CAJ
Committee on the Administration of Justice
Promoting Justice / Protecting Rights

Submission to the Bill of Rights Project from the Committee on the Administration of Justice (S467)

The Bill of Rights Project is undertaken by Colin Harvey of Queen's University Belfast Law School and Anne Smith of the Transitional Justice Institute at Ulster University. It is funded by the Joseph Rowntree Charitable Trust. Amongst other activities, the Project has produced a draft Model Bill of Rights based on the Advice given to the UK Government by the Northern Ireland Human Rights Commission on December 8th 2008. The Project has asked for suggestions and contributions to augment this Draft Model Bill; this is CAJ's submission.

A. Introduction

Next year will mark 20 years since the Belfast/Good Friday Agreement (BGFA) mandated a Bill of Rights containing rights supplementary to the European Convention on Human Rights (which was to be incorporated into domestic law) to reflect the 'particular circumstances of Northern Ireland'. The Bill of Rights is a so far unimplemented commitment of the BGFA.

Next year will also mark 10 years since the Northern Ireland Human Rights Commission (NIHRC) delivered its final BGFA-mandated advice as to its content. The NIHRC, itself created by the Agreement, was tasked with giving advice to the UK Government on its content. This it eventually did on 10th December 2008. The then British Government adopted a dismissive attitude to the advice and adopted a new pre-condition, not in the Agreement, of political consensus on its contents in a situation in which the two main unionist parties had already rejected the vast majority of its provisions. Daphne Trimble, a member of the Commission, articulated the minimalist position of most unionists in a letter to the Secretary of State: "the additional rights suggested by the majority have little if anything to do with the principles of mutual respect for the identity and ethos of both communities and parity of esteem."

In the new circumstances of the proposed withdrawal of the UK from the European Union and the partly associated crisis of our devolved institutions, CAJ believes that the need for a Bill of Rights takes on new importance and could have a vital role in re-stabilising the peace settlement. The NIHRC Advice remains a basis for the extra rights protection that the particular circumstances of Northern Ireland require; what this note explores is some of the range of other outstanding and new crisis issues that could be dealt with through the

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vehicle of the Bill of Rights. It is not a statement of everything that CAJ believes could be in a Bill of Rights but focuses on the impact of Brexit and the crisis in the institutions.

B. The impact of Brexit

1. Brexit and the Belfast Good Friday Agreement

The Belfast/Good Friday Agreement (BGFA), in addition to being approved by referenda, North and South, was incorporated as a treaty between the UK and Ireland and lodged with the UN (UK Treaty Series no. 50 Cm 4705) and entitled the British-Irish Agreement 1998. Article 2 of the treaty binds both Governments to implement the provisions of the annexed Multi-Party Agreement which corresponded to their respective competencies. From a human rights point of view, although rights can be protected in a range of constitutional forms, the current reality of Northern Ireland is that the Agreement represents the best current safeguard of peace and human rights and must be protected.

The Agreement creates a unique constitutional context for Northern Ireland. One of its purposes was declared to be that the British and Irish governments wished:

> To develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union; [Preamble; British Irish Treaty 1998]

There is therefore a presumption that the Treaty and the attached Multi-Party Agreement are to be understood in the context of the common membership of the European Union (EU) of Ireland and the UK. The departure of the UK from the EU (Brexit) will therefore have significant effects on the operation of the Agreement.

More generally, the withdrawal of the UK from the EU will have a profound effect on the legal and constitutional underpinning of the present jurisdiction of Northern Ireland, its relations with the Irish state and UK-Ireland bilateral relations. As we have said, the UK and Ireland's common membership of the EU was an assumption in the Belfast Good Friday Agreement (BGFA) and the UK's adherence to EU law regulates the powers and legislative operations of the devolved institutions. The equal rights of Irish and British citizens, a principle of the BGFA, in great part relies on the equal rights of both as having EU citizenship. The lack of significant border regulation is largely due to common membership of the EU, North and South, as well as the improved security situation. Many equality and anti-discrimination provisions in Northern Ireland, which have particular importance in a divided society, rely on EU law.

2. Equality of citizenship and access to rights

As we noted above, the Agreement is to be understood in the context of the common membership of the European Union (EU) of Ireland and the UK. Amongst other things, this means that the Agreement is designed to build on the rights that British and Irish citizens currently have in their capacity as EU citizens in order to express the "unique relationship between their peoples" and to contribute to peace on the island of Ireland.

The particular circumstances of Northern Ireland in respect of national identity and aspiration are recognised throughout the Agreement and in particular in Article 1(vi) of the British-Irish treaty. In that provision the UK and Ireland recognised the birthright of "the people of Northern Ireland" to self-identify and be accepted as Irish or British (or both), and "accordingly" the right to hold both British and Irish citizenship, a right which the BGFA provides will "not be affected by any future change in the status of Northern Ireland". It is apparent that the drafters of the treaty had in mind Northern Ireland joining a united Ireland as the change in status referred to. However, a UK withdrawal from the EU would also amount to a major change in status for Northern Ireland and the treaty provides that the citizenship provisions must be protected. For the purposes of this discussion, we make the assumption that Northern Ireland will be withdrawn from membership of the Union as part of Brexit, though we are aware that some propose some kind of "special status" within the EU.

It is CAJ's view that the full *content* of the existing rights currently accruing to Irish and British citizenship must be protected in the context of the changed status of Northern Ireland, not simply the right to choose between them. To do otherwise would be to undermine the basis of equality between the two national aspirations which was a major pillar of the Agreement. In the light of the fact that the current equality between Irish and British citizens rests, in large part, on their common EU citizenship, there are a number of areas of concern. These include the current rights of Irish and British citizens on the island of Ireland, the free movement of people throughout the Common Travel Area and the exercise of EU Treaty rights in other countries of the EU by Irish and British citizens born in the North. In addressing these areas of concern, it is also part of the ethos of the BGFA that the people of the North are not forced to choose either British or Irish citizenship to access particular rights. Otherwise, the sense of equality between the two main communities – the "parity of esteem" – which the BGFA seeks to instil would be vitiated.

It would be seen as a serious breach of the BGFA if those who choose Irish citizenship were forced to revert to British citizenship in order to access any kind of entitlement to services in the future. Similarly, if those who are British citizens by virtue of their birth in Northern Ireland lose rights compared to those who choose to identify as Irish, there is a breach of the spirit, at least, of the Agreement.

The Human Rights Commission's Advice on the content of a Bill of Rights of December 2008 contained a provision on citizenship. It said that a provision should be drafted to ensure:

> The right of the people of Northern Ireland to hold British or Irish citizenship or both in accordance with the laws governing the exercise of this right, with no detriment or differential treatment of any kind. This right would not be affected by any future change in the status of Northern Ireland [p41 NIHRC Advice].

This section is under the "Right to Identity and Culture." While the reasons for putting this provision under that right are understood, citizenship is not just about identity but is also a passport to rights within the relevant nation (often qualified by residency status), sometimes to extra-territorial rights (as in the current situation where citizenship of an EU nation gives rights in all EU countries) and a statement of association with (if not always full participation in) a particular polity.

The above proposal was one of the few elements of the Advice unequivocally accepted by the UK Government in its consultation paper, "A Bill of Rights for Northern Ireland: Next Steps," put out in November 2009 as a response to the Commission's proposals. They also accepted that there should be no detriment involved in the choice, but unfortunately on the basis of a misreading of Irish law.

Paragraph 6.9 of the consultation paper reads:

> 6.9 The NIHRC also proposes that "the people of Northern Ireland" should be able to exercise their rights to hold British or Irish citizenship or both, and to do so without any detriment or difference in treatment. In the case of an individual meeting the definition set out in paragraph 6.7, he or she is, as a matter of British law, a British national by virtue of the British Nationality Act 1981 and, as a matter of Irish law, an Irish national by virtue of the Irish Nationality and Citizenship Acts 1956 -2004, and therefore retains all the entitlements of both, whether he or she chooses to identify himself or herself as British, or Irish, or both, thus ensuring that he or she suffers no detriment as a result of any such choice.

In fact there are different legal provisions relating to the two nationalities. By virtue of the British Nationality Act 1981, people born in Northern Ireland are automatically British citizens (so long as at least one parent is British or with "settled" status). The Irish Nationality and Citizenship Act 1956 (as amended, notably in 2004) gives automatic Irish citizenship to all those born on the island of Ireland (with exceptions for temporary migrants) so long as they are not entitled to any other citizenship (Sec. 6.3). As all those born in Northern Ireland are actually British citizens by UK law, they are definitely entitled to

another citizenship and so, while they are "entitled" to be Irish (Sec. 6.1) they are not automatically Irish, at least through this route, and must claim Irish citizenship by doing "any act that only an Irish citizen is entitled to do" (most often applying for a passport), though the citizenship is then backdated to birth. Persons born in the North may also be Irish citizens by descent (Sec. 7) even if their "Irish" parent had not claimed that status. However, to claim any rights accruing only to Irish citizenship, that status would normally have to be asserted.

Of course, at the time of the Advice and the Consultation Paper, this complicated situation did not really matter since both citizenships gave EU citizenship as well and thus substantively equal status. However, after Brexit only Irish citizenship will also bring with it EU citizenship; no-one to our knowledge has so far suggested that those born in the North and "entitled" to Irish citizenship, yet who have not claimed it, will automatically "retain the entitlement" to EU citizenship. We will return to this issue below.

If it is accepted that the substantive equality of the two citizenships is an important underpinning of the Agreement, the question arises of how to express that in a Bill of Rights. Obviously, Brexit, with the threatened breach in that equality, increases the significance of the question. The above formulation in the Advice is translated into the following in the model Bill:

> The people of Northern Ireland have the right, without discrimination and unaffected by any change in the status of Northern Ireland, to hold Irish or British citizenship or both, as they choose, in accordance with the law governing the exercise of that right. [Schedule 2 Article 41]

This provision translates "with no detriment or differential treatment of any kind" as "without discrimination." We think this changes the meaning. The former formulation implies substantive equality or a continuing state of equal status and meaning whereas the latter merely refers to an absence of discrimination by any social actor. While both citizenships also granted EU citizenship, this distinction would not matter so much; after Brexit it will.

3. Legislating for citizenship equality in a Bill of Rights

In this context, how could a Bill of Rights legislate for equality of citizenship? The argument for the suitability of the Bill of Rights as a vehicle for legislation in this area is made below. There is also the question of how we express equality of citizenship in a formulation that would have the desired practical effect if contained in legislation. The Framework Convention for the Protection of National Minorities has the following text:

> The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. [Art. 4(2)]

The term "full and effective equality" is perhaps helpful and, of course, the Article permits positive action to achieve it. However, the discussion in this paper is about citizenship and associated rights rather than nationality as a signifier of ethnic group identity. Given that the citizenships are those of two sovereign states (plus at the moment citizenship of the EU) there must be both appropriate legislation relating to the North (in this case the Bill of Rights) and also some level of agreement or reciprocity with Ireland (and in the context of Brexit) with the EU.

We think, therefore, that the relevant Advice from the NIHRC be augmented as below (in bold italics):

> The right of the people of Northern Ireland to hold British or Irish citizenship or both in accordance with the laws governing the exercise of this right, with no detriment or differential treatment of any kind. ***It shall be the duty of the UK Government, through legislation and agreement as possible, to ensure full and effective equality of the rights accruing to the two forms of citizenship.*** This right would not be affected by any future change in the status of Northern Ireland.

This general duty would be much more difficult in the context of Brexit. It is important, therefore, to identify what relevant rights accrue to Irish and British citizenship, which may be affected by Brexit and how they might be equalised and guaranteed.

3.1 Right to vote

Irish citizens resident in Britain can vote in all elections and national referenda by virtue of the Ireland Act 1949. This provision was passed to restore the voting rights which had been lost through Ireland leaving the Commonwealth. In 1984 the Ninth Amendment to the Irish Constitution paved the way for the Electoral (Amendment) Act 1985 which granted voting rights to British citizens resident in Ireland for all elections except for Presidential elections and referenda (presumably because the latter usually involve amendments to the Constitution). There is no reason to think that these reciprocal rights will be affected by Brexit as such, though there are currently discussions on allowing the Irish diaspora to vote for the President and a suggestion in the European Parliament that Irish citizens in the North might also be able to vote for Irish MEPs.

3.2 Freedom of movement

It is entirely arguable that an implication of the BGFA is that there be freedom of movement between Northern Ireland and Ireland, at least for Irish and British citizens – though, as we argue below, in practice that has to mean for everyone. In fact, that freedom of movement is encapsulated in the concept of the "common travel area" between the UK, its associated islands and the Republic of Ireland. Section 1(3) of the British Immigration Act 1971 says: "Arrival in and departure from the United Kingdom on a local journey from or to ... the Republic of Ireland shall not be subject to control under this Act..." In terms of Ireland, under the Irish S.I. No. 97/1999 — Aliens (Exemption) Order, 1999 and Immigration Act 1999 British citizens are exempt from immigration control and immune from deportation. However, although common travel area (CTA) citizens are not obliged to carry passports they may be asked to confirm their nationality at ports, airports and, in principle, at or near the land border.

In Ireland, under the Aliens (Amendment) (No. 3) Order 1997, immigration checks on people arriving from another CTA area (i.e. the UK or associated islands) are routine at air and sea ports, although these are often not particularly invasive. There are also occasional checks at the land border – described as "intelligence led" but anecdotal evidence leads to the suspicion that they are targeted at people who appear to be from ethnic minorities.

There are no immigration checks on the Northern Ireland side of the land border. In Britain, there may be police checks on identity under the Terrorism Act 2000 and some "informal" immigration checks by Border Force personnel but there is no legal power for compulsory checks on nationality when people are travelling from the CTA.

In summary, although there is not perfect freedom of movement within the CTA, the land border, at least, is very largely free from restriction. The danger is that, when the UK leaves the EU, there will be political pressure to restrict immigration from EU countries (or some of them) as well as non-EU countries. In those circumstances, the CTA may be seen as a "back door" to avoid the immigration controls in place at places of entry on travellers from other areas.

CAJ has previously expressed the danger that this could lead to widespread racial profiling on the land border and at other UK entry points as those who "look" Irish or British are allowed to pass while those of ethnic minority appearance will be targeted. See http://caj.org.uk/2016/10/01/s458-written-evidence-northern-ireland-affairs-committee-inquiry-future-land-border-republic-ireland/ for further views on this from CAJ.

The danger of a "racist border" is one aspect but any immigration controls on the land border will reduce freedom of movement on the island. Any checks at a land border which is crossed by 30,000 people a day, which has over 300 road crossing points and where direct routes often cross between the two countries several times, would severely restrict everyone's freedom of movement. The ideal, which has been progressively realised in practice, of a "frictionless" border which is virtually imperceptible will be endangered if Brexit leads to demands for control of EU migration at the external borders of the UK. In reality therefore, freedom of movement for Irish and British citizens can only be realised through freedom of movement for all. The issue then becomes how this freedom of movement, at least as it relates to the land border, can be protected in law.

Various agreements have been made between Ireland and the UK around the CTA, most recently in 2014, but these are explicitly not legally binding. The only way the right to freedom of movement between Ireland and Northern Ireland can be legally enforceable in the UK is through legislation. In Ireland, only legislation or a constitutional amendment would have the same effect. The Bill of Rights would be an appropriate place to guarantee this right as regards the North. We therefore propose the following formulation could be included in the "advice" for the model Bill of Rights:

A provision should be drafted that prohibits immigration controls on local journeys between Ireland and Northern Ireland.

3.3 Equivalence of rights on the island of Ireland

In the "Rights, Safeguards and Equality of Opportunity" section of the Belfast Good Friday Agreement, both the British and Irish governments commit to a range of measures to protect and promote human rights. In particular it is noted that:

> The measures brought forward [by the Irish Government] would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland.

This concept of "equivalence" is only mentioned in relation to the Irish side as most of the detail in the Agreement is about changing Northern Ireland society and its governance. However, it also makes sense as a general concept underpinning the Agreement and a derivation from the idea of equality between the two main communities and the designations of Irish and British. In fact the all-island character of the Agreement is apparent throughout the text and in that the whole structure is supported by the British-Irish Treaty. Just as a fundamental purpose of the Agreement is to make the territory of Northern Ireland equally "home" for both Irish and British citizens, so the equivalence provision is designed to ensure that the Irish state offers equal protections to all.

The concept of equivalence has to work both ways to have any meaning. The aim can be expressed as ensuring that the rights of an individual are protected equally wherever they may be on the island, though the mechanisms will be different as they are those of the two sovereign states involved. Of course, UK legislation can only speak for its own jurisdiction but it would be important to enshrine the concept of equivalence in a Bill of Rights. The "advice" for the model Bill of Rights might contain the following formulation:

Without any regression, the level of protection of human rights in Northern Ireland shall be at least equivalent to that which pertains in Ireland. It shall be the duty of the UK Government to amend this Bill or bring forward appropriate legislation to ensure this as and when necessary.

3.4 EU citizenship rights

The most obvious impact of Brexit in terms of differentiating between the two citizenships to which the people of Northern Ireland are entitled will be that British citizens will lose EU citizenship while Irish citizens will retain it. Article 20(1) of the Treaty on the Functioning of the European Union says:

> Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

That wording makes it clear that EU citizenship depends on being a citizen of a member state; without special arrangements a citizen of a country that leaves the Union will lose EU citizen rights.

Article 20(2) details the rights involved:

> Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
> (a) the right to move and reside freely within the territory of the Member States;
> (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
> (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

> (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

Of the above rights, the right to free movement and residence, with the associated right to be free of discrimination on the grounds of nationality (Article 18), is one of the most significant. It is also one that does not require contemporary residence in a member state. So, for example, the right to vote in elections depends on being resident in the relevant member state, though there is an increasing trend towards expatriates being also able to vote in elections in their home member state which might at some point include Irish citizens resident in the North. The right to freedom of movement and residence, at some point in the future, exists whether or not the EU citizen is currently residing in a member state. So an EU citizen currently living in the United States still has the right to enter and move and take up residence within the Union at any time and thereby access services such as health and education.

It may be that the rights detailed in Article 20(2)(c) and (d) can apply to non-resident EU citizens but the other major area of rights – the protection of the EU Charter of Fundamental Rights, the application of EU law and the jurisdiction of the European Court of Justice (ECJ) – are all largely dependent on residence in a member state. This is because EU law is mainly administered by member states and its territorial jurisdiction is, of course, limited to the territory of the Union itself (and, by agreement, to some associated areas). Irish citizens living in the North will therefore lose some rights – those dependent on residence in a member state – but will also retain those not so dependent.

In principle, then, after Brexit, there will be large populations of both Irish and British citizens living in Northern Ireland. Irish citizens will continue to be EU citizens, with the right *inter alia* to move freely to and within the EU and to live and work there without discrimination; British citizens will not. This will mark a major distinction between the citizenships and thereby undermine the equality on which the BGFA was based. As we have noted, it would be entirely contrary to the spirit of the Agreement to force people to choose one or other citizenship in order to access different rights.

One possibility to resolve the issue is that those British citizens whose eligibility for UK citizenship arises from being born in Northern Ireland could be regarded as EU citizens along with their Irish neighbours. Of course, the UK cannot bestow EU citizenship or its associated rights on anyone as it depends on being a citizen of a member state. The Irish state could presumably amend or clarify its nationality law to provide that anyone “entitled” to Irish citizenship by virtue of being born in the North “is an Irish citizen from birth” just like those born in the South and not entitled to any other citizenship or those Irish by descent. That would mean that British citizens born in Northern Ireland would also be Irish citizens,

whether they wanted to be or not, and therefore also EU citizens. However, in the context of the Brexit negotiations, the EU would presumably have an opinion on such a development.

It seems unlikely that the EU negotiators would consider any movement outside the established categories of citizenship except on the basis of reciprocity. In other words, if all those born in Northern Ireland with Irish or British citizenship were to retain EU citizen rights throughout the 27 member states, other EU citizens would have to have the same rights within Northern Ireland.

The reciprocal measure would therefore be to guarantee that the rights that EU citizens currently possess would, in Northern Ireland, continue undiminished, as far as practically possible. Assuming, as we have throughout this discussion, that Northern Ireland will not remain as a full part of the EU, there may be difficulties in some areas such as the reach of EU law and the jurisdiction of the ECJ. However, the proposal would be, at a minimum, that all EU citizens, not just current residents, would have the right to enter, live and work in Northern Ireland on a similar basis as at present. This is envisaged as the UK side of a reciprocal agreement with the EU that grants EU citizenship, or at least the rights thereof, to all those born in Northern Ireland with the right to be Irish or British, irrespective of which national citizenship they choose.

It could be argued that the Northern Ireland Bill of Rights is an appropriate vehicle to carry such a provision for the following reasons. First, this is a matter of guaranteeing the rights of a present and future element of our population. Second, the whole issue arises out of the "particular circumstances of Northern Ireland," which is both the justification for the Bill itself and marks the distinction from the rest of the UK. Third, the proposal is to help safeguard the BGFA, which can be seen as a basic purpose of the Bill of Rights. Finally, it is appropriate because, like the Northern Ireland Act 1998, the Bill of Rights would be seen as a "constitutional Act" which could only be repealed by the most explicit future legislation.

There will clearly be objections to this proposal. One would be that it would create two classes of British citizenship, one for those born in Northern Ireland and one for the rest. The simple answer to this point is that such a division already exists with only the former category automatically entitled to Irish citizenship. In addition, we would make the point that it is not UK law that makes the current distinction between citizens born in Northern Ireland and the rest of the UK; it is Irish law. Similarly, it would presumably be EU law that would grant EU citizenship to those born in Northern Ireland. Crucially, however, the UK Government has explicitly endorsed the right of the people of Northern Ireland to Irish or joint Irish/British citizenship in a solemn Agreement and an international treaty. There is no reason why it could not endorse the right to EU citizenship, without having to claim Irish

citizenship, with a similar motive of supporting reconciliation within a shared geographical and political space.

Another objection might be that allowing free entry for EU citizens to Northern Ireland would mean immigration checks on people arriving in Britain from the North. In fact this is practically unnecessary and the idea is a result of conflating the rhetoric about "regaining control of our borders" with the actuality of immigration control. No-one has so far proposed that EU citizens will not have free travel rights to the UK; the issues are around residence, work and the right to remain indefinitely. These issues are not best dealt with at borders but through labour market and other forms of regulation. That fact will not necessarily stop political pressure for border immigration controls but it is important to recognise its irrelevance.

We therefore propose that the model Bill of Rights should contain a formulation that guarantees, as much as possible, the existing rights of EU citizens with respect to Northern Ireland. This is envisaged as the UK side of a reciprocal agreement with the EU that grants EU citizenship to all those born in Northern Ireland, irrespective of which national citizenship they choose.

It is understood that this would mean that EU citizens could enter and live and work in Northern Ireland much as at present. Subject to whatever overall agreement is made between the EU and the UK, this might be a different result from the rest of the UK. As we have said, we do not believe that this would necessarily mean any kind of "border" between Northern Ireland and Great Britain and we see no reason for significant opposition within Northern Ireland. Immigration by EU citizens has not created any problematic pressures on public services or society in general but has contributed materially to economic growth.

The text of the "advice" might be:

A provision should be drafted to ensure that all EU citizens have the right to enter and leave Northern Ireland without let or hindrance, the right to reside indefinitely and work in Northern Ireland and any other rights currently enjoyed by EU citizens under EU Treaties on the territory of the UK as may be practically possible.

4. EU equality protections

Equality between the two main communities is, of course, a basic principle of the BGFA and is explicitly recognised in the concepts of "equality of treatment" and "parity of esteem," though the extent to which these concepts have been implemented in practice is another matter. However, Sec 75 of the Northern Ireland Act 1998 and associated measures cover a

broad range of categories. To overcome the negative characteristics of a divided society, it is necessary not just to confront the headline prejudice (sectarianism) but also to attempt the creation of an equal society, accepting of diversity, at least as regards aspects of personal identity. Given the inter-sectionality of diverse forms of prejudice, confronting sectarianism requires a broad based equality agenda.

Significant elements of equality standards derive from EU law and regulation. These are not simply a static set of rules but a whole system of law with its associated jurisprudence, methods of enforcement and dynamic of progress. Moreover, these standards are external to Northern Ireland and currently bind the devolved institutions including the legislature. Their loss will represent a blow to the project of eradicating sectarianism in Northern Ireland society through the development of high standards of equality enforcement across all relevant grounds. It is now necessary to envisage and propose how the equivalent effect of these directives and regulations can be achieved post-Brexit.

The NIHRC Advice contains a general right to equality and a broad-ranging prohibition of discrimination. However, this would not compensate for the loss of EU protections mentioned above. It is assumed that the Repeal Bill, which will be part of the Brexit process and be passed at Westminster, will retain the effectiveness of EU law in the UK unless specifically repealed. Given the added importance of equality and human rights guarantees in Northern Ireland, however, a provision in the Bill of Rights would be important and appropriate.

The text of the "advice" for the model Bill might be as follows:

EU laws, regulations and directives that the NIHRC certify as having significant impact on equality and human rights protections shall continue in force in Northern Ireland in perpetuity unless and until they are replaced by equivalent or greater protections. Northern Ireland courts may take into account the jurisprudence of the European Court of Justice in interpreting such EU law.

C. Protecting and reinforcing Agreement institutions

1. Introduction

The institutions established by the BGFA, especially the devolved Assembly and Executive, have been in crisis since they were established. We are currently in a phase where they are not operative and political negotiations have so far failed to re-establish them. The former

Deputy First Minister, the late Martin McGuiness, resigned his position in January 2017 which precipitated elections to the Assembly. The political representatives so elected have failed to agree on a basis to go back into power-sharing government. The resignation letter of Martin McGuiness expresses the Sinn Féin view of the reasons for the fall of the Executive and the inability to restore it. In part he said:

> The equality, mutual respect and all-Ireland approaches enshrined in the Good Friday Agreement have never been fully embraced by the DUP. Apart from negative attitude to nationalism and to the Irish identity and culture, there has been a shameful disrespect towards many other sections of our community. Women, the LGBT community and ethnic minorities have all felt this prejudice. And for those who wish to live their lives through the medium of Irish elements in the DUP have exhibited the most crude and crass bigotry.
>
> Over this period successive British Governments have undermined the process of change by refusing to honour agreements, refusing to resolve the issues of the past while imposing austerity and Brexit against the wishes and best interests of people here.
>
> Against this backdrop the current scandal over the Renewable Heat Incentive (RHI) has emerged.

While accepting that this is a partial, party political viewpoint, CAJ has long held the position that the failure to implement crucial aspects of the Agreement, and in particular the neglect of human rights and equality commitments, has contributed to the instability of the devolved institutions. We held a 'mapping the rollback' conference in 2013 on this very subject. The DUP and successive UK Governments bear particular responsibility for this situation, but the point is not the apportionment of blame but remedying the situation. The question therefore arises as to whether any provisions of a putative Bill of Rights could help to put a framework of rights and obligations on public authorities that would assist in the governance and general running of the political institutions.

In a broader sense, the project of building a rights based society is a fundamental part of the architecture of the BGFA. The Agreement provided an agreed way in which the future constitutional status of Northern Ireland could either be changed or its current status as part of the United Kingdom be confirmed and governmental institutions that ensured a place in government for representatives of the two main communities as well as mechanisms to prevent the domination of one community over the other. However, it was also necessary to create a society based on human rights and equality that, through the fairness of its governance, could achieve the support, if not the "national" allegiance of all

people living within its boundaries. The entire Bill of Rights project was to be a significant contribution to that aim.

Within that generality, however, there are in the existing Advice provisions particularly relevant to the way society is organised and run and, with the advantage of another almost ten years of experience, others could be devised.

2. Existing provisions in the Advice

The advice presented by the Commission already includes several provisions which are relevant to establishing a pattern of governance based on human rights in general and equality in particular. In a Discussion Note in March this year, CAJ looked at "How many of the current negotiation issues could be dealt with by a NI Bill of Rights?"(Submission 461). We noted that the sections on equality of treatment of the two main communities, the general, free-standing right to equality, the right of women to full and equal political participation, the adding of "irrelevant criminal conviction" as a ground for prohibited discrimination and the provision that all "legacy" deaths must be investigated in line with international human rights law were all directly relevant.

We also noted that the proposed provision on civil partnership needed to be updated to reflect the necessary demand for equal marriage and that the section on language rights provided a minimum standard for public authorities. This provision may also require updating as the debate on an Irish Language Act has developed in the years since 2008. We also mentioned the concept of "objective need," but did not develop the idea as far as a proposed formulation.

3. Objective need

In 2015, CAJ took a judicial review over the failure of the Executive to develop an anti-poverty strategy as mandated by Section 28E of the Northern Ireland Act 1998 (as amended following the 2006 St Andrews Agreement). This section required that such a strategy should be "based on objective need." The judgement in CAJ's favour noted that "the applicant correctly identified Section 28E as an important milestone in the development of equality law in NI because the concept of 'objective need' had for the first time been put on a statutory footing."

Unfortunately, the failure of the Executive to agree an anti-poverty strategy based on objective need was symptomatic of a more general failure to fully implement the equality duty on public authorities. CAJ has drawn public attention to a number of cases where either the Executive or individual Ministers have failed to ensure that resources are

allocated fully on the basis of transparent criteria designed to identify the extent and location of social need. To remedy this situation is a major step needed to re-establish trust in the institutions in general and to re-establish a functioning Executive in particular.

We suggest that a provision be included in the "advice" for the Model Bill along the lines of the following:

The allocation of public funds designed to alleviate poverty or any other social need shall be carried out on the basis of objective need. That means that such allocation shall rely on neutral criteria that measure the extent of deprivation irrespective of community background or other status and with the purpose of ensuring that most resources go to those in most need. In this sense "allocation" means any policy determining how public funds are disbursed including those that involve any change in the existing resources devoted to the social need as well as those involving any new disbursement.

4. Defining Sectarianism

The history of this region and the experience of a 30 year violent political conflict have left a society marked by a basic ethnic division and characterised by widespread sectarianism. Unfortunately, sectarianism is sometimes downplayed, seen as an outworking of traditional "culture," tolerated and normalised. This is in spite of a murderous history of violence committed for sectarian motives, contemporary segregation enforced by sectarian intimidation and evidence of "intersectionality" with other forms of prejudice.

This is why CAJ and others have for long argued that sectarianism is simply another, local form of racism. The implication of this approach is that sectarianism falls within international standards calling for the eradication of racism and the sanctioning of behaviour and expression inciting violence and discrimination. The position that sectarianism is a form of racism has been promoted by the Northern Ireland Human Rights Commission and accepted by a number of international bodies. The UN Committee on the Eradication of Racial Discrimination (CERD) said:

> Sectarian discrimination in Northern Ireland and physical attacks against religious minorities and their places of worship attract the provisions of ICERD in the context of "intersectionality" between religion and racial discrimination. (Report on the UK 2011)

Later in 2011 the Council of Europe Advisory Committee on the Framework Convention for National Minorities directly addressed the exceptionalist (sectarianism is a distinct phenomenon) approach:

> [T]he Advisory Committee finds the approach in the Cohesion, Sharing and Integration Strategy [the then community relations programme] to treat sectarianism as a distinct issue rather than as a form of racism problematic, as it allows sectarianism to fall outside the scope of accepted anti-discrimination and human rights protection standards. Similarly, the CSI Strategy has developed the concept of "good relations" apparently to substitute the concept of intercultural dialogue and integration of society. (Council of Europe 2011: 25)

It is CAJ's view that the exceptionalist view, that seems to regard sectarianism as "a little local difficulty" needs to be decisively refuted through sectarianism being defined in law. In 2014, the Equality Coalition, which CAJ co-convenes with Unison, published a booklet on this theme which makes the case for a legal definition: Sectarianism in NI: Towards a Definition in Law by Dr Robbie McVeigh. (http://www.equalitycoalition.net/?page_id=38)

In its submission to the Haas/O'Sullivan process in 2013, CAJ suggested the following formulation, which closely follows the definition of racism promoted by the European Commission Against Racism and Intolerance definition of racism:

> Sectarianism shall mean the belief that a ground such as religion, political opinion, language, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.

https://caj.org.uk/2013/08/21/s419-dealing-past-investigating-troubles-related-deaths-submission-multi-party-group-chaired-richard-haass/

The Bill of Rights would be a fully appropriate place to define sectarianism given its role as one of the proposed guarantees of a rights based society. We therefore propose that the draft Advice contain a provision such as the following:

Sectarianism is a form of racism and shall mean the belief that a ground such as religion, political opinion, language, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.

5. Combating Sectarianism

As a form of racism, sectarianism must be combated as effectively as possible. In terms of our own history, a lasting peace, with minimal chance of a reversion to violence, requires social reconciliation and better relations between people, especially the two main ethnic

blocs. It is self-evident that reconciliation requires equality between the two main communities and the minimisation, if not eradication, of sectarianism.

The development of a rights based society which all can support depends on the universality of human rights and the fact that inherent dignity of the human is their foundation which in turn means that equality is at their heart. Any breach of the equality principle undermines the moral or normative basis of all human rights. Discrimination is an assault on human dignity and sense of belonging and self-worth; but it is also a breach of the very universality which is the basic characteristic of "human" rights.

Similarly, human rights are the antithesis, the polar opposite of any form of racism or other prejudice. Repressive laws and practices, institutionalised discrimination, limitations on basic freedoms, arbitrary detention, torture and extra-judicial killings are all gross violations of human rights but in some senses they are simply symptoms. Behind these abuses is a willingness to offend against the dignity of the human, almost always on the basis of some form of prejudice. The underlying racism or prejudice is the basic enemy. The intersectionality of prejudice is demonstrated in Northern Ireland by unusually high levels of misogyny, homophobia, racism and xenophobia and other prejudice and it is clear that combating sectarianism requires a broad campaign against prejudice of all kinds. In this sense, the general push for equality in all fields can be seen as an indirect campaign against sectarianism.

When it comes to direct campaigning against sectarian and other hate expression, the European Commission against Racism and Intolerance (ECRI) Recommendation on Hate Speech (General Policy Recommendation 15, 2015) is a broad action plan that includes support for victims, institutions to combat prejudice as well as detailed proposals for subjecting hate expression to legal sanctions.

The ECRI document defines "hate speech" in the following way:

> Considering that hate speech is to be understood for the purpose of the present General Policy Recommendation as the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of "race",[1] colour, descent, national or ethnic

[1] Since all human beings belong to the same species, ECRI rejects theories based on the existence of different races. However, in this Recommendation ECRI uses this term "race" in order to ensure that those persons who are generally and erroneously perceived as belonging to another race are not excluded from the protection provided for by the Recommendation.

> origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status;

The concept of "speech" also covers other forms of expression as Para 11 of the Explanatory Memorandum which accompanies the General Policy makes clear:

> Hate speech can take the form of written or spoken words, or other forms such as pictures, signs, symbols, paintings, music, plays or videos. It also embraces the use of particular conduct, such as gestures, to communicate an idea, message or opinion.

International standards also make it clear that racist expression and hate speech of all kinds must be sanctioned by the law and, in extreme cases, by the criminal law. Accordingly, the final Recommendation in the above report proposes that states:

> **take appropriate and effective action against the use, in a public context, of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it through the use of the criminal law provided that no other, less restrictive, measure would be effective and the right to freedom of expression and opinion is respected, and accordingly:**
>
> a. ensure that the offences are clearly defined and take due account of the need for a criminal sanction to be applied;
> b. ensure that the scope of these offences is defined in a manner that permits their application to keep pace with technological developments;
> c. ensure that prosecutions for these offences are brought on a non-discriminatory basis and are not used in order to suppress criticism of official policies, political opposition or religious beliefs;
> d. ensure the effective participation of those targeted by hate speech in the relevant proceedings;
> e. provide penalties for these offences that take account both of the serious consequences of hate speech and the need for a proportionate response;
> f. monitor the effectiveness of the investigation of complaints and the prosecution of offenders with a view to enhancing both of these;
> g. ensure effective co-operation/co-ordination between police and prosecution authorities;

The ECRI Explanatory Memorandum notes (Para. 173):

> The relevant factors for a particular use of hate speech to reach the threshold for criminal responsibility are where such use both amounts to its more serious

character - namely, it is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination - and the use concerned occurs in a public context.

It is notable here that subjective *intention* to incite negative actions can form the offence but so can a *reasonable expectation* that such acts are likely to result. In other words, it should not be necessary to prove the nature of the perpetrators state of mind to achieve a conviction but only that the normal and reasonable interpretation of the expression used would be such as to incite negative acts.

Existing legislation on hate speech is contained in Part III of the Public Order (Northern Ireland) Order 1987 – acts intended or likely to stir up hatred or arouse fear. This is not the place for an analysis of this legislation but it is inadequate and over complicated in some respects and should be reviewed. To our knowledge there has only been one successful prosecution under this provision. It appears that the PSNI are generally unwilling to take action against hate expression, especially when it is sectarian, rather than racist against some minority, in character.

This position seems to be informed by one strand of thought in Northern Ireland that basically says that sectarianism is ubiquitous and "normal" and that any particular act of sectarian expression is unlikely to incite "extra" acts of violence or discrimination. We believe that this position is factually inaccurate, defeatist and accepts the normalisation of our local variant of racism. While we believe that the legislation is at least awkward, inaction in the face of egregious examples of hate expression simply confirms to those who see or hear it the acceptability of sectarian hate speech. When words and symbols that assert superiority or denigrate the "other" side are everywhere, then hatred and hostility are seen as the norm and part of the values of "our" side. It is perverse to argue that because hate expression is common then no particular example of it can amount to incitement; it is the very accretion of examples that leads to an atmosphere of hostility that frequently ends in violence.

Criminalisation of extreme hate expression is part of building a rights based society and therefore an appropriate issue to be raised in a Bill of Rights. We therefore propose that the "advice" in the Model Bill be amended to contain:

A provision to implement in law Recommendation 10 in the ECRI General Policy Recommendation No. 15 on Combating Hate Speech.

Committee on the Administration of Justice, Ltd
August 2017