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An Comhchoiste um Dhlí agus Ceart agus Comhionannas

**Tuarascáil maidir le Cearta agus Comhionannas i gComhthéacs
Brexit**

Feabhra 2019

Houses of the Oireachtas

Joint Committee on Justice and Equality

Report on Rights and Equality in the Context of Brexit

February 2019

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Chairman's Preface

Equality and human rights are central elements of this Committee's remit. They are issues that we have taken very seriously since our establishment in 2016. As such, it would have been completely remiss of us not to address the urgent challenges posed by the imminent departure of the United Kingdom from the European Union in terms of preserving rights and equality on the island of Ireland. The Committee felt that, despite the huge volume of discussion and debate generated by Brexit, there has been insufficient focus thus far on the rights and equality dimension to it.

We conducted a public hearing on the 23rd of January 2019 which drew upon expertise from academia, the independent non-governmental sector and the two independent statutory bodies North and South with specific responsibility for protecting and promoting human rights and equality in Ireland. It was a hugely informative discussion, which brought home to the Members of the Committee in the first instance just how grave and complex these issues are. The Committee hopes this will be just the beginning of a much broader engagement with this subject across the political spectrum and wider society.

I would like to express my gratitude on behalf of the Committee to all the witnesses who attended our public hearings to give evidence. Finally, I also wish to thank the staff of the Committees Secretariat who assisted in the preparation of this report. Go raibh maith agaibh.



A handwritten signature in black ink, appearing to read "Caoimhghín Ó Caoláin".

Caoimhghín Ó Caoláin T.D.
Chairman – February 2019

The Committee Hearing

The Joint Committee met in public session on the 23rd of January 2019 to consider the impact upon rights and equality of the United Kingdom's likely departure from the European Union on the 29th of March 2019.

The following individuals and stakeholders appeared before the Committee:

- Colin Harvey, Professor of Human Rights Law in the School of Law, **Queen's University Belfast**;
- Committee on the Administration of Justice, represented by Brian Gormally, Director;
- Northern Ireland Human Rights Commission, represented by Les Allamby, Chief Commissioner, and Colin Caughey, Director; and
- Irish Human Rights and Equality Commission, represented by Emily Logan, Chief Commissioner, and Dr Ruth Gallagher, Senior Adviser.

A link to the Official Report of the hearing can be found here:

[Official Report](#)

Introduction

The Committee hearing of January 23, 2019 was convened for the purpose of discussing and reflecting upon the issues and potential risks raised by the United Kingdom's exit from the European Union (referred to hereafter for the sake of brevity as "**Brexit**") in terms of human rights and equality in Ireland, and how we ensure and strengthen the protection and promotion of human rights and equality on the island.

The decision of the people of the United Kingdom by way of referendum in June 2016 to leave the European Union (EU) has enormous and wide-ranging potential implications for the whole island of Ireland. It still remains to be seen whether, or on what terms, Britain will leave. As things stand, however, it is scheduled to depart the EU on March 29 2019. As such, there is a great degree of urgency to addressing all of the issues and potential difficulties arising out of this for Ireland.

Brexit has generated an enormous volume of analysis, debate and commentary in Ireland, both within political and media circles and wider society. However, this discussion has focused overwhelmingly upon issues pertaining to economics, trade, customs checks and the feared reintroduction of a so-called "**hard border**". **There has been relatively little focus upon the implications in terms of** human rights and equality, for the people of Northern Ireland in particular. The Committee is of the view that there is a pressing need for address of this aspect of the Brexit issue; and to this end, it convened a hearing that drew upon expertise from across the island, and from academia, the independent non-governmental sector and the two independent statutory bodies North and South with specific responsibility for protecting and promoting human rights and equality in Ireland. The latter bodies addressed the Committee in their capacity as the Joint Committee of both commissions established under the 1998 Belfast Agreement.

Given the complexity of the matters under discussion, and the urgent timeline for addressing them, this report does not set out an exhaustive account of the hearing that took place or the evidence submitted, nor a detailed consideration of the issues raised. Rather, it presents a short summary of the discussion and identifies the key issues that arose, with a view to highlighting such issues and hopefully prompting a wider political response, at Government level in particular. The opening statements submitted by each of the witness can be read in full at Appendix 4 of the report.

Summary and key issues

Key issue 1 – Status of Irish citizens in Northern Ireland

A central focus of the Committee's engagement was upon the implications of Brexit for the status and rights of Irish citizens in Northern Ireland.

The Belfast Agreement (also referred to as the "Good Friday Agreement") recognises "the birth right of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose."

Fears were expressed by witnesses, however, that Irish citizens in Northern Ireland may be reduced to the status of "second class citizens" after the UK leaves the EU. They will become EU citizens living in a non-member State, thus making their status constitutionally and practically uncertain and insecure. Questions arise as to their legal entitlement to live, work and access health and social services in Northern Ireland. The Committee on the Administration of Justice (CAJ) submitted that there are three possible answers to this:

- 1) The Home Office will regard Irish citizens as "really" British since UK nationality law decrees that most of those born in the UK have British citizenship;
- 2) The problem is resolved by way of the Common Travel Area (CTA); or
- 3) Under the Withdrawal Agreement, EU citizens living in the UK can retain many of their current rights by applying for "settled status."

None of these options are appealing, in the view of Brian Gormally of the CAJ, as they all involve the implication that those who choose Irish identity are in some way second class citizens: "Their rights as full participants in Northern Ireland life would depend on either their denial of their Irish nationality, as yet unknown bilateral agreements between the UK and Ireland about the CTA, or paying to ask the Home Office to graciously allow them leave to live in the land of their birth. The reality is that Irish citizens, born and living in Northern Ireland, have no legal connection to the jurisdiction in which they were born."

The view of the CAJ is that legislation is required in both the UK and Ireland to recognise the particular status of Irish citizens born in Northern Ireland and their unequivocal right to participate fully there on the basis of equality. A treaty enshrining these provisions in international law would repair the damage done to the principle of equality enshrined in the Belfast Agreement.

"If Brexit goes ahead, Irish citizens (in Northern Ireland) will be EU citizens living in a non-member State. What rights do they have to live, work, access health and social services and fully participate in social and political life in that State where they were born?" – Brian Gormally

Key issue 2 – equivalence and non-diminution of rights

Witnesses contended that the citizenship issue reveals how the basic assumptions of equality that underpin the Good Friday Agreement are undermined by Brexit in that Irish citizens would remain EU citizens whereas British citizens would not.

One of the basic principles of the Belfast Agreement is equivalence in the protection of rights North and South. In the view of the CAJ, it is important that some way of guaranteeing that rights are and will in perpetuity be protected in an equivalent manner in both jurisdictions is developed. This could be either in compatible legislation or in a treaty. The IHREC-NIHR Committee expressed its desire to avoid a scenario in which the people of Northern Ireland feel forced to choose their identity based on what they think their post-Brexit entitlements might be.

The Joint Committee noted in its submission that The UK Government committed **in December 2017 to ensuring that "no diminution of rights" is caused by its departure from the European Union". However,** The Draft Withdrawal Agreement published on 14 November 2018 narrowed this commitment to the rights included in the Rights, Safeguards and Equality of Opportunity section of the Good Friday Agreement 1998 insofar as those rights or standards are protected by EU membership. This section of the Agreement was not drafted with EU law in mind. It contains a number of specific commitments to rights but also embraces broader aims, for example, social inclusion, the advancement of women in public life, respect, understanding and tolerance in relation to **linguistic diversity and victims' rights to remember and contribute to a changed society.** It remains to be seen how these concepts will be translated and interpreted with reference to EU law. The NIHR argues that explicit reference should be made as a minimum to EU Directives on parental leave, pregnant workers and rights of victims being covered by the non-diminution commitment.

The Joint Committee has called for the Withdrawal Agreement to provide for the continuing North-South equivalence of rights. It believes that the offer of continued EU citizenship – or equivalent rights – should be extended to all the **'people of Northern Ireland' as defined by the Good Friday Agreement.**

"We believe that the offer of continued EU citizenship – or equivalent rights – should be extended to all the 'people of Northern Ireland' as defined by the Good Friday Agreement, given recognition of 'the birth right of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose'. The last situation we wish to see is one where the people of Northern Ireland feel forced to choose their identity based on what they think their post-Brexit entitlements might be." - IHREC-NIHRCC Joint Committee

Key issue 2 – Full implementation of the Belfast Agreement

Speakers noted that whilst progress has been made since 1998, much more needs to be done to overcome a continuing human rights and equality deficit in Northern Ireland that pre-dates Brexit. Professor Colin Harvey pointed out that the Northern Ireland Human Rights Commission submitted its advice to the British Government as far back as December 2008 that a Bill of Rights be established. Over ten years later, however, there is still no indication that such a Bill of Rights is to be introduced. In the view of Professor Harvey, such an enhanced and inclusive 'constitutional' measure is still required. Advances in relation to single equality legislation, equal marriage, women's rights and language rights, amongst other things, would all make a difference: "It is also apparent that aspects of the 1998 Agreement around identity are not well understood and are not fully reflected in domestic law, policy and practice. Where this is the case, for example, in relation to those who wish to exercise their right to identify and be accepted as Irish, then changes must be made."

Professor Harvey also called for implementation of the Joint Committee's 2011 proposal for a Charter of Rights for the island. This, he believes, would be one means of addressing any damage done to the principle of 'equivalence'. He also argued that in Ireland at present there are many positive steps that could be considered, including enhanced constitutional and other protections for social and economic rights; possible improvements in the effectiveness of the European Convention on Human Rights Act 2003 (as amended); more respect for, and compliance with, existing international human rights obligations; extending rights, including voting rights, to Irish citizens (and others) in Northern Ireland; and ensuring that the potential of existing measures is maximised.

"There is a palpable sense that the promises of the Belfast/Good Friday Agreement have been dishonoured. The failure to implement proposals on a Bill of Rights stands as only one example, as the region falls further and further behind other parts of these islands. The power-sharing institutions are no longer functioning, and the rights and equality crisis is often referenced as the major obstacle that is impeding political progress." – Professor Colin Harvey

Key issue 3 – Protection of border communities and migrant workers

The need to clarify and protect border communities and the rights of migrant workers was emphasised. Whilst witnesses welcomed the express commitment of the respective governments to avoiding a hard border, and confirmation that the Common Travel Area will continue, it was pointed out that leaving the EU changes the legal dynamic underpinning the existing and future arrangements. The formal legal underpinnings are scant and rely on the provisions of EU law particularly governing freedom of movement and other associated rights. The ability of the UK or Irish government to resile from existing or future commitments will be enhanced as a result of the loss of absolute protection of EU law. **In the word of Brian Gormally, “Common Travel Area rights are built on sand.”**

The Joint Commission, in its submission, pointed to research that it launched in November, which was carried out by academics in at Newcastle University, Durham University and the University of Birmingham. The research recommends that the Irish and UK Governments should look to secure a “gold standard” approach through a new intergovernmental Common Travel Area Treaty.

“To safeguard against any dilution of CTA arrangements, the Commission recommends the Irish and UK Governments should agree a Common Travel Area Treaty covering common immigration rules, travel rights, residency rights and related rights to education, social security, work, health, security and justice. Moreover, access to some rights in a cross-border setting remains determined by EU law rather than the Common Travel Area, for example, childcare support within UK Working Tax Credit and Universal Credit for cross-border workers where a child is placed in **childcare facilities within Ireland.**” – NIHRC

Key issue 4 – Right to participation in public life

The question was raised as to how those in Northern Ireland who continue to be EU citizens post-Brexit can exercise those rights in any meaningful way or having any input into the democratic decision-making process of the EU. The IHREC-NIHRD Joint Committee noted that the right to participation in public life is another aspect of the North-South equivalence of rights under the 1988 Agreement. It is therefore important to consider how those in Northern Ireland to whom EU citizenship is to be offered exceptionally after Brexit will continue to be represented in EU democratic institutions.

Professor Harvey called in his submission for Ireland to extend voting rights to Irish citizens (and others) in Northern Ireland. Asked specifically whether he believed it was still possible for the Irish Government to provide the additional two seats allocated to Ireland in the European Parliament to people who are resident in the North, he stated:

"Voting rights for the European Parliament is something that frustrates me. Throughout the Brexit negotiations people have used language referring to imagination, creativity and flexibility, but that has not been evident in the discussions on, for example, voting rights. There is a view that this is possible and doable. If there is political will in this jurisdiction to do this, it can be done. This is an area where a little imagination and creativity should be exercised by the Irish Government with regard to voting rights for the North. It is very disappointing to hear people say it is unrealistic and impossible when it is quite clear that aspects of it are legally doable. Some of that would also address some of the problems that are emerging in discussions around the protocol. One of the criticisms of the protocol on the backstop is about the democratic deficit. Perhaps one way to deal with an aspect of that is around the extension of voting rights in the North and handling the complexities of that, whether that is on this island or in the context of the EU-UK negotiations." – Professor Harvey

Key issue 5 – Evolving justice arrangements

The IHREC-NIHR Joint Committee expressed its concern in ensuring that evolving justice arrangements comply with the commitment to non-diminution of rights. These include the operation of the European arrest warrant; how prisoners are repatriated and transferred between member states; how policing co-operation takes place when the UK is no longer a member of Europol; how information and data are shared for criminal justice purposes; and how cross-Border justice arrangements will take place on the island of Ireland.

“The protection of human rights is closely linked to ensuring accountability for human rights violations, and co-operation in criminal justice investigations is, therefore, critical.” - IHREC-NIHR Joint Committee

Conclusions and Recommendation

In the course of the evidence heard by the Committee, it became abundantly clear that the scheduled departure of the United Kingdom from the European Union at the end of March 2019 poses great risks and huge challenges in terms of preserving rights and equality on the island of Ireland. These challenges include:

- Ensuring that a commitment to 'no diminution of rights' is evident and enforceable in the final withdrawal agreement;
- Safeguarding North/South equivalence of rights on an ongoing basis;
- Guaranteeing equality of citizenship within Northern Ireland;
- Protecting border communities and migrant workers;
- Ensuring a continued right to participate in public life for EU citizens in Northern Ireland; and
- Ensuring that evolving justice arrangements comply with the commitment to non-diminution of rights.

It is paramount that all necessary steps are taken to ensure the proper legislative and constitutional underpinning of both the Good Friday Agreement and the Common Travel Area. This will require the British Government, and most likely the Irish Government also, to introduce legislative reform. The precise nature and scope of that legislative reform is beyond the scope of this short report. Given the urgency and importance of addressing these challenges, the Committee calls upon the Government to establish an appropriate forum, with all-island participation, to conduct a review within three months and to make concrete recommendations and proposals on what changes and steps are necessary.

Appendix 1 – Committee Membership

Joint Committee on Justice and Equality

Deputies



Caoimhghín Ó Caoláin TD
(SF) [Chair]



Colm Brophy TD
(FG)



Jack Chambers TD
(FF)



Clare Daly TD
(I4C)



Peter Fitzpatrick TD
(IND)



Jim O'Callaghan TD
(FF)



Mick Wallace TD
(I4C)

Senators



Frances Black

(CEG)

Lorraine Lee

(FF)

Clifford-

Martin Conway

(FG)

Niall Ó Donnghaile

(SF)

Notes:

1. Deputies nominated by the Dáil Committee of Selection and appointed by Order of the Dáil on 16th June 2016.
2. Senators nominated by the Seanad Committee of Selection and appointed by Order of the Seanad on 20th July 2016.

Appendix 2 - Orders of Reference

a) Scope and Context of Activities of Committees (*derived from Standing Orders – DSO 84, SSO 70*)

- 1) The Joint Committee may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders;
- 2) Such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil/and or Seanad;
- 3) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Committee of Public Accounts pursuant to Standing Order 186 and/or the Comptroller and Auditor General (Amendment) Act 1993;
- 4) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Joint Committee on Public Petitions in the exercise of its functions under Standing Order 111A; and

The Joint Committee shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—

- (i) a member of the Government or a Minister of State, or
- (ii) the principal office-holder of a body under the aegis of a Department or which is partly or wholly funded by the State or established or appointed by a member of the Government or by the Oireachtas:

Provided that the Chairman may appeal any such request made to the Ceann Comhairle, whose decision shall be final.

- 5) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice given by the Chairman of the Select Committee, waives this instruction on motion made by the Taoiseach pursuant to Standing Order 28. The Chairmen of Select Committees shall have responsibility for compliance with this instruction.

b) Functions of Departmental Committees (derived from Standing Orders – DSO 84A and SSO 70A)

(1) The Select Committee shall consider and report to the Dáil on—

- (a) such aspects of the expenditure, administration and policy of a Government Department or Departments and associated public bodies as the Committee may select, and
- (b) European Union matters within the remit of the relevant Department or Departments.

(2) The Select Committee may be joined with a Select Committee appointed by Seanad Éireann for the purposes of the functions set out in this Standing Order, other than at paragraph (3), and to report thereon to both Houses of the Oireachtas.

(3) Without prejudice to the generality of paragraph (1), the Select Committee shall consider, in respect of the relevant Department or Departments, such—

- (a) Bills,
- (b) proposals contained in any motion, including any motion within the meaning of Standing Order 187,
- (c) Estimates for Public Services, and
- (d) other matters

as shall be referred to the Select Committee by the Dáil, and

- (e) Annual Output Statements including performance, efficiency and effectiveness in the use of public moneys, and
- (f) such Value for Money and Policy Reviews as the Select Committee may select.

(4) Without prejudice to the generality of paragraph (1), the Joint Committee may consider the following matters in respect of the relevant Department or Departments and associated public bodies:

- (a) matters of policy and governance for which the Minister is officially responsible,
- (b) public affairs administered by the Department,
- (c) policy issues arising from Value for Money and Policy Reviews conducted or commissioned by the Department,
- (d) Government policy and governance in respect of bodies under the aegis of the Department,
- (e) policy and governance issues concerning bodies which are partly or wholly funded by the State or which are established or appointed by a member of the Government or the Oireachtas,
- (f) the general scheme or draft heads of any Bill
- (g) any post-enactment report laid before either House or both Houses by a member of the Government or Minister of State on any Bill enacted by the Houses of the Oireachtas,
- (h) statutory instruments, including those laid or laid in draft before either House or both Houses and those made under the European Communities Acts 1972 to 2009,
- (i) strategy statements laid before either or both Houses of the Oireachtas pursuant to the Public Service Management Act 1997,
- (j) annual reports or annual reports and accounts, required by law, and laid before either or both Houses of the Oireachtas, of the Department or bodies referred to in subparagraphs (d) and (e) and the overall performance and operational results, statements of strategy and corporate plans of such bodies, and
- (k) such other matters as may be referred to it by the Dáil from time to time.

(5) Without prejudice to the generality of paragraph (1), the Joint Committee shall consider, in respect of the relevant Department or Departments—

- (a) EU draft legislative acts standing referred to the Select Committee under Standing Order 114, including the compliance of such acts with the principle of subsidiarity,
- (b) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,
- (c) non-legislative documents published by any EU institution in relation to EU policy matters, and
- (d) matters listed for consideration on the agenda for meetings of the relevant EU Council of Ministers and the outcome of such meetings.

(6) Where the Select Committee has been joined with a Select Committee appointed by Seanad Éireann, the Chairman of the Dáil Select Committee shall also be the Chairman of the Joint Committee.

(7) The following may attend meetings of the Select or Joint Committee, for the purposes of the functions set out in paragraph (5) and may take part in proceedings without having a right to vote or to move motions and amendments:

- (a) members of the European Parliament elected from constituencies in Ireland, including Northern Ireland,
- (b) members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and
- (c) at the invitation of the Committee, other members of the European Parliament.

(8) The Joint Committee may, in respect of any Ombudsman charged with oversight of public services within the policy remit of the relevant Department or Departments, consider—

- (a) such motions relating to the appointment of an Ombudsman as may be referred to the Committee, and

(b) such Ombudsman reports laid before either or both Houses of the Oireachtas as the Committee may select: Provided that the provisions of Standing Order 111F apply where the Select Committee has not considered the Ombudsman report, or a portion or portions thereof, within two months (excluding Christmas, Easter or summer recess periods) of the report being laid before either or both Houses of the Oireachtas.

c) Powers of Committees (derived from Standing Orders – DSO 85, 114 and 116 and SSO 71, 107 and 109)

The Joint Committee has: -

(1) power to take oral and written evidence and to print and publish from time to time minutes of such evidence taken in public before the Select Committee together with such related documents as the Select Committee thinks fit;

(2) power to invite and accept oral presentations and written submissions from interested persons or bodies;

(3) power to appoint sub-Committees and to refer to such sub-Committees any matter comprehended by its orders of reference and to delegate any of its powers to such sub-Committees, including power to report directly to the Dáil;

(4) power to draft recommendations for legislative change and for new legislation;

(4A) power to examine any statutory instrument, including those laid or laid in draft before either House or both Houses and those made under the European Communities Acts 1972 to 2009, and to recommend, where it considers that such action is warranted, whether the instrument should be annulled or amended;

(4B) for the purposes of paragraph (4A), power to require any Government Department or instrument-making authority concerned to submit a Memorandum to the Select Committee explaining any statutory instrument

under consideration or to attend a meeting of the Select Committee for the purpose of explaining any such statutory instrument: Provided that such Department or authority may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Dáil;

(5) power to require that a member of the Government or Minister of State shall attend before the Select Committee to discuss policy for which he or she is officially responsible: Provided that a member of the Government or Minister of State may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Dáil: and provided further that a member of the Government or Minister of State may request to attend a meeting of the Select Committee to enable him or her to discuss such policy;

(6) power to require that a member of the Government or Minister of State shall attend before the Select Committee to discuss proposed primary or secondary legislation (prior to such legislation being published) for which he or she is officially responsible: Provided that a member of the Government or Minister of State may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Dáil: and provided further that a member of the Government or Minister of State may request to attend a meeting of the Select Committee to enable him or her to discuss such proposed legislation;

(6A) power to require that a member of the Government or Minister of State shall attend before the Select Committee and provide, in private session if so requested by the member of the Government or Minister of State, oral briefings in advance of meetings of the relevant EU Council of Ministers to enable the Select Committee to make known its views: Provided that the Committee may also require such attendance following such meetings;

(6B) power to require that the Chairperson designate of a body or agency under the aegis of a Department shall, prior to his or her appointment, attend before the Select Committee to discuss his or her strategic priorities for the role;

(6C) power to require that a member of the Government or Minister of State who is officially responsible for the implementation of an Act shall attend before

a Select Committee in relation to the consideration of a report under Standing Order 164A;

(7) subject to any constraints otherwise prescribed by law, power to require that principal office-holders in bodies in the State which are partly or wholly funded by the State or which are established or appointed by members of the Government or by the Oireachtas shall attend meetings of the Committee, as appropriate, to discuss issues for which they are officially responsible: Provided that such an office-holder may decline to attend for stated reasons given in writing to the Committee, which may report thereon to the Dáil;

(8) power to engage, subject to the consent of the Houses of the Oireachtas Commission, the services of persons with specialist or technical knowledge, to assist it or any of its sub-Committees in considering particular matters; and

(9) power to undertake travel, subject to—

(a) such recommendations as may be made by the Working Group of Committee Chairmen under DSO 108(2)(a) and SSO 104(2); and

(b) the consent of the Houses of the Oireachtas Commission, and normal accounting procedures.

(10) In accordance with Articles 6 and 8 of Protocol No. 2 to the Treaty on European Union and the Treaty on the Functioning of the European Union (Protocol on the Application of the Principles of Subsidiarity and Proportionality) as applied by sections 7(3) and 7(4) of the European Union Act 2009, the Committee has the power to—

consider whether any act of an institution of the European Union infringes the principle of subsidiarity (DSO 116; SSO 109); and

form a reasoned opinion that a draft legislative act (within the meaning of Article 3 of the said Protocol) does not comply with the principle of subsidiarity (DSO 114 and SSO 107).

Appendix 3 – Opening Statements

Oireachtas Joint Committee on Justice and Equality

Opening statement by Professor Colin Harvey, School of Law, Queen's University Belfast

23rd January 2019

Introduction

Thank you Chair and Committee members for the invitation to address this meeting. The aim of the discussion is to reflect on ‘the issues and potential risks raised by Brexit in terms of human rights and equality in Ireland, and how we ensure and strengthen the protection and promotion of human rights and equality on the island’. In this opening statement the intention is to consider three themes: thinking about context; Brexit, human rights and equality; and strengthening the protection and promotion of human rights and equality on the island.

Thinking about Context

It makes little sense to consider the impact of Brexit without acknowledging the pre-existing and continuing human rights and equality deficit in N. Ireland. There is a palpable sense that the promises of the Belfast/Good Friday Agreement have been dishonoured. The failure to implement proposals on a Bill of Rights stands as only one example, as the region falls further behind other parts of these islands. The power-sharing institutions are no longer functioning, and the rights and equality crisis is often referenced as the major obstacle that is impeding political progress (more on this below).

Although there is much work still to be done, advances since 1998 must be acknowledged. The Human Rights Act 1998 remains in place (for now), with a Human Rights Commission and an Equality Commission (among other institutions) still there. There is a patchwork of equality and anti-discrimination provisions, including the s 75 ‘constitutional’ equality guarantee. The region is fortunate to have robust civil society organisations working hard to protect and promote rights and equality. The UK remains bound by a significant range of international human rights obligations, and efforts are ongoing to ensure that these matter in practice. In difficult times there is always an imperative to make use of the tools that are available and maximise their potential. However, be in no doubt that the context in N. Ireland is troubling. There is a genuine crisis; there is an urgency about the need for extensive legal and policy change.

Brexit, Human Rights and Equality

The decision to leave the EU was taken on the basis of a unitary UK-wide vote. In such a scenario, votes in N. Ireland were never likely to be decisive (this statement may also be true

of a second referendum, if it is conducted on the same basis). However, it remains relevant to note that the region voted to remain, and that Brexit is therefore an unwelcome imposition.

It was possible that the Brexit discussion might have had an excessively narrow focus. That this did not turn out to be the case is the result of concerted efforts by individuals and organisations on this island (that includes civil society organisations, commissions, political parties, academics and many others).

EU law is complex and evolving; it brings with it guarantees on rights and equality of significance. The EU Charter of Fundamental Rights is often cited as one example of an innovative approach (and the British Government's attitude to it is well known). EU law provides substantive protections *and* a strong measure of practical enforcement. The supremacy of EU law over domestic law gives this legal order a practical edge: there is nothing quite like it in the British constitutional system. Its impact is particularly notable in the rights and freedoms that it offers to EU citizens, and in fields such as equality and anti-discrimination law, and in advancing socio-economic protections in, for example, the context of employment law. With the assistance of the EU Charter and the general principles of EU law, rights have played an increasingly prominent role within the EU, and in the interpretation and implementation of EU law.

Common membership of the EU was a core part of the peace-building process, in terms that are now well known and accepted. But it is the freedoms that developed with the EU that assisted in easing tensions on the island. For example, facilitating, enabling and supporting the complex lives that people live in the border areas.

The Withdrawal Agreement and the Political Declaration speak to matters of human rights and equality. The rights of EU citizens and British citizens are covered extensively, with an elaborate set of arrangements to be put in place internationally and domestically. The Protocol on Ireland/N. Ireland includes references to rights and equality. The language reflects an understanding of what might be possible (in the context of a Withdrawal Agreement between the EU and the UK) and the different phases of the process. If this Agreement does form the basis for the UK's withdrawal, and the Protocol is operationalised, then detailed attention will turn to the adopted approach. A number of points are worth highlighting here:

- The recital notes the role of EU law in supporting the rights, safeguards and equality elements of the Belfast/Good Friday Agreement;
- The recital recognises the rights of Irish citizens in N. Ireland as EU citizens;
- Article 4 gives prominence to the rights, safeguards and equality section of the Belfast/Good Friday Agreement;
- There is an obligation on the UK to ensure 'no diminution' resulting from withdrawal from the EU (with respect to the above section of the Belfast/Good Friday Agreement);
- This includes listed areas of equality and anti-discrimination law (Annex 1);
- Implementation of Article 4 is to be through 'dedicated mechanisms';

- The UK must facilitate the work of the relevant human rights and equality bodies (including the Joint Committee);
- Within prescribed constraints, the UK and Ireland may continue to operate the Common Travel Area, and the UK must ensure Ireland is able to do so without affecting Ireland's EU law obligations;
- The notion of a single customs territory brings with it the idea of a 'level playing field' and this includes significant protections on, for example, 'labour and social standards';
- There will be a specialised Committee on the Implementation of the Protocol and the relevant human rights and equality bodies can draw matters to its attention;
- It is apparent that aspects of EU law relating to rights will inform the implementation and enforcement of this Agreement (including, where relevant, a role for the CJEU and its case law).

The terms of the Withdrawal Agreement, and whatever future relationship that emerges, can never replace the benefits of remaining in the EU; that is a matter of simple fact. The Protocol is an attempt to address the unique circumstances of N. Ireland by guaranteeing no hard border, ensuring continued North-South co-operation, and protecting the Belfast/Good Friday Agreement in all its parts. Rights and equality have found a place in the Protocol (and in the Withdrawal Agreement as a whole), and this fact is welcome. But it must be viewed with the context sketched above fully in mind, including the practical experience of inadequate implementation and enforcement of past promises, and the justifiable suspicion that this generates.

Strengthening the Protection and Promotion of Human Rights and Equality on the Island

Brexit has prompted immediate and pressing questions of crisis management, particularly the prospect of a no-deal outcome. Unsurprisingly, given the nature of the Belfast/Good Friday Agreement, it is encouraging larger constitutional questions. For example, the need for a constitutional conversation about how this island is shared in the future. Whatever configurations emerge (including full restoration of the power-sharing institutions) it is useful to acknowledge the value of a *human* rights framework. This will help to retain a focus on the rights of everyone on the island of Ireland, and this connects directly with a vision for the future that concentrates on *people* and their well-being. It also has the advantage of being couched within overarching international legal standards and institutions, as well as existing constitutional and other guarantees.

At present, there are several things that could be done to strengthen the existing position. In N. Ireland there is a need to revisit the work on a Bill of Rights. The Northern Ireland Human Rights Commission submitted its advice to the British Government on 10 December 2008 (I was a commissioner at the time). That process is now badly stalled, and over 10 years later there is still no Bill of Rights. Such an enhanced and inclusive 'constitutional' measure is still required. Advances in relation to single equality legislation, equal marriage, women's rights, and language rights, among other things, would all make a major difference. It is also apparent that aspects of the 1998 Agreement around identity are not well understood and are not fully reflected in domestic law, policy and practice. Where this is the case, for example in relation to those who wish to exercise their right to identify and be accepted as Irish, then

changes must be made. That is equally the case with the Common Travel Area, where again there is a need for effective ‘formalisation’ (in the British *and* Irish contexts). Remember also that the British Government is still talking about repealing the Human Rights Act 1998 and replacing it with a British Bill of Rights (once Brexit is out of the way).

It is equally vital that existing statutory institutions are encouraged and supported to be as robust as possible. A further concern for the future is the erosion of critical voices from civil society; N. Ireland has benefited from a vigilant and engaged community and voluntary sector and that work must continue. Attention must turn to the pressing matter of resources and capacity building.

On an all-island basis it should be recalled that the Joint Committee submitted advice on a Charter of Rights for the island in 2011. In the context of Brexit, and more generally, it would be wise to return to that work and to that project. There is a real risk that the principle of ‘equivalence’ will be further damaged, and a Charter is one way to address that. One welcome development in recent years is the renewal of the Joint Committee. This should be encouraged, and serious thought should be given to further expansion. There are many areas where the Joint Committee could make a significant contribution, and more attention might also be paid to how to ensure more extensive civil society participation and engagement in its efforts.

If there is a more intensive all-island conversation about the future constitutional status of N. Ireland (and recall that people on this island have a right to determine the constitutional future of the region) then human rights and equality must feature centrally in that. As this discussion gains momentum, it is to be hoped that the planning and preparation will include reference to the sort of new Ireland that people want.

In Ireland at present, there are many things that could be considered: enhanced constitutional and other protections for social and economic rights; possible improvements in the effectiveness of the European Convention on Human Rights Act 2003 (as amended); more respect for, and compliance with, existing international human rights obligations; extending rights, including voting rights, to Irish citizens (and others) in N. Ireland; and ensuring that the potential of existing measures is maximised.

Conclusion

The current crisis is generating considerable anxiety and fear about the future. People are right to be worried about the consequences for human rights and equality. There is an ongoing and commendably impressive mobilisation on this island and beyond in response to the threat that Brexit poses. The point of this opening statement is to suggest that there are solutions, many of which have been around for some time. The problem remains one of comprehensive implementation rather than the absence of credible proposals and suggestions. Is there the political appetite and desire to face the human rights and equality crisis in N. Ireland? Are both governments and the political parties willing to confront this challenge in a meaningful way through the necessary legal and policy reforms? Will the commitments made

as part of the Brexit negotiations be implemented and enforced effectively? The answers to these questions will determine the fate of this island for decades to come.

Further Reading:

1. See the work undertaken by the *BrexitLawNI* team, in particular the six policy reports available at: <https://brexitlawni.org/>
2. Colin Harvey, ‘Brexit, Borders and Human Rights’ <<http://qpol.qub.ac.uk/brexit-borders-human-rights/>> accessed 18 January 2019
3. Colin Harvey and Anne Smith, ‘The Return of the Bill of Rights for Northern Ireland?’ <<http://qpol.qub.ac.uk/return-bill-rights-ni/>> accessed 18 January 2019
4. Anne Smith and Colin Harvey, *Where Next for a Bill of Rights for Northern Ireland?* (2018) <<http://qpol.qub.ac.uk/where-next-for-a-bill-of-rights-for-northern-ireland/>> accessed 18 January 2019
5. Colin Harvey, ‘From civil rights to human rights?’ <<http://ukandeu.ac.uk/from-civil-rights-to-human-rights/>> accessed 18 January 2019
6. Colin Harvey, ‘Safeguarding Rights and Equality in Northern Ireland’ <<http://qpol.qub.ac.uk/safeguarding-rights-equality-northern-ireland/>> accessed 18 January 2019
7. Colin Harvey, ‘Brexit and Human Rights in Northern Ireland’ <<https://brexitlawni.org/blog/brexit-and-human-rights-in-northern-ireland/>> accessed 18 January 2019
8. Colin Harvey, ‘What Price Human Rights and Equality in Northern Ireland?’ <<http://ohrh.law.ox.ac.uk/what-price-human-rights-and-equality-in-northern-ireland/>> accessed 18 January 2019
9. Colin Harvey, ‘Sharing the Island: Brexit, Constitutional Imagination and the Right of Self-Determination’ <<http://qpol.qub.ac.uk/brexit-constitutional-imagination-self-determination/>> accessed 18 January 2019
10. Colin Harvey, ‘Northern Ireland and a Bill of Rights for the UK’ (2016, British Academy) <https://www.thebritishacademy.ac.uk/sites/default/files/NI%20BOR%20178_0.pdf> accessed 18 January 2019



Promoting Justice / Protecting Rights

Opening Statement to the Oireachtas Joint Committee on Justice and Equality

Wednesday 23rd January 2019

I would like to thank the Chair and members of this Joint Committee for the invitation to give evidence today. As you know, the Committee on the Administration of Justice, CAJ, is a Belfast based independent human rights organisation which finds its analysis on international standards and takes no position on the constitutional position of Northern Ireland.

There is no doubt that Brexit would damage and reduce protections for human rights and equality in a range of different ways. However, today I wish to concentrate on the damage that may be done – and to an extent has already been done – to the peace agreement which has brought twenty years of relative peace and stability to our island. Since conflict means a bonfire of rights, defending the peace is the first priority for human rights activists.

At the moment, we still do not know if Brexit will actually happen or, if it does, in what particular way. However, the events of the past two and a half years have already damaged the peace settlement and relations across this island. We presently have no devolved institutions in Northern Ireland and the two major political parties are on opposite sides of an increasingly fractious debate. In our view, whatever happens, we need to rebuild our intertwined societies on the basis of a new dispensation based on human rights and equality. In the coming years, there will be further dislocation and disagreement, whatever happens with Brexit, as the constitutional status of Northern Ireland again comes to the fore with a probable Border Poll. We need a resilient society and politics with institutions across the island which people can trust to be fair and transparent. In this briefing we wish to make some proposals that come out of our enhanced understanding of the weaknesses and pressure points that the Brexit debate process has laid bare.

The citizenship issue shows how basic assumptions of the Good Friday Agreement have been undermined. It recognised the birthright of the people of Northern Ireland to hold Irish or British citizenship on the basis of equality. The basic breach of this principle of equality by Brexit would be that Irish citizens **would remain EU citizens whereas British citizens wouldn't. It amounts to a new** focus of division between the two main communities here. But it has also become clear that Brexit could make the status of Irish citizens born in Northern Ireland constitutionally and practically insecure. If Brexit goes ahead, Irish citizens will be EU citizens living in a non-member state. What rights do they have to live, work, access health and social services and fully participate in social and political life in that state where they were born? There are several possible answers to that.

The first possibility is that the Home Office **will regard Irish citizens as "really" British** since UK nationality law decrees that most of those born in the UK have British citizenship. The second possibility is that the Common Travel Area will sort all this out. In fact, as the Human Rights Commission has suggested, **Common Travel Area rights are "built on sand."** The third possibility is that, under the Withdrawal Agreement, EU citizens living in the UK can retain many of **their current rights by applying for "settled status."** You must pay £65 and make an application to the Home Office before the Transition Period ends.

None of these options is appealing as they all involve the implication that those who choose Irish identity are in some way second class citizens. Their rights as full participants in NI life would depend on either a denial of their Irish nationality, as yet unknown bilateral agreements between the UK and Ireland about the CTA or paying to ask the Home Office to graciously allow them leave to live in the land of their birth. The reality is that Irish citizens, born and living in Northern Ireland, have no legal connection to the jurisdiction in which they were born.

Legislation is needed both in the UK and Ireland to recognise the particular status of Irish citizens born in Northern Ireland and their unequivocal right to participate fully in that region and as fully as feasible in Irish society and full equality in the rights the two categories can access. A treaty enshrining these provisions in international law would repair the damage done to the principle of the Agreement.

The other measures to protect rights we propose are the following:

To prevent a racist immigration policy and the territory of Northern Ireland **becoming “one big border,”** we propose that the Irish Government reject any practices of racial profiling and begin an open and transparent debate about how immigration into the Common Travel Area is managed.

The Charter of Rights for the island of Ireland signed by political parties should be revisited: commitments to human rights and equality based decision-making, with all the principles of transparency and public involvement that would involve, could be the basis of an island-wide code of political behaviour.

Equivalence in the protection of rights North and South is a basic principle of the Agreement: it is important that some way of guaranteeing that rights are and will in perpetuity be protected in an equivalent manner in both jurisdictions is developed, whether in compatible legislation or treaty.

Abuses of power, sectarian decision making and a corrosive lack of trust between the two major parties in the North led to the downfall of the devolved institutions. We need a human rights and equality based return to devolution based on the full implementation of the rights provisions of the peace settlement, addressing international rights obligations and working fully within the existing rules.

Brexit threatens human rights and equality protections in a number of specific ways. However, its main impact has already been to destabilise both the provisions of the peace settlement and the relations between the two jurisdictions on this island. The current uncertainty and political turmoil may subside to an extent, especially if Brexit does not actually go ahead, but trust and confidence have already been undermined. Questions of identity and citizenship have been opened up in a way not seen since well before the Agreement – those genies cannot be put back in the bottle. We therefore need a set of measures, across the island and, where possible, on the basis of formal treaties between the two sovereign states involved, which can stabilise trust and build resilience as we move into a future of change and challenge.

Opening statement to the Oireachtas Joint Committee on Justice and Equality on potential risks for human rights and equality raised by Brexit

Introduction

The Northern Ireland Human Rights Commission (the Commission) has worked productively with the Irish Human Rights and Equality Commission (IHREC) through the joint committee as established under the Belfast (Good Friday) Agreement to protect and promote the strongest possible human rights and **equality protections as a result of the United Kingdom's decision to leave the European Union in June 2016.**

We have also worked effectively in tandem with the Equality Commission for Northern Ireland (ECNI) in discussions with the UK government on the preservation and development of human rights and equality within the draft withdrawal agreement between the UK government and EU 27 member states.

The engagement with the Irish government, Article 50 Task Force and more recently the UK government has been meaningful, valuable and much appreciated.

We entered into the discussions as a joint committee with six key aims, namely:

- **Ensure a commitment to 'no diminution of rights' is evident and enforceable in the final Withdrawal Agreement**
- Safeguarding North/South equivalence of rights on an ongoing basis
- Guarantee equality of citizenship within Northern Ireland
- Protect border communities and migrant workers
- Ensure evolving justice arrangements comply with commitment to non-diminution of rights

- Ensure a continued right to participate in public life for EU citizens in Northern Ireland.

Our recommendations sought to preserve existing protection alongside at least keeping pace with human rights and equality protections as they develop within the EU in the future.

The Commission's view is that substantial progress has been made within the Withdrawal Agreement but there also remain significant gaps.

The Withdrawal Agreement

The Ireland/Northern Ireland protocol contains a number of important commitments including:

- **The UK government's commitment to ensuring no diminution of the rights contained within the Rights, Safeguards and Equality of Opportunity section of the Belfast (Good Friday) Agreement as a result of leaving the EU.**
- That a number of specific EU directives will continue to have effect in Northern Ireland covering equal treatment in the access of supply of goods and services, in employment, self-employment and social security alongside equal treatment between persons of racial or ethnic origin¹. This commitment covers both existing protection and keeping pace with future EU law protection.
- The UK and Irish government will continue to be able to make arrangements for the Common Travel Area (CTA) including offering more favourable treatment than to other EU citizens in some circumstances.
- Maintaining existing North-South co-operation in a number of areas including justice and security and may continue to build on the

provision of the Good Friday (Belfast) Agreement in other areas of North-South co-operation while respecting EU law.

- Putting in place institutional arrangements to oversee the protocol (e.g. a specialised committee and a dedicated mechanism comprised of the Commission, ECNI - and the joint committee of the Commission and IHREC). These arrangements, in turn, fit into the architecture of oversight, monitoring, dispute resolution and enforcement mechanisms contained within the Withdrawal Agreement as a whole.

Outstanding issues

There remain a number of outstanding issues. First, determining the actual scope and extent of the protections provided by the non-diminution commitment within the Rights, Safeguards and Equality of Opportunities section of the Belfast (Good Friday) Agreement. The section of the Agreement was not drafted with EU law in mind. It contains a number of specific commitments to rights but also embraces broader aims, for example, social inclusion, the advancement of women in public life, respect, understanding and tolerance in relation to **linguistic diversity and victims' rights to remember and contribute to a changed society**. How these concepts will be translated and interpreted with reference to EU law remains to be seen. The Commission and ECNI have argued strongly that explicit reference should be made as a minimum to EU directives on parental leave, pregnant workers and rights of victims being covered by the non-diminution commitment.

Second, there is the UK government's decision to no longer be bound by the EU Charter of Fundamental Rights (EU Charter). The EU Charter largely mirrored the rights contained in the European Convention on Human Rights but went further by including a number of economic and social rights.

The Belfast (Good Friday) Agreement envisaged a Bill of Rights for Northern Ireland supplementing rights contained in the European Convention on Human Rights (ECHR) to reflect the particular circumstances of Northern Ireland drawing on international instruments and experience. In effect, the Bill of Rights **was to provide a 'Convention plus' approach to human rights protection.** Though post-dating the Belfast (Good Friday) Agreement and only applying it in conjunction with EU law, the Charter remains the closest equivalent we have to a **'Convention plus' approach contemplated in a Bill of Rights.**

It has been argued that while the draft Withdrawal Agreement does not incorporate the Charter into Northern Ireland law, other provisions within the Withdrawal Agreement mean that the Charter would apply extensivelyⁱⁱ. Moreover, a majority of substantive rights set out in the EU Charter would continue to have some measure of protection under domestic law after Brexit through common law and other statutory mechanisms. Nonetheless, the loss of the EU Charter in its current form would lead to a loss of legal certainty and consistency as legal cases would have to argue whether the EU Charter applies as well as how it applies. In addition, the EU Charter is an accessible document and the wider understanding would be hampered through the failure to incorporate it within the Draft Withdrawal Agreement. The retention of the EU Charter would also provide a degree of continuing equivalence across the island of Ireland and is therefore in line with the spirit of the Belfast (Good Friday) Agreement. For all these reasons, the Commission continues to hold that the EU Charter should be retained for Northern Ireland at least until a Bill of Rights for Northern Ireland is introduced.

Third, while confirmation that the Common Travel Area (CTA) will continue is welcome, leaving the EU changes the legal dynamic underpinning the existing and future arrangements. The formal legal underpinnings are scant and rely on the provisions of EU law particularly governing freedom of movement and other associated rights. The ability of the UK or Irish government to resile from existing or future commitments will be enhanced as a result of the loss of absolute protection of EU lawⁱⁱⁱ. To safeguard against any dilution of CTA

arrangements, the Commission recommends the Irish and UK governments should agree a Common Travel Area treaty covering common immigration rules, travel rights, residency rights and related rights to education, social security, work, health, security and justice. Moreover, access to some rights in a cross-border setting remain determined by EU law rather than the Common Travel Area, for example, childcare support within UK Working Tax Credit and Universal Credit for cross-border workers where a child is placed in childcare facilities within Ireland.

Fourth, the extent of the commitment made in the December 2017 Report that '**the people who are Irish citizens will continue to enjoy rights as EU citizens**' remains unclear. Focussing solely on those who identify as Irish within Northern Ireland creates potential for a move towards unequal citizenship counter to the principles of the Belfast (Good Friday) Agreement unless these rights are extended to all the people of Northern Ireland. **The Commission's assessment is** that the ambition of the initial intentions from within the EU 27 have been significantly tempered. Clarity as to the specific rights and entitlements, and how they will be accessed in practice, would be welcome.

Fifth, long-term arrangements on issues of justice, security and data-sharing arrangements have yet to be agreed. This includes the continuation of the European Arrest Warrant. The Court of Justice of the European Union (CJEU) recently held that while the UK remains in the EU and EU law protections are in place, the European Arrest Warrant should normally be applied^{iv}. These protections include access to the CJEU through a member state's domestic court.

Given the UK government's 'red line' of no longer being subject to the CJEU, this raises the question of how oversight and redress with equivalent enforcement powers will be agreed and maintained between the EU 27 and the UK government.

Sixth, EU law has provided significant rights protections for people living in Northern Ireland. The provisions linked to the relevant sections of the Belfast (Good Friday) Agreement contained in the Ireland/Northern Ireland protocol would ensure a degree of continuing protection. Moreover, any future trade agreement between the UK and EU 27 may contain guarantees of rights within both the UK and the EU 27 though the focus is unlikely to be on Northern Ireland specifically. However, outside of the Withdrawal Agreement, future trade and other agreements, there is the likelihood of Northern Ireland diverging from Ireland and other EU member states in EU led rights protections. Whether this occurs and what are the ramifications of such divergence remains to be seen.

Finally, the value of a dedicated mechanism envisaged under Article 4 of the Ireland/Northern Ireland protocol will, in large measure, be determined by the statutory powers and resources provided to the Commissions. Alongside this, the Commission and ECNI have argued strongly that there must be individual rights of enforcement with access to legal aid for those on low incomes. In essence, the Commissions must not be the only option when it comes to **enforcement of the 'non diminution commitment' contained within the Protocol**. Separate individual rights of enforcement are not confirmed within the Protocol though the Commission understands that the UK government is amenable to this demand.



Oireachtas Joint Committee on Justice and Equality

23 January 2019

Opening Statement by Ms Emily Logan,

Chief Commissioner, Irish Human Rights and Equality Commission

Good morning. I would like to thank the Committee for the invitation to discuss the issues and potential risks raised by Brexit in terms of human rights and equality in Ireland. I am very pleased to be here with my colleagues from the Northern Ireland Human Rights Commission, addressing the Committee in our capacity as the Joint Committee of both commissions, on this occasion.

Human Rights and the Good Friday Agreement

The Belfast/Good Friday Agreement of 1998 has legal status within international law as a treaty lodged with the United Nations.¹ The Agreement laid down not only a mandate for both national human rights institutions, but also the mechanism to ensure strong cooperation between them by way of a Joint Committee with representatives of the two bodies, North and South 'as a forum for consideration of human rights issues in the island of Ireland'.

Today is an important opportunity to recall the commitments made back in 1998 to respect and protect human rights and equality of opportunity. Since 1998, there has been substantial progress towards a lasting resolution of the conflict in Northern Ireland, grounded in its human rights and equality provisions. However, as you know, the human rights and equality framework contained in the Agreement assumed that the UK and

¹ The Good Friday Agreement is in turn annexed to a treaty between the two Governments ('the British-Irish Agreement' Registered with the United Nations - UN Treaty Series No. I-36776. <https://peacemaker.un.org/uk-ireland-good-friday98>

Ireland would continue to be members of the EU. Although the Joint Report of December 2017 committed to protecting the Agreement ‘in all its parts’, Brexit negotiations currently depart from that common framework creating risks for both rights and remedies.

Work of the IHREC-NIHRCC Joint Committee

While the Joint Committee has worked collaboratively for many years, I will limit my remarks to the Joint Committee’s work relevant to today’s discussion.

March 2018 Policy Statement

As a Joint Committee, we were very pleased to see the UK’s commitment to no diminution of rights as to protecting the Good Friday Agreement, in the Joint Report of December 2017. In March 2018, the Joint Committee published its policy statement on the matter and made six key recommendations that ought to be adhered to in the UK-EU negotiations on the Withdrawal Agreement that followed:²

1. We strongly recommended the retention of the EU Charter of Fundamental Rights in UK law, as well as a clear and enforceable commitment to no diminution of human rights and equality standards following withdrawal, rather than simply as a result of it. The UK Government committed in December 2017 to ensuring that “**no diminution of rights** is caused by its departure from the European Union”,³ The Draft Withdrawal Agreement published on 14 November 2018 narrowed this commitment to the rights included in the Rights, Safeguards and Equality of Opportunity section of the Good Friday Agreement 1998 insofar as those rights or standards are protected by EU membership.

² Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission Policy statement on the United Kingdom withdrawal from the European Union, March 2018, https://www.ihrec.ie/app/uploads/2018/03/Joint-Committee-IHREC-NIHRCC-Brexit-Policy-Statement_March-2018.pdf

³ Joint EU-UK Report on Phase 1 of Negotiations, 8 December 2017, paragraph 52

2. We called for the Withdrawal Agreement to provide for the **continuing North-South equivalence of rights**.
3. We believe that the offer of **continued EU citizenship – or equivalent rights – should be extended to all the ‘people of Northern Ireland’** as defined by the Good Friday Agreement, given recognition of ‘the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose’. The last situation we wish to see is one where the people of Northern Ireland feel forced to choose their identity based on what they think their post-Brexit entitlements might be.
4. The commitment to avoiding a hard border during negotiations is welcome. We believe that any increase in border controls would impact negatively on the exercise of rights. People on both sides of the border between Ireland and Northern Ireland regularly cross the border to exercise their right to work, to access public services including health and education and to visit family, for example, and the **protection of border communities and migrant workers** remains paramount when we consider issues that go beyond the Common Travel Area arrangements, in terms of protecting rights.
5. Ensuring **evolving justice arrangements** comply with commitment to non-diminution of rights is of concern to the Joint Committee. These include the operation of the European Arrest Warrant; how prisoners are repatriated and transferred between member states; how policing cooperation takes place when the UK is no longer a member of Europol; how information and data is shared for criminal justice purposes; and how cross-border justice arrangements will take place on the island of Ireland. The protection of human rights is closely linked to ensuring accountability for human rights violations and cooperation in criminal justice investigations are therefore critical.
6. The **right to participation in public life** is another aspect of the North-South equivalence of rights under the 1998 Agreement. It is important to consider how those in Northern Ireland to whom EU citizenship is to be offered exceptionally after Brexit will continue to be represented in EU democratic institutions.

These six key recommendations became the basis of our meetings on Brexit throughout 2018. As the Joint Committee, we met with Tánaiste Simon Coveney T.D., and with the Brexit Coordination team in the Department of Foreign Affairs and Trade. We met with ambassadors and key officials in the UK and Irish permanent missions to the UN in Geneva and to the EU in Brussels. We met with the Article 50 Task Force three times in 2018, including with Chief Negotiator Michel Barnier, Deputy Chief Negotiator Sabine Weyand and Northern Ireland Advisor Nina Obermaier. We travelled to Westminster to meet with Robin Walker MP, Parliamentary Under Secretary of State at the Department for Exiting the European Union and his officials. We met with Lord Duncan, Under Secretary of State for Northern Ireland in Stormont House a number of times. In each of these meetings, and in particular with the Task Force, we made clear that – as a Joint Committee with a mandate in statute – we wished to have as formal a role as possible in the post-Brexit monitoring of human rights and equality on the island of Ireland.

Commissioned Research on Common Travel Area

In November 2018, we launched research, commissioned by the Joint Committee, and carried out by academics at Newcastle University, Durham University and the University of Birmingham. The research recommends that both the Irish and UK Governments should look to **secure a “gold standard” approach through a new intergovernmental** Common Travel Area treaty. Such a treaty would formalise common immigration rules, travel rights, residency rights, and related rights to education, social security, work, health and security and justice.

Of particular concern in our work at this crucial part of the negotiations and possibly also of concern to this Committee are the issues of North-South equivalence of rights on an ongoing basis and the guarantee of equality of citizenship.

I would like to thank the Committee for the invitation to appear today. The Irish Human Rights and Equality Commission welcomes the opportunity to engage with you on this important matter.

ⁱ Directive 2004/114/EC 2004 – the principle of equal treatment between men and women in access to and supply of goods and services.

Directive 2006/54/EC – the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

Directive 2000/43/EC – the principle of equal treatment between persons irrespective of racial and ethnic origin.

Directive 2000/78/EC – a general framework for equal treatment in employment and occupation.

Directive 2010/41/EU – the principle of equal treatment between men and women engaged in self-employment.

Directive 79/7/EEC – the principle of equal treatment for men and women in social security.

ⁱⁱ See Christopher McCrudden – Brexit, Rights and Northern Ireland Protocol to the Withdrawal Agreement paper to the British Academy and Royal Irish Academy, December 2018.

ⁱⁱⁱ See **Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick** – Discussion Paper on the Common Travel Area – paper for joint committee of NIHRC and IHREC, November 2018.

^{iv} See Case 327/18PPU RO preliminary ruling from Ireland, 19 September 2018.