

Professor Monica McWilliams and Emma De Souza – Written evidence (FUI0017)

Evidence to the House of Lords European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland

Professor Monica McWilliams and Emma DeSouza

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Author Biographies

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Co-founder of Northern Ireland Women's Coalition elected to the peace negotiations leading to Belfast/Good Friday Agreement and former Chief Commissioner of Northern Ireland Human Rights Commission.

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Human rights campaigner and writer. Took forward the first human rights case of the Belfast/Good Friday Agreement that resulted in substantive changes to UK immigration law. Coordinator at the National Women's Council of Ireland and Chairperson of the All-island Women's Forum.

This evidence is presented in a personal capacity.

The practical impact of the Protocol

(1) Much of the focus surrounding the operation of the Northern Ireland Protocol has been on trade, while the wider human rights and equality aspects of the agreement remain largely overlooked. Article 2 of the Northern Ireland Protocol contains a non-diminution of rights commitment which has come under increasing strain. Several pieces of domestic UK legislation introduced over the past six months have the potential to amount to a breach of Article 2.

(2) Article 2 (1) of the Protocol states: "The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out

in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.”¹

(3) Article 2(1) of the Protocol stipulates that the UK Government must ensure that there is no diminution of Rights, Safeguards and Equality of Opportunity provisions, as set out in the relevant chapter of the Belfast/Good Friday Agreement 1998², resulting from the UK’s withdrawal from the European Union. The scope of the relevant paragraph includes “the right to pursue democratically national and political aspirations”, “the right of free political thought”, “the right of women to full and equal political participation”, “the right to freely choose one’s place of residence”, among others.

(4) As set out in the UK Explainer Document (2020)³, alleged violations of Article 2 must relate to rights contained under paragraph 1 of the Belfast/Good Friday Agreement, which have been enshrined in domestic legalisation before the end of the transition period. The document outlines that it must be established that any diminution of these rights must have occurred as a result of the UK’s withdrawal from the EU.

(5) Two pieces of domestic UK legislation present a point of concern in relation to Article 2 obligations; the *Elections Act 2022*⁴, and *Nationality and Borders Act 2022*⁵, both of which are in their final stages.

¹ <https://www.legislation.gov.uk/eut/withdrawal-agreement/attachment/1/adopted> Article 2 (1)

² <https://www.gov.uk/government/publications/the-belfast-agreement> 10 April 1998, at Rights Safeguards and Equality of Opportunity, Human Rights, paragraph 1

³ <https://www.gov.uk/government/publications/protocol-on-ireland-northern-ireland-article-2> 7 August 2020, at para 10

⁴ Elections Bill 2022, <https://bills.parliament.uk/bills/3020>

⁵ Nationality and Borders Bill 2022, <https://bills.parliament.uk/bills/3023>

(6) Clause 13 of the Elections Bill gives effect to Schedule 8, which amends the voting and candidacy rights of EU citizens, including in Northern Ireland local council and Assembly elections. If given legal effect, the Bill will separate EU citizens within the UK into varying categories and impact rights including the ability to vote or stand in local elections for any EU citizens who arrive in Northern Ireland after the transition period.

(7) The relevant paragraph of the Belfast/Good Friday Agreement makes clear that the civil rights enshrined in paragraph 1 of the Rights, Safeguards and Equality of Opportunity section apply to the entire community; EU citizens who reside in Northern Ireland, including those who arrive after the Brexit transition period, should be considered part of the community. As such, restrictions on their ability to vote and stand in local elections would engage several rights under paragraph 1 of the Agreement including the “right to freedom of political thought”, and “the right to pursue democratically national and political aspirations”. It can therefore be reasonably argued that the legislation contained within the Elections Act 2022 would amount to a breach of Article 2.

(8) The relevant Belfast/Good Friday Agreement rights identified above were given effect in legal order in Northern Ireland prior to the end of the transition period.⁶

(9) To ensure compatibility between Article 2 and the provisions of the Elections Act 2022, Clause 13 of the Elections Bill, which gives effect to Schedule 8, should be amended to exclude Northern Ireland District Council elections from its application. If passed as is, the UK government is likely to see litigation on the compatibility of this Bill with its Article 2 obligations.

⁶ The franchise for voting in district council elections in NI is outlined in the Elected Authorities (Northern Ireland) Act 1989 at section 1. Section 1(1) specifies that a person is entitled to vote at a local election in any district electoral area if they are: registered to vote, a British or Commonwealth citizen; a citizen of the Republic of Ireland or other EU citizen; 18 or older; and there is no legal reason why they cannot vote. The right to stand as a candidate in district council elections in NI is outlined in section 3 of the Local Government Act (Northern Ireland) 1972, as amended by SI 1995/1948. Section 3 identifies that a “relevant citizen of the Union” is entitled to stand for election to local council.

- (10) A further point of concern that has been raised by numerous stakeholders is the proposed operation of an Electronic Travel Authorisation scheme on the island of Ireland.
- (11) The present situation is that almost all EU/EEA and non-EEA citizens who are non-visa nationals present in the Republic of Ireland can cross the land border freely on local journeys into Northern Ireland without any requirement for advance immigration permission.⁷ The operation of an ETA system would require that non-visa national's resident in the Republic of Ireland apply for and pay for advanced travel authorisation for land border crossings. It remains to be seen as to how such a system could in any way be regulated on cross border journeys, the requirement would only apply to a particular cohort of non-visa nationals which poses issues in terms of how such a person would be identified. Checks of this nature would invariably lead to incidents of racial discrimination.
- (12) Whilst the UK Government has stated that it does not intend to perform checks on the land border, Clause 39⁸ of the Nationality and Borders bill will leave citizens who fail to comply in a particularly vulnerable position. This clause increases the maximum penalty for entering the UK without leave or arriving without a valid entry clearance from 6 months to 4 years, including knowingly arriving in the UK without a required ETA. Given the sheer volume of daily crossings along the border on the island of Ireland, with many people crossing the border as part of their daily lives for work, education and tourism, there is a considerable risk that people crossing the border will not be aware of the ETA requirement but could still be subject to prosecution.
- (13) An amendment to the bill was tabled at Report stage by Stephen Farry MP and supported by Claire Hannah MP, Colum Eastwood MP, Bell

⁷ See s1(3) of the (UK) Immigration Act 1971, and The Immigration (Control of Entry through Republic of Ireland) Order 1972 (as amended).

⁸ Part 3, Clause 39 <https://bills.parliament.uk/publications/44307/documents/1132>

Ribeiro-Addy MP, and Alistair Carmichael MP.⁹ The amendment was not selected for debate.

(14) Article 1 of the Northern Ireland Protocol sets out its Objectives, subsection 3 states, “This Protocol sets out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions.” Furthermore, Article 3(2) states that, “The United Kingdom shall ensure that the Common Travel Area and the rights and privileges associated therewith can continue to apply without affecting the obligations of Ireland under Union law, in particular with respect to free movement to, from and within Ireland for Union citizens and their family members, irrespective of their nationality.”

(15) The operation of an ETA system on the island of Ireland would present a diminution of the current CTA arrangements and essentially create a hard border for a particular cohort of citizens. As such, the amendment proposed by the HoL to disapply the ETA proposals in relation to Ireland should be adopted by the government.

Social and political attitudes to the Protocol

(16) Empirical work being done by Queen’s University Belfast shows an evolution of people’s attitudes toward the Northern Ireland Protocol. The three-year ESRC-funded research project on the *Protocol on Ireland/Northern Ireland*, includes a series of regular surveys to ‘temperature test’ voter attitudes on a range of issues relating to Brexit, the Protocol, and their implications for Northern Ireland.¹⁰ More than ~~three-fifths of respondents~~ (63%) in the February 2022 survey agreed

⁹ Amendment 13: https://publications.parliament.uk/pa/bills/cbill/58-02/0187/amend/natbord_day_rep_1207.pdf

¹⁰ <https://www.qub.ac.uk/sites/post-brexit-governance-ni/ProjectPublications/OpinionPolling/TestingTheTemperature4/>

that the Protocol provides Northern Ireland with “a unique set of post-Brexit economic opportunities compared to the rest of the UK which if exploited could benefit Northern Ireland”. Support for utilising the benefits of the protocol has continued an upward trend through the previous polls in March 2021 (50%), June (57%) and October 2021 (62%).

- (17) These shifts in attitudes have taken place despite widespread anti-protocol rhetoric from unionist parties, who oppose the Northern Ireland protocol.
- (18) It should be noted that the recent Northern Ireland election returned a pro-protocol majority, and further polling conducted by Lucid Talk prior to the election indicates that the Protocol was not considered an important issue in the election, even among unionist voters, with only one in ten unionists listing the Protocol as an important issue.
- (19) There are valid concerns being expressed from within the unionist community, that do not diverge greatly with the concerns voiced by the nationalist community, who largely voted against any form of Brexit. Both communities have been impacted negatively by the UK’s decision to leave the European Union with concerns over a democratic deficit in Northern Ireland growing.
- (20) Despite the rhetoric surrounding the protocol, polling and the Northern Ireland Assembly results suggests that the vast majority of people in Northern Ireland want stability and accept that special arrangements to mitigate against Brexit in Northern Ireland are necessary.
- (21) There are several measures that could be taken to address the democratic deficit in Northern Ireland, one such measure would be to expand the remit of the UK-EU Joint Consultative Working Group (JCWG) to enable formal participation of representatives from Northern Ireland.

- (22) A further measure would be to grant observer status for Northern Ireland MLA's to increase visibility of Northern voices in Brussels. Representation from Northern Ireland in the Committee of the Regions whenever relevant legislation is debated in the European Parliament would increase visibility of Northern Ireland representatives and provide a further means for the voices from Northern Ireland to be heard.
- (23) Two further measures that may fall slightly outside the remit of this evidence call, but are nevertheless relevant, would be to bring forward the Northern Ireland Bill of Rights, and to reform the Northern Ireland Civic Forum, both form part of the Belfast/Good Friday Agreement and remain either unimplemented or disbanded. What is needed in Northern Ireland is enforceable human rights protections that ensure equality between both communities and more space for dialogue. Civic engagement in the form of Assemblies and Forums are used the world over to create a bridge between politics and the people – the reformation of the Civic Forum would provide such a bridge and be valuable in engaging wider civic society in the challenges ahead.

Benefits and potential opportunities

- (24) Evidence demonstrates that dual market access has the potential to shield Northern Ireland from some of the more damaging effects of Brexit. The Centre for European Reform, which has been monitoring the impact of Brexit on the economy, noted that by December 2021, leaving the single market and customs union had reduced UK goods trade by 14.9 per cent.¹¹ Meanwhile, the Office of National Statistics found that Northern Ireland's gross domestic product grew 1.4 percent in the July-September quarter of

¹¹ <https://www.cer.eu/insights/cost-brexid-december-2021>

2021, compared with gains of 0.9 percent and 0.6 percent in Scotland and England, respectively.¹²

(25) The economic benefits of the Northern Ireland Protocol have the potential to deliver on the so-called peace dividend that was to follow the 1998 peace agreement but has ultimately not reached some of the most deprived areas of Northern Ireland.

(26) There is evidence to suggest that large-scale supermarkets that operate in Northern Ireland have recalibrated supply chains to replace English suppliers with local Northern Ireland producers. For example, local Northern Irish sandwich company Deli-lites has secured significant deals with Supermarkets in Northern Ireland including Asda. This can only be a good thing for Northern Ireland, with potential for positive trickle-down effects on the local economy.

The UK and EU approach

(27) The importance of trust in delicate negotiations cannot be overstated. Threatening unilateral action, under the guise of protecting the Belfast/Good Friday Agreement, has a destabilising effect in Northern Ireland.

(28) The political instability and uncertainty stemming from the UK government's approach is having an impact on investment and opportunities with recent reporting suggesting the potential loss of Horizon research¹³ in response to the UK mess over the Protocol. This could have a significant impact on attracting scientists to NI universities, who are well known for leading the field in many scientific projects. It comes as several business leaders have called on the UK government to reach a negotiated agreement rather than take unilateral action.

¹²<https://www.ons.gov.uk/economy/grossdomesticproductgdp/bulletins/gdpukregionsandcountries/julytoseptember2021>

¹³ UK ready to abandon EU's €95bn science fund in [Brexit dispute](#)

(29) There has been a concerted effort to misapply the cross-community vote, as outlined in the Belfast/Good Friday Agreement and the Northern Ireland Act 1998¹⁴ as being applicable to the Northern Ireland Protocol. However, cross community consent is required in limited circumstances, the decisions requiring cross community consent are listed as: election of the Speaker and Deputy Speakers; changes to the rules of the Assembly, called Standing Orders; approval of the Budget; decisions about how many Ministers there should be and what areas of government they should be responsible for; and exclusion of a Minister, or members of a political party, from holding office; any vote subject to a Petition of Concern.

(30) As the Northern Ireland Protocol is an Act of Parliament and falls outside the remit of the cross-community vote criteria it is incorrect to claim that the absence of cross community consent for the Protocol is against the Belfast/Good Friday Agreement. It is also difficult to square this argument with the lack of nationalist consent for Brexit itself. Efforts to attach the cross-community consent mechanism to the Northern Ireland Protocol would be a divergence from the Belfast/Good Friday Agreement and the Northern Ireland Act 1998.

(31) A further concern to note is the long-term boycotting of Strand 2 of the Belfast/Good Friday Agreement, which has led to the cancellation of several North-South Ministerial meetings. There is a need to refocus minds on resetting relationships across these islands and re-establishing the full institutions of the Belfast/Good Friday Agreement.

6 June 2022

¹⁴ Northern Ireland Act 1998 <https://www.legislation.gov.uk/ukpga/1998/47/contents>