programme on the concepts and content of economic, social and cultural rights, on the options for implementation and so on. There is a challenge to popularize the understanding of rights and to simplify the technical and specialist language into more accessible and people-friendly terminology. This is necessary and vital to enhance the wider public’s participation in charter process. Specific attention could be given to an outreach and pro-active programme of information, education and consultation with people experiencing poverty and social exclusion and those affected by the conflict on the island. This is essential underpinning for

securing rights ‘*with* the collaboration of those who need them’<sup>5</sup>

## **10. Conclusion**

Combat Poverty welcomes the opportunity to participate in deliberations on the shape and nature of a future all-island charter of rights. Our role in relation to poverty prevention, reduction and elimination and our role as a funding body promoting peace and reconciliation on the island account for our specific interest in this development. This submission sets out our preliminary thinking, in response to the Joint Commission’s own pre-consultative paper.

Combat Poverty envisages that it will have a further contribution to make in the next stage of the Joint Committee’s work in advancing the Good Friday Agreement on an all-island charter of rights.

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<sup>5</sup> Mary Robinson (2002) ‘Foreword’ in *Participation and the Practice of Rights Conference Report* Belfast.