

<b>Section A</b>		
<b>Institution:</b> Durham University		
<b>Unit of Assessment:</b> 18 – Law		
<b>Title of case study:</b> Brexit and Northern Ireland: Safeguarding human rights and enhancing legal protection for Northern Ireland		
<b>Period when the underpinning research was undertaken</b> Between Feb 2015 - Dec 2020		
<b>Details of staff conducting the underpinning research from the submitting unit:</b>		
<b>Name(s):</b> Aoife O'Donoghue Dr Ben Warwick	<b>Role(s) (e.g. job title):</b> Professor Graduate Teaching Assistant	<b>Period(s) employed by submitting HEI:</b> Since November 2007 Between 2013 and 2016
<b>Period when the claimed impact occurred:</b> Between 2016 and 2020		
<b>Is this case study continued from a case study submitted in 2014?</b> N		
<b>Section B</b>		
<b>1. Summary of the impact</b>		
<p>Research by the Performing Identities (PII) research group, originating in Durham Law School, identified significant gaps in understandings of Northern Ireland's (NI) significance to Brexit, especially across human rights, equality and citizenship. Both the Good Friday/Belfast Agreement (GFA) and the Common Travel Area (CTA) create an entirely separate Brexit context for NI which also shapes the structure of the withdrawal process and future relationships between the UK and EU and the UK and Ireland.</p> <p>This research shaped the policies of key decision-makers in the Brexit process, including:</p> <ul style="list-style-type: none"> <li>• Parliamentarians in Westminster, Dublin and Belfast.</li> <li>• Joint Committee of the Irish and Northern Ireland Human Rights Commissions.</li> <li>• Civil services of the UK and Ireland.</li> </ul> <p>Public discourses on Brexit have also been enriched by greater knowledge and understanding of the significance of alterations to NI law and policy on the rest of the UK and EU.</p> <p>PII's work shaped decisions made on human rights reform in the UK Parliament, and shaped the policy position and advocacy of the Joint Committee of the Irish and Northern Ireland Human Rights Commissions with regards to London, Dublin and EU politicians. The research led to changes in policy as regards to the Settled Status scheme and Irish citizens, and directly shaped the newly re-coordinated structures of the CTA and human rights monitoring post Brexit.</p>		
<b>2. Underpinning research</b>		
<p>The PII team focuses on NI's unique constitutional and international legal position within Brexit, with a particular focus on human rights, equality and citizenship. Considering a specific legal aspect of Brexit in isolation is impossible, there are always knock-on effects especially in NI. The PII team's combined expertise developed substantive answers to these complexities and O'Donoghue's established expertise in Irish constitutional, international, human rights and trade law, as well as her experience of working with policy makers, formed a critical cross-cutting core. The team possess combined expertise in: Irish constitutional law (O'Donoghue, <i>Durham</i>), international law (O'Donoghue, Warwick, <i>Durham</i>), UK constitutional law (Murray, Warwick <i>Durham</i>), civil and political rights, (Murray) economic and social rights (Warwick, <i>Durham</i>), EU law (de Mars), Trade (O'Donoghue <i>Durham</i>, de Mars).</p> <p>The PII team first identified the significance of NI prior to the Brexit referendum in 2016, at a time when NI was being ignored in wider debates. In 2015, O'Donoghue and Warwick set out <b>[R1]</b> the potential difficulties NI posed for London based plans for human rights reform and Brexit. This article set the template to understand the mix of human rights, constitutional and trade issues that characterised Brexit and set out what specific aspects the UK and Irish Governments need to consider, especially the role of the GFA in ensuring rights across the island of Ireland are reciprocal, ever improving and the intertwining of trade and movement on</p>		

the island and between Britain and Ireland. After the referendum PId's research [R2] demonstrates that human rights and citizenship issues are intertwined with Brexit, with profound consequences with respect to trade (O'Donoghue), human rights (Warwick, Murray) and constitutional reform (O'Donoghue, Murray). The GFA necessity of reciprocal rights across the two jurisdictions on the island remains key to UK reforms.

PId's established expertise on these issues, now recognised as pivotal, led to us being commissioned by the Joint Committee of the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission (Joint Committee), the GFA mechanism by which Ireland and Northern Ireland's statutory human rights bodies collaborate. [R3,5,6] The first was a 40,000-word Discussion Paper on Brexit [R3]. This research, presented in January 2018, identified the serious consequences of the withdrawal deal outlined in the EU-UK December 2017 Joint Paper, in particular: how the GFA was a fundamental factor shaping the Joint Paper's terms on North-South co-operation, citizenship, human rights, security, and trade. It identified fundamental problems with the way in which the EU-UK Joint Paper would work if put directly into legal form, including the creation of multiple new categories of rights holders and citizens. This is particularly critical in NI where parity of esteem is essential and the potential of two individuals, both born in NI, with different passports having different rights a serious concern and hence amongst the recommendations was maintaining equality of rights.

The team's monograph [R4] sets out the legal historical context of why a specific NI approach is required. The book proves concentration on trade prevented deep reflection on how EU law would work in NI after Brexit and recommended a special status for NI (akin to the backstop/NI Protocol) to prevent an undermining of the peace process architecture. In August 2018, our 42,000 Report for the Joint Committee, was the first in depth research on the CTA, establishing that it did not provide a legal basis for personal rights for Irish and UK citizens. [R5] even as the UK Government repeatedly emphasised the significance of the CTA in smoothing border friction post Brexit. A combination of doctrinal, archival, and documentary research and interviews across Ireland, NI and Britain dispelled misunderstandings on the legal significance of the CTA in providing rights and detailed the steps necessary to transform the CTA to secure rights and obligations of people moving between and living in the UK and Ireland after Brexit, these included three options, with the second – a system of separate agreements between the UK and Irish Government, now established. Our Third Report for the Joint Committee 'Continuing EU Citizenship after Brexit' [R6] links human rights, citizenship and trade and non- options available to Ireland, the UK, and the EU in the Northern Ireland context of non-diminution of rights in the context of the complex citizenship. This Report recommends specific arrangements for those entitled to dual citizenship to secure their rights and the need to fully secure the residual EU rights of Irish citizens in the UK filled a critical gap in the existing analysis.

### 3. References to the research

**R1** A O'Donoghue, & B T C Warwick Constitutionally Questioned: UK Debates, International Law, and Northern Ireland (2015) 66 *Northern Ireland Legal Quarterly* 93-104 (Warwick was a 1.0FTE Durham Staff Member) Peer Reviewed Journal Article

**R2** C Murray, A O'Donoghue, B Warwick, 'The Implications of the Good Friday Agreement for UK Human-Rights Reform' (2017) 11-12 *Irish Yearbook of International Law* 71-96. Available <http://dro.dur.ac.uk/20900/> Peer Reviewed Journal Article

**R3** C Murray, A O'Donoghue, B Warwick, Discussion Paper on Brexit (Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission, 2018). Available <https://www.ihrec.ie/app/uploads/2018/03/Discussion-Paper-on-Brexit.pdf> (44,000 words original research)

**R4** S de Mars, C Murray, A O'Donoghue, B Warwick, *Bordering Two Unions: Northern Ireland and Brexit* (Bristol: Policy Press, 2018). (180 pages, rigorous, original research)

**R5** S de Mars, C Murray, A O'Donoghue, B Warwick, Discussion Paper on the Common Travel Area (Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission, 2018). Available at:

<https://www.ihrec.ie/documents/discussion-paper-on-the-common-travel-area/> (42,000 words, original, rigorous)

**R6** C Murray, S de Mars, [A O'Donoghue](#), Ben Warwick 'Continuing EU Citizenship "Rights, Opportunities and Benefits" in Northern Ireland after Brexit' ((Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission, 2018). 2020) Available at <https://www.nihrc.org/publication/detail/continuing-eu-citizenship-rights-opportunities-and-benefits-in-northern-ireland-after-brexit?> (41,000 words, original, rigorous)

#### **4. Details of the impact**

In the run up to the referendum and in its immediate aftermath, NI's role in Brexit was consistently overlooked or misunderstood. PlD was key to reframing the debate and situating NI as core to the Withdrawal process. PlD's impact has centred on issues of human rights, equality, citizenship and the CTA.

##### **Influencing public debate: Media and Public Discourse**

PlD's public engagement and policy work, including animations and policy briefs, drawing directly on our research, informed, shifted and set the parameters on which NI and Brexit came to be eventually considered a serious facet of Brexit amongst the general population and media. The project team published more than 30 blog pieces and newspaper opinion pieces on Brexit. Between 2015 and 2020 O'Donoghue was, amongst others, interviewed by *The Irish Times*, *der Standard* and *The New Yorker*, appeared on BBC Breakfast (20 August 2019), France 24 (24 September 2019, 13 October 2020, Today FM (Irish national radio) over 30 times and RTE Radio1. In the referendum's immediate aftermath our policy brief on ['Brexit, Ireland and Northern Ireland' \(2016\)](#) was relied upon as some of the only in-depth and up-to-date legal commentary on Brexit and NI. Journalist Emer O'Toole used the paper as the basis of an influential opinion piece in *The Guardian*. The piece, one of the first to tackle the legal reality of a likely return to a physical border used the policy paper as its basis quoting 'UK-Ireland border would represent an external border to the EU as a whole. There are no other "external" EU borders that do not come with border controls' **[E1]**. Alongside this work, the project team has commissioned an innovative series of animations explaining Brexit's impact on Northern Ireland; [Brexit and the Irish Border](#), [Northern Ireland: Brexit, Peace and Prosperity](#) and [Brexit Holdem: Who to Watch as Brexit Unfolds](#). These animations have been viewed on YouTube over 12,500 times.

##### **Shaped recommendations of UK and Irish Parliamentary Committees & Work of MPs**

Our Policy Brief [Brexit, Ireland and Northern Ireland 2016](#) was cited and endorsed in authoritative House of Commons Library Briefings on Brexit including our recommendation that the GFA requires a Northern Ireland specific solution. Our publications are also included in the Northern Ireland Assembly's Brexit Reading List. Our detailed submissions to the Northern Ireland Affairs Committee, the EU Select Committee and the Irish Oireachtas' Joint Committee on the Implementation of the GFA have drawn the parameters on which Northern Ireland operates since Brexit.

Pre the Brexit referendum, our evidence to the Northern Ireland Affairs Committee inquiry into 'Northern Ireland and the EU referendum' demonstrated that withdrawal from the ECHR, in the context of Northern Ireland must be treated separately. This was endorsed in the Committee's final report and recommendations **[E2a, p28-29]**. Further submissions to the Northern Ireland Affairs Committee inquiry into 'The Land Border between Northern Ireland and Ireland' were cited approvingly in the final report to set the parameters of the legal situation of NI and what the contents of a specific solution should entail **[E2b, p44]**.

Our evidence to the House of Lords EU Committee inquiry into 'Brexit: devolution' cited in its final report drew on PlD's evidence emphasising the need to avoid a physical land border as a focal for potential violence and history of EU funding in the border region in maintaining peace. The report quotes our evidence directly that 'that the burden of Brexit would 'fall most heavily on Northern Ireland, because of its unique historical, political and geographical situations'. In their [our] view, it would not be possible after Brexit to maintain the open border as it exists at present in terms of goods. They feared that the return of physical

manifestations of the border would act as a lightning rod to dissident republicans' [E2c p19] The Withdrawal Agreement and the Northern/Ireland Protocol follow these recommendations.

PI'd submitted evidence to the Irish Oireachtas Joint Committee on the Implementation of the GFA, which repeatedly cited the Policy Paper in its final report to shape its account of how Brexit would affect the GFA's arrangements [E3, pp.112-117 fen 84,92,93].

PI'd briefed Margaret Ritchie, (MP, between 2010 and 2017, former SDLP leader, member of the House of Lords), including meetings and emails. In a testimonial letter [E4] Ritchie states:

'In early 2017 following an in-person briefing from the group and email correspondence regarding draft parliamentary questions, I questioned the Government on potential human rights reform occurring alongside the Withdrawal negotiations. In response the Government acknowledged it would not pursue human rights reform during Brexit and would likely be obliged to accept human rights obligations in establishing the future UK/EU relationship. This was an important early response from the UK Government [...] which ultimately led to protections being embedded in Article 2 of the Protocol to the Withdrawal agreement.'

### **Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission – GFA Human Rights Oversight Body**

Our proven expertise and track record led to our successful tender to complete our first Report on Brexit and Human Rights for the Joint Committee and from here our subsequent Reports. The Report *Discussion Paper on Brexit* [R2], which O'Donoghue and Warwick presented to the Committee in Dublin, was the basis for the Joint Committee's lobbying of both Governments to sustain cross-border human rights protections. Our Report demonstrated the extent to which Brexit could result in diminution of rights as well as multiple categories of rights holders living side by side in NI, which would negatively impact on the peace process. Published March 2018, the Report received extensive media coverage [E5a], including Joint Chairs of the Committee citing our Paper in media interviews and formed the basis of the Joint Committee's dealings with the UK and Irish Governments and EU on Brexit (including advancing the findings presented in this paper in a meeting with Michel Barnier): 'This research has been vital ... for balancing a public narrative that all too often focuses on trade... The Commission was able to use this research to flag these issues in discussions with the UK Government and EU negotiating team, obliging the negotiators to spell out the choices that were being made in terms of rights protections' (Chief Commissioner Les Allamby) [E6]. 'This research was central to the concerted efforts of both bodies in Northern Ireland and IHREC to shape public debate on the Withdrawal Agreement and redress a previous imbalance in the political and public narrative which was overwhelmingly focussed on trade' (Chief Commissioner Caroline Fennell) [E6].

Subsequently, PI'd was commissioned by the Joint Committee to author a *Discussion Paper on the Common Travel Area* [R4]. In preparation for the Report O'Donoghue and Warwick briefed Irish diplomats in London and O'Donoghue and Murray briefed civil servants at the Home Office on the limitations of the CTA. The Report was presented in November 2018 and immediately adopted is the basis for a major policy campaign by the Joint Committee to pressurise the UK and Irish Governments to clarify and further protect the reciprocal rights extended to each other's' citizens under the CTA.

The Report '...was the basis of the Commission's engagement with the UK and Irish Governments over the Common Travel Area.' The report generated front-page headlines in the Irish Times and triggered a debate in Dáil Éireann. In the months after the report was published the UK and Irish Governments responded in light of its recommendations, concluding a new Memorandum of Understanding redefining the scope of the CTA and introducing specific legislation covering social security arrangements between the two governments (Chief Commissioner Les Allamby) [E6].

The CTA report received considerable media attention, including front-page headlines in the *Irish Times* and *Irish World* (interview with O'Donoghue) and shaped public debate [E5b]. PI'd's call for enhanced legal protections was taken up by Fianna Fáil, the then opposition in

Ireland, in parliamentary debate and was referenced as the basis of questioning the Minister of Employment Affairs in the Irish Dáil about certainty over maintaining reciprocal arrangements between Ireland and the UK [E7]. Since the Report's publication it has shaped public debate and understanding of the CTA. The UK and Irish Governments signed a Memorandum of Understanding which delineates the CTA to rectify some of the shortcomings that the Report described as 'written in sand' in direct response to our Report's finding and recommendations: 'The work was vital to establishing the rights implications within Northern Ireland of the UK's withdrawal from the European Union. The fruits and proof of the success of this engagement is evident in the major role of the Commissions and the Joint Committee envisaged in Article 2 of the Withdrawal Agreement's Protocol with regard to safeguarding rights' (Chief Commissioner Caroline Fennell) [E6].

Our 2020 Report for the Joint Committee 'Continuing EU Citizenship "Rights, Opportunities and Benefits" in Northern Ireland after Brexit' has significantly impacted and shaped UK and Irish Government responses to citizenship rights across Ireland, Northern Ireland, and Britain. The cumulative impact of the Reports is that the Joint Committee now has a specific role in post-Brexit human rights protection.

'[B]oth Commissions in Northern Ireland, and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, will provide a dedicated monitoring mechanism to ensure the protection of the Belfast/Good Friday Agreement and the UK government's commitment to no diminution of rights under the 1998 Agreement' (Chief Commissioner Caroline Fennell) [E6].

During UK Parliamentary debates on the *Immigration and Social Security Co-ordination (EU Withdrawal) Bill* both CTA and EU Citizenship Reports were repeatedly relied upon by Parliamentarians to push the Government to confirm that their changes were in line with its recommendations and the EU Settlement Scheme was in accordance with the GFA. The UK Government responding to these debates, changed its advice to Irish citizens on registering for the EU Settled Status Scheme. Government minister, Baroness Williams of Trafford, in direct response to a Parliamentary question stated that registering under the system would enable Irish citizens to prove their status.

'I and other peers drew extensively upon the ...Group's Reports for the Joint Committee on Citizenship and the Common Travel Area to push the Government to confirm that their changes would be in line with its recommendations. The conclusions of these reports, in particular that the existing CTA arrangements are 'written in sand' were relied upon [...] the UK Government, in direct response to these interventions, changed its advice to Irish citizens regarding the EU Settled Status Scheme' (Baroness Ritchie of Downpatrick) [E4].

## **5. Sources to corroborate the impact**

[E1] Emer O'Toole, 'Ireland Faces Partition Again: Preserving the Peace is Critical' (26 June 2016, The Guardian)

[E2] Parliamentary reports a) NI Affairs Committee, *Northern Ireland and the EU Referendum* (2016) HC 48. b) House of Commons NI Affairs Committee The land border between Northern Ireland and Ireland Second Report of Session 2017–19 HC 329 c) EU Committee, *Brexit: Devolution* (2017) HL 9.

[E3] Joint Committee on the Implementation of the Good Friday Agreement, *Brexit and the Future of Ireland* (August 2017, 32/JCIGFA/02)

[E4] Testimonial Baroness Margaret Ritchie

[E5] Media coverage of a) Joint Committee on Human Rights Commission Brexit report b) Media coverage of Joint Committee on Human Rights Commission CTA report

[E6] Testimonials from Chief Commissioner Les Allamby (NI Human Rights Commission) Caroline Fennell (Irish Human Rights and Equality Commission & Chair of European Network of National Human Rights)

[E7] a) Fianna Fáil news report referencing CTA report b) Fianna Fáil questioning the Irish Government on the issue and the Government's response.