



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

Colin Murray and Clare Rice

### *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. It focuses on the human rights and equality elements of the Withdrawal Agreement's Protocol on Ireland/Northern Ireland. It examines their implications for work on a Bill of Rights for Northern Ireland and their impact upon 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. The UK is obliged to fulfil this obligation through 'dedicated mechanisms'.
- [2] The practicalities of ensuring no diminution of rights in Northern Ireland nonetheless continue to be unclear. The technicalities of the Protocol's operation around trade have dominated discourse on Brexit's impact on Northern Ireland, with the consequence that the Article 2 commitments have received comparatively little attention. The Protocol and its implementing legislation engage with, and in certain respects reshape, some of the arrangements established under the Northern Ireland Act 1998. 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 to address the UK's Article 2 commitments.
- [3] 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. The transfer of areas of competence between Westminster and the Northern Ireland Assembly is something that was envisaged under the 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.
- [4] Transposition of EU laws – something which pre-Brexit was within the Northern Ireland Assembly's remit with regard to areas of devolved competence – was an important way in which Northern Ireland's devolved institutions could shape law for the people of Northern Ireland.

Comparable powers in Wales and Scotland meant that there are often multiple distinct transpositions of EU laws within the UK. Brexit has provided a fundamental shift in this dynamic, with the Protocol meaning that Northern Ireland alone continues to transpose elements of EU law.

- [5] Article 2(1) of the Protocol provides 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.
- [6] 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, case law from the Court of Justice of the European Union (CJEU) 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 elements of the Charter.
- [7] 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 'dedicated mechanisms' outlined in the Protocol. 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.

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

- [8] 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 become the central legislative body in future processes.
- [9] The CJEU's ongoing jurisdiction with regard to Northern Ireland only applies to the rules of the EU single market in goods and related level-playing field obligations, such as state aid rules.<sup>1</sup> Its jurisdiction does not extend over the operation of the Protocol's rights and equality obligations.<sup>2</sup> The Withdrawal Agreement contains alternate dispute settlement arrangements which are applicable to disputes over the application of Article 2. The Joint Committee, comprising individuals appointed by both the UK and the EU, meets at least annually, with its decisions having 'the same legal effect' as the Withdrawal Agreement itself.<sup>3</sup>
- [10] Under the Protocol's rights and equalities provision, the Joint Committee's implementation function extends indefinitely. If new EU law addresses issues which fall within the scope of the Belfast/Good Friday Agreement's 'rights, safeguards or equality of opportunity' provisions, then the Joint Committee must decide whether these new measures should also apply in Northern

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<sup>1</sup> UK-EU Withdrawal Agreement, Protocol on Ireland/Northern Ireland, Article 5 and Articles 7 to 10.

<sup>2</sup> *Ibid.*, Protocol on Ireland/Northern Ireland, Article 12(4).

<sup>3</sup> Withdrawal Agreement, Article 166.

Ireland.<sup>4</sup> In light of the 1998 settlement's cross-border linkage of rights protections, a presumption could emerge in favour of a dynamic application of Article 2.

- [11] In addition, there are also a number of Specialised Committees, tasked with assisting the Joint Committee.<sup>5</sup> These bodies work within defined remits, before passing them to the Joint Committee for a final decision or recommendation. Any subsequent Joint Committee decisions are binding on the UK and the EU. One of these Specialised Committees works on the implementation of the Protocol. Under Article 14(c) of the Protocol, the Ireland/Northern Ireland Specialised Committee is tasked with considering any matters relating to Article 2 of the Protocol which are brought to its attention by ECNI or the NIHRC.
- [12] The Committee structures provide an alternative recourse where matters of rights and equality are at issue in Northern Ireland as opposed to a replacement for the oversight of the CJEU. 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.
- [13] The importance of the role that has been entrusted to ECNI and the NIHRC in terms of oversight of the Protocol implementation cannot be understated. 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. This provides a secure legal basis for the Commission's litigation activity and enables the NIHRC (and ECNI) to exercise 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.
- [14] 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. The last of these is perhaps the most significant from a legal perspective. To understand its significance, Article 2 must be understood in the context of the overarching Withdrawal Agreement. The Withdrawal Agreement might not be an EU law treaty, but its Article 4 nonetheless vests its provisions with the EU law concepts of direct effect and supremacy, provided that they meet the requirements for these concepts.<sup>6</sup> This means that such provisions will continue to be enforceable within the UK's domestic courts after Brexit.
- [15] 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.
- [16] 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'.<sup>7</sup> This might appear to be a slender 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.

<sup>4</sup> *Ibid.*, Protocol on Ireland/Northern Ireland, Article 13(4).

<sup>5</sup> Withdrawal Agreement, Article 164(5)(b).

<sup>6</sup> 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.

<sup>7</sup> Lord Duncan of Springbank, House of Lords Written Answer 404 (28 January 2020).

## HUMAN RIGHTS AND EQUALITY IN NORTHERN IRELAND

[17] While the discussion over a Bill of Rights for Northern Ireland formally began in 1998, Brexit has created a context where a renewed consideration of this issue 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 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.

[18] In considering Northern Ireland's human rights and equality legal framework relative to elsewhere in the United Kingdom and in the Republic of Ireland, these unique arrangements could be considered to already represent the beginnings of a *de facto* Bill of Rights. The challenge, however, is whether they can be formalised without disrupting the delicate balance currently in place. There an inherent value given the specific circumstances of Northern Ireland in amalgamating these rights and protections in one place.

## CONCLUSION

[19] This submission draws attention to the practical impact of the Protocol's Article 2 'non-diminution' commitment, and how this fits with Northern Ireland's existing rights and equality framework. In effect, Northern Ireland pre-Brexit operated a distinct human rights and equality regime in some regards 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 these distinctions have become more pronounced.

[20] Brexit has presented a range of challenges for human rights and equality in Northern Ireland. However, the Protocol provides for distinct oversight and enforcement mechanisms for commitments made within it through ECNI and NIHRC. The enactment of a Bill of Rights could clarify these arrangements. 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 such a Bill of Rights be the reason for differences between Northern Ireland and elsewhere in the UK – these are already in operation.

[21] Given the UK Government's expressed desire to preserve the protections for Northern Ireland necessary to maintain compliance with 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 basis to ensure the Human Rights Act's retention in its current form. Should any such moves lead to a diminishment of rights in Great Britain 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 an paper prepared by the authors of this submission. A working version of the article, accepted for publication 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](https://www.researchgate.net/publication/346008295_Beyond_Trade_Implementing_the_IrelandNorthern_Ireland_Protocol's_Human_Rights_and_Equalities_Provisions)

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