

The Northern Ireland/Ireland Protocol and human rights



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# The Northern Ireland/Ireland Protocol and human rights

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# The Northern Ireland/Ireland Protocol and human rights

## 1. Introduction: What is the Northern Ireland/Ireland Protocol and why is it important from a human rights perspective?

The Protocol on Ireland/Northern Ireland (referred to as ‘the Protocol’) is a Protocol (or a formal international agreement) of the [Agreement](#) on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union (known as the UK Withdrawal Agreement).<sup>1</sup> As a legal document the Protocol recognizes the [unique situation](#) of Northern Ireland (NI) post-Brexit, and the profound impact that Brexit is having on the politics, trade and legal protections here.<sup>2</sup> The Protocol recognizes the importance of maintaining cross-border integration and cooperation on the island of Ireland, as emphasized by the Good Friday Agreement (GFA) 1998<sup>3</sup>, and finds a legal and practical solution to NI being an external frontier of the United Kingdom (UK) in relation to the European Union (EU), by keeping NI in the EU customs territory (meaning that NI remains in the EU’s Single Market and continues to apply EU’s Custom Union rules). Broadly speaking, the Protocol has three [main tasks](#): to protect citizens’ rights after Brexit; to deal with the future relationship between NI, UK and the EU; and to deal with issues relating to the border between the Republic of Ireland (ROI) and Northern Ireland.<sup>4</sup>

Given the political and media focus on those aspects of the Protocol that deal with trade, customs and movement of goods, it would be easy to be oblivious to the significance of some of the other provisions within the Protocol. In fact, the Protocol is of key importance for the protection of human rights in NI post-Brexit. Prior to Brexit, EU law played a big role in establishing human rights standards and practices in NI, in particular underpinning NI’s standards on equal treatment of people and non-discrimination. There have been [legitimate concerns](#) that post-Brexit human rights protection in NI might be destabilized, resulting in a diminishment of human rights<sup>5</sup>. The UK government recognizes this concern and presents a plan to safeguard human rights post-Brexit by including specific human rights provisions in the Protocol.

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<sup>1</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2020, OJ L 29, pp.1-187.

<sup>2</sup> Centre on Constitutional Change, ‘What is the Northern Ireland/Ireland Protocol?’, 2020, accessed 3 December 2021, <https://www.centreonconstitutionalchange.ac.uk/the-basics/what-northern-irelandireland-protocol#:~:text=The%20Northern%20Ireland%2FIreland%20Protocol%20is%20an%20annex%20to,will%20have%20on%20the%20land%20border%20between%20them>

<sup>3</sup> Good Friday Agreement 1998, Annex.

<sup>4</sup> Sub-Committee on the Ireland/Northern Ireland Protocol, ‘Introductory Report’, 19 July 2021, accessed 3 December 2021 <https://committees.parliament.uk/publications/7001/documents/72888/default/> Chapter 2 para 24, p.11.

<sup>5</sup> Human Rights Consortium, ‘Rights at Risk: Brexit, Human Rights and Northern Ireland’, January 2018, accessed 3 December 2021, <http://www.humanrightsconsortium.org/wp-content/uploads/2018/01/RIGHTS-AT-RISK-Final.pdf>

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In this briefing we outline what the Protocol says about protecting human rights in NI post-Brexit, we reflect on some of the challenges and shortcomings of the Protocol in this regard, and we share some exploratory points about the future of human rights protection in NI.<sup>6</sup>

## A. UNDERSTANDING THE PROTOCOL FROM A HUMAN RIGHTS PERSPECTIVE

### 2. What does the Protocol say about human rights in Northern Ireland?

Although the [Protocol](#) plays a crucial role in protecting human rights in NI post-Brexit, by comparison the section dedicated to human rights is relatively small (and perhaps less detailed) than the sections on customs and movement of goods. The Preamble references further human rights related issues for NI after Brexit, including the specific political and legal challenges resulting from Brexit for the peace process on the island.<sup>7</sup> The Preamble also reaffirms the commitment to protecting the GFA ‘in all of its parts’<sup>8</sup> and acknowledges that EU law has been a supportive framework for the provision of rights, safeguards and equality of opportunity in NI since the introduction of the GFA.<sup>9</sup> Finally the Preamble recognizes the rights of Irish citizens in NI, who will still be EU citizens after Brexit, to enjoy, exercise and access rights, opportunities and benefits that are derived from EU law.<sup>10</sup>

The main (legally binding) provision on human rights protection in NI after Brexit is Article 2 on the 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.<sup>11</sup>

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<sup>6</sup> In this briefing we are only focusing on the human rights aspects of the Protocol. For a good explainer on the other key aspects of the Protocol, such as maintaining the EU’s Single Market and Custom Union rules, please see this explainer by UK in a Changing Europe: <https://ukandeu.ac.uk/still-here-brexit-and-human-rights-in-northern-ireland/>

<sup>7</sup> Protocol on Ireland/Northern Ireland , 2019 accessed 3 December 2021, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/840230/Revised\\_Protocol\\_to\\_the\\_Withdrawal\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf) Preamble, para 3. It should be noted that Preambles in international agreements, such as the Protocol, are not considered to be legally binding. Therefore, it could be argued that the broadest commitment to the GFA (the GFA in all of its parts, including, presumably, those not specifically mentioned in the Protocol) is not legally binding.

<sup>8</sup> Ibid, Preamble, para 4.

<sup>9</sup> Ibid, Preamble, para 4.

<sup>10</sup> Ibid, Preamble, para 7.

<sup>11</sup> Ibid, Article 2.

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This provision in Article 2(1) commits the UK to ensuring that there will be no diminishment of rights as a result of Brexit.<sup>12</sup> Rights in this context are understood as those rights outlined in the chapter of the GFA entitled Rights, Safeguards and Equality of Opportunity.<sup>13</sup>

The GFA chapter presents the shared commitment to respect ‘the civil rights and the religious liberties’ of everyone in the community.<sup>14</sup> These terms, civil rights and religious liberties, are left without a strict definition, suggesting that the concepts can be expanded upon. The GFA chapter continues to state that some civil rights in particular will be affirmed, such as the right to free political thought, or, the right to freedom and expression of religion.<sup>15</sup> The phrasing ‘in particular’ suggests that the list of civil rights and religious liberties is not exhausted by those specifically mentioned, but that this particular provision can be understood to include other rights as well.

The GFA affirms the civil rights and religious freedoms of everyone in the community, in particular the right of free political thought; the right to freedom and expression of religion; the right to pursue democratically national and political aspirations; the right to seek constitutional change by peaceful and legitimate means; the right to freely choose one’s place of residence; the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity; the right to freedom from sectarian harassment; and the right of women to full and equal political participation.

In addition to the protection of civil rights and religious liberties stemming from the GFA, the Protocol ensures that there will be no diminishment of equality and non-discrimination provisions derived from. These provisions can be found in Annex 1 of the Protocol, which references six specific EU provisions on equal treatment that the Protocol commits to protect from diminishment post-Brexit:

- Directive 2004/113/EC implementing the principle of **equal treatment between men and women in the access to and supply of goods and services;**
- Directive 2006/54/EC on the implementation of the principle of **equal opportunities and equal treatment of men and women in matters of employment and occupation;**
- Directive 2000/43/EC implementing the principle of **equal treatment between persons irrespective of racial or ethnic origin;**
- Directive 2000/78/EC establishing a general framework for **equal treatment in employment and occupation;**

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<sup>12</sup> Professor Chris McCrudden has commented on the vague nature of this commitment. In his evidence to the House of Commons European Scrutiny Committee he notes that this can be interpreted as meaning that a breach of the Protocol would occur ‘only where any such alleged breach directly results from Brexit, occurring at the same time as and immediately connected to the withdrawal process’. It would be difficult to make such an assessment. See Christopher McCrudden, ‘Parliamentary scrutiny of the Joint Committee and the application of the Northern Ireland Protocol’ Evidence to the House of Commons European Scrutiny Committee, 2020, accessed 3 December 2021, <https://committees.parliament.uk/writtenevidence/10145/default/>

<sup>13</sup> The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland 1998, Chapter 2.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

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- Directive 2010/41/EU on the application of the principle of **equal treatment between men and women engaged in an activity in a self-employed capacity**;
- Directive 79/7/EEC of on the progressive implementation of the principle of **equal treatment for men and women in matters of social security**.<sup>16</sup>

The Protocol Explainer further mentions three EU Directives which have been incorporated into UK domestic legislation as EU retained law under the Withdrawal Agreement and which are relevant to the safeguarding of equality and non-discrimination.<sup>17</sup> These Directives can be added to those in Annex 1:

- Directive 2012/29/EU establishing **minimum standards on the rights, support and protection of victims of crime**;
- Directive 2010/18/EU implementing the **revised Framework Agreement on parental leave**;
- Directive 92/85/EEC on the introduction of **measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding**.<sup>18</sup>

The Explainer to Article 2 of the Protocol suggests that further EU Directives can be included in the scope of the Protocol and that the list in Annex 1 is not exhaustive (the phrase used is ‘not limited to’).<sup>19</sup> There is no simple way to determine if a legal provision or protection previously enjoyed will be covered by the Protocol. According to a recent practical guide on the NI Protocol, to determine whether a human right would be covered by the Protocol, two main questions must be answered in the positive.<sup>20</sup> The first question is whether a particular right has been diminished or weakened in NI since Brexit. The second questions is whether this right is covered by the relevant chapter of the GFA. If the answer to both questions is yes, the next stage of determining whether a right is covered by the Protocol would involve demonstrating that the right in question was given protection under NI law before 31 December 2020, that the right was underpinned by EU law before 31 December 2020, that Brexit has resulted in a full or partial removal of this underpinning, and that this diminishment in protection would not have occurred if the UK had stayed in the EU.<sup>21</sup>

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<sup>16</sup> As above No 7 (NI Protocol), Annex 1.

<sup>17</sup> UK Government, ‘Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland’ August 2020, accessed 3 December 2021, <https://www.gov.uk/government/publications/protocol-on-irelandnorthern-ireland-article-2>The Explainer to the NI/Ireland Protocol is an official document produced by the NI Office to present the UK’s interpretation and clarification on how the Protocol is meant to work. Although official the Explainer is not legally binding, unlike the Protocol itself.

<sup>18</sup> Ibid, para 13.

<sup>19</sup> Ibid, para 13.

<sup>20</sup> Social Change Initiative, Donia Human Rights Centre University of Michigan and Human Rights Centre QUB, ‘Human Rights and Equality in Northern Ireland Under the Protocol: A Practical Guide’ 2021, accessed 3 December 2021, <https://www.socialchangeinitiative.com/human-rights-and-equality-in-northern-ireland-under-the-protocol-a-practical-guide> p.9.

<sup>21</sup> Ibid, p.10.

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Ultimately domestic Courts will be the final decision makers on the scope and application of Article 2 of the Protocol. Future case-law will help us get a full picture of what rights are covered. In the exploratory part of our briefing, we offer a broader interpretation of the scope of Article 2 that goes beyond the seemingly narrow reading the Explainer outlines and includes other human rights provisions that in our opinion are protected by the GFA and therefore should fall under the scope of the Protocol.

## 3. How can the Protocol ensure no diminishment of rights in NI as a result of Brexit?

If it has been determined that the protection of a human right has been undermined as a result of Brexit, the next question we would ask ourselves is how the Protocol can protect human rights in practice. First, we need to know how a ‘diminishment’ of rights is defined.

### 3.1 Defining diminishment.

According to the Explainer, ‘no diminishment’ of rights means that if there is a breach of Article 2 (if future NI legislation or action by the NI Executive or Assembly breaches Article 2 of the Protocol), rights holders will be able to bring challenges before domestic courts. If their challenge is upheld by the domestic courts then a legal remedy must follow.<sup>22</sup> A ‘legal remedy’ means access to domestic courts and the right to judicial review from individuals to challenge legislation/actions on their incompatibility with the Protocol.

Currently there is a lack of clarity on how a diminishment of rights will be remedied by domestic Courts, since we have not yet seen a case testing the provisions of the Protocol. It has been pointed out that seeking legal remedies is not the only avenue in terms of addressing human rights protection diminishment.<sup>23</sup> Political tools, such as lobbying and campaigning, can also be useful in ensuring that human rights protection in NI is not weakened as a result of Brexit.

### 3.2 Mechanisms for providing a legal remedy.

There are two mechanisms for providing a legal remedy in circumstances where a diminishment of rights has been determined: an international one and a domestic one.<sup>24</sup> The international mechanism involves the Joint Committee [UK–EU Joint Committee](#) established by the Withdrawal Agreement. The domestic mechanism involves the Dedicated Mechanism established by Article 2(2) of the NI Protocol. Below we explain how these newly set up institutions are involved in the provision of legal remedies and how they can protect human rights in NI after Brexit.

The Joint Committee has specific responsibilities in relation to the NI Protocol, for example ensuring that NI continues to follow EU rules on trade as part of the EU customs zone and ensuring that there is no hard border between the ROI and NI. The EU-UK Withdrawal Agreement Joint Committee most recently met in June 2021 and issued [a joint statement](#) that highlighted citizens’ rights ongoing issues, such as EU citizens in UK and UK citizens in EU who

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<sup>22</sup> As above No 17 ( NI Protocol Explainer), para 6.

<sup>23</sup> As above No 20 (Social change initiative), p.20.

<sup>24</sup> Ibid, p.20.

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have applied for residency not having legal certainty as to whether they are covered or not by the Withdrawal Agreement. Both parties have agreed to continue resolving issues together.<sup>25</sup>

The Joint Committee is comprised of several sub-committees that focus on the key issues the WA is meant to cover. The Citizens Rights Sub-Committee has responsibility for ensuring that the UK sets up an independent monitoring authority to deal with possible complaints by EU citizens living in the UK after the transition period. The authority has the capacity to bring cases in front of courts and tribunals, in a capacity similar to the EU Commission, for at least eight years after the transition period.<sup>26</sup> The Independent Monitoring Authority for the Citizens Rights Agreement ([IMA](#)) was launched on 31 December 2020.

There is also the Sub-Committee on the Protocol on Ireland/Northern Ireland, a sub-committee specifically responsible for examining proposals by the North-South Ministerial Council and its implementing bodies, as well as any issues raised by the human rights and equality bodies established by the GFA. This sub-committee must submit recommendations to the central committee for a binding decision on any issues arising by the protocol. This sub-committee will be in existence for as long as the Protocol applies.<sup>27</sup> To date the Subcommittee has issued two reports on the Protocol, the [latest one](#) was published on 29 July 2021. The Sub-Committee reflected on the importance of Article 2 of the Protocol and the complex interaction between the Protocol and the GFA and committed to returning to the issues with a more detailed report in the future.<sup>28</sup>

Article 2 of the NI Protocol establishes a dedicated mechanism for the protection of rights in NI post-Brexit. This dedicated mechanism is comprised of the Equality Commission NI and the NI Human Rights Commission. The main Function of the dedicated mechanism is to monitor the implementation of Article 2 (1) of the Protocol and report to the Secretary of State for NI and to the NI Executive, either when these two bodies request a report or when the dedicated mechanism deems it necessary to produce one.<sup>29</sup> The [dedicated mechanism](#) is responsible for 'providing advice to government and monitoring, supervising, enforcing and reporting on the ongoing implementation' of the commitment under Article 2 (1) of the NI Protocol.<sup>30</sup> The dedicated mechanism will monitoring how Article 2(1) is implemented and will advise the NI

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<sup>25</sup> Statement by the European Commission following the eight meeting of the EU-UK Withdrawal Agreement Joint Committee, 9 June 2021, accessed 3 December 2021, [https://ec.europa.eu/info/sites/default/files/20210603\\_unilateral\\_jc\\_statement\\_002\\_final.pdf](https://ec.europa.eu/info/sites/default/files/20210603_unilateral_jc_statement_002_final.pdf)

<sup>26</sup> Georgina Wright and Joe Owen, 'Implementing Brexit: The role of the joint committee' March 2020 Institute For Government, accessed 3 December 2021, [https://www.instituteforgovernment.org.uk/sites/default/files/publications/implementing-brexit-role-joint-committee\\_0.pdf](https://www.instituteforgovernment.org.uk/sites/default/files/publications/implementing-brexit-role-joint-committee_0.pdf) p.6.

<sup>27</sup> Ibid, p.6.

<sup>28</sup> As above No 4 (Introductory report), p.44, para 181.

<sup>29</sup> House of Lords European Union Committee, '9<sup>th</sup> Report of Session 2019-21: The Protocol on Ireland/Northern Ireland' May 2020, accessed 3 December 2021, <https://publications.parliament.uk/pa/ld5801/ldselect/ldeucom/66/66.pdf> Chapter 3, p.13, para 28.

<sup>30</sup> Northern Ireland Human Rights Commission, 'Equality and Human Rights after Brexit: The UK Government's commitment under the Ireland/Northern Ireland Protocol Article 2(1)' April 2021, accessed 3 December 2021, <https://nihrc.org/uploads/Brexit-YourRightsShortGuidedigital.pdf> p.7.



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Assembly (or an Assembly Committee) on legislative and other measures that must be taken to implement Article 2(1), or whether a Bill is compatible with Article 2. The dedicated mechanism will also promote understanding and awareness of how important the no diminishment of rights commitment is under Article 2. Crucially the dedicated mechanism will be able to bring forward or intervene in legal proceedings in respect of an alleged breach (or potential future breach of the commitment) and assist persons in relevant legal proceedings.<sup>31</sup>

#### 4. What happens in the future if EU Law is updated?

Article 13 (3) of the NI Protocol stipulates that when the Protocol makes reference to a Union act, 'that reference shall be read as referring to that Union act as amended or replaced'.<sup>32</sup> What this means is that there is an obligation on NI to adhere to the EU Directives on equal treatment and non-discrimination mentioned in Annex 1 of the NI protocol even if these Directives are amended or replaced. When the Directives in Annex 1 develop at an EU level, UK and NI law must develop as well to stay in line.<sup>33</sup> This is why the Annex is so important. The Directives listed in the Annex are limited to the six Directives specifically mentioned. The government issued Explainer to the Protocol further stipulates that other retained EU law provisions (retained via the Withdrawal Act 2020) also apply. These EU Directives include the Victims 'Directive, the Parental Leave Directive and the Pregnant Workers' Directive, as well as specific measures aimed at protecting the rights of persons with disabilities.<sup>34</sup>

If an EU Directive has not been retained in UK law prior to Brexit or has not been included in Annex 1 of the Protocol, it will not be protected in NI under the Protocol, even if it might be pertinent to human rights protection in NI. This is one of the main arguments made that Brexit will inevitably result in the diminishment of rights in NI as EU law will develop but NI law won't be able to keep up. A further complication is presented by the fact that the ROI remains a member of the EU. This means that ROI equality legislation will advance alongside the EU equality legislation. The ROI, on account of continuing to be a Member State of the EU, will also be subject to this equality legislation. For example, as EU equality legislation is advanced and updated, Irish citizens and residents would be able to avail of the updated EU equality protections. The NI Protocol commits NI equality provisions to 'keep up' with EU provisions, but only those mentioned in Annex 1 and updated after 1 January 2021.<sup>35</sup> Whilst this provision aims to ensure that NI equality protection standards would not fall behind EU ones, the reality is that we do not know yet the extent to which the 'keeping up' element of the Protocol will be successful. We may see a situation where people in the ROI and NI enjoy very different standards of equality protection. There are also going to be additional existing and future EU equality provisions that will likely fall outside of a strict interpretation of the Art 2 and Annex1 protections. Such divergence in protections will create inequitable access to rights on the

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<sup>31</sup> Ibid, p.7.

<sup>32</sup> As above No 7 (NI Protocol) Article 13 (3).

<sup>33</sup> As above No 29 ( 9th Report), Chapter 3, p.13, para 29.

<sup>34</sup> As above No 17 (NI Protocol Explainer), para 13, p 4.

<sup>35</sup> As above No 7 (NI Protocol) Article 13 (3).

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island.<sup>36</sup> In December 2020 the dedicated mechanism (ECNI ad NIHRC) made a joint submission to the Northern Ireland Affairs Committee Inquiry on Brexit and the Northern Ireland Protocol urging the NI government to ensure that NI legislation keeps up with ROI legislation.<sup>37</sup> The responsibility of both the NI and the Irish government to make comparable steps in their jurisdictions to ensure ‘an equivalent level of protection of human rights as will pertain in NI’ is guaranteed by the GFA<sup>38</sup>, therefore the UK government and the NI government must respect this principle in order to ensure there will be no diminishment of rights in NI as a result of Brexit).

### Is the Protocol legally binding and can the NI Executive or Assembly ignore it?

The Protocol is an integral part of the WAA 2020. Both the WAA and the Protocol are legally binding for the UK and the NI Assembly and Executive under international law.<sup>39</sup> The WA 2020 modified the NI Act 1998 by restricting the power of the NI Assembly in relation to retained EU Law and the provisions of the NI Protocol. The NI Assembly cannot pass a law that modifies, confers, subordinates or violates retained EU Law.<sup>40</sup> This is an important part of ensuring that future NI laws will not result in a diminishment of current human rights standards and there will be protection from human rights being diminished or violated as a result of Brexit.

### B. EXPLORING POSIBILITIES TO EXPAND THE SCOPE AND APPLICATION OF ARTICLE 2

#### 5. What rights can we expect to be protected by the Protocol?

Both the Protocol and the Explainer that accompanies it say that the human rights provisions that the Protocol covers are not limited to those mentioned above. This phrasing suggests that the rights protection offered by the Protocol is broader and deserves to be mapped out. In this section we want to focus on what human rights provisions could be seen as being covered by the Protocol via a more expansive reading of the scope and application of Article 2. The nature, scope, application and meaning of Article 2 will ultimately be decided by Courts in any future jurisprudence on Article 2 of the Protocol. The following is simply some initial thoughts on how far the Protocol’s provisions could potentially stretch. To get an idea of the human rights provisions the Protocol might further cover (on top of the human rights provisions discussed in the briefing already) we need to start by looking at the rights specifically referenced in Article 2, or in the rights, safeguards and equality of opportunity chapter of the [GFA](#).

#### 5.1 Expanding on the GFA rights

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<sup>36</sup> ECNI & NIHRC, ‘Submission to Northern Ireland Affairs Committee Inquiry on Brexit and the Northern Ireland Protocol’ December 2019, accessed 3 December 2021, [https://nihrc.org/uploads/publications/ECNI\\_NIHRC\\_\\_Submission\\_to\\_NIAC\\_Inquiry\\_on\\_the\\_Protocol\\_\\_18.12.20\\_final\\_.pdf](https://nihrc.org/uploads/publications/ECNI_NIHRC__Submission_to_NIAC_Inquiry_on_the_Protocol__18.12.20_final_.pdf) p.3.

<sup>37</sup> Ibid.

<sup>38</sup> GFA, Section 6 (Rights, Safeguards and Equality of Opportunity), para 9.

<sup>39</sup> As above No 17 (NI Protocol Explainer), para 5.

<sup>40</sup> NI Act 1998, Part II, Section 6A (1).

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As already discussed above, the GFA affirms the civil rights and religious freedoms of everyone in the community.<sup>41</sup> The GFA also references economic and social rights, although in a less specific way. For example, there is a shared commitment to ensuring ‘sustained economic growth and stability’ in NI; the promotion of social inclusion, including the advancement of women in public life; tackling the issues of a divided society and ensuring social cohesion; strengthening anti-discrimination legislation in the field of employment; etc.<sup>42</sup>

The Preamble of the Protocol, as well as much of the official statements on the Protocol that both the UK and the EU have issued, state that the Protocol will respect the GFA in all its aspects. This could therefore at one level be given a literal interpretation and suggests that the commitment to the non-diminishment of rights as a result of Brexit that the Protocol guarantees has to extend to the full provisions of the GFA, not just the civil rights and religious liberties, but also to include the references to social and economic rights provisions.

### 5.2 Human Rights Act.

The GFA incorporated the provisions of the European Convention on Human Rights ([ECHR](#)) into NI law.<sup>43</sup> The ECHR provisions have been incorporated into UK law via the Human Rights Act 1998 ([HRA](#)). The HRA provisions are applicable to NI and offer protection of fundamental rights and freedoms: the right to life; freedom from torture and degrading treatment; freedom from slavery and forced labor; the right to liberty; the right to a fair trial; the right not to be punished for something that wasn't a crime when you did it; the right to respect for private and family life; freedom of thought, conscience and religion, and freedom to express your beliefs; freedom of expression; freedom of assembly and association; the right to marry and to start a family; the right not to be discriminated against for these rights and freedoms; the right to peaceful enjoyment of your property; the right to an education; the right to take part in free elections; and the right not to be subjected to the death penalty.<sup>44</sup> The GFA also provided that under the legislation to incorporate the Convention rights (the HRA) that individuals would have direct access to Courts, and that any Assembly legislation incompatible with the ECHR would be rendered ‘null and void’.<sup>45</sup>

Similarly to the point about the GFA rights made above, the incorporation of the ECHR in UK law via the HRA ([the HRA applies to NI as well](#)) is a key part of the GFA, even if the Protocol does not mention the HRA directly. It could be argued that the non-diminishment of rights commitment in the Protocol should apply to the full extent of rights protected by the HRA. Further, it is important to tease out whether the [UK government’s proposal to review the HRA](#) and the danger of the [UK pulling out of the ECHR](#) could constitute a diminishment of rights as a result of Brexit that the Protocol could help challenge.

The ECHR is a Council of Europe legislation and as such it is separate from the EU (the Council of Europe and the European Union are two different entities). Yet, all EU Member States are

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<sup>41</sup> GFA 1998, RIGHTS, SAFEGUARDS AND EQUALITY OF OPPORTUNITY, Human Rights, Para 1.

<sup>42</sup> Ibid, Economic, Social and Cultural Issues, Para 1.

<sup>43</sup> Ibid, Human Rights, Para 2.

<sup>44</sup> Human Rights Act 1998, Schedule 1: The Articles, Part 1: The Convention Rights and Freedoms.

<sup>45</sup> Ibid, para 2.

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signatories of the ECHR and have ratified the Convention into domestic law. Further, the EU has had [a long political ambition to accede to the ECHR](#), meaning that the EU as a whole would submit the EU's legal system to the supremacy of the ECHR in order to strengthen human rights protection across the Union.<sup>46</sup> Whilst it must be pointed out that there is no legal obligation on EU Member states to sign up to the ECHR, nevertheless the CJEU refers to the ECHR as a document with a key role in the EU's legal system that [provides fundamental human rights principles](#).

With the UK no longer a Member State of the EU, we lose access to the CJEU and to the principles enshrined in the ECHR being respected and referenced by the CJEU. In a situation where the UK leaves the ECHR as well as the EU, we would lose an extremely important human rights protection that was intertwined with the practical operation of our membership of the EU (the CJEU referencing the ECHR is its jurisprudence). Therefore, it could be argued that the intention of the UK's government to pull out of the ECHR could be seen as a diminishment of a human rights protection as a result of Brexit that the Protocol could potentially help challenge.<sup>47</sup>

### 5.3 Common Travel Area rights.

Article 3 of the Protocol covers another important source of rights for NI, namely the Common Travel Area (CTA):

1. The United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories (the 'Common Travel Area'), while fully respecting the rights of natural persons conferred by Union law.
2. The United Kingdom shall ensure that the Common Travel Area and the rights and privileges associated therewith can continue to apply without affecting the obligations of Ireland under Union law, in particular with respect to free movement to, from and within Ireland for Union citizens and their family members, irrespective of their nationality.<sup>48</sup>

It is important to note that the CTA arrangements and the rights derived from them pre-date both EU law and the GFA. The CTA rights are not directly mentioned in the GFA, but as Professor Imelda Maher argues they are an important part of the context for the GFA.<sup>49</sup> For example, under the GFA people born in NI can identify as Irish, British or both.<sup>50</sup> The GFA is

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<sup>46</sup> Article 6(2) of the Treaty on European Union (TEU). Please note that in 2015 the CJEU decided against the EU's formal accession to the ECHR as it was deemed insufficient to protect the EU's specific legislation on human rights. The academic community is divided on whether or not the EU's accession to the ECHR would strengthen human rights protection or not. Despite these disputes, the key importance of the ECHR as a source of legal principles for the EU is not disputed.

<sup>47</sup> As above No 20 (A Practical Guide), p.15.

<sup>48</sup> As above No 7 (NI Protocol), Article 3.

<sup>49</sup> Imelda Maher, 'The Common Travel Area: More Than Just Travel' (2017) A Royal Irish Academy – British Academy Brexit Briefing, accessed 3 December 2021,

<https://www.thebritishacademy.ac.uk/documents/319/common-travel-area-more-just-travel.pdf> p.4

<sup>50</sup> GFA 1998, RIGHTS, SAFEGUARDS AND EQUALITY OF OPPORTUNITY, Human Rights, Article 1 (vi).

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particularly committed to ensuring that Irish citizens in NI can exercise fully the rights awarded to them on account of being EU citizens as well.<sup>51</sup> This context makes the CTA an integral part of the GFA that the Protocol should cover.

The rights acquired under the CTA include not only the right to travel freely across the Common Travel Area, but also the right to work, the right to access education, the right to access social security benefits, the right to access healthcare, the right to access social housing support and the right to vote.<sup>52</sup> This makes the CTA rights broader than the free movement rights previously derived from EU law. Although they are an integral part of the GFA, they are not currently legally enforceable under Irish or UK law.<sup>53</sup> Also, the [CTA rights](#) extend to UK and Irish citizens only (not to non-Irish or British family members, for example). Since the CTA rights are an integral part of the GFA, to avoid diminishment of rights as a result of Brexit these rights should be protected by Article 2 of the NI Protocol, even when these rights appear to be broader than the rights explicitly mentioned in the Protocol or the Explainer. One example could be the right to vote that British and Irish citizens enjoy under the CTA. The NI Protocol lacks an explicit mention of this particular right, yet a more expansive interpretation of Article 2 would expect to see this right protected under the Protocol.

### 5.4 EU retained law and retained case-law.

The Protocol also interacts with the retained EU law outlined by the [Withdrawal Act 2018](#). Retained EU law on citizens' rights is now part of the UK legislation on equality and non-discrimination.

The Explainer document states that the Protocol can cover further EU law provisions than the ones listed in Annex 1, for example EU law provisions retained in UK legislation via the WA 2018.<sup>54</sup> The Explainer further suggests that the non-diminishment of rights commitment extends to retained EU law, as long as the retained law is relevant to a right in the "Rights, Safeguards and Equality of Opportunity" chapter of the GFA.<sup>55</sup>

The WA contains a number of citizens' rights provisions, such as rights in relation to entry and residence, the commitment to dynamically aligning UK law and EU law on the mutual recognition of professional qualification, and on the co-ordination of social security systems, as well as retained EU provisions on equal treatment and non-discrimination, the rights of workers, etc.<sup>56</sup> The practical difficulty, however, is having a clear idea of all the retained law that would be protected by the Protocol. Mapping out all the retained EU law in the WA 2018 that applies to NI, or indeed the NI domestic legislation derived from EU law, and

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<sup>51</sup> Ibid.

<sup>52</sup> UK Government, 'Common Travel Area guidance', September 2021, accessed 3 December 2021, <https://www.gov.uk/government/publications/common-travel-area-guidance/common-travel-area-guidance>

<sup>53</sup> Chris McCrudden, 'The Good Friday Agreement, Brexit, and Rights' (2017) A Royal Irish Academy – British Academy Brexit Briefing, accessed 3 December 2021, [https://www.thebritishacademy.ac.uk/documents/164/2017-10-30\\_Good\\_Friday\\_Agreement.pdf](https://www.thebritishacademy.ac.uk/documents/164/2017-10-30_Good_Friday_Agreement.pdf) p.3.

<sup>54</sup> As above No 17 (NI Protocol Explainer), para 13.

<sup>55</sup> Ibid, para 15.

<sup>56</sup> European Union (Withdrawal Agreement) Act 2020, part 2 Citizens' Rights, Articles 7-15.

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interrogating the extent to which the Protocol protects them, is an important task to be carried out.

### 6. Conclusion: Questions for the future

While the Protocol remains the key document guaranteeing and governing the protection of human rights in NI after Brexit, it is also a document that we do not yet fully understand.

Most of the concern around the Protocol from a human rights perspective relates to the scope and application of Article 2. The vagueness around some of the Protocol's provisions, such as the full extent of the rights that the Protocol can cover, allow for a range of possible interpretations on the scope and application of Article 2, such as those offered in this briefing. But such ambiguity also raises concerns and questions for the future, and indeed for further research.

For example, there is a concern regarding potential judicial reviews on the incompatibility of future NI Assembly legislation and the Protocol provisions. Judicial reviews are likely to be the main avenue for clarifying the full extent or limitations of the Article 2 protections but they can also be both timely and costly to undertake. This raises a concern over whether we may have the ability to react quickly to potential breaches of the Protocol if our main defense is litigation. The powers and support of the Dedicated Mechanisms will therefore be key in this regard.

A related question also arises as to what will the legal remedies be? Would the problematic legislation in question be scrapped automatically? What would be the redress for people whose rights have been violated? These are important questions that still need explored and again may only be fully resolved following initial litigation.

Lastly, the Protocol has attracted a lot of negative attention from some sections of NI society. Practical and political concerns have been raised about the barriers that the Protocol imposes on trade between the UK and NI, as well as the position of NI in the UK Single Market. Both the EU and the UK have produced their own solutions to the problems with the Protocol. The EU and the UK are in deep disagreement about the future of the Protocol, despite mutual assurances that both parties are open to discussion. Even though Article 2 of the protocol cannot be suspended if other elements of the Protocol are (for example those provisions concerning customs and the movement of goods), there is a real concern that human rights protection may be negatively impacted. Will the human rights provisions be able to sustain a political crisis and an overall destabilization of the Protocol?

For the Human Rights Consortium such ongoing instability surrounding Brexit and the NI Protocol only serves to reinforce the case for a comprehensive and robust Bill of Rights for NI as an effective mechanism for the protection of rights in what remains a volatile Post-Brexit landscape for human rights.

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