



RIGHTS AT RISK

Brexit, Human Rights and Northern Ireland

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The Human Rights Consortium is a not for profit coalition of civil society organisations from across Northern Ireland which was established in 2000. We have almost 170 member organisations from a range of community and voluntary grassroots groups, NGOs and Trade Unions, drawn from all sections of the community and all parts of Northern Ireland. We work together towards a human rights based Northern Ireland. A core element of this work to date has been our ongoing campaign for a strong Bill of Rights for Northern Ireland. This has been supplemented in recent years with an emerging focus on other human rights frameworks, positively influencing perspectives on human rights and supporting civil society to become engaged in human rights advocacy. To achieve these goals, we work to enhance understanding, communication, cooperation and campaigning opportunities on human rights issues between members of the Consortium, civil society and the public generally. In our day to day activities we try to achieve these objectives through research, training, awareness raising and advocacy.

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As always any errors or omissions rest with the authors.



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Executive Summary

The human rights and equality protections in Northern Ireland are built on a complex web of interlocking legal frameworks: local, national, European and international law all have a role in building this collection of human rights standards which inform all laws, policies and decisions made within the devolved administration in Northern Ireland and at a UK-wide level. Prior to the referendum in June 2016 on whether the UK should leave the EU, very little attention was given to the human rights framework underpinned by EU law and while the Consortium and others tried to pull attention to these rights concerns, the conversation in the media and beyond was dominated by trade, immigration and the EU budget. In the Brexit negotiations this imbalanced coverage of the implications of Brexit remains skewed towards trade, immigration and budgetary concerns, however there is now greater attention being paid to the impact of Brexit on Northern Ireland and on human rights. This report is designed to supplement this increased focus on rights and to inform both civil society and our political representatives of the complex human rights concerns of Brexit.

Our report situates this discussion on the human rights implications of Brexit in the broader context of the constitutional settlement for Northern Ireland and highlights the associated risks of Brexit destabilising the hard-won peace. As the only part of the UK with a land border with an EU member state, Northern Ireland is uniquely affected by Brexit. This is amplified in the context of the history of Northern Ireland, the conflict and subsequent peace process. The Belfast/Good Friday Agreement and the Northern Ireland Act form the constitutional basis for the exercise of power and set out the scope and limits of the competences of the devolution institutions. This constitutional framework also sets out how north-south and east-west relations should operate. The EU has provided a neutral underpinning for how the three strands of the Agreement operate and the Brexit process threatens to disrupt this finely balanced structure. The EU referendum has already created a new form of identity marker in Northern Ireland and is the source of renewed tension between communities. Our engagements with our members and wider civil society through a series of roundtables, workshops and individual discussions have highlighted that the risk to the peace process is something that people here are deeply worried about. The anxiety that Brexit could lead to a hardening of the border or even a

change to the ease with which people live, work and play in border areas is causing real concern to those border communities.

The core of the report is focused on the substantive rights affected by Brexit. This report does not attempt to document every right protection which is likely to be impacted by the UK leaving the EU. Instead it delivers an overview of the complexity of rights issues in Northern Ireland at risk in Brexit. It is clear from the rights issues addressed in this report that the EU has had a positive progressive impact on rights protections across Northern Ireland and there are fears that by removing this external pull factor that the enjoyment of rights here will be undermined.

Our outreach with members has highlighted a range of cross-cutting concerns about how Brexit could impact on supporting and advancing human rights in Northern Ireland:

- Impact on peace process

EU membership was intimately tied to both the context in which a peace process was achievable and to the peace agreement itself. References to the EU are both explicitly contained in our peace process and its practical delivery. The UK and Ireland's membership of the EU and the common platform of rights standards, legislation and redress mechanisms that go with it played a key 'confidence building' role in our peace process. There are real concerns that removing that underlying backdrop of EU protections represents both a symbolic and practical unpicking of the Agreement and peace process itself.

- *Rights that exist in EU law*

The EU human rights framework protects rights across a number of legal mechanisms, the EU treaties, the Charter of Fundamental Rights, directives, regulations and caselaw. These various instruments have had positive impacts on the enjoyment of rights in Northern Ireland and, despite assurances from the UK government, there are real fears that these rights frameworks will be undermined after the UK leaves the EU. The UK government has already identified that the Charter of Fundamental Rights will not be carried over into UK law via the EU (Withdrawal) Bill and this will create a human rights gap in local law. In addition, without the

requirement for local law to keep pace with EU human rights protections, there is a real risk that Northern Ireland will fall behind best European practice and that a gap between rights protections in Northern Ireland and Ireland will undermine the equivalency guarantee in the Agreement.

- *Rights dependent on reciprocity and membership of the EU*

There are vast areas of law and policies which exist in the EU supporting human rights which are based on mutual recognition of standards across borders. This is of particular importance in Northern Ireland as the land border presents immediate complications which need to be addressed in Brexit. Moreover, Strand II of the Belfast/Good Friday Agreement on north-south relationships is built on the common frameworks of EU law. The border presents a very real risk to the enjoyment of a range of rights from access to education and healthcare to child protection and security cooperation. Without the common frameworks of the EU to facilitate this cross-border collaboration, the UK will need to negotiate new arrangements with the EU.

- *Impacts of EU funding*

The human rights impact of the EU funding models is something that has been rather overlooked. The EU has supported large programmes for cross border environmental cooperation and rural development and Brexit risks these projects and the loss of any such funding could have a devastating impact on rural life and the environment. In addition, the EU provides micro funding streams to support people back into employment, which is invaluable for people who are long term unemployed. Another funding risk raised by participants was the impact of the loss of direct payments to farmers under the Common Agricultural Policy on the wider rural communities and Northern Ireland economy.

- *Access to European networks*

One of the significant ‘unseen’, but invaluable ways in which the EU supports rights in Northern Ireland is through facilitating and funding groups to work on a transnational basis to build networks and work together on rights issues. Through networks groups are able to look to best practice across EU member states on particular issues to campaign on a pan-European basis to improve EU human

rights standards. These networks are particularly important on a sectoral basis for groups working, for example, on rights of disabled people, children's rights and women's rights and allow for the coordination and strategising on how to improve human rights standards at the EU level and also within their own member states. They also support local groups, who might otherwise be unable to participate, to engage with the UN human rights treaty monitoring bodies.

- *Identity*

(i) Community identity in Northern Ireland

The Brexit referendum campaign at a UK level was built on a narrative of Britishness and 'taking back control' of our laws, borders and sovereignty. The impact of these narratives has been one which has increased inter-community tension and has created a new identity marker locally. Moreover, the impact of UK identifying people losing access to EU citizenship and Irish identifying people retaining the rights attached to EU citizenship creates a potentially polarising difference in the enjoyment of rights between the two main communities in Northern Ireland.

(ii) EU/EEA nationals in Northern Ireland

EU and EEA migrants living in Northern Ireland are facing high levels of fear and uncertainty around their status and rights in the aftermath of Brexit. This has fed into a sense of otherness and no longer feeling settled in Northern Ireland. According to participants in our workshops, it is already affecting EU migrants' decisions about leaving Northern Ireland, feeling they had 'no future' here.

Beyond the tension between the two main communities in Northern Ireland, Brexit has also increased friction between EU migrants living in Northern Ireland and 'locals'. Participants in our workshops linked the referendum and subsequent debates about hard and soft Brexit to increased hostility from 'locals' towards migrants and migrant communities.

In addition to these cross-cutting issues, the risk of Brexit to the local economy was a recurring theme in our engagements with members.

There is a real fear that the impacts of welfare austerity, combined with the disruption to business caused by Brexit could destabilise Northern Ireland's economy and lead to a drop in living standards that would particularly impact in rural and border areas and people at risk of poverty.

This report highlights the impact of these cross cutting issues across a range of areas and sectors covering: citizenship; children and young people; women; LGBT people; disabled people; workers; and the environment. Across all of these sectors, interlocking rights are impacted by Brexit. At present, while there have been high level commitments to ensuring there will be no impact on the rights enjoyed in Northern Ireland, these commitments have still to be translated into specific and detailed mechanisms to ensure that Brexit will not lead to a reduction in rights.

The uncertainty and disruption of Brexit highlights the current human rights lacuna in Northern Ireland in the form of the outstanding commitment from the Belfast/Good Friday Agreement of a strong and inclusive Bill of Rights for Northern Ireland. While it is not a perfect solution to the complexity of rights issues raised by the UK leaving the EU, it is clear that it could offer reassurance to people living in Northern Ireland that the constitutional settlement for Northern Ireland post-Brexit will be founded on a robust human rights framework.

1. Introduction

In the aftermath of the Brexit referendum it became clear that beyond some rather simplistic consideration of the border, very little thought had been given to the impact on Northern Ireland of leaving the EU. As the only part of the UK with a land border with another EU state, coupled with its distinct constitutional settlement founded on the Belfast/Good Friday Agreement, Northern Ireland risks being uniquely impacted by Brexit. It was this unique impact that provoked the former First and deputy First Ministers to write to the UK Prime Minister on 10th August 2016 setting out their concerns about the particular risks of Brexit for Northern Ireland. However, while this letter addressed a number of business and social issues, there was an insufficient focus on the risks of Brexit for human rights protections. This research is designed to help fill the gap in knowledge and understanding of the overarching human rights risks in Brexit and to supplement sector specific work which has already been completed.

It is clear from research on voting patterns and from our outreach on rights and Brexit that how people in Northern Ireland voted in the referendum has become a new marker of ethno-political division. In our workshops, participants identified the decision of the UK government to have a referendum and leave the EU as having created unprecedented anxiety and uncertainty. It has had a polarising impact both between the two main communities in Northern Ireland and also between migrants and people who have lived in Northern Ireland their whole lives. Research has demonstrated that the ethno-political divide between how people voted in the referendum is stark: ‘Catholics overwhelmingly voted to stay by a proportion of 85 to 15 while Protestants voted to leave by a proportion of 60 to 40. Similarly, two thirds of self-described ‘unionists’ voted to leave while almost 90 percent of self-described ‘nationalists’ voted to remain.’¹ This division is compounded when socio-economic and educational status is taken into account, which suggests that while ethno-political indications were important, they were not the only reason people voted to leave or remain.

¹ John Garry, The EU referendum Vote in Northern Ireland: Implications for our understanding of citizens’ political views and behaviour, Knowledge Exchange Seminar Series 2016-17 <https://www.qub.ac.uk/brexit/Brexitfilestore/Filetoupload,728121,en.pdf>

It is clear that in order to move on from the sectarian division created by Brexit, we need to find a way of shoring up the peace process and one of the key ways of doing this is by protecting and defending human rights. Research conducted on behalf of the Consortium demonstrates that human rights unite, rather than divide Northern Ireland, with overwhelming support for rights from across the ethno-political divide.² It is therefore essential that as a means of shoring up the peace process, as well as tackling concerns about the border and common travel area, that there is no reduction in the current level of rights underpinned and supported by EU law which are currently enjoyed.

This research is designed to take a human rights specific approach to the risks of Brexit. EU human rights law is part of a complex and multi-faceted legal and political system and can be difficult to navigate. This report sets out an accessible guide to how EU human rights law operates both generally and in the Northern Ireland context in chapter 2. The report then discusses in chapter 3 the particular implications of the UK leaving the EU for the institutions established under Belfast/Good Friday Agreement and subsequent agreements and seeks to identify the need for Northern Ireland specific arrangements in order to ensure that the hard won peace is not undermined by Brexit. In chapter 4, there is a more detailed discussion of the various human rights concerns on a thematic basis:

- citizenship rights for EU migrants and UK/Irish citizens in Northern Ireland
- rights of children and young people
- rights of women
- rights of LGBT people
- rights of disabled people
- environmental rights
- rights of workers.

This report then critiques the current approaches which have the potential to address some of these rights risks and highlights the limitations of the current proposed solutions.

The research in this report was conducted on the basis of engagement with our members through a variety of tools, including individual meetings, sharing information and sectoral work and desk-based

² Human Rights Consortium, Attitudes to Human Rights in Northern Ireland: Polling Data (July 2017) <http://www.humanrightsconsortium.org/human-rights-unite-northern-ireland/>

research. We also conducted workshops in rural and border regions with the support of North West Community Network, Community Development and Health Network and the Rural Community Network to ensure this report was based on a well-informed understanding of the concerns of people and groups from across Northern Ireland. It is designed to pull these findings together into a single document to ensure accessibility of the material. This process has underlined a common theme running through these materials, namely that Brexit poses an unprecedented risk to the peace settlement and human rights in Northern Ireland. A risk that urgently needs to be addressed head on.

2. How EU law works: Current operation of EU human rights law

To understand how human rights fit within the EU architecture, we need to understand how EU law works more broadly. The EU is a complex and multifaceted system built on a series of multilateral economic agreements between its member states. The complexity of the EU and how human rights fit within it mean that there is a lot of confusion and a lack of understanding of the value of the EU in advancing human rights in Northern Ireland. The human rights law we are most familiar with here is the Human Rights Act and that will remain untouched by Brexit.³ However, this does not mean that the EU and human rights are completely separate. In fact the very complexity of the EU has meant that often human rights protections have grown organically in order to respond to a particular problem and therefore human rights protections can be found in a variety of places within EU law which can make it difficult to navigate.

Background

The EU as is it now is known has evolved over time from 3 core international agreements to coordinate the economic markets between the original six member states starting with the European Coal and Steel Community and followed by the EEC Treaty and Euratom treaty in 1957. These treaties were designed to integrate the economies of Europe to allow for increased trade and cooperation between the markets of the member states. The EEC, as it was then known, was a vehicle for building a strong economy across the member states. However, this was not its only function. The economic integration was also a mechanism to consolidate peace in Europe in the aftermath of the turmoil of conflict in the region in the first half of the 20th Century. The EEC treaty was designed to ‘lay the foundations of an ever closer union among the peoples of Europe’ and to achieve this through ‘pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts’. The success of the EEC in the creation of a common market consolidated this goal and led to its growth both in competences and size since the 1950s.

³ Although the Human Rights Act is still threatened by an overarching commitment by the Conservative Government to amend or repeal. This threat has been put on hold while the UK government deals with the multifaceted issues which arise in Brexit.

The EU was a new legal order unlike trade deals of the past or other international treaty arrangements. It created its own political and legal system that grew out of the original treaties and expanded across Europe as new member states joined. Since 1973 when the UK and Ireland joined, many other states have joined or started the accession process. It is now made up of 28 member states, and until the EU referendum in June 2016, no member state has opted to leave. This means that there is very little in the way of a roadmap for how the UK and EU should navigate the Brexit process.

Timeline of European Integration

YEAR	TREATY OR POLICY DEVELOPMENT	MEMBER STATES
1951	European Coal and Steel Community	France, Germany, Belgium, Netherlands, Luxemburg, Italy
1957	European Economic Community Euratom	
1965	Merger Treaty - EEC, ECSC and Euratom become known as EC	
1970	Pathway to European Monetary Union	
1973		Denmark, Ireland and UK
1977	Internal customs duties between member states abolished	
1981		Greece
1985	Single European Act - complete the single market	
1986		Spain and Portugal
1990	Two inter-governmental conferences: economic and monetary union; and political union	
1992	Maastricht Treaty - EC becomes known as EU - includes social chapter and citizens' rights	
1995		Austria, Finland and Sweden

1997	Treaty of Amsterdam - Extends QMV voting and social chapter part of EU law	
1999	Security and defence policy adopted	
2001	Treaty of Nice - reforms decision making and readies EU for expansion	
2002	Euro enters into circulation in 11 member states	
2004		Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia
2005	Voters in France and the Netherlands reject the Treaty establishing a Constitution for Europe	
2007	Lisbon Treaty - vast treaty reform and EU Charter of Fundamental Rights given treaty status	Bulgaria and Romania
2013		Croatia
2017	UK notifies the EU that it will leave the EU by triggering article 50	

The EU is founded on treaties, which form the constitutional basis for all of its actions. The most recent consolidation of the founding treaties was done via the Lisbon Treaty in 2007, which set about streamlining the treaties and many of the systems and processes that had developed on an ad hoc basis over the years. These treaties were agreed by all Member States and set out the EU's powers to make laws and policies which are largely to do with coordinating and protecting the single market and economic cooperation. The powers of the EU can be divided into two areas, those for which the EU has exclusive competence (like competition law, the common fisheries policy, the common agriculture policy and the common commercial policy which governs the 'four freedoms' of goods, persons, services and capital) and those for which there is shared competence between the member state and the EU. These include areas such as environmental regulation, labour law, economic and monetary

policy and asylum and immigration policy. Anything that is not in the treaty as an exclusive or shared competence of the EU remains within the exclusive domain of member states, which means policies and laws on those areas can vary greatly between member states.

Aims of the EU

At a constitutional level the EU is more than an economic body. It is a value based organisation that seeks to protect and defend its core ideals in all of its actions. While these are somewhat aspirational, they do make up an important part of the collective European identity. Article 2 of the Treaty of the European Union identifies these core values as common to all member states of the EU and places particular emphasis on respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. That the EU views itself as more than an economic project is particularly significant for Northern Ireland. The EU recognises that economic integration and peace building are closely linked and in article 3 sets out its core aim of promoting the peace and well-being of its peoples. Northern Ireland has benefited from this through various rounds of PEACE funding and the promotion of economic and social development in the region. The close link between economic stability and peace also means that the EU is aware of the potential risk factors of economic and political destabilisation in the Brexit process for Northern Ireland and for that reason there is a specific negotiation group, between the UK government and the EU Commission, which is focused on the impact of Brexit on Ireland and Northern Ireland.

The EU has changed considerably since it started its project on economic integration in Europe, but its core values have always been about facilitating cooperation between its member states. The common market of the EU is designed to free up internal barriers to trade between member states and based around four freedoms:

- ***Free movement of goods***: removes any restrictions on goods moving between member states, including the elimination of customs tariffs, common standards and ensuring there is no quantitative or other restriction on moving or selling goods across the 28 EU member states.
- ***Free movement of persons***: allows people to move across the EU to take up employment or start a business in another member state. This includes the rights of students to move and of family members of a worker to move with them to another member state.

- ***Free movement of services***: allows for people to establish businesses to trade or provide services in another member state and can include recognition of qualifications or professional standing.
- ***Free movement of capital***: origins of this policy were based on the removal of customs duties or discriminatory taxation, but has been extended to a prohibition on restrictions on capital and payments and is linked to the policy of economic and monetary union.

The powers of the EU to ensure parity across the member states is not limited to purely economic measures, but has also worked towards integration across a number of areas to ensure cooperation of member states across a range of areas, such as environmental protection, competition, justice and home affairs, social and economic progress and human rights.

Institutions of the EU

The core institutions of the EU are the Council, the Commission and Parliament.

The European Council

The European Council meets in intergovernmental-summit form twice a year and brings together the heads of national governments and foreign ministers from all of the 28 member states to discuss high level policy and agree common positions on matters of cooperation on foreign and security policy and cooperation on policing. It is designed to set the general direction of EU law making.

Council of the European Union

The Council is made up of Ministers from the government of each of the 28 member states and is the core law making body of the EU, along with the Parliament. Northern Ireland's interests and concerns are represented by Ministers of the UK government, not the Executive. The Council has four core functions: law-making; coordination of economic policy; forming international agreements on behalf of member states; and approval of the EU budget. It is also responsible for cooperation on common foreign policies and security matters and cooperation on policing and judicial matters.

European Commission

The Commission is the core bureaucratic institution of the EU. Each member state appoints one or two commissioners and their function is to work collegiately to promote and protect the EU treaties and to lead the departments of the EU with the support of staff. These departments cover a range of areas: agriculture and rural development; competition; education and culture; international cooperation and development; employment, social affairs and inclusion and mobility and transport. The Commission is the main source of law-making within the EU and proposes laws for the consideration of the Council and the Parliament. It also has a guardian function in that it ensures all member states are applying EU law properly and can take action against member states who do not properly apply EU law through infringement procedures. It also takes on the bureaucratic role of implementing EU laws and policies through its extensive civil service.

European Parliament

The Parliament is the direct link between the citizens of the EU member states and the EU. Members of the European Parliament (MEPs) are directly elected with smaller states being 'over-represented' in relation to number of MEPs per head of population. The Parliament is the key legislator alongside the Council. The MEPs elected to the Parliament sit in loose groupings which are based on common political outlooks and there are a number of specialist parliamentary committees, for example: Foreign Affairs; Human Rights (subcommittee); International Trade; Environment, Public Health and Food Safety; Civil Liberties, Justice and Home Affairs; and Women's Rights and Gender Equality.

Court of Justice of the European Union (CJEU)

The CJEU is made up of judges appointed by each of the member states and judges must possess the qualifications required for appointment to the highest judicial office in their own member state. The CJEU has three primary objectives. Firstly, it ensures that EU law is observed in practice and provides the definitive interpretation of EU law. Secondly, it resolves disputes between member states, institutions of the EU and individuals. Finally, it protects individual rights. The most common action before the CJEU is a reference from a national court to interpret and clarify EU law. It also hears cases brought by the EU Commission against member states for failing to implement their treaty obligations and cases against institutions for abuse of power or failure to act.

Sources of EU law

Rights and equality protections with the EU legal system can be found across a range of legal (and non-legal) sources. To understand how the EU human rights regime operates, we need to have a basic knowledge of the sources of EU law.

Primary Law	Lisbon Treaty (TEU and TFEU) & Charter of Fundamental Rights	
Secondary Law	Directives	Regulations
Tertiary Law	Case Law of the Court of Justice of the European Union (CJEU)	

Treaties

All the powers of the EU institutions to make laws and policies are derived under the treaties and this is the primary source of all EU law. The Lisbon Treaty was agreed to by all member states in 2007 and actually consolidates all EU law into two core treaties which set out all the powers, objectives and principles of the EU. These are the Treaty on the Functioning of the European Union (TFEU) and the Treaty on the European Union (TEU). The treaties set the technical rules governing how laws and policies are made, the powers and competences of the various institutions of the EU and how they interact with each other. TFEU identifies the core principles and aims of the EU and its substantive areas of competence to make laws and policies, including (but not limited to) the internal market, agriculture, employment, social policy, public health and environment.

Some examples of rights in the Treaties:

Article 6: places the **Charter of Fundamental Rights** on the same legal footing as the EU treaties

Article 19: places an obligation on the EU to make laws to combat discrimination on grounds of gender, sexual orientation, race or ethnicity, belief, disability age and other grounds.

Article 20: recognises the right to EU citizenship

Article 157: recognises equal pay for equal work

Article 167: recognises the right to culture and to the linguistic and regional diversity

Regulations and Directives

The EU institutions have the power to make law areas which fall within the competence of the treaties. Article 288 TFEU states that ‘To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions’. The two most important forms of EU legislation are regulations and directives.

Regulations tend to be more technical and detailed in the subject matter that they cover. They apply directly within the laws of all member states across the EU and can be enforced through the courts if necessary. This means that once a regulation is implemented in EU law, it automatically becomes part of Northern Ireland law without the need for an additional mechanism.

Some examples of rights in Regulations:

Regulation 492/2011 on free movement of workers covers the rights of family members of workers to access education and social welfare

Regulation 604/2013 on asylum protection covers the right to asylum and the mechanisms for establishing the state responsible for evaluating asylum applications

Regulation 1107/2006 on the rights of disabled persons and persons with reduced mobility when travelling by air covers rules on accessible travel

Directives are not immediately enforceable within member states. They set out objectives or frameworks for how a particular issue should be addressed and leave it to lawmakers within member states to decide how to achieve those objectives. In the UK, directives will be implemented at Westminster through a specific legislative act or by the devolved assembly in Northern Ireland if it is a matter falling under the devolution settlement. If the member state does not implement the directive within specific timeframe set out or only partially implements it, then it is responsible for such a failure. This means that it is possible for an individual to rely directly on the directive when taking a case against the state or a public body. When there is a case between two private individuals, the courts will interpret domestic law in line with the directive where it is possible to do so.

Some examples of rights in Directives:

Working Time Directive (2003/88) recognises the rights of workers to have limits to their weekly working hours

Gender Recast Directive (2006/54) recognises the right to equal treatment of men and women in employment and occupation
Equality Framework Directive (2000/78) prohibits discrimination on grounds of belief, disability, age and disability

Case law of the CJEU

The CJEU is the ultimate arbiter of disputes within the EU. It decides on cases where there are disputes between member states. For example, where one state implements a policy on access to fishing waters which another state believes unfairly disadvantages their citizens, they can take a case to the CJEU to rule on whether the policy violates EU laws on the single market. The CJEU can also decide on cases where there are disputes between the EU institutions and a member state.

All courts within all member states are empowered to interpret and enforce EU law. If a court or tribunal in Northern Ireland has any questions or is unsure about how to interpret EU law, then they can refer the matter to the CJEU for consideration and to provide guidance. This is known as the preliminary reference procedure. To ensure the uniform application of EU law across all 28 member states, the interpretation of EU law declared by the CJEU is binding on all courts in all the member states. This procedure allows for the CJEU to provide detail and context to the broad principles contained in the treaties and EU laws and clarifies how these should apply in specific cases.

Some examples of rights in case law of the CJEU

Digital Rights Ireland - Data retention directive 2006/24 violated the right to privacy and the right to data protection in article 7 and 8 of the Charter of Fundamental Rights

Internationale Handelsgesellschaft - Fundamental rights form integral part of the general principles of EU law

Fransson - Requirement to respect EU fundamental rights is binding on the Member States when they act in the scope of EU law

General principles of EU law

The EU is founded on a number of principles, including the rule of law, democracy and protection of fundamental rights. These principles have been developed by the CJEU to give effect to the essential values and standards of the EU and are derived through the treaties and the principles common to the member states. Some of those core principles

are important to our understanding of how the EU protects rights and include:

- *Proportionality* - the basic principle that any action or measure should be proportionate to the end it is seeking to achieve;
- *Equality* - the principle of non-discrimination is a founding principle of the EU and embedded in the treaties, and other laws and policies;
- *Legal certainty* - the principle that the application of law must be certain and predictable is as important in business and it is in the protection of rights;
- *Natural justice* - the principle of fairness, includes a right to be heard and the right to a reasoned decision from an unbiased decision maker; and
- *Protection of fundamental rights* - in addition to the EU Charter of Fundamental Rights, all member states of the EU must also be party to the European Convention on Human Rights (ECHR) and article 11(2) makes it clear that the fundamental rights resulting from the constitutional traditions of member states also form part of the ethos and legal heritage of the EU.

EU Charter of Fundamental Rights

Human rights are deeply embedded in the EU at a foundational level. While the EU was originally conceived of as a means of economic cooperation to facilitate trade in goods and services across Europe, the centrality of human rights is important to understand the interrelated nature of all the EU's functions and the protection and promotion of rights. Human rights principles have been adopted by the EU institutions, endorsed and expanded by the court and codified into the EU Charter on Fundamental Rights. The EU Charter is an overarching human rights framework which informs all actions of EU institutions, its laws and policies, decisions and activity within the scope of EU law, whether at an EU level or within the member states.

The EU Charter on Fundamental Rights began as a political declaration to emphasise the importance of human rights and increase their visibility for EU institutions when making laws and policies and make them more visible to citizens. As identified above, prior to the EU Charter entering into force, the case law of the CJEU had recognised fundamental rights as a general principle of EU law. As all member states of the EU are required, as a precondition to accession, to sign and ratify the European

Convention of Human Rights, this underpins a number of the rights in the EU Charter, however the range of rights it protects are much broader. The EU Charter consolidated into a single document the substantive and procedural rights derived from EU law; contained in the ECHR; and those rights derived from the common constitutional traditions of EU member states as general principles of EU law. It also codified the rights associated with EU citizenship and European Social Charter and the Community Charter of the Fundamental Social Rights of Workers.

The EU Charter is accompanied by extensive Explanations which do not have the status of law, however, they are ‘a valuable tool of interpretation intended to clarify the provisions of the Charter’. These Explanations tie the rights contained in the EU Charter to their originating legal source whether in the EU treaties, other legal sources in the EU or member states or other international agreements. The Charter was brought into legal force by the Lisbon Treaty in 2007 and now forms part of the foundational law of the EU, having the same legal value as the Treaties. As an unpinning human rights framework for EU law, the EU Charter is still at a fairly early stage of development. While there are some areas which have already been the subject of extensive interpretation and analysis, such as rights to data protection and privacy, other areas are still emerging as important areas of human rights development in the EU.

The EU Charter is much more far-reaching in the rights it protects than the Human Rights Act and while it cannot offer a lower level of human rights protection than the European Convention of Human Rights, it can take a more generous interpretation: ‘In so far as this Charter contains rights which correspond to rights guaranteed by the [European Convention of Human Rights], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’⁴ In addition to the rights that mirror or extend those in the European Convention of Human Rights, the Charter also recognises and guarantees many other rights.

<i>Articles of the Charter which correspond to rights in the ECHR</i>	<i>Articles of the charter where the scope is wider than in the ECHR</i>
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⁴ Article 52(3) EU Charter of Fundamental Rights

<p>Article 2 on the right to life Article 4 on freedom from torture and inhuman or degrading treatment or punishment Article 5(1) & (2) on freedom from slavery and forced labour Article 6 on the right to liberty and security Article 7 on the right to respect for private and family life Article 10(1) on freedom of thought, conscience and religion Article 11 on freedom of expression and information Article 17 on the right to property Article 19(1) & (2) on protection in the event of removal, expulsion or extradition Article 48 on the presumption of innocence and the right of defence Article 49(1) & (2) on legality and proportionality in criminal offences and penalties</p>	<p>Article 9 on the right to marry and found a family is framed in a gender neutral way which enables it to be used by same-sex couples Article 12(1) on freedom of assembly and association is extended in scope to European Union level Article 14(1) on the right to education is extended to cover access to vocational and continuing training Article 47(2) & (3) on the right to fair trial and access to legal aid is not limited to the determination of civil rights and obligations or criminal charges as regards EU law and its implementation Article 50 on the protection against double jeopardy in criminal law is extended to the EU level and between the Courts of the Member States The limitations provided for by Article 16 of the ECHR as regards the rights of aliens therefore do not apply to EU citizens. EU law prohibits any discrimination on grounds of nationality for EU citizens.</p>
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The rights contained in the Charter are gathered under six titles: dignity; freedoms; equality; solidarity; citizen's rights and justice. While some of the rights are very similar to those contained in the ECHR, the Charter covers a broader range of rights. The Charter recognises rights such as the right to life, the rights to freedom of expression and association and the right to a fair trial which are mirrored in the ECHR. However, it also protects the right to protection of personal data, the right to asylum and the right to health care. It also includes specific protections for people who are at a higher risk of interference of rights, such as older people,

children and disabled people. In addition, the Charter also recognises a category of citizens' rights, which are civic rights associated with democracy and good governance in the EU, such as the right to vote and stand in elections to the European Parliament, the rights to access documents, good administration and to refer matters to the European Ombudsman. The range of rights contained in the Charter mean that it has the potential to positively impact how human rights are enjoyed in Northern Ireland and across the 28 member states of the EU.

Right to Asylum

Article 18 of the Charter guarantees the right to asylum under the terms of the Refugee Convention 1951 and the 1967 Protocol relating to the status of refugees. This has informed how asylum law has been enforced and interpreted across all EU member states through the Common European Asylum System. It is supplemented by a number of directives which have sought to harmonise qualifying criteria for asylum across the EU, the minimum standards for processing asylum applications and establishing minimum standards for living conditions.⁵ These directives extended and modernised some of the definitions in the Refugee Convention. For example, express protection is provided for when there is 'a serious risk and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.⁶ The UK has opted into the some parts of this common approach, but opted out of more recent developments.

Data Protection

As an example of how its more recent codification of rights has allowed for the EU Charter to be more responsive to advances in technology and how we share and use information, Article 8 of the Charter recognises that 'Everyone has the right to the protection of personal data concerning him or her.' It goes on to highlight the need for consent of the person from whom data is gathered and how data must be processed. In addition it guarantees everyone a right of access to data which has been collected concerning them and that compliance with this right should be 'subject to control by an independent authority'. The area of data

⁵ Qualification Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees; Procedures Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status; and Reception Directive 2003/9/EC on laying down minimum standards for the reception of asylum seekers

⁶ Article 15 Qualification Directive (2004/83/EC)

protection is one in which the EU is the global leader and through its regulations, directives and case law it has sought to control how data is used and shared within the EU, both by public and private bodies. The CJEU has had a significant role in operationalising the EU Charter to protect the rights of individuals against undue interference through laws passed at an EU level. For example, the EU Directive on Data Retention required telecommunications service providers to retain bulk telecommunications data by all individuals within the EU, for a period of between 6 months and 2 years.⁷ In the *Digital Rights Ireland* case the CJEU found that the Directive was invalid as it was contrary to the right to privacy and the right to data protection in articles 7 and 8 of the EU Charter.⁸

Right to health care

The EU Charter's catalogue of rights includes a range of economic and social rights in its Solidarity Chapter, such as the right to healthcare in article 35 which states: 'Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices'. It also places an obligation on the EU to ensure a high level of human health protection in all its policies and activities. This is supplemented with a range of measures which regulate health across the EU. For example, the EU regulates minimum safety standards in dealing with human tissue and blood in order to minimise the risk of contamination or infection.⁹ Another example of EU providing leadership on public health is the common framework to ensure that tobacco products could not be advertised on television.¹⁰

Right to social security

In article 34 the EU Charter recognises the right to social security benefits and social services to provide protection in cases of maternity,

⁷ Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services

⁸ Cases C-293/12 *Digital Rights Ireland Ltd v Ireland* (8 April 2014)

⁹ Directive 2004/23/EC on the quality and safety standards for donated human tissues and cells

¹⁰ Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action concerning the provision of audiovisual media services (Audiovisual Media Services Directive)
OJ 2007 L 332/27

illness, industrial accidents, dependency or old age, loss of employment. It also recognises the need to tackle social exclusion and poverty through the right to social and housing assistance ‘in accordance with the rules laid down by Community law and national laws and practices’. In practice these provisions have been given effect across a range of measures designed to coordinate social security systems across the EU.¹¹ These provisions have a direct impact on EU citizens coming to live and work in Northern Ireland and people from here exercising their free movement rights to live elsewhere in the EU.

Right to environmental protection

In article 37 the EU Charter guarantees the right to environmental protection stating that the ‘improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development’. The EU Treaties empower the EU to act to raise standards in all areas of environment policy, such as air and water pollution, waste management and climate change across the EU.¹² The EU has legislated on a range of environmental issues including air quality, climate change, water quality, species protection and habitats protection.¹³ In addition, the EU has acted as an enforcer of environmental standards through infringement proceedings.¹⁴

Right to equality

The EU Charter includes a whole Chapter devoted to equality. It includes a freestanding equality guarantee in article 21 which prohibits discrimination on any ground ‘such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation’. In article 20 it guarantees the right to equality before the law. This chapter also identifies certain categories and sets out specific protections: cultural, religious and linguistic diversity is guaranteed in article 22; equality between men and women is recognised in article 23; and the rights of the child, older people and

¹¹ Regulation 883/2004/EC on the coordination of social security systems and Implementing Regulation 987/2009/EC laying down the procedure for implementing Regulation 883/2004/EC

¹² Articles 191-193 of the Treaty on the Functioning of the EU

¹³ House of Commons Briefing Paper Brexit: Impact Across Policy Areas CBP-7213 (26 August 2016) <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7213>

¹⁴ <http://ec.europa.eu/environment/legal/law/statistics.htm>

disabled people are addressed in articles 24-26. The range and scope of equality rights in the EU Charter reinforce its central role as a core value and principle of EU law.

Limits on the application of the EU Charter

There is a distinction in the EU Charter between justiciable rights (rights that can be directly enforced through the courts) and rights in principle. The latter category requires that there is some kind of implementing legislative or other acts of the EU and Member States and are interpretative provisions within the EU Charter and ‘shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality’.¹⁵ Rights in principle ‘do not however give rise to direct claims for positive action by the Union’s institutions or Member States authorities’.¹⁶ Justiciable rights are directly enforceable and can be used to invalidate EU law or national law within the scope of EU law and apply between private parties. It is not always clear which articles within the EU Charter relate to justiciable rights and which relate to rights in principle and even experts in this area of law can be in dispute. Therefore, it is likely that this issue will be decided on by the CJEU on a case by case basis.

The UK signed what is sometimes referred to as an opt-out of the EU Charter, but it is in fact a clarification on how the EU Charter was to be interpreted.¹⁷ This Protocol clarified that the EU Charter does not extend the powers of the CJEU or UK courts to find that UK laws or administrative practices are inconsistent with the EU Charter. It further states that nothing in the solidarity rights chapter in the EU Charter creates a right to make a claim through the courts, unless those rights already exist in UK law. However, expert opinion on the EU Charter suggests that definition of a Charter right in principle does not remove its status as a right.¹⁸

3. Northern Ireland and the EU

¹⁵ Article 52(5) of the EU Charter of Fundamental Rights

¹⁶ Explanations relating to the Charter of Fundamental Rights

¹⁷ Protocol 30 on the Application of the Charter of Fundamental Rights of the EU to UK and Poland

¹⁸ Report of the House of Commons European Scrutiny Committee, The application of the EU Charter of Fundamental Rights in the UK: A State of Confusion (HC 2013-14 979)

The complexities of the Northern Ireland constitutional settlement means that Brexit presents unique threats to this region. These complexities include the geographical position which will result in a post-Brexit land border with the EU, the constitutional and political history, the existence of the right to both British and Irish citizenship and by extension a continuing right to EU citizenship, and the fragility of a peace process which is supervised by both the UK and Irish governments. Much of the discussion in relation to Northern Ireland has focused on the border and the common travel area, but it has not yet grappled with the multifaceted way in which the infrastructure of the Belfast/Good Friday Agreement could be undermined by Brexit. The EU is at its core built on economic (and social) integration across the member states. However, this has always been part of an overarching aim that, through such economic and social integration, the EU will promote peace. Article 3 of the Treaty of the EU states ‘the Union’s aim is to promote peace, its values and the well-being of its peoples.’ This aim of peace building linked to stability, economic development and sustainability is foundational for the EU and this is especially important in the context of Northern Ireland, where the EU has supported peace through specific funding¹⁹ and through providing a neutral underpinning of North-South and East-West relations.

Many of the substantive rights that individuals in Northern Ireland have access to by virtue of existing EU citizenship will be discussed in this report, as will concerns from civil society across a range of sectors about what the removal or alteration of those specific legal protections may mean for the protection of those rights moving forward. Before that, this chapter will conceptualise this discussion on how rights standards risk being destabilised by Brexit within the broader context of the political, social and legal landscape of Northern Ireland. It also attempts to set the scene for whether approaches in the current Brexit negotiations are conducive to the protection of those rights.

The Belfast/Good Friday Agreement and the EU

Since before the referendum, there have been consistent warnings that the decision to leave the EU risks destabilising the peace process in

¹⁹ EU Funding in Northern Ireland gives a brief overview for 2007-2013 and the current round of funding for 2014-2020 https://ec.europa.eu/unitedkingdom/news/eu-funding-northern-ireland-0_en

Northern Ireland.²⁰ The susceptibility of the peace process to disruption during and after the Brexit process has also been emphasised by people working in business and industry, who understand that the growth and success of Northern Ireland's economy is closely linked to the peace settlement.²¹ In a place where the border has been a source of tension, the prospect of any changes to the current stability has been an issue which has caused consternation for our members and has been raised by participants in our workshops. Despite these concerns, there have been attempts to dismiss apprehensions about the significance of Brexit to the stability of the Belfast/Good Friday Agreement and the wider peace settlement in Northern Ireland by downplaying the role the EU played in underpinning both processes.²² Those dismissing such concerns have emphasised that the EU is only explicitly mentioned in passing in the Agreement, rather than as a core principle underpinning the institutions. However this interpretation is to misunderstand the significance of these references.

Firstly, in the third paragraph of the preamble to the British-Irish Agreement it is recognised that both parties, the United Kingdom and Ireland, are members of the EU. As with any international treaty, this preamble establishes the underpinning ethos of the Agreement. It is the agreed basis upon which both parties will cooperate and work together to give effect to the obligations under the Treaty. It states that both parties, 'Wish... to develop still further the unique relationship between their people and the close co-operation between their countries as friendly neighbours and as partners in the European Union'. This statement of intent identifies mutual EU membership as core to the relationship

²⁰ Human Rights Consortium, The EU Referendum and Human Rights - A Briefing Note (June 2016) <http://www.humanrightsconsortium.org/wp-content/uploads/2016/06/The-EU-Referendum-and-Human-Rights-A-Briefing-Note.pdf>, Chris McCrudden, The Good Friday Agreement, Brexit and Rights, Royal Irish Academy and British Academy Discussion Paper Series (24 October 2017); Colin Harvey, Judging Brexit Solutions (1 December 2017) <http://ukandeu.ac.uk/judging-brexit-solutions/>; Katy Hayward and David Phinnemore, This Brexit juncture is a critical moment for the Belfast (Good Friday) Agreement (27 November 2017) <http://qpol.qub.ac.uk/brexit-juncture-critical-moment-for-good-friday-agreement/>

²¹ See for example the comments of Angela McGowan, Director of the CBI in Northern Ireland at the 'Brexit: Charting a Way Forward - A Civil Society Dialogue' Conference on 15 June 2017 organised by the Human Rights Consortium, NICVA and Unison.

²² Newsletter, Northern Ireland peace process rights 'not affected by Brexit' (17 May 2016) <https://www.newsletter.co.uk/news/northern-ireland-peace-process-rights-not-affected-by-brexit-1-7386663> and Belfast Telegraph, Brexit risk to peace process claims 'absolute nonsense' Yvette Shapiro (2 April 2016) <https://www.belfasttelegraph.co.uk/news/brexit/brexit-risk-to-peace-process-claims-absolute-nonsense-34591914.html>

between Ireland and the UK. It also expresses a commitment to that friendly relationship between nations which will continue to be developed both as good neighbours, and as members of the EU. Accordingly, the foundation for future relationships was clearly based on the notion that both Ireland and the United Kingdom would be members of the European Union. This was the assumed context both politically and publicly when the Belfast/Good Friday Agreement was voted for by a majority of the public on both sides of the Irish border.

In our conversations with civil society and grass roots groups, the supporting framework of the EU to the Belfast/Good Friday Agreement and consequent constitutional settlement has been raised consistently. In fact, for children and young people there is a sense of the solidity of the Agreement and its function in protecting identity and the border being destabilised by removing this connectedness to the EU.²³ There was an underlying assumption both in 1998 and since that the UK and Ireland's membership of the EU would underpin the peace process and agreement and be a constant backdrop or platform upon which the provisions of the Agreement would be delivered. It is clear from our engagement with members and through our workshops that it was felt that the EU platform of rights supported and strengthened the rights and safeguards in the Agreement. Moreover, mutual membership of the EU for the UK and Ireland has pulled both jurisdictions towards higher standards of equality and human rights compliance and has reduced tensions over mutual recognition of standards on both sides of the Irish border. Even before the peace process of the late 1990s the EU was seen locally as having a positive impact on establishing North-South linkages and standards. In particular, the Maastricht Treaty played an important role in streamlining customs arrangements and opening up the border between Ireland and the United Kingdom.²⁴ A measure only achievable through the UK and Ireland's mutual membership of the EU.

The second explicit reference to the EU is in the important Strand Two North-South arrangements which establish the North-South Ministerial Council (NSMC). The role of the NSMC was to act as a vehicle for cooperation and action between the Northern Ireland Executive and the

²³ Children's Law Centre, Consultation with Children and Young People on Brexit (June 2017)

²⁴ Irish Times, 'Britain wakes up to the reality of free trade' Kevin O'Rourke (6th December 2017) <https://www.irishtimes.com/opinion/kevin-o-rourke-britain-wakes-up-to-the-reality-of-free-trade-1.3316849>

Irish Government on all-island and cross-border basis. The NSMC's remit was to exchange information, discuss and consult with a view to cooperating on matters of mutual interest within the competence of both administrations. Part of this consultation work was to consider the EU dimension of relevant matters and the implementation of relevant policies and programmes. The areas identified for North-South co-operation by the Council and the supporting implementation bodies had a very high degree of overlap both with EU areas of influence and matters that had a significant human rights dimension, including education, the environment, social security and health.

Mutual EU membership and the platform of common EU standards and legislation was therefore seen to be the 'grease' that would enable cross-border bodies and co-operation to work. Indeed, this has been proven to be the case in practice since the establishment of the NSMC and the implementation bodies almost twenty years ago. Moreover, paragraph 13 of the Agreement highlights the co-dependent nature of the NSMC and the Northern Ireland Assembly which states: 'It is understood that the North/South Ministerial Council and the Northern Ireland Assembly are mutually inter-dependent, and that one cannot successfully function without the other'. This paragraph implies that if the NSMC cannot function then the existence of the Northern Ireland Assembly is itself threatened. The NSMC and its implementation bodies are in large part dependent upon the normalising effect of EU standardisation and membership on both sides of the border to aid cooperation on cross border issues. Indeed, the EU Commission and UK have conducted a study of the potential impacts of Brexit and have identified 142 areas of North-South cooperation.²⁵ Therefore, the removal of that EU context from one of the states, via the Brexit process, risks undermining the continuation of the NSMC, which imperils the proper functioning of the Northern Ireland Assembly, further underlining the link between EU membership and the survival of the Belfast/Good Friday Agreement institutions.

Beyond this, when the Agreement is considered in the context of its implementing legislation, institutions and measures, there are other examples of where the EU has served to realise and support the Belfast/

²⁵ The Guardian, Hard Brexit would hit 142 Irish cross-border agreements Protest signs at Irish border, Lisa O'Carroll (27 November 2017) <https://www.theguardian.com/politics/2017/nov/27/hard-brexit-would-hit-142-irish-cross-border-agreements>

Good Friday Agreement and the wider peace process. The Northern Ireland Act 1998 took many of the agreed Belfast/Good Friday Agreement provisions and translated them into UK law. It is the core piece of legislation implementing the Agreement and provided for the establishment of the Assembly, Executive and departments, but also for a series of checks and balances on the power-sharing Executive.

One of these checks and balances is hugely significant from the perspective of EU human rights. Section 6 of the Northern Ireland Act sets out the legislative competence of the Assembly and one of the restrictions it places on the powers of the Assembly is that it cannot do anything that is incompatible with EU law. A similar limitation is placed on the actions and policy making of Ministers and within departments. As discussed elsewhere in this report, this has restricted the powers of Ministers and public authorities and bound them to implement EU law locally. This obligation to give effect to EU law is one of the main mechanisms that provided for local access to substantive EU-derived rights.

The Northern Ireland Act implements the Belfast/Good Friday Agreement and links our institutions to EU standards and structures. It also delivers the commitment in the ‘Agreements Declaration of Support’²⁶ and ‘Rights Safeguards and Equality of Opportunity’ sections to enhance and defend human rights in Northern Ireland. Indeed the House of Lords established that the Northern Ireland Act, read together with the Belfast/Good Friday Agreement is a constitution for Northern Ireland; ‘The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution’.²⁷ Civil society organisations in Northern Ireland, including the Consortium, sought further clarification on the status of the Belfast/Good Friday Agreement and Northern Ireland Act in relation to the Brexit process in *Agnew and Others*.²⁸ This case sought clarity from the Supreme Court on whether any provision of the

²⁶ ‘The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all.’ Declaration of Support, Belfast Agreement <https://www.gov.uk/government/publications/the-belfast-agreement>

²⁷ *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32

²⁸ This was joined with a similar case from the English High Court and the judgment is available via *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5

Northern Ireland Act, read together with the Belfast/Good Friday Agreement and the British-Irish Treaty, restricted the powers of the UK Government to take unilateral decisions about Brexit that would affect Northern Ireland. Unfortunately, the Supreme Court failed to address these specific issues relating to Northern Ireland and so no further clarification of the constitutional settlement for Northern Ireland has been provided beyond the judgment in *Robinson*. As commented by Rory O’Connell; ‘The brief discussion on Northern Ireland issues hardly does justice to the lengthy and detailed arguments in the Agnew and McCord cases. It may reflect the pragmatic approach that having decided [the] bulk of issues in relation to the ECA argument, the Court did not need to decide these issues. Or perhaps judges in the majority have more nuanced views on these issues but the need for agreement on an 8-judge decision lead to this brief discussion of the Northern Irish issues.’²⁹ It follows that the constitutional status of the Northern Ireland Act and the Agreement still stands and any amendment or undermining of the Act risks undermining the constitutional settlement of Northern Ireland.

All the linkages to the EU in the Belfast/Good Friday Agreement, both in terms of direct references in the Agreement and in its implementing legislation, weaved the EU into the Northern Ireland peace process and helped play a significant cumulative role in delivering an agreement in 1998. It would be overly simplistic to categorise the Agreement merely as the establishment of new power sharing arrangements in the form of the Assembly and D’Hondt system of mandatory executive government. The Agreement represented a stranded approach that dealt with Northern Ireland issues, north-south relations and east-west relations. Each stage included a series of concessions and important ‘confidence building measures’ that made up the wider package of the deal. The platform of EU law has been instrumental in providing for the development of mutual standards across the island of Ireland and within the UK.

The status of both Ireland and the UK as members of the EU ensured that the border between North and South would continue to become increasingly fluid. It ensured that reciprocal rights and the standardisation of services and protections would exist on both sides of the border. It also ensured that the north-south bodies establishing important all-island dimensions would be able to function effectively.

²⁹ Rory O’Connell, The Supreme Court’s Brexit Judgment (27 January 2017) <http://rightsni.org/2017/01/the-supreme-courts-brexit-judgment/>

The restriction on the Assembly from acting contrary to EU law is part of the complex system of human rights protections at the heart of the Agreement, alongside the European Convention of Human Rights (ECHR). These systems safeguarded against any community or political party exercising ministerial or executive power in a discriminatory manner. Additionally, the UK Government, which continued to exercise sovereignty over Northern Ireland, was also bound to act in accordance with EU law and be held to account for breaches at the CJEU. Such measures made significant in-roads in developing both the context and conditions by which an agreement was possible by building confidence in communities that the abuses of the past could not happen again. It also ensured the democratic institutions of the Agreement continued to be compliant with EU human rights standards into the future. All of these safeguards risk being undermined as the UK leaves the EU.

The Peace Settlement and UK-EU Negotiations

As the Brexit process has unfolded over the last 18 months, the Consortium and others have raised concerns that protections within our peace process linked to the EU or underwritten by our EU membership will be lost as part of the Brexit withdrawal.³⁰ While there have been assurances from both the EU and the UK government, the detail of what this means in practice has yet to be established. In the Article 50 notification letter, Prime Minister May set out her intention to ‘pay particular attention to the UK’s unique relationship with the Republic of Ireland and the importance of the peace process in Northern Ireland’.³¹ Her concerns centred on the border and common travel area; ‘We want to avoid a return to a hard border between our two countries, to be able to maintain the Common Travel Area between us, and to make sure that the UK’s withdrawal from the EU does not harm the Republic of Ireland’. In addition, her letter made it clear that the government had ‘an important responsibility to make sure that nothing is done to jeopardise the peace process in Northern Ireland, and to continue to uphold the Belfast Agreement.’

³⁰ Human Rights Consortium, NICVA and Unison, Overview - ‘Brexit: Charting a Way Forward’ conference <http://www.humanrightsconsortium.org/brief-overview-brexit-charting-way-forward/> (22 June 2017) Human Rights Consortium, Human Rights Implications of Brexit (12 October 2016) <http://www.humanrightsconsortium.org/human-rights-implications-brexit/>

³¹ Prime Minister’s letter to Donald Tusk triggering Article 50 (29 March 2017) <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50>

In response the EU Commission's negotiation guidelines that were approved by the Council identified the risks of Brexit to Northern Ireland; 'The Union has consistently supported the goal of peace and reconciliation enshrined in the Good Friday Agreement *in all its parts*, and continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance'.³² It emphasised the unique circumstances on the island of Ireland and the need for 'flexible and imaginative solutions' to avoid a hard border 'while respecting the integrity of the Union legal order'. In an implicit recognition of the Common Travel Area, it also acknowledged the 'existing bilateral agreements and arrangements between the United Kingdom and Ireland which are compatible with EU law'. This was a welcome development and was reciprocated in statements from the Irish and UK Governments. However, both from our engagement with our members, and our own research, there is a profound concern that as the process develops, these sentiments may fail to move beyond rhetoric.

There are also some suggestions that despite these high-level commitments, it is difficult to establish how they will work in practice. The commitment to the Common Travel Area (and associated informal agreements) is stressed in the UK government's position paper as a proposed solution to these issues, but it creates a number of additional problems which need to be addressed. The UK government needs to marry its commitment to limiting immigration, while at the same time protecting the rights of Irish and UK citizens to move across the borders without impediment. The outworking of the current UK proposal appears to be to move immigration control from the border to become an everyday feature of daily life in Northern Ireland; 'immigration controls are not, and never have been, solely about the ability to prevent and control entry at the UK's physical border. ... controlling access to the labour market and social security have long formed an integral part of the UK's immigration system'.³³ These forms of internal immigration controls in Northern Ireland create the risk that it will be the most highly controlled part of the UK, with residents here having to prove their

³² European Council (Art. 50) guidelines following the United Kingdom's notification under Article 50 TEU (29 April 2017) <http://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf>

³³ Department for Exiting the EU, Northern Ireland and Ireland - position paper (16 August 2017) <https://www.gov.uk/government/publications/northern-ireland-and-ireland-a-position-paper>

entitlement to work, live and access services here on an unprecedented scale. This threatens to mutate into a situation where Northern Ireland becomes ‘one big border with respect to the rest of the UK’.³⁴ As well as creating tensions with the right to privacy, having to prove these rights of residence in Northern Ireland also creates the risk of increased sectarian tensions where people are forced to identify as UK or Irish (or other) as a form of social interaction.

The EU guiding principles for dialogue on Ireland and Northern Ireland published in September 2017 attempted to give greater specificity to the human rights elements of the Northern Ireland peace process which need to be secured within Brexit negotiations. Paragraph 4 confirms the following:

‘The Good Friday Agreement includes provisions on Rights, Safeguards and Equality of Opportunity, for which European Union law and practice has provided a supporting framework in Northern Ireland and across the island. The Good Friday Agreement requires equivalent standards of protection of rights in Ireland and Northern Ireland. The United Kingdom should ensure that no diminution of rights is caused by the United Kingdom’s departure from the European Union, including in the area of protection against forms of discrimination currently enshrined in Union law.’³⁵

The supporting framework of EU law and practice in Northern Ireland is evident both in the text of the Belfast/Good Friday Agreement and its implementation. This report clearly highlights the range of areas which fall under the scope of EU law and demonstrates how fundamental the bind of EU law is to the upwards harmonisation of rights standards in the UK and particularly in Northern Ireland. In our local assembly and executive the political and institutional limitations of our system of governance have in some cases acted as a block to the enhancement of protections. In this context the EU has helped move the institutions, legislation and governance of Northern Ireland towards enhanced protection of rights despite the internal politics of power sharing getting in the way. This external EU influence has also encouraged the Westminster government to take action to strengthen human rights

³⁴ Brexit Law NI, The New UK-EU Joint Report on Phase 1 of the Negotiations: Preliminary views on the Ireland and Northern Ireland section (11 December 2017)

³⁵ EU Commission, Guiding principles for the Dialogue on Ireland/Northern Ireland (21 September 2017) https://ec.europa.eu/commission/publications/guiding-principles-dialogue-ireland-northern-ireland_en

protections in Northern Ireland where there are political or institutional blockages in our power sharing arrangements.³⁶ These EU law checks also form a key part of the assumed context within which the peace agreement was signed and were, and continue to be, a core confidence building component of support for the Agreement and its institutions.

Progress towards achieving equivalent standards of protection of rights in Ireland and Northern Ireland has been aided immensely by substantive areas of commonality within the respective legal systems flowing from existing common membership of the EU. In areas of cross border cooperation this has aided fundamentally in the reciprocity of rights for EU citizens in areas such as employment, health, social assistance, education and many others. While the clarifications in the EU guidelines were positive and broadly welcomed, they also create a clear contrasting tension with the actions and intentions of the UK Government. Despite its stated commitment to the Belfast/Good Friday Agreement, it is difficult to align this with the practical implications of current UK government Brexit policy.³⁷ Civil society in Northern Ireland remains deeply concerned that it will not be possible to ensure no diminution of rights in Northern Ireland if the UK continues pursuing its current legislative proposals in relation to the EU (Withdrawal) Bill or fails to give proper protection to rights in Northern Ireland within the Brexit negotiations.

The UK Government's domestic legislative agenda outlines a course of action that fundamentally alters EU rights as they are currently enjoyed. This undermines the implementing legislation for the Belfast/Good Friday Agreement and changes the devolution settlement upon which the Agreement and the peace process were built. Further, it seems clear that there is an alarming lack of focus in the Westminster discourse and arguably awareness and/or interest among UK legislators of the significant threat to the Belfast/Good Friday Agreement and the peace process posed by the UK government's approach to Brexit. The EU (Withdrawal) Bill currently making its way through the Westminster parliament provides for the legal transition of EU law to UK domestic law on exit day:

³⁶ See for example the discussion on the rights of LGBT people in chapter 4 of this report.

³⁷ Katy Hayward, The Irish border is not a technical issue but a political one (20 October 2017) <http://blogs.lse.ac.uk/brexit/2017/10/20/the-irish-border-is-not-a-technical-issue-but-a-political-one/>

- In Clause 5(4) it provides that the EU Charter of Fundamental Rights will no longer be part of domestic UK law on or after exit day;
- Clause 6 removes the restriction for UK law to act in compliance with CJEU case law;
- Clause 11(3) amends the Northern Ireland Act 1998 removing the restriction on the Northern Ireland Assembly to act in accordance with EU law;
- Clause 7 gives UK Ministers very wide Henry VIII powers to amend retained EU legislation with little or no Parliamentary scrutiny; and
- Clause 11 also allows Westminster to take powers from devolved governments that would have reverted to them naturally upon exit day.

Crucially the Bill gives no formal recognition or protection to the Belfast/Good Friday Agreement or any assurances that its full implementation and enjoyment is a priority as the UK exits the EU, despite assurances from UK Government.

Beyond Borders

In order to meet the requirements of the current EU guidelines, as they relate to Northern Ireland and Ireland, then the rights protections and safeguards that currently exist need to be retained in a way that is as close as possible to the current status quo. The EU (Withdrawal) Bill is clearly at odds with that requirement and as currently drafted fundamentally undermines and hollows out the Belfast/Good Friday Agreement and consequently threatens the broader peace process. As the Brexit process progresses, it is clear that we are moving away from a situation where the power in the UK is dispersed between the supranational EU-plane and the local through devolution, towards a system of recentralisation, at least in the short term. This has worrying implications for the out workings of the constitutional settlement for Northern Ireland.

In the aftermath of Brexit there will need to be some level of assurance that the new internal regulatory frameworks to replace the current EU structure which will apply across all the devolved regions will allow the current devolution settlement to be maintained. According to the Secretary of State for leaving the EU, the EU (Withdrawal) Bill will provide ‘certainty and continuity for people across the UK by recreating in UK law the common frameworks currently provided by EU law, and

providing that the devolved institutions cannot generally modify them'.³⁸ There are four core reasons for the UK government taking a common frameworks approach.³⁹ Firstly to maintain a properly functioning UK single market. Secondly, to mitigate against regulatory divergence in the UK undermining the UK government's ability to strike comprehensive trade deals with third countries or devolved administrations putting in preferential measures for a particular industry. Thirdly to 'provide the certainty needed to agree and meet international obligations' including in areas relating to devolved policy competences. This might apply, for instance, if the UK continues to cooperate with the EU in tackling cross-border crime or in allowing each other's citizens access to healthcare when abroad. Finally, some policy issues inherently do not respect national boundaries in relation to fisheries or environmental regulation.

These common UK frameworks could have a particularly destabilising effect in Northern Ireland if there is a marked divergence from EU standards. Common EU frameworks on the island of Ireland have helped consolidate good working relations across the border on a range of issues from the environment, to the single energy market and the agri-food industry. The EU has demonstrated a willingness to take an imaginative and flexible approach to Northern Ireland in Brexit in order to protect the Belfast/Good Friday Agreement and all its out workings. Unless due consideration is given to the unique circumstances of Northern Ireland by the UK government in developing these UK-wide common frameworks, they could unintentionally undermine the Agreement. The list of areas which would be affected by this 'common frameworks' approach is extensive. According to research by the Institute for Government, this list extends to over 140 policy areas - a much greater number than for Scotland and Wales, which reflects the asymmetric nature of devolution.⁴⁰

As we finalise this report there seems at least some potential for the EU and UK to reach a deal within the first phase of Brexit negotiations that

³⁸ House of Commons Hansard Debate Vol 628/Col 354 (07 September 2017) [http://hansard.parliament.uk/Commons/2017-09-07/debates/DA3CC146-F8AB-40FF-812B-FE2CADDEA2F4/EuropeanUnion\(Withdrawal\)Bill#contribution-630D6BFC-0C15-4CC3-843F-A5536F2629FC](http://hansard.parliament.uk/Commons/2017-09-07/debates/DA3CC146-F8AB-40FF-812B-FE2CADDEA2F4/EuropeanUnion(Withdrawal)Bill#contribution-630D6BFC-0C15-4CC3-843F-A5536F2629FC)

³⁹ Institute for Government, Brexit, Devolution and Common Frameworks <https://www.instituteforgovernment.org.uk/explainers/brexit-devolution-and-common-frameworks>

⁴⁰ Institute for Government, Brexit, Devolution and Common Frameworks <https://www.instituteforgovernment.org.uk/explainers/brexit-devolution-and-common-frameworks>

would allow for regulatory convergence between Northern Ireland and the EU as it relates to the Single Market and the Customs Union.⁴¹ That may well solve many of the barriers to retaining an open border and allow trade, movement and transport to continue in line with the status quo. But while the Customs Union and the Single Market certainly solve many of the trade and business concerns and maintain cooperation across the border such as protecting the four freedoms of the Single Market,⁴² it does little to deal with the problem of the UK, and as a result Northern Ireland, diverging significantly from current EU human rights standards as they currently apply locally or reciprocation of shared rights standards across the Irish border.

On the same day that a possible deal on these issues were being lauded (and subsequently scuppered) the House of Commons discussed a clause in the EU Withdrawal Bill (Clause 11) that would fundamentally alter the power of the Northern Ireland Assembly to be bound by Community Law and would centralise devolved functions related to EU legislation within Westminster.⁴³ This example is symbolic of a deeper contradiction within the Brexit negotiation process. On one hand Northern Ireland (including the border, the Belfast/Good Friday Agreement and the peace process) have been identified as a priority issue within the Brexit negotiations, but on the other hand little substantive progress has been made on protecting EU-derived human rights within Northern Ireland which underpin the constitutional settlement.

It is understandable that there have been calls for the retention of the single market and customs union as it brings forth at least the possibility of further regulatory convergence or standardisation.⁴⁴ This would deliver an open border and help protect elements of North South cooperation

⁴¹ RTE News, No deal reached in Brexit talks between May and Juncker (4 December 2017) <https://www.rte.ie/news/brexit/2017/1204/924815-single-market-eu-negotiations/> It is noted that the Phase 1 agreement was reached on Friday, 8 December.

⁴² Customs Unions establish the member states with a common external tariff. Members decide not to impose tariffs (taxes on imports) on each other's goods and agree to impose common external tariffs on goods from countries outside their customs union. A Single Market allows the free movement from one EU member country to another of goods, people, services and capital (the so-called 'four freedoms'). Those rules remove barriers to trade and they harmonise, or unify, national rules at EU level.

⁴³ There is further discussion of the phase 1 agreement in the conclusion.

⁴⁴ Brian Doherty, Christopher McCrudden, Lee McGowan, David Phinnemore, Dagmar Schiek and John Temple Lang, Northern Ireland and Brexit: the European Economic Area option, European Policy Centre (7 April 2017) http://epc.eu/pub_details.php?cat_id=17&pub_id=7576

agreed in our peace process. But these measures do not in themselves represent the retention of the supporting framework in Northern Ireland of European Union law and practice, nor would it cover EU derived human rights. It is not possible to identify an individual law, which if retained could guarantee the maintenance of the full enjoyment of EU rights. This requires the rich tapestry of rights, processes and access to institutions to be retained.

From our research and extensive discussion with civil society organisations across Northern Ireland in the last twelve months, the consensus is clear; EU membership, law and practices play an essential confidence-building role in supporting the Northern Ireland peace process. Restrictions on the Assembly not to act outside of EU law; the presence and accessibility of EU rights via the EU Charter of Fundamental Rights and other EU law sources; the binding nature of CJEU judgments and the third party nature and supervisory aspect of avenues of appeal to the CJEU; the supremacy of EU law and the upwards harmonising effect it has on local legislation all help create confidence that the governance of Northern Ireland is bound by procedures, legislation and practice which restrict the potential for abuses of power and ensure the development of rights protections reflective of a modern, democratic European state. Replicating or maintaining that sense of confidence requires not just selective elements of EU law or practice being retained, but the entire tapestry of what EU membership represents in Northern Ireland. In the current environment there seems little evidence that this is a priority within the Brexit negotiations.

4. Substantive Rights

The human rights and equality protections in Northern Ireland are built on a complex web of interlocking legal frameworks: local, national, European and international law all have a role in building this collection of human rights standards which inform all laws, policies and decisions made within the devolved administration and at a UK-wide level. The various forms of human rights protections provide an underpinning constitutional ethos, but the effectiveness of these rules changes depending on their sources. The EU human rights and equality framework is reasonably strong within the scope of EU law and offers options for more robust remedies and checks where there is a risk of non-compliance. It also offers a mechanism for some international human rights treaties to be enforceable in local law, for example for the UN Convention on the Rights of the Child and the Convention on the Rights of People with Disabilities. Brexit risks destabilising this complex human rights framework which threatens to detrimentally impact the enjoyment of rights here. This Chapter will set out some of these risks on a thematic basis through a closer examination of citizenship rights; the rights of children and young people; rights of women; rights of LGBT people; rights of people with disabilities, environmental rights; and the rights of workers.

EU human rights law in Northern Ireland

The UK is not the only EU member state to have embedded EU law in its constitutional hierarchy. In fact, all EU member states, including Ireland, have amended their constitutional frameworks to accept EU law as part of their domestic legal order. This means there is an equivalence of EU based rights in all member states - including jurisdictions on the island of Ireland. The way in which the government of the time entrenched EU law into UK law was through an act of parliament. Therefore, the main conduit for EU law in the UK is the European Communities Act 1972. This law was passed to allow for the UK to accede to the EU in January 1973. The European Communities Act has the effect of ensuring that EU law has direct effect in the UK - in the same way that EU law applies in all EU member states. It allows government (and Northern Ireland) ministers to use secondary laws to implement EU law, such as directives, where necessary. The law makes it clear, in very broad terms, that all remedies and procedures which are available under the EU treaties are available in the UK without the need for further legislation. This provision applies to EU human rights and equality laws, as it does in other areas of EU law.

The European Communities Act sets out the framework for how the EU treaties and any regulations, directives, case law or other measures should be downloaded into UK law. It is sometimes referred to as a constitutional revolution for the UK,⁴⁵ as it, in effect, bound all future parliaments to also comply with EU law. This constitutional revolution was cemented by the case of *Factortame* where the courts accepted that, under the terms of the European Communities Act 1972, the Westminster parliament could not legislate contrary to obligations which flowed from membership of the EU.⁴⁶ The EU has evolved into a legal and political order unlike any other and this has influenced its impact in Northern Ireland.

The Northern Ireland Act 1998 is the mechanism which gives effect to the Belfast/Good Friday Agreement in UK law. It provides the legal basis for devolution of government, power-sharing and its law-making powers. The Agreement, together with the Northern Ireland Act are considered to have created a constitution for Northern Ireland. According to the House of Lords in 2002:

‘The 1998 Act... was passed to implement the Belfast Agreement, which was itself reached, after much travail, in an attempt to end decades of bloodshed and centuries of antagonism. The solution was seen to lie in participation by the unionist and nationalist communities in shared political institutions, without precluding ... a popular decision at some time in the future on the ultimate political status of Northern Ireland. ... The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. ... the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody.’⁴⁷

The formation of the devolved administration for Northern Ireland was a constitutionally distinct process to that in Scotland and Wales and reflects what is referred to as asymmetrical devolution. This means that the content of powers devolved and the way in which devolution has happened is different in each jurisdiction in the UK. The framework of

⁴⁵ Wade, ‘Sovereignty: Revolution or Evolution?’ (1996) 112 *Law Quarterly Review* 568

⁴⁶ *Factortame* (No 2) [1991] 1 AC 603

⁴⁷ Lord Bingham in *Robinson v. Secretary of State for NI* [2002] UKHL 32

the Belfast/Good Friday Agreement established that the internal devolution arrangements in Northern Ireland sit alongside the North-South Ministerial Council and the East-West arrangements between the UK and Ireland as that of ‘friendly neighbours and as partners within the European Union’.⁴⁸ This settlement has not remained static, however any constitutional changes have been the result of cross-party agreements to progress through the challenges of the post-conflict power-sharing arrangements.

The Northern Ireland Act reflects the agreement of the UK to be bound by and in compliance with EU law in a provision which states that the Northern Ireland Assembly and Ministers of the Executive are prohibited from making laws which are incompatible with EU law, including rights protections in EU law.⁴⁹ This places an immediate constraint on the powers on the devolved institutions. Neither the Executive acting together, nor a Minister alone can lawfully make any laws or policies which are contrary to EU law and if they do, these can be challenged in the courts. This provides an important check on the powers of ministers in the Northern Ireland power-sharing government, as ministers have a considerable amount of decision-making autonomy in the Executive. Similarly, if the Assembly mistakenly or intentionally passed a law which is contrary to EU law, it can be challenged in the courts. There are various mechanisms in the Northern Ireland Act to ensure that the Assembly acts within its competence and are not contrary to EU law. In the first instance the Minister must assert that any proposed bill is within the legislative competency when introducing the Bill. Secondly, the presiding officer must also agree that it is within the Assembly’s powers and refer any issues to the Secretary of State for Northern Ireland. In addition, where there is doubt or uncertainty about whether a Bill is within the legislative competence of the Assembly, the Attorney General may refer the matter to the Supreme Court for a decision. If such a referral is made, the Supreme Court may then choose to refer any questions of EU law to the CJEU for clarification before it takes a decision on whether it falls within the powers of the Assembly.

In the UK constitutional order, usually laws that are passed through Westminster parliament are considered to be the highest source of law -

⁴⁸ Belfast/Good Friday Agreement

⁴⁹ Sections 6(2) and 24(1)(b) Northern Ireland Act 1998

this is the principle known as parliamentary supremacy. For example, under the Human Rights Act, if a law passed through the Westminster parliament is found to be contrary to an ECHR right, then the court can try to interpret that law in a way that is compatible with human rights. If this is not possible, then the court may decide to issue a ‘declaration of incompatibility’. This declaration does not remove the disputed law from the statute book, nor does it provide a remedy for anyone affected by this law. Instead it signals to government that there is a problem with the law and it provides for an accelerated process for Ministers to remedy the law, but they are not under any obligation to do so. While it is rare for this happen, the Government does not always seek to remedy the incompatibility with the ECHR and the law in question remains in force. In such circumstances, the declaration of incompatibility has a largely symbolic value. The only option then left to a litigant is to take their case to the European Court of Human Rights, but even if they are successful there, it does not follow that the UK government will remedy the breach.⁵⁰

The situation for EU law is different. The caselaw of the CJEU has recognised that in order for the EU to function effectively as a single market, EU law must have supremacy over laws of member states where a conflict arises. This was an established principle of EU law prior to the UK joining in 1973.⁵¹ On the rare occasion there is a conflict between UK law and EU law, then the EU law takes priority. For example, in a recent case, the Supreme Court found that an exemption in the Equality Act was contrary to EU anti-discrimination law as it allowed for married same sex couples to be treated less favourably than married opposite sex couples in relation to occupational pensions.⁵² When this happens, the provision of UK law which is incompatible with EU law is ‘disapplied’ and will cease to have any legal effect. Therefore in this case the court decision provided for an immediate remedy for the applicants. The exemption in the Equality Act which allowed for less favourable treatment of the same

⁵⁰ See for example the prisoner voting saga. Following a declaration of incompatibility in the House of Lords, the applicant took their case to Strasbourg. The decision of the European Court of Human Rights was handed down in 2005 (*Hirst v United Kingdom (No 2)* [2005] ECHR 681) and twelve years later the government has mooted changing its policy. See The Guardian, Government reportedly planning to allow some UK prisoners to vote, Haroon Siddique (29 October 2017) <https://www.theguardian.com/society/2017/oct/29/government-planning-to-allow-some-prisoners-to-vote-european-court-human-rights>

⁵¹ Case 26/62 *Van Gend en Loos* and Case 6/64 *Costa v ENEL*

⁵² *Walker v Innospec Limited* [2017] UKSC 47

sex couple was removed. Moreover, as this provision was carried over from laws establishing civil partnerships, it follows that any such exemption which exists in Northern Ireland law relating to civil partnerships should also be ‘disapplied’ as it is contrary to EU anti-discrimination law.

What is the difference between the EU Charter of Fundamental Rights and the European Convention of Human Rights?

EU Charter of Fundamental Rights	European Convention of Human Rights
A bill of rights for the EU and all member states acting within the scope of EU law	An international treaty under the auspices of the Council of Europe
28 member states of the EU	47 member states of the Council of Europe
<i>Core legislation in UK:</i> European Communities Act 1972	<i>Core legislation in UK:</i> Human Rights Act 1998
<i>Supervisory Courts:</i> All Northern Ireland (and UK) courts and tribunals Court of Justice of the EU	<i>Supervisory Courts:</i> Only the High Court, Court of Appeal and Supreme Court European Court of Human Rights
<i>Bringing a claim:</i> An applicant must have ‘sufficient interest’ when application brought under judicial review	<i>Bringing a claim:</i> An applicant must demonstrate that they are a ‘victim’ of a rights violation - a much stricter test
<i>Substantive Rights:</i> 50 articles under 6 titles Dignity; Freedoms; Equality; Solidarity; Citizens’ Rights and Justice	<i>Substantive Rights:</i> 14 substantive articles and additional protocols Largely focused on civil and political rights

<p><i>Enforcement:</i> Fairly robust - any court or tribunal in the UK can disapply a law or part of law to the extent that it is not compatible with the Charter (or any other EU law) and provide immediate redress for the applicants.</p>	<p><i>Enforcement:</i> Less robust - any superior court can interpret existing law in light of the rights in the ECHR. Where this is not possible it can make a declaration of incompatibility in relation to primary law. This means that it is up to the Minister or Parliament to decide whether to rectify this law to bring it in line with the Human Rights Act.</p>
<p><i>Remedies:</i> Compensation is based on losses incurred where there is a direct causal link between the breach of EU law and the damages suffered</p>	<p><i>Remedies:</i> Compensation for damages are relatively rare, limited and rely on the just satisfaction test</p>
<p><i>Northern Ireland institutions:</i> The Northern Ireland Assembly and the Executive is prohibited from making any law or policy that is contrary to EU law, including the Charter</p>	<p><i>Northern Ireland institutions:</i> The Northern Ireland Assembly and the Executive is prohibited from making any law or policy that is contrary to the rights contained in the ECHR.</p>

Brexit and Rights: Cross-cutting issues

Our outreach with our members and through our workshops has emphasised the level of fear and uncertainty felt across communities in Northern Ireland. This insecurity was felt particularly acutely in border areas. This fear and insecurity was amplified for EU and EEA migrants living in Northern Ireland who were unable to get clear advice about how their lives and rights might be impacted by Brexit. People working as advisers to EU migrants reiterated this concern, as they had to deal with the distress of EU migrants on a daily basis and were unable to predict where the negotiations on citizenship rights might end up. This uncertainty was also raised in relation to risks to the economy. A recurring issue which participants in our workshops raised was the economic impact of Brexit in border areas in particular. There was a deep anxiety that any such economic destabilisation would have an immediate impact on jobs, wages and living standards which would in

turn have a direct impact on the enjoyment of economic and social rights.

The EU has supported human rights development in Northern Ireland in a number of ways. It has had a positive progressive influence and has pulled the UK generally and Northern Ireland in particular towards better compliance with international best practice and a more robust framework for the enjoyment of human rights. From our research a range of cross-cutting concerns were identified about how Brexit could destabilise the positive impact the EU has had on supporting and advancing human rights in Northern Ireland:

- Impact on Peace Process

EU membership was intimately tied to both the context in which a peace process was achievable and to the peace agreement itself. References to the EU are both explicitly contained in our peace process and its practical delivery. The UK and Ireland's membership of the EU and the common platform of rights standards, legislation and redress mechanisms that go with it played a key 'confidence building' role in our peace process. There are real concerns that removing that underlying backdrop of EU protections represents both a symbolic and practical unpicking of the Agreement and peace process itself.

- *Rights that exist in EU law*

The EU human rights framework protects rights across a number of legal mechanisms, the EU treaties, the Charter on fundamental rights, directives, regulations and caselaw. These various instruments have had positive impacts on the enjoyment of rights in Northern Ireland and, despite assurances from the UK government, there are real fears that these rights frameworks will be undermined after the UK leaves the EU. The UK government has already identified the Charter of Fundamental Rights will not be carried over into UK law via the EU (Withdrawal) Bill and this will create a human rights gap in local law. In addition, without the requirement for local law to keep pace with EU human rights protections, there is a real risk that Northern Ireland will fall behind best European practice and that a gap between rights protections in Northern Ireland and Ireland will undermine the equivalency guarantee in the Belfast/Good Friday Agreement.

- *Rights dependent on reciprocity and membership of the EU*
 There are vast areas of supporting law and policies which exist in the EU which strengthen human rights and which are based on mutual recognition of standards across borders. This is of particular importance in Northern Ireland as the land border presents immediate complications which need to be addressed in Brexit. Moreover, Strand II of the Belfast/Good Friday Agreement on north-south relationships is built on the common frameworks of EU law. The border presents a very real risk to the enjoyment of a range of rights from access to education and healthcare to child protection and security cooperation. Without the common frameworks of the EU law, policy and institutions to facilitate this cross-border collaboration, the UK will need to negotiate new arrangements with the EU on a cross-sectoral basis.

- *Impacts of EU funding*
 The human rights impact of the EU funding models is something that has been rather overlooked. The EU has supported large programmes for cross border environmental cooperation and rural development and Brexit threatens to interrupt these projects. The loss of any such funding could have a devastating impact on rural life and the environment. In addition, the EU provides micro funding streams to support people back into employment, which is invaluable for people who long term unemployed. Another funding risk raised by participants was the impact of the loss of direct payments to farmers under the Common Agricultural Policy on the wider rural communities and Northern Ireland Economy.

- *Access to European networks*
 One of the significant ‘unseen’, but invaluable ways in which the EU supports rights in Northern Ireland is through facilitating and funding groups to work on a transnational basis to build networks and work together on rights issues. Through networks, local groups are able to look to best practice across EU member states on particular issues and to campaign on a pan-European basis to improve EU human rights standards. These networks are particularly important on a sectoral basis for groups working, for

example, on rights of disabled people, children's rights and women's rights. They allow for coordination and strategising on how to improve human rights standards at the EU level and also within their own member states. They also support local groups, who might otherwise be unable to participate, to engage with the UN human rights treaty monitoring bodies.

- *Identity*

(i) Community identity in Northern Ireland

The Brexit referendum campaign at a UK level was built on a narrative of Britishness and 'taking back control' of our laws, borders and sovereignty fuelled further divisions in the ethno-political identity in Northern Ireland. The impact of these narratives has been one which has increased inter-community tension and has created a new identity marker locally. Moreover, the impact of UK identifying people losing access to EU citizenship and Irish identifying people retaining the rights attached to EU citizenship creates a potentially polarising difference in the enjoyment of rights between the two main communities in Northern Ireland.

(ii) EU/EEA nationals in Northern Ireland

EU and EEA migrants living in Northern Ireland are facing high levels of fear and uncertainty around their status and rights in the aftermath of Brexit. This has fed into a sense of otherness and no longer feeling settled in Northern Ireland. According to participants in our workshops, it is already affecting EU migrants' decisions about leaving Northern Ireland - feeling they had 'no future' here. Beyond the two main communities in Northern Ireland, Brexit has also increased friction between EU migrants living in Northern Ireland and 'locals'. Participants in our workshops linked the referendum and subsequent debates about hard and soft Brexit to increased hostility from 'locals' towards migrants and migrant communities.

These cross cutting issues are explored in more detail in the next section of the report which looks at the substantive impact of the EU laws and policies which underpin human rights in Northern Ireland in the following

areas: citizenship rights; the rights of children and young people; rights of women; rights of LGBT people; rights of disabled people, environmental rights; and the rights of workers.

Citizenship Rights

EU citizenship rights for British and Irish citizens

In the *Miller* case, the Supreme Court recognised that there were three categories of rights established through the European Communities Act and membership of the EU: rights capable of replication in UK law; rights enjoyed in other member states of the EU; and rights that cannot be replicated in UK law.⁵³ This is significant, as no matter what actions the UK government or the Northern Ireland Executive take to shore up rights in the aftermath of Brexit, there will be some rights which cannot be downloaded or replicated within local law. Even where rights are transposed into local law, there will no longer be there overarching back stop of EU law or the CJEU. There are various other models that have been suggested, such as EEA+ that would involve the maintenance of free movement rights, as well as membership of the single market.⁵⁴ Such a model would necessarily envisage some kind of external supervision through the European Free Trade Association court of those rights associated with free movement of persons, however this model has been dismissed by the UK government as being inconsistent with their Brexit policy.⁵⁵ This means that this constitutional role of EU rights, including citizenship rights, and the CJEU as the overarching framework within which all other actions within the scope of EU operate will be lost.

Citizenship of the EU is not created as a free-standing right under the EU law, but is a right that is associated with being a national of one of the member states. It was established as a core principle of the Maastricht Treaty and it confers rights upon nationals of all EU member states. Brexit will have implications for these EU citizens' rights in two ways. Firstly, some of these rights are enjoyed in other member states of the EU and secondly, there are those which cannot be replaced by UK law after Brexit. This has particular resonance for Northern Ireland as under the terms of the Belfast/Good Friday Agreement, there is recognition of the 'birthright of all people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and

⁵³ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5

⁵⁴ Brian Doherty, Christopher McCrudden, Lee McGowan, David Phinnemore, Dagmar Schiek and John Temple Lang, Northern Ireland and Brexit: the European Economic Area option (7 April 2017) http://www.epc.eu/pub_details.php?cat_id=17&pub_id=7576&year=2017

⁵⁵ Prime Minister Theresa May, 'The government's negotiating objectives for exiting the EU' (Lancaster House speech) (17 January 2017) <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>

accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland'. This creates a category of people born and living within the UK who will have access to EU citizenship in perpetuity. This means that people from Northern Ireland who choose to be Irish citizens will have access to EU citizenship rights, whereas people who choose to be British will not.⁵⁶ By its very nature this distinction risks creating new tensions between the two main communities in Northern Ireland. In our workshops this matter raised alarm bells for people working on good relations and on a cross-community basis within communities. Already the Brexit referendum had created a new layer of tension along orange and green lines and unless this issue is addressed it is storing up problems for the future. It was felt that many people did not yet understand how Brexit will in fact impact their lives and this issue in particular was one which participants in our workshops felt had the potential to increase community tensions unless a solution is found.

Access to some rights will be lost automatically, as they are dependent on residency within an EU member state. These rights are derived under the treaties and are recognised in a range of EU laws and policies. Chapter V of the EU Charter sets out a range of EU citizens' rights - all of which are at risk in Brexit. For example, the right to vote and stand as a candidate in elections to the European Parliament in Member States in which she or he resides (under the same conditions as nationals of that state), is dependent on residing in a member state of the EU. After Brexit, even though Irish citizens in Northern Ireland will retain their EU citizenship as a birthright, they will not be able to vote in European Parliament elections unless they are resident in an EU state (unless some special arrangement is envisaged for Irish citizens who reside in Northern Ireland).

If the flexible and imaginative solution for Northern Ireland does include some form of integration of EU laws locally, it follows that arrangements should be put in place to ensure that the democratic rights of people

⁵⁶ It is noted that the Phase 1 Agreement has clarified that Irish identifying people will continue to enjoy their rights as EU citizens in Northern Ireland, but it is not clear what this will mean in practice. Joint Report from the Negotiators of the EU and UK government on progress during Phase 1 of the negotiations under article 50 TEU on the UK's orderly withdrawal from the EU. (8 December 2017)

living in Northern Ireland are maintained through representation in the European Parliament and in other EU institutions. In addition, the European Health Insurance Card (EHIC) is issued by one's country of residence and allows the holder access health care in EEA or EU countries. While the UK has agreed, in principle, to continue the EHIC scheme for EU27 citizens in the UK after Brexit and for UK citizens who are in the EU 27 on exit day, it is not clear how this will affect NI residents who are not in another EU member state on exit day.⁵⁷ Once the UK has left the EU, without specific access for UK residents to access EHIC, then all residents in Northern Ireland will lose access to this scheme unless they are covered by the exception above.⁵⁸ This could have a particularly detrimental impact for people living in border areas and for those who travel between Northern Ireland and Ireland. While it may be possible that a special arrangement is made to cover Northern Ireland resident Irish citizens, this will not be an automatic right as the Irish system for administering the EHIC scheme requires you to be resident and have an Irish social security number.⁵⁹ Moreover, such a scheme could create further tensions between the two main communities in Northern Ireland. There will be citizenship rights which Northern Ireland Irish citizens will retain access to, but which Northern Ireland UK citizens will lose, for example, the right to diplomatic protection by the diplomatic or consular authorities of any member state in the territory of a third country in which the member state of which she or he is a national is not represented and the right to move freely through the EU member states, for example, to work, to access services or to establish a business.

Free movement in EU law is often misconstrued as a right for anyone to move around the EU, it is more accurately characterised as a right of EU citizens to move to find work for workers to move around the EU in line with the citizenship directive and under the EU treaties. Connected to this free movement right, is the right to respect for family life. This

⁵⁷ Department for exiting the EU and EU Commission Article 50 Taskforce, Joint technical note on the comparison of EU-UK positions on citizens' rights (28th September 2017) <https://www.gov.uk/government/publications/joint-technical-note-on-the-comparison-of-eu-uk-positions-on-citizens-rights>

⁵⁸ Regulation 883/2004/EC on the coordination of social security systems

⁵⁹ The EU has a number of mechanisms for accessing health care across borders depending on the particular circumstances of the individual. However, similar limitations will apply to these other mechanisms in Brexit. See http://europa.eu/youreurope/citizens/work/social-security-forms/index_en.htm

means there are rules in place which allow EU migrants to bring their non-economically active members of their family to their country of residence. This applies whether or not those family members are EU citizens. This means that Northern Ireland Irish citizens will still be entitled to access and move freely within the EU under the terms of EU law, whereas Northern Ireland UK citizens will not, unless specific provision for this is negotiated under the terms of the Brexit negotiations. It should be noted that the EU negotiating position on the rights of UK nationals in the EU27 has proposed maintaining all current rights for UK nationals in the EU and EU citizens in the UK, but the UK has taken a much more restrictive approach, which could impact on the rights of NI based UK citizens travelling in the EU.⁶⁰

The difference between UK passport holders and Irish passport holders while travelling, working and accessing services across remaining 27 EU states could be quite stark once the UK has left the EU. This difference could also create differences within Northern Ireland. This dichotomy is further complicated by a recent case at the immigration tribunal in Northern Ireland. The First Tier Tribunal allowed a Northern Ireland woman to rely on her Irish citizenship under the Belfast/Good Friday Agreement, rather than considering her a UK-Irish dual national (a characterisation she rejected). This meant that her American husband could be treated as a family member of an EU national exercising free movement rights and therefore be subject to more lenient immigration rules for family reunification than if she were considered a UK dual national.⁶¹ This case is being appealed by the Home Office, but represents an example of the complexity of citizenship issues in Northern Ireland and the need to recognise both the Belfast/Good Friday Agreement rights and how these intersect with EU citizenship rights.

Any differentiation of rights between Irish and UK citizens living in Northern Ireland is significant. While some people who view themselves as UK citizens in Northern Ireland will be happy to apply for recognition of the rights associated with EU citizenship through availing of their right to Irish citizenship, there are other people in Northern Ireland who will

⁶⁰ Steve Peers, The Brexit talks: opening positions on the status of UK and EU citizens (30 June 2017) <http://eulawanalysis.blogspot.co.uk/2017/06/the-brexit-talks-opening-positions-on.html>

⁶¹ Irish Times, Couple wins appeal for visa after Derry wife refuses to identify as British, Sorcha Pollok (11 November 2017) <https://www.irishtimes.com/news/social-affairs/couple-wins-appeal-for-visa-after-derry-wife-refuses-to-identify-as-british-1.3288670>

not wish to do this. It is core tenet of the Belfast/Good Friday Agreement that the right to be considered British, Irish or both is a personal decision and should be recognised by both the UK and Irish governments. There is a real risk that post Brexit that this change in the rights and entitlements of UK and Irish citizens in Northern Ireland could have a destabilising effect on this right to freely choose one's ethno-political identity and create tensions between and within communities. The conflict in Northern Ireland was in part caused by differential access to rights on the basis of community identity, and a key aspect of the peace agreement has been to ensure that everyone is treated equally under the law and that no one community has access to rights to the detriment of the other. Under the terms of the Agreement, no one should feel obligated to identify as an Irish or UK citizen in order to access rights and there is a real risk that once the UK withdraws from the EU that both UK and Irish citizens living in Northern Ireland will face a divergence in rights. The EU referendum has already had created a new marker of community identity in Northern Ireland and is a new source of tension. This divergence in citizenship rights risks further aggravating this.

Under the Belfast/Good Friday Agreement, there is no provision made for the rights of people who are not born in Northern Ireland to claim the right to UK or Irish citizenship. This has given rise to a discrepancy between the citizenship rights of family members, where, for example, children will be entitled to Irish and UK citizenship by birth and the parents will only be able to apply for UK citizenship. While there is some provision for special application process for Irish citizenship for people living in Northern Ireland, this is a discretionary power of the Irish Government, rather than a formal process. This discrepancy between citizenship rights within families will become increasingly stark after Brexit, where some family members will be entitled to EU free movement rights and others will not. It is for this reason that the Northern Ireland Council for Racial Equality is calling for 'anyone who acquired the permanent residency and Indefinite Leave to Remain status under the UK immigration law in NI after the Agreement, [to have] the same equal right to Irish citizenship in exercising Article 1 self-determination rights of the Agreement, as an Irish, British or both.' This highlights an example of a group of people who risk having their rights undermined by Brexit, and it essential that minority ethnic people living in Northern Ireland are given the opportunity for full recognition under the terms of the Agreement.

Rights of EU27 and EEA citizens in Northern Ireland

Under the Citizenship Directive,⁶² ‘Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there’. This is an automatic right that applies to any *qualifying person* and does not require any additional action on the part of the EU or EEA migrant to regularise this. To exercise this right to permanently reside, the person must meet certain criteria. They must be an EU/EEA national, or a family member of that EU/EEA national, and have resided in the UK for a continuous period of five years and one of the following:

- a job-seeker
- a worker
- self-employed
- a former worker who has kept your worker status
- a student who is self-sufficient
- self-sufficient and supporting yourself financially
- a family member of a person in one of these groups.

There are some categories of person who are not automatically included in this group, such as people who are unpaid carers and anyone who is not economically self-sufficient.

In addition, any person who is ‘self-sufficient’ or a student must also have comprehensive sickness insurance for themselves and their families. Primary carers of dependent children must also have comprehensive sickness insurance, where they are dependent on that child for a right of residence.⁶³ The question of who is subject to the comprehensive sickness insurance requirement has only been enforced since 2011⁶⁴ and has been the subject of recent regulatory changes by the UK government extending the scope of who must have comprehensive sickness insurance.⁶⁵ Despite the fact that these cohorts of people are entitled to treatment and care under the NHS, this is not equivalent to

⁶² Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (29 April 2004)

⁶³ Case C-200/02 *Chen v Secretary of State for the Home Department* (19 October 2004)

⁶⁴ Home Office European operational policy notice 10/2011 for caseworkers to process EEA nationals' applications (published 18 June 2014) <https://www.gov.uk/government/publications/european-operational-policy-notice-102011-for-caseworkers-to-process-eea-nationals-applications>

⁶⁵ Home Office Guidance for family members of EEA national students required to hold comprehensive sickness insurance in the UK (2 June 2015) <https://www.gov.uk/government/publications/sickness-insurance-for-family-members-of-eea-students> and EEA Regulations 2016

comprehensive sickness insurance for the purposes qualifying for permanent residency in the UK. In the *Ahmad* case,⁶⁶ the Court of Appeal affirmed this, 'If an EEA national enters the UK and is not involved in an economically active activity, for example because she is a student, her residence and that of her family members will not be lawful unless she has CSIC [Comprehensive Sickness Insurance Cover] while she is a student in the five years following her arrival. ... The fact that she would be entitled to treatment under the NHS, and was thus at all times in substantially the same position as she would have been had she had CSIC, is nothing to the point.'⁶⁷ This issue was raised by the House of Lords EU Committee in a report, where it urged the government to give clarity on the extent to which the requirement to have comprehensive sickness insurance would impact on which EU nationals in the UK are given a permanent right to reside after Brexit.⁶⁸ While the government has published its negotiating position on the rights of EU citizens and the EU and UK and published ongoing technical notes to map agreement on citizens' rights after Brexit, this issue continued to threaten the rights of EU27 nationals to remain post-Brexit.⁶⁹

The UK government has recently issued guidance on administrative procedures which it will implement in the event of an agreement between the UK and EU Commission on citizenship rights.⁷⁰ This is a welcome development which will streamline the process of how EU27 citizens will be able to have their right to remain in the UK recognised post-Brexit. For example, according to the most recent UK regulations governing the right of residence of EU nationals which came into force in February 2017, the UK government has an automatic right to remove anyone who does not qualify for residence.⁷¹ This means that any student

⁶⁶ *Ahmad v Secretary of State for the Home Department* [2014] EWCA Civ 988

⁶⁷ <https://asadakhan.wordpress.com/2014/07/21/arden-lj-on-csic-and-permanent-residence/>

⁶⁸ House of Lords European Union Committee, Brexit: acquired rights (2016-17/82) (14 December 2016) <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/82/8202.htm>

⁶⁹ Department for exiting the EU and EU Commission Article 50 Taskforce, Joint technical note on the comparison of EU-UK positions on citizens' rights (28th September 2017) <https://www.gov.uk/government/publications/joint-technical-note-on-the-comparison-of-eu-uk-positions-on-citizens-rights>

⁷⁰ Department for Exiting the European Union, Citizens' rights: administrative procedures in the UK (7 November 2017) <https://www.gov.uk/government/publications/citizens-rights-administrative-procedures-in-the-uk>

⁷¹ Paragraph 23 Immigration (European Economic Area) Regulations 2016

or self-sufficient person, who does not have comprehensive sickness insurance, can be forced to leave the UK. The UK government has also taken a more aggressive approach to issuing EU27 nationals with deportation orders.⁷² This approach is the subject of an ongoing infringement action by European Commission, but it has not progressed.⁷³ The policy has placed EU27 nationals resident in Northern Ireland in a difficult and uncertain position, as on the face of law, they have been residing in the UK unlawfully for any period they did not have comprehensive sickness insurance.

The newly issued technical note clarifies that the process for EU27 migrants to apply for settled status will be a streamlined application process, which will focus on supporting the applicant, rather than refusing status on the basis of a technical error.⁷⁴ For example, under the scheme set out in its technical note, the UK government will not require proof that comprehensive sickness insurance was held by the applicant. This is a significant concession in light of the difficulty that this had created for people who are for example, full time carers or students. Another area of particular importance for people living in Northern Ireland, particularly in border areas, it will no longer require applicants to account for every trip they have taken in and out of the UK. These administrative changes will make the process of applying for settled status much easier for EU27 citizens. However, these procedures are not currently operational and there has been no indication as to when they will be implemented by the Home Office. It is likely they will be linked to any withdrawal agreement, rather than being implemented to facilitate EU27 citizens regularising their status immediately. In the intervening period, the current policies and more draconian approach will continue.

At the moment, all EU27 migrants who live in the UK continue with all the same rights and entitlements until March 2019 the current date the UK officially leaves the EU. In its white paper on legislating for exiting the EU, the government assured that it would convert all EU law into UK

⁷² The Guardian, EU nationals deportation letters an 'unfortunate error', says May (Mattha Busby) (23 August 2017) <https://www.theguardian.com/politics/2017/aug/23/home-office-apologises-for-letters-threatening-to-deport-eu-nationals>

⁷³ http://europa.eu/rapid/press-release_IP-12-417_EN.htm

⁷⁴ Department for Exiting the European Union, Citizens' rights: administrative procedures in the UK (7 November 2017) <https://www.gov.uk/government/publications/citizens-rights-administrative-procedures-in-the-uk>

law, which should mean that the right of residence EU nationals is guaranteed after the UK leaves the EU.⁷⁵ In its technical note, the UK government makes it clear that post Brexit the rights of EU27 citizens in the UK will be set out in the withdrawal agreement and that the citizens' rights chapter will be incorporated into UK law.⁷⁶ This note makes it clear that these rights will be enforceable in UK law, and that the UK government will be bound by the withdrawal agreement as a matter of international law. The UK government does not envisage any EU supervision of the rights of EU27 migrants in the UK after Brexit day. It also means that if there is a discrepancy with regards to citizenship rights set out in the law and those set out in the withdrawal agreement, it will be the interpretation in UK law that takes priority. This reflects the position which it set out in the government's position paper citizens' rights.⁷⁷

The ongoing uncertainty as regards to the rights EU27 migrants in the negotiation process has been a cause of some distress for people who have lived in Northern Ireland and made their lives here. From a human rights perspective, using the ongoing uncertainty as a bargaining chip in the withdrawal process is very worrying.⁷⁸ This approach and the uncertainty it creates may be contrary to the UK's obligations to protect the right to private and family life under article 8 of the ECHR.⁷⁹ In refusing to give a guarantee to EU nationals, the uncertainty could be crippling and could affect their ability to plan their lives, buy a home and even progress in their work, 'where the uncertainty and precariousness of an individual's situation affects the network of his or her personal, social and economic relations, which make up his or her private life, there can

⁷⁵ Department for Exiting the EU, The Repeal Bill: White Paper <https://www.gov.uk/government/publications/the-repeal-bill-white-paper>

⁷⁶ Department for Exiting the European Union, Citizens' rights: administrative procedures in the UK (7 November 2017) <https://www.gov.uk/government/publications/citizens-rights-administrative-procedures-in-the-uk>

⁷⁷ It is noted that in the phase 1 agreement, the UK government has committed to allowing the CJEU supervise its implementation of citizens' rights for a time limited period. Joint Report from the Negotiators of the EU and UK government on progress during Phase 1 of the negotiations under article 50 TEU on the UK's orderly withdrawal from the EU. (8 December 2017)

⁷⁸ Giannouloupolous, EU citizens' rights: The 'fair and serious' offer that wasn't (23 June 2017) <http://ukandeu.ac.uk/eu-citizens-rights-the-fair-and-serious-offer-that-wasnt/>

⁷⁹ V Mantouvalou <https://ukconstitutionallaw.org/2016/07/14/virginia-mantouvalou-eu-citizens-as-bargaining-chips/>

be an infringement of Article 8'.⁸⁰ From our research it is clear that EU27 citizens living in Northern Ireland are experiencing a sense of fear and uncertainty about their status and that there is a sense that this protracted debate is fuelling division between EU27 migrants and other communities in Northern Ireland and risks creating an anti-migrant backlash. In addition, worryingly, EU27 migrants who are living in Northern Ireland have felt ostracised and that they have 'no future' here.

The starting proposals from the UK government offered a much lower level of protected status for EU27 citizens in the UK than those from the EU on the rights of UK citizens in the EU27 member states.⁸¹ The EU position, set out in early June, made it clear that it would seek to preserve EU law rights for citizens of the EU in the UK and of the UK in the EU alike and that the CJEU would supervise this process.⁸² While the two sides have agreed on many issues, for example, on the extent of reciprocal health care arrangements, there are still some areas of serious disagreement, such as the procedure for EU27 citizens to regularise their status after Brexit and the rights of family reunification. The current UK proposals in relation to family reunification are based around 'levelling down' of the rights for future family members of those EU27 citizens who live in the UK after Brexit. This will mean that they are subject to the same, more stringent, rules that apply to non-EU nationals joining UK citizens. The UK has made it clear that its proposals regarding EU27 nationals living in the UK will not apply to Irish citizens. However, this does not mean that Irish nationals living in the UK will not be affected by Brexit. In fact, many of the rights currently exercised in the UK by Irish people are legally founded on EU law and these will have to be replaced with a new legal and policy regime post-Brexit.

⁸⁰ Giannouloupoulos, EU citizens' rights and Brexit negotiations: both sides could be violating human rights law (8 November 2017) <https://theconversation.com/eu-citizens-rights-and-brexit-negotiations-both-sides-could-be-violating-human-rights-law-87030>

⁸¹ Department for Exiting the EU, Safeguarding the position of EU citizens in the UK and UK nationals in the EU (26 June 2017) <https://www.gov.uk/government/publications/safeguarding-the-position-of-eu-citizens-in-the-uk-and-uk-nationals-in-the-eu>

⁸² https://ec.europa.eu/commission/publications/position-paper-essential-principles-citizens-rights_en

Rights of children and young people

As is clear from this report the decision of the UK to leave the EU will impact everyone in Northern Ireland, but not everyone will be affected in the same way. Children and young people were not able to vote in the referendum on Brexit and yet will face some of the more acute impacts on the enjoyment of their rights. The lack of voice of children and young people in the Brexit debate before and since the referendum has increased the sense of marginalisation felt by this lack of democratic franchise and has created a sense of anger for some young people, as highlighted by work carried out by the Children's Law Centre.⁸³ According to young people, Brexit has increased both racial and sectarian tensions which will necessarily have an impact on their lives and on their interpersonal relationships and friendships. It has created uncertainty, as many children and young people are unsure how their lives will be affected by Brexit and how their rights generally and under the Belfast/ Good Friday Agreement will be protected as the UK withdraws from the EU - a theme that has been replicated across much of the work that has been done on rights post Brexit.

EU law has had a significant impact on the rights of the child and has embedded these rights into its core legal framework. Article 3 of the Treaty of the European Union states that the EU 'shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child'.⁸⁴ The EU Charter highlights and specifically recognises the rights of the child in article 24 which states that 'Children shall have the right to such protection and care as is necessary for their wellbeing. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.' This recognises that children are independent rights-holders and their agency and independent personhood should be respected and their full participation in decisions which concern them should be supported and fulfilled. In addition, this article goes on to make it clear that the best interests of

⁸³ Children's Law Centre, Consultation on Children and Young People on Brexit (June 2017) <http://www.childrenslawcentre.org.uk/index.php/component/zoo/item/bbc-broadcast-appeal-for-clc-copy-2-copy-3>

⁸⁴ Consolidated Version of the Treaty on European Union <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:en:PDF>

the child should be the primary consideration for any public authority or private institution.

Clearly all the rights contained in the Charter will have some bearing on the lives and children and young people, but some rights are of particular relevance. For example, the right to education (including free compulsory education) in article 14, the protection against discrimination on grounds of age in article 21 and the prohibition of child labour and the protection of young people in work in article 32 specifically relate to children's lives. In addition, children's rights are also protected through rights targeted at the family and in relation to care. Article 7 assures the right to respect for private and family life, home and communications and the family's right to enjoy legal, economic and social protection in article 33 of the Charter. Rights framed in general terms, such as the right to healthcare in article 35 and environmental protection in article 37 will also have particular implications for children.

The EU Charter uses the UN Convention on the Rights of the Child as its underpinning framework for its recognition of children's rights. At a policy level, the EU has committed to embedding children's rights in all its actions and it has set out this commitment in the EU agenda on the rights of the child which requires the "child rights perspective" must be taken into account in all EU measures affecting children' and that this is based on the UN Convention of the Rights of the Child.⁸⁵ As identified by European Children's Rights Unit in evidence to the Joint Select Committee on Human Rights: 'CRC-inspired references are now an increasingly routine feature of EU-level legislative and policy measures relating to children, particularly in the context of EU free movement law, immigration and asylum law, EU family law, EU criminal law, and policies seeking to tackle poverty and social exclusion.'⁸⁶ This evidence also highlights the particular role that the EU has had in protecting children's rights across borders, especially in relation to the protection of children's rights in the event of a breakdown in the relationship of the child's parents.

⁸⁵ EU agenda on the rights of the child (15th February 2011) <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011DC0060&from=en>

⁸⁶ Published written evidence to the inquiry on the Human Rights Implications of Brexit (HL 88/ HC 695) 19 December 2016 <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/695/695.pdf>

The Brussels Ila Regulation⁸⁷ addresses family justice across borders and sets out the procedures for establishing where family law proceedings should take place and for ensuring that divorces and parental responsibility decisions and/or agreements reached in one Member State can be enforced easily in any other Member State to which any of the parties move. This has a particular relevance for families on the island of Ireland who currently have the reassurance of knowing that family law decisions and more informal separation and custody agreements made in one jurisdiction are enforceable in the other. In addition to addressing divorce, custody and access decisions, the Brussels Ila Regulation also regulates how the child's property should be administered and/or disposed of. It also covers the cross-border proceedings for care and custody of the child and a system for the recognition of contact orders to ensure that moving across the border does not interfere with the child's right to enjoy their relationships with their parents and other family. It also establishes a common framework for addressing parental child abduction across the EU and for the return of the child to their home. In October 2016, the UK Government indicated its intention to 'opt in' to the EU Commission's decision to streamline the Brussels Ila Regulation: the government 'wants to avoid the risk that ... for a period of time no EU instrument regulates these matters for UK families even though the UK is still a member state. Secondly, even after a UK exit the regulation will affect UK citizens, principally in other member states, and it is in the UK's interests to influence the negotiations.'⁸⁸ It is not clear how these regulations will apply in the aftermath of Brexit, as even if they are carried over into UK, and by extension Northern Ireland, law by the EU Withdrawal Bill, the reciprocal nature of the regulations will depend on the negotiated agreement between the UK government and the EU Commission.

As with all other areas of EU human rights law, the Charter applies within the scope of EU law - whether at an EU or local level. Despite this limitation, the impact of EU law on children's rights has been substantial, with the EU Commission's compilation of law and policy on the rights of the child running to more than 90 pages.⁸⁹ This document covers

⁸⁷ Regulation 2201/2003/EC

⁸⁸ Written Statement to the House of Commons by Minister for Courts and Justice (27 October 2016)

⁸⁹ EU acquis and policy documents on the rights of the child http://ec.europa.eu/newsroom/document.cfm?doc_id=40297

everything from standardisation of toy safety,⁹⁰ to data protection and privacy and child abuse, child porn and exploitation.⁹¹ UK law has a dualist approach to international human rights treaties. This means that while there is a general duty on ministers to act in compliance with international human rights standards, these rights are not directly enforceable in the courts. While the UK has adopted some international principles into decisions relating to children, such as the best interests of the child test, this is not directly linked to the human rights principles in the Convention of the Rights of the Child.

Having the UN Convention of the Rights of the Child embedded within EU law has allowed for these protections to be enforced at a local level, including through the courts.⁹² For example, under EU law, a child's fundamental right to education, regardless of their migration status, is recognised in virtually all aspects of EU migration law.⁹³ The scope and limitation of EU law means that the EU does not have the competence to determine the substance or scope of national educational provisions. Rather, the EU protects migrant children's right to access education on the same or, depending on their status, similar basis as nationals. The children of EU migrants who move to another EU Member State under free movement law have the right to be admitted to that state's general educational, apprenticeship and vocational training courses under the same conditions as nationals, including access to educational maintenance grants.⁹⁴ On the island of Ireland, this legal framework is particularly important in streamlining access to education for people who live in border areas or who move across the border and it is unclear how these arrangements will be accommodated by any Brexit agreement between the UK and the EU Commission.

⁹⁰ Directive 2009/48/EC on the safety of toys and subsequent amending directives (2014/84/EU and 2014/81/EU)

⁹¹ Directive 2011/93/EU on combatting sexual abuse and sexual exploitation of children and child pornography; Directive 2012/29/EU on minimum standards on rights, support and protection of victims of crime; Council Decision 2008/909/JHA and Council decision 2008/947/JHA (27 November 2008) on mutual recognition of judgments in criminal matters

⁹² Published written evidence of the European Children's Rights Unit at the University of Liverpool to the inquiry on the Human Rights Implications of Brexit (HL 88/HC 695) 19 December 2016 <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/695/695.pdf>

⁹³ Qualification Directive 2011/95/EU (recast)

⁹⁴ Regulation 492/2011/EU on freedom of movement for workers within the Union (5 April 2011). In relation to maintenance grants see C-3/90 *Bernini v Minister van Onderwijs en Wetenschappen* 26 February 1992 <http://curia.europa.eu/juris/celex.jsf?celex=61990CJ0003&lang1=en&type=TEXT&ancre=>

The cross-border issues are particularly stark for children in Northern Ireland. For children and young people living in border areas EU free movement rules have facilitated children being able to attend their closest school, even if it is across the border. Over 600 school children live on one side of the border but attend school on the other.⁹⁵ This will similarly impact on all aspects of children's lives, including membership of clubs, engaging in sports, visiting friends and family and the imposition of border controls or other checks could severely limit the full enjoyment of their rights. In addition, the EU has had a significant role in developing cross border mechanisms to safeguard children, including the gathering and sharing of information across member states. Security mechanisms and agencies such as European Arrest Warrants, Eurojust, EUROPOL, ECRIS and Schengen Information System have been essential tools in protecting children on both sides of the border.⁹⁶

The uncertainty regarding EU citizens in the UK in the aftermath of Brexit is particularly concerning for children and young people. Where an EU citizen child (including a British or Irish citizen) is living in the UK, but whose parent or guardian who is not an EU citizen, they rely on the child's EU citizenship to be able to remain. This category of persons is called a 'Zambrano carer' after the case which established this right to reside. This right is now at risk on Brexit. The Zambrano case involved two Colombian nationals who had lived in Belgium for a number of years.⁹⁷ Their immigration status was uncertain as they had been refused regularisation by the Belgian courts, but they could not be returned to Colombia on grounds of the ongoing civil war. They had two children during this period and both children acquired Belgian citizenship (and EU citizenship under article 20 of TFEU). They were refused social security benefits and the industrial tribunal considering this denial referred the matter to the CJEU in 2008 for clarification of law. The CJEU found that the Zambranos had a right to reside and work in the EU which derived directly from article 20 of the TFEU as otherwise their EU citizen children would be unable to exercise their EU citizenship rights. The CJEU also made it clear that the rights it was protecting were those of the EU

⁹⁵ Children's Law Centre, *Brexit: Potential implications for Children and Young People in Northern Ireland* (August 2017)

⁹⁶ *ibid*

⁹⁷ Case C-34/09 *Zambrano v Office national de l'emploi (ONEm)* <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0034>

citizen children and that their parents could not accrue a right to remain in the EU member state or gain EU citizenship rights on the back of being their children's carers.

Similarly, the *Teixeira* case⁹⁸ affirmed that the right of access to education, recognised in the Charter and in Article 12 of Regulation 1612/68/EEC, applies to the children of former migrant workers. This right necessarily means that a child in full time education cannot be forced to leave their country of residence because their parent no longer works in that member state. By extension their parents have a right to reside in the same country as their children for the duration of their education.⁹⁹ In other words, EU national parents of children in education in Northern Ireland maintain a right to reside despite no longer being a worker nor meeting the 'self-sufficiency' criteria for residency set out in the citizenship directive. This derivative right to reside continues until the child reaches the age of 18 or, if the child continues in education (and continues to need the presence and care of their parent) until they have completed their education. These rulings have had broad implications across the EU and now children and their carers currently relying on the Zambrano carer or *Teixeira* status are at risk of losing their right to live, be educated and make a home in Northern Ireland. It is particularly concerning for these children as the derivative right in these cases does not qualify towards permanent residency status after five years under the citizenship directive and are not currently addressed by the UK government's negotiation position. However, under the terms of the EU negotiation position regarding citizens' rights, it would appear to cover these categories as it includes the continuation of all rights derived under the treaties after Brexit.¹⁰⁰

In addition to the more formalistic areas of law, the EU has also had a significant role in assuring the rights of children and young people in its policy work. For example, one area the EU has been particularly active is in relation to tackling poverty and social exclusion. It has funded a range of measures including training, sharing best practice and supporting local

⁹⁸ Case C-480/08 *Teixeira v London Borough of Lambeth* (23 February 2010) <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62008CJ0480>

⁹⁹ Regulation 1612/68/EEC (15 October 1968) on freedom of movement for workers within the Community

¹⁰⁰ See analysis from Peers *The Brexit talks: opening positions on the status of UK and EU citizens* (30 June 2017) <http://eulawanalysis.blogspot.co.uk/2017/06/the-brexit-talks-opening-positions-on.html>

efforts to address social exclusion. For example, the EU Commission's strategy, 'Investing in Children: Breaking the Cycle of Disadvantage' seeks to address tackle child poverty and promote well-being by 2020 through a range of measures including access to quality and inclusive services such as childcare and education and meaningful participation in decision-making. The EU supports local efforts to achieve these outcomes by undertaking monitoring, evaluation and data collection to chart progress, and, importantly, providing funding. The European Social Fund has had a significant impact in Northern Ireland by supporting efforts to reduce economic inactivity and increase workforce skills by extending employment opportunities in particular for those groups at a disadvantage in the labour market.¹⁰¹

The impact of the Convention of the Rights of the Child has been a guiding influence on EU law in the area of children and young people. Its influence has been significant in how the law-making institutions have viewed their role as protectors of the best interests of the child and this has impacted on children's rights have been central to law making. This has had significant impact when addressing children's rights to education and family life and ensuring that migrant children are not discriminated against in their enjoyment of rights. There is a real risk that children and young people's voices will be dismissed or ignored in the Brexit process and it is essential that mechanisms are found to ensure that meaningful engagement with children and young people is at the heart of decision-making as the UK leaves the EU.

¹⁰¹ Alliance for Investing in Children, *Breaking the Cycle of Disadvantage* (2015)

Rights of women

EU law has had a significant impact on the rights of women, especially in the areas of economic activity and employment law. From the outset, the EU recognised the value of equal pay for equal work in the EU treaties as a core value of the European project.¹⁰² This provision was a recognition of the economic origins of the EU, but it evolved over time and is now considered as a fundamental right¹⁰³ and the economics are secondary to its social aim of contributing to the improvement of living and working conditions for everyone within the EU.¹⁰⁴ The EU Charter recognises that equality between men and women should be viewed as a priority and that this principle of equality should not prevent the ‘maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex’. This reaffirms the need for structural change and recognises that when dealing with systematic gender discrimination it is often necessary to take positive action to redress historic underrepresentation and to ensure that women are properly represented in all areas of public life. As well as this specific assertion of equality between the genders, the rights of women are protected across the full range of rights contained within the Charter and the prohibition of discrimination on grounds of sex and a range of other grounds is recognised in article 21.

The fundamental recognition of equal pay for equal work in the treaties has been updated and supplemented by a range of other provisions which ensure that women are not discriminated against in the workplace and beyond. The Gender Recast Directive consolidated a number of important EU law developments in 2006 and covered areas such as access to employment, promotion, vocational training schemes and working conditions to ensure rights of women were central to protections of workers.¹⁰⁵ This law has been supplemented by a number of EU gender equality strategies that seek to encourage all EU member states and the EU institutions to mainstream gender equality in all of their laws, policies and funding models. The current strategic engagement for gender equality 2016-2019 sets the framework for the EU to work towards

¹⁰² Article 119 Treaty establishing the European Economic Community

¹⁰³ Case C50-96 *Deutsche Telekom v Schröder*

¹⁰⁴ Case C-43/75 *Defrenne v Sabena*

¹⁰⁵ 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 (recast) (5 July 2006)

improving gender equality.¹⁰⁶ It reaffirms the EU's commitment to gender mainstreaming and has five priority areas. Firstly, it aims to increase women's participation in the labour market. Secondly, it seeks to reduce the gender pay gap, the pension gap and aims to tackle the high levels of women in poverty. It also addresses the gender disparity in decision-making and promotes greater representation of women in public life across a range of sectors including politics and business. In addition it aims to combat gender-based violence and support victims. Finally, it looks to promote gender equality beyond the borders of the EU and advocate for women's rights across the world. Progress towards these priority areas is reported on an annual basis.¹⁰⁷ While the EU has had a significant impact on advancing women's rights through law and policy the process of change is more subtle.¹⁰⁸ A major contribution of the EU has been to 'shift the nature of debates about gender equality' and through its principles of gender mainstreaming and coding gender equality into the actions of the EU, it has 'made us all better at 'talking the talk' of gender equality.'¹⁰⁹ The 'pull factor' of EU membership towards higher standards is considerable in the area of gender equality.

The EU has been particularly important in extending the scope of equality protections for women in the workplace. Some of the most significant developments relate to the protection against discrimination on grounds of pregnancy and maternity. In his report for the TUC prior to the Brexit referendum, Michael Ford QC stated: 'The [CJEU] has repeatedly acted to correct decisions of the domestic courts which were antithetical to female workers' rights: a history could be written based on the theme of progressive decisions of the [CJEU] correcting unprogressive tendencies of the domestic courts.'¹¹⁰ For example, historically in the UK if a pregnant woman was making a claim for

¹⁰⁶ European Commission, Strategic engagement to gender equality 2016-2019 http://ec.europa.eu/justice/gender-equality/document/files/strategic_engagement_en.pdf

¹⁰⁷ European Commission, 2017 Report on equality between women and men in the EU http://ec.europa.eu/justice/gender-equality/files/annual_reports/2017_report_annual_gender-equality.pdf

¹⁰⁸ Charlotte O'Brien 'The EU speaks the language of gender equality but with a male voice' 8 March 2016 <http://ukandeu.ac.uk/the-eu-speaks-the-language-of-gender-equality-but-with-a-male-voice/>

¹⁰⁹ Ibid

¹¹⁰ Michael Ford QC: Workers' Rights from Europe: The Impact of Brexit (Report for the TUC) <https://www.tuc.org.uk/research-analysis/reports/workers%E2%80%99-rights-europe-impact-brexite> (20 April 2016)

discrimination on grounds of sex, she would have to prove she was being treated less favourably than a pregnant man. This created an anomaly and as there was no easily identifiable direct male comparison in her workplace, she was instead compared to a 'sick man'. It was not until the *Webb* case referred to the CJEU from the House of Lords in 1994 that this 'sick man' comparison ended. The CJEU recognised the unique experience of pregnancy could not be equated with illness: 'there can be no question of comparing the situation of a woman who finds herself incapable, by reason of pregnancy ... of performing the task for which she was recruited with that of a man similarly incapable for medical or other reasons. ... pregnancy is not in any way comparable with a pathological condition'.¹¹¹ The court recognised that the gendered potential for discrimination on grounds of pregnancy was one which fell specifically on women and as such should be treated as a unique form of discrimination.

Discrimination on grounds of pregnancy or maternity continues to be serious problem for women's full participation in the work force as demonstrated in a recent report by the Equality Commission for Northern Ireland.¹¹² This discrimination impacts on women's lives in a variety of ways. As well as impacting on their ability to work and salary, it can also negatively impact women's self-confidence, family life and mental and physical health. The effect of this change in the law was to make it easier for women who face pregnancy discrimination to hold their employer to account and to get financial redress.¹¹³ This mechanism continues to be an important safeguard against an ongoing pattern workplace pregnancy and maternity discrimination in Northern Ireland.

In addition, the CJEU has had an important role in protecting migrant women's rights to access social benefits when they are constrained from working due to pregnancy and maternity: 'a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of 'worker', within the meaning of that article, provided she returns to work or finds another job within a reasonable period after the birth of her child'.¹¹⁴

¹¹¹ Case C-32/93 *Webb v EMO* (14 July 1994)

¹¹² ECNI, *Expecting Equality: A Formal Investigation into the Treatment of Pregnant Workers and mothers in Northern Ireland workplaces* 2016

¹¹³ Woman accepts settlement over pregnancy discrimination <http://www.bbc.co.uk/news/uk-northern-ireland-40874631> (10 August 2017)

¹¹⁴ Case C507/12 *Saint Prix v Secretary of State for Work and Pensions* 19 June 2014.

This has a profound impact as unless a pregnant EU migrant can show they are entitled to continued worker status during this period they would not be entitled to access the necessary social benefits and could otherwise face poverty and destitution. Moreover this protection means that periods where women are not working due to pregnancy or maternity do not constitute a break in the 5 years residence required to attain permanent residency as an EU citizen.¹¹⁵ Similarly the EU has proactively sought to extend parental rights to leave¹¹⁶ and it has encouraged better child care support for families.¹¹⁷ These measures led from an EU level promote a more gender balanced approach to parenting and have a broader aim of reducing the gender pay gap and the advancement of women's rights within the workplace and in public life more generally.

Another area of priority for the EU relates to gendered violence and it has sought to coordinate efforts to combat violence against women and girls. In 2013 the EU passed a regulation to coordinate enforcement of 'civil protection measures' across the EU to protect people affected by domestic violence.¹¹⁸ This regulation ensured that anyone who sought and obtained a civil injunction for physical or psychological abuse against another person could move across the EU in the knowledge that this injunction could be enforced in another EU state without any additional declaration or special procedure. A reciprocal arrangement of increased importance in Northern Ireland, due to the proximity of the land border with Ireland. This mechanism includes orders covering the prevention of violence in close relationships, such as physical violence, harassment, sexual aggression, stalking, intimidation or coercion.¹¹⁹ Moreover, the EU has sought to coordinate the support given to victims of crimes across all the member states and has sought to coordinate policing and security

¹¹⁵ Citizenship Directive 2004/38/EC is discussed in more detail later in this section.

¹¹⁶ Directive 2010/18/EU implementing the revised Framework Agreement on parental leave (8 March 2010)

¹¹⁷ European Platform for Investing in Children - <http://ec.europa.eu/social/main.jsp?catId=1246&langId=en>

¹¹⁸ Regulation 606/2013 on mutual recognition of protection measures in civil matters

¹¹⁹ Council Press Release, EU-wide protection for victims: Council adopts regulation on mutual recognition of protection measures in civil matters http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137391.pdf

measures on gendered violence.¹²⁰ The European Protection Order established a mechanism allowing persons who benefit from a protection order in criminal matters issued in one member state to allow for that protection to move with them as they move between member states.¹²¹ These mechanisms for mutual recognition of civil and criminal measures are particularly important in Northern Ireland to ensure that women have the protection of the law and an enforceable means of redress when moving across the Irish border. In addition, the EU has worked to raise awareness of and to combat female genital mutilation both within and outside of EU by supporting NGOs working to protect women and girls from harm.¹²²

As the EU is framed through an economic lens, one area it has been less effective at recognising is the area of informal caring work, which is disproportionately carried out by women. The EU laws regarding free movement between member states has consistently disregarded unpaid care work as non-economic activity. Carers are not included among the categories of mobile EU citizens who have residence rights, as unpaid care is excluded from the definition of ‘genuine and effective work’ on which basis EU citizens can claim the status of worker.¹²³ People engaged in unpaid caring work are therefore excluded from access to social benefits and residency. This means that a primary carer does not have a right to permanent residence in her (or his) own right, which could have serious implications for EU migrants currently living in Northern Ireland (and Northern Ireland originated migrants in the EU27 countries).¹²⁴ There is an opportunity in Brexit for the UK to take action to protect carers who may not meet the technical requirements for residency under EU law and to grant them equivalent status to workers or self-employed people and push the EU to take equivalent action for UK citizens living in other parts of the EU in the negotiation process. The UK government has recently issued guidance which would suggest that it will take a more

¹²⁰ Victims' Directive 2012/29/EU established minimum standards on the rights, support and protection of victims of crime

¹²¹ Directive 2011/99/EU on the European protection order

¹²² http://ec.europa.eu/justice/gender-equality/gender-violence/raising-awareness-of-violence-against-women/index_en.htm

¹²³ Directive 2004/38

¹²⁴ Isabel Shutes, When unpaid childcare isn't 'work': EU residency rights have gendered consequences <http://blogs.lse.ac.uk/brexit/2017/07/20/when-unpaid-childcare-isnt-work-eu-residency-rights-have-gendered-consequences/>

lenient approach to this categorisation when granting EU27 migrants living in the UK settled status under the terms of the withdrawal agreement, however as these have not been transposed into regulations, it is unclear how this will work in practice for full time carers.¹²⁵

As well as legal mechanisms and policies to assure women's rights in Northern Ireland and across all 28 member states, the EU has also had a significant impact on women's lives through its different funding streams. Of particular importance for rural women has been the Rural Development Programme for Northern Ireland which is funded through the EU. One of the priority areas for the EU has been social inclusion, poverty reduction and rural economic development. In addition, the European Social Fund has been significant in supporting unemployed women to get the skills and experience necessary to get back into the workforce.¹²⁶ It is perhaps due to the economic uncertainty caused by changes to these funding streams through Brexit that research by the Northern Ireland Rural Women's Network has highlighted the insecurity felt by women living in rural and border areas.¹²⁷ When asked, 'What impact do you believe Brexit will have on you, your family and your community?', 40% felt that the impact would be 'mostly negative' and another 53% were 'unsure but concerned'.¹²⁸ When the UK withdraws from the EU, it is essential for the UK government to address this uncertainty and find new funding streams to support these projects in Northern Ireland.

One of the areas that women's groups have raised consistently before and since the referendum on whether the UK should leave the EU is the underrepresentation of women's voices in the debate. This was something that was highlighted as an issue in advance of the EU

¹²⁵ Department for Exiting the European Union, Citizens' rights: administrative procedures in the UK (7 November 2017) <https://www.gov.uk/government/publications/citizens-rights-administrative-procedures-in-the-uk>

¹²⁶ See for example the First Steps, Women Towards Education & Employment Project <http://www.firststepswomenscentre.org/index.php/about-us/esf-funding>

¹²⁷ <http://www.nirwn.org/>

¹²⁸ Louise Coyle, Charting Brexit conference <http://www.humanrightsconsortium.org/wp-content/uploads/2017/06/LCoyle.pdf> (June 2017)

referendum¹²⁹ and continues to be a concern with the gender breakdown of the UK negotiating team being a particular issue.¹³⁰ Northern Ireland is particularly poorly represented when it comes to women in politics¹³¹ and while this has improved somewhat recently with increased numbers of women returned as MLAs¹³² and with the leadership of three of the five main parties now being led by women, this has not translated into a more inclusive discussion on Brexit.¹³³ As already highlighted elsewhere in this report, the current political instability in Northern Ireland and the inability of the parties to agree to restore the executive and devolved administration has made it harder for voices from Northern Ireland to be heard in the Brexit debates and this is made even more acute for women who face multiple obstacles to having their voice heard. It is vital that women are assured a platform to have their voice heard so they can influence both the local decision-making which will impact on women's rights in Northern Ireland and also the UK-wide decisions of the Westminster government.¹³⁴ In addition, it is vital that the negotiations between the EU and the UK Government make space to hear women's voices and concerns and to address the very real risks to rights which women face in the Brexit process.

¹²⁹ Polly Neate (Chief Executive of Women's Aid) 'Forget house prices. The EU referendum matters for women's lives' <http://www.telegraph.co.uk/women/life/forget-house-prices-the-eu-referendum-matters-for-womens-lives/> (6 June 2016)

¹³⁰ Siona Jenkins, 'Is Brexit bad for women?' <https://www.ft.com/content/a1ec120c-6307-11e7-91a7-502f7ee26895>

¹³¹ Assembly and Executive Review Committee, Report on Women in Politics and the Northern Ireland Assembly http://www.niassembly.gov.uk/globalassets/documents/reports/assem_exec_review/women-in-politics.pdf (17 February 2015)

¹³² Michael Potter, The representation of women in public life: where does Northern Ireland stand (now)? <http://www.assemblyresearchmatters.org/2017/03/08/representation-women-public-life-northern-ireland-stand-now/> (8 March 2018)

¹³³ Louise Coyle, Charting Brexit conference <http://www.humanrightsconsortium.org/wp-content/uploads/2017/06/LCoyle.pdf> (June 2017)

¹³⁴ Caroline Walsh, Brexit: Women's Perspectives, Women's Regional Consortium (October 2017)

Rights of LGBT people

The area of LGBT rights is one where the progressive influence of the EU is most readily felt in NI. The development of positive protections against discrimination, victimisation and harassment of LGBT people has been propelled and bolstered by EU law developments and the necessary implementation of those developments in local law and policy. The EU Charter specifically recognises that everyone is equal before the law in article 20 and in article 21 prohibits any discrimination on grounds of sex or sexual orientation. The value of having rights underpinned by an external human rights framework allows for courts to take an expansive interpretation of rights when necessary to ensure that LGBT people do not face less favourable treatment on the basis of their sexual orientation or gender status. EU law has had a profound impact on the protection and consolidation of rights minorities in Northern Ireland, especially when these rights of minorities come up against deadlock in the Executive. This is particularly stark for the rights of LGBT people and the EU human rights regime has offered a route for the rights of LGBT people to be advanced via the Westminster parliament.

The nature of the power sharing government and the need for cross-party support for some measures to be advanced through the assembly can create the potential for legislative standstill where the main parties cannot agree a way forward. Even where the Northern Ireland Assembly has the power to change law to advance the rights of LGBT people, to keep Northern Ireland law in line with EU law, it has not always been possible to find the consensus within the executive to allow for this to happen. For example, under the devolution settlement, the Northern Ireland Assembly was required to implement the EU Equal Treatment Directive into Northern Ireland law.¹³⁵ The Directive was designed to protect lesbian, gay, bisexual and transgendered people from being discriminated against when accessing goods and services, for example, when shopping or using restaurants, bars and hotels, engaging with banks and financial services, accessing health services, housing and accommodation, transport, and gyms.

There was, however, some resistance to implementing this directive in Northern Ireland law from the then First Minister and despite some back and forth between the Assembly Committee for the OFMdfM and the First

¹³⁵ Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

Minister, the issue was taken out of the Assembly's remit and was eventually legislated for at Westminster.¹³⁶ This decision was a direct response to the stalemate in the Northern Ireland Executive and demonstrated that the UK government would take action to ensure that rights in Northern Ireland were in line with EU law if the devolved institutions were unable to act.

'Although the Northern Ireland Assembly has competence to legislate on this devolved matter, because the First Minister did not agree to the inclusion of references to transgender or gender reassignment in the Northern Ireland Regulations ... the decision was taken to take forward UK-wide regulations at Westminster. It was considered the most effective way of securing UK-wide compliance with our European Community obligations.'¹³⁷

This example shows the value of having the EU rights framework to create pressure to reinforce rights in Northern Ireland when the local institutions failed to act. It placed an obligation on the UK government to take action, rather than be in breach of EU law. On other rights issues without the external obligation of EU law, the UK government has taken a more hands-off approach to recognising the rights of LGBT people in Northern Ireland law rather than keeping it in line with the similar advances in the rest of the UK.

The extension of equality law in Northern Ireland to trans people has been heavily influenced by developments coming from the EU. EU law has been instrumental in ensuring that transgender people are protected against discrimination on grounds of having transitioned between genders. In a significant case from 1996, the CJEU made it clear that the prohibition on discrimination on grounds of sex 'cannot be confined to discrimination based on the fact that a person is of one or the other sex'.¹³⁸ It asserted that the principle of equality is a fundamental right recognised in EU law and the court had a duty to uphold this right. The directive in question¹³⁹ was targeted at equal treatment for men and

¹³⁶ Minutes of Proceedings of the Committee for the OFMDFM, 9 January 2007 <http://www.niassembly.gov.uk/assembly-business/committees/archive/office-of-the-first-minister-and-deputy-first-minister/archive/minutes-of-proceedings/session-2007-2008/09-january-2008/>

¹³⁷ Explanatory Memorandum to the Sex Discrimination (amendment of legislation) Regulations SI 2008/963 http://www.legislation.gov.uk/uksi/2008/963/pdfs/uksiem_20080963_en.pdf

¹³⁸ Case C-13/94 *P v S and Cornwall County Council* <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61994CJ0013&from=EN>

¹³⁹ EU Directive 76/207/EEC on equal treatment for men and women

women in employment and the court found that ‘the scope of the directive is such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned’. Where a trans person is dismissed on grounds that ‘he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which her or she was deemed to belong before undergoing gender reassignment’ it is unlawful and they are entitled to redress.¹⁴⁰ This principle of sex discrimination covering trans people has been extended across the breadth of EU law measures covering equality in the workplace, educational and vocational settings and in accessing goods and services.¹⁴¹

EU law has also had an important role in challenging the ongoing discrimination faced by LGBT people in Northern Ireland. For example, until recently any man who had sex with another man faced a lifetime ban to donating blood in Northern Ireland. A report of the Advisory Committee on the Safety of Blood, Tissues and Organs on blood donor selection criteria in 2011 found reducing the lifetime prohibition on men who have sex with men from giving blood, to one year did not increase the risks to blood products.¹⁴² This was a reflection of the fact that while this group faced an increased risk of some blood based diseases, enhanced screening techniques reduced the risk of any contamination of the blood products which meant the risk was minimised. However, as some infections are not detectable in the initial stages of infection and in order for the screening process to be effective, there must be some deferral period before blood donation. The Advisory Committee also recognised that ‘shifting social attitudes’ meant that the blanket lifetime ban on men who have sex with men had a detrimental impact on the LGBT community.

While in England, Scotland and Wales health ministers made an immediate decision to reduce the lifetime ban to one year, in Northern Ireland, there was no similar reduction. This decision was eventually

¹⁴⁰ Case C-13/94 *P v S and Cornwall County Council* <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61994CJ0013&from=EN>

¹⁴¹ EU Commission Report on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services COM/2015/0190

¹⁴² Advisory Committee on the Safety of Blood, Tissues and Organs, Donor Selection Criteria Review (April 2011) <https://www.gov.uk/government/publications/donor-selection-criteria-review>

challenged in the courts and in the Court of Appeal which reviewed it in light of article 21(1) of the Charter of Fundamental Rights which prohibits any discrimination based on any ground, including sexual orientation.¹⁴³ The court rejected the suggestion that as the category of men who sleep with men also covered heterosexual men, that it was not discriminatory against gay men. The court used a proportionality test, namely that national measures restricting the donation of blood from men who sleep with men must be no more onerous than is required to achieve the legitimate aim, which in this case is the maintenance of a high level of human health protection. The Lord Chief Justice Morgan, in his minority opinion, found that the permanent deferral on blood donation was a disproportionate interference with the rights of men who sleep with men and exceeded what is necessary to maintain a high quality of human health protection in Northern Ireland. However, the majority opinion of the court was that the decision of whether or not to change the deferral period should be actioned by the Minister, rather than the courts, in light of the medical evidence and their EU law obligations. The rules were eventually changed in September 2016 when the then Minister for Health announced that a deferral period of 12 months would replace the lifetime ban.¹⁴⁴

EU law also had a significant role to play in expanding the rights of access to occupational pensions of civil partners and same-sex spouses. When implementing civil partnerships legislation, Parliament included an exception to the prohibition on discrimination in the context of some occupational pensions. This meant there was no requirement in law for pension rights for same sex couples accrued before the Civil Partnership Act entered into force in 2005 to be conferred in the same way as for heterosexual marriage. In England this was carried forward through same sex marriage legislation and is included as an exception to the Equality Act 2010. However, in a decision that could have ramifications for same sex partners in Northern Ireland, in July 2017, the Supreme Court found that this exception was contrary to EU law.¹⁴⁵ Mr Walker was a member of his employer's occupational pension scheme between 1980 and 2003.

¹⁴³ *Re Judicial Review* [2016] NICA 20 (16 March 2016) [https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2016/\[2016\]%20NICA%2020/2016%20NICA%2020Final.htm](https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2016/[2016]%20NICA%2020/2016%20NICA%2020Final.htm)

¹⁴⁴ BBC news: Gay blood donation: Lifetime ban in NI on gay men donating blood is to be lifted (2nd June 2016) <http://www.bbc.co.uk/news/uk-northern-ireland-36435858>

¹⁴⁵ *Walker (Appellant) v Innospec Limited* [2017] UKSC 47 <http://www.bailii.org/uk/cases/UKSC/2017/47.html>

He had been in a relationship since 1993, he had entered a civil partnership in January 2006 and later married his partner. Had Mr Walker married a woman and he died before her, his widow would have been entitled to a pension of nearly £45,000 a year. However, under the regime created by the Civil Partnership Act and subsequent legislation, his male spouse was only entitled to a pension of about £1,000 a year. The Court made it clear that non-discrimination on grounds of sexual orientation was a general principle of EU law and that the exception to equality law which permitted this less favourable treatment for same sex couples was unlawful. It declared that: ‘Mr Walker’s husband is entitled to a spouse’s pension calculated on all the years of his service with [the company], provided that at the date of Mr Walker’s death, they remain married.’

The supremacy of EU law within the UK means this case will likely have positive implications for access to survivor benefits for occupational pension schemes in relation to civil partners in Northern Ireland. The fact that the case was decided on a point of EU law means that it will have immediate implications for NI law and it avoids the potential for differential interpretation of the law in Northern Ireland courts from those in England and Wales. This case demonstrates the significant reach of EU human rights law. Had the case been decided under the Human Rights Act, the court could not have disapplied the exception to non-discrimination in the Equality Act and would simply have made a declaration of incompatibility. Such a declaration would have referred the issue back to the Minister to decide whether to take action to remedy the breach of human rights, rather than allow for the court to provide an immediate remedy to the applicant. The EU law remedy empowers the courts to be strong defenders of human rights and to ensure that rights can be vindicated immediately and that any losses incurred can be compensated, without the need for further action by ministers or parliament.

Of particular interest to marriage equality campaigners and gay and lesbian couples in Northern Ireland will be the decision of the CJEU in the *Coman* case.¹⁴⁶ This case relates to the recognition of same sex marriage across the EU. Under the Citizenship Directive¹⁴⁷ there is a distinction between the recognition of marriage and registered partnerships across

¹⁴⁶ Case C-673/16 pending before the CJEU

¹⁴⁷ Directive 2004/58/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (29 April 2004)

the EU. Whereas a marriage conducted in one member state is automatically recognised in another, the status of civil partnership conducted in one member state is only recognised in another member state where there is an equivalent 'registered partnership' in law. If the host member state has no such registered partnership, then their relationship is recognised as *de facto*, rather than in law, which generally impacts on the associated rights attached to that change in status. The issue in the *Coman* case is that while Mr Coman and his husband married in Belgium in 2010, Romanian officials have refused to recognise their marriage in law as the Romanian Civil Code bans the recognition of same-sex marriages performed abroad. Had Mr Coman married a woman, his marriage would be automatically recognised in Romania. If the CJEU finds that the term 'spouse' in the Citizenship Directive includes same-sex marriage, this could have direct implications for the recognition of same-sex marriages conducted in other EU member states in Northern Ireland. If the CJEU delivers its decision and finds that the refusal of officials to recognise the same sex marriage as valid is discriminatory,¹⁴⁸ it would mean that any gay or lesbian couple who got married in another member state would, as a matter of EU law, have that marriage recognised in Northern Ireland. However, if the CJEU decides the case after the UK leaves the EU, then the impact of this decision will depend on whether or not the UK will continue to mirror developments in EU citizenship and equality law after Brexit. While not a solution to the campaign for marriage equality here, it would be another example of how the EU pulls Northern Ireland in the direction of better protection of rights for lesbians and gay men.

¹⁴⁸ Alina Tryfonidou, *Awaiting the ECJ Judgment in Coman: Towards the Cross-Border Legal Recognition of Same-Sex Marriages in the EU?* (5 March 2017) <http://eulawanalysis.blogspot.co.uk/2017/03/awaiting-ecj-judgment-in-coman-towards.html>

Rights of people with disabilities

The decision of the UK to withdraw from the EU will have a dramatic impact on the rights currently enjoyed by disabled people in Northern Ireland. The EU has had an important supporting role providing opportunities to build networks and share best practice across all 28 member states. Our member groups have expressed concerns about losing this support and opportunity to work with other groups in the network to coordinate and learn from colleagues in other member states. The European Disability Forum¹⁴⁹ is an independent INGO which is funded through the EU and has facilitated disability groups from across Europe working together and sharing experiences in order to amplify the voices of disabled people and to coordinate actions on Europe-wide campaigns and assist groups and individuals assert and vindicate their rights. It also has an important role in supporting disabled people and groups in Northern Ireland to engage with the UN Convention on the Rights of People with Disabilities (UN CPRD). In August, representatives from disability groups and disabled individuals in Northern Ireland travelled to Geneva to give evidence to the UN Committee which supervises the UN CPRD. The informal support provided by this network of disability groups across the EU provides invaluable opportunities to work collaboratively with colleagues and while disability groups in Northern Ireland have maintained good working relationships with groups across the island of Ireland and the rest of the UK, there are concerns about the risks of losing this Europe-wide cooperation.

The EU is also a signatory to the UN CPRD in its own right and has declared that, in all its law-making and policy development, it will give effect to the rights recognised in that treaty. When signing and ratifying the CPRD, the EU made a declaration that included a substantial list of EU laws and policies directly impacted by the Convention, covering accessibility regulations; independent living and social inclusion, work and employment; access to information; data collection and statistics; and international cooperation.¹⁵⁰ This demonstrates the breadth of areas, some of which are quite technical, which the EU has committed to ensuring are compliant with the human rights standards in the UN CPRD.

¹⁴⁹ <http://www.edf-feph.org/>

¹⁵⁰ Signatories and Ratifications to the UN Convention on the Rights of People with Disabilities https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en#EndDec

The EU has also developed a framework to promote, protect and monitor the implementation of the UN CPRD in matters of EU competence, such as EU law and policy, funding and administration.¹⁵¹ This framework highlights key priorities of EU law and policy sets out the overall aim to ‘empower disabled people so that they can enjoy their full rights, and benefit fully from participating in society and in the European economy’. It also identifies the need for funding, research, awareness-raising, statistics and data collection to support this aim. The EU collects and disaggregates data and statistics from across the member states to track issues like barriers to social integration of disabled people, access to education, training and the labour market and tackling poverty and income inequality.¹⁵² The key areas of action for the EU are Accessibility, Participation, Equality, Employment, Education and training, Social protection and Health.

The EU has had a significant impact on the harmonisation of standards across member states which has facilitated travel and communication of disabled people both within Northern Ireland and across the UK and EU.¹⁵³ The EU has also been at the forefront of standardising access to products and services for disabled people, insofar as they fall under the umbrella of the EU competencies and has pushed for the harmonisation of access across all the EU member states. For example, something as simple as the inclusion of braille on medicines can mean that a person with a visual impairment can access the medications they need independently and without having to disclose private information unnecessarily.¹⁵⁴ Similarly, the blue badge scheme for disabled drivers or passengers is an important mechanism for improving independence, accessibility and participation for disabled people. At the moment drivers from Northern Ireland can travel across Ireland (and the rest of the EU) in the knowledge that their blue badge will be recognised and will allow them to use disabled parking facilities without having to undertake any additional bureaucracy. It is unclear whether the blue badge will

¹⁵¹ European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0636:FIN:en:PDF>

¹⁵² http://ec.europa.eu/eurostat/statistics-explained/index.php/Disability_statistics

¹⁵³ For example, Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air

¹⁵⁴ Directive 2004/27/EC amending Community code relating to medicinal products for human use

continue to work in the same way in the aftermath of Brexit and it will depend on the extent to which it is covered by any reciprocal Agreement between the UK and the EU.

In addition to the support for and integration of the UN CPRD in to EU law, the EU Charter also makes the integration of persons with disabilities a core human rights priority and ‘recognises and respects the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community’.¹⁵⁵ This provision recognises that often what limits a disabled person’s ability to access the full range of opportunities is not their disability, but that the environment in which they live is not built to facilitate their full participation. It is therefore necessary to take positive action to ensure that, for example, an ATM is accessible for a person in a wheelchair, or that a person with a learning disability is given time to articulate what they want when accessing a public service or are in a shop.¹⁵⁶ The whole range of rights in the Charter apply to disabled people and of those rights there will be some that will be more acutely relevant for some disabled people than others, for example the protection of personal data in article 8 and the right to privacy in article 7 will have a particular resonance for people who engage with health and social care services regularly and the right to education in article 14 will be of particular relevance to disabled children and young people.

Unlike the rest of the UK, the Equality Act 2010 does not apply in Northern Ireland. The Equality Act harmonised a range of anti-discrimination laws into a single piece of legislation. The Equality Act also streamlined redress mechanisms through a single framework, rather than the disparate courts and tribunals that exist in NI. The Act consolidated much of the developing jurisprudence and case law decisions into the legislation. This made it easier to identify the core principles of how the prohibition on disability discrimination works. It also ensures that the law in England, Scotland and Wales is in line with the standards which have been developed at an EU level and through the CJEU and UK courts. In Northern Ireland, as the Disability Discrimination Act 1995 has not been replaced by a similar consolidating statute, we still

¹⁵⁵ Article 26 of the EU Charter of Fundamental Rights

¹⁵⁶ JAM (just a minute) has been developed by Now Group supporting people with learning difficulties and autism and is part funded by the European Social Fund, Department for the Economy and Department for Communities <https://www.nowgroup.org/>

rely on identifying the relevant precedents and case law to ensure that disability law here remains in compliance with the EU standards. For example, the Disability Discrimination Act 1995 placed a positive duty to make reasonable adjustments to accommodate a disabled worker, but provided for an exemption for small businesses of 20 employees or fewer. These adjustments can involve modifying equipment, making adjustments to premises or allowing for changes to normal working hours.¹⁵⁷ The automatic exemption was removed in 2004 as a direct result of an EU law requirement to bring Northern Ireland law in line with the Employment Framework Directive 2000/78/EC. This directive protects people against discrimination in employment on grounds of their race, sexual orientation, religion and disability.¹⁵⁸

Some additional protections in disability discrimination law in Northern Ireland have been a direct result of court cases which have used the EU Employment Framework Directive to expand the scope of rights of disabled people. Associative discrimination involves a situation where a person is discriminated against not on the basis of their own disability, but on the basis of their connection with a disabled person. The principle that a person should not be discriminated against in work on the basis that they are caring for a person with disabilities, was recognised by the CJEU in *Coleman v Attridge Law*.¹⁵⁹ This case involved a reference from a London employment tribunal to the CJEU. The CJEU found that even though the employee was not himself disabled, he could bring a claim for direct discrimination or harassment on the grounds that he was the principal carer for his disabled child. It was the principle of direct effect combined with supremacy of EU law over local provisions, which meant that the Disability Discrimination Act in Northern Ireland had to be interpreted in light of the EU directive and thereby extending this protection to employees here. This EU law protection is an important safeguard for disabled people and their carers in Northern Ireland. In a recent decision in Northern Ireland, the industrial tribunal awarded damages to a woman who had been discriminated against on the grounds of being primary carer for her disabled child. The tribunal found she had been unfairly dismissed on the grounds that her managers took the view

¹⁵⁷ <http://www.equalityni.org/ECNI/media/ECNI/Publications/Individuals/DisabilityDiscrimShortGuide2011.pdf>

¹⁵⁸ The Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004

¹⁵⁹ [2008] IRLR 722

that, because the claimant had a disabled child, her daughter was her priority and therefore she would not be sufficiently focused in the workplace.¹⁶⁰ While the ideal situation would have been for this woman to have been supported by her employer, rather than dismissed, she would have had no remedy had the Disability Discrimination Act not been reinterpreted in light of our EU law obligations.

Disability Action has produced a short briefing paper setting out some of the key risks that Brexit poses to disabled people.¹⁶¹ The paper highlights areas of particular concern raised by disabled people in focus groups and engagement with their members and service users. The paper highlights three priorities. Firstly, there should be no retrogression or lowering of rights and protections currently available under EU Law. Secondly, that funding for existing programmes should be protected and new sources of funding for programmes funded under EU funds be identified. And finally, that disabled people and their organisations be fully involved and participate in all Brexit decision making.

As the Disability Action Briefing makes clear, much of the employment law in the UK is underpinned by minimum standards in EU law, which have direct effect in our legal system.¹⁶² The government White Paper on legislating for withdrawal from the EU and subsequent bill set out that the EU case law and regulations will be carried over in relation to worker's rights into UK law.¹⁶³ The EU Withdrawal Bill confirms that EU law up until exit day will retain its special status, however, it is unclear how, in the aftermath of leaving the EU, the courts will interpret the different disability laws in Northern Ireland from the rest of the UK. Whereas at the moment, any ruling of the CJEU determining the interpretation of a directive automatically applies across all the UK, under the principle of supremacy, including Northern Ireland. Once this principle no longer exists, it is possible that the differences between

¹⁶⁰ Belfast Telegraph, Mother with disabled girl awarded £19k after tribunal decides her dismissal was discrimination (9 May 2017) <http://www.belfasttelegraph.co.uk/news/northern-ireland/mother-with-disabled-girl-awarded-19k-after-tribunal-decides-her-dismissal-was-discrimination-35693538.html>

¹⁶¹ Disability Action Brexit - Ensuring we protect disability equality <http://www.disabilityaction.org/fs/doc/Exiting%20the%20EU%20-%20Concerns%20for%20Disabled%20People%20in%20Northern%20Ireland%20Final%20March%202017.doc>

¹⁶² *ibid*

¹⁶³ Department for Exiting the EU, The Repeal Bill: White Paper <https://www.gov.uk/government/publications/the-repeal-bill-white-paper>

disability discrimination law in Northern Ireland and the rest of the UK could fall further out of step.

The paper from Disability Action also highlights the issue of funding and support for disabled people which has had a significant impact on people in Northern Ireland. The Northern Ireland European Social Fund has had a particular focus on targeting poverty and social exclusion and aims to reduce economic inactivity and support people back into work where possible.¹⁶⁴ In its first round of current funding, this has provided support to 65 projects for disabled people in Northern Ireland and has a total value of £105 million. It supports 42,700 individuals with disabilities to ‘fulfil their potential by equipping them with better skills and improved job prospects to enable them to take steps towards employment.’¹⁶⁵ The Programme also provides assistance to 2,340 families under the community Family Support Programme. In addition, disabled people who are also long term unemployed or face other barriers may access any a range of programmes to assist them to increase their skills base and employability and 25 of the 65 projects are targeted directly at disabled people who have been long term unemployed. As the Disability Action paper makes clear, 50% of these projects target learning disability and/or autism, seek to support 750 disabled people in Northern Ireland into paid employment across the 3 year funding cycle. There is a real risk that in Brexit vital small-scale projects such as these could be lost in the scale of economic upheaval faced locally and at a UK level. As this funding is currently in addition to the Barnett Formula for deciding the block grant for NI, it is essential that the UK Government make alternative provision for these funds to be replaced.

As with other groups in Northern Ireland, disabled people and groups have felt very distant from decision making processes and it is vital that systems are established to ensure that disabled people can have their voices heard in order to shape the human rights framework in the aftermath of Brexit. In particular Disability Action have called for the active participation of disabled people in the following areas. Firstly, ensuring that the voices of disabled people are heard in relation to any legislation that will be needed to vindicate the rights of disabled people

¹⁶⁴ More details here: <https://www.economy-ni.gov.uk/esf>

¹⁶⁵ Disability Action Brexit - Ensuring we protect disability equality <http://www.disabilityaction.org/fs/doc/Exiting%20the%20EU%20-%20Concerns%20for%20Disabled%20People%20in%20Northern%20Ireland%20Final%20March%202017.doc>

in the aftermath of Brexit. Secondly, assessing the impact of EU funding on the lives of disabled people in Northern Ireland and the full participation of disabled people in designing how it should be replaced. And finally, for a positive engagement with disabled people in relation to opportunities which will exist for disabled people post Brexit.

Environmental rights

The EU has had a particularly important role in protecting the environment in Northern Ireland. Environmental protection is a shared competence between the EU and member states. Under the principle of subsidiarity, the EU does not take action unless it is justified by being more effective, for example by the scale or effects of the proposed action, than action taken at national, regional or local level.¹⁶⁶ The advantage of working on a EU-wide basis to tackle environmental concerns is clear, whether addressing bio-diversity or climate change, no state can achieve environmental improvement alone and the EU provides a mechanism for coordinated action across 28 member states. The EU Charter sets out the underpinning rights basis for environmental protection in article 37 which guarantees a high level of environmental protection and improvement linked to sustainable development. The powers of the EU to take action in the area of environmental regulation are broad and are derived under the Treaty on the Functioning of the European Union. The objectives of the environmental policy are set out in article 191 of the Treaty on the Functioning of the EU and they link to protection, preservation and improvement of the environment with human health and promotion of measures at international level to combat climate change and address regional or worldwide environmental problems. In addition, there are two important principles underpinning all EU environmental law and policy the polluter pays principle and the precautionary principle. The polluter pays principle is the basic idea that liability for the cost of repairing or making good any environmental damage rests with the polluter. This extends beyond pollution control at source and extends across impacts across the life cycle of a product. The precautionary principle highlights environmental risks and takes action to mitigate that risk in order to prevent environmental damage or pollution. These constitutional principles have guided all law making and policy decision on environmental regulation within the EU.

The EU Treaties empower the EU to act to raise standards in all areas of environment policy, such as air and water pollution, waste management, bio-diversity and climate change across the EU.¹⁶⁷ This has resulted in

¹⁶⁶ Article 5 Treaty on the EU

¹⁶⁷ Articles 191-193 of the Treaty on the Functioning of the EU

over 740 EU environmental instruments in the directory of EU law.¹⁶⁸ The EU's environmental legislation is complex and wide ranging and links the single market and the equalisation of standards across EU member states to broader environmental concerns in relation to product development.¹⁶⁹ Embedding environmental requirements in EU law has meant that all businesses, civil society organisations and public bodies in 28 member states are bound by the same core obligations and the attendant costs are shared by all bodies operating within the single market. This levels the playing field and means that it is not possible for states to get regulatory advantage by removing environmental regulations. This has been especially important in Northern Ireland, where agriculture and agri-food businesses make up a significant part of the local economy and are reliant on cross-border trade and supply networks.¹⁷⁰ Environmental interests are a central plank of the common agriculture and fisheries policies.¹⁷¹ If Northern Ireland businesses want to continue to work across the border as they do now, this will likely require de facto acceptance of EU standards, even if the UK government does not agree to embedding these rules in UK law.¹⁷²

The EU has had a fundamental role in coordinating environmental policy across member states, particularly in relation to those areas where unilateral action would be less effective than 28 member states acting together. The development of environmental policy has often been led by the EU, but it has also offers a route for UK, and other, governments to get wider support for its own environmental objectives: 'the UK has been

¹⁶⁸ Directory of European Union legislation - legislation in force. Chapter 15 Environment, consumers and health protection http://eur-lex.europa.eu/print-pdf.html?pageTitle=Directory+of+European+Union+legislation¤tUrl=%2Fbrowse%2Fdirectories%2Flegislation.html%3Froot_default%3DCC_1_CODED%253D15%2CCC_2_CODED%253D1510%26displayProfile%3DallRelAllConsDocProfile%26classification%3Din-force

¹⁶⁹ Directive 92/75/EEC on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances (22 September 1992) and Directive 2011/65/EU on the restriction of the use of certain hazardous substances in electrical and electronic equipment (8 June 2011)

¹⁷⁰ Northern Ireland Food and Drink Association, Brexit: Challenges & Opportunities for Northern Ireland Food & Drink (November 2016) http://nifda.co.uk/wp-content/uploads/2016/11/NIFDA_Brexit_Final_Report.pdf

¹⁷¹ House of Lords EU Committee, Brexit: Environment and Climate Change, HL 109/2016-17 (14 February 2017) <https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/109/10902.htm>

¹⁷² V Gravey, 'Brexit and the Environment: Challenged and opportunities for the UK and Northern Ireland' Queen's on Brexit Briefing Paper (October 2017) <http://www.qub.ac.uk/brexit/Brexitfilestore/Fileupload,777642,en.pdf>

a major player in the EU, influencing the strategic and long-term direction of EU environmental policy and the design of specific laws and policies'.¹⁷³ When dealing with environmental matters, no country can act alone and while this is recognised across the UK, it will be felt most acutely in Northern Ireland where the land border, shared water ways and cross-border cooperation will require that any deal on the future relationship between the UK and EU will have to address the specificity of the interlinked environment of Northern Ireland and Ireland.

Common environmental regulation and policies on both sides of the border facilitate cooperation, create a level economic playing field in the market and also render action more effective, as environmental impacts are not limited by borders. EU regulation is built on the need for cross-border cooperation to protect and improve the environment. The island of Ireland has common geology, waterways, flora and fauna and any withdrawal agreement will need to address the need for continued collaborative working at the border and across Ireland and Northern Ireland on the environment. The EU INTERREG VA funding programme 2014-2020 is designed to address problems that arise as a result of borders and has a priority axis focused on the environment. This funding has been used to facilitate cooperation in border areas and to create a common platform for environmental action both in Northern Ireland and Ireland. This programme has funded projects designed to promote cross-border cooperation on protected habitats, monitoring and management of marine protected areas, and monitoring freshwater quality. The risk to this funding could destabilise these projects and undermine environmental protection across the border. In addition, further funding for environmental research and development projects in Northern Ireland has been made available through LIFE¹⁷⁴ and Horizon 2020.¹⁷⁵ The UK Prime Minister has indicated that she may be interested in continuing

¹⁷³ House of Commons Environmental Audit Committee, EU and UK Environmental Policy, HC 537/2015-16 (19 April 2016) <https://publications.parliament.uk/pa/cm201516/cmselect/cmenvaud/537/53702.htm>

¹⁷⁴ Regulation 1293/2013 on the establishment of a Programme for the Environment and Climate Action (LIFE) (11 December 2013)

¹⁷⁵ Horizon 2020 The EU Framework Programme for Research and Innovation <https://ec.europa.eu/programmes/horizon2020/en/area/environment-climate-action>

access to some EU programmes but it is not clear how this will work, nor is it clear which programmes the UK may negotiate access to.¹⁷⁶

The EU has also been a vehicle for the implementation of international environmental standards into local law. For example, the Aarhus Convention establishes a number of rights.¹⁷⁷ It provides for the right of access to environmental information that is held by public authorities, including information on the state of the environment, relevant policies and on the state of human health and safety, where this is affected by the environment. It also provides for the right to participate in environmental decision-making and to challenge public decisions on grounds of lack of information, participation or on environmental law grounds. These rights have been incorporated into EU law through a number of measures and this means that they are directly actionable within the EU and member states.¹⁷⁸ These rights have increased transparency on the effectiveness of EU and of government policy and action in relation to areas such as climate change and air and water quality and provided the space for increased scrutiny by individuals and environmental groups.

Water quality law and policies are driven by EU prioritisation through the Water Framework Directive,¹⁷⁹ which requires an integrated approach to managing inland and coastal waters and the protection and improvement of rivers, lakes, estuaries, coastal waters and groundwater.¹⁸⁰ Water management across three river basin districts which cross the border between Northern Ireland and Ireland is currently operationalised on a partnership basis under the terms of the Water Framework Directive through river basin management plans for each river basin. These plans are designed to improve water quality and in Northern Ireland 37% of

¹⁷⁶ Prime Minister, The government's negotiating objectives for exiting the EU (Lancaster House Speech) (17 January 2017) <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>

¹⁷⁷ UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 2001

¹⁷⁸ Directive 2003/4/EC on public access to environmental information (28 January 2003) and Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment (26 May 2003)

¹⁷⁹ Directive 2000/60/EC establishing a framework for Community action in the field of water policy (23 October 2000)

¹⁸⁰ The Water Environment (Water Framework Directive) Regulations (Northern Ireland) 2017

water bodies are classified as ‘good’ under the Water Framework Directive and an additional 19% are failing on one assessed element.¹⁸¹ In light of the interconnected nature of waterways on the island of Ireland, continued cooperation between Northern Ireland and Ireland will be required in the aftermath of the UK withdrawal from the EU in order to ensure that the improvements in water quality are maintained and strengthened. Therefore a new framework for cooperation will need to be developed with consideration given to the potential gap arising from changes to environmental law and policy on both sides of the border over time.

Another area where cross-border cooperation is essential is air quality control. The EU has issued a number of directives identifying mandatory limits and target values for concentrations of pollutants.¹⁸² It takes a three-pronged approach to controlling air pollution through national annual emission limits for pollutants; ambient air quality limits and sector specific measures, for example on vehicle emissions.¹⁸³ The EU has issued a number of directives governing air quality, which are transposed into local law through the Air Quality Standards Regulations for Northern Ireland.¹⁸⁴ The CJEU has made it clear that the right to clean air is inherently linked to the right to health in EU law. In 1991 EU Commission took enforcement action against Germany for failure to comply with one of the first EU air quality directives. The Court found that the limits in the directive were designed to protect human health and that whenever they are exceeded ‘persons concerned must be in a position to rely on mandatory rules in order to be able to assert their rights’.¹⁸⁵ The UK has been the subject of infringement proceedings by the EU Commission in relation to persistently high levels of nitrogen oxide in the

¹⁸¹ Suzie Cave, Northern Ireland’s environment background and potential ‘Brexit’ considerations, Northern Ireland Assembly Research and Information Service Briefing Paper (NIAR 262-16) (22 September 2016) <http://www.niassembly.gov.uk/assembly-business/committees/2016-2017/agriculture-environment-and-rural-affairs/research-papers-2016/northern-irelands-environment---background-and-potential-brexit-considerations/>

¹⁸² Directive 2008/50/EC (CAFÉ Directive) on ambient air quality and cleaner air for Europe (21 May 2008) and Directive 2004/107/EC (fourth daughter directive) relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air (15 December 2004)

¹⁸³ Parliamentary Office of Science and Technology, POSTnote on Ambient Air Quality (14 February 2014) <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/POST-PN-458>

¹⁸⁴ Air Quality Standards Regulations (Northern Ireland) 2010 implementing Directive 2008/50/EC on ambient air quality and cleaner air for Europe

¹⁸⁵ Case C-59/89 *Commission v Germany*

air: ‘persistently high levels of nitrogen dioxide caused almost 70,000 premature deaths in Europe in 2013, which was almost three times the number of deaths by road traffic accidents in the same year’.¹⁸⁶ Some sites in Northern Ireland were included in 2010 and 2015 and the UK government had to produce an action plan to identify measures to address the failure to meet nitrogen oxide limits in Northern Ireland.¹⁸⁷ The EU issued a final warning to the UK in relation to failure to meet air quality targets in February 2017, however the sites in Northern Ireland are no longer listed as failing to meet limits, demonstrating a clear improvement in air quality.¹⁸⁸

Law and policies governing waste management in Northern Ireland are similarly driven by EU law. Local targets for waste management are set in line with the overarching objectives of the Waste Framework Directive which sets out statutory targets for preparing for re-use and recycling of waste.¹⁸⁹ This is operationalised through the NI Waste Management Strategy¹⁹⁰ which also addresses targets under the Landfill Directive¹⁹¹ to prevent or reduce as far as possible negative effects on the environment from landfill. In addition, this strategy is guided by the EU Commission’s Roadmap to Resource Efficiency which aims to create a circular waste economy which reduces residual waste as far as possible.¹⁹² In order to address these objectives the NI strategy focus has evolved from resource management and moved towards a resource efficiency. Divergence on waste policies between Northern Ireland and Ireland has created

¹⁸⁶ European Commission Press release, Commission warns Germany, France, Spain, Italy and the United Kingdom of continued air pollution breaches (15 February 2017) http://europa.eu/rapid/press-release_IP-17-238_en.htm

¹⁸⁷ Suzie Cave, Northern Ireland’s environment background and potential ‘Brexit’ considerations, Northern Ireland Assembly Research and Information Service Briefing Paper (NIAR 262-16) (22 September 2016) <http://www.niassembly.gov.uk/assembly-business/committees/2016-2017/agriculture-environment-and-rural-affairs/research-papers-2016/northern-irelands-environment---background-and-potential-brexit-considerations/>

¹⁸⁸ European Commission Press release, Commission warns Germany, France, Spain, Italy and the United Kingdom of continued air pollution breaches (15 February 2017) http://europa.eu/rapid/press-release_IP-17-238_en.htm

¹⁸⁹ Directive 2008/98/EC on waste (19 November 2008)

¹⁹⁰ Daera, Delivering Resource Efficiency - Northern Ireland Waste Management Strategy (October 2013) <https://www.daera-ni.gov.uk/publications/delivering-resource-efficiency-northern-ireland-waste-management-strategy>

¹⁹¹ Directive 1999/31/EC on the landfill of waste (26 April 1999)

¹⁹² COM/2011/0571 Communication from the EU Commission, Roadmap to a Resource Efficient Europe <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011DC0571>

problems in relation to illegal dumping and fly tipping in the past. In the early 2000s increased costs of landfill in Ireland led to 250,000 tonnes of waste being illegally dumped in Northern Ireland.¹⁹³ EU law facilitated a cross border waste repatriation plan to be completed by 2018.¹⁹⁴ The EU continues to have a substantial impact on how waste policy is created and there is a risk that when Northern Ireland is no longer following the same regulatory framework as Ireland that tackling smuggling and dumping could be much harder to prevent and if and when it does occur to coordinate any remedial action.

The EU has had a significant role as an enforcer of environmental standards through its supervisory role in ensuring compliance and the power to take infringement proceedings for failures to comply with EU standards.¹⁹⁵ Without this external oversight, it is not clear how this supervision gap will be filled. The EU has provided independent oversight, accountability and enforcement functions. Northern Ireland, unlike England, Scotland and Wales, does not have an independent environmental protection agency, and instead the Northern Ireland Environment Agency falls within the hierarchy of the Department of Agriculture, Environment and Rural Affairs, operating within the context of the Department's overall vision and strategic objectives. Northern Ireland historically was known as the 'dirty part of the UK' in light of its 'uniquely serious problem of weak environmental regulation and enforcement'.¹⁹⁶ This reputation has continued due to inadequate supervision by the Environment Agency in the area of Environmental Crime.¹⁹⁷ Without the supervisory role of the EU Commission, there will need to be a new enforcement agency that can fulfil its supervisory function. Through reporting on compliance with environmental standards, monitoring progress and sharing information the current EU governance

¹⁹³ V Gravey, 'Brexit and the Environment: Challenged and opportunities for the UK and Northern Ireland' Queen's on Brexit Briefing Paper (October 2017) <http://www.qub.ac.uk/brexit/Brexitfilestore/Fileupload,777642,en.pdf>

¹⁹⁴ Regulation 1013/2006 on shipments of waste (14 June 2006)

¹⁹⁵ <http://ec.europa.eu/environment/legal/law/statistics.htm>

¹⁹⁶ BBC News, NI is 'dirty part of the UK' (7th May 2004) http://news.bbc.co.uk/1/hi/northern_ireland/3691893.stm

¹⁹⁷ Dean Blackwood, Environmental Crime: a symptom of institutional neglect in Northern Ireland's Planning System? UKELA E-law newsletter (April 2014) <https://www.ukela.org/content/page/4038/e-law%20april%202014.pdf> and Criminal Justice Inspectorate in Northern Ireland, A Review of the Northern Ireland Environment Agency's Environmental Crime Unit (May 2015) <http://www.cjini.org/TheInspections/Inspection-Reports/2015/April---June/A-review-of-the-Northern-Ireland-Environment-Agenc>

structures facilitate action to protect and improve the local environment. The effectiveness of this process is strengthened by the ‘deterrent effect of the power of EU institutions to hold Member States to account and to levy fines upon them for non-compliance’.¹⁹⁸ In order to fill this enforcement gap, there will need to be an effective and independent body created to regulate and educate, underpinned by a judicial oversight role to ensure compliance.¹⁹⁹

The EU’s role in coordinating action across member states to protect and improve the environment has been extensive. It is clear that in the context of devolution the EU has pulled Northern Ireland into greater compliance with environmental standards than might otherwise have been the case.²⁰⁰ The range of detailed compliance measures and the requirement for reporting and transparency have had a positive impact on environmental standards in Northern Ireland. The interconnected nature of the environment on the island of Ireland means that Northern Ireland is uniquely vulnerable to the environmental threats of Brexit. The EU has facilitated cross border cooperation on a range of areas from water to waste and it has allowed for cross border research and development projects to be undertaken to protect and improve the environment. There needs to be clear guidance on standards and cross border environmental cooperation, including independent oversight for Northern Ireland in any post-Brexit regime.

¹⁹⁸ House of Lords EU Committee, Brexit: Environment and Climate Change, HL 109/2016-17 (14 February 2017) <https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/109/10902.htm>

¹⁹⁹ Brian Jack, speaking at Brexit: Charting a Way Forward A Civil Society Dialogue (15 June 2017)

²⁰⁰ Irish Times, Brexit: How EU environmental law affects the North by Mary C Murphy (30 March 2016) <https://www.irishtimes.com/news/world/uk/brexit-how-eu-environmental-law-affects-the-north-1.2592019>

Rights of workers

Having its origins in economic integration, EU employment and workers' rights have been a key area of EU law and policy. As such, the EU has had a significant influence on the development of employment rights in the UK generally and in Northern Ireland. One of the four fundamental freedoms of the EU is the right of workers to move between member states to take up employment or establish a business. Article 45 of the Treaty on the Functioning of the EU affirms the 'abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'.²⁰¹ Workers are not viewed simply through the lens of economic agents, but as people who should be supported in employment through 'improved living and working conditions, ... proper social protection, [and] ... dialogue between management and labour'.²⁰² At a policy level the EU works towards protecting workers' health and safety; it seeks to protect workers in work and when unemployed; it places equality between men and women in the workplace as a core principle; and it aims to combat social exclusion.²⁰³ The EU Charter of Fundamental Rights devotes nine articles to workers' rights covering everything from the right to work²⁰⁴ to the prohibition of child labour²⁰⁵ and an entire chapter to equality and non-discrimination rights²⁰⁶ which have been vital in the protection of workers. This situates any discussion on regulating employment within the EU firmly within a clear human rights framework.

Workers' rights are given extensive protection in EU law. Employment law directives cover technical provisions, such as health and safety in the work place, both in general and more specific circumstances, like for pregnant workers and people working in a particular sector.²⁰⁷ Similarly,

²⁰¹ Article 45 TFEU

²⁰² Article 151 TFEU

²⁰³ Article 153 TFEU

²⁰⁴ Article 15 EU Charter of Fundamental Rights

²⁰⁵ Article 32 EU Charter of Fundamental Rights

²⁰⁶ Title III Equality (Articles 20-26)

²⁰⁷ Directive 89/391/EEC Framework Directive on Safety and Health at Work; Directive 2010/32/EU on the prevention from sharp injuries in the hospital and healthcare sector; Directive 93/103/EC work on board fishing vessels; Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers

the posted worker directive protects the rights of workers posted between member states to protect against abuse of differences in working standards across the EU by employers and ensure that all workers have the same rights as workers in the host country, including minimum wage and annual leave.²⁰⁸ The ‘TUPE’ framework protects the rights of workers when ownership of the business or company they work for is transferred.²⁰⁹ This protection means that when a business changes hands, the contractual terms that pre-existed the transfer can continue and, significantly, continuity of employment is preserved (which can have a knock on impact on entitlements relating to pensions, sick leave and redundancy). EU law also covers important principled pronouncements of rights, such as the right to equal pay for equal work, now recognised in article 157 of the Treaty on the Functioning of the EU. As a treaty provision this right is directly enforceable in Northern Ireland courts and tribunals and has been the impetus for the extension of equal pay laws across the UK, to cover equal pay for work of equal value. This has had a positive impact for women workers who have fought to have their work valued as equivalent to male dominated sections of the workplace.²¹⁰

Equality is recognised as a fundamental principle of EU law.²¹¹ Article 19 of the TFEU states that the EU institutions are empowered to take ‘appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.’ The EU has pushed its legislative and policy agenda to prevent discrimination in the workplace with a range of measures. The Race Equality Directive prohibits discrimination on grounds of race and ethnicity in employment, vocational training and in membership of employer and employee organisations, as well as in accessing goods and services.²¹² The Framework Employment Directive, prohibits discrimination on the grounds of religion or belief, disability, age or sexual orientation in

²⁰⁸ Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

²⁰⁹ Transfers of Undertakings (Protection of Employment) Regulations 2006 implementing Directive 2001/23/EC

²¹⁰ Hilary Osborne ‘Asda faces £100m equal pay battle with shopfloor staff’, The Guardian (14 October 2016) <https://www.theguardian.com/business/2016/oct/14/asda-equal-pay-shopfloor-staff-women>

²¹¹ Case C-13/94 *P v S and Cornwall County Council* <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61994CJ0013&from=EN>

²¹² Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (29 June 2000)

employment.²¹³ In addition, the Recast Directive consolidated EU sex discrimination law into a single legal framework and prohibits discrimination on grounds of sex in employment and in access to goods and services.²¹⁴ This prohibition of discrimination on grounds of sex is also wide enough to encompass people who identify as non-binary and people who have transitioned or are in the process of transitioning from one gender to another. These measures have all served to underpin and enhance local laws prohibiting discrimination in employment and provide useful clarifications on definitions of harassment and direct and indirect discrimination that have been used to interpret the corresponding law in Northern Ireland. For example, it is by interpreting the Disability Discrimination Act in light of the Framework Employment Directive that courts have provided protection for workers who face discrimination on grounds of caring for a disabled person.²¹⁵

Unlike other parts of the UK, powers to make or amend employment law are uniquely devolved to the Northern Ireland Assembly, which means there is significant scope for local law to ensure the highest standard of employment protection in the aftermath of Brexit. However, as the EU Withdrawal Bill makes clear, all current EU powers in relation to employment law will not be automatically devolved on Brexit day. At the moment, the Northern Ireland Act 1998 prohibits the devolved institutions from making any laws or policies that are contrary to our EU law obligations. After the UK leaves the EU, there will be a new category of law called ‘retained EU law’ and the power to make law in this area will be reserved in Westminster, rather than devolved. Clause 11 of the EU (Withdrawal) Bill, will introduce an amendment to the Northern Ireland Act stating that ‘an Act of the Assembly cannot modify, or confer power by subordinate legislation to modify, retained EU law.’ Moreover Schedule 2 of the EU (Withdrawal) Bill identifies that when the Northern Ireland Act does have powers to ‘correct’ retained EU law, such corrections must mirror those which have been made by the UK Government. This means that the potential for the Northern Ireland institutions to lead a progressive workers’ rights regime after Brexit is

²¹³ Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (27 November 2000)

²¹⁴ 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 (recast) (5 July 2006)

²¹⁵ *Coleman v Attridge Law* [2008] IRLR 722

somewhat limited and there is a risk that the recent downward trend in workers' rights in the rest of the UK will automatically be extended to Northern Ireland.

In its White Paper on Brexit the UK government made the case that employment rights, such as maternity leave and statutory annual leave entitlements in UK law are higher than the minimums set at EU level and that the government is 'committed to maintaining our status as a global leader on workers' rights and will make sure legal protection for workers keeps pace with the changing labour market'.²¹⁶ However this assertion fails to engage with the positive progressive influence that the EU has had in expanding workers' rights across a range of areas. For example, the CJEU maintains its role in understanding the scope of EU law in the area of worker's rights. In *Pereda v Madrid Movilidad*, the CJEU found that under the Working Time Directive²¹⁷ a person who is ill during a period of annual leave, and takes sick leave, can take that annual leave at another time. In this case the court highlighted the different functions of annual leave and sick leave: the purpose paid annual leave is to enable 'a period of relaxation and leisure' whereas the purpose of sick leave is to 'recover from being ill'.²¹⁸ This followed from the *Stringer v HMRC* case which found that a worker was entitled to payment in lieu of annual leave which had not been taken if they left their job after a period of sick leave.²¹⁹ These provisions have a direct impact on the rights of all workers across the EU, including those in Northern Ireland. Similarly, a 2015 case had significant implications for mobile workers - workers who travel between clients or customers as part of their job, such as carer and engineers. The case examined the situation of workers without a fixed place of work who travel between their homes and customers. The CJEU found that the time spent travelling between their homes and the first and last clients of the day were covered by Working Time Directive and as such were part of their working day.²²⁰ This case has a direct

²¹⁶ Department for Exiting the EU 'The United Kingdom's exit from and new partnership with the European Union White Paper' (2 February 2017) <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper>

²¹⁷ Directive 2003/88/EC

²¹⁸ Case C-277/08 (10 September 2009)

²¹⁹ Case C-520/06 (20 January 2009)

²²⁰ Case C-266/14 *Federación de Servicios Privados del sindicato Comisiones obreras v Tyco* (10 September 2015)

impact on the pay and working conditions of mobile workers without a fixed workplace across the EU, including in Northern Ireland. Such judgments might seem technical, but they reflect a broader understanding of the human rights of the worker, who is not just as an economic actor, but as a person who should be able to enjoy a reasonable work-life balance. This broader approach to understanding the worker as a person is built on the foundations of the rights framework provided for in the EU treaties and the EU Charter.

The EU has also played an important role in ensuring that temporary and agency workers are covered by employment law protections. The Temporary Agency Worker's Directive²²¹ was incorporated into Northern Ireland law in 2011²²² and provides that an agency worker who is in post with a company or employer for a period of twelve weeks becomes entitled at that point to same working terms and conditions as permanent employees. This means that after the twelve week period has elapsed the agency worker must have the same basic working and employment conditions of permanent or directly employed workers, including the terms and conditions laid out in standard contracts, pay scales, collective agreements and company handbooks. Another EU led measure to protect workers is the Fixed-Term Workers Directive,²²³ which required that fixed-term employees were not treated less favourably than permanent employees and that after series of fixed-term contracts for a period of four continuous years they could seek to have their position regularised. Again, these measures seem quite technical, but have had the impact of improving the rights guaranteed to workers who are in a particularly vulnerable position in the workplace.

As employment law in Northern Ireland is a devolved matter, the region has remained largely unscathed by recent changes to the employment law in other parts of the UK. This creates a very real risk that where the UK government retains the powers to amend or repeal EU law, it may lead to a diminution of rights and protections in Northern Ireland. For example, recent changes to employment law in the rest of the UK have made it harder for workers to enforce their rights through the courts.

²²¹ Directive 2008/104/EC on temporary agency work (19 November 2008)

²²² Agency Workers Regulations (Northern Ireland) 2011

²²³ Directive 1999/70/EC concerning the framework agreement on fixed-term work (28 June 1999)

Changes to the rules regulating unfair dismissal have extended the period an employee must work before they can make a claim for unfair dismissal. Prior to recent changes in law, the period that a person had to be employed to enjoy this protection was one year, however the government has extended this period to two years in England, Scotland and Wales. A right is only ever as effective as a workers' ability to get a remedy for breach and this change hollows out this right and makes it easier for an unreasonable employer to unfairly dismiss workers without that worker having the opportunity for redress.²²⁴

Another regressive change introduced by the UK government was the introduction of fees for taking a claims to the employment tribunal in England to between £400 and £1,000.²²⁵ This had a dramatic impact on the number of claims before the Employment Tribunal for lower value claims, such as unpaid wages or where a financial remedy was not sought, which have a disproportionately negative impact on low-paid and vulnerable workers. The Supreme Court found these fees were a disproportionate interference with the right to an effective remedy under the EU Charter of Fundamental Rights.²²⁶ While this fees structure has been abolished by the court, it is likely that government will re-evaluate these fees and develop a fairer fee structure which is compliant with its obligations under EU law and the UK constitution. Although these changes do not apply in Northern Ireland, the Department of Economy did introduce a review of employment law here to consider bringing it into line with the rest of the UK.²²⁷ There is a real risk after Brexit, in an attempt to be business friendly, the Northern Ireland Executive will face pressure to adopt changes in employment rights to bring it into line with the rest of the UK. This 'downward pressure' on rights is an ongoing risk when faced with the economic uncertainty of Brexit.²²⁸

²²⁴ The Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012

²²⁵ Full Fact, Employment rights <https://fullfact.org/law/employment-rights/>

²²⁶ *R (Unison) v Lord Chancellor* [2017] UKSC 51

²²⁷ <https://www.economy-ni.gov.uk/publications/northern-ireland-review-employment-law>

²²⁸ NIC-ICTU Briefing, Brexit: Time to Rethink the Key Issues (Summer 2017) https://www.ictu.ie/download/pdf/brexit_briefing_paper_summer_2017.pdf

There have been strong calls for maintaining Northern Ireland's distinctiveness in relation to employment law.²²⁹ While many of the current laws and regulations are derived under EU law, they mirror employment law in other parts of the UK, but implemented by specific Northern Ireland enactments, such as Working Time Regulations (Northern Ireland) and Agency Workers Regulations (Northern Ireland) 2011 under the European Communities Act. EU law has been so influential in the area of worker's rights in Northern Ireland that it creates a form of super-constitutional law. This overarching framework informs local interpretation of law beyond just giving effect to these EU directives and regulations in Northern Ireland law. As is clear from the discussion here and in other areas examined in this report, the overarching human rights and equality law framework in the EU has had a progressive influence on worker's rights in Northern Ireland. There is a real risk that this will be lost when the UK leaves the EU and workers will be left in a more vulnerable position with fewer mechanisms to push for positive rights development and an external environment that places unprecedented pressures on the local economy.

²²⁹ White: Brexit and NI Employment Law - A modest proposal: Can we have an NI-specific campaign to defend workers' EU rights? <http://rightsni.org/2016/08/brexit-and-ni-employment-law-a-modest-proposal-can-we-have-an-ni-specific-campaign-to-defend-workers-eu-rights/>

5. Risk to Rights in Northern Ireland

One of the key outcomes of the peace agreement in Northern Ireland has been the establishment of protections for rights and equality in the constitutional settlement. The Belfast/Good Friday Agreement provides the foundations for the legal framework giving effect to this settlement. The Northern Ireland Act 1998 is built upon the limitations provided by the Human Rights Act and EU human rights and equality law. The complexity of the EU has somewhat obscured its supporting value to rights protection in Northern Ireland, but it has nevertheless been hugely important to the protection of rights as evidenced in the previous chapter. Many of the rights that are enjoyed in Northern Ireland are derived under and underpinned by EU law. There is a real risk that when this supporting mechanism is removed that many human rights protections will be undermined or even lost altogether. The EU has demonstrated that it has been a progressive force for rights in Northern Ireland - pulling the region forward in relation to the rights of LGBT people, the rights of disabled people, workers' rights, environmental protection and women's rights.

The supporting structure of EU human rights and equality protections in Northern Ireland faces a variety of risks in Brexit. The fact that Northern Ireland will be the site of a land border with the EU and the impact this could have both at a pragmatic and psychological level, creates a number of specific local risks. However, the risks in Northern Ireland go beyond just the fact of the border. There are two categories of human rights risks here which need to be addressed. The first is the rights that currently exist in UK or Northern Ireland law which are threatened by the Brexit process or at risk in its aftermath. The mechanism for shoring up these rights is ensuring there is a strong recognition of the rights in local law. The second category of rights that are at risk in Brexit are those rights which are currently accorded by reciprocity - or in other words, rights which we are guaranteed by the UK's membership of the EU. For example, it is 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'.²³⁰ This element of the Agreement will not change but Brexit will likely change what this means in terms of citizenship rights. British citizens in Northern Ireland will no longer be entitled to the rights

²³⁰ Belfast/Good Friday Agreement

that flow from being citizens of the EU, whereas Irish citizens will. This creates an immediate differentiation between those identifying as unionist and nationalist in Northern Ireland and therefore a possible source of tension between these ethno-political identities. The impact of this differentiated access to rights based on whether an individual identifies as Irish or British is something that has been at the forefront of concerns raised by the Consortium's members and in our workshops. While it may be possible to mitigate these tensions through the EU-UK negotiated 'deal' it is not clear how (or even if) this will be achieved.

Shoring up rights in Northern Ireland

At the moment as part of the membership of the EU all EU law - everything from treaty provisions, directives and regulations and the case law of the CJEU - is part of Northern Ireland law. If the UK was to leave the EU without having a mechanism to transfer these laws and policies into local law it would lead to legal uncertainty and huge gaps in regulation across a range of issues from environmental law to competition law and from agriculture policies to civil aviation regulation. Therefore, the UK government has made it clear that it intends to carry over the majority of laws and policies from the EU into domestic law and it has published its principal means of doing so in the EU (Withdrawal) Bill. This Bill highlights the need to ensure that the potential gaps and errors that result from the UK leaving the EU will be kept to a minimum. While this law cannot hope to replicate the constitutional safeguards of the EU supremacy and enforcement mechanisms, it is an essential mechanism to ensure that there are not huge legal and policy gaps in local law when the UK exits the EU. However, the mechanism the government has chosen to implement EU law locally has a number of flaws which will put rights at risk in Northern Ireland. These flaws fall under the following areas; the EU Charter of Fundamental Rights, the centralisation of power, both in terms of devolution and in terms of ministerial overreach, the case law of the CJEU, and finally by making rights harder to enforce through the courts.

*EU Charter of Fundamental Rights*²³¹

One of the key functions of the EU (Withdrawal) Bill is to provide legal certainty by carrying over EU law into local law. Any EU-derived legislation in UK-wide or Northern Ireland law or any direct EU legislation which has effect in local law before the UK exits the EU will continue to have effect in local law on exit day and thereafter.²³² In addition any rights, powers or obligations which are part of local law through the European Communities Act on exit day will continue to be recognised after Brexit.²³³ This creates the impression that the UK government is committed to carrying over all the rights and protections of EU law into UK law, however there are some significant and worrying exceptions.

As already identified in this report, the EU Charter on Fundamental Rights is an important human rights instrument within EU law and can be used to challenge actions both of the UK government when acting within the scope of EU law and of EU institutions. The rights contained in the EU Charter are much more extensive than for other human rights protections available in law in Northern Ireland. While it is still in its infancy as a human rights instrument, it has had a significant role in shoring up and underpinning human rights locally and within the UK more generally. Despite its value as part of the fabric of human rights protections in Northern Ireland, the government has made it clear in EU (Withdrawal) Bill that it does not intend to carry over the EU Charter into UK law after Brexit²³⁴ and this creates a real risk that rights protections that are currently enjoyed in Northern Ireland will be lost.

The logic behind the exclusion of the EU Charter from the rights enjoyed after Brexit is set out in the Government's White Paper on the Bill.²³⁵ The first reason identified by the government is that many of the rights protected in the Charter are also found in other international

²³¹ It is noted that the Department for Exiting the EU published a 'right by right' analysis of the EU Charter on 5th December 2017 in an attempt to address some of the concerns raised by MPs during the committee stage of the EU (Withdrawal) Bill. This document does little to allay the concerns raised in this report and instead is a cursory engagement with the issues, rather than a deeper level analysis of the potential gaps in human rights protection in the aftermath of Brexit.

²³² Clauses 2 and 3 of the EU (Withdrawal) Bill

²³³ Clause 4 of the EU (Withdrawal) Bill

²³⁴ Clause 5(4)

²³⁵ Department for Exiting the European Union, The Repeal Bill: White Paper, Cm 9446 (March 2017) <https://www.gov.uk/government/publications/the-repeal-bill-white-paper>

instruments. The government particularly highlights that many of the rights in the EU Charter replicate rights contained in other international human rights treaties, such as the UN Convention on the Rights of the Child and the UN Convention on the Rights of People with Disabilities. While this is true, this does not take account of the ‘dualist’ nature of UK law, which means that the rights contained in UN human rights treaties are not enforceable in local law or in the courts, unless incorporated by specific legislative provision. Currently none of the UN human rights treaties are incorporated in this manner. So, the Charter actually provides for a more robust form of rights protection within Northern Ireland than UN treaties.

The government also defended its decision not to carry the EU Charter into UK law by asserting that the European Convention of Human Rights will remain part of UK law. However, this logic fails to recognise, as has already been identified in this report, that the rights in the EU Charter are much more extensive and often go further than the rights in the European Convention on Human Rights. Moreover, while it is true that Brexit will not change the UK’s participation in the ECHR, it is clear that the Human Rights Act is under a separate threat. The Prime Minister has already asserted her desire for the UK to leave the European Convention on Human Rights²³⁶ and the Conservative manifestos since 2010 and government ministers have repeatedly asserted that reform of the Human Rights Act is a priority.²³⁷ In light of the gargantuan task in legislating for Brexit, reform of the Human Rights Act has been postponed but not permanently shelved, ‘we will not repeal or replace the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes.’²³⁸ Between the government’s refusal to carry over the EU Charter into local law and the fact another core human rights law is also under threat, there is a real risk of the human rights framework being undermined by decisions made by the UK government without consideration of how this could impact on Northern Ireland.

²³⁶ Home Secretary’s speech on the UK, EU and our place in the world (25 April 2016) <https://www.gov.uk/government/speeches/home-secretarys-speech-on-the-uk-eu-and-our-place-in-the-world>

²³⁷ RightsInfo, Minister Confirms Indefinite Delay In Plans to Replace the Human Rights Act, Rebecca Hacker <https://rightsinfo.org/plans-replace-human-rights-act-put-hold/>

²³⁸ Conservative Party Manifesto, Forward, Together: Our Plan for a Stronger Britain and a Prosperous Future <https://www.conservatives.com/manifesto>

Rather than the EU Charter being part of UK law, the EU (Withdrawal) Bill relies on fundamental rights or principles which pre-exist the Charter in EU law. These fundamental principles will be carried over into local law, and ‘references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles’.²³⁹ According to the White Paper, ‘this will not affect the substantive rights that individuals already benefit from in the UK’.²⁴⁰ This approach is based on the assumption that the core institution grappling with these issues post-Brexit will be the courts, however this provision must be read in light of the rest of the Bill and in Schedule 1, this is limited further. Reference to these general principles of EU law will only be relevant as an *interpretative tool* for other EU retained law and it will not be possible to take an action on the basis of a right which is currently guaranteed by the Charter. In addition, by restricting what were formerly EU Charter rights to principles of interpretation for the courts after Brexit, this approach will remove the general obligation to take the EU Charter rights into account when making laws and policies in areas that would otherwise have been within the scope of EU law. In other words, it also removes an important rights safeguard in the development stage of laws and policies.

Centralisation of Power: Ministerial Overreach

Another area of concern in the EU (Withdrawal) Bill is that of the sweeping concentration of powers in the hands of Ministers. It was well documented prior to the introduction of the Bill that some use of delegated powers would be necessary in order to grapple with the enormity of ensuring that all EU law would be incorporated into UK law before the UK leaves the EU.²⁴¹ However, what is worrying about the current draft Bill is the breadth of powers being given to Ministers with minimal oversight from Parliament. The House of Lords Constitution Committee took the unusual step of issuing an interim report on the Bill setting out its concerns. The report states that ‘the executive powers

²³⁹ Clause 5(5) of the EU (Withdrawal) Bill

²⁴⁰ Department for Exiting the European Union, The Repeal Bill: White Paper, Cm 9446 (March 2017) <https://www.gov.uk/government/publications/the-repeal-bill-white-paper>

²⁴¹ House of Lords Committee on the Constitution, The ‘Great Repeal Bill’ and delegated powers, HL Paper 123/2016-17 (7 March 2017) <https://publications.parliament.uk/pa/ld201617/ldselect/ldconst/123/12302.htm>

conferred by the Bill are unprecedented and extraordinary and raise fundamental constitutional questions ... it is not merely that the Bill invests the executive with deep legislative competence by authorising the making of “any provision that could be made by an Act of Parliament,” it is that the Bill contains multiple such powers, which overlap to a very considerable extent, and which are not subject to an enhanced scrutiny process. ... the Bill weaves a tapestry of delegated powers that are breath-taking in terms of both their scope and potency.’²⁴²

The scale and breadth of the delegated powers within the Bill have raised concerns from a range of organisations who are concerned about how these powers could be used to undermine rights and equality protections.²⁴³ In clauses 7 and 8 the Bill sets out the powers Ministers have to remedy deficiencies arising from withdrawal and to comply with international obligations, including the power to amend an Act of Parliament, so-called Henry VIII powers. There are some limits on these powers, including importantly that this clause cannot be used to amend the Human Rights Act and reassuringly for our devolution settlement, the Northern Ireland Act. However, as has already been pointed out in this report, the rights we currently enjoy under EU law are often broader and more extensive than those guarantees under the Human Rights Act and this means that where it is deemed expedient, a Minister could undermine a current protection, either intentionally or not, without any substantial parliamentary scrutiny.

Clause 9 of the Bill goes even further.²⁴⁴ It is designed to facilitate the implementation of any withdrawal agreement and gives the Minister substantial powers to ‘make such provision as the Minister considers appropriate for the purposes of implementing the withdrawal

²⁴² House of Lords Committee on the Constitution, European Union (Withdrawal) Bill: interim report HL Paper 19/2017-19 (7 September 2017) <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/19/1902.htm>

²⁴³ Human Rights Consortium, Consortium Concerns over EU (Withdrawal) Bill (17 July 2017) <http://www.humanrightsconsortium.org/consortium-concerns-eu-withdrawal-bill/>, Amnesty International UK Withdrawal Bill must be urgently amended to protect people from Government rollback on fundamental rights after Brexit (5 September 2017) <https://www.amnesty.org.uk/press-releases/withdrawal-bill-must-be-urgently-amended-protect-people-government-rollback>

²⁴⁴ It is noted that the UK government has made a statement assuring that it will introduce a new Bill to parliament specifically addressing how any agreement will be given effect to in local law. However this (now apparently unnecessary) clause remains in the EU (Withdrawal) Bill <https://www.gov.uk/government/news/new-bill-to-implement-withdrawal-agreement>

agreement'. This power is further enlarged in subsection 2 where it empowers the Minister to make or amend any primary law, including the EU (Withdrawal) Bill. In other words, it allows the Minister to amend any provision in the Bill without any substantial oversight. While this power is limited insofar as it cannot undermine, repeal or revoke the Human Rights Act, there is no similar limitation in relation to the Northern Ireland Act. This is especially concerning for Northern Ireland in light of the range of rights at risk in Brexit and that agreement on a range of cross border issues and reciprocal arrangements are unlikely to be resolved until the entire withdrawal deal is finalised. It is very worrying given the complexity of the human rights framework in EU law that these extensive ministerial powers have not been limited in a variety of ways. One way to ensure rights are not undermined would be to explicitly set out in the act that these powers cannot be used to lessen or weaken any human rights or equality protections that currently exist under EU law.²⁴⁵

Centralisation of Power: Devolution

Very little consideration has been given to the specificity of the Northern Ireland devolution arrangements in the Bill. The Northern Ireland devolution settlement is unlike that in Wales and Scotland and is the result of the Belfast/Good Friday Agreement and subsequent agreements. It is the product of the efforts to establish peace in Northern Ireland and the settlement is finely balanced. As identified elsewhere in this report, the Northern Ireland Act and the Belfast/Good Friday Agreement form a constitution for Northern Ireland and it is essential that any change which may disrupt the balance of powers within this settlement is considered in this context. There is a real risk of destabilisation of this constitutional settlement and the EU (Withdrawal) Bill as it currently stands does little to allay this concern. At the moment, the devolved administration in Northern Ireland is prohibited from legislating contrary to EU law, including all the rights and equality protections which are derived under EU law. The Bill, rather than allowing for policy areas which are currently under the remit of the EU to cascade down naturally once the UK leaves the EU under the terms of the devolution settlement, will instead centralise these powers in Westminster. Clause 11 states that the powers of the Northern Ireland administration will be locked on Brexit day and that anything that would otherwise have been an EU law matter will

²⁴⁵ An amendment to this clause was passed by the House of Commons at Committee stage of this Bill, however, it is as yet unclear what the impact of that amendment will be on the final text of the Act.

remain in the hands of the UK Government. The one exception to this is where an Order in Council devolves a specific area to the devolved legislature. However, this provision is further limited in Schedule 2 of the Bill, which suggests that even where some competence in relation to EU derived law is devolved, it will not be possible for the devolved administration to act in a way which is inconsistent with any modification made by a UK Minister.

The Scottish and Welsh governments have already raised a series of objections in relation to the EU (Withdrawal) Bill. Highlighting that the devolved powers to legislate under the Bill ‘extend only to correcting EU law that has been given effect by domestic legislative procedures’ whereas ‘Directly effective EU legislation ... and other EU law derived rights ... can be amended only by a UK Minister even if the subject matter falls clearly within devolved competence.’²⁴⁶ There is also a real risk that shared competency between UK Ministers ‘acting jointly with a devolved authority’ in Schedule 2 of the Bill will only be released to the devolved ‘authorities’ at the discretion of UK Ministers. When added to sweeping Ministerial powers to make law under clauses 7-9 and the uncertainty about the scope of what will constitute EU retained law²⁴⁷ limiting devolved law making, the Bill creates ‘an astonishing state of affairs that when the EU (Withdrawal) Act comes into force it will be almost impossible to articulate the boundaries of devolved competence for Scotland, Wales or Northern Ireland, dependent as these boundaries will be upon the shifting sands of domesticated EU law.’²⁴⁸ Not only does this centralisation of power at Westminster risk undermining rights in Northern Ireland through lack of appropriate scrutiny, it also risks destabilising the delicately balanced peace agreement by moving powers from the ‘neutral’ supranational field of EU law making and concentrating it in the hands of UK ministers to the detriment of local accountability.

²⁴⁶ Scottish Legislative Consent Memorandum, European Union (Withdrawal) Bill LCM-S5-10 <http://www.parliament.scot/S5ChamberOffice/SPLCM-S05-10-2017.pdf>; See also Welsh Legislative Consent Memorandum, European Union (Withdrawal) Bill <http://www.assembly.wales/laid%20documents/lcm-ld11177/lcm-ld11177-e.pdf>

²⁴⁷ Mark Elliot, The Devil in the Detail: Twenty Questions about the EU (Withdrawal) Bill (14 August 2017) <https://publiclawforeveryone.com/2017/08/14/the-devil-in-the-detail-twenty-questions-about-the-eu-withdrawal-bill/>

²⁴⁸ Stephen Tierney, The European Union (Withdrawal) Bill: legal implications for devolution (7 September 2017) <https://constitution-unit.com/2017/09/07/the-european-union-withdrawal-bill-legal-implications-for-devolution/>

Case law of the CJEU

One of the key mechanisms for enforcing and expanding on rights in EU law has been through the courts. As already demonstrated in this report, the supremacy of the case law of the CJEU and by extension its influence on local courts has been significant. The UK Government has stressed that the direct link between the case law of the CJEU and courts in the UK should be cut. This commitment was initially set out as a red line in the Prime Minister's Lancaster House Speech; 'So we will take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain. ... Because we will not have truly left the European Union if we are not in control of our own laws.'²⁴⁹ The line that taking back control means removing the UK from the jurisdiction of the CJEU has been consistent. Once the UK leaves the EU it will lose this external supervising jurisdiction of the CJEU and its role in ensuring a common minimum adherence to EU human rights law across all EU member states. In order to bridge this gap, the EU (Withdrawal) Bill addresses the issue of how to deal with the jurisprudence of the CJEU once the UK has left the EU. Clause 6 sets out the basic principle that after Brexit day, the case law of the CJEU will not be binding on courts within the UK, nor will there be any possibility of referring a matter for their consideration. However, jurisprudence of the CJEU which already exists prior to Brexit will continue to have binding status in all UK courts unless the Supreme Court chooses to depart from that jurisprudence after due consideration.

The uncertainty with regards to the case law of the CJEU arises when dealing with future situations once the UK has left the EU, but is still applying EU retained law. Clause 6 states that 'A court or tribunal need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so.' This means that it is up to the courts to decide whether and to what extent to consider future EU case law which may be relevant to the interpretation of existing EU derived rights post-Brexit. Both the former and current presidents of the Supreme Court have raised concerns about the lack of clarity in the Bill and the implications for

²⁴⁹ Prime Minister Theresa May, 'The government's negotiating objectives for exiting the EU' (17 January 2017) <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>

judicial law making.²⁵⁰ Moreover, the current lack of clarity in the Bill could lead to a divergence in how legislation on rights apply in the Northern Ireland, when compared to Ireland, who will remain under the jurisdiction of the CJEU. This could be particularly stark for people living and working in border areas who may be inadvertently affected by this divergence in human rights standards on both sides of the border. For example, if the General Data Protection Regulation is interpreted differently in Ireland and Northern Ireland, this could have particular implications for data protection rights and the sharing of information between bodies across the border.

Making rights harder to enforce through the courts

Schedule 1 of the Bill states that there will be ‘no right in domestic law on or after exit day to challenge any retained EU law on the basis that, immediately before exit day, an EU instrument was invalid.’ This is a direct removal of a right to enforce EU law in the courts in the event of government failure. In addition, as noted above the EU Charter will no longer be considered as part of UK law. The UK government insists that it will not be necessary as any rights in the Charter which have been invoked in the courts will instead be recognised as a ‘general principle of EU law’. While this might appear at first glance as nothing more than word play, it actually changes how that right can be enforced. Under the current system, an individual can take a case in order to invoke their rights under the EU Charter through the courts. However, under the terms of the Bill, this will no longer be possible. Instead it will only be possible to use the ‘general principles’ of EU human rights law indirectly to interpret another EU law measure. This will make it much harder for people to vindicate their rights through the courts.

One of the strengths of the EU human rights framework is that it offers much more robust remedies than the Human Rights Act. However, the EU (Withdrawal) Bill also plans to limit the scope of possible remedies. For example, it removes the potential for a law to be disapplied because it is incompatible with any of the general principles of EU law. In addition, it

²⁵⁰ Lord Neuberger in BBC News, UK judges need clarity after Brexit: Lord Neuberger (8 August 2017) <http://www.bbc.co.uk/news/uk-40855526> and Lady Hale in the Guardian UK's new supreme court chief calls for clarity on ECJ after Brexit (5 October 2017) <https://www.theguardian.com/law/2017/oct/05/uks-new-supreme-court-chief-calls-for-clarity-on-ecj-after-brexit>

also removes the remedy of damages in *Francovich*.²⁵¹ This rule refers to a well-established principle in EU law. Where an EU directive creates rights for individuals, but a member state does not implement that directive in local law, it is possible for an individual to be compensated for any loss or damage suffered. These provisions might appear like technocratic amendments, but they reduce the enforceability of rights post-Brexit and will hollow out human rights safeguards once the UK leaves the EU.

Shoring up Reciprocal Rights

Ensuring that Brexit does not lead to a lessening of rights in Northern Ireland is not something that can be guaranteed by the UK government alone. Much of the supporting human rights infrastructure is based on cooperation and reciprocation across EU member states. Areas as diverse as social security, enforcement of civil judgments and combatting human trafficking are founded on EU coordination across all 28 member states. The EU provides a common platform for states to work together towards common aims. It also provides a mechanism for ensuring compliance with the reciprocity elements of EU membership. When the UK leaves the EU, it will have to address these issues in any withdrawal or future relationship agreement. Northern Ireland is especially vulnerable to any failure to find agreement on these rights areas, due to its geographical position having a land border with the EU and because of established north-south cooperation elements of the peace process that were underpinned by a common EU legal platform.

The EU provides for a supra national legal and policy framework within which all member states must operate. For example, common regulations for toy production to ensure minimum safety standards mean that all toys produced for the EU market and sold across member states meet this common standard. Similarly, in the agri-food production, the animal welfare provisions in EU law ensure that all meat and food produce meet the required standards to be sold within the EU. This commonality of standards is essential for the all island agri-food market.²⁵² The reciprocity of the EU is based around the centrality of the single market and the customs union, which are underpinned by the freedom to move

²⁵¹ C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* (1991)

²⁵² See for example the comments of Angela McGowan, Director of the CBI in Northern Ireland at the 'Brexit: Charting a Way Forward - A Civil Society Dialogue' Conference on 15 June 2017 organised by the Human Rights Consortium, NICVA and Unison.

across the EU to work, to access services, to establish a business and to move capital. While the EU is built on its economic mandate it is not the only consideration. When workers move around the EU, they are not viewed as mere economic migrants, but as rights holders who enjoy the full range of the rights established in the of EU law. Moreover, they are also entitled to the same rights in relation to access to education, healthcare and social welfare as settled residents in the ‘host’ state. Moreover, the EU facilitates the cross-border elements of people living and working across two different member states. This is something that is perhaps overlooked by people living in England, Scotland and Wales, but it is of vital importance in Northern Ireland.

Border communities are acutely aware of the potential of Brexit to disrupt their lives. There is a deep understanding of how members of these communities live their lives, work, access healthcare and education, play, enjoy their sport and leisure facilities could change as the UK withdraws from the EU. It is these communities who are most conscious of how Northern Ireland has been scarred by borders in the past and how the normality of cross-border living enriches their lives. They are also most likely to be engaging with their EU ‘free movement’ rights on a daily basis through decisions about which childcare provider to choose or where to shop. People living in border areas are often on the frontlines of invoking their EU rights and pushing for recognition, for example, of their right to use tax credits for their closest childcare provider, even if that provider is on the far side of the border.²⁵³

Case study - Right to Health in Brexit

The NHS was a key issue in the referendum debate. Controversially the Leave campaign claimed that the money that the UK currently pays into the EU could be redirected into the NHS. This slogan resonated as strongly in Northern Ireland as it did in other parts of the UK. While the figure claimed was disputed,²⁵⁴ the impact of this claim in particular demonstrated the general level of support for the right to health care free at point of access in the UK and that this needs to be shored up in Brexit. There is a real risk however that any economic slowdown which is linked to Brexit could impact on the provision of health and social care

²⁵³ *NB v HMRC (TC)* [2016] NICom 47

²⁵⁴ <https://fullfact.org/blog/2016/apr/uk-statistics-authority-350-million-eu-membership-fee-potentially-misleading/>

across the UK.²⁵⁵ The impact of Brexit will have a direct impact on the cross-border and all-island health and social care partnerships. The Cooperation and Working Together programme has been funded through the EU to build collaborative relationships across a range of areas, including acute services across the border, alcohol abuse, eating disorders, diabetes, health inequalities and supporting older people.²⁵⁶ One area of particular concern is all-island cardiac care for sick children which provides care for children north and south through a unified service. In order to ensure that the high level of care for children with congenital heart disease is maintained, then this cross-border network will need to be supported after the UK leaves the EU.²⁵⁷

There is data for England, Scotland and Wales to show that there is a real risk of the shortfall in nursing and other health care staff being exacerbated by Brexit and changes to immigration rules for health and social care workers from the EU post Brexit.²⁵⁸ This could have a dramatic impact on the provision of health care across the UK, including in Northern Ireland. There are also concerns about how cross border recognition of qualifications and professional regulation post-Brexit, as although health policy is a devolved matter, professional regulation remains primarily in London and questions have been raised about how consistency will be maintained after the EU exit.²⁵⁹

Brexit presents serious issues for regulation of healthcare in the UK, as the EU has an important role in the regulation of many pharmaceuticals and in relation to blood and human tissue. For example, the European Medicines Agency licences all medicines to be sold within the EU and this means that either the UK extends the competency of the UK based

²⁵⁵ Mark Dayan, General Election 2017: Getting a Brexit Deal that works for the NHS (Nuffield Trust Briefing) (May 2017) <https://www.nuffieldtrust.org.uk/files/2017-05/getting-brexit-deal-for-nhs-web-final.pdf>

²⁵⁶ Cooperation and Working Together, Annual Progress Report 2015 <http://www.cawt.com/Site/11/Documents/Publications/CAWT%20Annual%20Report/CAWT%20APR%202015.pdf>

²⁵⁷ Northern Ireland Confederation for Health and Social Care and NHS Confederation Briefing, Northern Ireland and the EU exit: A unique set of challenges March 2017 <http://www.nhsconfed.org/resources/2017/03/northern-ireland-and-the-eu-exit>

²⁵⁸ The Guardian, Haroon Siddique, 96% drop in EU nurses registering to work in Britain since Brexit vote (12 June 2017) <https://www.theguardian.com/society/2017/jun/12/96-drop-in-eu-nurses-registering-to-work-in-britain-since-brexit-vote>

²⁵⁹ Northern Ireland Confederation for Health and Social Care and NHS Confederation Briefing, Northern Ireland and the EU exit: A unique set of challenges March 2017 <http://www.nhsconfed.org/resources/2017/03/northern-ireland-and-the-eu-exit>

Medicines and Healthcare products Regulator Agency or negotiates a way to remain under the remit of the European Medicines Agency.²⁶⁰ Similarly, the EU is a global leader in data protection and its current regulatory regime provides for the particularities of data protection in the area of public health.²⁶¹ At a practical level there are serious issues about how and if the UK agencies will be able to continue to coordinate on public health initiatives, medical trials and blood and human tissue safety without some kind of negotiated arrangements in place.

The complexities and range of cross border issues make it difficult to predict how they might disrupt access to a range of rights in Northern Ireland. Areas as diverse as child protection and violence against women rely on EU wide measures to ensure that the different legal systems on the island of Ireland are sufficiently coordinated to protect vulnerable people through the criminal justice and family law systems. Child protection measures work on the basis of sharing of information across a range of agencies and through multilateral engagement with a range of security EU mechanisms and agencies, including Eurojust, EUROPOL, European Arrest Warrants and ECRIS.²⁶² For example, the EU law framework facilitates the process whereby family law decisions on child custody, access and maintenance can be recognised and enforced across borders and means that parents cannot avoid abiding by these decisions by moving across the Irish border.

All of these elements of reciprocity require the UK government and the EU to negotiate specific solutions to these complex problems. There is no way for the UK government or the Northern Ireland Assembly to remedy these issues without them being addressed by both the UK and the EU. The impact of this uncertainty on our members and on people we have engaged with through our workshops has been profound and this is particularly stark from people living in and around the border areas. These are human stories of people who are anxious about Brexit and unsure about how these impacts will be mitigated, if at all, in the negotiations between the UK government and the EU Commission. It is essential that both parties to the negotiations tackle these reciprocal

²⁶⁰ Jean McHale, Brexit and health care: a view from the cliff-edge, Blog UK in a Changing Europe (14 July 2017) <http://ukandeu.ac.uk/brexit-and-health-care-a-view-from-the-cliff-edge/>

²⁶¹ https://ec.europa.eu/health/data_collection/data_protection/in_eu_en#fragment3

²⁶² Children's Law Centre, Briefing on the impact of Brexit on Children and Young People

rights issues, which go beyond trade and customs and that space is carved out in the next phase of negotiations to ensure that the range of protections affected by Brexit is not overlooked.

6. Conclusions

This report does not attempt to map every human rights concern which is raised by the UK leaving the EU, but instead highlights the complexity and array of human rights and equality risks which are provoked by Brexit. It attempts to map out some of the key themes that have been raised by our members and to highlight that reducing the narratives of impacts on Northern Ireland to trade and a need for a 'seamless and frictionless' border does not address the intricate and complicated way in which membership of the EU supports and underpins the enjoyment of rights and equality safeguards in Northern Ireland. Membership of the EU has been a progressive influence on the UK in pulling it towards increased human rights protection. This has been even more remarkable in Northern Ireland, where since the peace agreement and constitutional settlement the developing human rights framework in the EU has supported the 'ECHR+' stipulation of the Belfast/Good Friday Agreement.

Brexit risks destabilising the hard-won peace in Northern Ireland and in the circumstances where there has been no Northern Ireland Executive in place for 12 months and no real prospect of re-establishment of devolved institutions in the near future, there is a real risk that the concerns of Northern Ireland civil society will be unheard. Our research has demonstrated a clear sense of distance of Northern Ireland from the UK-wide narratives and it was not until the very final days of the Phase 1 agreement that attention was focused on the impact of Brexit on Northern Ireland. Our members have consistently raised the issue of the underrepresentation of Northern Ireland voices in the wider Brexit discussions, especially the voices of women, children and young people, people with disabilities and people living in rural and border areas. There is a real sense of the broader Brexit discussions being overly focused on trade and business, which although important have obscured a more inclusive discussion on the variety of human rights and equality issues raised by Brexit.

Phase 1 - mapping progress on rights

Northern Ireland is facing its most challenging environment for our peace agreements since 1998 and it is essential that the disruptive impact of Brexit is addressed head on. It is not enough for the UK and EU Commission to agree that there should be no risk to the peace agreements, the detail of how this is to be effected needs to be mapped

out. It is in this context that the agreement between the UK and EU Commission on Phase 1 of the negotiations is to be given a cautious welcome.²⁶³ The Consortium is reassured that both parties have agreed that in the context of a ‘no deal’ scenario, the interests of Northern Ireland will be protected:

‘The United Kingdom remains committed to protecting North-South cooperation and to its guarantee of avoiding a hard border. Any future arrangements must be compatible with these overarching requirements. The United Kingdom's intention is to achieve these objectives through the overall EU-UK relationship. Should this not be possible, the United Kingdom will propose specific solutions to address the unique circumstances of the island of Ireland. In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement.’²⁶⁴

This commitment demonstrates that both the UK government and the EU recognise the specific risks to Northern Ireland of Brexit and the need to mitigate those risks.

Both parties to the Phase 1 agreement have given assurances about the position of the Belfast/Good Friday Agreement in any negotiated withdrawal by the UK from the EU, making it clear that it must be ‘protected in all its parts’ and that this assurance extends to the ‘practical application of the 1998 Agreement on the island of Ireland and to the totality of the relationships set out in the Agreement’ in order to protect the ‘achievements, benefits and commitments of the peace process [which] remain of paramount importance to peace, stability and reconciliation’.²⁶⁵ However, despite the Joint Report going into a considerable amount of technical detail on the ‘citizens’ rights’, the guarantees in relation to Northern Ireland are high level commitments to objectives. While this is welcome, the challenges of Brexit for Northern Ireland are complex and without more detail setting out the nuance of

²⁶³ Joint Report from the Negotiators of the EU and UK government on progress during Phase 1 of the negotiations under article 50 TEU on the UK’s orderly withdrawal from the EU. (8 December 2017)

²⁶⁴ At paragraph 49 of the Joint Report

²⁶⁵ At paragraph 42 of the Joint Report

how these challenges will be addressed, it is difficult to evaluate how effective this commitment will be in practice.

In addition to the above commitments the UK and EU Commission have also identified rights as being central to any future withdrawal agreement. Paragraph 52 gives reassurance to Irish-identifying people living in Northern Ireland by clarifying that:

‘The people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland. Both Parties therefore agree that the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship for such people and, in the next phase of negotiations, will examine arrangements required to give effect to the ongoing exercise of, and access to, their EU rights, opportunities and benefits.’

This demonstrates a commitment by both parties to the agreement to ensure that this cohort of people in Northern Ireland will have their EU citizenship rights assured *where they reside in Northern Ireland*. This language implies that the EU and UK will look to guaranteeing existing EU citizenship rights within the jurisdiction of Northern Ireland including the right to vote and stand in European and municipal elections, EU information and good administrative rights, the right to diplomatic protection and EU citizen family reunification rights and others currently enjoyed under EU law as identified throughout this report. However, a note of caution must be struck in this interpretation, as despite the clear language in the Joint Report, the Irish Taoiseach appears to take a more restrictive interpretation to this paragraph, limiting it to free movement rights in EU27 member states: ‘Everyone born in Northern Ireland will continue to have the right to Irish and therefore EU citizenship. So, a child born in Belfast or Derry today will have the right to study in Paris, buy property in Spain, work in Berlin or any other part of the European Union. All they have to do is exercise the right to Irish and therefore EU citizenship.’²⁶⁶

This assurance for Irish-identifying people in Northern Ireland also creates a complicating factor for the enjoyment of rights for all people

²⁶⁶ An Taoiseach Leo Varadkar, Statement on Brexit Negotiations (8 December 2017) <https://merrionstreet.ie/MerrionStreet/en/News-Room/News/Statement-on-Brexit-negotiations-by-the-Taoiseach-Leo-Varadkar-T-D-.html>

here. As acknowledged in the Joint Report, ‘Both Parties acknowledge that the 1998 Agreement recognises **the birth right of all the people of Northern Ireland to choose to be Irish or British or both** and be accepted as such’. However, the commitment that only Irish-identifying people in Northern Ireland will have access to EU citizenship rights creates an inherent tension whereby UK-identifying people in Northern Ireland will not have access to these rights, unless they choose to identify as Irish. Under the terms of the Belfast/Good Friday Agreement, no one in Northern Ireland should have to identify as British or Irish in order to access rights. The language of the joint report creates a real tension between the two main communities in Northern Ireland that must be grappled with in the next stage of negotiations.

The supporting framework of EU law in upholding human rights in Northern Ireland is particularly important when addressing those rights which are assured through reciprocity or membership of the EU. Paragraph 47 of the report accepts that the EU has facilitated the ‘cooperation between Ireland and Northern Ireland [as] a central part of the 1998 Agreement’ and that it is ‘essential for achieving reconciliation and the normalisation of relationships on the island of Ireland. ...Therefore, the United Kingdom’s departure from the European Union gives rise to substantial challenges to the maintenance and development of North-South cooperation.’ This appreciation of the EU as a supporting framework for rights is further emphasised in paragraph 53, including the important provisions on rights, safeguards and equality of opportunity in the Belfast/Good Friday Agreement, ‘for which EU law and practice has provided a supporting framework in Northern Ireland and across the island of Ireland’. The UK government also undertakes to ensure that ‘**no diminution of rights is caused by its departure from the European Union**, including in the area of protection against forms of discrimination enshrined in EU law’ and ‘commits to facilitating the related work of the institutions and bodies, established by the 1998 Agreement, in upholding human rights and equality standards.’ This is a welcome assurance in light of the complex and multi-faceted human rights concerns which have been raised and identified in this report. However, these high level commitments have yet to be mapped onto specific solutions and while many of these issues rely on a better understanding of what the future relationship between the UK and the EU will look like, it is essential that the human rights concerns are not drowned out by the complexities of trade and business concerns.

Beyond Phase 1 - Where do we go from here?

As has been clear throughout this report, there are two ways in which rights are at risk in Brexit - one is on the basis of reciprocal relationships within the EU and the other is in relation to how rights protections are effected in Northern Ireland within the UK constitutional structure. As the UK exits the EU the safeguards of being part of a supranational structure will change how these rights will be protected internally within Northern Ireland. Brexit is having a profoundly disruptive effect on the UK constitutional structure and the impact appears to be resulting in a recentralisation of power in the hands of the UK government. Whereas before the EU referendum, this power was dispersed between the EU at the international level, the UK government and devolved authorities locally, the EU (Withdrawal) Bill is resetting the constitutional scaffolding based on repatriated powers being pulled into the centre, at least in the short term. This is evident from the sweeping way in which ministerial powers will be exercised after Brexit, including to change primary law. Similarly, the devolved administrations, rather than increasing the scope of law and policy making, will have their powers limited by the Bill, which will instead vest those powers in the hands of the UK government in a development that is already threatening the good relations between the UK government and devolved administrations. This recentralisation of powers is particularly worrying for Northern Ireland where the constitutional settlement is built on the rigorous impartiality of the UK government and on the UK and Irish governments as co-guarantors.

The reality of losing the external supervision of the CJEU also risks threatening the confidence building mechanism of knowing that decisions or laws of the local or UK government and parliament which are in breach of EU law, including human rights protections, can be challenged in the courts. The supremacy of the CJEU also ensures that all parts of the UK keep pace with changes to EU human rights standards which are interpreted through the courts. Any such interpretation is automatically applied in the Northern Ireland courts and is binding on law and policy makers too. While the EU (Withdrawal) Bill makes it clear that the case law of the CJEU which exists on Brexit day will be binding on all courts in the UK, any human rights interpretations after that date will not automatically apply, which threatens to create a gap between human rights standards in Northern Ireland and Ireland (and the rest of the EU).

Similarly, the UK government's decision to exclude the EU Charter of Fundamental Rights from all the laws and polices carried over in the Bill creates a human rights vacuum. The EU Charter acts as an important constitutional safeguard underpinning human rights protections in Northern Ireland and its removal weakens the quality and range of human rights protections available here. It is clear that this removal will create a human rights vacuum and risks undermining the confidence building measures which exist in Northern Ireland pursuant to the Belfast/Good Friday Agreement. This deletion of an important human rights framework reiterates the need for the UK government to take action to shore up human rights in Northern Ireland. In the context of a UK-wide constitutional disruption, there is a greater urgency to ensuring that the scaffolding of the Agreement is reinforced, rather than undermined. In this context there are renewed calls for a strong and inclusive Northern Ireland Bill of Rights from our members and a strengthening of resolve for a strong human rights scaffolding to protect against any diminution in the enjoyment of rights in Northern Ireland.

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