

ANNEX A: Selected Extracts from Relevant Texts

A. Belfast/Good Friday Agreement

CONSTITUTIONAL ISSUES

1. The participants endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo- Irish Agreement, they will:

(i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;

(ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland;

(iii) acknowledge that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and, accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people;

(iv) affirm that if, in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish;

(v) affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities;

(vi) recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

B. Northern Ireland Act 1998

1 Status of Northern Ireland.

(1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.

Schedule 1

1 The Secretary of State may by order direct the holding of a poll for the purposes of section 1 on a date specified in the order.

2 Subject to paragraph 3, the Secretary of State shall exercise the power under paragraph 1 if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.

3 The Secretary of State shall not make an order under paragraph 1 earlier than seven years after the holding of a previous poll under this Schedule.

4(1) An order under this Schedule directing the holding of a poll shall specify—

(a) the persons entitled to vote; and

(b) the question or questions to be asked.

(2) An order—

(a) may include any other provision about the poll which the Secretary of State thinks expedient (including the creation of criminal offences); and

(b) may apply (with or without modification) any provision of, or made under, any enactment.

C. Bunreacht na hÉireann

AIRTEAGAL 2

Tá gach duine a shaolaítear in oileán na hÉireann, ar a n-áirítear a oileáin agus a fharraigí, i dteideal, agus tá de cheart oidhreacht aige nó aici, a bheith páirteach i náisiún na hÉireann. Tá an teideal sin freisin ag na daoine go léir atá cáilithe ar shlí eile de réir dlí chun bheith ina saoránaigh d'Éirinn. Ina theannta sin, is mór ag náisiún na hÉireann a choibhneas speisialta le daoine de bhunadh na hÉireann atá ina gcónaí ar an gcoigríoch agus arb ionann féiniúlacht agus oidhreacht chultúir dóibh agus do náisiún na hÉireann.

ARTICLE 2

It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.

AIRTEAGAL 3

1 Is í toil dhiongbháilte náisiún na hÉireann, go sítheach cairdiúil, na daoine go léir a chomhroinneann críoch oileán na hÉireann i bpáirt lena chéile, in éagsúlacht uile a bhféiniúlachtaí agus a dtraidisiún, a aontú, á aithint gur trí mhodhanna síochánta amháin le toiliú throllach na ndaoine, á chur in iúl go daonlathach, sa dá dhlínse san oileán, a dhéanfar Éire aontaithe a thabhairt i gcrích. Go dtí sin, bainfidh na dlíthe a achtófar ag an bParlaimint a bhunaítear leis an mBunreacht seo leis an limistéar feidhme céanna, agus beidh an raon feidhme céanna acu, lenar bhain na dlíthe, agus a bhí ag na dlíthe, a d'achtaigh an Pharlaimint a bhí ar marthain díreach roimh theacht i ngníomh don Bhunreacht seo.

2 Féadfaidh údaráis fhreagracha faoi seach na ndlínsí sin institiúidí ag a mbeidh cumhachtaí agus feidhmeanna feidhmiúcháin a chomhroinntear idir na dlínsí sin a bhunú chun críoch sonrath agus féadfaidh na hinstitiúidí sin cumhachtaí agus feidhmeanna a fheidhmiú i leith an oileáin ar fad nó i leith aon chuid de.

ARTICLE 3

1 It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island. Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.

2 Institutions with executive powers and functions that are shared between those jurisdictions may be established by their respective responsible authorities for stated purposes and may exercise powers and functions in respect of all or any part of the island.

D. Ireland/N. Ireland Protocol

Article 1 Objectives

1. This Protocol is without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people.
2. This Protocol respects the essential State functions and territorial integrity of the United Kingdom.
3. This Protocol sets out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions.

ANNEX B: What the Good Friday Agreement Requires

A. Constitutional Conversations Group: A Briefing Note on Unity Referendums

This briefing note is produced by the Constitutional Conversations Group. It is intended to assist those who are interested in the mechanics of Irish unity. The aim is not to be prescriptive but we hope this note may be of benefit to those participating in any pre-referendum consultations or discussions about aspects of the process.

It reflects the thinking of the Group on some of the *procedural questions* raised by the unity referendums. The Group is aware that there are a range of possible views, but this note advances an interpretation that we believe is as faithful as possible to the letter and spirit of the self-determination provisions of the Good Friday Agreement.

1. How will a reunited Ireland be achieved?

The Agreement provides that Irish reunification is a matter for the people of the island of Ireland. The right of self-determination has been given effect in the Irish Constitution and the Northern Ireland Act 1998. Reunification can be achieved through positive votes in concurrent referendums in both jurisdictions on the island. Each referendum will be subject to the distinctive traditions, rules and processes in each state.

The votes should follow political and civic planning and preparation. Those eligible to vote in these referendums, and everyone affected by the outcome, must be clear about the constitutional, political, economic, social and cultural consequences in advance.

2. Who decides if a vote on Irish Unity is to take place in N. Ireland?

The power to call a referendum on Irish unity is conferred on the Secretary of State (SoS) for Northern Ireland in section 1 and schedule 1 of the Northern Ireland Act 1998. This power includes a *discretion* to hold a poll at any time. The *duty* to do so comes into effect when it appears likely to the SoS that a majority of those voting would express a wish for Irish reunification.

3. Who decides if a vote occurs in the Republic of Ireland?

Irish reunification remains a constitutional goal of the Irish State, and is described as the firm will of the ‘Irish Nation’. However, it requires a positive vote by the electorate in the Republic. The decision to propose a referendum on unity lies with the Oireachtas, although the political reality is that it will have to be sponsored by the Irish Government.

4. Should separate referendums occur?

No. The Agreement, properly interpreted, envisages *concurrent referendums* on reunification to mirror the votes which occurred on the 22nd May 1998 across the island of Ireland. In our view, this requires *simultaneous* votes.

Should a referendum be proposed in either jurisdiction, by the Irish Government or by the SoS, there will be a presumption that steps will be taken to provide for a concurrent vote in the neighbouring jurisdiction. Neither state can legitimately impose Irish reunification on the other. Equally, neither state can legitimately frustrate or delay Irish reunification.

The most faithful interpretation of the Agreement is that the referendums should be held at the same time.

5. Right to vote in N. Ireland

The phrase used in the Agreement is the ‘people of Northern Ireland’. The franchise in N. Ireland for the reunification referendum is not yet determined. Schedule 1 to the Northern Ireland Act 1998 requires that the Secretary of State specify the persons entitled to vote. Options for the franchise include: (i) Westminster list, which is limited to British, Irish and qualifying commonwealth citizens who are resident or registered as overseas voters and are over the age of 18; (ii) the Assembly, European Parliament and local elections list, which also includes citizens of the European Union; or (iii) specially constructed franchise, as occurred with the Scottish independence referendum permitting, for example, voting by those over the age of 16.

Given the implications of potential constitutional change on everyone in N. Ireland, a case can be made for an inclusive franchise that acknowledges, for example, the impact on young people and future generations. There is considerable merit in the approach adopted for the independence referendum in Scotland.

6. Right to vote in the Republic of Ireland

The right to vote in any reunification referendum in the Republic of Ireland is determined by combined reading of articles 12 and 46 of the Constitution, together with the Referendum Acts. The franchise will be restricted to Irish citizens resident in the territory of the State and registered as referendum electors. No expansion of the electorate is possible without a separate and preceding constitutional amendment.

7. Consequences of a vote for reunification in N. Ireland

The status of N. Ireland as part of the UK will change. A positive vote in favour of reunification in N. Ireland is a demonstration of Irish self-determination which, in accordance with article 1(iv) of the British-Irish Agreement, imposes a duty on the UK Government to introduce and support legislation in its Parliament to give effect to that wish. It is assumed that section 1 of the Northern Ireland Act 1998 will be repealed.

Unless and until amended or superseded, the Agreement (bilateral British-Irish Agreement) will remain in place, including the existing institutions, and those obligations intended to apply in the event of a transfer of sovereignty.

As noted above, it should be clear in advance of the referendums what model and arrangements people are opting for if they select the change option. In the event of votes for reunification it will then be a matter of *implementing the proposals* that have been democratically endorsed.

8. Consequences of a vote for reunification in the Republic of Ireland

The status of N. Ireland will change, and the whole territory of the island of Ireland will be part of the EU. The Irish Constitution will be amended or replaced in accordance with the proposal approved by the electorate. At a minimum, it is presumed that this will require amendment to articles 2 and 3 as currently configured. But it is also possible that discussions will lead to proposals for a new constitution. Advance civic and political discussion is needed on the depth, scale and extent of the constitutional reforms that will follow votes for reunification.

While it is possible that reunification could be achieved in a way that minimises constitutional and political disruption, there is also an opportunity to consider more ambitious arrangements that reflect a commitment to a modern, pluralist ‘New Ireland’.

Those advocating reunification will need to have a settled view on the precise implications of votes for change and how transformative this will be.

9. What becomes of British citizenship in a united Ireland?

In the Agreement both the Irish and British governments promised the continuation of citizenship regardless of the status of N. Ireland. British citizenship is governed by UK nationality legislation and that would continue to the case. It would continue in perpetuity for those currently entitled to that status. It would be available for future generations in accordance with British legislation.

Proposals for reunification should provide agreed guarantees for British citizens to ensure that British identity is respected based on the values of the Agreement.

10. What becomes of the Good Friday Agreement institutions in N. Ireland in a united Ireland?

The Agreement does not contemplate the abolition of the Assembly or the Executive following reunification. These institutions remain operable in a united Ireland and would, presumably, continue unless and until alternative institutions are approved. This would also be the case for other Agreement structures, which may prove particularly valuable in maintaining East-West and British-Irish connections.

11. What becomes of the Good Friday Agreement human rights and equality protections?

The Agreement requires that ‘the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities’.

The obligation of ‘rigorous impartiality’ will transfer to the Irish Government in the event of reunification. The commitments to parity of esteem, equality of treatment and rights will have implications for reunification proposals.

The Irish Government is under an obligation to provide at least an equivalent level of rights protection, and has already made changes to reflect this aspect of the Agreement.

It is notable, for example, that the Agreement anticipated a Bill of Rights for N. Ireland and led to further effect being given to the European Convention on Human Rights, and the creation of the NI Human Rights Commission. Any Bill of Rights adopted for N. Ireland will have implications for the guarantees required in the event of reunification.

Work will be needed to ensure that there is *at minimum* equivalence, and that reunification results in no diminution of protection. As noted above, this will also create an opportunity to discuss the adoption of a more expansive range of rights and equality guarantees.

12. What level of support is necessary in each jurisdiction?

Article 47.1 provides that a simple majority of votes cast is sufficient to amend the Irish Constitution. The Agreement recognises the equal legitimacy of both the unionist and nationalist position, and the principle of consent rests constitutional status on a majority of the people of N. Ireland. Therefore, any threshold beyond a simple majority of those voting in N. Ireland can be rejected as contrary to the Agreement, undemocratic, and an attempt to frustrate the self-determination provisions.

13. Does there *need* to be more than concurrent referendums?

No. The Agreement is clear that the process by which Irish reunification will be achieved is concurrent consent. The novel imposition of, for example, further confirmatory referendums in either jurisdiction would amount to a significant and unjustified deviation from what was agreed in the Agreement and approved in 1998. The right to Irish self-determination is already significantly qualified by the requirement of concurrent votes in each jurisdiction.

If reunification is achieved through the existing Irish Constitution, the proposal to be put to the electorate will have to be crafted in such a way as to achieve Irish unity whilst not conflicting with any other provisions of the Constitution. If a new constitution is proposed, to replace the 1937 Constitution, then this could be endorsed through a referendum.

Multiple referendums beyond the two anticipated in the Agreement carry risks of inconsistent outcomes and additional instability. This is particularly the case in N. Ireland where a confirmatory vote will be viewed by many as another attempt to place procedural hurdles in the way of constitutional change. Proposals should be fully worked through in advance of the concurrent referendums.

14. What would become of the Ireland – Northern Ireland Protocol contained within the EU-UK Withdrawal Agreement?

The reunification of Ireland in accordance with the provisions of the Agreement has already been considered by the European Council in April 2017. The 1990 precedent of German reunification would be followed. The entire territory of a united Ireland would form part of the EU, without the need for Treaty change. The Protocol would no longer be necessary and will be superseded by the return of N. Ireland to the EU. Both states may, however, wish to continue the Common Travel Area arrangements, and it is assumed the EU would remain willing to permit this, within existing and prescribed limits.

B. Professor Colin Harvey and Mark Bassett: Additional Responses

1. How long could (or should) the Northern Ireland institutions continue after Irish reunification?

The Good Friday Agreement contemplates a transfer of sovereignty from the United Kingdom to Ireland. It does not expressly address the form that a united Ireland would take. There are, however, provisions in the Agreement that are clearly forward facing, including the obligation of rigorous impartiality and guarantees on identity, citizenship and rights. In particular, we draw the attention of the Committee to the role of a rights and equality framework, and the need to ensure there is no diminution in guarantees as a consequence of reunification. People in N. Ireland must enjoy at least an equivalent range of protections in a united Ireland.

We recognise the significance of shared institutions in the jurisdiction of N. Ireland as one part of the Agreement. Those will remain in place in more or less their current form unless and until an alternative arrangement is agreed. This is therefore part of a larger conversation about the form a united Ireland will take. This is precisely why we continue to emphasise advance planning and preparation.

The question of the continuation of northern legislative, executive and judicial organs will also have to be addressed in a way that ensures consistency with Bunreacht na hÉireann or any new constitutional arrangements that emerge from the conversations noted above.

2. Why focus on securing referendums on Irish reunification when important work on reconciliation remains outstanding?

The work of reconciliation between the traditions, communities and peoples on this shared island is essential and must continue regardless of the constitutional position of N. Ireland. In our view, reconciliation is not advanced by avoiding hard questions about the constitutional future or by making an often ill-defined and ‘thin’ version of reconciliation an obstacle to holding the referendums contemplated in the Agreement. We underline again that these concurrent referendums are a central part of the compromise at the heart of the Agreement. This is not an either/or conversation and the vital work of reconciliation on our shared island will continue.

3. What is meant by ‘external impediment’ in the Agreement?

In our view, and for these purposes, this refers primarily to the Westminster Parliament. We also acknowledge how significant it was for the EU in 2017 to confirm that a reunified Ireland would continue as a Member State, thus addressing a potential ‘external’ obstacle to reunification.

The right to self-determination belongs to the people of this island without ‘external impediment’. The link to the Westminster Parliament was certainly the understanding of the then Taoiseach Ahern when in April 1998 he said that the: *‘British government are effectively out of the question, and neither the British parliament nor people have any legal right under this Agreement to impede the achievement of Irish unity if it had the consent of the people North and South ...’*¹

The centrality of the concept of parliamentary supremacy to the British constitutional tradition remains a concern. The British Government is under a ‘binding obligation’ to take forward and support the outcome of concurrent referendums on this island. But what happens if the Westminster Parliament becomes an impediment? If this were to take place it would amount to an egregious breach of the Agreement. It would be comparable to the Irish state assuming jurisdiction and control of N. Ireland without reference to the principle of consent.

4. Do the referendums have to be a binary question? What about alternatives to the status quo or Irish unity?

¹ Speaking at Arbour Hill on the 26th April 1998: available at <https://www.irishtimes.com/news/britain-has-been-ruled-out-of-the-equation-on-north-says-ahern-1.146434>.

The Agreement contemplates two, and only two, outcomes. Re-partition, independence, accession to any other sovereign state and joint authority between London and Dublin do not feature in the Agreement.

Any such proposal would, in effect, require a back to the drawing board approach from the governments and the parties. We would therefore repeat that adherence to the Agreement should guide the approach throughout and this includes the question asked.