

# Initial thoughts on rights and the *New Decade, New Approach* (NDNA) agreement (S485)

## Briefing Note

January 2020

The British and Irish Governments published the *New Decade, New Approach* (NDNA) deal for restoring power sharing on 9 January 2020.

Published alongside this was draft Assembly legislation related to the language and cultural aspects of the deal. This legislation comprises three separate (draft) bills to establish: the Office of Identity and Cultural Expression (OICE); an Irish language Commissioner; and a Commissioner focusing on Ulster Scots and Ulster British language, arts and literature. If enacted, all three bills would amend the Northern Ireland Act (NIA) 1998 through the addition of new provisions. This is subject to further examination in a separate CAJ briefing note.

This analysis will look at NDNA with reference to the main elements of the Equality Coalition's [Manifesto for a Rights Based Return to Power Sharing](#), which was published during 2019.

It is notable that a number of new appointments and offices are created by the proposals, which will require transparent recruitment processes and attention to ensuring gender-specific considerations.

## Health, public services, infrastructure and funding

First up, in an initial section on NI Executive 'priorities', are provisions on **health** including settlement of the underpayment of NHS staff (though the UK intended to withhold this money if the parties did not return to Stormont). The taking forward of other health transformation measures is also mentioned, including commitments to publish a Mental Health Action Plan within two months and to establish a graduate entry medical school in Magee.

There are **Education** commitments to bring forward sustainable school budgets; an external review of education provision (including considering the prospects of moving towards a single education system); support for educational integration; and an action plan on educational underachievement. There is a pledge to resolve the ongoing teachers' industrial dispute, as well as a promise to address the links between educational underachievement and socio-economic background, though no explicit reference is made to removing the Transfer test. A new special educational needs framework is referenced.

On **Justice**, there are commitments to increase PSNI numbers to 7,500 and to address findings from recent Criminal Justice Inspection Northern Ireland (CJINI) reports and the Gillen Review into the handling of cases involving sexual offences.

Additionally, there is a commitment to unspecified further **reform** of the NI Civil Service, and to a ‘review’ of **arm’s length bodies**, with a view to **culling** them, and hence reducing staffing.

There are references to a ‘balanced’ regional economy and to **infrastructure** projects. Singled out for particular mention (as per DUP-Tory deal) are plans to improve the York Street Interchange. There is also a commitment to extend **Welfare-reform Mitigations** post 2020 – but it is later qualified that there is no agreement in the deal as to what mitigations will be extended.

Annex A of the deal (which sets out ‘UK Government Financial and Economic Commitments to NI’) details additional **financial support** that will be provided to the NI Executive. However, this support will be provided only if the deal is implemented and certain other conditions are met, including public sector ‘reform’. No exact figures are provided.

There, thankfully, is no reference to the previous Executive commitment to cut **Corporation tax**, which would have required significant additional public service cuts.

However, in addition to **singling out specific capital** projects (including the aforementioned York Street Interchange project and the new medical school at Magee), the UK also announces unspecified amounts of direct funding for particular projects. This includes meeting existing commitments (e.g. the UK contribution to The Ireland Funds), but also the establishment of new funds. Reference is made to a fund designed to tackle deprivation and promote opportunity – which is similar to the stated aims of the Social Investment Fund. Also mentioned is a new **Culture and Community Fund**, described in Annex A as a fund to: “Support expression of identities and progress cultural development in the region and beyond, supporting various groups in the expression of culture, arts and heritage and community halls and bands”. The reference to community halls (rather than to the predecessor community facilities fund) is reminiscent of the Department for Communities’ controversial Community Halls Fund. The administration of this fund attracted substantial criticism - in particular there were concerns that sectarian and gender discrimination was influencing how funding was allocated.

Overall, compliance with the Section 75 equality duty in the allocation of funding (both by the Northern Ireland Office (NIO) and Stormont departments) is going to remain a key question. This includes consideration of ‘objective need’ when making allocations, especially in relation to infrastructure. Gender based budgeting considerations should also be taken into account.

## **Bill of Rights**

For the first time in 14 years (since the St Andrews Agreement), the deal establishes a formal process to take forward the Bill of Rights (BoR) for Northern Ireland. The passing of an NI Bill of Rights was a significant component of the 1998 Good Friday Agreement (GFA) so it is to be welcomed that this is back on the agenda.

However, the process to formulate the Bill of Rights departs significantly from that contained within the GFA, which gave responsibility for advising on its content to the NI Human Rights Commission (NIHRC), an independent body designed precisely for this purpose. Under the new deal, NIHRC is side-lined. Instead, an Ad Hoc Assembly

Committee will be established to ‘consider’ the Bill of Rights, assisted by a panel of five experts appointed by the Executive Office (TEO). It is mentioned that the resulting BoR should be “faithful to the stated intention” of the GFA. Explicitly, this means ensuring that the BoR reflects the ‘particular circumstances of Northern Ireland’ (a phrase drawn directly from the terms of reference NIHRC previously developed for the Bill of Rights). The BoR should also take into account the new circumstances arising from Brexit

More concerning is how the deal departs from the GFA in appearing to subject the BoR itself to ‘cross-party’ support. Whilst the British government has previously endorsed such a pre-condition for the BoR, this appears to be a first for the Irish government.

## **Petition of Concern and other governance issues**

Reform of the Petition of Concern (PoC) is set out within a dedicated annex. The stated intention is to return the PoC to its original purpose under the GFA. This is, however, only partially achieved. It appears this section was watered down in light of DUP objections and is now more limited than originally proposed (particularly with regards to how outside advice is sought, adjudication, and the numbers needed to advance a petition).

It is stated that the proposed changes will be given effect in Standing Orders or legislation at the earliest opportunity (text of which is not provided).

The reformed process can summarised as follows:

- There is now a duty to set out reasons for tabling a PoC when doing so;
- Though the threshold for a petition remains at 30 MLAs, one can only be triggered by MLAs from at least two parties. Additionally, the Speaker and three Deputy Speakers are not able to sign, and there are limitations on Ministers signing;
- PoCs will not be available for motions censuring members conduct or on ‘take note’ motions with no bearing. PoCs in relation to legislation can only be tabled at the second stage;
- Following a PoC, there is a 14 day consideration period. During this time, MLAs will consider “any reports” submitted on whether the measure/legislation in question is in conformity with equality requirements (including the European Convention on Human Rights and BoR). This will include advice from NIHRC on the back of Standing Orders 30(6) and 85(4) (which require the Speaker to send a copy of the legislation to NIHRC upon the tabling of a PoC);
- Pre-existing provisions that say that the Assembly may establish an Ad Hoc Committee on Conformity with Equality Requirements as part of this PoC process will continue to apply (but it remains ambiguous if this Committee is mandatory, as per the GFA);
- Following the completion of the consideration period outlined above, the PoC can trigger a cross-community vote if 30+ MLAs are still signed up to it.

In essence, the reforms place some limits on the Petition of Concern. They put a more concrete structure in place and specify that, as part of the standard process, NIHRC should report on whether legislation does in fact offend equality requirements.

However, under these reforms, even if NIHRC strongly advises that a proposed bill does not ‘offend equality’, the bill could nonetheless still be made subject to a cross-community vote. As it stands, there is nothing to compel MLAs to heed NIHRC’s advice.

Additionally, other vetoes still remain intact, including the Executive level veto introduced by the St Andrews Agreement over politically contentious (“significant or controversial”) measures.

Outside of the PoC reforms, a further annex of the deal lists around 20 other additional measures to improve governance, transparency and accountability. These measures will be enacted by amending the Ministerial Code and various other relevant codes (e.g. those for the civil service and for special advisors). They deal with matters such as the mandatory recording of ministerial meetings, requirements to maintain accurate records, etc.

## **Anti-poverty and equality strategies and the Programme for Government (PfG)**

Two appendices put forward a detailed ‘possible outline’ of a PfG in some detail. This includes reference to a number of strategies that the incoming Executive will adopt. Included in this list are three strategies that the Executive has a legal obligation to introduce further to the St Andrews Agreement. Namely, an **Anti-Poverty Strategy**, **Irish Language Strategy** and **Ulster Scots Strategy**.

Whilst this might sound self-evident given that their adaptation is a legal obligation on the Executive (one which the courts have found was breached in the past), this matter has not been straightforward. The DUP previously resisted the development of an Anti-Poverty Strategy, which, as per the St Andrews Agreement, must be based on objective need. In the last draft of the aborted 2017 PfG, an Anti-Poverty Strategy was only referred to as part of an overarching ‘social’ strategy. The explicit inclusion in the new deal is therefore important.

There is also a commitment to a **Childcare Strategy and Child Poverty Strategy** within the deal, which could complement and form part of the Anti-Poverty Strategy. Further to this, there are commitments to a number of equality based strategies, namely a: **Racial Equality Strategy; Disability Strategy; Gender Strategy; Sexual Orientation Strategy; Active Ageing Strategy; and Children and Young People’s Strategy**. However, while positive, the inclusion of a strategy does not mean that it will actually happen. The DUP blocked a Sexual Orientation Strategy in previous mandates. The previous Gender Strategy also lapsed.

There are specific commitments on **Workers’ Rights**, including the banning of zero hours contracts and a view to devolve the minimum wage (though it is not clear if it will change to a lower or higher rate). There is also a commitment to bring forward an **Age, Goods and Facilities and Services Bill** to ensure no-one is discriminated against because of their age. This was previously blocked by the DUP for under-16s.

Additionally, the outline PfG contains commitments for ‘**Ending Sectarianism**’, pledging an “enhanced strategic focus”, strategies and actions to this end. The document alludes to the very limited definition of sectarianism previously found in the Together: Building a United Community (T:BUC) strategy. This definition focuses on interpersonal behaviour and attitudes and, as such, fails to encompass issues like

sectarian discrimination or gerrymandering. However, the document does separately commit to seeking to eliminate sectarian discrimination. It (thankfully) makes no reference to prior worrying proposal for an 'Equality and Good Relations Commission' or to undermining the equality duty by incorporating undefined good relations considerations into its methodology. There are also commitments to giving **sectarianism legal expression as a hate crime** and to public representatives committing to an anti-sectarian pledge.

## **GFA duties on states to accept NI-born as British or Irish or both**

The deal presents the outworking of the British government's review into the issues that have emerged from the DeSouza case. In a nutshell, NI-born Irish citizens were being treated as British in order to prevent their access to certain EU rights that would allow them to be joined by (non-EU) family members.

The UK states its review has taken "into account" the GFA, and that its policy should no longer create incentives for people to renounce their British citizenship if they wish to keep it. Further, the UK commits to changing the rules as to how the "people of Northern Ireland" (in reference to the GFA term referring to most people born in NI) can be joined by family members. The UK then commits to such persons being able to apply for UK immigration status on broadly the same terms as the family members of other Irish citizens living in the UK. It is clear that this will apply to all who are NI-born (regardless of whether they claim British or Irish citizenship or both).

On one level, this is a highly significant symbolic shift in that NI-born who are solely Irish will no longer be treated as British by the UK Home Office in a way that conflicts with the GFA. However, there are outstanding issues. The UK will continue to confer British citizenship in NI on persons who wish to be solely Irish citizens, and will not amend the relevant legislation. This is despite forthcoming NIHRC proposals on remedial legislation to this end.

The most significant practical impact of conferring British citizenship will nonetheless be removed. This will likely return us to a pre-2012 situation where the ongoing conferral of British citizenship was rarely noticed, albeit there may be other practical implications of this continued conferral beyond family reunification. One pressing concern is the commitment to treat "eligible family members of the people of Northern Ireland" in "broadly the same terms as family members of Irish citizens in the UK" as it is not clear exactly how Irish citizens in the UK will be treated post-Brexit.

Currently, Irish citizens in Great Britain have an *EU right* to be joined by non-EU family members. Any Irish citizen successfully applying under the EU Settlement Scheme to retain EU rights under the Withdrawal Agreement will *continue* to have that right. Outside of this, at present, Irish citizens in the UK can apply under the costly, limited and draconian scheme for British citizens to be joined by family members. Therefore, at present, there exists two different ways through which Irish citizens in the UK can apply for family reunification. However, following the Brexit transition period, the more favourable one *does not apply* to NI-born Irish citizens as the Home Office has been preventing them from applying to the EU Settlement Scheme by treating these applicants as *de facto* British. No commitment has been made to change this policy. Hence, at least as far as the retention of EU rights under the settlement scheme is

concerned, it seems the Home Office will continue to treat NI-born Irish citizens as British.

There is presently no clarity over whether there will be any different scheme put forward for Irish (or any other) EU citizens post-Brexit. There is no present commitment to make separate provision on family reunification for Irish citizens. Indeed, this is something which has already been excluded from the 'reciprocal rights' developed by the two governments for the Common Travel Area (CTA). Unless separate provision is made, however, the practical outworking of the new deal will be to treat everyone equally badly and, in practice, apply the scheme designed for British citizens to all. The best case scenario would be a commitment that allows all the people of NI to retain something equivalent to their existing EU rights. The intention merits clarification.

## Rights, language and identity

Under the terms of the deal, TEO Ministers will sponsor and oversee a new framework "both recognising and celebrating Northern Ireland's diversity of identities and culture, and accommodating cultural difference". This framework will be underpinned by the birthright of all NI-born people to identify and be accepted as Irish or British or both. It will also recognise and accommodate those defined as 'other' and those from NI's "ethnic and newcomer communities" [sic].

There are several components to this framework, including the establishment of:

- A new Office of Identity and Cultural Expression;
- An Irish Language Commissioner;
- A Commissioner on Ulster Scots / Ulster British language, arts and literature;
- A central translation hub for the public sector; and
- Simultaneous translation in Irish and Ulster Scots for the Assembly.

More detail on the first three new offices is set out below. As previously mentioned at the start of this briefing, **three separate draft bills** were published alongside the NDNA deal to take each of these components forward.

## Office of Identity and Cultural Expression (OICE)

As is stated within the deal, the Office of Identity and Cultural Expression will be established "to promote cultural pluralism and respect for diversity, build social cohesion and reconciliation and to celebrate and support all aspects of Northern Ireland's rich cultural and linguistic heritage". The 'OICE' will provide funding and schemes.

A 'due regard' statutory duty will be placed on public authorities in respect of OICE Principles which are namely:

- (a) the need to respect the freedom of all persons in Northern Ireland to choose, affirm, maintain and develop their national and cultural identity and to celebrate and express that identity in a manner which takes into account the sensitivities of those with different national or cultural identities and respects the rule of law;

(b) the need to encourage and promote reconciliation, tolerance and meaningful dialogue between those of different national and cultural identities in Northern Ireland with a view to promoting parity of esteem, mutual respect and understanding and cooperation.

The OICE is to monitor compliance with this statutory duty, but there are no enforcement powers. Notably, the principles depart from the subjective formulation of undefined duties on 'good relations', and are largely centred on concepts that have a direct link to international human rights standards. The only term that merits further interpretation is the reference to the 'sensitivities' of others. Freedom of expression cannot be objected to on the basis of prejudice or intolerance of others, but can be limited if it unjustifiably interferes with the rights of others.

## **Irish language legislation**

In short, the draft Irish language bill included alongside the deal is considerably more limited than what was previously committed to in the 2006 St Andrews Agreement. It therefore does not constitute a realisation of that commitment.

However, there are significant positives to be found in the proposals. They follow a model of appointing an Irish language Commissioner and having this individual develop best practice language standards for public authorities. The Commissioner will be appointed by the First and deputy First Ministers.

The functions of the Commissioner are set out in the draft bill. One particular weakness is that the language standards developed by the Commissioner are to be subject to guidance and agreement from the First and deputy First Ministers. This means that, subject to the constraints placed on ministerial powers, the standards could potentially be blocked by a DUP minister.

The long awaited repeal of the 1737 Act (banning Irish in court documents) is also provided for elsewhere within the draft legislation, along with steps for allowing Irish on birth certificates, etc.

## **Ulster Scots and Ulster British Commissioner**

A further Commissioner to be appointed by the First and deputy First Ministers will have a remit focusing on the 'language, arts and literature' associated with Ulster Scots and Ulster British tradition. The functions of the Commissioner will encompass increasing awareness of relevant services in NI; providing advice and guidance to public authorities; and dealing with complaints from the public about the failure of public authorities to have due regard to this advice and guidance.

The Commissioner will provide advice on the application of a number of human rights instruments in relation to Ulster Scots (although this is stated within the main NDNA document and not within not the draft bill). These instruments are to include the European Charter for Regional or Minority Languages (ECRML); the Framework Convention for National Minorities (FCNM); and the UN Convention on the Rights of the Child (UNCRC). This will create an overlap with the functions of NIHRC, which already advises on the scope of such instruments.

In an entirely separate part of the deal document, the UK commits to recognising Ulster Scots as a “national minority” under the aforementioned Framework Convention for National Minorities. Ulster Scots speakers (as with Irish speakers) have long been recognised as a linguistic minority under the FCNM. This provision therefore appears to refer to the recognition of Ulster Scots as a separate ethnic group. This would constitute quite a significant shift from the mainstream position. It is not clear how many persons would self-define in this manner (a principle of FCNM). However, if the intention is indeed to recognise Ulster Scots as a national minority, this would have implications for the above remit of the Commissioner.

It is unclear what the ‘Ulster British’ role of the Commissioner is intended to be. Clearly, this is not likely to involve a particular focus on language given the already dominant position of English. It would therefore appear more likely to focus on Ulster British arts and literature. Whilst Ulster Scots is part of a shared linguistic heritage, the manner of the remit does create a link with Ulster Britishness.

### **Legacy – Stormont House Agreement (SHA)**

The legacy proposals contained within the deal commit to introducing the long delayed SHA legacy bill within 100 days of the deal. A key question remains over whether or not amendments will be made to the bill before it is introduced into Westminster, particularly in light of the 2018 consultation conducted by NIO on the draft bill.

There is also a commitment to implement redress for victims of historical institutional abuse.

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