

Written Evidence to the House of Lords Constitution Committee on the EU (Withdrawal) Bill and its implications for human rights and equality in Northern Ireland

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Context

1. Northern Ireland voted to remain in the EU and that fact continues to be significant. Common membership of the EU has been a basic assumption of the peace process and the ‘special relationship’ between the UK and Ireland has also underpinned that peace. There is extensive debate at all levels on the unique circumstances of Northern Ireland and how these will be reflected in the discussions ahead. These constitutional conversations are now travelling well beyond the Westminster Parliament given the emphasis that the EU has placed on, for example, the Good Friday Agreement in the negotiations (including matters relating to rights and equality).

2. At the time of writing, the Northern Ireland Assembly and Executive were still not functioning and negotiations on their restoration are continuing. Brexit was one of the reasons listed in the resignation letter of the then deputy First Minister (the late Martin McGuinness) in January 2017. That means that Brexit contributed to the current crisis and is progressing without an Executive and Assembly; consent therefore cannot be given (and would be highly unlikely). Even if that was not the case it is not apparent that there would be consensus or agreement on a specifically Northern Irish approach to Brexit. The two major parties of government took opposite sides in the Brexit debate (DUP – Leave; Sinn Féin – Remain) and they both take different positions on proposals around ‘special status’ for Northern Ireland (even if there appears to be mutual recognition that there are circumstances that are ‘particular’ to this jurisdiction). The DUP has, following the Westminster elections in June, concluded a ‘Confidence and Supply Agreement’ with the Conservative Government. The party has continued to express its established view on Brexit; as noted, this includes its rejection of the idea of ‘special status’ and the party voted with the Government on the second reading of the EU (Withdrawal) Bill. A notable point, however, is that things changed in Northern Ireland as a result of the Assembly elections in March, with unionist political parties losing their overall majority. If the Assembly is restored then this may well have implications, including for human rights and equality in Northern Ireland.

3. The human rights and equality context in Northern Ireland is distinctive and advances in an environment of government and a society shaped by the principles of unionist/nationalist power-sharing. It remains a place that is emerging from violent conflict and governmental structures flow from a political process and peace agreement with domestic and international legal implications (Belfast/Good Friday Agreement 1998). The centrality of human rights and

* BrexitLawNI is an ESRC funded project exploring the consequences of Brexit for N. Ireland in the areas of human rights, equality, constitutional law and conflict transformation. For further information see: <https://brexitlawni.org/>

equality to that document is much commented upon; even if many of the promises of peace have not been realised as yet.

4. Northern Ireland has had its own Bill of Rights process that led to detailed proposals in 2008 from the NI Human Rights Commission and there are ongoing discussions about a Charter of Rights for the island of Ireland. There are calls for the enactment of a Single Equality Act, and serious gaps have opened up between equality guarantees here and in Britain. As with the rest of the UK, the Human Rights Act 1998 applies in Northern Ireland and ‘Convention rights’ are woven into the Northern Ireland Act 1998, as well as being key to reform in areas such as policing.

The EU (Withdrawal Bill) and Human Rights and Equality

5. The general constitutional, human rights and equality concerns with the Withdrawal Bill are well known and extensively documented, including questions around appropriate levels of parliamentary scrutiny. So, for example, the position taken on the Charter of Fundamental Rights in the Bill is of considerable concern in Northern Ireland too. This will lead to a loss of rights, in addition to the departure of the more muscular remedies that are available through EU law. The current approach in the Bill to the Charter is a backward and unwelcome step.

6. The Bill will, for example, amend the Northern Ireland Act 1998. The competence of the Northern Irish administration is currently constrained with reference to EU law (and other matters such as ‘Convention rights’). The Bill will remove this and essentially replace it with the concept of ‘retained EU law’, and Ministers at Westminster will have a much discussed ‘transitional’ power of ‘correction’ (a carefully circumscribed and limited ‘correction’ power for devolved Ministers is also present). The approach in the Bill raises many challenging questions of constitutional principle, and will promote considerable uncertainty on the precise future boundaries of devolved competence; it is clear that serious issues arise for Northern Ireland in the Bill as currently drafted (this remains the case even though the Bill does indicate that the regulations on ‘dealing with deficiencies’ and ‘operational effectiveness’ should not be used to amend or repeal the Northern Ireland Act 1998 or the Human Rights Act 1998). Careful thought should be taken on the constitutional consequences of taking the steps outlined in this Bill.

7. In Northern Ireland, matters such as equality and employment law and observing and implementing international obligations (including EU law obligations) are, for example, devolved (although s 75 – the ‘constitutional’ equality provision in the Northern Ireland Act – is a reserved matter, and note the point above about reference to amendment or repeal of that Act in the Withdrawal Bill). Equality and employment are areas where EU law and case law have much to say, and have impacted positively on laws, policies and practices in Northern Ireland. The Withdrawal Bill will mean increased uncertainty, tension and potential confusion about the boundaries of devolved competence and powers that would have come to Northern Ireland will be diverted for now to Westminster, in the context of a limited range of complex safeguards and exceptions (including a sunset clause of questionable standing given other ambiguities in the Bill). While it may be agreed that powers can eventually be conferred on Northern Ireland (although how that process will in fact function given the constitutional politics of Northern Ireland remains to be seen) the current position does merit the ‘power-

grab' label it has been given in Scotland and Wales. There are also questions raised about whether the Bill sufficiently recognises current levels of constitutional distinctiveness as well as future issues (for example, around proposed 'special arrangements') that may arise under the Withdrawal Agreement. There is still a live debate on the island of Ireland and at EU level on the notion of 'special status' or some form of 'special arrangements' that reflect the unique circumstances of Northern Ireland. Nothing in this Bill should rule out or prejudge the outcome of those negotiations or those discussions.

8. The political (and possibly legal) complexities are further complicated by the Conservative Party – DUP 'deal'; there are 'power-sharing protections' wrapped around the Northern Ireland arrangements (including around Executive-level agreement and cross-community consent) that do not exist at Westminster. Putting aside for a moment worries about UK Government 'impartiality', there are many who believe that the DUP record on matters of human rights and equality is a questionable one (in the Northern Ireland Executive, Assembly or at the Westminster Parliament). Taken together this picture is causing much anxiety; it underlines the urgency and pressing need for safeguards on the face of the legislation that respect and protect human rights and equality in strong terms, as well as the constitutionally unique circumstances of Northern Ireland.

Conclusions

9. For such a fundamental new constitutional measure the Bill plainly lacks sufficient safeguards, either for human rights and equality or for the constitutional circumstances of Northern Ireland. Given the scale of what is being proposed and the level of uncertainty it promotes there is a strong case for significant amendment. Many of the implications of this have already been well-documented and discussed in relation to constitutional principle, the rule of law and Ministerial 'power-grabs'. There are additional reasons why this is of particular concern for Northern Ireland. Human rights and equality are intended to be central to the peace process. Although the Human Rights Act 1998 appears safe for now the volatility of politics means that it is not secure while the promise to 'repeal and replace' remains intact. The design of the structures that are in place in Northern Ireland were carefully crafted over decades, and this Bill injects unhelpful levels of uncertainty, including in areas where there is sharp disagreement. It also suggests that in the rush to address the practical mess created by Brexit, the UK Government is prepared to sacrifice significant constitutional values and even the future of the 'union state' itself.

10. There is good reason to insist that the Withdrawal Bill should include an explicit generic non-regression provision that clearly protects human rights and equality guarantees, but thought also needs to be given to the future progressive development of the law in line with EU developments (on equality, for example) as well as the need for explicit Northern Irish safeguards. Here thought is required on how respect for the Belfast/Good Friday Agreement is to be demonstrated in precise legal terms under this and related legislation (something that is of great concern to the EU also). It is also time to begin thinking again about the human rights and equality promises of peace that have not been delivered, including the proposed Bill of Rights for Northern Ireland.

11. It is worth reiterating that this process is being taken forward without a functioning Executive and Assembly in Northern Ireland. There is a need for imaginative thinking to ensure that some of the concerns outlined above are reflected fully in the debates to come, and that voices from Northern Ireland are heard in this constitutional conversation.

12. To conclude we suggest the Committee considers the following:

- In the context of the need for safeguards there should be a clear non-regression provision in the Bill relating to human rights and equality
- The Charter of Fundamental Rights offers a rights-based framework of value and significance and its treatment in the Bill should be reconsidered
- Thought should be given to the future progressive development of matters of equality law in particular (keeping pace with EU developments)
- Consideration should be given to including a provision on the Belfast/Good Friday Agreement in the Bill (in addition to existing references to the Northern Ireland Act 1998)
- Nothing in this Bill should prejudge the outcome of negotiations around ‘special status’ arrangements for Northern Ireland or take options legally off the table
- It is timely to reconsider the Bill of Rights process in Northern Ireland as well as the enactment of a Single Equality Act
- Work in this and related areas should be taken forward on the basis of comprehensive equality impact assessments