



Evidence to the Ad-Hoc Committee on a Bill of Rights Consultation on a Bill of Rights for Northern Ireland

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Author Biographies

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This evidence is presented in a personal capacity and does not represent the views of the ESRC or of Newcastle University.

This submission focuses on the human rights and equality implications of the Withdrawal Agreement's Protocol on Ireland/Northern Ireland. It examines the repercussions of this for work on a Bill of Rights for Northern Ireland and what the impact of this might be for the monitoring and oversight roles of Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland.

Background – Devolved Competences and EU Law

- [1] Article 2 of the Protocol on Ireland/Northern Ireland states that there will be 'no diminution of rights, safeguards or equality of opportunity' as a result of the UK's exit from the EU. This was included with specific reference to the 'Rights, Safeguards and Equality of Opportunity' provisions contained within the Belfast/Good Friday Agreement 1998 (GFA). As such, through 'dedicated mechanisms' the UK Government is obliged to fulfil this obligation.
- [2] However, Article 2 and the practicalities of ensuring no diminution of rights in Northern Ireland is something that remained and continues to be open to political interpretation. The need to clarify logistical technicalities of the Protocol's operation namely around trade related matters, has dominated, with the consequence being that Article 2 commitments have received comparatively little attention. In this way, much remains unclear about the practicalities of how this commitment will be upheld in reality, and what the longer-term consequences of Brexit will be for the human rights and equality landscape in Northern Ireland in the times ahead.
- [3] The Protocol and its implementing legislation both engages with and in certain respects reshapes some of the arrangements established under the GFA. In particular, the roles and powers of the Equality Commission for Northern Ireland (ECNI) and the Northern Ireland Human Rights Commission (NIHRC) have been altered in response to the Article 2 commitment.

- [4] As the Committee has already received extensive oral evidence on devolved competences and EU law in Northern Ireland pre-Brexit, we will only outline here a number of key areas in this regard relevant to the scope of our submission.
- [5] The movement of areas of competence between Westminster and the Northern Ireland Assembly is something that was envisaged as part of the GFA and Northern Ireland Act 1998, and is something which has also been demonstrated in the changing nature of the devolution arrangements Westminster holds with Scotland and Wales.
- [6] Transposition of EU laws – something which pre-Brexit was within the Northern Ireland Assembly’s remit with regard to areas of devolved competence – was a key way in which the working relationship between Westminster and the Assembly was shaped. That each devolved administration had the power to incorporate EU law into their own legislative frameworks entailed that often multiple iterations of the same EU laws existed within the UK. Brexit has provided a fundamental shift in this dynamic, with Great Britain operating a different regime now compared to the arrangements in place for Northern Ireland as a result of the Protocol.
- [7] Article 2(1) of the Protocol entails that the base line of rights protections in Northern Ireland should not fall below those set by the Belfast/Good Friday Agreement. EU law’s six directives on equality and non-discrimination are explicitly preserved in effect in Northern Ireland’s law through this provision, but Article 2(1) also reaches beyond these measures by including them alongside other EU law relevant to the Belfast/Good Friday Agreement’s provisions on rights, safeguards and equality of opportunity.
- [8] Article 2(1) opens up the possibility of the EU’s rights architecture continuing to apply with regard to any EU law which remains in effect in Northern Ireland. Despite the UK Government maintaining throughout the Brexit process that the EU Charter of Fundamental Rights does not create stand-alone rights separate from other rules and principles of EU law, CJEU case law is increasingly placing weight upon the Charter as a source of enforceable rights. This means that the terms of non-diminution under Article 2(1) of the Protocol could thus be subject to expansive readings which encompass the Charter.
- [9] However, the extent of inherent alignment between EU law with Northern Ireland’s law (as opposed to alignment with new EU rights and equality mechanisms established through Joint Committee processes) will depend upon how these interests are protected, particularly by the Protocol’s ‘dedicated mechanisms’. Article 2(2) explicitly connects oversight of these protections to the workings of the NIHRC, the ECNI and the Joint Committee of the Human Rights Commissions of Northern Ireland and Ireland.
- [10] The Assembly’s three-year suspension highlighted that rights and equalities remain intensely contested elements of Northern Ireland’s politics, in varying ways from different perspectives across the political spectrum. This has been seen in division on matters ranging from language rights to citizenship (particularly in the context of the *DeSouza* case¹), for example. The Brexit negotiations had placed an emphasis on the fractured nature of the relevant legal protections, and Westminster’s action on reproductive rights and same-sex marriage had illustrated the limits to devolution. January 2020, however, marked a turning point in the political travails of Northern Ireland with the conclusion of the New Decade, New Approach agreement.

¹ Secretary of State for the Home Department v De Souza (2019) EA/06667/2016 (UKUT).

Oversight and Enforcement of the Protocol's Human Rights and Equality Protections

- [11] There is a distinct overlap of competences between Westminster and the Northern Ireland Assembly in terms of implementing the Protocol, reflective of the operational status of the Assembly being uncertain at the time of drafting. In effect, steps had to be taken to ensure commitments regarding Northern Ireland post-Brexit could be upheld in the event the Assembly was not functioning, but with the preference that it would be a central actor in future processes.
- [12] In the main, the legal expression provided to these commitments were constructed from the perspective of trade, however, their application beyond this scope to include rights and equalities commitments entails their relevance for these considerations, and for pragmatic analysis of the future for rights and equality in the Northern Irish context.
- [13] The CJEU's ongoing jurisdiction with regard to Northern Ireland will only apply to the rules of the EU single market in goods and related level-playing field obligations, such as state aid rules.² Its jurisdiction does not extend over the operation of the Protocol's rights and equality obligations.³
- [14] The Withdrawal Agreement contains dispute settlement arrangements, which must be used where any disputes arise. The Joint Committee is the central body in this, comprising individuals appointed by both the UK and the EU. This body will meet at least annually, with its decisions having 'the same legal effect' as the Withdrawal Agreement.⁴
- [15] Under the Protocol's rights and equalities provision, the implementation function of the Joint Committee can extend indefinitely. In this way, if new EU law addresses issues which fall within the scope of the GFA's 'rights, safeguards or equality of opportunity' provisions, then the Joint Committee must decide whether these new measures should also apply in Northern Ireland.⁵ In light of the 1998 settlement's cross-border linkage of rights protections, such a dynamic application of Article 2 might be difficult for the UK Government to avoid.
- [16] In addition, there are also a number of Specialised Committees, tasked with assisting the Joint Committee.⁶ These bodies work on issues within defined remits, before passing them to the Joint Committee for a final decision or recommendation to be made. Any decisions of the Joint Committee are then binding on both the UK and the EU.
- [17] One of these Specialised Committees works specifically on the implementation of the Protocol. Under Article 14(c) of the Protocol, the Ireland/Northern Ireland Specialised Committee is specifically tasked with considering any matters relating to Article 2 of the Protocol which are brought to its attention by ECNI or the NIHRC.
- [18] While appearing to be a comprehensive structure for oversight of the Protocol's implementation, this cannot be confused with being an equivalent replacement for the Court of Justice of the European Union (CJEU). It is an alternative recourse to action where matters of rights and equality are at issue in Northern Ireland as opposed to a replacement.

² Ibid., PINI, Article 5 and Articles 7 to 10.

³ Ibid., PINI, Article 12(4).

⁴ Withdrawal Agreement, Article 166.

⁵ Ibid., PINI, Article 13(4).

⁶ Withdrawal Agreement, Article 164(5)(b).

- [19] Northern Ireland residents affected by the implementation of the Withdrawal Agreement will have limited opportunity to engage with the Specialist Committee without NIHRC or ECNI taking up their cause. Even if an issue is heard, the internal processes of the committee system are opaque and could ultimately result in no meaningful outcome and no reasoned decision made publicly available.
- [20] The importance of the role that has been entrusted to ECNI and the NIHRC in terms of oversight of the Protocol implementation cannot be underestimated. In this way alone, the roles that both of these bodies would be expected to fulfil with regard to the design, implementation or oversight of a Bill of Rights in Northern Ireland which moves beyond current scope for activity requires careful consideration.
- [21] In terms of the powers available to NIHRC in particular, Schedule 3 of the Withdrawal Agreement Act 2020 modifies section 71 of the Northern Ireland Act 1998 to explicitly provide for the Commission's standing to institute legal proceedings under the Human Rights Act 1998. Even though this reform was tangential to Brexit, it, nonetheless, has provided a secure legal basis for the Commission's litigation activity. This enables the NIHRC (and ECNI) to flex their new powers inserted as sections 78A to 78E of the Northern Ireland Act 1998, relating to Brexit, human rights and equality in Northern Ireland.
- [22] In all, there are four elements to the powers held by ECNI and NIHRC: oversight; education; information exchange with the Joint Committee; and bringing or intervening in judicial review proceedings in relation to Article 2 of the Protocol.
- [23] The last of these is perhaps the most significant from a legal perspective. To understand its significance, this Protocol provision must be understood in the context of the Withdrawal Agreement as a whole. The Withdrawal Agreement might not be an EU law treaty, but Article 4 nonetheless vests its provisions with the EU law concepts of direct effect and supremacy, provided that they meet the requirements for this.⁷ This means that such provisions will continue to be enforceable within the UK's domestic courts after Brexit.
- [24] With regard to Article 2 of the Protocol, the EU Directives relating to equality listed in Annex 1 of the Protocol have all long operated on the basis that they are directly effective within domestic law. However, the broader commitment to non-diminution of rights is, by its nature, more vague, and this want for clarity initially put the direct effect of this commitment in doubt.
- [25] A clarification on this was issued by the UK Government through a Written Answer in the House of Lords, where it was stated that it 'considers that Article 2(1) of the Protocol is capable of direct effect and that individuals will therefore be able to rely directly on this article before the domestic courts'.⁸ This might appear to be a weak basis for the broad range of rights protections which could operate under Article 2, however, it does sustain the NIHRC and ECNI's pre-Brexit powers with regard to EU law, as well as empowering them to redefine the protection of human rights and equality in Northern Ireland after Brexit.

Human Rights and Equality in Northern Ireland

⁷ As classically formulated in *Van Gend*, EU Law provisions enjoy direct effect within the domestic legal orders of Member States when they are clear, provide for negative obligations, unconditional, make no reservation for Member States and are not dependent for their effect on Member State implementation measures; Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1.

⁸ Lord Duncan of Springbank, House of Lords Written Answer 404 (28 January 2020).

[26] In considering Northern Ireland's human rights and equality legal framework relative to elsewhere in the United Kingdom and in the Republic of Ireland, the unique arrangements could be considered to already represent the beginnings of a *de facto* Bill of Rights in reality. The challenge, however, is how this could be formalised without disrupting the delicate balance currently in place.

[27] While the discussion on a Bill of Right has been ongoing formally since 1998, Brexit has created a context where a renewed consideration of this is required. The arrangements in place now as a result of the UK leaving the EU bear the potential to further differentiate Northern Ireland's human rights and equality legal framework further from approaches taken elsewhere in the UK. This is not necessarily a bad thing, not least given the commitment that protections will not be diminished, but it does present the potential for frictions to occur where issues may become more complex in the future.

[28] From a political, as much as a practical, perspective, there is an argument to be made that there is an inherent value given the specific circumstances of Northern Ireland in amalgamating these rights and protections in one place. This does not mean to say that it would remove all potential difficulties in the future, but it could potentially help to mitigate some of the challenges that could arise, causing delays to updates which would be tantamount to a diminution of rights in the interim.

Conclusion

[29] This submission does not aim to argue either for or against a Bill of Rights. Rather, its purpose is to contribute to the discussion on the practicalities of what the Protocol's Article 2 'non-diminution' commitment means in practice, how this fits with Northern Ireland's existing rights and equality framework, and what some key considerations in the future might need to be in order to ensure this commitment can be upheld.

[30] In effect, Northern Ireland pre-Brexit operated a distinct human rights and equality regime compared to elsewhere in the UK and on the island of Ireland. Through the Withdrawal Agreement's Protocol on Ireland/Northern Ireland and its implementing legislation, this will continue to be the case.

[31] Brexit has presented a range of challenges for human rights and equality in Northern Ireland. However, the Protocol also provides for distinct oversight and enforcement mechanisms for these commitments through ECNI and NIHRC, which Article 2(2) of the Protocol states must be 'facilitated' by the UK Government.

[32] The consequence is that in practice, the creation of a Bill of Rights would serve as a copper-fastening of arrangements already in existence. It would not necessarily serve to fundamentally alter the substantive content of what currently constitutes the rights and equality landscape in Northern Ireland, nor would it itself be the reason for differences between Northern Ireland and elsewhere in the UK – these are already in operation

[33] The roles of ECNI and NIHRC will be important considerations in the establishment of a Bill of Rights for Northern Ireland. Should there be a necessity for their obligations to increase (as there is no scope for these to decrease legally), both bodies will need to be adequately supported and resourced to reflect this.

[34] The UK Government also potentially stands to benefit from the ad-hoc Committee's quest for a politically acceptable Bill of Rights. Given its expressed desire to preserve the protections for Northern Ireland necessary to maintain compliance with its Belfast/Good Friday Agreement obligations, and its corresponding eagerness to prevent those obligations

from working against its political ambitions to unpick parts of the Human Rights Act, it cannot be assumed that the 1998 Agreement's explicit references to the ECHR will provide sufficient enough basis to ensure the Human Rights Act's retention in its current form. Should any such moves lead to a diminishment of rights in GB vis à vis those currently in place, a Bill of Rights could serve as a further layer of protection on Northern Ireland's already differentiated legal framework on these matters.

NOTE: This evidence is derived from a paper prepared by the authors of this submission. A working version of the full paper, due to be published in Northern Ireland Legal Quarterly in early 2021, is available to view in a pre-print format here: https://www.researchgate.net/publication/346008295_Beyond_Trade_Implementing_the_IrelandNorthern_Ireland_Protocol's_Human_Rights_and_Equalities_Provisions

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