

## **Briefing Note for Ad Hoc Committee on a Bill of Rights**

### **EU Withdrawal and a Bill of Rights**

**April 2021**

#### **Introduction**

1. The Commission is grateful to the Committee for the opportunity to engage on the connection between Human Rights & Equality after EU withdrawal and the Committee's consideration of a Bill of Rights.
2. As alluded to in our previous submission, the Commission believes this new context is material to a Bill of Rights and is part of the reason we emphasised the need to devise a Bill of Rights suitable for 2021 onwards, while recognising the provisions contained within the 1998 Agreement. We welcome the Committee's focus on rights after Brexit, in that light.
3. This short paper gives an overview of the 'no diminution' commitment in Article 2 of Protocol on Ireland/Northern Ireland ('the Protocol') and then provides an analysis of the potential considerations for a Bill of Rights against the backdrop of the new commitment and the curtailed application of the Charter of Fundamental Rights of the EU ('the Charter'). It concludes by highlighting opportunities to ensure complementarity of approach regarding the Bill of Rights, Human Rights Act 1998 and the Article 2 no diminution commitment.

#### **The 'no diminution' commitment in Protocol Article 2**

4. The importance of protecting the Belfast Good Friday Agreement (BGFA) and its human rights and equality commitments was accepted in negotiations leading to the UK's withdrawal from the EU.
5. The first reference to 'no diminution of rights' appeared in the December 2017 joint statement of the UK government and EU 27, which stated:

- a. "The United Kingdom commits to ensuring that no diminution of rights is caused by its departure from the European Union, including in the area of protection against forms of discrimination enshrined in EU law."<sup>1</sup>
6. This was formalised under the terms of the UK EU Withdrawal Agreement 2019, in Article 2 of the Protocol:

"Article 2

Rights of individuals

1. The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.
  2. The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards."
7. This is known as the no diminution commitment and was given domestic legal effect by the European Union (Withdrawal Agreement) Act 2020 ('the EUWAA').<sup>2</sup>
8. The UK government issued an Explainer document in August 2020, acknowledging its obligations under Article 2 as follows:

"The Protocol commitment means that the UK government must ensure that the protections currently in place in Northern Ireland for the rights, safeguards and equality of opportunity provisions set out in the relevant chapter of the Agreement are not diminished as a result of the UK leaving the EU..... we do not envisage any

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<sup>1</sup> At paragraph 53.

<sup>2</sup> See in particular section 5, inserting new section 7A into the European Union (Withdrawal) Act 2018.

circumstances whatsoever in which any UK government or Parliament would contemplate any regression in the rights set out in that chapter, but, the commitment, nonetheless provided a legally binding safeguard. It means that, in the extremely unlikely event that such a diminution occurs, the UK government will be legally obliged to ensure that the holders of the relevant rights are able to bring challenges before the domestic courts and should their challenges be upheld, that appropriate remedies are available.”<sup>3</sup>

9. Further, the Explainer document outlines that:

“by virtue of being included in the UK-EU Withdrawal Agreement, the no diminution commitment is binding on the UK government and Parliament as well as the NI Executive and Assembly as a matter of international law and to ensure the ‘no diminution’ commitment is maintained the NI Act 1998 will be amended to ensure the NI Executive and Assembly must comply with the Article 2 commitment.”

10. This amounts, first of all, to a non-regression commitment in respect of the range of rights set out in the relevant chapter of the BGFA and underpinned by EU obligations – EU treaties, Regulations, Directives etc. – in place at the end of the transition period.

11. The relevant chapter of the BGFA was not drafted as a comprehensive statement of rights, anticipating, as it did, further work on a Bill of Rights. Research is ongoing to examine the read-across of the rights as expressed in the BGFA, to relevant EU law, but ultimately the courts will play a role in interpreting the parameters of Article 2.

12. In addition to the non-regression obligation, Article 2 includes a commitment that NI law will ‘keep pace’<sup>4</sup> with future EU law developments on six EU Directives listed in Annex 1 to the Protocol, covering equal treatment in employment, self-employment, access to goods and services, social security and freedom from discrimination based on racial or ethnic origin.<sup>5</sup>

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<sup>3</sup> Explainer\_\_UK\_Government\_commitment\_to\_no\_diminution\_of\_rights\_\_safeguards\_and\_equality\_of\_opportunity\_in\_Northern\_Ireland.pdf (publishing.service.gov.uk)

<sup>4</sup> See Article 13 of the Protocol.

<sup>5</sup> - Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment

13. This 'dynamic alignment' obligation reflects the significance of these EU directives in contributing to equality standards in Northern Ireland based on areas that clearly fall within the relevant section of the 1998 Agreement and reflect their emphasis on the importance of equal treatment and equality.
14. In the areas covered by these Directives at least, this should help to avoid NI falling behind as other jurisdictions progress, as has been seen with the passing of single equality legislation in GB.<sup>6</sup> In 2016, for example, the European Commission against Racism and Intolerance reported that "In a number of key areas individuals in Northern Ireland have a lower level of protection against racial discrimination than people in other parts of the United Kingdom."<sup>7</sup>
15. Article 2 binds the UK Government as a matter of international law and has resulted, amongst other things, in a change to the Assembly's legislative competence. It will add to existing duties on policymakers – in NI and Westminster – to consider human rights and equality issues in the development of policy and the passage of legislation affecting Northern Ireland. In addition, the keeping pace obligation will require monitoring of amendments to the specified directives as well as CJEU judgements on their interpretation.
16. The EUWAA amended the Northern Ireland Act to provide the legislative basis for NIHRC and ECNI to take on their oversight role as the 'dedicated mechanism'.<sup>8</sup> Under this remit, the Commissions have responsibility for providing advice to government and monitoring, supervising, enforcing and reporting on the ongoing implementation of this commitment. The Commissions can carry out their duties jointly or separately.
17. The Commissions will also work with the Irish Human Rights and Equality Commission (IHREC) to provide oversight of, and reporting

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between persons irrespective of racial or ethnic origin

- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

- Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC

- Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security

<sup>6</sup> See also Ireland's Employment Equality Acts 1998-2015 and Equal Status Acts 2010-18, prohibiting discrimination in employment and in the provision of goods & services, accommodation and education. These cover nine grounds of gender, marital status, family status, age disability, sexual orientation, race, religion, and membership of the Traveller community.

<sup>7</sup> ECRI Report on the UK, October 2016, at paragraph 21.

<sup>8</sup> EU (Withdrawal Agreement) Act 2020, Schedule 3.

on, rights and equalities issues falling within the scope of the commitment that have an island of Ireland dimension. Further, the Equality Commission, the NI Human Rights Commission, and the Joint Committee of NI Human Rights Commission and IHREC can raise directly with the Specialised Committee on the Protocol matters of relevance to the implementation of the commitment.

## **EU withdrawal and the case for a Bill of Rights**

18. As outlined in our previous submission, the Commission believes that EU withdrawal strengthens the case for a Bill of Rights and may make it more important and beneficial.
19. EU legislation has formed an important part of the human rights and equality framework in NI. Withdrawal from the European Union has reduced the protection afforded to that framework. This includes, notably, access to the Court of Justice of the EU and the clear and straightforward application of the EU Charter of Fundamental Rights. A Bill of Rights for NI may fill the gap that now exists in the human rights architecture.
20. EU withdrawal also poses direct challenges in relation to human rights and equality. Research commissioned by NIHRC & IHREC<sup>9</sup>, identified that after withdrawal from the EU, there would be nine or more categories of citizen in Northern Ireland.
21. At a time of uncertainty, change and political challenge, a Bill of Rights offers the opportunity to build a shared sense of the relationship between the citizen and the state in this new context, to minimise any divergence in rights between the different groups of citizens, and to translate complex layers of obligations into a clear and publicly accessible document, capable of providing guidance to public authorities and increasing public confidence in government.

## **The Limits of Article 2**

22. Article 2 is no substitute for a Bill of Rights. It is limited in scope to the provisions of the relevant chapter of the BGFA and to precluding a diminution of rights, safeguards or equality of opportunity occurring 'as a result of Brexit', in other words, to actions that could not have

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<sup>9</sup> Discussion Paper on Brexit, Colin Murray, Aoife O'Donoghue and Ben Warwick, 2018, at page 23

been taken prior to withdrawal, due to obligations under EU membership.

23. The 'keeping pace' requirement only applies to the six specified directives in Annex 1 of the Protocol and not to other relevant directives such as those protecting victims, pregnant or part-time workers, where only non-diminution is guaranteed. NI may therefore fall behind the EU, should these directives be strengthened or indeed should new directives offer further protection of rights. As ECNI previously advised, the Annex 1 Directives do not cover equality protections in areas outside employment and vocational training on the grounds of sexual orientation, disability or religion or belief.
24. A wide range of NI legislation relevant to rights may therefore be susceptible to diminution that would be incapable of challenge via Article 2 but could be protected by a non-retrogression clause in a Bill of Rights.

### **The Charter of Fundamental Rights of the EU**

25. In the absence of a Bill of Rights, the Charter arguably served as the instrument most closely aligned to the vision set out in the BGFA of enforceable rights supplementing the provisions of the ECHR.
26. The Committee will be aware that the Charter came into force with the Treaty of Lisbon in 2009, having the same force in EU law as a treaty. It consolidated and gave modern expression to a comprehensive range of rights and entitlements set out in EU treaties, incorporating existing rights under the ECHR and drawing on other international obligations of member states.
27. The Charter only binds states to the extent that they are acting within an area governed by EU law. It is nevertheless valuable in setting out the rights of EU citizens and the following illustrate some of its features which, we submit, should inform discussions on a Bill of Rights.
28. While the UK position was that the Charter was a restatement and gathering together of existing rights, the Charter nevertheless articulated certain of those rights more explicitly or in a more modern context. Articles 20 and 21 provide free-standing rights to equality and non-discrimination unlike Article 14 ECHR, which only protects individuals from discrimination in relation to the exercise of another

ECHR right – a ‘parasitic’ right. Article 24 sets out the rights of the child expressed in conformity with UNCRC – a treaty ratified by the UK but still unincorporated in domestic legislation. Article 47 sets out the right to an effective remedy whereas the ECHR equivalent, Article 13, is not protected by Human Rights Act.

29. Standing is wider under the Charter than the ‘victim’ test under section 7(1) of the Human Rights Act 1998. This is consistent with the Commission’s advice that standing for a Bill of Rights should be defined in terms of the ‘sufficient interest’ used in judicial review, rather than the victim test.

30. The Charter has been in place for over a decade, applying a ‘Convention plus’ approach to matters of EU law. To the extent that the Charter is less accessible, that is a loss to citizens. We also lose the potential for it to guide and support our evolving understanding of the application of rights in a changing society. An example of such a benefit is the CJEU ruling recognising a ‘right to be forgotten’, interpreted from Charter Articles 7 & 8 – the right to a private life and data protection.<sup>10</sup> There is evidence of the Charter gaining traction in CJEU decisions, evidenced by increasing references in CJEU judgements.<sup>11</sup> The same occurred in national courts in the decades after the ECHR was signed.

31. The future application of the Charter in the UK remains the subject of debate. While it is no longer fully incorporated in UK law as per the requirements of EU membership, it is anticipated that it will remain relevant across the UK for the interpretation of EU law relevant to the Withdrawal Agreement. There may be particular relevance in respect of the Protocol but the outworkings remain to be seen.<sup>12</sup>

## **EU Withdrawal and technical aspects of a Bill of Rights**

32. The following paragraphs refer to some of the technical points made in our previous submission on a Bill of Rights, identifying their potential read-across to issues arising from EU exit.

33. The no diminution commitment in Protocol Article 2 resonates with the recommendation by the Commission that a non-retrogression clause

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<sup>10</sup> C-131/12 Google Spain SL v Agencia Espanola de Proteccion de Datos [2014] QB 1022

<sup>11</sup> 2018 report on the application of the EU Charter of Fundamental Rights, European Commission at 3.2

<sup>12</sup> See in particular, section 7A, EUWA 2018, Article 4 of the UK EU Withdrawal Agreement 2019 & evidence to the House of Commons EU Scrutiny Committee by Professor Chris McCrudden, ‘[Parliamentary scrutiny of the Joint Committee and the application of the Northern Ireland Protocol](#)’, 2 September 2020

be included in the Bill of Rights. Such a provision would underpin the Article 2 commitment and ensure a consistent message is communicated to the public and public bodies that there will be no reduction in human rights and equality standards in the future.

34. As an international commitment given domestic effect, the Article 2 no diminution obligation is justiciable and has impacted legislative competence, therefore courts will have a role in defining the parameters and implementation of the commitment. Decisions of public bodies may be subject to judicial review and legislation could be referred to the Supreme Court in relation to competence.
35. Again, this chimes with the advice of the Commission on putting in place for the Bill of Rights similar enforcement mechanisms to those in place under Human Rights Act.
36. Our previous advice referred to the benefits of harmonising a new Bill of Rights with the ECHR as domesticated through the HRA, to ensure complementary interpretation. The same reasoning informs our advice around non-diminution/non-retrogression and enforcement, in order to maximise complementarity of a Bill of Rights with Article 2.

## Conclusion

37. We no longer have automatic and comprehensive recourse to EU law to protect and develop equality and human rights protections. While the no diminution commitment is important, it won't stop us falling behind the EU, should legislative protection develop more swiftly than in the UK, with exception of the six equality directives. Prior to EU withdrawal there was already a gap to make up as GB pulls ahead in terms of single equality legislation.
38. The no diminution commitment arising from Brexit, strengthens the argument for a Bill of Rights. There is an opportunity to build a shared understanding and provide clarity and coherence for citizens and public bodies alike, on what the citizen can expect from the state in what has become a more complex framework of international obligations.
39. Non-diminution is consistent with a non-retrogression approach to a Bill of Rights and, to the extent that the EU Charter is less directly applicable, its provisions can inform the drafting of a local Bill of Rights, consistent with advice from the Commission.



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