



**Evidence of the Human Rights Consortium
to the Joint Committee on Human Rights Inquiry:**

WHAT ARE THE HUMAN RIGHTS IMPLICATIONS OF BREXIT?

October 2016

The Human Rights Consortium is a not for profit coalition of civil society organisations from across Northern Ireland which was established in 2000. We have 163 member organisations from a range of community and voluntary grassroots groups, NGOs, charities and Trade Unions, drawn from all sections of the community and all parts of Northern Ireland. We work together towards a human rights based Northern Ireland.

A core element of this work to date has been our ongoing campaign for a strong Bill of Rights for Northern Ireland. This has been supplemented in recent years with an emerging focus on other human rights frameworks, positively influencing perspectives on human rights and supporting civil society to become engaged in human rights advocacy.

We therefore welcome the opportunity to respond to this consultation from the Joint Committee on Human Rights. We would further welcome any opportunity to welcome a delegation from the Committee to Northern Ireland to meet with our members in order to further examine the potential human rights implications of Brexit in the specific context of Northern Ireland.

Human Rights Frameworks in Northern Ireland

The importance of human rights frameworks and protections in Northern Ireland should not be underestimated. Northern Ireland is a transitional society, which is in the process of establishing stable and lasting political

institutions. Human rights protections form an important part of the institutional underpinning for the peace settlement and have been a crucial confidence-building measure for communities across Northern Ireland as we transition to peace.

In addition to this the result of the EU referendum has already caused uncertainty in Northern Ireland and we believe that at this time the guarantee that rights standards will be upheld and maintained while our future with the European Union is clarified, would do much to allay fears about what lies ahead and ensure a backstop of fundamental protections moving into the future. Assuring people in Northern Ireland that their rights will be upheld as a country outside the European Union could be very valuable to provide a sense of stability.

Instead, neither the devolved administration, nor the Secretary of State for Northern Ireland have reached out to civil society in Northern Ireland to understand how changes to EU derived rights might impact on the lives of people in this region. The right to participate and to be heard are fundamental rights that must be respected in the process of the UK leaving the EU. We are concerned that in the rush to trigger article 50, the Government may not engage in the necessary consultation with the community and voluntary sector in Northern Ireland. It is essential that in the circumstances of such a significant constitutional upheaval that the government fully consult with civil society in all parts of the UK, and especially in Northern Ireland.

We have been very concerned that rights issues in the Brexit discussions have been side-lined, with greater focus on trade, the economy and access to the single market. The EU has an important role to play in assuring human rights and equality protections in Northern Ireland.¹ However, discussions about human rights have tended to focus on threats to the Human Rights Act and have to date largely ignored the additional layers of protection provided by the EU. We are therefore pleased that the Joint Committee on Human Rights is interrogating this in more depth to explore the nature and extent of the EU derived and underpinned human rights protections we currently enjoy. These rights extend beyond the scope of those protected under the European Convention of Human Rights and include privacy, social rights, citizenship rights, environmental rights, workers' rights and the right to family life.

Though it should be noted that as the Charter of Fundamental Rights was given the same status as an EU treaty it became legally binding and must be applied in any action or court applying EU law. As the Charter replicated and adds to many of the provisions of the Convention it therefore helps to multiply the normative effect and reach of Convention rights through the

¹ We raised these issues during the referendum campaign. More information can be found on our website: <http://www.humanrightsconsortium.org/eu-referendum-human-rights/>

scope of EU law across a range of areas currently beyond the application of the Convention. Breaking the applicability of the Charter, as EU law, to the UK effectively weakens the current application and reach of both the Charter and Convention rights in the UK.

We also note that in evidence to the Justice Sub-Committee of House of Lords Select Committee on the EU, that Professors Douglas-Scott and Lowe made it clear that there were a number of rights which currently exist in EU law, which are not protected under the European Convention of Human Rights. Professor Lowe also made it clear in that evidence that the very fact of Brexit would make it impossible for EU based rights to continue to be protected as they are now.²

The Consortium is concerned that the Human Rights Act is also under threat as this is the foundation upon which the Belfast/Good Friday Agreement is built. However, these are not the only rights protections which underpin the constitutional settlement for Northern Ireland. The Agreement is anchored in an understanding of the UK and Irish Governments as partners in Europe with common human rights standards as a basis for interaction. This understanding is often referred to as 'equivalency of rights' and draws its origin from the Belfast/Good Friday Agreement. One of the key commitments in the Agreement is for a Bill of Rights for Northern Ireland to provide for an enhanced human rights framework which neither the Assembly nor public bodies could infringe. The Northern Ireland Bill of Rights was considered an essential safeguard on the powers of the devolved administration. In the absence of the Bill of Rights, the rights protected through the EU have acted as an important protection for people in Northern Ireland.

Northern Ireland has not always been at the forefront of the protection of the rights of minorities. For example while the Race Relations Act was introduced in the rest of the UK in 1976, it took until 1997 for the Race Relations (NI) Order to be introduced. Therefore, the importance of EU based rights is particularly significant for the protection of minority rights in Northern Ireland. In the case of the rights of LGB and T people, the Northern Ireland Assembly was competent to legislate to give effect to the EU Council Directive on gender and access to goods and services 2004/113/EC, as it fell within its devolved powers, however it failed to do so. In 2007 the then First Minister raised concerns about the inclusion of references to transgendered persons in the Northern Ireland regulations. In December the Assembly Committee for the OFMDFM wrote to First Minister seeking further clarification on this point.³ Implementation of

² For more see <http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-justice-subcommittee/news-parliament-2015/Brexit-Acquired-Rights/>

³ Minutes of Proceedings of the Committee for the OFMDFM, 12 December 2007
<http://www.niassembly.gov.uk/assembly-business/committees/archive/office-of-the-first-minister-and-deputy-first-minister/archive/minutes-of-proceedings/session-2007-2008/12-december-2007/>

these regulations had been raised before the committee on three previous occasions and, in January 2008, it was noted that the decision was taken to legislate for this in Westminster.⁴ The explanatory memorandum clearly sets out the logic for this move:

*'Although the Northern Ireland Assembly has competence to legislate on this devolved matter, because the First Minister did not agree to the inclusion of references to transgender or gender reassignment in the Northern Ireland Regulations ... the decision was taken to take forward UK-wide regulations at Westminster. It was considered that the most effective way of securing UK-wide compliance with our European Community obligations.'*⁵

This is significant as it demonstrates that the enforced coalition of the consociational government in Northern Ireland can make it difficult for the parties within the executive to find a consensus position on policy issues.

When this 'stalemate' occurs it is important that an external arbiter ensures that this does not lead to individual rights being ignored or disregarded in the political process. EU law (along with the rights contained in the Human Rights Act) is a check on the devolved administration and places an obligation on it to ensure that it acts in a rights compliant manner. Furthermore, the EU has also actively driven protections for minorities in Northern Ireland forward. EU law places both a negative and a positive duty on the devolved administration. Firstly, it is prohibited from acting outside of the scope of EU law, including EU based rights. Secondly, it places a positive obligation on the devolved administration to give effect to rights underpinned by and derived from EU law and where it cannot do this, then the Secretary of State for Northern Ireland can intervene under section 26 of the Northern Ireland Act 1998.

In addition, the current legal status of rights found in EU law means that they are subject to supervision by the courts. Again, this has a particularly important function in Northern Ireland where the enforced political coalition makes it difficult for controversial issues to be resolved through the ordinary political process. For this reason having a rights based framework which can be accessed through the courts has a particularly important function. This has been recognised in the judgment of Horner J in a case taken by the Northern Ireland Human Rights Commission in 2015:

'the history of the Northern Ireland Assembly suggests that when there are contentious religious and moral issues that divide the

⁴ Minutes of Proceedings of the Committee for the OFMDFM, 9 January 2007
<http://www.niassembly.gov.uk/assembly-business/committees/archive/office-of-the-first-minister-and-deputy-first-minister/archive/minutes-of-proceedings/session-2007-2008/09-january-2008/>

⁵ Explanatory Memorandum to the Sex Discrimination (amendment of legislation) Regulations SI 2008/963
http://www.legislation.gov.uk/ukxi/2008/963/pdfs/ukxiem_20080963_en.pdf

*political classes, there is little prospect of progress given the present constitutional settlement. This is not intended as a criticism, but rather to reflect what has happened in the past.*⁶

In light of this potential for political stalemate and the importance of the rights issues at play, the courts have a particularly important function to ensure that all the rights derived under EU law are protected and safeguarded.

We note that the Prime Minister announced that a 'Great Repeal Bill' would form part of the next legislative programme for government and that the purpose of this bill would be to repeal the European Communities Act 1972. This future law will then convert all the existing EU law at the time the UK leaves the EU into UK law. This is a normal transitional process⁷ and we welcome the confirmation of adoption of the '*acquis – that is the body of existing EU law – into British law*'.⁸ This means that the current human rights standards that are enjoyed via EU law will become part of the domestic law in the UK. In advance of this happening it is necessary to engage in a full scoping exercise to identify all the relevant rights and protections which currently exist in EU law or are underpinned by or derived from EU law. These rights are currently subject to an additional layer of protection as parliament cannot legislate contrary to an EU law obligation. Moreover, the courts also have a supervisory role in ensuring that EU based rights are protected and if a law of the Westminster parliament interferes with these rights, then the courts are empowered to disapply that law. This constitutional principle is embedded in the Northern Ireland Act making it unlawful for the assembly or the executive to act in a way which is contrary to any EU law obligation.

We are concerned that the Great Repeal Bill or any other transitional measure might become a mechanism by which power is concentrated in the hands of the executive at the expense of parliament.⁹ This could mean that any changes to fundamental rights could be made without due scrutiny of parliament and proper discussion of how this will impact on devolution. Similarly, if the Northern Ireland assembly wished to reinstate any EU derived right that was repealed by or through mechanisms established in the Great Repeal Bill, it would not be possible for it to have the same legal force as it is impossible for the NI assembly to legislate to bind itself. Professor Christopher McCrudden made this point at a conference we

⁶ *Re NIHRC* [2015] NIQB 96

⁷ See for example Dr Katie Boyle, 'The legitimacy of the EU referendum requires that citizens are informed of the implications of their decision' (22nd April 2016) <http://www.democraticaudit.com/2016/04/22/the-legitimacy-of-the-eu-referendum-requires-that-citizens-are-informed-of-the-implications-of-their-decision/>

⁸ Theresa May speech to the Conservative party conference 'Britain after Brexit: A Vision of a Global Britain' <http://press.conservatives.com/post/151239411635/prime-minister-britain-after-brexit-a-vision-of>

⁹ See for example the discussion in the Briefing Paper: Parliament and the Rule of Law in the Context of Brexit by the Bingham Centre for the Rule of Law (29th September 2016) http://www.biicl.org/documents/1284_briefing_paper_-_parl_and_rol_in_brexit.pdf?showdocument=1

hosted in January this year on the Human Rights Act, stating that the powers of the assembly and the Northern Ireland ministers are not devolved matters.¹⁰ He also made it clear that the Northern Ireland Assembly is also incapable of binding any person or body covered by a reserved or excepted power of the UK Government. Therefore, the possibility of the Assembly replicating these rights is limited to those areas for which it has competence.

We would also be extremely concerned that a Great Repeal Bill would only serve as a mechanism by which to supplant existing EU laws into domestic legislation in order to begin a political Pick'N'Mix of the rights and protections that the Westminster Government no longer wished to be bound by. Thus in one action removing both recourse to a supra-national external appeal body in the form of the European Court of Justice and placing existing European laws and protections on a legal footing that is far from the constitutionally entrenched position that they should enjoy.

The concept of a Great Repeal Bill does little to allay our concerns about whether we will continue to enjoy the current level of protection of EU derived rights into the future. The Prime Minister has made it very clear both in her speech to the Conservative Party Conference and previously that she is not a fan of human rights. We therefore find it very worrying that at a time when the current UK government is particularly rights sceptic, it could find itself empowered to change and repeal laws which establish important rights. It is imperative that in advance of triggering article 50 that the UK Government makes it clear the nature and extent of human rights and equality protections which are currently underpinned by EU law and pledges to ensure that any change to these rights will continue to be subject to the full scrutiny of parliament.

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¹⁰ Conference: The Impact of the Human Rights Act in Northern Ireland on 26th January 2016 (Conference Report forthcoming in November 2016)