

Evidence to the House of Lords EU Justice Sub-Committee inquiry

Rights after Brexit

April 2019

The **Human Rights Consortium** is a not for profit coalition of over 160 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.

To achieve this goal, we work to enhance understanding, communication, cooperation and campaigning opportunities on human rights issues between members of the Consortium, civil society and the public generally.

Recommendations:

- **The UK Government must implement the outstanding obligation under the B/GFA to a Northern Ireland Bill of Rights. This would provide a strong constitutional framework for protecting rights which are at risk through the Brexit process, developing supplementary rights in line with our particular circumstances, rebuilding trust and confidence in our institutions of governance and shoring up our constitutional settlement.**
- **In the event of a 'no deal' Brexit the UK government must uphold its obligation to protect the B/GFA and its good faith commitment to ensuring there is no diminution of rights caused by the UK's withdrawal from the EU. It should continue to give effect, in domestic law, to its commitments to enhance the powers of the NIHRC and ECNI under the terms of the Backstop Protocol.**
- **Any UK-EU future relationship agreement, whether as a result of successfully ratifying the Withdrawal Agreement or after a 'no deal' Brexit, must have the rights commitments in the Backstop Protocol as minimum, with scope for more expansive human rights commitments possible.**
- **To assess the strength and robustness of the domestic implementation of dedicated mechanisms in the Backstop Protocol there needs to be clarification and consultation on the nature and scope of powers to be conferred on the NIHRC and ECNI.**

Introduction

Our research and engagement with our members has consistently highlighted a clear message: Brexit poses an unprecedented risk to the peace settlement and human rights in Northern Ireland. In our Rights at Risk report we made the case that this risk urgently needed to be addressed head on.¹ This message has not changed. The EU has supported human rights development here in a number of ways and pulled Northern Ireland towards stronger human rights protections and better compliance with international best practice.

The process of the UK leaving the EU is already having impacts on how people live their lives in Northern Ireland and this has been particularly acute for people living, working, going to school and socialising in border areas. It is essential that throughout the Brexit process, the enjoyment of rights of people living in Northern Ireland is not undermined. Whatever form the UK-EU future relationship takes, the UK government must live up to its obligations as co-guarantor of the Belfast/Good Friday Agreement (B/GFA) and ensure that human rights are upheld and reinforced.

1. The impact of the loss of the Charter of Fundamental Rights

In December 2017, while the UK government was committing to ensuring that there would be no diminution of rights caused by its departure from the EU at an international level,² it was pushing a domestic policy that carried over the majority of EU law, but excluded the Charter of Fundamental Rights.³ The Government's memo⁴ on the Charter of Rights was designed to provide reassurance that this policy would not undermine rights. Instead this memo highlighted the gap that the removal of the Charter would have on the constitutional safeguards that guarantee the enjoyment of rights in Northern Ireland and reinforced the difference that already exists between the scope and enforceability of EU human rights law and other international and domestic human rights frameworks.⁵

The UK Government in the negotiation process has repeatedly affirmed its commitment to protect the B/GFA in all its parts, including its practical application and the totality of relationships. The EU Charter of Fundamental Rights, along with the European Convention of Human Rights (ECHR), have been key to providing a common platform of rights upon which the peace agreement and the constitutional settlement

¹ Human Rights Consortium, Rights at Risk: Brexit, Human Rights and Northern Ireland
<http://www.humanrightsconsortium.org/wp-content/uploads/2018/01/RIGHTS-AT-RISK-Final.pdf>

² Paragraph 53 of the Joint from the negotiators of the EU and UK Government on progress during phase 1 of negotiation under article 50 TEU on the UK's Orderly Withdrawal from the EU (8th December 2017)

³ Section 5 EU (Withdrawal) Act 2018

⁴ Charter of Fundamental Rights of the EU, Right by Right Analysis (5th December 2017)
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/664891/05122017_Charter_Analysis_FINAL_VERSION.pdf

⁵ Human Rights Consortium briefing on the UK government's Right by Right analysis of the EU Charter
<http://www.humanrightsconsortium.org/wp-content/uploads/2019/04/HRC-Briefing-EU-Charter-removal-and-review-of-UK-Govts-Right-by-Rights-analysis.pdf>

for Northern Ireland is built.⁶ Their constitutional function is particularly important in the context of the failure of successive governments to legislate for a strong and inclusive Bill of Rights for Northern Ireland – an outstanding commitment of the B/GFA.⁷

The EU Charter fortified human rights within EU law and this had the impact of providing an additional constitutional safeguard under the Northern Ireland Act 1998, which prohibited the Assembly and executive Ministers from acting contrary to EU law. Replacing this with a ‘general principles’ guarantee for rights which are subject to recognition by the courts in the EU (Withdrawal) Act 2018, rather than an *a priori* constraint on the making of policy and law in Northern Ireland weakens these rights and removes an important safeguard from our constitutional settlement.

The Charter incorporates ECHR rights and also modernises, supplements and expands many of these protections. In addition, the Charter protects a much more extensive list of rights including economic, social and cultural rights and explicitly protects the rights of vulnerable groups, such as children and young people, disabled people and older people.

EU human rights and equality law and policy has consistently provided a progressive pull-factor for Northern Ireland. While in the rest of the UK the Equality Act has consolidated and codified equality protections, Northern Ireland still relies on a piecemeal legal framework built on a range of legal measures interpreted through the lens of EU non-discrimination law.⁸ And it is clear that without the binding nature of EU law, it will be much harder to extend human rights and equality law locally.⁹

Northern Ireland is particularly reliant on the jurisprudence of the CJEU to give effect to principles of EU law, that have been codified through the Equality Act in other parts of the UK. The strong remedies currently available to the courts to set aside primary law when there is a conflict with EU human rights law will also no longer be available post Brexit.

⁶ Human Rights Consortium, Rights at Risk: Brexit, Human Rights and Northern Ireland

<http://www.humanrightsconsortium.org/wp-content/uploads/2018/01/RIGHTS-AT-RISK-Final.pdf>

⁷ Human Rights Consortium, Human Rights Consortium, Rights at Risk: Brexit, Human Rights and Northern Ireland <http://www.humanrightsconsortium.org/wp-content/uploads/2018/01/RIGHTS-AT-RISK-Final.pdf>; Brexit Law NI, Brexit and the Peace Process <https://brexitlawni.org/library/resources/policy-report-peace-process/>

⁸ See for example *McKeith v Ardoyne Association*

<http://www.equalityni.org/ECNI/media/ECNI/News%20and%20Press/Press%20Releases/2017/McKeith-v-ArdoyneAssoc.pdf>

⁹ See for example paragraphs 7.4-7.5 of Explanatory Memorandum to the Sex Discrimination (amendment of legislation) Regulations 137 SI 2008/963

http://www.legislation.gov.uk/uksi/2008/963/pdfs/uksiem_20080963_en.pdf

In the absence of the EU Charter, appropriate constitutional protection of rights must be given effect in Northern Ireland law and the most appropriate mechanism to do this is through a dedicated Bill of Rights for Northern Ireland, which would ensure that human rights are considered at all stages of policy and law making and that strong judicial remedies are available to supervise and enforce these rights.

2. The way in which standards relating to rights will be contained in any future agreement with the European Union

Northern Ireland is the only part of the UK with a physical land border to another EU member state. It has integrated cross-border agrifood supply chains, a single energy market and all-island environmental concerns. In addition, our peace process is founded on the B/GFA which embeds north/south cooperation and protection of rights in our constitutional settlement. The draft Withdrawal Agreement and Protocol on Ireland/Northern Ireland (Backstop Protocol) recognise ‘the unique challenge’ that Brexit presents to our peace, north/south cooperation and our rights. The Backstop Protocol is designed to shore up rights and protect the all-island economy and environment and to uphold the commitment in December 2017 to an all-weather backstop that

‘must be upheld in all circumstances, irrespective of the nature of any future agreement between the European Union and United Kingdom.’¹⁰

In the process of ‘legalisation’ of the commitments made by the UK and EU in December 2017 into the Withdrawal Agreement, there is already clear watering down of the principle of non-diminution of rights.¹¹

Article 4 of the draft protocol also highlights that the commitment to non-diminution of rights will be implemented through ‘dedicated mechanisms’ and highlights the important role of the Northern Ireland Human Rights Commission (NIHRC) and Equality Commission for Northern Ireland (ENCI) in upholding rights in Northern Ireland. In the UK Government ‘explainer’, these dedicated mechanisms are elaborated and focus on conferring new powers on NIHRC and ECNI to ‘monitor, supervise, advise and report on and enforce the commitment’ to non-diminution of rights.¹² It is encouraging to see the commitments in the Protocol being given domestic effect and that the NIHRC and ECNI will have an important function in

¹⁰ Joint Report of the UK and EU on progress during phase 1 of negotiations
https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf

¹¹ Human Rights Consortium, ‘NO DEAL: A Dangerous Threat to our Rights’
<http://www.humanrightsconsortium.org/no-deal-brexit-threatens-rights/>

¹² UK Government Explainer for the EU-UK Withdrawal Agreement
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759020/14_November_Explainer_for_the_agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union.pdf

protecting and progressing rights in Northern Ireland, especially as the supervisory mechanisms in the protocol itself are minimal.¹³

To date these new powers to be conferred on the ECNI and NIHRC have not yet been defined in law, nor has there been any consultation on how these powers will be implemented. We understand that there is draft legislation in place and a policy document setting out proposed powers but these are not publicly available. It is essential that in order for these dedicated mechanisms to be effective, the role, functions powers of the NIHRC and ECNI need to clearly and expansively defined in law and their budget needs to reflect this new and extensive stream of work ensuring that the UK's exit from the EU does not undermine rights in Northern Ireland. Any policy documents and/or draft legislation needs to be put into the public domain as a matter of urgency to ensure proper scrutiny and consultation with civil society on the exercise of these functions.

3. The future framework for rights after Brexit, including the Human Rights Act and the European Convention on Human Rights

The general commitments to rights in the future relationship agreement are rather weakly framed, only obliging the UK government to 'respect the framework' of the ECHR. Our concern is that this language reflects a continuing desire by the current UK government to repeal or amend the Human Rights Act and replace it with weaker safeguards. A policy that has only been put into abeyance during the Brexit process. The Consortium has consistently opposed this policy of the UK government as it undermines the scaffolding of human rights and is contrary to the B/GFA.¹⁴ It is essential that the future framework for human rights beyond Brexit builds upon the Human Rights Act.

Brexit has exposed a fault line in the protection of rights in Northern Ireland and it risks destabilising our devolution settlement. Our institutions have been suspended for over two years and the potential for re-establishing devolution institutions in Northern Ireland is challenging when everything is currently distorted through the lens of Brexit. In the meantime, important human rights decisions have not been progressed in Northern Ireland.

Both the EU and UK recognise that the Backstop Protocol, including its provisions on rights, should be an option of last resort, but that it should continue to apply 'unless and until they are superseded, in whole or in part, by a subsequent agreement' (article 1). It therefore commits the UK and EU to ensuring that the commitments to rights in

¹³ Article 16 of the backstop protocol addresses the role of the Specialised Committee which will 'supervise and facilitate' the implementation of the protocol. One of its functions will be to consider any matter of relevance to article 4 of this Protocol brought to its attention by the NIHRC, and others then 'make any recommendations to the Joint Committee as to functioning of this protocol'.

¹⁴ See for example our conference report on The Impact of the Human Rights Act in Northern Ireland <http://www.humanrightsconsortium.org/impact-human-rights-act-northern-ireland-conference-report/>

article 4 of the Backstop Protocol must be subsumed into any future relationship agreement and provides the starting point for how rights should be protected in any future relationship agreement between the UK and EU.

A no deal Brexit would be significantly detrimental to rights in Northern Ireland and would be an unprecedented threat to the B/GFA. In the event of a 'no deal' Brexit the issues of the financial settlement, citizens rights and Northern Ireland still need to be resolved in order for the UK to agree an eventual future relationship agreement.¹⁵ The UK government must, in good faith, continue to uphold its obligation to protect the B/GFA in all its parts and should ensure that the principle of non-diminution of rights is upheld.

In addition, the UK government must intensify its efforts to safeguard rights in Northern Ireland through the B/GFA and must act immediately to implement the outstanding commitment to a Bill of Rights for Northern Ireland that is built on the foundation of the ECHR and reflects the unique circumstances of Northern Ireland.¹⁶ A strong and inclusive Bill of Rights for Northern Ireland would help reinforce our human rights framework, which is essential for our peace settlement and to rebuild trust and confidence in our institutions.

¹⁵ See for example the comments of Michel Barnier on a recent visit to Dublin for a meeting with Taoiseach Leo Varadkar <https://www.rte.ie/news/2019/0408/1041274-barnier-visiting-dublin/>

¹⁶ See for example findings of a recent report from Professor Colin Harvey and Dr Anne Smith on Where next for a Bill of Rights for Northern Ireland?

'In summary, the final key finding is that Brexit combined with the repeal of the HRA and possible withdrawal from the ECHR increase the significance of the Bill of Rights. This report shows how a Bill of Rights could be a solution to the plethora of current rights and equality challenges.'

<http://qpol.qub.ac.uk/wp-content/uploads/2018/12/Full-Report.pdf>