

Equality Commission

FOR NORTHERN IRELAND



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION



Annual Report of the NIHRC and the ECNI on the implementation of Protocol Article 2 2021 – 2022

July 2022

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Protocol Article 2
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Foreword

Securing an internationally binding commitment to protect the human rights and equality provisions of the Belfast (Good Friday) Agreement was a primary aim that many worked to achieve in the months and years following the UK's decision to withdraw from the EU, including our two Commissions. The result, in Protocol Article 2, is an important and positive commitment to no diminution of these rights by the UK Government and it reflects the centrality of equality and human rights in the Belfast (Good Friday) Agreement. It provides a degree of certainty and stability in the context of wider change arising from withdrawal, providing an important safeguard against the diminution of certain human rights and equality protections.

The Commissions accepted new responsibilities to advise on, monitor and hold the UK Government to account on the implementation of the no diminution commitment. We welcomed the UK Government's undertaking to support our mandate to oversee the implementation of Protocol Article 2 and over the first year of operation the Commissions have built up dedicated teams who are delivering on their new responsibilities.

Over the reporting period, we have worked to secure the effective implementation of Protocol Article 2 through engagement with officials in the NI Office and the Executive Office in NI; through more formal advice in responses to consultations and submissions on legislation and policy; and through engagement with the NI Assembly and UK Parliamentary Committees. One of our key recommendations has been to ensure that consideration of Protocol Article 2 is embedded at the earliest stages of policy and legislative development. We have also advised the UK Government and NI Executive that Protocol Article 2 requires monitoring any proposed changes by the EU which would amend or replace the Annex 1 Equality Directives and includes monitoring relevant CJEU case law, to ensure NI law keeps pace with changes which enhance protections.

Protocol Article 2 contains a new commitment to upholding certain human rights and equality protections and the Commissions have a particular responsibility to increase public awareness of this commitment. To that end we have published short guides to Protocol Article 2 and have also engaged directly with the public via radio and billboard advertising and through campaigns on social media, which have had very positive engagement figures. We have also undertaken several public engagements with key stakeholders including border communities, the

women's sector, disabled people and the disability sector, migrant and minority ethnic people and the employment lawyers' group.

An important aspect of our work has been to understand what Protocol Article 2 means in practice and we have undertaken research, sought legal advice and intervened in a relevant case before our courts. We will be continuing this important work over the year to come.

The Commissions have already identified ways in which new laws risk undermining the rights, safeguards and equality protections in Protocol Article 2. We have identified protections for victims of trafficking in the EU Trafficking Directive as falling within scope of Protocol Article 2 and are very concerned that provisions in the Nationality and Borders Act may be in breach of the non-diminution commitment. We have also raised concerns about potential non-compliance with Protocol Article 2 in relation to the Elections Act and called on the UK Government to set out its assessment of how the (then) Bill conformed with Protocol Article 2.

In Protocol Article 2(2) the UK Government has committed to continue to facilitate our work and we reiterate our call to ensure that there is sustained and adequate funding of both Commissions.

Vigilance is required to ensure Protocol Article 2, including its enforcement mechanisms, is protected. We will take any breaches, or potential breaches, of Protocol Article 2 seriously and will be exploring the possibility of what further actions we can take, both through our domestic courts and the UK-EU Specialised Committee, to ensure that all the human rights and equality protections within scope of Protocol Article 2, and more broadly, are upheld.

We are conscious that this Annual Report is being published at a time of concern about wider risks to human rights and equality protections in NI. The Commissions are very concerned that with a legislative programme which seeks to facilitate divergence from retained EU law and to undermine the domestic implementation of the European Convention of Human Rights, there is a risk of destabilising the human rights and equality protections Protocol Article 2 is designed to safeguard. While the NI Protocol Bill carves out specific protection of Protocol Article 2, that protection is currently incomplete. We would reiterate our call to the UK Government to ensure that there is no weakening of Protocol Article 2 or Protocol Article 2 oversight mechanisms.

In this report the Commissions have focused on highlighting those issues and recommendations we have raised over the year ending March 2022. We are pleased to present the advice and recommendations arising from our work over the first fifteen months of our new mandate and look forward to the Secretary of State's response.



Alyson Kilpatrick
Chief Commissioner
NI Human Rights Commission



Geraldine McGahey
Chief Commissioner
Equality Commission for NI

1.0 Introduction

- 1.1 Both the Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland (ECNI) (the Commissions) were established following the Belfast (Good Friday) Agreement and pursuant to the Northern Ireland Act 1998. The Commissions are non-departmental public bodies. The NIHRC is a National Human Rights Institution with ‘A status’ accreditation from the United Nations.
- 1.2 The Commissions are mandated in accordance with Article 2(1) (Protocol Article 2) of the Protocol on Ireland/Northern Ireland of the UK-EU Withdrawal Agreement¹ (the Protocol) to oversee the UK Government’s commitment on rights and equality in Northern Ireland (NI) after EU withdrawal. The Commissions can exercise these functions separately or jointly.²
- 1.3 The Commissions jointly publish this annual report, based on their respective mandates to:
- monitor the implementation of Protocol Article 2;
 - report to the Secretary of State for NI and the NI Executive Office on the implementation of Protocol Article 2; and
 - advise the Secretary of State for NI and the NI Executive of legislative and other measures which ought to be taken to implement Protocol Article 2.³
- 1.4 In addition, the Commissions exercise part of this mandate in partnership with the Irish Human Rights and Equality Commission (IHREC) in relation to those aspects of oversight, and reporting on, rights and equalities issues falling within the scope of Protocol Article 2 which have an island of Ireland dimension.⁴

¹ Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 24 January 2020.

² Section 78E, Northern Ireland Act 1998.

³ Section 78A(1)-(2) and 78A(5), Northern Ireland Act 1998 in respect of the NIHRC and Section 78B(1)-(2) and 78B(5) Northern Ireland Act 1998 in respect of the ECNI.

⁴ Article 2(2) and Article 14(c), Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement; NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’, (NIO, 2020), at 5.

- 1.5 In this report, the Commissions have focused on highlighting those obligations under Protocol Article 2 which reflect the focus of their work in 2021-2022. This report highlights the key changes to the human rights and equality landscape over the reporting period and sets out the Commissions' recommendations relating to Protocol Article 2 as of the end of March 2022.
- 1.6 The Commissions work closely in the exercise of their mandate to oversee Protocol Article 2, reflected in many of the recommendations being made jointly. Some recommendations, however, are made by one or other Commission in keeping with its core remit and consistent with the option under Section 78E of the Northern Ireland Act, to exercise this mandate jointly or separately. It should be noted that each organisation may have made additional recommendations on the issues set out below, on matters outside the scope of Protocol Article 2, which are not included here, but which can be found in the related submissions referenced.
- 1.7 Chapter 2 sets out key aspects of Protocol Article 2 and the international framework within which it sits and Chapter 3 sets out over-arching recommendations by the Commissions. Chapter 4 is structured under key rights and equality issues and developments, with recommendations at the end of each sub-section, given their application across the topic. Some narrative is re-stated, where required, to provide the minimum context necessary to understand recommendations without cross-reference to other chapters.
- 1.8 The report also highlights issues relevant to the wider role of the Commissions, in monitoring and considering best practice relating to the rights and equality landscape in NI to ensure there is no diminution of rights as a result of Brexit, including for those living in border areas. These recommendations on the wider impacts of UK Withdrawal from the EU on equality and human rights are set out in Chapter 5.
- 1.9 Section 78A(3) in respect of the NIHRC and Section 78B(3) in respect of the ECNI of the Northern Ireland Act 1998, states that a report under subsection 2 Section 78A and 78B "may require the Secretary of State or the Executive Office in NI to reply in writing to any recommendations contained in the report, explaining what steps have been taken or are planned in response to the recommendations". **The Commissions therefore request a response from the Secretary of State for NI and the NI Executive Office to the recommendations in this report.**

2.0 International and Domestic Legal Framework

Withdrawal Agreement and the Ireland/NI Protocol

- 2.1 The NIHRC and ECNI are mandated in accordance with Protocol Article 2 of the UK-EU Withdrawal Agreement to oversee the UK Government's commitment on rights and equality in NI after EU withdrawal.
- 2.2 The UK signed the UK-EU Withdrawal Agreement in January 2020 and the Protocol, which is part of the treaty, took effect from 1 January 2021.⁵
- 2.3 Section 7A of the EU (Withdrawal) Act 2018 gives effect to all the rights, obligations and remedies arising under the UK-EU Withdrawal Agreement in UK law without the need for further enactment.

Protocol Article 2

- 2.4 Protocol Article 2 states:
 1. The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.
 2. The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards.⁶

⁵ Agreement on the Withdrawal of the UK of Great Britain and NI from the EU and the European Atomic Energy Community 2020 (UK-EU Withdrawal Agreement).

⁶ Article 2(1), Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

- 2.5 In Protocol Article 2 the UK Government commits to ensuring that certain rights, safeguards and equality of opportunity protections are not diminished as a result of the UK leaving the EU. Therefore, to fall within scope of Protocol Article 2, the human right or equality protection being relied on must be covered by the relevant chapter of the Belfast (Good Friday) Agreement and have been underpinned by EU law including EU treaties, directives and regulations, in place on or before 31 December 2020.
- 2.6 Further detail on the scope of Protocol Article 2 as well as how it interacts with the domestic and international framework, is available in Appendix 1.

Dedicated mechanism

- 2.7 Protocol Article 2(1) provides that the no-diminution guarantee in that paragraph shall be implemented through dedicated mechanisms. Protocol Article 2(2) states that:

The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards.

- 2.8 The EU (Withdrawal Agreement) Act 2020 amended the Northern Ireland Act 1998 to empower the NIHRC and ECNI with new functions to monitor, advise, report on, promote, and enforce the implementation of Protocol Article 2.⁷ These new powers took effect from 1 January 2021. In July 2020, the Commissions were provided with additional funds to undertake their respective roles as part of the dedicated mechanism.
- 2.9 The Commissions welcome the UK Government's commitment to their work overseeing the proper implementation of Protocol Article 2.⁸ Further to the UK Government's commitment in Protocol Article 2(2) to facilitate the related work of the ECNI and NIHRC in upholding human rights and equality standards, it is important that there is sustained and adequate

⁷ Sections 78A-78E, Northern Ireland Act 1998.

⁸ Letter from Conor Burns MP, Minister of State in the NI Office to Lord Jay of Ewelme, Chair of the House of Lords EU Affairs Committee Sub Committee on the Ireland/ Northern Ireland Protocol, 24 November 2021.

funding of both Commissions to carry out this related work on upholding rights and equality standards.

- 2.10 In 2021 the UN concluded its 5-year periodic review of the NIHRC and deferred its decision on re-accrediting the Commission with ‘A Status’ due to concerns about the impact of funding cuts on the Commission’s fitness for purpose. NIHRC has advised that there would be a potential breach of Protocol Article 2(2) if for this reason its ‘A status’ is not confirmed on review in October 2022.⁹

All-island dimension of Protocol Article 2

- 2.11 Protocol Article 2(2) recognises the Belfast (Good Friday) Agreement commitment for a Joint Committee of representatives of the two human rights commissions on the island of Ireland as a forum for the consideration of human rights issues on the island of Ireland. In addition, the NIHRC, ECNI and IHREC will work together to provide oversight of, and report on, issues which engage Protocol Article 2 that have an island of Ireland dimension.¹⁰

- 2.12 In March 2021, the NIHRC, ECNI and IHREC (‘the three Commissions’) agreed a Memorandum of Understanding on providing oversight of and reporting on rights and equality issues falling within the scope of the commitment in Protocol Article 2 that have an island of Ireland dimension.¹¹ Following this Memorandum of Understanding, a working group of the three Commissions has met regularly and in November 2021, the boards of the three Commissions met. At this meeting, Commissioners were updated on the ongoing research, advice to government, engagement and legal work on Protocol Article 2.

The Specialised Committee

- 2.13 The Specialised Committee on the implementation of the Protocol was established pursuant to Article 165 of the UK-EU Withdrawal Agreement. The Specialised Committee is co-chaired by the UK and EU and can draw up draft decisions and recommendations and refer them for adoption by the UK-EU Withdrawal Agreement Joint Committee. The Joint Committee is

⁹ Letter from NIHRC to Brandon Lewis MP, Secretary of State for NI, 17 November 2021.

¹⁰ Article 2(2) and Article 14(c), Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement. See also NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at 5.

¹¹ NI Human Rights Commission, Equality Commission for NI, Irish Human Rights and Equality Commission, ‘Ireland/ Northern Ireland Protocol of the European Union Withdrawal Agreement, Article 2: Island of Ireland Dimension - Memorandum of Understanding’, (NIHRC, ECNI and IHREC, 2021).

responsible for the implementation and application of the UK-EU Withdrawal Agreement and is co-chaired by the UK and EU.¹² The Joint Committee is empowered to make decisions in respect of the Withdrawal Agreement which are binding on the EU and UK and have the same legal effect as the Withdrawal Agreement.¹³ The Joint Committee can also make appropriate recommendations to the UK and EU.¹⁴ The Specialised Committee can make recommendations to the Joint Committee in respect of the functioning of the Protocol.¹⁵

2.14 The Specialised Committee can consider any matter of relevance to the UK-EU Withdrawal Agreement brought to its attention by the NIHRC, ECNI or the Joint Committee of representatives of the NIHRC and IHREC. Sections 78A(9) and 78B(9) of the NI Act 1988 empower the NIHRC and ECNI respectively to bring matters of relevance to Protocol Article 2 to the attention of the Specialised Committee.

Legal and UK Government consideration of Protocol Article 2

2.15 In June 2021, following a legal challenge, the NI High Court upheld the legality of the Protocol.¹⁶ In March 2022, the Court of Appeal dismissed the appeal on all grounds noting that Protocol Article 2 and the protections for the Common Travel Area in the Protocol were not controversial.¹⁷

2.16 In February 2020, in a legal challenge to the NI Health Minister's power to issue abortion regulations the applicants raised an argument that those regulations breached Protocol Article 2.¹⁸ Both Commissions intervened in these legal proceedings on matters related to Protocol Article 2.¹⁹ The NI High Court dismissed this challenge on the basis that the right in question was not underpinned by EU law prior to 31 December 2020. In the course of the judgment Colton J found that Protocol Article 2 has direct effect and can be relied on in domestic courts;²⁰ and that there was a continuing

¹² Article 164, UK-EU Withdrawal Agreement.

¹³ Article 166, UK-EU Withdrawal Agreement.

¹⁴ Further details of the rules of procedure of the Joint Committee and Specialised Committees are set in in Annex VIII to the UK-EU Withdrawal Agreement.

¹⁵ Article 14(e), Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

¹⁶ *In the matter of an application by James Hugh Allister for Judicial Review* [2021] NIQB 64.

¹⁷ *Allister et al v Secretary of State for NI* [2022] NICA 15, at para 324.

¹⁸ *Re SPUC Pro-Life Limited* [2022] NIQB 9.

¹⁹ The NIHRC also intervened on other matters not related to Protocol Article 2.

²⁰ *Re SPUC Pro-Life Limited* [2022] NIQB 9, at para 77 and para 88.

obligation to conform with Court of Justice of the European Union (CJEU) jurisprudence in respect of the Protocol.²¹

3.0 Implementation of Protocol Article 2 and General Recommendations

- 3.1 In exercising their new mandate during 2021-22, the Commissions have engaged with Government and parliamentary inquiries and made a number of recommendations aimed at securing the effective implementation of Protocol Article 2, seeking to ensure that it is fully considered from the earliest stages of policy and legislative development. These over-arching recommendations have been informed by Commission research, including research on parliamentary scrutiny referenced below.
- 3.2 In July 2021, the UK Government published proposals for “establishing a new balance” on how the Protocol operates noting that the protection of equality and human rights in Protocol Article 2 was uncontroversial and that the focus should be on trade in goods and institutional arrangements.²² This was followed in October 2021 by the EU’s “non-papers” in response to the ongoing issues facing NI in relation to the operation of the Protocol. The Commissions made a joint submission on the UK and EU proposals and the prospects for Agreement to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland in November 2021.²³
- 3.3 In the submission the Commissions highlighted that, in light of the positive aspects of the Protocol Article 2 commitment, and its ‘non-controversial’ nature, it is essential the UK Government remains committed to upholding its commitment set out in Protocol Article 2. The Commissions also highlighted the need to ensure that there are no changes to the Protocol that would result in a weakening of the Protocol Article 2 commitment and the importance of engagement with civil society including human rights and equality groups.

²¹ Ibid, at para 78 and para 93.

²² UK Government, ‘NI Protocol: the way forward’, (UK Gov, 2021), at para 37.

²³ NI Human Rights Commission and Equality Commission for NI, ‘Submission of the NIHRC and ECNI on the UK and EU proposals and the prospects for Agreement to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland’ (NIHRC and ECNI, 2021).

Protocol Article 2 Parliamentary scrutiny

3.4 In June 2021, the ECNI commissioned research on how to ensure that there is effective Assembly and Parliamentary scrutiny measures in place related to the Protocol Article 2 commitment. The research report,²⁴ completed in September 2021, highlighted the unique nature of obligations under Protocol Article 2 which requires scrutiny of five different streams of legislation: primary and secondary legislation created both in Westminster and the NI Assembly, and also EU legislation. It also identified several committees in Westminster and Stormont with responsibility for scrutiny of relevant legislation in relation to the ‘non-diminution’ and/or ‘keeping pace’ obligations under Protocol Article 2. It also highlighted a number of measures for Westminster and for the Northern Ireland Assembly, to ensure effective scrutiny of the UK Government’s compliance with its commitment under Protocol Article 2. This includes setting out in the Explanatory Memoranda for any new legislative measures, details of the Government’s consideration of Protocol Article 2 compliance. It also called for the continued and sustained resourcing of the Commissions.

Overarching Recommendations

- 3.5 **The Commissions recommend that in the development of any laws or policies the UK Government and NI Executive consider the extent to which any change engages Protocol Article 2 and ensure that there is no diminution to the rights and safeguards which fall within its scope.**
- 3.6 **In line with the ‘keeping pace’ obligations under Protocol Article 2, the Commissions recommend that the NI Office and the Executive Office ensure that the UK Government and NI Executive monitor any proposed changes by the EU to the six Annex 1 Equality Directives, including relevant case law of the CJEU.**
- 3.7 **The Commissions recommend that the NI Executive, in particular the Executive Office, Department for Communities, Department for Education and Department for the Economy, ensure that NI law keeps pace with any changes to the Annex 1 Equality Directives, including relevant CJEU case law, which enhance protections.**

²⁴ Paul Evans, Alexander Horne, Tasneem Ghazi, ‘Legislative Scrutiny and the Dedicated Mechanism for monitoring Article 2 of the Ireland/Northern Ireland Protocol’ (ECNI, 2021).

- 3.8 The Commissions recommend that the NI Office ensures there is adequate and sustained resourcing of the two Commissions to fulfil their responsibilities as the dedicated mechanism framework.²⁵ The Commissions also recommend that, further to the UK Government’s commitment in Protocol Article 2(2) to facilitate the related work of the two Commissions in upholding human rights and equality standards, there is sustained and adequate funding of both Commissions generally.**
- 3.9 The Commissions recommend that the UK Government ensures that Explanatory Memoranda on draft EU proposals which amend or replace the Annex 1 Equality Directives, as well as other EU legislation relevant to the provisions of Protocol Article 2, sets out what consideration has been given to ensuring conformity with Protocol Article 2.**
- 3.10 The Commissions recommend that the UK Government and NI Executive ensure that Explanatory Memoranda on draft UK and NI legislative proposals that are likely to engage Protocol Article 2 set out what consideration has been given to ensuring conformity with Protocol Article 2.**
- 3.11 The Commissions recommend that the UK Government ensures that there are no changes to the Protocol that would result in a weakening of either the Protocol Article 2 commitment or rights, safeguards and oversight mechanisms relating to this commitment.**
- 3.12 The Commissions recommend that both the NI Executive and UK Government ensure effective and regular engagement with civil society, including human rights and equality groups.**
- 3.13 The Commissions recommend that they are kept informed of any future EU equality law developments relevant to the Annex 1 equality Directives, including via the Joint Consultative Working Group, and have the opportunity to highlight in advance any implications of those changes for equality law in NI.**
- 3.14 The Commissions recommend that the NI Office engages with relevant UK Government departments and the supervisory bodies established under the UK-EU Withdrawal Agreement and the UK-EU Trade and Cooperation**

²⁵ The work of the Commissions as the dedicated mechanism is funded by the UK Government, with funding delivered through the Commissions’ respective sponsor Departments.

Agreement to establish formal structures for open, transparent and regular engagement with equality and human rights stakeholders in NI.

4.0 Protocol Article 2: Rights and Issues

4.1 In addition to the general overarching recommendations above, the Commissions have made specific recommendations in respect of Protocol Article 2. This section is organised thematically to reflect the range of areas where the Commissions have made such recommendations. In addition to those recommendations which are made jointly by the Commissions, some recommendations in this section have been made specifically by NIHRC or ECNI in line with their respective remits.

Constitutional issues

4.2 Protocol Article 2 adds an additional layer of human rights and equality protections in NI which must be considered within the wider constitutional human rights and equality framework. This section identifies those areas where the Commissions have raised specific concerns and made recommendations on the interaction of Protocol Article 2 in respect of a Bill of Rights for NI; the Human Rights Act; and Retained EU Law.

4.3 The Commissions reiterate the overarching recommendations on Protocol Article 2 above which are relevant across all areas in this section, in addition to the specific issues below.

A Bill of Rights for NI

4.4 A Bill of Rights for NI remains an unfulfilled commitment of the Belfast (Good Friday) Agreement.²⁶ Following commitments made in the New Decade, New Approach Agreement,²⁷ the Ad Hoc Committee on a Bill of Rights was established and, during 2021, conducted extensive stakeholder consultation. The Committee also carried out a survey between November 2020 and February 2021, seeking views on human rights and a Bill of Rights for NI. The results of this survey were published in March 2021.²⁸

²⁶ In 2008, as required by the Belfast (Good Friday) Agreement and the NI Act 1998, the NIHRC produced 'A Bill of Rights for Northern Ireland - Advice to the Secretary of State for Northern Ireland (NIHRC, 2009). Subsequent UK Government public consultation found "considerable support" for a Bill of Rights along lines recommended but UK Ministers have since referred to lack of political consensus. See UK Parliament Hansard, 'Written Ministerial Statement: Minister of State Hugo Swire MP', 16 December 2010; UK Parliament Hansard, 'House of Commons (Westminster Hall) - Bill of Rights (NI)', 16 July 2003.

²⁷ NI Office, 'New Decade, New Approach', (NIO, 2020).

²⁸ Research and Information Service, 'Briefing Note: NI Bill of Rights Survey', (NIA, 2021), at para 37.

- 4.5 The Commissions separately provided written submissions and oral evidence to the Committee, building on previous advice.²⁹ In April 2021, the Commissions jointly provided oral evidence on Protocol Article 2 and a Bill of Rights for NI.³⁰ The NIHRC and ECNI separately provided written submissions to the Ad Hoc Committee on a Bill of Rights in advance of this session.³¹
- 4.6 In its written evidence, the NIHRC gave an overview of how the ‘no diminution’ commitment in Protocol Article 2 and the provisions of the EU Charter of Fundamental Rights should inform the development and drafting of a NI Bill of Rights.³² It also highlighted the opportunities to ensure complementarity of approach regarding the Bill of Rights, Human Rights Act 1998 and the Protocol Article 2 commitment. The NIHRC advised that Protocol Article 2 strengthened the argument for a Bill of Rights.
- 4.7 In its report, the Ad Hoc Committee referenced the NIHRC evidence which highlighted the importance of the EU Charter of Fundamental Rights (the EU Charter) in the absence of a Bill of Rights and the limits of Protocol Article 2.³³ However, the report states that the Committee was unable to “make a decision on what constitutes the ‘particular circumstances’ of NI or the implications of Brexit for the ‘particular circumstances’” due to a lack of political consensus and the absence of the panel of experts.³⁴
- 4.8 In its written evidence, the ECNI highlighted that the NI Bill of Rights should be underpinned by measures to strengthen NI equality laws and address gaps in equality legislation. The need for additional measures, within a Bill of Rights, to better protect equality and human rights, is important in the context of UK Withdrawal from the EU. This is particularly in light of the negative impact on equality and human rights due to the exclusion of the EU Charter in UK domestic law³⁵ and the weak oversight mechanisms on rights under the Trade and Cooperation Agreement.

²⁹ NI Human Rights Commission, 'Response to the Ad Hoc Committee's Consultation on a Bill of Rights for NI', (NIHRC, 2021); Equality Commission for NI, 'Submission to Ad Hoc Committee on a Bill of Rights for NI', (ECNI, 2021).

³⁰ NI Assembly Hansard, 'Ad Hoc Committee on a Bill of Rights: Implications of Brexit for Human Rights: Equality Commission for Northern Ireland; Northern Ireland Human Rights Commission', 29 April 2021.

³¹ NI Human Rights Commission, 'Briefing Note for Ad Hoc Committee on a Bill of Rights: EU Withdrawal and a Bill of Rights', (NIHRC, 2021); Equality Commission for NI, 'Submission to the Ad Hoc Committee on a Bill of Rights for NI', (ECNI 2021).

³² NI Human Rights Commission, 'Response to the Ad Hoc Committee's Consultation on a Bill of Rights for NI', (NIHRC, 2021).

³³ Ad Hoc Committee on a Bill of Rights, '156/17-22 Report of the Ad Hoc Committee on a Bill of Rights', (NIA, 2022), at para 180 and 186-188.

³⁴ Ibid, at para 197.

³⁵ Equality Commission for NI, 'Submission to Ad Hoc Committee on a Bill of Rights for Northern Ireland', (ECNI, 2021), at 8.

- 4.9 The ECNI also highlighted the limitations of the Protocol, including that the ‘keeping pace’ commitment applies only to Annex 1 directives and not to other existing EU Directives that provide rights for equality groups. It also does not cover future EU equality related Directives that may be introduced, except to the extent that they might result in changes to the Annex 1 Directives.³⁶
- 4.10 In its report, the Ad Hoc Committee referenced the ECNI’s recommendation that a Bill of Rights is underpinned by measures to strengthen NI equality laws.³⁷
- 4.11 In March 2021, the NIHRC responded to the Independent Human Rights Act Review Team’s UK wide Call for Evidence, identifying the specific impact that altering the operational mechanisms of the Human Rights Act could have on NI.³⁸ In addition to highlighting the importance of Protocol Article 2, the NIHRC recommended that the Independent Human Rights Act Review Team engage with the Ad Hoc Committee on a Bill of Rights for NI to ensure that the NI context was appropriately considered in the course of the review.³⁹ The report of the review team was published on the same day as the Ministry of Justice consultation on Human Rights Act Reform.⁴⁰
- 4.12 In its response to the Ministry of Justice consultation on Human Rights Act Reform,⁴¹ the NIHRC advised that Protocol Article 2 is no substitute for a NI Bill of Rights.⁴² The NIHRC highlighted the human rights and safeguards in the relevant chapter of the Belfast (Good Friday) Agreement and that Protocol Article 2 is limited to precluding a diminution of rights, safeguards or equality of opportunity occurring ‘as a result of Brexit’. Moreover, the ‘keeping pace’ requirement only applies to the six Annex 1 Equality Directives and not to other relevant underpinning EU obligations where only non-diminution is guaranteed. A wide range of NI legislation relevant to rights may therefore be susceptible to diminution that would be

³⁶ Equality Commission for NI, ‘Submission to Ad Hoc Committee on a Bill of Rights for Northern Ireland’, (ECNI, 2021), at 10.

³⁷ Ad Hoc Committee on a Bill of Rights, ‘156/17-22 Report of the Ad Hoc Committee on a Bill of Rights’, (NIA, 2022), at para 231.

³⁸ NI Human Rights Commission, ‘Submission to the Independent Human Rights Act Review Team’s Call for Evidence’, (NIHRC, 2021), at 3.

³⁹ Ibid.

⁴⁰ Independent Human Rights Act Review Team, ‘The Independent Human Rights Act Review 2021’, (MoJ, 2021).

⁴¹ Ministry of Justice, ‘Human Rights Act Reform: A Modern Bill Of Rights - A consultation to reform the Human Rights Act 1998’, (MoJ, 2021).

⁴² NI Human Rights Commission, ‘Response to the consultation on Human Rights Act Reform: a Modern Bill of Rights’, (NHRC 2022).

incapable of challenge via Protocol Article 2 but could be protected by a non-retrogression clause in a Bill of Rights.

Recommendations

- 4.13 **The Commissions welcome local progress made by the Ad-Hoc Assembly Committee on a Bill of Rights for NI but continue to recommend that the NI Office implements the UK Government commitment to legislate for a Bill of Rights for NI.**
- 4.14 **The NIHRC recommends that the Ministry of Justice considers and engages with the ongoing process to develop a Bill of Rights for NI to avoid contradicting and frustrating this process, committed to under the Belfast (Good Friday) Agreement.**
- 4.15 **The ECNI recommends that the UK Government and NI Executive ensure that there are additional measures within a Bill of Rights to strengthen NI equality laws, address gaps in equality legislation and protect equality and human rights in a post-Brexit context.**

Divergence of rights on the island of Ireland

- 4.16 The text of the Belfast (Good Friday) Agreement requires “at least an equivalent level of protection of human rights” in Ireland as in NI.⁴³ In its Explainer on Protocol Article 2, the UK Government sets out its view that the 1998 Agreement does not require North-South equivalence of rights and equality protections.⁴⁴ However, in the context of the Protocol Article 2 commitment, it also highlighted that “best practices in the area of human rights and equalities in the rest of the UK, the EU and rest of the world will be taken into consideration as the commitment is implemented”.⁴⁵
- 4.17 Pursuant to the Belfast (Good Friday) Agreement, the Joint Committee of the NIHRC and IHREC was established as a forum for the consideration of human rights issues on the island of Ireland that are of cross-jurisdictional relevance. The Joint Committee of NIHRC and IHREC believe that it is clear from the context of the provisions and the establishment of the Joint

⁴³ Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights; the Agreement states, “the Irish Government will also take steps to further strengthen the protection of rights in its jurisdiction ... The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland”.

⁴⁴ NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 9.

⁴⁵ Ibid, at para 7.

Committee that long-term North-South equivalence was the intention.⁴⁶ In addition, the ECNI, NIHRC and IHREC will work together to provide oversight of, and report on, issues which engage Protocol Article 2 with an all-island dimension.⁴⁷

- 4.18 The Commissions consider that long-term North-South equivalence is important to ensure there is no diminution of rights in NI and to ensure that human rights and equality protections are subject to continual improvement. Whilst the Protocol requires that NI equality law keeps pace with any EU changes to the Annex 1 equality directives which enhance protections, there is the potential for equality and human rights on the island of Ireland to diverge after the end of the Brexit transition period. For example, there are already a number of proposed EU laws, and/or EU laws which were not transposed into Northern Ireland law prior to the end of the Brexit transition period, that have the potential to strengthen equality and human rights. Such EU laws, if introduced, will need to be implemented in law in Ireland, but the UK Government will not, under the terms of the Protocol, be required to ‘keep pace’ with them in terms of implementing them into Northern Ireland law. Such EU laws include, for example, the Parental Leave Directive,⁴⁸ the European Accessibility Act,⁴⁹ and proposed legislation aiming to improve the gender balance among non-executive directors of listed companies.⁵⁰
- 4.19 The three Commissions have also commissioned research on the divergence of equality and human rights on the island of Ireland. This research will highlight in more detail EU developments (law, CJEU case law, policy and best practice) that relate to equality and human rights in NI post Brexit. The research is due to be completed in Spring 2022.

Recommendation

- 4.20 **The Commissions recommend that the UK Government and the NI Executive ensure North-South equivalence, by keeping pace with changes to equality and human rights law, arising as a result of EU laws introduced**

⁴⁶ NIHRC and IHREC, ‘Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission - Policy statement on the United Kingdom withdrawal from the European Union’ (NIHRC and IHREC, 2018).

⁴⁷ Article 2(2) and Article 14(c), Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement. See also; NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at 5.

⁴⁸ Directive 2019/1158/EU ‘Directive of the European Parliament and Council on work-life balance for parents and carers’, 20 June 2019.

⁴⁹ Directive 2019/882/EU, ‘Directive of the European Parliament and Council on the accessibility requirements for products and services’, 17 April 2019.

⁵⁰ EU Commission, Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures.

on or after 1 January 2021, that enhance protections. This should include rights introduced as a result of EU laws that do not amend or replace the Protocol Annex 1 Directives.

Human Rights Act

- 4.21 In 2017, the Report of the UN Working Group on the Universal Periodic Review recommended the UK Government ensure effective participation of all stakeholders in any process to amend the Human Rights Act and design a possible UK Bill of Rights.⁵¹ It also recommended no regression of rights and that “in view of the process of leaving the EU, [the UK Government] ensure that any new legislation aims at strengthening human rights in the entire jurisdiction of the country”.⁵²
- 4.22 In December 2020, the UK Government announced that there would be an independently conducted review of the Human Rights Act 1998. The Terms of Reference and a Call for Evidence for the Independent Review were published in January 2021.⁵³ The Terms of Reference specified that the Review would consider the operational mechanisms of the Human Rights Act, noting “the [Human Rights Act] is underpinned by the UK’s international obligations under the Convention, and the UK remains committed to upholding those obligations”.⁵⁴
- 4.23 In March 2021, the NIHRC responded to the Independent Human Rights Act Review Team’s Call for Evidence, identifying the specific impact that altering the operational mechanisms of the Human Rights Act could have on NI.⁵⁵ The Commission recommended that “the [Independent Review of the Human Rights Act] Team consider the Belfast (Good Friday) Agreement and the UK Government’s commitment to non-diminution when considering its deliberations”.⁵⁶
- 4.24 In March 2021, the NIHRC responded to the call for evidence on the UK Government’s Independent Human Rights Act Review by the UK Joint Committee on Human Rights.⁵⁷ The NIHRC, along with the Scottish Human

⁵¹ A/HRC/36/9, ‘Report of the Working Group on the Universal Periodic Review - UK of Great Britain and NI’, 14 July 2017, at paras 134.66-134.78.

⁵² Ibid, at para 134.76.

⁵³ Independent Human Rights Act Review Team, ‘Independent Human Rights Act Review Team: Call for Evidence’, (MoJ, 2021).

⁵⁴ Ibid, at 10.

⁵⁵ NI Human Rights Commission, ‘Submission to the Independent Human Rights Act Review Team’s Call for Evidence’, (NIHRC, 2021), at 3.

⁵⁶ Ibid.

⁵⁷ NI Human Rights Commission, ‘Submission to the Joint Committee on Human Rights on the Independent Human Rights Act Review’, (NIHRC, 2021).

Rights Commission and the Equality and Human Rights Commission, gave oral evidence to the Joint Committee. During this oral evidence session, the Chief Commissioner outlined how the Human Rights Act has impacted on NI's specific context, including by reference to the Belfast (Good Friday) Agreement 1998 and Protocol Article 2.⁵⁸

- 4.25 In September 2021, the NIHRC responded to the UK Government's Follow-up Report on the UN Convention on the Elimination of All Forms of Discrimination against Women (UN CEDAW), which focused on the implementation of four recommendations from the Committee's Concluding Observations on the UK in March 2019.⁵⁹ In this report the NIHRC reiterated its concerns about the potential impact of Human Rights Act reform on Protocol Article 2, advising the Committee may wish to request additional information from the UK Government on how changes to the Human Rights Act would impact on women in NI.
- 4.26 In December 2021, the Independent Human Rights Act Review Team published its report on the operation of the Human Rights Act 1998 and whether any change was required.⁶⁰ The Review Team noted in their report that they were mindful that a commitment to the European Convention on Human Rights (ECHR) "formed an important assumption of the UK-EU Withdrawal Agreement" as evidenced by Protocol Article 2 and the Trade and Cooperation Agreement.⁶¹
- 4.27 In December 2021, the Ministry of Justice published a consultation on its proposals to revise the Human Rights Act 1998 and replace it with a Bill of Rights "in order to restore proper balance between the rights of individuals, personal responsibility and the wider public interest".⁶² The consultation states that proposals will "ensure that human rights continue to be fully protected in NI ... through an improved framework that provides greater legal certainty and respects our constitutional principles" and that "these proposals will be fully in line with our commitments under the Withdrawal Agreement, the Northern Ireland Protocol and the TCA [Trade and Cooperation Agreement]".⁶³ However, there was no analysis on the impact

⁵⁸ UK Parliament Hansard, 'Joint Committee on Human Rights: Corrected oral evidence: The Government's Independent Human Rights Act Review - HC 1161', 10 March 2021.

⁵⁹ NI Human Rights Commission, 'Response to the UK Government's Follow-up Report to the UN CEDAW Committee's 2019 Concluding Observations on the UK of Great Britain and NI', (NIHRC, 2021).

⁶⁰ Independent Human Rights Act Review Team, 'The Independent Human Rights Act Review 2021', (MoJ, 2021).

⁶¹ Ibid, at para 31.

⁶² Ministry of Justice, 'Press Release: Plan to Reform the Human Rights Act', 14 December 2021.

⁶³ Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights - A consultation to reform the Human Rights Act 1998', (MoJ, 2021), at paras 68-70.

of these proposals on Protocol Article 2, nor any clarity on how the UK Government intends to ensure compliance with Protocol Article 2.

4.28 Article 4 of the Withdrawal Agreement provides that individuals can rely directly on the provisions of the Withdrawal Agreement in UK Courts, including Protocol Article 2. Article 4 further provides that judicial and administrative authorities must be empowered to “disapply inconsistent or incompatible domestic provisions”.⁶⁴ This has been incorporated into UK law in Section 7A of the EU (Withdrawal) Act 2018. The UK Government has recognised that Protocol Article 2 has direct effect and that individuals can invoke their rights under Protocol Article 2 in UK Courts.⁶⁵

4.29 In March 2022, the NIHRC responded to the consultation on the UK Government’s proposals, noting that, under Protocol Article 2, there can be no diminution of those ECHR rights which were underpinned by EU law prior to 1 January 2021.⁶⁶ The NIHRC registered its concern that any changes to how UK courts interpret the ECHR or how it is claimed or enforced in NI law and available remedies, could constitute a diminution of human rights and equality protections in Protocol Article 2.

4.30 The NIHRC further noted that Article 4 of the Withdrawal Agreement produces “the same legal effects” on the UK as EU law on Member States, including compliance with the EU Charter and the general principles of EU law. Where required by Protocol Article 2, the EU Charter continues to have relevance in NI.⁶⁷ The link between rights in the EU Charter and the ECHR is well established.⁶⁸ The NIHRC advised that changing how ECHR rights and European Court of Human Rights (ECtHR) jurisprudence is interpreted may impact on the interpretation of EU Charter rights within scope of Protocol Article 2.

4.31 In March 2022, ECNI responded to the UK Government’s proposals, drawing attention to the Government that it made clear in its Explainer document on Protocol Article 2 that it considered ‘the key rights and equality provisions in the Belfast (Good Friday) Agreement are supported

⁶⁴ UK Government, ‘UK Government commitment to no-diminution of rights, safeguards and equality of opportunity in Northern Ireland’, (NIO, 2020), at para 29.

⁶⁵ Ibid.

⁶⁶ NI Human Rights Commission, ‘Response to the consultation on Human Rights Act Reform: a Modern Bill of Rights’, (NIHRC, 2022).

⁶⁷ See *Re SPUC Pro-Life Ltd* [2022] NIQB 9, at para 115.

⁶⁸ *WebMindLicences kft v Nemzeti Adó*, Case C-419/14, 17 December 2015, para 70; *AK v Krajowa Rada Sądownictwa v Sąd Najwyższy*, Case C-585/18, C-624/18 C-625/18, 19 November 2019, para 116-118; *Rayonna prokuratura Lom*, Case C-467/18, 19 September 2019, paras 42-45.

by the ECHR'. It also made clear its commitment to the ECHR and 'to protecting and championing human rights'.⁶⁹ The ECNI noted that in its Human Rights Act reform consultation document there is no detail as to what consideration the UK Government has given to compliance with its commitment under Protocol Article 2 and that some of the proposed specific amendments to the Human Rights Act and, therefore, their exact nature and impact, are unclear from the consultation document.

4.32 The ECNI highlighted that:

given the general nature of some of the proposals, the Commission is concerned that there is the potential that some of the Government's proposals will weaken current ECHR / Human Rights Act protections and engage some of the rights, safeguards and equality of opportunity provisions set out in the relevant chapter of the Good Friday Agreement.⁷⁰

4.33 In March 2022, the NIHRC raised concerns regarding UK Government's plans to replace the Human Rights Act 1998 in its submission to the fourth cycle of the UN Human Rights Council's Universal Periodic Review of the UK. It highlighted in particular the failure of the proposals to adequately consider the Belfast (Good Friday) Agreement, Protocol Article 2 and the integral role of ECHR in NI.⁷¹

Recommendations

4.34 **The Commissions recommend that the Ministry of Justice sets out in detail what consideration has been given to the proposals' compliance with Protocol Article 2, including consideration of the effect of the proposals on the rights, safeguards and equality of opportunity protections under the relevant chapter of the Belfast (Good Friday) Agreement (and underpinned by EU law) that fall within the scope of Protocol Article 2.**

4.35 **The Commissions advise that the protection of safeguards under Protocol Article 2 encompasses how those rights within the scope of Article 2 are claimed and enforced and available remedies. The Commissions therefore recommend that in any assessment for compliance with Protocol Article**

⁶⁹ Equality Commission NI, 'Response to consultation: Human Rights Act Reform: A Modern Bill of Rights, Ministry of Justice', (ECNI, 2022).

⁷⁰ Ibid.

⁷¹ NI Human Rights Commission, 'NI Human Rights Commission Submission to the UN Human Rights Council's Universal Periodic Review of the UK', (NIHRC, 2022), at para 9.

2, the Ministry of Justice should consider access to remedies and how ECHR rights are claimed and enforced.

- 4.36 **The Commissions recommend that no further action is taken in relation to the Ministry of Justice’s proposals until a detailed assessment of compliance with Protocol Article 2 is undertaken and published.**
- 4.37 **The Commissions recommend that the Ministry of Justice provides greater clarification on all its proposals, to enable a full assessment of the degree to which the proposals are compliant with Protocol Article 2.**
- 4.38 **The NIHRC recommends that the Ministry of Justice takes cognisance of the interplay of the ECHR, the EU Charter of Fundamental Rights and Protocol Article 2 and ensures there is no weakening of the substantive rights, or how those rights are claimed and enforced, including access to remedies.**

Retained EU Law

- 4.39 The EU (Withdrawal) Act 2018 repealed the European Communities Act 1972, which gave effect to EU law within the UK domestic legal framework before 1 January 2021.⁷² Notwithstanding that repeal, retained EU law continues to be recognised and available as UK law on and after 1 January 2021.⁷³
- 4.40 Where required by the UK-EU Withdrawal Agreement both the EU Charter and the general principles of EU law will continue to be relevant to the provisions of the Withdrawal Agreement, including Protocol Article 2.⁷⁴ This is an exception from the general provision of the EU (Withdrawal) Act 2018 which provides that the EU Charter is not carried over by the general rules on the retention of EU law and is not part of UK law on or after 1 January 2021.⁷⁵
- 4.41 The question of whether a piece of legislation falls within the category of 'retained EU law' is not material to whether it falls within the scope of Protocol Article 2. It is not necessary for EU-derived UK law underpinning the rights, safeguards and equality of opportunity protections in the relevant part of the Belfast (Good Friday) Agreement to be part of retained EU law. Nevertheless, particular care should be taken by the NI Executive

⁷² Section 1, European Union (Withdrawal) Act 2018.

⁷³ Sections 2-4, EU (Withdrawal) Act 2018.

⁷⁴ Article 4, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

⁷⁵ Section 5, EU (Withdrawal) Act 2018. See also; *Re SPUC Pro-Life Limited* [2022] NIQB 9, at paras 78 and 115.

and UK Government when repealing or amending retained EU law to ensure it does not result in a diminution of rights, safeguards or equality of opportunity protections contrary to Protocol Article 2.

- 4.42 Pursuant to the EU (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, the power to depart from retained EU case law was extended to additional courts, including the Court of Appeal NI.⁷⁶ These regulations came into effect on 1 January 2021 and preserved the normal operation of precedent between UK courts, therefore a decision of a superior court on whether or not to depart from retained EU case law would continue to be binding.
- 4.43 In March 2021, the Court of Appeal in England identified a number of principles to be considered when departing from retained EU caselaw and confirmed that it can depart from any retained CJEU case law or general principles if it considers it right to do so. Nevertheless, the court should take into account the meaning and effect of a retained EU measure by reference to CJEU jurisprudence up to and including 31 December 2020 and that general principles derived from the EU Charter and Treaties continue to be relevant to interpretation.⁷⁷
- 4.44 In its response to the UK Government's follow-up Report to the UN CEDAW Committee in September 2021, the NIHRC highlighted concerns about amendments to retained EU law over time repealing or amending a provision, without adequate parliamentary scrutiny, leading to a diminution of rights, safeguards or equality of opportunity and therefore engaging Protocol Article 2.⁷⁸ The NIHRC suggested that the UN CEDAW Committee recommend that the UK Government provide additional scrutiny on any change to retained EU law that engages Protocol Article 2, particularly on secondary legislation, in respect of its impact on women.
- 4.45 The ECNI, in its response to the Ad Hoc Committee on the Bill of Rights for NI⁷⁹ also expressed its concern that equality and human rights currently enshrined in NI domestic law that are *not* covered by the non-diminution commitment in Protocol Article 2 could be subject to change; both in relation to devolved and non-devolved matters. The ECNI noted⁸⁰ that it had, for example, expressed concern about the wide-ranging powers

⁷⁶ The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020.

⁷⁷ *Lipton & Another v BA City Flyer Ltd* [2021] EWCA Civ 454, at para 83.

⁷⁸ NI Human Rights Commission, 'Response to the UK Government's Follow-up Report to the UN CEDAW Committee's 2019 Concluding Observations on the UK of Great Britain and NI', (NIHRC, 2021).

⁷⁹ Equality Commission for NI, 'Submission to Ad Hoc Committee on a Bill of Rights for Northern Ireland', (ECNI, 2021).

⁸⁰ *Ibid*, at para 3.10.

('Henry VIII' powers) of Ministers of the Crown to make changes to EU retained equality law in Northern Ireland in its 2017 recommendations on the EU (Withdrawal) Bill.⁸¹

- 4.46 In September 2021, the UK Government announced a planned review of retained EU law to accelerate its repeal and amendment.⁸² In December 2021, Cabinet Office Minister, Lord Frost announced there would be two further reviews, the first into the substance of retained EU law and the second into its status in law with the overall intention to amend, repeal or replace all the retained EU law that was not right for the UK.⁸³ Lord Frost noted that, pursuant to the EU (Withdrawal) Act 2018, retained EU law is treated in some instances as UK primary law and that the UK Government would be revisiting the legislative framework to give it “a more appropriate status within the UK legal system for the purposes of amendment and repeal”.⁸⁴
- 4.47 In January 2022, the European Scrutiny Committee launched an inquiry into the future of retained EU law in the context of the reviews announced by the UK Government.⁸⁵ As of 31 March 2022, the Commissions were preparing a joint submission in advance of the April 2022 closing date, building on existing positions that any amendment or repeal of retained EU law, affecting human rights and/or equality protections in NI, should be progressed on the basis of continuing adherence to the UK constitutional convention of providing for policy change via the primary legislative process, with technical and operational detail addressed in subordinate legislation.
- 4.48 Protocol Article 2 imposes an obligation of result, so while the form of the legislation can change, the no diminution requirement applies to the substance of the rights protected as well as to the procedural safeguards relevant to implementation and enforcement of rights. Changes to the status of EU-derived UK law which, for example, excluded specific EU general principles, changed how courts interpret that law, and/or reduced or limited the means by which rights can be asserted or enforced, could therefore potentially constitute a diminution of rights.

⁸¹ Equality Commission for NI, 'UK's decision to leave the EU: recommendations on the EU (Withdrawal) Bill', (ECNI, 2017).

⁸² UK Parliament Hansard, 'House of Lords: Brexit Opportunities - Lord Frost', 16 September 2021.

⁸³ UK Parliament Hansard, 'Written Statement: Brexit Opportunities: Review of Retained EU Law – Lord Frost – UIN HLWS445', 9 December 2021.

⁸⁴ Ibid.

⁸⁵ European Scrutiny Committee, 'Call for Evidence: Retained EU Law: Where Next?', (ESC, 2022).

4.49 In March 2022, the NIHRC highlighted its concerns regarding the repeal or amendment of retained EU law where it relates to human rights or equality protections in its submission to the fourth cycle of the UN Human Rights Council’s Universal Periodic Review of the UK. The submission advised that care should be taken when repealing or amending retained EU law to ensure it does not result in a diminution of rights contrary to Protocol Article 2 and that any change impacting human rights or equality, should progress changes by primary legislation, rather than secondary legislation or other ‘accelerated process’.⁸⁶

Recommendations

4.50 **The Commissions recommend that no change to retained EU law be made which would weaken Protocol Article 2, its enforceability or oversight mechanisms.**

4.51 **The Commissions recommend that when making any change to retained EU law, the relevant UK or NI Minister confirms that an assessment for compliance with the commitment in Protocol Article 2 has been undertaken and that there is no diminution of the rights, safeguards and equality of opportunity as set out in the relevant part of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU.**

Equality and non-discrimination

4.52 Protocol Article 2 provides specific protection against discrimination as enshrined in the six EU equality directives listed in Annex 1 of the Protocol. The UK Government has said that these directives have “been specifically referenced because of the important framework they provide for the anti-discrimination commitments set out in the relevant chapter of the Belfast (Good Friday) Agreement”.⁸⁷

4.53 The Racial Equality Directive protects against discrimination on the grounds of race and ethnicity across a range of areas, including employment and vocational training, access to goods and services, education and social security.⁸⁸

⁸⁶ NI Human Rights Commission, ‘NI Human Rights Commission Submission to the UN Human Rights Council’s Universal Periodic Review of the UK’, (NIHRC, 2022), at para 12.

⁸⁷ NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at 3.

⁸⁸ Directive 2000/43/EC, ‘Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin’, 29 June 2000.

- 4.54 The Employment Equality (Framework) Directive protects against discrimination on the grounds of age; religion; sexual orientation; and disability in employment and vocational training.⁸⁹
- 4.55 The four gender equality directives: Gender Goods and Services Directive;⁹⁰ Gender Equality (Employment) Directive;⁹¹ Self-Employment Equality Directive;⁹² and Equality in Social Security Directive⁹³ protect against discrimination in employment (including self-employment) and vocational training, access to goods and services and social security.
- 4.56 NI equality law must keep pace with any changes made by the EU to improve the minimum levels of protection, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.⁹⁴
- 4.57 The Commissions reiterate the overarching recommendations on Protocol Article 2 in relation to equality and non-discrimination which are relevant across all areas in this section, in addition to the specific issues below.

Age Discrimination

- 4.58 Unlike in Great Britain and Ireland, there is currently no prohibition on discrimination in the provision of goods, facilities and services in NI on the basis of age.⁹⁵ This has resulted in a divergence of rights across the island of Ireland with Northern Ireland falling behind Ireland and Great Britain with respect to age discrimination. There is also a draft EU Directive (the Horizontal Directive) on prohibiting age discrimination in access to goods, facilities and services, as well as discrimination on other equality grounds, such as religion and belief, which has yet to be finalised and brought into force. If introduced,⁹⁶ the UK, including NI would have had to implement this Directive if the UK had not left the EU.

⁸⁹ Directive 2000/78/EC, 'Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000.

⁹⁰ Directive 2004/113/EC, 'Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and Services', 13 December 2004.

⁹¹ Directive 2006/54/EC, 'Directive of European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast)', 5 July 2006.

⁹² Directive 2010/41/EU, 'Directive of the European Parliament and of the Council on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity', 7 July 2010.

⁹³ Directive 79/7/EEC, 'Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security', 19 December 1978.

⁹⁴ Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

⁹⁵ Equality Commission for NI, 'Gaps in equality law between Great Britain and Northern Ireland', (ECNI, 2014).

⁹⁶ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Brussels, 2.7.2008 COM(2008) 426 final, 2008/0140 (CNS).

- 4.59 Protocol Article 2 provides specific protection against discrimination as enshrined in the six directives listed in Annex 1 of the Protocol, including the **Employment Equality (Framework) Directive** which protects against discrimination on the grounds of age in employment.⁹⁷
- 4.60 NI equality law must keep pace with any enhancements made by the EU to the six Annex 1 directives, on or after 1 January 2021. This obligation also includes monitoring current and future CJEU case law.⁹⁸ Both Commissions have called for the NI Executive to introduce specific legislation which will extend protection against age discrimination in the provision of goods, facilities and services.⁹⁹ As, in general there is protection against age discrimination for adults in Great Britain and Ireland, this would avoid the continuing divergence of rights and ensure that Northern Ireland keeps pace with British, Irish and potentially European law in relation to age discrimination in the provision of goods, facilities and services in NI.
- 4.61 In June 2016, the United Nations Convention on the Rights of the Child (UN CRC) Committee recommended that the UK Government and the NI Executive “consider the possibility of expanding legislation to provide protection of all children under 18 years of age against discrimination on the grounds of their age”.¹⁰⁰

Recommendations

- 4.62 **The Commissions recommend that the NI Executive introduces age discrimination legislation in the provision of goods, facilities and services to address gaps in protections between NI and Great Britain and to avoid divergence of rights on the island of Ireland.**
- 4.63 **In line with the ‘keeping pace’ obligations under Protocol Article 2, the Commissions recommend that the Executive Office monitor any proposed changes by the EU to the six Annex 1 Equality Directives, including relevant case law of the CJEU.**

⁹⁷ Directive 2000/78/EC, ‘EU Council Directive on establishing a General Framework for Equal Treatment in Employment and Occupation’, 27 November 2000.

⁹⁸ Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

⁹⁹ Including providing for the protection against discrimination on the grounds of age to children under 18 years of age.

¹⁰⁰ CRC/C/GBR/CO/5, ‘UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016.

Consolidating, strengthening and clarifying equality protections and intersectional and multiple discrimination

- 4.64 In NI, discrimination is prohibited by a complex framework of legislation and regulations. Unlike other parts of the UK (which fall under the Equality Act 2010), there is no single legislative instrument to consolidate, clarify and enhance existing equality protections in NI.
- 4.65 In 2016, the UN International Covenant on Economic, Social and Cultural Rights (UN ICESCR) Committee stated its regret that no action had been taken on its earlier recommendation to extend “comprehensive anti-discrimination legislation” to NI.¹⁰¹ It further called for NI law to be enhanced to reflect protections in other jurisdictions in the UK.¹⁰²
- 4.66 Protocol Article 2 adds a further dimension which was highlighted in relation to consolidating and clarifying equality legislation in the NIHRC’s submission to the Advisory Committee on the Framework Convention on National Minorities, in March 2022.¹⁰³
- 4.67 NI legislation also does not provide for cases of intersectional multiple discrimination. At present in NI, each ground for discrimination must form its own case, meaning it has to be considered and ruled on separately.¹⁰⁴ The Equality Act 2010 which applies in England, Scotland and Wales, contains a dual discrimination provision, although this has not been brought into force.¹⁰⁵
- 4.68 The ECNI has consistently called for the harmonisation ‘upwards’ of equality law, in a way that strengthens and simplifies equality rights and protections.¹⁰⁶ The ECNI considers that single equality legislation would best harmonise and simplify the protections available. There are already

¹⁰¹ E/C.12/GBR/CO/6, 'UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 14 July 2016, at para 22.

¹⁰² Ibid, at para 23. Calls for equality protections to be extended to all parts of the UK, including NI were reiterated by CRI(2016)38, 'European Commission on Racial Intolerance Report on the UK (Fifth Monitoring Cycle)', (ECRI, 2016), at para 22; CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019, at para 16(a); and CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the United Kingdom of Great Britain and NI', 3 October 2017, at para 17(b).

¹⁰³ NI Human Rights Commission, 'Submission to the Advisory Committee on the Framework Convention for the protection of National Minorities – Parallel Report to the Advisory Committee on the Fifth Monitoring Report of the United Kingdom' (NIHRC, 2022).

¹⁰⁴ Equality Commission for NI, 'Recommendations for law reform: Strengthening protection against racial discrimination', (ECNI, 2014), at 38.

¹⁰⁵ House of Lords Select Committee on the Equality Act 2010 and Disability, 'The Equality Act 2010: The Impact on Disabled People (Report of session 2015-16) HL Paper 117, (HL, 2016).

¹⁰⁶ Equality Commission for NI, 'Gaps in equality law between Great Britain and Northern Ireland', (ECNI, 2014).

significant gaps between levels of protection against discrimination in Northern Ireland compared to other parts of the UK.

Review of the Race Relations Order 1997¹⁰⁷

- 4.69 The Executive Office Racial Equality Strategy 2015-2025 committed to reviewing the Race Relations (NI) Order 1997 and terms of reference of the review refer to the United Nations Committee on the Elimination of Racial Discrimination's (UN CERD) recommendation on multiple discrimination.¹⁰⁸ The Executive Office has confirmed that a comparison of protections offered by the Race Relations (NI) Order with laws in the rest of the UK and Ireland has been examined by the Departmental Solicitor's Office and formed part of the engagement with stakeholders and other administrations.¹⁰⁹ However, the Commissions understand that the consultation on legislative reform of the Race Relations (NI) Order is unable to proceed at present due to the absence of the Executive.¹¹⁰
- 4.70 In January 2022, the EU Commission launched a public consultation, running until 11 April, to pinpoint potential gaps in the Racial Equality Directive and identify measures to address these gaps.¹¹¹ Both Commissions plan to respond to the consultation, as part of their respective mandates to monitor the alignment of NI law with any enhancements to rights or safeguards under the Racial Equality Directive.¹¹²
- 4.71 The Commissions have previously highlighted concerns that there has been limited progress to consolidate, strengthen and clarify existing equality protections in NI thus far, despite numerous recommendations from various international standard bodies.¹¹³
- 4.72 The Commissions' respective responses to the consultation will develop existing positions on the need for more explicit recognition of intersectional and multiple discrimination within the Directive.

¹⁰⁷ This section focuses on that part of the review of the Race Relations Order as relates to multiple and intersectional discrimination. Additional considerations relating to Racial Equality and Protocol Article 2 are discussed in the corresponding section below.

¹⁰⁸ Eoin Mullan, Sinead Brown and Paul Roddy, 'Racial Equality Legislation Review', (TEO, 2018).

¹⁰⁹ Email correspondence from The Executive Office to the NI Human Rights Commission, October 2021.

¹¹⁰ Meeting of the Executive Office Racial Equality Subgroup, 16 February 2022.

¹¹¹ EU Commission, 'Addressing possible gaps in the Racial Equality Directive – Public Consultation', (EU, 2022).

¹¹² Section 78A(1), Northern Ireland Act 1998.

¹¹³ E/C.12/GBR/CO/5 'UN ICESCR Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI' 12 June 2009, at para 16; CRI(2016)38, 'European Commission on Racial Intolerance Report on the UK (Fifth Monitoring Cycle)' (ECRI, 2016), at para 22; ACFC/OP/IV(2016)005 'Advisory Committee on the Framework Convention for the Protection of National Minorities: Fourth Opinion on the United Kingdom adopted on 25 May 2016' 27 February 2017.

Recommendations

- 4.73 In line with the ‘keeping pace’ obligations under Protocol Article 2, the Commissions recommend that the Executive Office monitor any proposed changes by the EU to the six Annex 1 Equality Directives, including relevant case law of the CJEU and pays particular attention to the ongoing consultation by the EU on the Racial Equality Directive.
- 4.74 The Commissions recommend that the NI Executive introduce a single equality act to ensure that NI equality law is strengthened and that gaps are addressed as a matter of urgency.

Discrimination on Grounds of Sexual Orientation

- 4.75 Protocol Article 2 provides specific, enhanced protection against discrimination as enshrined in the six directives listed in Annex 1 of the Protocol, including the **Employment Equality (Framework) Directive** which protects against discrimination on the grounds of sexual orientation.¹¹⁴ NI equality law must keep pace with any changes made by the EU to improve the minimum levels of protection, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.¹¹⁵

LGBTQI+ Strategy

- 4.76 The New Decade, New Approach agreement committed to publishing a Sexual Orientation Strategy.¹¹⁶ The Department for Communities has adopted a co-design approach to developing the strategy, which included appointing an Expert Advisory Panel and undertaking ongoing engagement with a Co-Design Group and Cross-Departmental Working Group made up of key stakeholders. The Expert Panel report was published in March 2021.¹¹⁷ The Co-Design Group and cross-departmental working group have met regularly since November 2020 and will continue to meet until the finalisation of the action plan. The NIHRC and ECNI are both members of the Co-Design Group for the LGBTQI+ Strategy and have raised, among other issues, how gender equality engages commitments under Protocol Article 2. The strategy is due to be subject to public consultation in 2022 and will thereafter be published.

¹¹⁴ Directive 2000/78/EC, ‘EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation’, 27 November 2000.

¹¹⁵ Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

¹¹⁶ NI Office, ‘New Decade, New Approach’, (NIO, 2020), at 27.

¹¹⁷ Department for Communities, ‘LGBTQI+ Strategy Expert Advisory Panel – Themes and Recommendations’ (DfC, 2020).

Local Government Pensions

- 4.77 In October 2021, the Department for Communities consulted on draft Local Government Pension Scheme (Amendment) Regulations. The proposed amendments address gender and sexual orientation discrimination in relation to survivor benefits as highlighted in the cases of *Goodwin* and *Walker*, including retrospective application of the regulations.¹¹⁸
- 4.78 While the NIHRC did not identify a breach, it advised the Department for Communities that it must screen all new legislation to ensure its compatibility with Protocol Article 2. The Department should, therefore, consider Protocol Article 2 throughout the development and implementation of amendments to the Local Government Pension Scheme in NI.

Recommendations

- 4.79 **The Commissions recommend that the Department for Communities promptly publishes and implements a robust LGBTQI+ Strategy for NI, accompanied by a measurable plan of action, which takes into account its obligations under Protocol Article 2.**
- 4.80 **In line with our overarching recommendations, the Commissions recommend that the Department for Communities should consider Protocol Article 2 throughout the development and implementation of amendments to the Local Government Pension Scheme in NI.**

Gender Equality Strategy

- 4.81 Protocol Article 2 provides specific, enhanced protection against discrimination as enshrined in the six directives listed in Annex 1 of the Protocol, including the **equality directives which protect against gender discrimination** and which cover **employment and vocational training**,¹¹⁹ **access to goods and services**,¹²⁰ and **social security**.¹²¹ NI equality law must keep pace with any changes made by the EU which improve the minimum

¹¹⁸ Department for Communities, 'Consultation on the draft Local Government Pension Scheme (Amendment) Regulations (Northern Ireland) 2022', (DFC, 2021).

¹¹⁹ Directive 2006/54/EC, 'EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation', 5 July 2006; Directive 2010/41/EU, 'EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity', 7 July 2010.

¹²⁰ Directive 2004/113/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services', 13 December 2004.

¹²¹ Directive 79/7/EEC, 'EU Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security', 19 December 1978.

levels of protection, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.¹²²

- 4.82 The rights, safeguards and equality of opportunity provisions set out in the relevant Chapter of the Belfast (Good Friday) Agreement include the “right to equal opportunity in all social and economic activity, regardless of ... gender”. To the extent that additional EU obligations fall within scope of Protocol Article 2, such as the Parental Leave Directive¹²³ and the Pregnant Worker’s Directive,¹²⁴ there should be no diminution of rights, safeguards and equality of opportunity following the UK withdrawal from the EU.
- 4.83 Following the commitment in the New Decade, New Approach agreement, to publish a new Gender Equality Strategy¹²⁵, the Department for Communities has adopted a co-design approach to development of the strategy. This has included appointing an Expert Advisory Panel and undertaking ongoing engagement with a Co-Design Group and Cross-Departmental Working Group made up of key stakeholders. The Expert Panel published its report in March 2021¹²⁶. The report highlighted key human rights obligations as relevant to gender equality and outlined a number of key themes for discussion by the Co-Design Group¹²⁷. The Co-Design Group and Cross-Departmental Working Group have met regularly since November 2020. The strategy is due to be subject to public consultation in 2022. Both the NIHRC and ECNI are members of the co-design group and have raised, among other issues, how gender equality engages commitments under Protocol Article 2.

Recommendation

- 4.84 **The Commissions recommend that the Department for Communities promptly publishes and implements a robust Gender Equality Strategy for NI, accompanied by a measurable plan of action, which takes into account its obligations under Protocol Article 2.**

Transgender Discrimination

- 4.85 Protocol Article 2 provides specific, enhanced protection against discrimination as enshrined in the six directives listed in Annex 1 of the

¹²² Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

¹²³ Directive 2010/18/EU, ‘Council Directive implementing the revised Framework Agreement on parental leave’, 8 March 2010.

¹²⁴ Directive 92/85/EEC, ‘Council Directive on the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers who have Recently Given Birth or are Breastfeeding’, 19 October 1992.

¹²⁵ NI Office, ‘New Decade, New Approach’, (NIO, 2020).

¹²⁶ Department for Communities, ‘Gender Equality Strategy Expert Advisory Panel Report’, (DfC, 2021).

¹²⁷ *Ibid*, at 12.

Protocol including the **equality directives** which cover **employment and vocational training**,¹²⁸ **access to goods and services**,¹²⁹ and **social security**¹³⁰ and protect against gender discrimination, including transgender people. The CJEU has made it clear in that “to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard”.¹³¹ NI equality law must keep pace with any changes made by the EU to improve the minimum levels of protection, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.¹³²

LGBTQI+ Strategy

4.86 As noted above, the Department for Communities has adopted a co-design approach to developing the strategy, which included appointing an Expert Advisory Panel and undertaking ongoing engagement with a Co-Design Group and Cross-Departmental Working Group made up of key stakeholders. The Expert Panel published its report in March 2021, making a number of recommendations around gender recognition including that legislation is fit for purpose and recognises and is reflective of the diversity of genders in NI.¹³³ The Co-Design Group and Cross-Departmental Working Group have met regularly since November 2020 and will continue to meet until the finalisation of the action plan. The NIHRC and ECNI are both members of the Co-Design Group for the LGBTQI+ Strategy and have raised among other issues, how gender equality engages commitments under Protocol Article 2. The strategy is due to be subject to public consultation in 2022.

Recommendations

4.87 **The Commissions recommend that the Department for Communities promptly publishes and effectively implements a robust LGBTQI+ Strategy for NI, accompanied by a measurable plan of action, which takes into**

¹²⁸ Directive 2006/54/EC, ‘EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation’, 5 July 2006; Directive 2010/41/EU, ‘EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity’, 7 July 2010.

¹²⁹ Directive 2004/113/EC, ‘EU Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services’, 13 December 2004.

¹³⁰ Directive 79/7/EEC, ‘EU Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security’, 19 December 1978.

¹³¹ *P v S and Cornwall County Council*, Case C-13/94, 30 April 1996, at para 22.

¹³² Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

¹³³ Department for Communities, ‘LGBTQI+ Strategy Expert Advisory Panel – Themes and Recommendations’, (DfC, 2021).

account its obligations under Protocol Article 2, including effective monitoring arrangements.

Participation of Women in Public Life

- 4.88 Protocol Article 2 provides specific, enhanced protection against discrimination as enshrined in the six directives listed in Annex 1 of the Protocol, including the **equality directives which protect against gender discrimination** and which cover **employment and vocational training**,¹³⁴ **access to goods and services**,¹³⁵ and **social security**.¹³⁶ All of these protections impact women's ability to participate in public life. NI equality law must keep pace with any changes made by the EU to improve the minimum levels of protection, in the Annex 1 Directives, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.¹³⁷
- 4.89 The Commissions consider that, in the long-term, North-South rights equivalence is important. While the Protocol requires that NI equality law keeps pace with any EU changes to the Annex 1 equality directives which enhance protections, there is the potential for equality and human rights on the island of Ireland to diverge after the end of the Brexit transition period in relation to the participation of women in public life.
- 4.90 For example, the EU Commission has proposed a directive on gender balance in non-executive director roles,¹³⁸ whereby Member States would be required to ensure that listed companies employ at least 40% female members in non-executive director roles. If adopted, Ireland would be obliged under EU law to adopt measures to promote the participation of women in non-executive director roles, provisions which may not be reflected in NI law and which could potentially lead to a divergence of rights.

¹³⁴ Directive 2006/54/EC, 'EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation', 5 July 2006; Directive 2010/41/EU, 'EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity', 7 July 2010.

¹³⁵ Directive 2004/113/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services', 13 December 2004.

¹³⁶ Directive 79/7/EEC, 'EU Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security', 19 December 1978.

¹³⁷ Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

¹³⁸ European Commission, Proposal for a Directive of the European Parliament and of the Council on Improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM(2012)614, 14 November 2012.

4.91 In Protocol Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity protections contained in that chapter of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU. This Chapter includes the “right of women to full and equal political participation” and the “right to equal opportunity in all social and economic activity, regardless of ... gender”. To the extent that additional EU obligations fall within the scope of Protocol Article 2, such as the Parental Leave Directive¹³⁹ and the Pregnant Worker's Directive,¹⁴⁰ there should be no diminution of rights, safeguards and equality of opportunity following the UK withdrawal from the EU.

Recommendation

4.92 **In line with the ‘keeping pace’ obligations under Protocol Article 2, the Commissions recommend that the Department for Communities monitor any proposed changes by the EU to the six Annex 1 Equality Directives, including relevant case law of the CJEU and the four gender equality directives.**

Persons With Disabilities

4.93 Protocol Article 2 provides specific, enhanced protection against discrimination as enshrined in the six Annex 1 Equality Directives, including the **Employment Equality (Framework) Directive** which protects against discrimination on the grounds of disability in employment and vocational training.¹⁴¹ NI equality law must keep pace with any changes made by the EU to these rights to improve the minimum levels of protection available, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.¹⁴²

4.94 In addition, in Protocol Article 2, the UK Government committed to ensuring there is no diminution of the rights, safeguards and equality of opportunity protections contained in that chapter of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU. The UK Government has also recognised a non-exhaustive list of relevant measures

¹³⁹ Directive 2010/18/EU, ‘Council Directive implementing the revised Framework Agreement on parental leave’, 8 March 2010.

¹⁴⁰ Directive 92/85/EEC, ‘Council Directive on the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers who have Recently Given Birth or are Breastfeeding’, 19 October 1992.

¹⁴¹ Directive 2000/78/EC, ‘EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation’, 27 November 2000.

¹⁴² Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

which fall within scope of the commitment in Protocol Article 2, including specific measures which protect the rights of disabled people.¹⁴³

- 4.95 As the EU has acceded to the UN Convention on the Rights of People with Disabilities (UN CRPD),¹⁴⁴ there is an overriding obligation to promote, protect and implement the UN CRPD through EU law and policy.¹⁴⁵ The UN CRPD is relevant to the interpretation of Withdrawal Agreement, including Protocol Article 2, and to all EU measures referenced in that Agreement.¹⁴⁶ The UN CRPD is similarly relevant to the interpretation of any additional underpinning EU obligations for the rights, safeguards and equality of opportunity listed in the relevant part of the Belfast (Good) Friday Agreement.¹⁴⁷

Disability Strategy

- 4.96 Following the New Decade, New Approach commitment to publish a Disability Strategy, the Department for Communities has adopted a co-design approach in the development of a Disability Strategy. This included appointing an Expert Advisory Panel and undertaking ongoing engagement with a Co-Design Group and cross-departmental working group made up of key stakeholders. The Expert Panel published its report in March 2021, highlighting a focus on the general principles of the UN CRPD which should form a guide to what should be included in a Disability Strategy.¹⁴⁸ The Co-Design Group and cross-departmental working group have met regularly from November 2020. The Strategy is expected to be subject to public consultation in early 2022. The Commissions are members of the Co-Design Group for the Disability Strategy and have identified the need to embed consideration of Protocol Article 2 into the Disability Strategy.

Autism strategy

- 4.97 The Autism Act (NI) 2011 places a statutory responsibility on the Department of Health to publish an autism strategy every seven years. The first Autism Strategy 2013-2020 was published in January 2014 and expired at the end of 2020, with its three-year action plan already having expired in 2016. The New Decade, New Approach agreement committed to publish a

¹⁴³ NI Office, 'UK Government Commitment to "No Diminution of Rights, Safeguards and Equality of Opportunity" in Northern Ireland: What does it Mean and How will it be Implemented?', (NIO, 2020), at para 13.

¹⁴⁴ EU Commission, 'Press Release: EU Ratifies UN Convention on Disability Rights', 5 January 2011.

¹⁴⁵ *HK Danmark (Jette Ring and Lone Skouboe Werge)*, Case 335/11 and Case 337/11, 11 April 2013, at paras 28-32; *Z v A Government Department*, Case C-363/12, 14 March 2014, at para 85.

¹⁴⁶ Article 2(a)(iv) and Article 4, UK-EU Withdrawal Agreement 2020.

¹⁴⁷ Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

¹⁴⁸ Department for Communities, 'Disability Strategy Expert Advisory Panel – Report and Recommendations', (DfC, 2020).

Disability Strategy and a Children and Young People's Strategy, but not an Autism Strategy.¹⁴⁹

- 4.98 Following delays caused by the COVID-19 pandemic, in March 2021, the Department of Health published the 'Autism Interim Strategy 2021-2022'.¹⁵⁰ In August 2021, the Department of Health consulted on key priorities to inform the next five-year Autism Strategy.
- 4.99 In July 2021, Pam Cameron MLA, introduced a Private Member's Bill, the Autism (Amendment) Bill, to amend the Autism (Northern Ireland) Act 2011 and introduce new duties; review and update the current Programme for Care; introduce an independent scrutiny mechanism; and develop funding for an Autism training strategy for NI.
- 4.100 The NIHRC provided written advice to the Committee for Health on the Bill in September 2021, welcoming the intention of the Bill to strengthen the impact of the Autism Strategy and the relevance of the UN CRPD. The NIHRC further advised that the Department for Communities should consider the Protocol Article 2, including the Employment Equality (Framework) Directive and continue to monitor relevant current and future CJEU jurisprudence insofar as it is relevant to those parts of the Autism Strategy relating to employment and vocational education.¹⁵¹ The Autism (Amendment) Act (Northern Ireland) 2022 was passed by the Assembly and submitted for Royal Assent in March 2022.

Assistance Dogs

- 4.101 Rules around taking pets between the EU and the UK changed after the UK withdrew from the EU, meaning pet-owners in Great Britain have to fulfil additional requirements before travelling to the EU.¹⁵² Due to certain EU standards continuing to apply in NI after UK Withdrawal from the EU, these additional requirements are also applicable for pet-owners travelling from Great Britain into NI. The new regulations impact upon disabled people's ability to travel freely as they may require assistance dogs.¹⁵³ The Commissions wrote jointly to the Minister for Agriculture, Environment and Rural Affairs to raise concerns about the UK's international human rights obligations in relation to the additional obligations and raise human rights

¹⁴⁹ NI Office, 'New Decade, New Approach', (NIO, 2020).

¹⁵⁰ Department of Health, 'Autism Interim Strategy 2021-2022', (DoH, 2021).

¹⁵¹ Letter from the NI Human Rights Committee to Colm Gildernew MLA, Chair of the Committee for Health, on Call for Evidence on the Autism (Amendment) Bill, 6 October 2021.

¹⁵² 'Pet passport: Can I take my pet to the EU after Brexit?', BBC News, 24 June 2021.

¹⁵³ Amy Stewart, 'Guide Dogs: Charity calls for NI exemption on new post-Brexit rules' BBC News NI, 5 January 2021.

and equality implications under Protocol Article 2.¹⁵⁴ Checks on pets entering NI from Great Britain were subsequently delayed until July 2021 and then further delayed indefinitely to allow for the UK and EU to find a long-term solution.¹⁵⁵

4.102 The Commissions have also raised the issue of checks on those travelling with assistance dogs with the NI Assembly, Committee for the Executive Office, the House of Commons Northern Ireland Affairs Committee and the House of Lords Sub-Committee on the Ireland/Northern Ireland Protocol. The House of Lords Sub-Committee subsequently wrote to the Secretary of State for NI to request that the UK Government provides its assessment of the interaction of these issues with Protocol Article 2 and an update on the UK Government's efforts, including dialogue with the EU, to resolve these issues¹⁵⁶. The Commissions highlighted that the issue of travel arrangements for assistance dogs may have potential equality and human rights implications both domestically and internationally, including in relation to Protocol Article 2, Article 8 of the ECHR and the UN CRPD.¹⁵⁷

Medicines

4.103 Under the Protocol NI remains aligned to EU regulations and legislation on medicines and their supply. Following the end of the 'grace period', which had been due to end on 31 December 2021, it would have been required that all medicines imported to NI from GB follow EU rules and regulations. As a result, suppliers raised concerns about the viability of supplying items to NI in the longer term. The Commissions raised concerns that this could result in NI facing continued and intensified disruption in relation to medicines supply.

4.104 The Commissions raised these concerns in evidence to the House of Lords Sub-Committee on the Ireland/Northern Ireland Protocol, highlighting potential equality and human rights implications and negative impacts on the day to day lives of disabled people in NI, emphasising that there should be no-diminution of rights for disabled people in relation to their access to health and treatment, and that the UK and EU undertake urgent

¹⁵⁴ Letter from the NI Human Rights Commission and Equality Commission for NI to Head of the NI Civil Service, 10 June 2021.

¹⁵⁵ Department of Agriculture, Environment and Rural Affairs, 'Press Release: Permanent solutions needed for pet checks', 15 September 2021.

¹⁵⁶ Letter from Lord Jay of Ewelme, Chair of the House of Lords Sub-Committee on the Ireland/Northern Ireland Protocol, to Brandon Lewis MP, the Secretary of State for Northern Ireland, 25 October 2021.

¹⁵⁷ NI Human Rights Commission and Equality Commission for NI, 'Submission of the NIHRC and ECNI on the UK and EU proposals and the prospects for Agreement to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland', (NIHRC and ECNI, 2021), at paras 3.9-3.14.

constructive engagement to reach agreement on a long-term, sustainable solution.¹⁵⁸

4.105 In December 2021, the EU announced that it would act unilaterally to ensure the continued long-term supply of medicines from Great Britain into NI with the grace period extended until the end of 2022 or the finalisation of the legislative procedure.¹⁵⁹ While the EU legislation does address some immediate and urgent supply issues the UK Government has described the EU's package as "not comprehensive" with some issues still to be addressed.¹⁶⁰ The UK Government said that they are "closely monitoring supply and gathering evidence on the risks not dealt with in the EU proposals".¹⁶¹

Recommendations

4.106 **The Commissions recommend that the Department for Communities promptly publishes and effectively implements a robust Disability Strategy, which embeds consideration of Protocol Article 2 and is accompanied by a measurable plan of action for improving the living conditions of all persons with disabilities and effective monitoring arrangements.**

4.107 **The NIHRC recommends that the Department of Health ensures full implementation of the Autism Act (NI) 2011, as amended, and commits to meeting its legislative requirement to publish a revised strategy, which takes into account Protocol Article 2, including the Employment Equality (Framework) Directive and relevant CJEU jurisprudence, insofar as it is relevant to those parts of the Strategy relating to employment and vocational education.**

4.108 **The Commissions recommend that the UK Government work with the EU Commission to find a long-term solution which minimises checks on assistance dog owners travelling between Great Britain and NI.**

4.109 **The Commissions recommend that the UK Government, working with the EU continues to monitor and address any outstanding issues relating to the supply of medicines from Great Britain to NI to guarantee no**

¹⁵⁸ Ibid, at paras 3.1-3.8.

¹⁵⁹ EU Commission, 'Press Release: EU-UK relations: Commission delivers on promise to ensure continued supply of medicines to Northern Ireland, as well as Cyprus, Ireland and Malta', 17 December 2021.

¹⁶⁰ Letter from James Cleverly MP, Minister of State for Europe and North America, to Lord Jay of Ewelme, Chair of House of Lords Sub-Committee on the Ireland/Northern Ireland Protocol, 28 March 2022.

¹⁶¹ Ibid.

diminution of the current provision, including for disabled people, and to protect the highest attainable standard of health.

Racial Equality

4.110 In 2016, the UN CERD Committee recommended that the UK Government and NI Executive promptly adopt comprehensive legislation prohibiting racial discrimination in line with UN CERD.¹⁶²

4.111 Protocol Article 2 adds a further dimension as the UK Government has committed to ensuring there is no diminution of rights, safeguards and equality of opportunity set out in the relevant Chapter of the Belfast (Good Friday) Agreement as a result of the UK's withdrawal from the EU, including the right to equality of opportunity in all social and economic activity regardless of class, creed, disability, gender or ethnicity.¹⁶³ The UK Government also committed to ensuring that NI equality law 'keeps pace' with any changes made by the EU to six Annex 1 Equality Directives which improve the minimum levels of protection available, after 1 January 2021, including the Racial Equality Directive.¹⁶⁴

Racial Equality Directive¹⁶⁵

4.112 The Racial Equality Directive protects against discrimination on the grounds of race and ethnicity across a range of areas, including employment and vocational training, access to goods and services, education and social security.¹⁶⁶

4.113 In June 2021, the Commissions wrote to the head of the NI Civil Service highlighting a recent EU Commission Report on the Racial Equality Directive and the Employment Equality (Framework) Directive highlighting recent legal and other developments. The Commissions underlined that these developments were of particular significance in relation to the ongoing

¹⁶² CERD/C/GBR/CO/21-23, 'Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of United Kingdom', 26 August 2016, at para 8(c). This was reiterated by UN Special Rapporteur on contemporary forms of racism, E Tendayi Achiume when she visited in NI in 2018 (A/HRC/41/54/Add.2, 'Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance: Visit to the UK of Great Britain and NI', 27 May 2019, at para 74(f)).

¹⁶³ Article 2(1), Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

¹⁶⁴ Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

¹⁶⁵ This section should be read in conjunction with the discussion on that part of the review of the Race Relations Order as relates to multiple and intersectional discrimination in the section on Consolidating, strengthening and clarifying equality protections and intersectional and multiple discrimination above.

¹⁶⁶ Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000.

review of the Race Relations (NI) Order 1997, a commitment which was made under the Executive Office Racial Equality Strategy 2020-2025.¹⁶⁷

4.114 In January 2022, the EU Commission launched a public consultation, running until 11 April, to pinpoint potential gaps in the Racial Equality Directive and identify measures to address these gaps.¹⁶⁸ As part of their mandate to monitor the alignment of NI law with any enhancements to rights or safeguards under the Racial Equality Directive, the Commissions will respond to that consultation. Previously stated concerns in this area include approaches to intersectional and multiple discrimination, equality data and monitoring, the scope of discrimination in the Directive and enhancing compliance. The ECNI has also published recommendations on the role, mandate and powers of equality bodies which are relevant to the Racial Equality Directive in response to the EU Commission's consultation on binding standards for equality bodies.¹⁶⁹

Racial Profiling

4.115 In December 2021, the NIHRC wrote to the Secretary of State to express its concerns about Home Office guidance in relation to the Common Travel Area and the proposed intelligence-led immigration checks which could lead to increased risk of racial profiling.¹⁷⁰ It asked the Secretary of State for information on what training and guidance is provided for enforcement officers, the review mechanisms and disciplinary procedures in place for cases of racial profiling, and for data on intelligence-led checks carried out under Common Travel Area guidance. At the time of writing, a response was awaited.

4.116 In January 2022 the ECNI also wrote to the Secretary of State, at the Home Office, on the UK Government's changes to Home Office guidance on the Common Travel Area and the potential for increased racial profiling, which were raised with the Commission by equality and human rights stakeholders.¹⁷¹ The ECNI sought assurance on this and requested information on how it will be achieved such as what steps and measures, including monitoring and training, have been, or will be put in place, to

¹⁶⁷ EU Commission, 'Report to the EU Parliament and Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive')' COM/2021/139, (EU Commission, 2021).

¹⁶⁸ EU Commission, 'Addressing possible gaps in the Racial Equality Directive – Public Consultation', (EU Commission, 2022).

¹⁶⁹ Equality Commission for NI, 'Feedback from: Equality Commission for NI on EU Commission Consultation on Equality Bodies-binding standards', (ECNI, 2021).

¹⁷⁰ Letter from the NI Human Rights Commission to the Secretary of State for the Home Department, 20 December 2021.

¹⁷¹ Home Office, 'Common Travel Area Guidance' (UK Gov, 2021).

ensure immigration checks will not lead to an increase in racial profiling practices, in the context of cross border travel.

4.117 The Commissions further note with concern the proposed Electronic Travel Authorisations, under the Nationality and Borders Bill, which requires an Electronic Travel Authorisation for all non-British citizens who require leave to enter the UK, when travelling from Ireland to the UK.¹⁷² Although Irish citizens do not require leave to enter the UK,¹⁷³ those who do not hold a recognised UK immigration status will be affected, despite freedom to travel being presently available to them on the island of Ireland. It is not known what measures are in place to decide which individuals will be required to ‘demonstrate’ that they have permission to travel. Concerns about potential for racial profiling under the proposed Bill were reiterated in a joint briefing paper by the Commissions to the House of Lords in January 2022.¹⁷⁴

Minority ethnic groups/faith communities

4.118 The Commissions have raised concerns on access to, cost, and the availability of, halal and kosher food and ritual items and the impact on certain ethnic minority groups/faith communities in NI, including on lower income groups within Jewish and Islamic communities, such as students and refugees and asylum seekers. This results from issues relating to the movement of goods from Great Britain to Northern Ireland following Brexit.

4.119 The Commissions have raised the issue in a joint submission to the House of Lords Sub-Committee on the Ireland/Northern Ireland Protocol on the UK and EU proposals and the prospects for Agreement¹⁷⁵ and in joint oral briefings to that Committee.¹⁷⁶

Recommendations

4.120 **In line with the ‘keeping pace’ obligations associated with Protocol Article 2,¹⁷⁷ the Commissions recommend that the NI Executive, particularly the**

¹⁷² Clause 71, Nationality and Borders Bill as introduced to the House of Lords on 9 December 2021 (HL Bill 82).

¹⁷³ Section 3ZA, Immigration Act 1971.

¹⁷⁴ NI Human Rights Commission and Equality Commission for NI, ‘Joint Submission to House of Lords on the Nationality and Borders Bill’, (NIHRC and ECNI, 2022), at 11-12.

¹⁷⁵ NI Human Rights Commission and Equality Commission for NI, ‘Joint supplementary written evidence: Submission of the NIHRC and ECNI on the UK and EU proposals and the prospects for Agreement to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland’, (NIHRC and ECNI, 2021), paras 3.15 – 3.19.

¹⁷⁶ UK Parliament Hansard, ‘European Affairs Committee – Sub-Committee on the Protocol on Ireland/Northern Ireland - Article 2 of the protocol (rights of individuals) – NI Human Rights Commission and Equality Commission for NI’, 15 September 2021.

¹⁷⁷ Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement 2020; Article 13 provides:

“Notwithstanding Article 6(1) of the Withdrawal Agreement, and unless otherwise provided, where this Protocol makes reference to a Union act, that reference shall be read as referring to that Union act as amended or replaced”.

Executive Office, the Department for Communities and Department for the Economy, and relevant UK Government departments, informed by engagement with the NI Office, monitor any proposed changes by the EU to the six Annex 1 Equality Directives, including the Racial Equality Directive and relevant case law of the CJEU.

- 4.121 The NIHRC recommends that that the Home Office ensures that all journeys into NI, that originate from Ireland, should be exempt from Electronic Travel Authorisation requirements.**
- 4.122 The Commissions recommend that effective steps are taken by the Home Office to prevent and address racial profiling, including through appropriate monitoring and training, in the implementation of the revised guidance on the Common Travel Area and the Electronic Travel Authorisation requirements, including at entry to NI at ports and airports and in the context of cross border travel.**
- 4.123 The Commissions recommend that the UK Government work with the EU Commission to find a long-term solution which ensures Muslim and Jewish communities in NI are able to access halal and kosher food products and ritual items respectively.**

Sectarianism¹⁷⁸

- 4.124 In 2020/21, 934 sectarian incidents and 674 sectarian crimes were recorded in NI.¹⁷⁹ This represented an increase from 888 recorded sectarian incidents and 639 recorded sectarian crimes in 2019/2020.¹⁸⁰**
- 4.125 The rights, safeguards and equality of opportunity provisions set out in the relevant Chapter of the Belfast (Good Friday) Agreement include the “the right to freedom from sectarian harassment”.¹⁸¹ EU obligations underpinning the rights of victims include the Victims’ Directive¹⁸² as well as other relevant EU laws which support victims.¹⁸³**

¹⁷⁸ This section should be read in conjunction with the section on Hate Crime at para 4.177-4.182 below.

¹⁷⁹ Police Service of NI, 'Incidents and Crimes with a Hate Motivation Recorded by the Police in Northern Ireland: Financial Year Update', (PSNI, 2021), at 4.

¹⁸⁰ Ibid.

¹⁸¹ Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

¹⁸² Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

¹⁸³ Directive 2011/36/EU 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011; Directive 2011/92/EU, 'Parliament and Council Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography', 13 December 2011; Directive 2004/80/EC, 'Council Directive Relating to the Compensation to Crime Victims', 29 April 2004.

4.126 The Victims’ Directive reinforces existing national laws and establishes minimum standards on victims’ rights and its purpose is to ensure victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings.¹⁸⁴

4.127 In January 2022, the EU Commission launched a public consultation to pinpoint potential gaps in the Racial Equality Directive and identify measures to address these gaps.¹⁸⁵ The NIHRC response will build on its existing position that, given the complex interplay between ethnicity, nationality and sectarianism in NI, and previous recommendations from international standards bodies on this issue,¹⁸⁶ sectarianism should be addressed within the existing racial discrimination framework. As noted in 2017 by the Advisory Committee on the Framework Convention for the Protection of National Minorities, sectarianism often falls outside the scope of anti-discrimination and human rights standards currently provided for in NI legislation.¹⁸⁷

4.128 In March 2022, the Commissions separately responded to the Department of Justice consultation on improving the effectiveness of Hate Crime Legislation in NI.¹⁸⁸

Recommendations

4.129 The Commissions recommend that the Department of Justice ensures compliance with Protocol Article 2 in the context of the EU Victims’ Directive, when developing hate crime legislation, including sectarian hate crime.

4.130 In line with the ‘keeping pace’ obligations under Protocol Article 2, the Commissions recommend that the Department of Justice monitor any proposed changes by the EU to the six Annex 1 Equality Directives, including relevant case law of the CJEU as well as the outcome of the ongoing consultation on the Racial Equality Directive.

¹⁸⁴ Article 8 and Recitals 56-58, Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

¹⁸⁵ EU Commission, ‘Addressing possible gaps in the Racial Equality Directive – Public Consultation’, (EU Commission, 2022).

¹⁸⁶ Article 1, UN Convention on the Elimination of All Forms of Racial Discrimination 1965; European Commission against Racism and Intolerance, ‘Policy Recommendation No 7: National Legislation to Combat Racism and Racial Discrimination’, 7 December 2017, at para 1.

¹⁸⁷ ACFC/OP/IV(2016)005, ‘Advisory Committee on the Framework Convention for the Protection of National Minorities Fourth Opinion on the UK’, 27 February 2017, at para 86.

¹⁸⁸ Equality Commission for NI, ‘Response to consultation: Department of Justice – Improving the effectiveness of Hate Crime Legislation in NI’, (ECNI, 2022); NIHRC, ‘Consultation response to Improving Hate Crime Legislation in NI’, (NIHRC, 2022).

Victims' Rights and Freedom from Slavery

4.131 The rights, safeguards and equality of opportunity section of the Belfast (Good Friday) Agreement includes “the rights of victims to remember as well as to contribute to a changed society”.¹⁸⁹ The UK Government has recognised a non-exhaustive list of relevant measures which fall within scope of the commitment in Protocol Article 2, which includes the Victims' Directive.¹⁹⁰ In addition, the Commissions have identified other relevant EU laws which support victims, including the Trafficking Directive¹⁹¹ and the Child Sexual Exploitation Directive.¹⁹² The Commissions consider these directives within scope of Protocol Article 2 for a number of reasons: firstly since these are sub-categories of victims and victims' rights are recognised in the relevant chapter of the Belfast (Good Friday) Agreement; secondly on the basis that these Directives underpin ECHR Article 4;¹⁹³ and thirdly on the basis of the equality commitments in the relevant chapter of the Belfast (Good Friday) Agreement.

4.132 These Directives have implications for policy and legislation across NI Departments responsible for a range of areas set out in this section including hate crime, domestic and sexual violence, child and forced marriage, female genital mutilation and child sexual exploitation. In addition, in those areas where law and policy fall under the remit of reserved or excepted matters, such as in relation to immigration and terrorism offences, or in other areas where UK Government and Parliament is making law and policy for NI, due consideration should be given to Protocol Article 2.

4.133 Protocol Article 2 provides specific protection against discrimination as enshrined in the six Equality Directives listed in Annex 1 of the Protocol.¹⁹⁴

¹⁸⁹ Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

¹⁹⁰ Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

¹⁹¹ Directive 2011/36/EU, 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011.

¹⁹² Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012; Directive 2011/36/EU 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011; Directive 2004/80/EC, 'Council Directive relating to the Compensation to Crime Victims', 29 April 2004.

¹⁹³ NI Human Rights Commission and Equality Commission for NI, 'Working Paper: Scope of Article 2(1) of the Ireland/Northern Ireland Protocol' (NIHRC and ECNI, forthcoming).

¹⁹⁴ Directive 2000/43/EC, 'Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000; Directive 2000/78/EC, 'Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000; Directive 2004/113/EC, 'Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and Services', 13 December

NI equality law must keep pace with any changes made by the EU to improve the minimum levels of protection, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.¹⁹⁵

4.134 The Commissions reiterate the overarching recommendations on Protocol Article 2 set out above in relation to victims' rights in all areas in this section, in addition to the specific recommendations below.

Child, early and forced marriage

4.135 The Marriage (NI) Order 2003 permits the marriage of a child aged 16 or 17 years, with the consent of their parents or legal guardians or the courts.

4.136 International human rights oversight bodies have consistently called on the UK Government and the NI Executive raise the minimum age of marriage to 18 years.¹⁹⁶ The UN CEDAW Committee and UN CRC Committee advise that "child marriage is considered to be a form of forced marriage, given that one or both parties have not expressed full, free and informed consent".¹⁹⁷

4.137 In 2018, there were 35 girls married in NI which increased to 54 girls in 2019.¹⁹⁸ There were 14 boys married in both 2018 and 2019.¹⁹⁹ In 2020, there were 24 girls and 7 boys married in NI, these decreases are primarily attributed to the COVID-19 pandemic and associated lockdown restrictions.²⁰⁰

4.138 In November 2021, the Department of Finance launched a consultation on changes to Marriage Law in NI.²⁰¹ The consultation sought feedback on

2004; Directive 2006/54/EC, 'Directive of European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast)', 5 July 2006; Directive 2010/41/EU, 'Directive of the European Parliament and of the Council on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity', 7 July 2010 and Directive 79/7/EEC, 'Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security', 19 December 1978.

¹⁹⁵ Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

¹⁹⁶ CRC/GC/2003/4, 'UN CRC Committee General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child', 1 July 2003; CRC/C/GC/20, 'UN CRC Committee General Comment No. 20 on the Implementation of the Rights of the Child during Adolescence', 6 December 2016; CRC/C/GBR/CO/5, 'UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 19; CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019, at para 59(b); CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019, at para 57(f).

¹⁹⁷ CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1, 'Joint General Recommendation 31 of the UN CEDAW Committee/General Comment 18 of and UN CRC Committee on harmful practices', 14 November 2014, at para. 20; see also, CRC/C/GC/13, 'UN CRC Committee General Comment No.13: The right of the child to freedom from all forms of violence', 18 April 2011, at para 29.

¹⁹⁸ Statistics provided to NI Human Rights Commission by NI Statistics and Research Agency, 8 November 2019.

¹⁹⁹ Statistics provided to NI Human Rights Commission by NI Statistics and Research Agency, 17 August 2020.

²⁰⁰ Statistics provided to NI Human Rights Commission by NI Statistics and Research Agency, 2 July 2021.

²⁰¹ Department of Finance, 'Belief marriage and minimum age for marriage or civil partnership – a public consultation', (DoF, 2021).

raising the minimum age at which people can legally marry or enter into a civil partnership. Views were sought on raising the current minimum age in NI, from 16 with parental consent, to 18, to comply with calls from the UN CRC Committee to raise the age to 18 in all jurisdictions which allow child marriage.

4.139 The NIHRC responded to the consultation in February 2022, noting that international human rights standards consider child marriage to be a form of forced marriage and the Victim's Directive recognises forced marriage as a form of gender-based violence.²⁰² The NIHRC advised that it considers that certain provisions on marriage law engage Protocol Article 2. The NIHRC identified that any subsequent legislation or policy that may result from this consultation process must consider Protocol Article 2 throughout its development and implementation.²⁰³

Recommendation

4.140 **In line with our overarching recommendations, the Commissions recommend the Department of Finance ensure that Protocol Article 2 is considered and complied with throughout the development and implementation of any subsequent legislation or policy in relation to marriage law.**

Child Sexual Exploitation

4.141 EU obligations underpinning the rights of child victims in Protocol Article 2 include the Directive on combatting sexual abuse and sexual exploitation of children²⁰⁴ as well as other relevant EU laws which support victims.²⁰⁵

4.142 The Directive on combatting sexual abuse and sexual exploitation of children sets out a number of provisions which are aimed at setting out minimum rules in relation to criminal offences and tariffs in the areas of sexual abuse and exploitation of children, including effective, proportionate and dissuasive penalties. In addition, the Directive recognises that the best interests of the child is a primary consideration for child victims, in line with the EU Charter of Fundamental Rights and UN CRC. It also recognises the

²⁰² Recital 17, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

²⁰³ NI Human Rights Commission, 'Submission to the Department of Finance consultation on marriage law', (NIHRC, 2022).

²⁰⁴ Directive 2011/92/EU, 'Parliament and Council Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography', 13 December 2011.

²⁰⁵ Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012; Directive 2011/36/EU 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011; Directive 2004/80/EC, 'Council Directive relating to the Compensation to Crime Victims', 29 April 2004.

need for enhanced protections for victims, including, in recognition of the harm caused by these offences, that assistance should be provided for as long as necessary for the child’s physical and psychological recovery, including into adulthood.

- 4.143 In June 2020, the Criminal Justice Inspection NI published its inspection report on child sexual exploitation, which considered the frontline response and investigation of child sexual exploitation.²⁰⁶ This report found that Public Prosecution Service NI staff needed instructions specific to child sexual abuse and exploitation and that “where cases did progress to court, support for children was required”.²⁰⁷ The Barnahus (children’s house) model was proposed as the preferred approach.²⁰⁸
- 4.144 In October 2020, following a consultation on proposals aimed at implementing the Independent Inquiry into Child Sexual Exploitation in NI’s recommendations,²⁰⁹ the Minister of Justice, Naomi Long MLA, committed to legislative amendments.
- 4.145 In July 2021, the Minister of Justice introduced a re-drafted Justice (Sexual Offences and Trafficking Victims) Bill to the Assembly which contained provisions for child sexual exploitation.²¹⁰
- 4.146 In September 2021, the NIHRC responded to a call for evidence by the Committee for Justice on the Justice (Sexual Offences and Trafficking Victims) Bill. The Bill deals with, among other things, provisions to give effect to the outcome of the review of the law on child sexual exploitation and sexual offences against children to include live-streamed images in the definition of exploitation for sexual purposes and to create a new offence of adults masquerading as children online.²¹¹ The NIHRC identified that provisions of the Bill engaged Protocol Article 2 in the submission, and recommended that the Committee may wish to advise the Department of Justice to monitor relevant EU Directives and relating CJEU jurisprudence to ensure there is no-diminution of rights in keeping with Protocol Article 2.²¹² In defining EU obligations the CJEU has drawn on international human rights standards, including general comments of the UN CRC to elaborate

²⁰⁶ Criminal Justice Inspection NI, ‘Child Sexual Exploitation in NI: An Inspection of the Criminal Justice System’s Response’, (CJINI, 2020).

²⁰⁷ Ibid, at 8.

²⁰⁸ Ibid.

²⁰⁹ Meeting between Department of Justice and NI Human Rights Commission, 23 October 2018.

²¹⁰ Justice (Sexual Offences and Trafficking Victims) Bill – NI Assembly Bill 29/17-22 as introduced on 5 July 2021.

²¹¹ NI Human Rights Commission, ‘NIHRC response to Committee for Justice call for evidence on the Justice (Sexual Offences and Trafficking Victims) Bill’, (NIHRC, 2021).

²¹² Ibid.

on key concepts, such as the best interests of the child, in EU law, including the EU Charter.²¹³

4.147 The Justice (Sexual Offences and Trafficking Victims) Bill passed final stage of the NI Assembly in March 2022 and was submitted for Royal Assent.

Nationality and Borders Bill & human trafficking of children

4.148 In July 2021 the UK Government introduced the Nationality and Borders Bill in Parliament. The Bill included provisions relating to victims of human trafficking, however the Bill did not specifically mention child victims of human trafficking, nor were they discussed in the explanatory notes to the Bill.

4.149 In October 2021, the NIHRC submitted written evidence to the Joint Committee on Human Rights raising concerns, among other areas, about its compliance with the UK's international human rights obligations on the rights of children throughout the Bill and in relation to Part 4 of the Nationality and Borders Bill on modern slavery. The NIHRC called for a children's rights impact assessment to be carried out in relation to the Bill's impact on children. The NIHRC also advised that the UK Government must ensure that any changes to retained EU law as regards NI that fall within scope of Protocol Article 2, including changes to legislation deriving from the EU Trafficking Directive,²¹⁴ do not result in a diminution of the rights, safeguards and equality of opportunity in the relevant part of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU.

4.150 In November 2021, the UN Special Rapporteur on trafficking of persons, the UN Special Rapporteur on human rights of migrants, the UN Special Rapporteur on contemporary forms of slavery and the UN Special Rapporteur on human rights in countering terrorism jointly wrote to the UK Government expressing concerns about the compliance of Nationality and Borders Bill with the UK's international obligations and, in particular, that:

there is no recognition of the primacy of the rights of the child, or of the State's obligation to ensure the protection of migrant child victims of trafficking and contemporary forms of slavery, including through the implementation of best

²¹³ See for example Ingeborg Odink, 'European Parliamentary Research Service - Children's rights in the EU: Marking 30 years of the UN Convention on the Rights of the Child' (EPRS, 2019).

²¹⁴ Directive 2011/36/EU, 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011.

interests assessments and determination procedures in migration related decisions.

4.151 The Commissions raised the issue of child victims of human trafficking in a briefing on the Bill for members of the House of Lords. In addition, the NIHRC, acting within its specific remit, recommended that the House of Lords enquire what consideration had been given to the needs of child victims of human trafficking.²¹⁵

4.152 In March 2022, the House of Lords Sub-Committee on the Ireland/Northern Ireland Protocol sent a letter to the Baroness Trafford, Minister for the Home Office, asking for a specific response on the NIHRC and ECNI's recommendations from their briefing paper on the Nationality and Borders Bill, including the recommendation on child victims.²¹⁶

Recommendations

4.153 The NIHRC advises that the requirements of the Child Sexual Exploitation Directive should be considered as falling within scope of Protocol Article 2.

4.154 In line with our overarching recommendations, the Commissions recommend that the Department of Justice, the Home Office and other relevant departments and bodies, consider Protocol Article 2 in the development and implementation of legislation or policy on child sexual exploitation.

4.155 The NIHRC recommends that, in line with best international practice and the requirements of the Trafficking Directive, specialised training for professionals and measures reflective of the Barnahus Model are adopted throughout the criminal justice system.

4.156 The NIHRC recommends that, in line with the requirements of the Trafficking Directive, the Department of Justice and the Home Office within their respective remits legislate to provide specific protections for child victims of modern slavery and human trafficking, which ensure the consideration for the best interests of the child.

²¹⁵ NI Human Rights Commission and Equality Commission for NI, 'Joint NIHRC/ECNI briefing paper on the modern slavery and human trafficking and electronic travel authorisation provisions in the Nationality and Borders Bill', (NIHRC and ECNI, 2022).

²¹⁶ Letter from Lord Jay of Ewelme, Chair of the Protocol on Ireland/Northern Ireland Sub-Committee to Baroness Williams of Trafford, Home Office Minister, 3 March 2022.

Domestic and Sexual Violence and Abuse

4.157 EU obligations underpinning the rights of victims in Protocol Article 2 include the Victims' Directive²¹⁷ as well as other relevant EU laws which support victims.²¹⁸

4.158 The Victims' Directive recognises that where physical, sexual, psychological or economic violence is committed in a close relationship, this can cause psychological and physical trauma and such victims are therefore in need of special protection measures. The Directive further recognises that women are disproportionately impacted by this harm.²¹⁹

Justice (Sexual Offences and Trafficking Victims) Bill

4.159 In July 2021, the Department of Justice introduced the Justice (Sexual Offences and Trafficking Victims) Bill, which created provisions to introduce a number of recommendations arising from the Gillen Review.²²⁰ The Bill made provision to exclude the public from all serious sexual offence proceedings, introduce anonymity for defendants pre-charge, and give effect to the outcome of a review of the law on child sexual exploitation and sexual offences against children.

4.160 In September 2021, the NIHRC responded to a Committee for Justice Call for Evidence on the Bill.²²¹ The response noted that the Victims' Directive reinforces existing national measures, setting minimum standards on the rights, support and protection of victims of crime in all EU countries. The Directive establishes the right for victims, including child victims, to have their case heard in court, review a decision by the state not to prosecute, have their expenses reimbursed, access legal aid and recover stolen property.²²² The Directive also requires that national authorities minimise the difficulties faced when a victim is a resident of an EU country which

²¹⁷ Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

²¹⁸ Directive 2011/36/EU 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011; Directive 2011/92/EU, 'Parliament and Council Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography', 13 December 2011; Directive 2004/80/EC, 'Council Directive Relating to the Compensation to Crime Victims', 29 April 2004.

²¹⁹ Recital 18, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

²²⁰ Department of Justice, 'Gillen Review: Report into the law and procedures in serious sexual offences in Northern Ireland', (DoJ, 2019).

²²¹ NI Human Rights Commission, 'NIHRC response to Committee for Justice call for evidence on the Justice (Sexual Offences and Trafficking Victims) Bill', (NIHRC, 2021).

²²² Articles 10-15, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

differs from where the offence was committed.²²³ The NIHRC advised that provisions of the Bill engaged the Victims' Directive and fell within scope of Protocol Article 2 and therefore Protocol Article 2 should be considered throughout development and implementation of the Bill.

4.161 The Justice (Sexual Offences and Trafficking Victims) Bill passed final stage of the NI Assembly in March 2022 and was submitted for Royal Assent.

Domestic Abuse and Safe Leave Bill

4.162 In October 2021, Rachel Woods MLA introduced the Domestic Abuse and Safe Leave Bill. The Bill proposed introducing 10 days of paid leave to employees that are victims or survivors of domestic abuse.

4.163 In January 2022, the NIHRC responded to the Committee for Economy's call for views on the Bill, advising that the Recast Gender Equality (Employment) Directive and the Equality (Social Security) Directive, both listed in Annex 1 of the Protocol, and the Victims' Directive were relevant to provisions within the Bill and fell within scope of Protocol Article 2.²²⁴

4.164 The Domestic Abuse and Safe Leave Bill passed in March 2022 and was submitted for Royal Assent.

Domestic Abuse and Violence Against Women and Girls Strategies

4.165 In January 2022, the NI Executive Office, Department of Justice and Department of Health launched a call for views on a domestic and sexual abuse strategy and the Equally Safe Strategy: a strategy to tackle violence against women and girls.

4.166 As noted above, the Victims' Directive recognises that where physical, sexual, psychological or economic violence is committed in a close relationship, this can cause psychological and physical trauma and such victims need special protection measures.²²⁵ The Directive also recognises that women are disproportionately impacted by this harm.²²⁶ Additionally, the Directive notes that gender-based violence is understood to be a form

²²³ Articles 17, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

²²⁴ Letter from the NI Human Rights Commission to the Committee for Economy, 7 January 2022.

²²⁵ Recital 18, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

²²⁶ Ibid.

of discrimination and a violation of the fundamental freedoms of the victim.²²⁷

4.167 Article 9 of the Directive requires provision of specialist support for victims with specific needs including “victims of sexual violence, victims of gender-based violence and victims of violence in close relationships, including trauma support and counselling”.²²⁸ Article 22 of the Victims’ Directive requires States to ensure victims receive a timely and individual assessment to identify protection needs. Article 22(3) requires states to pay particular attention to victims who have suffered a crime with a biased or discriminatory motive and victims whose relationship with the offender makes them particularly vulnerable, including victims of gender-based violence or violence within a close relationship.²²⁹ Article 23 of the Directive provides for the right to protection for victims during criminal proceedings where a victim has been assessed as requiring special support and protection under Article 22.²³⁰

4.168 In March 2022, both Commissions separately responded to the consultation. The NIHRC response advised that the provisions of the strategies engaged the Victims’ Directive and fell within scope of Protocol Article 2.²³¹

4.169 The ECNI response noted that that, given that domestic and sexual abuse falls within scope of Protocol Article 2, it is the responsibility of the NI Executive and departments to ensure that any legislative developments progressed under the strategies do not reduce the rights of victims under the Victims’ Directive.²³²

Recommendations

4.170 In line with our overarching recommendations, the Commissions recommend that the Department of Justice take Protocol Article 2 and the

²²⁷ Ibid.

²²⁸ Article 9, Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

²²⁹ Article 22, Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

²³⁰ Article 23, Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

²³¹ NI Human Rights Commission, ‘NIHRC response to call for views: Domestic abuse strategy and equally safe strategy – a strategy to tackle violence against women and girls’, (NIHRC, 2022).

²³² Equality Commission NI, ‘Response to call for views: The Departments of Justice and Health – domestic and sexual abuse strategy; The Executive Office – Equally Safe Strategy’, (ECNI, 2022).

Victims' Directive into account in the implementation of the Justice (Sexual Offences and Trafficking Victims) Bill.

- 4.171 **The NIHRC recommends that the Department for the Economy take Protocol Article 2 and the Victims' Directive into account in the implementation of the Domestic Abuse and Safe Leave Bill. In line with the 'keeping pace' obligations under Protocol Article 2, the NIHRC recommends that the Department for the Economy monitor any proposed changes by the EU to the Equality (Employment) Directive and the Equality (Social Security) Directive, including relevant case law of the CJEU.**
- 4.172 **The Commissions recommend that the Department of Health and the Department of Justice consider and take into account the Victims' Directive and Protocol Article 2 during the development and implementation of the Domestic Abuse and Violence Against Women and Girls Strategies.**

Female Genital Mutilation

- 4.173 EU obligations underpinning the rights of victims in Protocol Article 2 include the Victims' Directive²³³ as well as other relevant EU laws which support victims.²³⁴
- 4.174 The Victims' Directive recognises that victims of gender-based violence, including female genital mutilation, and their children, often require special support and protection against secondary and repeat victimisation, intimidation and retaliation.²³⁵
- 4.175 In March 2022, the NIHRC responded to a call for views on a domestic abuse strategy, led by the Departments of Justice and Health, and the Equally Safe Strategy: a strategy to tackle violence against women and girls, led by the Executive Office.²³⁶ The response noted that the Victims' Directive identifies female genital mutilation as a form of gender-based violence. The NIHRC noted that the provisions of a strategy tackling

²³³ Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

²³⁴ Directive 2011/36/EU 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011; Directive 2011/92/EU, 'Parliament and Council Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography', 13 December 2011; Directive 2004/80/EC, 'Council Directive Relating to the Compensation to Crime Victims', 29 April 2004.

²³⁵ Recitals 17 and 21, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

²³⁶ NI Human Rights Commission, 'NIHRC response to call for views: Domestic abuse strategy and equally safe strategy – a strategy to tackle violence against women and girls', (NIHRC, 2022).

violence against women and girls engages the Victims' Directive and therefore, falls within scope of Protocol Article 2.

Recommendation

4.176 The NIHRC recommends the Department of Justice and Department of Health ensure that legislative developments progressed by the Equally Safe Strategy ensure that rights protections do not fall below the standards contained in the Victims' Directive.

Hate Crime

4.177 The international human rights oversight bodies have consistently called for the UK Government and NI Executive to strengthen their efforts to investigate alleged hate crimes and prosecute perpetrators, provide effective remedies to victims, take action to increase reporting from people impacted by hate crime and to systematically collect disaggregated data.²³⁷

4.178 In 2020/21, there were 2,493 recorded incidents of hate crime and 1,757 recorded crimes in NI- an increase on the previous year.²³⁸ The number of hate motivated incidents recorded rose across four of the six hate motivations (racist, homophobic, sectarian, and transphobic), when compared with the previous 12 months. The number of crimes recorded also increased across four of the six motivations (racist, homophobic, sectarian and faith/religion), with a fall in recorded incidents and crimes with a disability motivation. Incidents with a homophobic motivation and crimes with a racist motivation showed the largest overall increase.²³⁹

4.179 EU obligations underpinning the rights of victims in Protocol Article 2 include the Victims' Directive²⁴⁰ as well as other relevant EU laws which support victims.²⁴¹

4.180 The Victims' Directive reinforces existing national laws and establishes minimum standards on victims' rights and its purpose is to ensure victims

²³⁷ CCPR/C/GBR/CO/7, 'UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and NI', 17 August 2015, at para 10; CERD/C/GBR/CO/21-23, 'Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of the UK of Great Britain and NI', 26 August 2016, at para 16; CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019, at para 63.

²³⁸ Police Service of NI, 'Incidents and Crimes with a Hate Motivation Recorded by the Police in Northern Ireland: Financial Year Update', (PSNI, 2021).

²³⁹ *Ibid*, at 4.

²⁴⁰ Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

²⁴¹ Directive 2011/36/EU 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011; Directive 2011/92/EU, 'Parliament and Council Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography', 13 December 2011; Directive 2004/80/EC, 'Council Directive Relating to the Compensation to Crime Victims', 29 April 2004.

of crime receive appropriate information, support and protection and can participate in criminal proceedings. The Victims' Directive further recognises that victims of hate crime are at a high risk of secondary and repeat victimisation and, as such, that there should be a strong presumption that those victims will benefit from special protection measures during criminal proceedings.²⁴²

4.181 After the Independent Hate Crime Review in 2020,²⁴³ and the Department of Justice response to the Review,²⁴⁴ a public consultation was launched in 2022 seeking responses on improving the effectiveness of NI hate crime legislation. In its submission, the NIHRC recommended that the Department of Justice carefully consider the provisions of the Victims' Directive within the context of Protocol Article 2 in the development of hate crime legislation.²⁴⁵

4.182 The ECNI also responded to the Department of Justice's consultation on improving the effectiveness of Hate Crime Legislation in Northern Ireland,²⁴⁶ highlighting that the Department of Justice should ensure there is consideration of, and compliance with, Article 2 obligations. The ECNI also highlighted in its submission the relevance of the EU Victims' Directive in relation to the development of the legislation under the Protocol's Article 2 non-diminution principle.

Recommendation

4.183 The Commissions recommend that the Department of Justice consider carefully and ensure compliance with Protocol Article 2, including the provisions of the EU Victims' Directive in the development of hate crime legislation.

Modern Slavery and Human Trafficking

4.184 As set out in more detail above in paragraphs 4.131-4.134 above, the Commissions take the view that EU obligations underpinning the rights of

²⁴² Article 8 and Recitals 56-58, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

²⁴³ Independent Hate Crime Review Team, 'Hate Crime Legislation in NI: Independent Review', (DoJ, 2020).

²⁴⁴ Department of Justice, 'Review of Hate Crime Legislation in Northern Ireland - Departmental Response', (DoJ, 2021).

²⁴⁵ NI Human Rights Commission, 'Response to Public Consultation on Improving the Effectiveness of Hate Crime Legislation in NI' (NIHRC, 2022), at para 5.18.

²⁴⁶ Equality Commission for NI, 'Response to consultation: Department of Justice – Improving the effectiveness of Hate Crime Legislation in NI', (ECNI, 2022).

victims in Protocol Article 2 include the Trafficking Directive²⁴⁷ as well as other relevant EU laws which support victims.²⁴⁸

4.185 The EU Trafficking Directive sets out a number of provisions which are particularly aimed at criminalisation of trafficking offences,²⁴⁹ non-prosecution and non-application of penalties to victims,²⁵⁰ investigation and prosecution of offences²⁵¹ and supporting victims, including child victims of trafficking.²⁵²

Nationality and Borders Bill

4.186 In July 2021, the UK Government introduced the Nationality and Borders Bill in Parliament. The Bill included a range of provisions relating to victims of human trafficking including disapplication of retained EU Law deriving from the EU Trafficking Directive to the extent inconsistent with the Bill (Clause 67 as introduced in House of Lords).²⁵³

4.187 In October 2021, the NIHRC submitted written evidence to the Joint Committee on Human Rights raising concerns, among other areas, about (then) Part 4 of the Nationality and Borders Bill on modern slavery.²⁵⁴ The NIHRC advised that UK Government ensure that any changes to provisions extending to NI, that fall within scope of Protocol Article 2, including changes to domestic law deriving from the EU Trafficking Directive,²⁵⁵ do not result in a diminution of rights, safeguards and equality of opportunity in that field.²⁵⁶

4.188 In January 2022, the NIHRC and ECNI provided a joint briefing paper on the Bill's provisions on modern slavery and human trafficking to members of

²⁴⁷ Directive 2011/36/EU, 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011.

²⁴⁸ Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012; Directive 2011/36/EU 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011; Directive 2004/80/EC, 'Council Directive relating to the Compensation to Crime Victims', 29 April 2004.

²⁴⁹ Articles 2-7, Directive 2011/36/EU, 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011.

²⁵⁰ Article 8, Directive 2011/36/EU, 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011.

²⁵¹ Articles 9-10, Directive 2011/36/EU, 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011.

²⁵² Articles 11-17, Directive 2011/36/EU, 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011.

²⁵³ Clause 67 (Disapplication of retained EU law deriving from Trafficking Directive), Nationality and Borders Bill as brought from the House of Commons on 9 December 2021 (HL Bill 82).

²⁵⁴ Part 4, Nationality and Borders Bill as introduced in the House of Commons on 6 July 2021 (Bill 141).

²⁵⁵ Directive 2011/36/EU, 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011.

²⁵⁶ NI Human Rights Commission, 'Response to Call for Evidence by the Joint Committee on Human Rights on the Nationality and Borders Bill' (NIHRC, 2021).

the House of Lords.²⁵⁷ The briefing paper set out the Commissions' argument for including the Trafficking Directive within scope of Protocol Article 2. The briefing paper identified a number of ways in which the provisions of the Bill may breach the minimum standards laid out in the Trafficking Directive and therefore, potentially breach Protocol Article 2. Clause 57 of the Bill (as introduced in House of Lords) provided powers for the Secretary of State to issue Trafficking Information Notices to potential victims of human trafficking. Clause 58 of the Bill required that late compliance with Trafficking Information Notices, without good reason, must be taken into account as damaging a victim's credibility when making an assessment of their case. The Commissions identified that this may not be compliant with Articles 8, 9 and 11 of the Trafficking Directive.²⁵⁸

4.189 Clause 62 of the Bill provides for automatic loss of entitlement to a period of recovery for a victim if they are a "threat to public order", and specifies offences that would result in this assessment. The Independent Anti-Slavery Commissioner raised concerns that this "casts a wide net", potentially preventing a considerable number of potential victims from being able to access a recovery period.²⁵⁹ The Human Trafficking and Exploitation (NI) Act 2015 does not make any corresponding provisions for disqualification. The Commissions noted that disqualification may amount to a penalty which would engage and arguably infringe Article 8 of the Trafficking Directive on non-prosecution of the victim relating to crimes they were compelled to commit, as a consequence of being trafficked.²⁶⁰

4.190 The briefing paper also identified that the Bill contains no specific provisions or guidance on how this Bill may impact on child victims of human trafficking.²⁶¹

²⁵⁷ NI Human Rights Commission and Equality Commission for NI, 'Joint NIHRC/ECNI Briefing paper on the modern slavery and human trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill', (NIHRC and ECNI, 2022).

²⁵⁸ Article 8, Directive 2011/36/EU, 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011 on non-application of penalties to the victim; see also Article 9 on requirement for Member States to investigate and prosecute offences of human trafficking; Article 11 on assistance and support for victims of human trafficking.

²⁵⁹ Letter from the Independent Anti-Slavery Commissioner to Priti Patel MP, Home Secretary on the Nationality and Borders Bill, 7 September 2021.

²⁶⁰ Article 8, Directive 2011/36/EU 'Council Directive on preventing and combating trafficking in human beings and protecting its victims', 5 April 2011.

²⁶¹ NI Human Rights Commission and Equality Commission for NI, 'Joint NIHRC/ECNI Briefing paper on the modern slavery and human trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill', (NIHRC and ECNI, 2022).

- 4.191 In February 2022, the Commissions jointly sent letters to the Home Secretary and Secretary of State for NI on concerns relating to the Nationality and Borders Bill's compliance with Protocol Article 2.²⁶²
- 4.192 In March 2022, the House of Lords Sub Committee on the Ireland/Northern Ireland Protocol wrote to Baroness Trafford, Minister for the Home Office, highlighting and seeking a response to the Commissions' concerns around the Bill's provisions on human trafficking and Protocol Article 2.²⁶³
- 4.193 The NIHRC commissioned legal research on the Nationality and Borders Bill and Protocol Article 2 human trafficking provisions to be published in May 2022.²⁶⁴
- 4.194 If the Nationality and Borders Bill remains unamended the Commissions will be considering what action to take to address potential incompatibility with Protocol Article 2.

Justice (Sexual Offences and Trafficking Victims) Bill

- 4.195 In July 2021, the Department of Justice introduced the Justice (Sexual Offences and Trafficking Victims) Bill, which included provisions on supports and protective measures for victims of slavery and trafficking and strategies on slavery and trafficking offences.
- 4.196 In September 2021, the NIHRC provided written evidence to the Committee for Justice on the Justice (Sexual Offences and Trafficking Victims) Bill advising that the Department continue to ensure there is no diminution of victims' rights in line with Protocol Article 2.²⁶⁵ The NIHRC provided oral evidence on the Bill to the Committee in November 2021.
- 4.197 In March 2022, the Bill passed its final stage and was submitted for Royal Assent.

Recommendations²⁶⁶

- 4.198 **The Commissions recommend that the Home Office embed consideration of Protocol Article 2 in the development and drafting of human trafficking**

²⁶² Letter from the NI Human Rights Commission and the Equality Commission for NI to Priti Patel MP, Home Secretary, 9 February 2022; Letter from the NI Human Rights Commission and the Equality Commission for NI to Brandon Lewis MP, Secretary of State for NI, 9 February 2022.

²⁶³ Letter from Lord Jay of Ewelme, Chair of the Protocol on Ireland/NI Sub-Committee to Baroness Williams of Trafford, Minister of State in the Home Office, 3 March 2022.

²⁶⁴ Alison Harvey, 'Human Trafficking and Article 2 of the Ireland/Northern Ireland Protocol', (NIHRC, 2022).

²⁶⁵ NI Human Rights Commission, 'NIHRC Response to Committee for Justice Call for Evidence on the Justice (Sexual Offences and Trafficking Victims) Bill', (NIHRC, 2021).

²⁶⁶ Recommendations relate to status of the Nationality and Borders Bill as of 31 March 2022.

legislation and establish processes to ensure compliance with this obligation.

- 4.199 **The Commissions recommend that the Home Office exclude NI from the operation of Clauses 57, 58, 60, 61, 62 and 67 of the Nationality and Borders Bill, to ensure no diminution of the rights of victims of trafficking in NI.**
- 4.200 **The NIHRC recommends that the Home Office consider the needs of child victims of modern slavery and human trafficking and how the best interests principle will be ensured under the Nationality and Borders Bill.**
- 4.201 **The NIHRC recommends that the Department of Justice continue to monitor relevant EU Directives and relating CJEU jurisprudence to ensure there is no diminution of victims’ rights within the scope of Protocol Article 2.**

Democratic Rights

Electoral Rights

Elections Bill

- 4.202 In June 2021, the Commissions wrote to the Secretary of State outlining their concerns that Protocol Article 2 would be engaged should the UK Government amend, replace, or repeal legislation governing the voting franchise for local council elections in NI to remove the right to vote and stand in these elections by EU citizens.²⁶⁷ The UK Government subsequently confirmed that EU citizens living in the UK prior to 1 January 2021 will maintain their local voting and candidacy rights in NI, including NI Assembly elections.²⁶⁸
- 4.203 In July 2021 the UK Government introduced the Elections Bill making provision about the administration and conduct of elections, including about voting and candidacy rights of EU citizens.²⁶⁹
- 4.204 In October 2021, the Commissions wrote to the Public Bill Committee on the Elections Bill requesting that it give further consideration to the proposed changes to voting and candidacy rights of ‘qualifying’ EU citizens living in NI as part of its scrutiny of the Bill. The letter further suggested

²⁶⁷ Letter from the NI Human Rights Commission to Brandon Lewis MP, Secretary of State for Northern Ireland, 11 June 2021.

²⁶⁸ UK Parliament Hansard, ‘House of Commons Written Statement: Local Elections – Chloe Smith MP, Minister of State for the Constitution and Devolution - HCWS99’, 17 June 2021.

²⁶⁹ Elections Bill 2021- 2022 as introduced in the House of Commons on 5 July 2021 (Bill 138).

that the Committee ask the UK Government to set out its assessment of the provisions of the Elections Bill in the context of their conformity with its commitment under Protocol Article 2.²⁷⁰

4.205 In March 2022, the Commissions undertook joint engagement with House of Lords peers, submitting a joint briefing in which the Commissions expressed the view that, were the changes proposed by the Elections Bill to pass into law in its current form, the provisions preventing certain EU citizens who come to reside in the UK after the end of the Brexit transition period from standing for election and voting in NI District Council elections in the future, may amount to a breach of the UK's obligations under Protocol Article 2.²⁷¹

4.206 The Commissions advised that the UK Government can ensure that Protocol Article 2 is not breached if it maintains the position that existed prior to the end of the transition period and allows all EU citizen categories who would have been eligible to stand or to vote in District Council elections to continue to be eligible.²⁷² The Commissions advised that in order for the UK Government to avoid a potential breach of the “no-diminution” commitment under Protocol Article 2 Clause 13 of the Elections Bill, which gives effect to Schedule 8, should be amended to exclude NI District Council elections from its application. Further, Part 3 of Schedule 8 of the Elections Bill should be amended to remove Paragraphs 7, 8 and 9, thus restoring the status quo ante, and permitting all EU citizens lawfully resident in NI to continue to be able to vote/stand for election in District Council elections in NI.

4.207 The Bill's Committee stage took place in March 2022 and the bill was anticipated to move to the Report stage in April 2022. If unamended the Commissions will be considering what action to take to address potential incompatibility with Protocol Article 2.

²⁷⁰ Letter from the NI Human Rights Commission and the Equality Commission for NI to the Public Bill Committee on the Elections Bill, 20 October 2021.

²⁷¹ Equality Commission for NI and NI Human Rights Commission, 'Joint ECNI / NIHRC Briefing on the provisions on Voting/Candidacy Rights of EU citizens in Northern Ireland in the Elections Bill', (ECNI and NIHRC, 2022).

²⁷² The UK Government has outlined its view that there is now no requirement under the Protocol for EU Member States to grant voting rights to new Northern Ireland nationals arriving in the EU, it would be 'irrational' if Protocol Article 2 required the voting rights of new EU citizen arrivals to be retained in NI where there are no reciprocal arrangements for NI nationals arriving in the EU. The Commissions do not consider that either of these arguments provides a convincing explanation justifying the Government's assertion that Protocol Article 2 would not be violated by the provisions of the Bill.

Recommendations²⁷³

- 4.208 **The Commissions recommend that the Cabinet Office ensures there is no reduction of the rights of certain EU citizens who arrive in NI after the end of the Brexit transition in terms of their voting/candidacy rights in local elections in NI.**
- 4.209 **The Commissions recommend that the UK Government sets out, in full, its assessment of the relevant provisions of the Elections Bill, in the context of its conformity with its commitments under Protocol Article 2.**
- 4.210 **In the absence of any convincing explanation as to how the provisions in the Elections Bill comply with Protocol Article 2, the Commissions recommend that the UK Government amend the Elections Bill to ensure compatibility with Protocol Article 2.**
- 4.211 **Specifically, the Commissions recommend the following amendments to the Bill in order to avoid a potential breach of the “no-diminution” commitment under Protocol Article 2:**
- **Clause 13 of the Elections Bill, which gives effect to Schedule 8, should be amended to exclude NI District Council elections from its application; and**
 - **Part 3 of Schedule 8 of the Elections Bill should be amended to remove Paragraphs 7, 8 and 9, thus restoring the status quo ante, and permitting all EU citizens lawfully resident in NI to continue to be able to vote/stand for election in District Council elections in NI.**

Migrants’ Rights

- 4.212 **The parties to the Belfast (Good Friday) Agreement affirmed their commitment to “the mutual respect, the civil rights and the religious liberties of everyone in the community”. The UK Government recognises that Protocol Article 2 applies to “everyone who is subject to Northern Ireland law – irrespective of whether that law has been passed by the Northern Ireland legislature or Westminster”.²⁷⁴**
- 4.213 **The non-exhaustive list of rights which are “affirmed in particular” in the relevant Chapter of the Belfast (Good Friday) Agreement include the right to freely choose one’s place of residence and the right to equal opportunity**

²⁷³ Recommendations relate to status of the Elections Bill as of 31 March 2022.

²⁷⁴ NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 8.

in all social and economic activity, regardless of class, creed, disability, gender or ethnicity”.

4.214 In addition, the obligation to ‘keep pace’ in respect of the six Annex 1 equality Directives, includes the Race Directive, which establishes a framework for combating discrimination on the grounds of racial or ethnic origin,²⁷⁵ and the Equality (Goods and Services) Directive, which prohibits sex discrimination in access to goods and services and relevant CJEU case law.²⁷⁶

4.215 The Commissions reiterate the overarching recommendations on Protocol Article 2 in relation to migrants’ rights in all areas in this section, in addition to the specific recommendations below.

Refugees and Asylum Seekers

4.216 The NIHRC has commissioned research to explore the interaction of Protocol Article 2 and the rights of asylum seekers and refugees. This research will be published in 2022. The ECNI has also commissioned research on the impact of Brexit on minority ethnic and migrant people in NI, which includes consideration of the experiences of asylum seekers and refugees. This research is due to be completed in late 2022.

4.217 In addition to the obligation to keep pace with the Annex 1 equality directives, the Commissions consider that there are other EU obligations which underpin the rights, safeguards and equality of opportunity within scope of Protocol Article 2. Protocol Article 2 requires that standards and protections of rights in NI do not fall below the minimum standards and protections contained in relevant Directives as they were on 31 December 2020. These additional EU measures of relevance to persons with refugee status include the Reception Directive²⁷⁷ and the Qualification Directive.²⁷⁸

4.218 The EU Charter on Fundamental Rights also continues to have relevance in the application and interpretation of those provisions of EU law which are

²⁷⁵ Directive 2000/43/EC, ‘EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin’, 29 June 2000.

²⁷⁶ Directive 2004/113/EC, ‘EU Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and Services’, 13 December 2004.

²⁷⁷ Directive 2003/9/EC, ‘Council Directive laying down minimum standards for the reception of asylum seekers’, 27 January 2003.

²⁷⁸ Directive 2004/83/EC ‘Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted’, 29 April 2004.

relevant to the application of Protocol Article 2. Article 18 of the Charter protects the Right to Asylum:

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as ‘the Treaties’).

Draft Refugee Integration Strategy

- 4.219 In February 2022, the Executive Office consulted on its Draft Refugee Integration Strategy.²⁷⁹ The Executive Office noted that since 2015, NI had welcomed over 1800 refugees through the Syrian Vulnerable People Resettlement Scheme and they were “keen that the knowledge, experience and systems developed through this are shared and used for the benefit of all refugees and newcomers”.²⁸⁰
- 4.220 The NIHRC responded to the consultation, advising that provisions within the draft strategy fell within scope of Protocol Article 2, noting the requirement to keep pace with the Racial Equality Directive and the Gender Equality (Goods and Services) Directive and to ensure the minimum standards of the Reception Directive and the Qualification Directive.²⁸¹
- 4.221 ECNI also responded to the consultation, identifying the relevance of the Victims’ Directive in relation to the rights of victims of human trafficking, torture and hate crime, and the Trafficking Directive, which creates provisions relating to assistance and support of victims of trafficking, including children. ECNI noted these Directives were relevant to Outcome 2 of the draft Strategy, focusing on an approach to protecting the most vulnerable.²⁸² The ECNI also highlighted that the Executive Office should consider what additional measures could be taken, including via the Refugee Integration Strategy to ensure that there are not increased instances of racial profiling of refugee and asylum seekers, in the context of cross border travel and accessing cross border services.

²⁷⁹ The Executive Office, ‘Refugee integration strategy for NI 2022-2027 consultation’, (TEO, 2022).

²⁸⁰ Ibid.

²⁸¹ NI Human Rights Commission, ‘Response to public consultation on draft Refugee Integration Strategy’, (NIHRC, 2022).

²⁸² Equality Commission for NI, ‘Response to the consultation by the Executive Office on the draft Refugee Integration Strategy 2022-2027’, (ECNI, 2022).

Recommendations

- 4.222 In line with overarching recommendations the Commissions recommend that the NI Executive, and the Executive Office in particular, ensure that at all stages of policy and legislative development and reform in the area of refugee and asylum seeker integration, including the Refugee Integration Strategy, there is consideration of, and compliance with, Protocol Article 2 obligations.
- 4.223 The NIHRC recommends that the Executive Office ensure that, in line with legal obligations, the Refugee Integration Strategy adopts a human rights-based approach which expressly references, explains and incorporates relevant human rights standards, including relevant EU obligations which underpin the non-diminution commitment in Protocol Article 2.

Right to Health

- 4.224 The right to the highest attainable standard to health is protected under the UN ICESCR, UN CRC and UN CRPD.²⁸³ As a minimum, respect for the right to health includes the prohibition of unlawful discrimination in access to health services. As noted above, the obligation to ‘keep pace’ in respect of the six Annex 1 equality Directives, includes the Racial Equality Directive, which establishes a framework for combating discrimination on the grounds of racial or ethnic origin, including in access to goods and services,²⁸⁴ and the Gender Equality (Goods and Services) Directive, which prohibits sex discrimination in access to goods and services and relevant CJEU case law.²⁸⁵
- 4.225 The NIHRC commissioned research on the implications of EU Withdrawal on access to healthcare on the island of Ireland, arising from concerns about clarity of rights and the interaction of various international commitments including Citizens’ rights provisions of the Withdrawal Agreement, Protocol Article 2 and the Common Travel Area. The NIHRC also wished to explore arrangements for continuing access to cross-border and all-island services. The research found that in a number of cases, current access to healthcare could amount to a diminution of rights.²⁸⁶

²⁸³ Article 12, UN International Covenant of Economic, Social and Cultural Rights; Article 24, UN Convention on the Rights of the Child; and Article 25, UN Convention on the Rights of People with Disabilities.

²⁸⁴ Directive 2000/43/EC, ‘EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin’, 29 June 2000.

²⁸⁵ Directive 2004/113/EC, ‘EU Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and Services’, 13 December 2004.

²⁸⁶ Tamara Hervey, ‘Brexit, Health and its potential impact on Article 2 of the Ireland/Ni Protocol’, (NIHRC, 2022).

These include entitlement to healthcare of trafficked children and the rights of family members of frontier workers, to access healthcare in the jurisdiction of work. At the time of writing, NIHRC was considering the research and developing its recommendations.

4.226 In March 2022, the ECNI commissioned research on the impact of Brexit on minority ethnic and migrant people in Northern Ireland. It will consider the impacts on minority ethnic and migrant people who experience disadvantage or discrimination due to intersectional or multiple identities, including the specific impacts for people living/working in rural areas; minority ethnic women; disabled people from minority ethnic background; and for those living with poverty and social exclusion. The research is anticipated to finish in late 2022.

Access to Healthcare for Irregular Migrants²⁸⁷

4.227 Following UK withdrawal from the EU, EU, EEA and Swiss citizens living in the UK must now apply for settled status, through the EU Settlement Scheme, to ensure they have leave to remain in the UK.²⁸⁸ The deadline to apply for the EU Settlement Scheme was 30 June 2021.²⁸⁹ Should EU, EEA and Swiss citizens not apply for settled status, they risk being viewed as irregular migrants and may lose access to healthcare among other benefits.²⁹⁰ Concerns have been raised regarding the accessibility of the EU Settlement Scheme, particularly for more vulnerable members of the community, including young people who have grown up in care, victims of modern slavery and members of the Roma community.²⁹¹

4.228 In December 2021, the Independent Monitoring Authority issued judicial review proceedings against the Home Office, challenging the policy where EU or EEA citizens who fail to apply for settled status before the expiry of their pre-settled status automatically lose their rights.²⁹²

4.229 Everyone in NI is entitled to free emergency healthcare at the point of service, including irregular migrants. It is important that information regarding the right to emergency healthcare is communicated to irregular

²⁸⁷ Discussion in this section on access to health care for irregular migrants should be read in light of the wider context of the EU Settlement Scheme below at para 5.48.

²⁸⁸ UK Government, 'Stay in the UK ('settled status'): Step by Step'. Available at: <https://www.gov.uk/eusetledstatus>

²⁸⁹ Home Office, 'EU Settlement Scheme: Information for late applicants', (HO, 2021).

²⁹⁰ Amelia Gentleman, 'High court rejects bid to extend UK's EU settlement scheme', The Guardian, 11 March 2021.

²⁹¹ The Migration Observatory, 'Vulnerable EU citizens are at risk of becoming "irregular migrants" after Brexit', 24 September 2021. Available at: <https://migrationobservatory.ox.ac.uk/press/vulnerable-eu-citizens-are-at-risk-of-becoming-irregular-migrants-after-brexit/>

²⁹² Independence Monitoring Authority, 'Judicial Review claim issued by IMA', IMA, 14 December 2021. Available at: <https://ima-citizensrights.org.uk/news/judicial-review-claim-issued-by-ima/>

migrants to ensure they are able to access this type of healthcare when they need it.

4.230 The Commissions reiterate the overarching recommendations on Protocol Article 2 which are relevant to the right to health, in addition to the specific recommendations below.

Recommendations

4.231 **The NIHRC recommends that the Home Office provide further guidance on the rights of people with pending and late applications to the EU Settlement Scheme to applicants to the Scheme and to healthcare professionals to ensure no diminution of the current provision and protect the rights to the highest attainable standard of healthcare.**

4.232 **The NIHRC recommends that the Department of Health provide clear, accessible and complete information on rights to healthcare post-EU withdrawal, including access to cross-border and island-of-Ireland services to ensure no diminution of the current provision and protect the rights to the highest attainable standard of healthcare.**

Employment Rights

4.233 NI equality law must dynamically align with any changes made by the EU to the six Annex 1 Equality Directives which improve the minimum levels of protection available on or after 1 January 2021, including monitoring relevant current and future CJEU case law.²⁹³ Four of these directives cover the area of employment discrimination on grounds of race and ethnicity, sexual orientation, religion and belief, disability, age and gender:

- Racial Equality Directive;²⁹⁴
- Employment Equality (Framework) Directive;²⁹⁵
- Gender Equality Directive;²⁹⁶
- Gender Equality (Self-Employment) Directive.²⁹⁷

²⁹³ Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

²⁹⁴ Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000.

²⁹⁵ Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000.

²⁹⁶ Directive 2006/54/EC, 'EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation', 5 July 2006.

²⁹⁷ Directive 2010/41/EU, 'EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity', 7 July 2010.

4.234 In addition to the Annex 1 Equality Directives, there are a number of other EU obligations which impact employment and underpin the rights and safeguards in the relevant part of the Belfast (Good Friday) Agreement. For example, the Commissions consider that the Parental Leave Directive²⁹⁸ and the Pregnant Workers Directive²⁹⁹ and other safeguards for part-time workers³⁰⁰ and agency workers³⁰¹ fall within scope of Protocol Article 2.³⁰²

4.235 In its Explainer on Protocol Article 2, the UK Government confirmed the commitment to dynamically align with the Annex 1 Directives to “provide a reassurance that, at the very least, the minimum standard of rights protection required by the listed directives will continue to be relevant in NI” and this will “ensure NI will not fall behind minimum European Standards in anti-discrimination law”.³⁰³

4.236 The Commissions reiterate the overarching recommendations on Protocol Article 2 in relation to employment rights which are relevant across all areas in this section, in addition to the specific recommendations below.

Employment Equality

4.237 In June 2021, the Commissions wrote to the head of the NI Civil Service drawing attention to key legal and other developments on the Racial Equality Directive and the Employment Equality (Framework) Directive impacting the keep pace obligation. This letter drew on an EU Commission Report on the two Directives.³⁰⁴

Parental Bereavement (Leave and Pay) Bill

4.238 In June 2021, a Bill to make provision for regulation on leave and pay for employees whose children have died was introduced into the NI Assembly.

4.239 In August 2021, the NIHRC provided written evidence to the Committee welcoming the Bill and, among other issues, advised on the obligation to ‘keep pace’ any improvements to rights in the Annex 1 Equality Directives

²⁹⁸ Directive 2010/18/EU, ‘Council Directive implementing the revised Framework Agreement on parental leave’, 8 March 2010.

²⁹⁹ Directive 92/85/EEC, ‘Council Directive on the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers who have Recently Given Birth or are Breastfeeding’, 19 October 1992.

³⁰⁰ Directive 97/81/EC, ‘Council Directive Concerning the Framework Agreement on Part-time Workers’, 15 December 1997.

³⁰¹ Directive 2008/104/EC, ‘EU Parliament and Council Directive on temporary agency work’, 19 November 2008.

³⁰² The Commissions are currently undertaking an extensive research exercise to form a view as to which EU obligations underpin the rights and safeguards in the relevant part of the Belfast (Good Friday) Agreement.

³⁰³ NI Office, ‘UK Government commitment to “no diminution of rights, safeguards and equality of opportunity” in Northern Ireland: What does it mean and how will it be implemented?’, (NIO, 2020), at para 12.

³⁰⁴ EU Commission, ‘Report to the EU Parliament and Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘the Racial Equality Directive’) and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (‘the Employment Equality Directive’)’ COM/2021/139, (EU Commission, 2021).

on or after 1 January 2021, including monitoring relevant CJEU case law. The NIHRC highlighted the need for ongoing monitoring of changes in relevant EU law, notably the Racial Equality Directive,³⁰⁵ the Employment Equality (Framework) Directive,³⁰⁶ and the Gender Equality Employment Directive,³⁰⁷ in the development and implementation of the regulations which give effect to the scheme.³⁰⁸

4.240 The Parental Bereavement (Leave and Pay) Act (Northern Ireland) 2022 received royal assent in March 2022.

Fair Employment and Treatment (NI) Order 1998

4.241 In January 2022, a private member's bill was introduced into the Assembly aiming to amend the Fair Employment and Treatment (NI) Order 1998 and remove the exception for non-discrimination on the basis of religion for school teachers in NI.³⁰⁹

4.242 During the Committee's examination of the Fair Employment (School Teachers) Bill, ECNI provided oral evidence reiterating the view that all teachers should be able to enjoy the same legislative protection as other workers. ECNI highlighted the importance of including teachers in monitoring requirements, ensuring annual data collection and regular review.³¹⁰

4.243 In March 2022, the NIHRC wrote to the Committee for the Executive, welcoming the proposed Bill as a positive step forward in the development of NI equality law.³¹¹ The NIHRC advised that the 'keep pace' obligation of Protocol Article 2 requires that NI law reflect any improvements to rights in the Annex 1 Equality Directives on or after 1 January 2021, including monitoring relevant current and future CJEU case law.³¹²

4.244 In particular, the NIHRC highlighted the Employment Equality (Framework) Directive which established a general framework for equal treatment in

³⁰⁵ Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000.

³⁰⁶ Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000.

³⁰⁷ Directive 2006/54/EC, 'EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation', 5 July 2006.

³⁰⁸ NI Human Rights Commission, NIHRC Submission to Committee for Economy on the Parental Bereavement (Leave and Pay) Bill, (NIHRC, 2021).

³⁰⁹ NI Assembly, NIA Bill 51/17-22 Fair Employment (School Teachers) Bill.

³¹⁰ NI Assembly, 'Hansard Official Report: Committee for the Executive Office', 16 February 2022.

³¹¹ Letter from NI Human Rights Commission to the Committee for the Executive Office, 2 March 2022.

³¹² Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

employment and occupation.³¹³ The Directive contains specific provisions in relation to NI, which reflect the exemptions for school teachers in the Fair Employment and Treatment (Northern Ireland) Order 1998.³¹⁴ However, the Directive does not require that the exemption is maintained and NI law can be changed to ensure that school teachers are brought within the scope of the Directive.³¹⁵ The Directive also permits Member States to introduce provisions that are more favourable to the protection of equal treatment than laid down in it.³¹⁶

4.245 Furthermore, the Employment Equality (Framework) Directive may continue to allow employers to consider if there is a genuine occupational requirement to appoint a candidate of a particular religion, so long as the objective is a legitimate one and the requirement proportionate. This is also consistent with the Fair Employment and Treatment (Northern Ireland) Order 1998.³¹⁷

4.246 The NIHRC advised that the removal of the blanket exemption of teachers from anti-discrimination legislation would provide a more robust framework for the protection of rights under the ECHR and Protocol Article 2 for those working in the teaching profession.

4.247 The Bill was passed in March 2022 and submitted for Royal Assent.

Civil Service Nationality Rules

4.248 The Civil Service Nationality Rules govern eligibility for employment in the Civil Service on the grounds of nationality and must be followed by government departments in their recruitment and appointment procedures.³¹⁸

4.249 Since 31 December 2021, following the UK's withdrawal from the EU, EEA nationals have been subject to the same UK immigration rules as non-EEA nationals, including the new points-based immigration system.³¹⁹ This means that EEA nationals are no longer able to rely on entitlements under

³¹³ Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000.

³¹⁴ Article 15(2), Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000.

³¹⁵ Article 15, Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000.

³¹⁶ Article 8(1), Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000.

³¹⁷ Article 70(2), Fair Employment and Treatment (Northern Ireland) Order 1998.

³¹⁸ Cabinet Office, 'Civil Service Nationality Rules: Guidance on Checking Eligibility (Updated February 2021)', (CO, 2021).

³¹⁹ Civil Service HR, 'Changes to the Civil Service Nationality Rules from the 1st January 2021: Guidance and Departmental Actions' (CSHR, 2021).

EU law and will require a UK immigration status in the same way as non-EEA nationals.

- 4.250 Furthermore, from 31 December 2020 there have been changes to the eligibility criteria for certain civil service posts based on immigration status.³²⁰
- 4.251 In view of the above, in 2021 the NIHRC sought and received a legal opinion on the underpinning EU obligations falling within the scope of Protocol Article in relation to the Civil Service Nationality Rules and any potential diminution. This issue raises a question in relation to the personal scope of Protocol Article 2, in other words, the cohort of people protected, which is relevant to a number of strands of ongoing work initiated by the Commissions in 2021/22, including on the Elections Bill and on the Social Security (Amendment) (EU Exit) Regulations (Northern Ireland) 2021.
- 4.252 Civil Service Nationality Rules were also raised at a meeting of the NI Assembly Committee for the Executive Office in December 2021, where the Commissions and IHREC briefed members on the dedicated mechanism and Protocol Article 2 issues.³²¹ In a follow-up letter to the Committee, the NIHRC updated members on its work on Civil Service Nationality Rules.³²² Both Commissions will keep this matter under review as related work progresses and continue to keep a watching brief on any developments in this area.

Recommendations

- 4.253 **The Commissions recommend that in the development of any laws or policies in the area of employment, including within civil service employment, the UK Government and relevant NI Executive departments, including the Executive Office, Department for the Economy, Department for Finance and other NI Executive departments consider and comply with Protocol Article 2.**
- 4.254 **In line with the overarching recommendations the Commissions recommend that the Department for the Economy should continue to monitor any developments in EU law, including relevant CJEU case law,**

³²⁰ Section 5, Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020; the Act contains a power to make changes to legislation as a consequence of, or in connection to the end of free movement.

³²¹ Northern Ireland Assembly, 'Committee for the Executive Office: Minutes of the Proceedings', 15 December 2021.

³²² Letter from NI Human Rights Commission to Sinead McLaughlin MLA, Chair of the Committee for the Executive Office, 7 January 2022.

relating to the Parental Bereavement (Leave and Pay) Act and resulting Regulations to ensure compliance with Protocol Article 2.

4.255 In line with the ‘keeping pace’ obligation associated with Protocol Article 2, the Commissions recommend that relevant NI Executive departments, including the Executive Office, and the Department for the Economy, and other NI Executive departments monitor any proposed changes by the EU to the six Annex 1 Equality Directives, including relevant case law of the CJEU and the ongoing consultation on the Racial Equality Directive.

Gender Pay Gap

4.256 The international human rights oversight bodies have consistently called for the UK Government and NI Executive to adopt effective measures to eliminate the gender pay gap.³²³

4.257 The gender pay gap in NI is comparatively small due to a greater concentration of public sector employment.³²⁴ However the gender pay gap is much greater in the private sector where men earn 20.4 per cent more, compared to 1.6 per cent more within the public sector.³²⁵ Moreover, the gender pay gap in NI is affected by the ‘part-time effect’, as part-time employees earn less on average than full-time employees and a higher proportion of part-time employees are women.³²⁶

4.258 The obligation to ‘keep pace’ with the Annex 1 Equality Directives includes the Gender Equality (Employment) Directive which protects against discrimination in employment on the grounds of gender.³²⁷ NI equality law must align with any improvements made by the EU to these rights, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.³²⁸

4.259 The Expert Advisory Panel for the Gender Equality Strategy published its report in March 2021. The report included a section on ‘Gender Pay Gap Reporting, Low Pay Levels and Pay Transparency’ and made a number of recommendations on the gender pay gap for the purpose of developing the

³²³ E/C.12/GBR/CO/6, 'UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 14 July 2016; CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019.

³²⁴ Price Waterhouse Cooper, 'Women in Work Index', (PWC, 2019).

³²⁵ NI Assembly Research and Information Service, 'Northern Ireland Gender Pay Gap – 2020 update', (NI Assembly, 2020).

³²⁶ Ibid.

³²⁷ Directive 2006/54/EC, 'EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation', 5 July 2006.

³²⁸ Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

Gender Equality Strategy.³²⁹ The Commissions are currently represented on the co-design group developing this work, and a consultation is expected later in 2022.

Pay Transparency

4.260 In March 2021, the EU Commission issued a proposal for a new Directive on gender pay transparency.³³⁰ The proposed Pay Transparency Directive is designed to “strengthen the existing enforcement tools and procedures in regard to the rights and obligations laid down in this Directive and the equal pay provisions set out in Directive 2006/54/EC”,³³¹ the Gender Equality (Employment) Directive, Article 4 of which states:

For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.

In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

4.261 Where one of the Annex 1 equality directives is amended or replaced by the EU on or after 1 January 2021, NI law must be updated to reflect any enhancements to the rights or safeguards in those directives.³³²

4.262 The Commissions initiated ongoing work to explore the extent to which this proposed Directive amends or replaces the Gender Equality (Employment) Directive in Annex 1 of the Protocol. Considerations include the legal basis for this new measure; the purpose of the new measure; the degree of overlap on the substance of the rights and safeguards between the new measure and the Annex 1 equality directives, any relevant Court of Justice of the EU (CJEU) case law; and the extent to which the new measure facilitates the implementation and/or enforcement of an Annex 1 equality directive.

4.263 In July 2021, the then Minister of State at the NI Office, Robin Walker MP responded to correspondence from the House of Commons European

³²⁹ Department for Communities, ‘Gender Equality Strategy Expert Advisory Panel Report’, (DfC, 2021).

³³⁰ EU Commission proposal for a Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms (COM(2021) 93).

³³¹ Ibid.

³³² Article 13(3), Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

Scrutiny Committee³³³ in which the Committee sought the Government's views on a range of matters relating to proposed Directive and Protocol Article 2. The Minister's response indicated that, whilst the Government remained committed to ensuring that matters of pay transparency are dealt with, it did 'not believe that there is any requirement to go further than the requirements to assess this already included in the Protocol'. There was no clear indication in the Government's response that, should the proposed Directive become law that it is committed to ensuring that relevant protections in NI's equality legislation would be amended to keep pace with its provisions.

4.264 There have been requirements on gender pay gap reporting in Great Britain since 2017 (the GB GPGR Regulations)³³⁴ and Ireland has introduced the Gender Pay Gap Information Act 2021.³³⁵ Unlike Great Britain and Ireland, there is no requirements on gender pay gap reporting in Northern Ireland with the NI Executive not enacting Section 19 of the Employment Act (NI) 2016³³⁶ which would have implemented pay transparency obligations. This has resulted in a divergence of rights across the island of Ireland with Northern Ireland falling behind Ireland, as well as Great Britain, with respect to gender pay transparency.

4.265 The ECNI has made a number of recommendations relating to strengthening gender pay transparency, including the introduction of requirements on gender pay gap reporting.³³⁷

4.266 The Commissions are currently considering the extent to which the proposed Pay Transparency Directive amends or replaces the Gender Equality (Employment) Directive.

Recommendations

4.267 The Commissions recommend that the Executive Office commit to ensuring that to the extent that the Pay Transparency Directive, if

³³³ Letter from Robin Walker MP, Minister of State for NI to Sir William Cash MP, Chair of the European Scrutiny Committee, 15 July 2021.

³³⁴ The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (SI 2017/172); Regulations came into force on 6 April 2017 and which applies to all private and voluntary sector employers with 250 or more employees in England, Wales and Scotland. Public sector employers with 250 or more employees that are listed in The Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 (SI 2017/353) are also required to publish information on their gender pay gap. These Regulations came into force on 31st March 2017.

³³⁵ Gender Pay Gap Information Act 2021.

³³⁶ Section 19, Employment Act (Northern Ireland) 2016.

³³⁷ Equality Commission for NI, 'Gender Pay Strategy and pay Reporting – Summary of policy recommendations', (ECNI, 2019).

introduced, amends or replaces the Gender Equality (Employment) Directive, the law in NI is amended to keep pace with that change.

4.268 The Commissions further recommend that, regardless of whether or not required to under the ‘keeping pace’ requirement associated with Protocol Article 2, the NI Executive should ensure that NI law keeps pace with changes that enhance equality and human rights protections further to the Pay Transparency Directive, if introduced.

Right to Education

Migrant and Minority Ethnic Children

4.269 Protocol Article 2 provides specific, enhanced protection against discrimination covered by the six Annex 1 equality directives, including the Racial Equality Directive which protects against discrimination on the grounds of race and ethnicity in the area of education.³³⁸ NI equality law must keep pace with any changes made by the EU to these rights to improve the minimum levels of protection available, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.³³⁹

4.270 In its submission the Advisory Committee on the Framework Convention for the protection of National Minorities, the NIHRC drew attention to these protections in relation to the inequalities experienced by minority ethnic and migrant children.³⁴⁰ In particular, it highlighted the need to ensure protection for children from Traveller communities, children from the Roma community and refugee children.³⁴¹

4.271 The UN CRC has raised concerns about the substantial, persistent inequalities in educational achievement of children in poverty, Roma, Gypsy and Traveller children, and migrant children among others.³⁴²

4.272 In 2020/21, 1,106 Irish Traveller children were enrolled in NI schools (an increase of 18 from 2019/20), with an attendance rate of 74 per cent and

³³⁸ Directive 2000/43/EC, ‘EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin’, 29 June 2000.

³³⁹ Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

³⁴⁰ NI Human Rights Commission, ‘Submission to the Advisory Committee on the Framework Convention for the protection of National Minorities – Parallel Report to the Advisory Committee on the Fifth Monitoring Report of the UK’, (NIHRC, 2022), at para 11.5.

³⁴¹ *Ibid*, at paras 11.3-11.14.

³⁴² CRC/C/GBR/CO/5, ‘UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016.

67 per cent receiving Free School Meals.³⁴³ There were 779 Roma children enrolled in NI schools (an increase of 74 from 2019/20), with an attendance rate of 79 per cent and 28 per cent receiving Free School Meals.³⁴⁴ Additionally, there were 17,664 children from migrant families enrolled in schools in NI (an increase of 273 from 2019/20), equating to 5 per cent of total school enrolments.³⁴⁵

4.273 The New Decade, New Approach agreement established an Expert Panel on Educational Underachievement to examine the links between persistent educational underachievement and socio-economic background.³⁴⁶ In its final report published in 2021, the Expert Panel highlighted that children from the Traveller community, Roma children and looked after children, have some of the lowest levels of attainment of all equality groups.³⁴⁷

4.274 In October 2021, the Independent Review of Education Panel commenced work, with the review expected to take a minimum of 18 months. The NIHRC has met with representatives of the Independent Review and raised, along with other issues, the need to consider Protocol Article 2 in its work.

Recommendations

4.275 The Commissions recommend that in the development of any laws or policies in the area of education and the educational needs of migrant and minority ethnic children, the Department of Education consider and comply with Protocol Article 2.

4.276 In line with the ‘keeping pace’ obligations associated with Protocol Article 2, the Commissions recommend that the Department of Education monitor any proposed changes by the EU to the Racial Equality Directive, including relevant case law of the CJEU.

³⁴³ Northern Ireland Statistics and Research Agency, ‘Irish traveller & Roma pupils in education: 2020-2021 Key Statistics’, (DE, 2021).

³⁴⁴ Ibid.

³⁴⁵ Northern Ireland Statistics and Research Agency, ‘Newcomer pupils 2001/02 to 2019/20’, (DE, 2020).

³⁴⁶ NI Office, ‘New Decade, New Approach’, (NIO, 2020), at 40.

³⁴⁷ Expert Panel on Educational Underachievement, ‘A Fair Start: Final Report and Action Plan’, (DE, 2021).

5.0 Human Rights and Equality after Brexit: Protocol Article 2 and Beyond

5.1 The UK's withdrawal from the EU has implications for human rights and equality that are not fully encompassed by Protocol Article 2 but are connected to the work of the dedicated mechanism. The Commissions have set out below their recommendations on the wider impact of Brexit on the equalities and human rights landscape in Northern Ireland, aligned to their respective remits and statutory roles.

Birthright

5.2 Recognition in the Belfast (Good Friday) Agreement, of the “birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both”, has attracted renewed focus in the context of EU withdrawal, due to the implications for access to EU free movement rights.

5.3 In 2020, the Joint Committee of the NIHRC and the Irish Human Rights and Equality Commission published a legal analysis and proposals for reform to enshrine the commitment in domestic law.³⁴⁸ Under Section 1 of the British Nationality Act 1981, anyone born in the UK to a British, Irish, or settled parent, is deemed British.

5.4 In New Decade, New Approach, the UK Government noted that it had reviewed its rules on family migration arrangements “taking into account the letter and spirit of the Belfast Agreement and recognising that the policy should not create incentives for renunciation of British citizenship by those citizens who may wish to retain it”.³⁴⁹

5.5 On 24 August 2020, temporary changes came into force to allow for a “relevant person of NI” to access EU free movement law protections.³⁵⁰ A relevant person of NI was defined as someone who is a British citizen, an Irish citizen, or both British and Irish, and was born in NI to a parent who was British, Irish, or both, or otherwise entitled to reside in NI without any

³⁴⁸ Alison Harvey, ‘A Legal Analysis of Incorporating into UK Law the Birthright Commitment under the Belfast (Good Friday) Agreement 1998’, (NIHRC and IHREC, 2020).

³⁴⁹ NI Office, ‘New Decade, New Approach’, (NIO, 2020), at 48.

³⁵⁰ Home Office, ‘Statement of Changes in Immigration Rules CP232’, (HO, 2020), at 10.

restriction on their period of residence. This scheme closed on 30 June 2021 in line with the EU Settlement Scheme.³⁵¹

- 5.6 In January 2021, the NIHRC provided a written submission to the NI Affairs Committee inquiry on Citizenship and Passport Processes in NI, which highlighted its recommendation that UK nationality and immigration legislation be amended to give effect to the birthright commitment.³⁵² The NIHRC was invited to give oral evidence³⁵³ and further written evidence³⁵⁴ at the Committee's request to respond to written evidence submitted by the UK Government.³⁵⁵
- 5.7 The Committee's report called for the UK Government to "clarify the meaning of the phrase 'to be accepted as' in Article 1(vi) of the Agreement, including how it is respected and upheld in the Government's approach towards the birthright provisions for the people of Northern Ireland".³⁵⁶ The Committee further called on the UK Government and Government of Ireland to agree a shared approach to the birthright provisions to remove any remaining ambiguity.³⁵⁷
- 5.8 In its submission on the Nationality and Borders Bill, to the Joint Committee on Human Rights in October 2021, the NIHRC welcomed the regularisation of historical anomalies within UK nationality and citizenship law. However, the NIHRC expressed concern that the Home Office had not taken the opportunity to clarify the birthright of all the people of NI to identify, and be accepted, as Irish or British or both, without any loss of rights or entitlements.³⁵⁸
- 5.9 During a House of Lords debate on the Bill, Lord Sharpe of Epsom, representing the Government, opposed an amendment on the subject,³⁵⁹

³⁵¹ NI Human Rights Commission, 'EU Settlement Scheme extended to the people of Northern Ireland: what does it mean for me?', (NIHRC, 2020).

³⁵² NI Human Rights Commission, 'Submission to the NI Affairs Committee Inquiry into Citizenship and Passport Processes', (NIHRC, 2021).

³⁵³ UK Parliament Hansard, 'NI Affairs Committee Inquiry into Citizenship and Passport Processes in NI - NI Human Rights Commission - HC1111', 10 March 2021.

³⁵⁴ NI Human Rights Commission, 'NI Affairs Committee Inquiry into Citizenship and Passport Processes in NI: NIHRC Commentary on the Northern Ireland Office/Home Office Submission to the Committee', (NIHRC, 2021).

³⁵⁵ Correspondence from Robin Walker MP, Minister of State for NI and Kevin Foster MP, Minister for Future Borders and Immigration to the NI Affairs Committee, 2 March 2021.

³⁵⁶ NI Affairs Committee, 'First Report of Session 2021/2022 on Citizenship and Passport Processes relating to Northern Ireland', (HC, 2021), at para 14.

³⁵⁷ Ibid.

³⁵⁸ NI Human Rights Commission, 'Response to Call for Evidence by the Joint Committee on Human Rights on the Nationality and Borders Bill', (NIHRC, 2021), at paras 3.1-3.4.

³⁵⁹ House of Lords, 'Nationality and Borders Bill: Fourth Marshalled List of Amendments to be Moved in Committee of the Whole House', (HoL, 2022), at 186.

stating that the birthright provisions were already clear and that further legislation stipulating a particular view of identity would risk impinging upon the freedom of the people of NI to choose what their identity means to them.³⁶⁰

Recommendation

- 5.10 **The NIHRC recommends that the Home Office amend nationality and immigration laws to reflect the commitment under the Belfast (Good Friday) Agreement 1998, that it is the birthright of all the people of NI to identify, and be accepted, as Irish or British or both, without any loss of rights or entitlements.**

Common Travel Area

- 5.11 Article 3 of the Ireland/Northern Ireland Protocol recognises that the UK and Ireland “may continue to make arrangements between themselves relating to the movement of persons between their territories”, subject to Ireland’s obligations under EU law.
- 5.12 In the context of UK withdrawal from the EU, the UK Government advised Irish nationals that they need not apply for the EU Settlement Scheme on the basis that “You can still enter and reside in the UK and enjoy your existing rights as provided for by the CTA arrangements”.³⁶¹
- 5.13 In March 2021, the NIHRC provided oral evidence to the NI Affairs Committee’s inquiry on Citizenship and Passport Processes in NI and outlined the limited legal underpinning to Common Travel Area rights in the absence of supporting EU law.³⁶²
- 5.14 On 1 October 2021, new Home Office guidance took effect, stating that while travellers into Great Britain from Ireland need not show a passport to a Border Force officer, they may be asked to show a document confirming their identity and nationality.³⁶³ European Economic Area and Swiss citizens may be asked to show their passport or identity card to enter Great Britain when travelling from Ireland if they are encountered by Border Force. Only

³⁶⁰ UK Parliament Hansard, ‘House of Lords: Nationality and Borders Bill (Committee Stage) – Lord Sharpe of Epsom – Column 1937’, 10 February 2022.

³⁶¹ Home Office, ‘Common Travel Area Guidance’, (HO, 2021), at section 8A.

³⁶² NI Human Rights Commission ‘Submission to the NI Affairs Committee Inquiry into Citizenship and Passport Processes’ (NIHRC, 2021); NI Human Rights Commission, ‘NI Affairs Committee Inquiry into Citizenship and Passport Processes in NI: NIHRC Commentary on the Northern Ireland Office/Home Office Submission to the Committee’, (NIHRC, 2021); UK Parliament Hansard, ‘Northern Ireland Affairs Committee Inquiry into Citizenship and Passport Processes in NI - NI Human Rights Commission - HC1111’, 10 March 2021.

³⁶³ Cabinet Office and Home Office, ‘Common Travel Area Guidance’, (CO and HO, 2021).

certain categories of people may use their identity card, such as those who have EU settled status, the rest will be required to show their passport. The Commissions have raised concerns about the risk of racial profiling in the context of additional checks arising from EU exit, including in correspondence to the Home Office, enquiring about the training, guidance and procedures in place to prevent and address such occurrences.³⁶⁴

- 5.15 In its letter to the Home Office the ECNI have raised specific concerns relating to the potential for increased racial profiling, which have also been raised with the Commission by equality and human rights stakeholders, in relation to new Common Travel Area guidance. The ECNI highlighted that Home Office should take effective steps to ensure that the implementation of the revised guidance will not lead to an increase in instances of racial profiling of black and ethnic minority people and migrant people, in the context of cross border travel.

Nationality and Borders Bill: Electronic Travel Authorisations

- 5.16 In July 2021, the UK Government published its Nationality and Borders Bill. The Bill, among other things, introduced Electronic Travel Authorisations (ETA), originally under Clause 71. Clause 71 states:

Immigration rules may require an individual of a description specified in the rules not to travel to the United Kingdom from any place (including a place in the common travel area), whether with a view to entering the United Kingdom or to passing through it without entering, unless the individual has an ETA that is valid for the individual's journey to the United Kingdom.³⁶⁵

- 5.17 Clause 71 requires an Electronic Travel Authorisation for all non-British citizens who require leave to enter the UK when travelling from Ireland to the UK. Irish citizens are excluded as individuals not requiring leave to enter the UK by virtue of Section 3ZA of the Immigration Act 1971. However, a significant number of individuals who do not hold recognised UK immigration status will be affected despite free travel across the island of Ireland being available to them under the current system.

³⁶⁴ Letter from NI Human Rights Commission to Home Office, 20 December 2021; Letter from Equality Commission for NI to Home Office, January 2021.

³⁶⁵ Clause 71(2), Nationality and Borders Bill as introduced to House of Lords on 9 December 2021 (HL Bill 82).

- 5.18 While the Explanatory Notes confirm that British and Irish citizens do not require an Electronic Travel Authorisation, their permission to travel will require evidence of their nationality, as ‘demonstrated by their passports’.³⁶⁶ It is not known what measures are in place to decide which individuals will be required to ‘demonstrate’ that permission to travel.
- 5.19 In December 2021, the NIHRC wrote to Rt Hon Priti Patel MP, Home Secretary, to raise concerns about proposals to introduce Electronic Travel Authorisations.³⁶⁷ The letter identified that the imposition of restrictions and checks engages Article 8 of the ECHR (the right to private and family life), particularly of those who cross the border to shop, work, access services or visit family and that related checks raised the risk of racial profiling. The NIHRC noted that, under the NI Protocol, the UK Government committed to avoiding a hard border, including related checks and controls, and gave undertakings in respect of protecting North-South co-operation and the Common Travel Area.
- 5.20 In January 2022, the ECNI also wrote to the Home Secretary to highlight and seek clarification on a number of issues relating to proposals to introduce an Electronic Travel Authorisation. The ECNI noted that it has received specific concerns from equality and human rights stakeholders in NI about the potential impact on certain people living in border communities and that the enforcement of the Electronic Travel Authorisations could result in an increase of racial profiling and racial discrimination. The ECNI requested that the UK Government set out its assessment of the conformity of the proposed Electronic Travel Authorisation with its commitment under Protocol Article 2.
- 5.21 In January 2022, the NIHRC and ECNI jointly produced a briefing paper for the House of Lords on the Nationality and Borders Bill provisions on human trafficking and Electronic Travel Authorisations. The NIHRC and ECNI raised their concerns regarding the potential increase in racial profiling as a result of Electronic Travel Authorisations across the island of Ireland and suggested further consideration was required, including specifically Protocol Article 2’s ‘non-diminution’ guarantee, which includes the right to ‘equal opportunity in all social and economic activity’.³⁶⁸ The NIHRC raised

³⁶⁶ Explanatory Notes to the Nationality and Borders Bill as brought from the House of Commons on 9 December 2021 (HL Bill 82), at para 676.

³⁶⁷ Letter from NI Human Rights Commission to Priti Patel MP, Home Secretary, 20 December 2021.

³⁶⁸ The Belfast (Good Friday) Agreement section on Rights, Safeguards and Equality of Opportunity – Human Rights; the Agreement references “the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity”.

concerns that additional restrictions or checks would likely engage Article 8 of the ECHR, particularly for those individuals who cross the border to shop, work, access services or visit family.³⁶⁹

5.22 The NIHRC and ECNI jointly sent letters to Rt Hon Priti Patel MP, Home Secretary³⁷⁰ and Rt Hon Brandon Lewis MP, Secretary of State for NI³⁷¹ and, alongside IHREC, an additional letter to Simon Coveney TD, Irish Minister for Foreign Affairs outlining potential Protocol Article 2 concerns with Electronic Travel Authorisations.

5.23 If the Nationality and Borders Bill remains unamended the Commissions will be considering what action to take to address potential incompatibility with Protocol Article 2.

Recommendations³⁷²

5.24 **The Commissions recommend that effective steps are taken by the Home Office to ensure that the implementation of the revised guidance on the Common Travel Area will not lead to an increase in instances of racial profiling of black and ethnic minority people and migrant people, in the context of cross-border travel.**

5.25 **The Commissions recommend that effective steps are taken by the Home Office to prevent and address racial profiling, including through appropriate training and monitoring, in the implementation of the revised guidance on the Common Travel Area and the Electronic Travel Authorisation requirements, including at entry to NI at ports and airports and in the context of cross-border travel.**

5.26 **The NIHRC recommends that the Common Travel Area and associated rights are enshrined in law by agreeing a comprehensive bilateral treaty between the UK and Irish governments. The NIHRC further recommends that this agreement codifies reciprocal free movement rights and rights to employment, education, health care and justice and security on that basis and that it is incorporated into domestic legislation.**

5.27 **The Commissions recommend that the Home Office confirms what consideration was given to Protocol Article 2 in the development of the Nationality and Borders Bill and that Protocol Article 2 should be**

³⁶⁹ NI Human Rights Commission and Equality Commission for NI, 'Joint NIHRC/ECNI Briefing Paper in the Modern Slavery and Human Trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill', (NIHRC/ECNI, 2022), at 12.

³⁷⁰ Letter from NI Human Rights Commission and Equality Commission NI to Home Office, 9 February 2022.

³⁷¹ Letter from NI Human Rights Commission and Equality Commission NI to Northern Ireland Office, 9 February 2022.

³⁷² Recommendations relate to status of the Nationality and Borders Bill as of 31 March 2022.

considered and complied with throughout its implementation and the development of regulations and guidance.

- 5.28 The NIHRC recommends that all journeys into NI that originate from Ireland should be exempt from Electronic Travel Authorisation requirements.**
- 5.29 The Commissions recommend that effective steps are taken by the Home Office, including through appropriate monitoring and training, to ensure that the Electronic Travel Authorisation will not lead to an increase in instances of racial profiling of black and ethnic minority people and migrant people, in the context of cross border travel.**

Cross-Border Justice Arrangements

Policing, Security and Criminal Justice

- 5.30** In April 2021, the House of Commons NI Affairs Committee published its report following an inquiry on cross-border cooperation on policing, security and criminal justice after Brexit.³⁷³ The NIHRC submitted evidence to the Committee in October 2020 which highlighted the human rights and data protection standards when sharing data, and the need to establish an effective and efficient UK-EU extradition arrangement in the absence of the European Arrest Warrant, to ensure continued cross-border arrangements to ensure victims' rights and the rights of accused persons are upheld.³⁷⁴
- 5.31** In June 2021, the UK Government responded to the recommendations set out in the report and highlighted a number of significant developments which had either occurred, or which will occur, in relation to cross-border policing, security and criminal justice after Brexit. This included a commitment to work with domestic and EU partners to monitor the operation of the new extradition arrangements under the Trade and Cooperation Agreement and to take steps to address any issues that should arise; a commitment to work with EU and Irish law enforcement partners to strengthen international law enforcement cooperation to tackle shared threats in the absence of access to Schengen Information System II;³⁷⁵ and a commitment to ongoing cooperation in the areas of information-sharing

³⁷³ NI Affairs Committee, 'Cross-Border Cooperation on Policing, Security and Criminal Justice after Brexit', (NIAC, 2021).

³⁷⁴ NI Human Rights Commission, 'Submission to NI Affairs Committee Inquiry on Cross-border Cooperation on Policing, Security and Criminal Justice after Brexit', (NIHRC, 2020).

³⁷⁵ Schengen Information System (SIS II) is a European database, which provides alerts on the movement of people or objects of interest as they cross EU borders. Regulation 1987/2006, 'European Parliament and European Council Regulation on the Establishment, Operation and Use of the Second Generation Schengen Information System (SIS II)', 28 December 2006.

initiatives, bio-metric data, criminal record data, bi-lateral cooperation with Ireland in tackling crime, the establishment of robust data protection standards and the development of cross-agency cooperation in NI to tackle crime.³⁷⁶

- 5.32 The Trade and Cooperation Agreement has introduced a number of changes.³⁷⁷ The NIHRC welcomes the commitment in the Trade and Cooperation Agreement to ensure criminal justice cooperation is based on respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the ECHR.³⁷⁸
- 5.33 While the UK is not part of the European Arrest Warrant system, the Trade and Cooperation Agreement does allow for a fast-track system which enables the extradition of either UK or EU nationals.³⁷⁹ However, unlike the European Arrest Warrant, which was based on the principle of mutual judicial recognition, this new system will likely be more restrictive in practice as it also revives the ‘dual criminality’ requirement, meaning that an offence must exist in both jurisdictions before an extradition request can be granted.³⁸⁰ The NIHRC welcomes that the UK and EU have agreed data adequacy agreements to allow for the sharing of some information but regrets that access to information sharing tools such as Schengen Information System II has been lost.³⁸¹
- 5.34 In August 2021, the Irish Supreme Court submitted a request for a preliminary ruling to the CJEU on the legality of continuing extradition proceedings to the UK under the Withdrawal Agreement and the Trade and Cooperation Agreement.³⁸² In November 2021, the CJEU ruled that the surrender mechanism established by the UK-EU Withdrawal Agreement and the Trade and Cooperation Agreement related to the investigation, detection and prosecution of criminal offences and the execution of criminal penalties which strengthen the security of the UK and the EU and

³⁷⁶ NI Affairs Committee, 'Cross-border co-operation on policing, security and criminal justice after Brexit: Government Response to the Committee's Fourth Report of Session 2019–21', (NIAC, 2021).

³⁷⁷ Part Three of the Trade and Cooperation Agreement relates to Law Enforcement and Judicial Cooperation.

³⁷⁸ Article 524, UK-EU Trade and Cooperation Agreement 2020.

³⁷⁹ Article 596-632, UK-EU Trade and Cooperation Agreement 2020.

³⁸⁰ Section 12, European Union (Future Relationship) Act 2020 has repealed Sections 64 and 65, Extradition Act 2003 which previously contained a waiver in relation to the requirement of dual criminality.

³⁸¹ Commission Implementing Decision pursuant to Regulation (EU) 2016/679 on the adequate protection of personal data by the United Kingdom, C(2001) 4800, 28 June 2021; and Commission Implementing Decision pursuant to Regulation (EU) 2016/680 on the adequate protection of personal data by the United Kingdom, C(2001) 4801, 28 June 2021.

³⁸² *Saqlain v The Governor of Cloverhill Prison & Others, Shahzad v The Governor of Mountjoy* [2021] IESC 45; Reference for a preliminary ruling 3 August 2021, SN and SD v Governor of Cloverhill Prison, C-479/21.

could be included in those agreements without the need for Ireland to opt in to that procedure. Therefore, a European Arrest Warrant issued on or before 31 December 2020, where the requested person has not been arrested until after that date, is binding on Ireland.³⁸³

- 5.35 Any delays and impediments to the timely operation of the criminal justice system have the potential to impact on both the rights of the accused person and victims. Where such delays result in a diminution of the current levels of protection for victims, these have the potential to engage Protocol Article 2.

Civil Justice and the Adoption and Children Bill

- 5.36 Questions of cross-border civil justice co-operation arose during committee stage of the Adoption and Children (NI) Bill, introduced to the Assembly in September 2021. Following oral evidence by the NIHRC in December 2021, the Committee for Health wrote to request further information, including regarding the possible impact of Protocol Article 2, which were addressed by NIHRC in a letter to the Committee in January 2022.³⁸⁴

- 5.37 Before 1 January 2021, cross-border disputes within the EU relating to children were regulated under the Brussels Ila Regulation ('Brussels Ila').³⁸⁵ This provided rules for establishing jurisdiction and ensured that orders relating to parental responsibility issued in one EU member state could be recognised and enforced in another.

- 5.38 Neither the UK-EU Withdrawal Agreement, nor the UK-EU Trade and Cooperation Agreement address cooperation on matters of cross-border civil justice and no replacement of the Brussels Ila system has been put in place. Therefore, for cases instituted after 1 January 2021, the mechanisms for inter-country child placement are now governed by common law and the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention).³⁸⁶

- 5.39 The 1996 Hague Convention confers functions on designated Central Authorities within each Contracting State. England, Wales, Scotland and Northern Ireland each have their own Central Authority. The Department of

³⁸³ *Governor of Cloverhill Prison and Others*, Case C-479/21, 16 November 2021, at paras 68-71.

³⁸⁴ Letter from the NI Human Rights Commission to the Committee for Health, 17 January 2022.

³⁸⁵ Regulation 2201/2003/EU, 'Council regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels Ila)', 27 November 2003.

³⁸⁶ Ratified by the UK in 2012.

Justice has been designated as the Central Authority for NI under the 1996 Convention. One of its key functions is “to request the competent authorities in Northern Ireland to consider the need to take measures for the protection of a child habitually resident in Northern Ireland upon the request of another Contracting State with which the child has a substantial connection”.³⁸⁷

- 5.40 Current challenges are exemplified by the introduction of a Special Guardianship Order in the Bill. A special guardian would acquire parental responsibility for the child and may exercise it to the exclusion of others with parental responsibility, except in very exceptional circumstances.³⁸⁸ Special Guardianship Orders are an option for those who do not wish to go through the adoption process, but who want to provide greater security for a child by placing him or her with a kinship carer. In NI, it is foreseeable that such cases may involve an extended family member who lives across the Irish border.
- 5.41 In its correspondence with the Committee for Health, the NIHRC raised the question of whether the loss of the Brussels IIa framework could adversely impact how the cross-border placement of children is managed. It advised that it was unclear how the Bill, as drafted, would meet the needs of children for whom adoption is not appropriate, but who would benefit from the permanence provided by a kinship placement across the Irish border.
- 5.42 The NIHRC further asked whether placing children under Special Guardianship Orders overseas or cross-border may warrant a distinct form of regulatory framework for domestic cases (for example a bilateral agreement between UK and Ireland), in order to pre-empt any difficulties that may arise.

Recommendations

- 5.43 **The NIHRC recommends that the highest standards of victims’ rights and rights of accused persons are central to cross-border criminal justice cooperation.**
- 5.44 **The NIHRC recommends that, in the absence of CJEU oversight of the extradition process, the UK and EU establish clear safeguards within the**

³⁸⁷ Department of Justice NI, ‘Child Abduction 1996 Hague Convention’. Available at <https://www.justice-ni.gov.uk/articles/child-abduction-1996-hague-convention>

³⁸⁸ Article 14(A), Children (NI) Order 1995.

Trade and Cooperation Agreement oversight mechanisms to ensure that human rights will be safeguarded.

- 5.45 **The NIHRC recommends that the UK and the EU work to ensure that loss of access to criminal justice data-sharing arrangements do not result in unreasonable delays in investigations and proceedings.**
- 5.46 **The NIHRC further recommends that in the absence of the European Arrest Warrant, effective and efficient UK-EU extradition arrangements are put in place with robust human rights and legal safeguards for accused persons and for victims of crimes.**
- 5.47 **The NIHRC recommends that consideration be given to how the cross-border placement of children is managed following the UK's withdrawal from the EU, to ensure no adverse impacts.**

EU Settlement Scheme

- 5.48 The EU Settlement Scheme is relevant to the Commissions' role under Protocol Article 2 since it concerns the rights of EU nationals living in NI prior to 1 January 2021 and therefore interacts with the 'no diminution' commitment.³⁸⁹ The Independent Monitoring Authority has responsibility for monitoring the EU Settlement Scheme.
- 5.49 The ECNI has commissioned research which will seek to identify the key socioeconomic impacts of Brexit on minority ethnic and migrant people in NI, which may identify further areas of concern.
- 5.50 The EU Settlement Scheme was designed to protect the rights of EU and EEA citizens and their family members already living in the UK prior to 1 January 2021. The EU Settlement Scheme gives effect to the Citizens' Rights provisions in the UK-EU Withdrawal Agreement.³⁹⁰ Applicants and their families can be granted either settled status or pre-settled status under the EU Settlement Scheme. For EU and EEA nationals with five years' continuous residency in the UK, they will ordinarily be granted settled status, which is indefinite leave to remain, while those with less than five years' continuous residency will be granted pre-settled status, which is a temporary right to reside for five years. Pre-settled status allows the applicant to remain in the UK, subject to conditions, in order to fulfil the residency requirements to apply for settled status. EU, EEA and Swiss

³⁸⁹ See also the section of this report on Electoral Rights at 4.202-4.211.

³⁹⁰ Part 2, UK-EU Withdrawal Agreement 2020.

citizens who come to the UK from 1 January 2021 are subject to the UK's points-based immigration system.

- 5.51 In July 2021, the House of Lords European Affairs Committee published a report on Citizens' Rights which is its assessment of the operation of the EU Settlement Scheme.³⁹¹ In particular, the report expressed concern that the absence of a physical document for those who had been granted settled status may prove problematic for older people or those not digitally astute in claiming their rights. The report also expressed concern about the status of the 2 million people who had been granted pre-settled status and the fact that their future applications are subject to individualised deadlines which may create uncertainty. The report further highlighted the need to ensure greater clarity and certainty around late applicants to the EU Settlement Scheme who may lose rights as a result of late applications.

Late applications

- 5.52 The deadline for applications to the EU Settlement Scheme was 30 June 2021. The UK Government confirmed that late applications would be accepted where there are reasonable grounds for failing to meet the deadline. Guidance indicated that a 'flexible and pragmatic approach' should be taken; that rights would be protected pending consideration of applications; and that those without status, encountered by Immigration Enforcement, who may be eligible, should be afforded the opportunity to make a late application.³⁹²
- 5.53 However, a number of issues arose regarding the implementation of the scheme. There was concern that children and young people, including looked after children and care leavers, who did not apply to the EU Settlement Scheme within the prescribed timeframe, would find themselves unlawfully residing in the UK. Following engagement with the Children's Law Centre, the Commissions understand that outstanding applications for looked after children have been resolved.
- 5.54 The Independent Monitoring Authority for the Citizens' Rights Agreements called on the Home Office to provide further clarity on the rights of EU citizens whose applications are pending or who have made late applications

³⁹¹ House of Lords European Affairs Select Committee, 'Citizens' Rights, 1st Report of Session 2021 - 22', (HL, 2021).

³⁹² Home Office, 'EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members', (HO, 2021), at 31-34; Home Office, 'Press Release: Temporary protection for more applicants to the Settlement Scheme', 6 August 2021.

to ensure public bodies and individuals concerned are aware of and can vindicate their rights.³⁹³

Deferrals

5.55 Applicants to the EU Settlement Scheme with pending criminal proceedings have been experiencing delays in getting their applications processed and decisions are being deferred until the criminal process is resolved.³⁹⁴ In the case of pending criminal proceedings, the delays in the criminal justice system are well documented and have been exacerbated by the COVID-19 pandemic, meaning applicants can face extensive delays in getting their status confirmed.³⁹⁵ The NIHRC has been supporting applicants who have not had their applications to the EU Settlement Scheme finalised on account of minor criminal convictions which are causing either a suspension or deferral of their applications.

5.56 The NIHRC has written to the NI Housing Executive following evidence of an individual being denied housing benefit on account of their status under the EU Settlement Scheme not being regularised.³⁹⁶ In its response, the NI Housing Executive confirmed that where a person cannot confirm they have Settled Status, then a direct inquiry is undertaken to establish whether the individual has a qualifying right to reside under EU law.³⁹⁷ Concerns have been raised with the Commissions about individuals' access to housing benefit and individuals being denied employment, despite being able to prove that they had applied for settled status, which the Commissions have subsequently raised with the Independent Monitoring Authority.

Pre-settled Status

5.57 Pre-settled status under the EU Settlement Scheme provides for a limited period of leave to remain. Under the Universal Credit Regulations, access to this benefit is limited to applicants who are habitually resident in the UK and this excluded people with pre-settled status from this benefit.³⁹⁸ A challenge was brought by a woman who had left a violent relationship and was refused access to Universal Credit before the end of the transition

³⁹³ Independent Monitoring Authority, 'Press Release: Home Office asked to clarify the rights of EU citizens applying late to the EU Settlement Scheme', 27 September 2021.

³⁹⁴ Home Office, 'EU Settlement Scheme: Suitability Requirements - Version 6.0', (HO, 2021).

³⁹⁵ Cormac Campbell, 'Coronavirus: COVID-19 courthouse closures create huge backlog', BBC News, 15 July 2020; Northern Ireland Audit Office, 'Speeding Up Justice: Avoidable Delay in the Criminal Justice System' (NIAO, 2018).

³⁹⁶ Letter from the NI Human Rights Commission to the NI Housing Executive, 22 July 2021.

³⁹⁷ Letter from NI Housing Executive to the NI Human Rights Commission, 26 August 2021.

³⁹⁸ Regulation 9(3)(d), The Universal Credit Regulations (Northern Ireland) 2016.

period despite not having the means to support herself or her children.³⁹⁹ The CJEU found that the right to human dignity,⁴⁰⁰ the right to private and family life,⁴⁰¹ and the rights of the child⁴⁰² were engaged and decided that such applications could only be refused where claimants and their children would not be exposed to “an actual and current risk of violation of their fundamental rights”, stating:

Where that citizen does not have any resources to provide for his or her own needs and those of his or her children and is isolated, those authorities must ensure that, in the event of a refusal to grant social assistance, that citizen may nevertheless live with his or her children in dignified conditions.⁴⁰³

5.58 In October 2021, the Independent Monitoring Authority issued a pre-action protocol letter to the Home Office stating that the automatic loss of residence status for EU citizens with pre-settled status who do not apply in time for EU Settled Status, is a breach of the UK-EU Withdrawal Agreement and the EEA EFTA Separation Agreement.⁴⁰⁴

VI v HMRC

5.59 In 2022, the Social Security Appeal Tribunal (NI) referred a case to the CJEU for a preliminary ruling under Article 267 of the Treaty on the Functioning of the EU. The case concerned VI, a woman from a third country living in NI with her husband, also a third country national, and her four children, one of whom held Irish nationality by virtue of having been born in NI. VI’s son had resided legally in the UK for a period of 5 years and thus acquired permanent residence pursuant to Article 16(1) of the EU Citizens’ Rights Directive.⁴⁰⁵ The case concerned VI’s right to reside in the UK during the periods from 1 May 2006 to 20 August 2006 and from 18 August 2014 to 25 September 2015 and to receive Child Tax Credit and Child Benefit for these periods.⁴⁰⁶

³⁹⁹ *CG v Department for Communities*, Case C-709/20, 15 July 2021.

⁴⁰⁰ Article 1, EU Charter of Fundamental Rights.

⁴⁰¹ Article 7, EU Charter of Fundamental Rights.

⁴⁰² Article 24, EU Charter of Fundamental Rights.

⁴⁰³ *CG v Department for Communities*, Case C-709/20, 15 July 2021, at paras 92-93

⁴⁰⁴ Independent Monitoring Authority, 'Press Release: IMA issues pre-action protocol letter to the Home Office', 15 October 2021.

⁴⁰⁵ Directive 2004/38/EC, 'Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', 29 April 2004. See *VI v HMRC*, C-247/20, 10 March 2022, at para 50.

⁴⁰⁶ *VI v HMRC*, C-247/20, 10 March 2022.

- 5.60 The court found as regards Article 16 of the Citizens' Rights Directive, conditions under Article 7 of that Directive, on the right of residence for more than three months, do not apply to EU citizens who have permanent residence and this extends to family members even where they are not dependants.⁴⁰⁷ Thus, the court found that neither VI nor her son required comprehensive sickness insurance cover to retain their right to reside in the UK since 2011.⁴⁰⁸
- 5.61 The court also found that the Citizens' Rights Directive makes it clear that, for periods before the child acquired permanent residence in the UK, not only the Union citizen, but also members of their family who reside with them, must have comprehensive sickness insurance cover.⁴⁰⁹ Thus the court found that, before 2011 when VI's son acquired the right to permanent residence, both VI and her son were required to have comprehensive sickness insurance cover within the meaning of the Citizens' Rights Directive.
- 5.62 The third question raised was whether, following a judgement delivered in 2014 by the England and Wales Court of Appeal, the reciprocal arrangements between the UK and Ireland relating to the Common Travel Area and health insurance must be regarded as comprehensive sickness insurance cover for the purposes of Regulation 4(1) of the Immigration Regulations 2016.⁴¹⁰ The court found that this question did not meet the requirements concerning the content of request for a preliminary ruling under Article 94 of the Rules of Procedure and was ruled inadmissible.⁴¹¹

Recommendations

- 5.63 **The NIHRC recommends that the Home Office takes immediate action to resolve all outstanding applications under the EU Settlement Scheme and ensures that no one is left without the ability to prove their right to live and work in the UK on the basis of pending minor criminal prosecutions that would otherwise not meet the threshold for refusal.**
- 5.64 **The NIHRC recommends that the Home Office ensure that all eligible vulnerable groups and individuals, who had not applied to the EU**

⁴⁰⁷ Ibid, at paras 54-58.

⁴⁰⁸ Ibid, at para 60.

⁴⁰⁹ Ibid, at para 63.

⁴¹⁰ Ibid at para 73.

⁴¹¹ Ibid at paras 74-75.

Settlement Scheme by 30 June 2021 are supported to regularise their status in an efficient and timely way.

EU Citizenship and Workers' Rights

- 5.65 Under Article 26 of the UK-EU Withdrawal Agreement, frontier workers are entitled to be issued with appropriate documentation which certifies their rights as frontier workers. Article 10(1)(c) extends the rights set out in Part Two of the treaty, to “Union citizens who exercised their right as frontier workers in the UK in accordance with Union law before the end of the transition period and continue to do so thereafter”. In practical terms, this means that Irish, British and EU citizens who commenced a cross-border job on or before 31 December 2020 will benefit from the Withdrawal Agreement.
- 5.66 The Frontier Workers Permit Scheme was established by the UK Government to ensure that EU citizens living in Ireland but working in NI on or after 1 July 2021 can prove their right to work in the UK.⁴¹² Any EU citizens wishing to come to the UK to work on or after 1 January 2021 will have to apply to the new points-based immigration system.
- 5.67 EU citizens, including Irish citizens, living in NI and working in Ireland on or after 1 January 2021 do not have to apply to a similar scheme as they maintain their right to work in the EU as an EU citizen. Similarly, British citizens living in NI and working in Ireland will have their right to work protected under the reciprocal guarantees associated with the Common Travel Area.⁴¹³
- 5.68 The Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020 set out the rules governing the application of the frontier workers permit scheme, the timeframes within which applications have to be made, and the grounds upon which a refusal can be issued. They also set out the circumstances in which a worker or self-employed person can retain their status. These cover instances involving accidents, illnesses, engagement in vocational training and pregnancy or childbirth.⁴¹⁴ The regulations confirm that applications can be refused on grounds of public policy, public security, public health or on grounds of misuse of rights.⁴¹⁵ The regulations are likely

⁴¹² Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020.

⁴¹³ Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland concerning the Common Travel Area and associated reciprocal rights and privileges, 8 May 2019.

⁴¹⁴ Regulation 4, Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020.

⁴¹⁵ Regulation 18, Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020.

to apply to a number of EU citizens travelling between Ireland and NI for work.

- 5.69 A number of civil society organisations raised concerns about this scheme, including the lack of consultation and impact assessment in advance of the regulations being published and the limited period provided for registration.⁴¹⁶ The NIHRC has commissioned ongoing research to explore the protection of rights under the Frontier Worker scheme and its interaction with Protocol Article 2.⁴¹⁷
- 5.70 In March 2022 the ECNI commissioned research on the impact of Brexit on minority ethnic and migrant people in NI, including on frontier workers and migrant workers, who are also frontier workers, and their families. The research is anticipated to be completed in late 2022.

Recommendation

- 5.71 **The NIHRC advises that people living and working across the border are in a particularly vulnerable situation and recommends that the Department for Communities provide support to frontline advisers and to employers to ensure that no eligible worker or self-employed person is left unprotected by the frontier worker scheme.**

EU Loss of Funding

- 5.72 In September 2021, the ECNI commissioned research⁴¹⁸ on the “Impact of Brexit on Section 75 Equality Groups: EU funding”. This research was completed in February 2022. The research has highlighted concerns held by many in the community and voluntary sector regarding the implications of the loss of EU funding on Section 75 groups. The research highlighted the important role of EU funding in promoting equality of opportunity and good relations in NI, the benefits of EU funding to Section 75 groups and the challenges. It identified a number of serious concerns about the measures outlined by the UK Government to replace EU funding, including

⁴¹⁶ Letter from the Committee on the Administration of Justice; UNISON; Border People; Centre for Cross Border Studies; Migrant Centre NI; Irish Congress of Trade Unions; Migrant Rights Centre Ireland; Stronger Together; South Tyrone Empowerment Project; Inter Ethnic Forum: Chinese Welfare Association; Omagh Ethnic Community Support Group; Belfast Metropolitan College, College of Sanctuary; North West Migrant Forum; Advice NI; Granite Legal Services NI to the Home Secretary, 26 October 2020.

⁴¹⁷ Tamara Hervey, ‘Brexit, Health and its potential impact on Article 2 of the Ireland/NI Protocol’, (NIHRC, 2022), at chapter 3.

⁴¹⁸ Rory O’Connell and Tim Cunningham, ‘Impact of Brexit on Section 75 Equality Groups in Northern Ireland: EU Funding’, (ENCI, 2022).

a lack of clarity around replacement funds and the serious risk of a financial 'cliff edge' for organisations delivering key services to Section 75 groups.

- 5.73 As next steps the ECNI will consider the key recommendations and findings arising from the report and publish the Commission's policy recommendations.

Recommendations

- 5.74 **The ECNI recommends that Government should address through future funding arrangements the potential negative impact of the loss of EU funding on programmes, including under the European Social Fund, on equality groups, including the impact on the voluntary and community sector.**

Summary of Recommendations

3.0 Implementation of Protocol Article 2 and General Recommendations

Overarching Recommendations

- 3.5 The Commissions recommend that in the development of any laws or policies the UK Government and NI Executive consider the extent to which any change engages Protocol Article 2 and ensure that there is no diminution to the rights and safeguards which fall within its scope.
- 3.6 In line with the ‘keeping pace’ obligations under Protocol Article 2, the Commissions recommend that the NI Office and the Executive Office ensure that the UK Government and NI Executive monitor any proposed changes by the EU to the six Annex 1 Equality Directives, including relevant case law of the CJEU.
- 3.7 The Commissions recommend that the NI Executive, in particular the Executive Office, Department for Communities, Department for Education and Department for the Economy, ensure that NI law keeps pace with any changes to the Annex 1 Equality Directives, including relevant CJEU case law, which enhance protections.
- 3.8 The Commissions recommend that the NI Office ensures there is adequate and sustained resourcing of the two Commissions to fulfil their responsibilities as the dedicated mechanism framework. The Commissions also recommend that, further to the UK Government’s commitment in Protocol Article 2(2) to facilitate the related work of the two Commissions in upholding human rights and equality standards, there is sustained and adequate funding of both Commissions generally.
- 3.9 The Commissions recommend that the UK Government ensures that Explanatory Memoranda on draft EU proposals which amend or replace the Annex 1 Equality Directives, as well as other EU legislation relevant to the provisions of Protocol Article 2, sets out what consideration has been given to ensuring conformity with Protocol Article 2
- 3.10 The Commissions recommend that the UK Government and NI Executive ensure that Explanatory Memoranda on draft UK and NI legislative proposals that are likely to engage Protocol Article 2 set out what consideration has been given to ensuring conformity with Protocol Article 2.

- 3.11 The Commissions recommend that the UK Government ensures that there are no changes to the Protocol that would result in a weakening of either the Protocol Article 2 commitment or rights, safeguards and oversight mechanisms relating to this commitment.
- 3.12 The Commissions recommend that both the NI Executive and UK Government ensure effective and regular engagement with civil society, including human rights and equality groups.
- 3.13 The Commissions recommend that they are kept informed of any future EU equality law developments relevant to the Annex 1 equality Directives, including via the Joint Consultative Working Group, and have the opportunity to highlight in advance any implications of those changes for equality law in NI.
- 3.14 The Commissions recommend that the NI Office engages with relevant UK Government departments and the supervisory bodies established under the UK-EU Withdrawal Agreement and the UK-EU Trade and Cooperation Agreement to establish formal structures for open, transparent and regular engagement with equality and human rights stakeholders in NI.

4.0 Protocol Article 2: Rights and Issues

Constitutional issues

A Bill of Rights for NI

- 4.13 The Commissions welcome local progress made by the Ad-Hoc Assembly Committee on a Bill of Rights for NI but continue to recommend that the NI Office implements the UK Government commitment to legislate for a Bill of Rights for NI.
- 4.14 The NIHRC recommends that the Ministry of Justice considers and engages with the ongoing process to develop a Bill of Rights for NI to avoid contradicting and frustrating this process, committed to under the Belfast (Good Friday) Agreement.
- 4.15 The ECNI recommends that the UK Government and NI Executive ensure that there are additional measures within a Bill of Rights to strengthen NI equality laws, address gaps in equality legislation and protect equality and human rights in a post-Brexit context.

Divergence of rights on the island of Ireland

- 4.20 The Commissions recommend that the UK Government and the NI Executive ensure North-South equivalence, by keeping pace with changes

to equality and human rights law, arising as a result of EU laws introduced on or after 1 January 2021, that enhance protections. This should include rights introduced as a result of EU laws that do not amend or replace the Protocol Annex 1 Directives.

Human Rights Act

- 4.34 The Commissions recommend that the Ministry of Justice sets out in detail what consideration has been given to the proposals' compliance with Protocol Article 2, including consideration of the effect of the proposals on the rights, safeguards and equality of opportunity protections under the relevant chapter of the Belfast (Good Friday) Agreement (and underpinned by EU law) that fall within the scope of Protocol Article 2.
- 4.35 The Commissions advise that the protection of safeguards under Protocol Article 2 encompasses how those rights within the scope of Article 2 are claimed and enforced and available remedies. The Commissions therefore recommend that in any assessment for compliance with Protocol Article 2, the Ministry of Justice should consider access to remedies and how ECHR rights are claimed and enforced.
- 4.36 The Commissions recommend that no further action is taken in relation to the Ministry of Justice's proposals until a detailed assessment of compliance with Protocol Article 2 is undertaken and published.
- 4.37 The Commissions recommend that the Ministry of Justice provides greater clarification on all its proposals, to enable a full assessment of the degree to which the proposals are compliant with Protocol Article 2.
- 4.38 The NIHRC recommends that the Ministry of Justice takes cognisance of the interplay of the ECHR, the EU Charter of Fundamental Rights and Protocol Article 2 and ensures there is no weakening of the substantive rights, or how those rights are claimed and enforced, including access to remedies.

Retained EU Law

- 4.50 The Commissions recommend that no change to retained EU law be made which would weaken Protocol Article 2, its enforceability or oversight mechanisms.
- 4.51 The Commissions recommend that when making any change to retained EU law, the relevant UK or NI Minister confirms that an assessment for compliance with the commitment in Protocol Article 2 has been undertaken and that there is no diminution of the rights, safeguards and equality of

opportunity as set out in the relevant part of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU.

Equality and non-discrimination

Age Discrimination

- 4.62 The Commissions recommend that the NI Executive introduces age discrimination legislation in the provision of goods, facilities and services to address gaps in protections between NI and Great Britain and to avoid divergence of rights on the island of Ireland.
- 4.63 In line with the ‘keeping pace’ obligations under Protocol Article 2, the Commissions recommend that the Executive Office monitor any proposed changes by the EU to the six Annex 1 Equality Directives, including relevant case law of the CJEU.

Consolidating, strengthening and clarifying equality protections and intersectional and multiple discrimination

- 4.73 In line with the ‘keeping pace’ obligations under Protocol Article 2, the Commissions recommend that the Executive Office monitor any proposed changes by the EU to the six Annex 1 Equality Directives, including relevant case law of the CJEU and pays particular attention to the ongoing consultation by the EU on the Racial Equality Directive.
- 4.74 The Commissions recommend that that NI Executive introduces a single equality act to ensure that NI equality law is strengthened and that gaps are addressed as a matter of urgency.

Discrimination on Grounds of Sexual Orientation

- 4.79 The Commissions recommend that the Department for Communities promptly publishes and implements a robust LGBTQI+ Strategy for NI, accompanied by a measurable plan of action, which takes into account its obligations under Protocol Article 2.
- 4.80 In line with our overarching recommendations, the Commissions recommend that the Department for Communities should consider Protocol Article 2 throughout the development and implementation of amendments to the Local Government Pension Scheme in NI.

Gender Equality Strategy

- 4.84 The Commissions recommend that the Department for Communities promptly publishes and implements a robust Gender Equality Strategy for NI, accompanied by a measurable plan of action, which takes into account its obligations under Protocol Article 2.

Transgender discrimination

- 4.87 The Commissions recommend that the Department for Communities promptly publishes and effectively implements a robust LGBTQI+ Strategy for NI, accompanied by a measurable plan of action, which takes into account its obligations under Protocol Article 2, including effective monitoring arrangements.

Participation of Women in Public Life

- 4.92 In line with the ‘keeping pace’ obligations under Protocol Article 2, the Commissions recommend that the Department for Communities monitor any proposed changes by the EU to the six Annex 1 Equality Directives, including relevant case law of the CJEU and the four gender equality directives.

Persons With Disabilities

- 4.106 The Commissions recommend that the Department for Communities promptly publishes and effectively implements a robust Disability Strategy, which embeds consideration of Protocol Article 2 and is accompanied by a measurable plan of action for improving the living conditions of all persons with disabilities and effective monitoring arrangements.
- 4.107 The NIHRC recommends that the Department of Health ensures full implementation of the Autism Act (NI) 2011, as amended, and commits to meeting its legislative requirement to publish a revised strategy, which takes into account Protocol Article 2, including the Employment Equality (Framework) Directive and relevant CJEU jurisprudence, insofar as it is relevant to those parts of the Strategy relating to employment and vocational education.
- 4.108 The Commissions recommend that the UK Government work with the EU Commission to find a long-term solution which minimises checks on assistance dog owners travelling between Great Britain and NI.
- 4.109 The Commissions recommend that the UK Government, working with the EU continues to monitor and address any outstanding issues relating to the supply of medicines from Great Britain to NI to guarantee no diminution of the current provision, including for disabled people, and to protect the highest attainable standard of health.

Racial Equality

- 4.120 In line with the ‘keeping pace’ obligations associated with Protocol Article 2, the Commissions recommend that the NI Executive, particularly the Executive Office, the Department for Communities and Department for the

Economy, and relevant UK Government departments, informed by engagement with the NI Office, monitor any proposed changes by the EU to the six Annex 1 Equality Directives, including the Racial Equality Directive and relevant case law of the CJEU.

4.121 The NIHRC recommends that the Home Office ensures that all journeys into NI, that originate from Ireland, should be exempt from Electronic Travel Authorisation requirements.

4.122 The Commissions recommend that effective steps are taken by the Home Office to prevent and address racial profiling, including through appropriate monitoring and training, in the implementation of the revised guidance on the Common Travel Area and the Electronic Travel Authorisation requirements, including at entry to NI at ports and airports and in the context of cross border travel.

4.123 The Commissions recommend that the UK Government work with the EU Commission to find a long-term solution which ensures Muslim and Jewish communities in NI are able to access halal and kosher food products and ritual items respectively.

Sectarianism

4.129 The Commissions recommend that the Department of Justice ensures compliance with Protocol Article 2 in the context of the EU Victims' Directive, when developing hate crime legislation, including sectarian hate crime.

4.130 In line with the 'keeping pace' obligations under Protocol Article 2, the Commissions recommend that the Department of Justice monitor any proposed changes by the EU to the six Annex 1 Equality Directives, including relevant case law of the CJEU as well as the outcome of the ongoing consultation on the Racial Equality Directive.

Victims' Rights and Freedom from Slavery

Child, early and forced marriage

4.140 In line with our overarching recommendations, the Commissions recommend the Department of Finance ensure that Protocol Article 2 is considered and complied with throughout the development and implementation of any subsequent legislation or policy in relation to marriage law.

Child Sexual Exploitation

- 4.153 The NIHRC advises that the requirements of the Child Sexual Exploitation Directive should be considered as falling within scope of Protocol Article 2.
- 4.154 In line with our overarching recommendations, the Commissions recommend that the Department of Justice, the Home Office and other relevant departments and bodies, consider Protocol Article 2 in the development and implementation of legislation or policy on child sexual exploitation.
- 4.155 The NIHRC recommends that, in line with best international practice and the requirements of the Trafficking Directive, specialised training for professionals and measures reflective of the Barnahus Model are adopted throughout the criminal justice system.
- 4.156 The NIHRC recommends that, in line with the requirements of the Trafficking Directive, the Department of Justice and the Home Office within their respective remits legislate to provide specific protections for child victims of modern slavery and human trafficking, which ensure the consideration of the best interests of the child.

Domestic and Sexual Violence and Abuse

- 4.170 In line with our overarching recommendations, the Commissions recommend that the Department of Justice take Protocol Article 2 and the Victims' Directive into account in the implementation of the Justice (Sexual Offences and Trafficking Victims) Bill.
- 4.171 The NIHRC recommends that the Department for the Economy take Protocol Article 2 and the Victims' Directive into account in the implementation of the Domestic Abuse and Safe Leave Bill. In line with the 'keeping pace' obligations under Protocol Article 2, the NIHRC recommends that the Department for the Economy monitor any proposed changes by the EU to the Gender Equality (Employment) Directive and the Gender Equality (Social Security) Directive, including relevant case law of the CJEU.
- 4.172 The Commissions recommend that the Department of Health and the Department of Justice consider and take into account the Victims' Directive and Protocol Article 2 during the development and implementation of the Domestic Abuse and Violence Against Women and Girls Strategies.

Female Genital Mutilation

- 4.176 The NIHRC recommends the Department of Justice and Department of Health ensure that legislative developments progressed by the Equally Safe

Strategy ensure that rights protections do not fall below the standards contained in the Victims' Directive.

Hate Crime

4.183 The Commissions recommend that the Department of Justice consider carefully and ensure compliance with Protocol Article 2, including the provisions of the EU Victims' Directive in the development of hate crime legislation.

Modern Slavery and Human Trafficking⁴¹⁹

4.198 The Commissions recommend that the Home Office embed consideration of Protocol Article 2 in the development and drafting of human trafficking legislation and establish processes to ensure compliance with this obligation.

4.199 The Commissions recommend that the Home Office exclude NI from the operation of Clauses 57, 58, 60, 61, 62 and 67 of the Nationality and Borders Bill, to ensure no diminution of the rights of victims of trafficking in NI.

4.200 The NIHRC recommends that the Home Office consider the needs of child victims of modern slavery and human trafficking and how the best interests principle will be ensured under the Nationality and Borders Bill.

4.201 The NIHRC recommends that the Department of Justice continue to monitor relevant EU Directives and relating CJEU jurisprudence to ensure there is no diminution of victims' rights within the scope of Protocol Article 2.

Democratic Rights

Electoral Rights⁴²⁰

4.208 The Commissions recommend that the Cabinet Office ensures there is no reduction of the rights of certain EU citizens who arrive in NI after the end of the Brexit transition in terms of their voting/candidacy rights in local elections in NI.

4.209 The Commissions recommend that the UK Government sets out, in full, its assessment of the relevant provisions of the Elections Bill, in the context of its conformity with its commitments under Protocol Article 2.

⁴¹⁹ Recommendations relate to status of the Nationality and Borders Bill as of 31 March 2022.

⁴²⁰ Recommendations relate to status of the Elections Bill as of 31 March 2022.

4.210 In the absence of any convincing explanation as to how the provisions of the Elections Bill comply with Protocol Article 2, the Commissions recommend that the UK Government amend the Elections Bill to ensure compatibility with Protocol Article 2.

4.211 Specifically, the Commissions recommend the following amendments to the Bill in order to avoid a potential breach of the “no-diminution” commitment under Protocol Article 2:

- Clause 13 of the Elections Bill, which gives effect to Schedule 8, should be amended to exclude NI District Council elections from its application; and
- Part 3 of Schedule 8 of the Elections Bill should be amended to remove Paragraphs 7, 8 and 9, thus restoring the status quo ante, and permitting all EU citizens lawfully resident in NI to continue to be able to vote/stand for election in District Council elections in NI.

Migrants’ Rights

Refugees and Asylum Seekers

4.222 In line with overarching recommendations the Commissions recommend that the NI Executive, and the Executive Office in particular, ensure that at all stages of policy and legislative development and reform in the area of refugee and asylum seeker integration, including the Refugee Integration Strategy, there is consideration of, and compliance with, Protocol Article 2 obligations.

4.223 The NIHRC recommends that the Executive Office ensure that, in line with legal obligations, the Refugee Integration Strategy adopts a human rights-based approach which expressly references, explains and incorporates relevant human rights standards, including relevant EU obligations which underpin the non-diminution commitment in Protocol Article 2.

Right to Health

Access to Healthcare for Irregular Migrants

4.231 The NIHRC recommends that the Home Office provide further guidance on the rights of people with pending and late applications to the EU Settlement Scheme to applicants to the Scheme and to healthcare professionals to ensure no diminution of the current provision and protect the rights to the highest attainable standard of healthcare.

4.232 The NIHRC recommends that the Department of Health provide clear, accessible and complete information on rights to healthcare post-EU withdrawal, including access to cross-border and island-of-Ireland services

to ensure no diminution of the current provision and protect the rights to the highest attainable standard of healthcare.

Employment Rights

Employment Equality

4.253 The Commissions recommend that in the development of any laws or policies in the area of employment, including within civil service employment, the UK Government and relevant NI Executive departments, including the Executive Office, Department for the Economy, Department for Finance and other NI Executive departments consider and comply with Protocol Article 2.

4.254 In line with the overarching recommendations the Commissions recommend that the Department for the Economy should continue to monitor any developments in EU law, including relevant CJEU case law, relating to the Parental Bereavement (Leave and Pay) Act and resulting Regulations to ensure compliance with Protocol Article 2.

4.255 In line with the ‘keeping pace’ obligation associated with Protocol Article 2, the Commissions recommend that relevant NI Executive departments, including the Executive Office, and the Department for the Economy, and other NI Executive departments monitor any proposed changes by the EU to the six Annex 1 Equality Directives, including relevant case law of the CJEU and the ongoing consultation on the Racial Equality Directive.

Gender Pay Gap

4.267 The Commissions recommend that the Executive Office commit to ensuring that to the extent that the Pay Transparency Directive, if introduced, amends or replaces the Gender Equality (Employment) Directive, the law in NI is amended to keep pace with that change.

4.268 The Commissions further recommend that, regardless of whether or not required to under the ‘keeping pace’ requirement associated with Protocol Article 2, the NI Executive should ensure that NI law keeps pace with changes that enhance equality and human rights protections further to the Pay Transparency Directive, if introduced.

Right to Education

Migrant and Minority Ethnic Children

4.275 The Commissions recommend that in the development of any laws or policies in the area of education and the educational needs of migrant and minority ethnic children, the Department of Education consider and comply with Protocol Article 2.

4.276 In line with the ‘keeping pace’ obligations associated with Protocol Article 2, the Commissions recommend that the Department of Education monitor any proposed changes by the EU to the Racial Equality Directive, including relevant case law of the CJEU.

5.0 Human Rights and Equality after Brexit: Protocol Article 2 and Beyond

Birthright

5.10 The NIHRC recommends that the Home Office amend nationality and immigration laws to reflect the commitment under the Belfast (Good Friday) Agreement 1998, that it is the birthright of all the people of NI to identify, and be accepted, as Irish or British or both, without any loss of rights or entitlements.

Common Travel Area⁴²¹

5.24 The Commissions recommend that effective steps are taken by the Home Office to ensure that the implementation of the revised guidance on the Common Travel Area will not lead to an increase in instances of racial profiling of black and ethnic minority people and migrant people, in the context of cross-border travel.

5.25 The Commissions recommend that effective steps are taken by the Home Office to prevent and address racial profiling, including through appropriate training and monitoring, in the implementation of the revised guidance on the Common Travel Area and the Electronic Travel Authorisation requirements, including at entry to NI at ports and airports and in the context of cross-border travel.

5.26 The NIHRC recommends that the Common Travel Area and associated rights are enshrined in law by agreeing a comprehensive bilateral treaty between the UK and Irish governments. The NIHRC further recommends that this agreement codifies reciprocal free movement rights and rights to employment, education, health care and justice and security on that basis and that it is incorporated into domestic legislation.

5.27 The Commissions recommend that the Home Office confirms what consideration was given to Protocol Article 2 in the development of the Nationality and Borders Bill and that Protocol Article 2 should be

⁴²¹ Recommendations relate to status of the Nationality and Borders Bill as of 31 March 2022.

considered and complied with throughout its implementation and the development of regulations and guidance.

- 5.28 The NIHRC recommends that all journeys into NI that originate from Ireland should be exempt from Electronic Travel Authorisation requirements.
- 5.29 The Commissions recommend that effective steps are taken by the Home Office, including through appropriate monitoring and training, to ensure that the Electronic Travel Authorisation will not lead to an increase in instances of racial profiling of black and ethnic minority people and migrant people, in the context of cross border travel.

Cross-Border Justice Arrangements

- 5.43 The NIHRC recommends that the highest standards of victims' rights and rights of accused persons are central to cross-border criminal justice cooperation.
- 5.44 The NIHRC recommends that, in the absence of CJEU oversight of the extradition process, the UK and EU establish clear safeguards within the Trade and Cooperation Agreement oversight mechanisms to ensure that human rights will be safeguarded.
- 5.45 The NIHRC recommends that the UK and the EU work to ensure that loss of access to criminal justice data-sharing arrangements do not result in unreasonable delays in investigations and proceedings.
- 5.46 The NIHRC further recommends that in the absence of the European Arrest Warrant, effective and efficient UK-EU extradition arrangements are put in place with robust human rights and legal safeguards for accused persons and for victims of crimes.
- 5.47 The NIHRC recommends that consideration be given to how the cross-border placement of children is managed following the UK's withdrawal from the EU, to ensure no adverse impacts.

EU Settlement Scheme

- 5.63 The NIHRC recommends that the Home Office takes immediate action to resolve all outstanding applications under the EU Settlement Scheme and ensures that no one is left without the ability to prove their right to live and work in the UK on the basis of pending minor criminal prosecutions that would otherwise not meet the threshold for refusal.
- 5.64 The NIHRC recommends that the Home Office ensure that all eligible vulnerable groups and individuals, who had not applied to the EU

Settlement Scheme by 30 June 2021 are supported to regularise their status in an efficient and timely way.

EU Citizenship and Workers' Rights

5.71 The NIHRC advises that people living and working across the border are in a particularly vulnerable situation and recommends that the Department for Communities provide support to frontline advisers and to employers to ensure that no eligible worker or self-employed person is left unprotected by the frontier worker scheme.

EU Loss of Funding

5.74 The ECNI recommends that Government should address through future funding arrangements the potential negative impact of the loss of EU funding on programmes, including under the European Social Fund, on equality groups, including the impact on the voluntary and community sector.

Appendix 1: General Overview of Protocol Article 2

Protocol Article 2

Protocol Article 2 states:

1. The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.⁴²²

In Protocol Article 2 the UK Government commits to ensuring that certain rights, safeguards and equality of opportunity protections are not diminished as a result of the UK leaving the EU. Therefore, to fall within scope of Protocol Article 2, the human right or equality protection being relied on must be covered by the relevant chapter of the Belfast (Good Friday) Agreement and have been underpinned by EU law including EU treaties, directives and regulations, in place on or before 31 December 2020.

In the rights, safeguards and equality of opportunity chapter of the Belfast (Good Friday) Agreement, the parties affirmed their commitment to “the mutual respect, the civil rights and religious liberties of everyone in the community”, before affirming “in particular”:

- the right of free political thought;
- the right to freedom and expression of religion;
- the right to pursue democratically national and political aspirations;
- the right to seek constitutional change by peaceful and legitimate means;
- the right to freely choose one’s place of residence;
- the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;

⁴²² Article 2(1), Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

- the right to freedom from sectarian harassment; and
- the right of women to full and equal political participation.⁴²³

Alongside these are other specific rights, safeguards and equality of opportunity protections in the relevant Chapter which the UK Government has recognised as forming a non-exhaustive list of rights:⁴²⁴

- the right of victims to remember as well as to contribute to a changed society;
- respect, understanding and tolerance in relation to linguistic diversity; and
- the need to ensure that symbols and emblems are used in a manner which promotes mutual respect rather than division.⁴²⁵

The commitment to no diminution in Protocol Article 2 includes the area of protection against discrimination, referencing Annex 1 which sets out six EU equality directives:

- Racial Equality Directive;⁴²⁶
- Employment Equality (Framework) Directive;⁴²⁷
- Gender Goods and Services Directive;⁴²⁸
- Gender Equality (Employment) Directive;⁴²⁹
- Self-Employment Equality Directive;⁴³⁰ and
- Gender Equality in Social Security Directive.⁴³¹

The UK Government has committed not only to ensuring there is no diminution of the rights contained in the Annex 1 equality directives but also that NI equality law must dynamically align, or ‘keep pace’, with any

⁴²³ Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

⁴²⁴ NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’, (NIO, 2020), at para 13.

⁴²⁵ Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

⁴²⁶ Directive 2000/43/EC, ‘Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin’, 29 June 2000.

⁴²⁷ Directive 2000/78/EC, ‘Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation’, 27 November 2000.

⁴²⁸ Directive 2004/113/EC, ‘Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and Services’, 13 December 2004.

⁴²⁹ Directive 2006/54/EC, ‘Directive of European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast)’, 5 July 2006.

⁴³⁰ Directive 2010/41/EU, ‘Directive of the European Parliament and of the Council on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity’, 7 July 2010.

⁴³¹ Directive 79/7/EEC, ‘Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security’, 19 December 1978.

enhancements made by the EU to these rights, on or after 1 January 2021.⁴³²

Scope of Article 2

The Commissions are currently undertaking work to examine the scope of Protocol Article 2 and have initiated an extensive exercise to form a view as to which EU laws and obligations underpin the rights and safeguards in the relevant part of the Belfast (Good Friday) Agreement. The Commissions intend to publish the outworkings of this initial scoping exercise in 2022. It will ultimately be for the courts to determine the scope of Protocol Article 2 and confirm the extent to which the identified underpinning EU obligations fall within scope of this commitment.

In addition to the Annex 1 equality directives, there are a number of other EU legal obligations which underpin the rights and safeguards in the relevant part of the Belfast (Good Friday) Agreement and are subject to the no diminution commitment. The UK Government has recognised a non-exhaustive list of relevant measures which fall within scope of the commitment in Protocol Article 2,⁴³³ including:

- the Victim’s Directive;⁴³⁴
- the Parental Leave Directive;⁴³⁵
- the Pregnant Workers’ Directive;⁴³⁶ and
- other specific measures which protect the rights of disabled people.⁴³⁷

The Commissions consider that there are additional EU measures that will also fall within the scope of Protocol Article 2.⁴³⁸ Measures identified to date include additional protections for victims⁴³⁹ and employment

⁴³² Article 13 (3), Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

⁴³³ NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’, (NIO, 2020), at para 13.

⁴³⁴ Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

⁴³⁵ Directive 2010/18/EU, ‘Council Directive implementing the revised Framework Agreement on parental leave’, 8 March 2010.

⁴³⁶ Directive 92/85/EEC, ‘Council Directive on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding’, 19 October 1992.

⁴³⁷ NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 13.

⁴³⁸ The Commissions are conscious that in defining EU obligations the CJEU has drawn on international human rights standards, including general comments of the international treaty monitoring bodies to elaborate on key concepts in EU law, including the EU Charter. See for example Ingeborg Odink, ‘European Parliamentary Research Service - Children’s rights in the EU: Marking 30 years of the UN Convention on the Rights of the Child’ (EPRS, 2019) on the best interests of the child test.

⁴³⁹ Directive 2011/36/EU, ‘Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims’, 5 April 2011.

protections for workers.⁴⁴⁰ In the Commissions' view, there is the potential for additional underpinning EU law to fall within the scope of Protocol Article 2 as we work to define the rights that are covered within the general commitment to the "civil rights and religious liberties of everyone in the community".

The general commitment of the Belfast (Good Friday) Agreement signatories to civil rights and a range of rights referenced within the chapter, along with the UK Government commitment in that chapter to incorporate the ECHR into domestic law, leads the Commissions to the view that Protocol Article 2 must be understood as embracing, as a minimum, those rights set out in the ECHR. Indeed, the UK Government has acknowledged that "key rights and equality provisions in the [Belfast (Good Friday)] Agreement are supported by the ECHR".⁴⁴¹ The Commissions are therefore adopting a working assumption that the non-diminution commitment in Protocol Article 2 encompasses the full range of rights set out in the ECHR, to the extent that they are underpinned by EU legal obligations in force on or before 31 December 2020. The Commissions are adopting a broad interpretation of the right to equality of opportunity in all social and economic activity protected under Protocol Article 2.

The Rights, Safeguards and Equality of Opportunity chapter requires that advice on the anticipated Bill of Rights should draw on "international instruments and experience". The Declaration following the 1993 World Conference on Human Rights, reaffirmed that "All human rights are universal, indivisible and interdependent and interrelated".⁴⁴² The preambles of both the United Nations International Covenant on Civil and Political Rights (UN ICCPR) and UN ICESCR recognise that the full enjoyment of human rights can only be achieved if conditions are created whereby everyone can enjoy the full range of rights in both Covenants.⁴⁴³ The UN ICESCR Committee has recognised that the realisation of rights can only be achieved where the interdependence and indivisibility of the two sets of human rights is recognised and reflected.⁴⁴⁴ It is therefore arguable that

⁴⁴⁰ Directive 97/81/EC, 'Council Directive concerning the Framework Agreement on part-time workers', 15 December 1997; Directive 2008/104/EC, 'Directive of the European Parliament and of the Council on temporary agency work', 19 November 2008.

⁴⁴¹ NI Office, 'UK Government Commitment to "No Diminution of Rights, Safeguards and Equality of Opportunity" in Northern Ireland: What does it Mean and How will it be Implemented?' (NIO, 2020), at para 3.

⁴⁴² Vienna Declaration and Programme of Action 1993, adopted by the World Conference on Human Rights in Vienna, 25 June 1993.

⁴⁴³ Preamble to the UN International Covenant on Civil and Political Rights 1966; UN International Covenant on Economic, Social and Cultural Rights 1966.

⁴⁴⁴ 'UN ICESCR Committee General Comment 3: The Nature of States Parties' Obligations (Art 2, Para 1, of the Covenant)', 14 December 1990.

the signatories' general commitment to civil rights was made with reference to the full range of human rights standards ratified by the UK and that it should be read as an ambulatory or living reference capable of such an interpretation.

The 'keeping pace' obligation which arises in the context of the Annex 1 Directives requires ongoing monitoring of the development and interpretation of EU law to ensure that any amendment to, or replacement of, an Annex 1 Directive by the EU on or after 1 January 2021, which enhances rights and protections, is reflected in NI law. The Commissions' view is that, in line with Article 13 of the Protocol, the Annex 1 equality directives will continue to be informed by future CJEU rulings and, to the extent that such rulings evolve general principles of EU law, the EU Charter of Fundamental Rights and the relevant EU Treaty provisions, these will continue to have relevance in NI.⁴⁴⁵

In addition to the role of the courts in determining the scope of Protocol Article 2, the UK-EU Joint Committee can make binding decisions to resolve disputes on interpretation and application of the Withdrawal Agreement, including Protocol Article 2.⁴⁴⁶ Any decision of the Joint Committee must be agreed by mutual consent by the UK and EU and has the same legal effect as the Withdrawal Agreement and is binding on both parties.⁴⁴⁷ Where a dispute on the application and interpretation of the Withdrawal Agreement cannot be resolved through the Joint Committee, it will be subject to arbitration and any decision of the arbitration panel will be binding on both parties.⁴⁴⁸

Trade and Cooperation Agreement

On 30 December 2020, the UK and EU signed the Trade and Cooperation Agreement (TCA) governing the future UK-EU relationship. The Agreement provisionally applying from 1 January 2021, formally entered into force on

⁴⁴⁵ Article 13(2) and 13(3), Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement. See also *Re SPUC Pro-Life Limited* [2022] NIQB 9, at para 93.

⁴⁴⁶ Article 164, UK-EU Withdrawal Agreement 2020.

⁴⁴⁷ Article 166, UK-EU Withdrawal Agreement 2020. The Specialised Committee on the implementation of the Protocol can consider any matter of relevance to Article 2 brought to its attention by the Commissions and the Joint Committee of representatives of the NIHRC and IHREC (Article 14, Ireland/Northern Ireland Protocol). The Specialised Committee may draft decisions and recommendations and refer them to the Joint Committee for adoption (Article 165, UK-EU Withdrawal Agreement 2020).

⁴⁴⁸ Article 164-161, UK-EU Withdrawal Agreement. Article 174 clarifies that where any question on the interpretation of an EU law concept is raised in arbitration, it shall be referred to CJEU to give a ruling on that question and that ruling will be binding on the arbitration panel.

1 May 2021. The Trade and Cooperation Agreement was given effect in UK law by the EU (Future Relationship) Act 2020.

The Trade and Cooperation Agreement is largely focused on trade and covers a range of issues relating to trade, transport and fisheries, which includes level playing field provisions on labour and social standards and the climate and environment. The Commissions welcome the level playing field commitment in relation to labour and social protection in the Trade and Cooperation Agreement, however it is weakened by a caveat to the effect that the diminution must not impact upon trade or investment, which may be difficult to demonstrate. The Commissions advise that the development of domestic policy in this field must take account of Protocol Article 2, as well as the Trade and Cooperation Agreement.

It is critical to ensure that measures are taken, including information-sharing by the relevant joint bodies to avoid, for example, changes to employment law which are compatible with the Trade and Cooperation Agreement but could breach Protocol Article 2. Such rights are central to the work of the TCA Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development but are also relevant to the Specialised Committee on the Protocol under the Withdrawal Agreement. Importantly, policy and legislative developments in the UK or the EU, which engage human rights and equality commitments under either treaty, will need to be shared at an early stage with the Commissions and all relevant stakeholders and bodies. This is critical to enable Protocol Article 2 and the Dedicated Mechanism to function effectively.

In addition, the Trade and Cooperation Agreement sets out agreed standards on law enforcement and judicial cooperation in criminal matters including the exchange of biometric and vehicle registration data, passenger data and exchange of criminal record information. The Agreement further sets out a framework for cooperation on health security and cyber security.

The Trade and Cooperation Agreement also creates a number of mechanisms for civil society engagement, including Domestic Advisory Groups⁴⁴⁹ and a Civil Society Forum.⁴⁵⁰ In October 2021, the Commissions submitted evidence to the European Scrutiny Committee inquiry on the

⁴⁴⁹ Article 13, UK-EU Trade and Co-operation Agreement.

⁴⁵⁰ Article 14, UK-EU Trade and Co-operation Agreement.

institutional framework of the UK-EU Trade and Cooperation Agreement and its impact on the operation of the Protocol.⁴⁵¹

⁴⁵¹ NI Human Rights Commission and Equality Commission for NI, 'Response to Call for Evidence by the European Scrutiny Committee on the institutional framework of the UK-EU Trade and Co-operation Agreement', (NIHRC and ECNI, 2021).

Appendix 2: About Us

The NIHRC and the ECNI are mandated in accordance with Article 2(1) of the Protocol on Ireland/Northern Ireland of the UK-EU Withdrawal Agreement⁴⁵² to oversee the UK Government's commitment on rights and equality in NI after EU withdrawal.

The Commissions' functions for this purpose, set out in Sections 78A-78E of the Northern Ireland Act 1998, are:

- monitoring the implementation of Protocol Article 2 (rights of individuals);
- reporting to the Secretary of State for NI and the NI Executive Office on the implementation of Protocol Article 2;
- advising the Secretary of State for NI and the NI Executive of legislative and other measures which ought to be taken to implement Protocol Article 2;
- advising the NI Assembly (or a committee of the Assembly) whether a Bill is compatible with Protocol Article 2;
- promoting understanding and awareness of the importance of Protocol Article 2, including undertaking, commissioning or providing financial or other assistance for research and educational activities;
- bringing any appropriate matters of relevance to Protocol Article 2 to the attention of the Specialised Committee on the Protocol;
- taking judicial review proceedings in respect of an alleged breach (or potential future breach) of Protocol Article 2;
- assisting persons in legal proceedings or proposed proceedings in respect of an alleged breach (or potential future breach) of Protocol Article 2; and
- intervening in legal proceedings in so far as they relate to an alleged breach (or potential future breach) of Protocol Article 2.

⁴⁵² Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 24 January 2020.

NIHRC

The NIHRC was established as a result of the Belfast (Good Friday) Agreement 1998. The NIHRC's governing legislation is the Northern Ireland Act 1998, as amended by the Justice and Security (Northern Ireland) Act 2007 and the European Union (Withdrawal Agreement) Act 2020.

The NIHRC is a National Human Rights Institution with A status accreditation from the United Nations. This recognition means that the organisation operates independently in full accordance with the UN General Assembly Resolution 48/134 (the Paris Principles) reporting to UN treaty bodies and exercising speaking rights before the UN Human Rights Council.

The Commission is also a non-departmental public body and receives grant-in-aid from the UK Government through the NI Office. We report to Parliament through the Secretary of State for NI.

The NIHRC also has additional functions, as set out in the Northern Ireland Act 1998, to:

- keep under review the adequacy and effectiveness in NI of law and practice relating to the protection of human rights;
- advise the Secretary of State for NI and the Executive Committee of the NI Assembly of legislative and other measures which ought to be taken to protect human rights;
- advise the NI Assembly whether proposed legislation is compatible with human rights standards;
- promote understanding and awareness of the importance of human rights in NI, for example, by undertaking or commissioning or otherwise assisting research and educational activities;
- give assistance to individuals who apply to it for help in relation to proceedings involving law or practice concerning the protection of human rights;
- bring proceedings involving law or practice concerning the protection of human rights;
- intervene in legal proceedings concerning human rights where it need not be a victim or potential victim of the unlawful act to which the proceedings relate;

- conduct investigations;
- require a person to provide information and documents in their possession, and to give oral evidence, in respect of an investigation;
- enter a specified place of detention in NI, in respect of an investigation; and
- publish its advice and the outcome of its research and investigations.

ECNI

The ECNI is an executive non-departmental public body sponsored by the Executive Office (TEO). The ECNI, established on 1 October 1999 under the Northern Ireland Act 1998, assumed, along with the responsibilities for statutory equality duties and new disability matters, the duties and responsibilities of four former organisations:

- The Commission for Racial Equality for Northern Ireland;
- The Equal Opportunities Commission for Northern Ireland;
- The Fair Employment Commission for Northern Ireland; and
- The Northern Ireland Disability Council.

Since October 1999, additional duties and responsibilities with respect to age, disability, sexual orientation and special educational needs have also been assumed.

During 2009, jointly with the NIHRC, the ECNI was designated as the independent mechanism for NI of the UN Convention on the Rights of Persons with Disabilities (UNCRPD) with the role of promoting, protecting and monitoring the implementation of the Convention.

The main pieces of legislation from which the Commission derives its duties and powers are:

- Sex Discrimination (NI) Order 1976, as amended;
- Disability Discrimination Act 1995, as amended;
- Race Relations (NI) Order 1997, as amended;
- Fair Employment and Treatment (NI) Order 1998, as amended;

- Northern Ireland Act 1998, as amended;
- Equality (Disability, etc.) (NI) Order 2000;
- Employment Equality (Sexual Orientation) Regulations (NI) 2003, as amended;
- Special Educational Needs and Disability (NI) Order 2005, as amended;
- Disability Discrimination (NI) Order 2006;
- Employment Equality (Age) Regulations (NI) 2006, as amended; and
- Equality Act (Sexual Orientation) Regulations (NI) 2006, as amended.

Appendix 3: List of Submissions

Joint NIHRC/ECNI Submissions

- NI Human Rights Commission and Equality Commission for NI, ‘Submission to the Seanad Éireann Special Select Committee on UK Withdrawal from the EU’, (NIHRC and ECNI, 2021).
- NI Human Rights Commission and Equality Commission for NI, ‘[Submission of the NIHRC and ECNI to the Introductory Inquiry into the Operation of the Protocol by the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland](#)’, (NIHRC and ECNI, 2021)
- NI Human Rights Commission and Equality Commission for NI, ‘[Response to Call for Evidence by the European Scrutiny Committee on the institutional framework of the UK-EU Trade and Co-operation Agreement](#)’, (NIHRC and ECNI, 2021).
- NI Human Rights Commission and Equality Commission for NI, ‘[Submission of the NIHRC and ECNI on the UK and EU proposals and the prospects for Agreement to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland](#)’ (NIHRC and ECNI, 2021).
- Letter from the Equality Commission for NI and NI Human Rights Commission to the Public Bill Committee, 20 October 2021 on the [Elections Bill](#).
- NI Human Rights Commission and Equality Commission for NI, ‘[Joint NIHRC/ECNI Briefing paper on the modern slavery and human trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill](#)’, (NIHRC and ECNI, 2022).
- Letter from the Equality Commission for NI and NI Human Rights Commission to the House of Lords Sub Committee on the Ireland/Northern Ireland Protocol, 7 February 2022 on [Clause 13 of the Elections Bill](#).
- Equality Commission for NI and NI Human Rights Commission, ‘[Joint ECNI/NIHRC Briefing on the provisions on Voting/Candidacy Rights of EU citizens in NI in the Elections Bill](#)’ (ECNI and NIHRC, 2022).

NIHRC Submissions

- NI Human Rights Commission 'Submission to the NI Affairs Committee Inquiry into Citizenship and Passport Processes' (NIHRC, 2021).
- NI Human Rights Commission, 'Submission to the Independent Human Rights Act Review Team's Call for Evidence', (NIHRC, 2021).
- NI Human Rights Commission, 'Submission to the Joint Committee on Human Rights on the Independent Human Rights Act Review', (NIHRC, 2021).
- NI Human Rights Commission, 'Response to the Ad Hoc Committee's Consultation on a Bill of Rights for NI', (NIHRC, 2021).
- NI Human Rights Commission, 'Briefing Note for Ad Hoc Committee on a Bill of Rights: EU Withdrawal and a Bill of Rights', (NIHRC, 2021).
- NI Human Rights Commission, 'Response to Public Consultation on the Home Office's 'New Plan for Immigration'', (NIHRC, 2021)
- NI Human Rights Commission, 'NI Affairs Committee Inquiry into Citizenship and Passport Processes in NI: NIHRC Commentary on the Northern Ireland Office/Home Office Submission to the Committee', (NIHRC, 2021).
- NI Human Rights Commission 'Submission to the Joint Human Rights Committee on the Independent Human Rights Act Review' (IHRC, 2021).
- NI Human Rights Commission, NIHRC Submission to Committee for Economy on the Parental Bereavement (Leave and Pay) Bill, (NIHRC, 2021).
- NI Human Rights Commission, 'NIHRC Response to Committee for Justice Call for Evidence on the Justice (Sexual Offences and Trafficking Victims) Bill', (NIHRC, 2021).
- NI Human Rights Commission, 'Response to the UK Government's Follow-up Report to the UN CEDAW Committee's 2019 Concluding Observations on the UK of Great Britain and NI', (NIHRC, 2021).
- NI Human Rights Commission, 'Response to Call for Evidence by the Joint Committee on Human Rights on the Nationality and Borders Bill' (NIHRC, 2021).
- NI Human Rights Commission, 'Response to the Department of Justice Consultation on Charlotte's Law', (NIHRC, 2022).
- NI Human Rights Commission, 'Response to public consultation on draft Refugee Integration Strategy', (NIHRC, 2022).
- NI Human Rights Commission, 'Submission to the Advisory Committee on the Framework Convention for the protection of National Minorities – Parallel Report to the Advisory Committee on the Fifth Monitoring Report of the UK', (NIHRC, 2022).
- NI Human Rights Commission, 'Response to the consultation on Human Rights Act Reform: a Modern Bill of Rights', (NIHRC, 2022).

- NI Human Rights Commission, 'Submission to the Department of Finance Consultation on Marriage Law', (NIHRC, 2022).
- Letter from NI Human Rights Commission to the Committee for the Executive Office, 2 March 2022 on the Fair Employment (School Teachers) Bill.
- NI Human Rights Commission, 'Response to Call for Views: Domestic Abuse Strategy and Equally Safe Strategy – A Strategy to Tackle Violence against Women and Girls' (NIHRC, 2022).
- NI Human Rights Commission, 'NI Human Rights Commission Submission to the UN Human Rights Council's Universal Periodic Review of the UK', (NIHRC, 2022).
- NI Human Rights Commission, 'Response to Public Consultation on Improving the Effectiveness of Hate Crime Legislation in NI' (NIHRC, 2022).

ECNI Submissions

- Equality Commission for Northern Ireland's Submission to [Ad Hoc Committee on a Bill of Rights for Northern Ireland](#), March 2021.
- Equality Commission for Northern Ireland's Submission to [Ad Hoc Committee on a Bill of Rights for Northern Ireland](#), April 2021.
- Equality Commission for Northern Ireland's Submission to the Committee for the Economy on the Private Member's Bill - Employment (Zero Hours Workers and Banded Weekly Working Hours) Bill, 23 February 2022.
- Equality Commission for Northern Ireland's Submission on the [Programme for Government and Budget Recommendations](#), 2021.
- Equality Commission for Northern Ireland's [Shadow Report to the Advisory Committee for the Framework Convention for the Protection of National Minorities on the 5th Monitoring Report of the UK](#), February 2022.
- Equality Commission for Northern Ireland's Submission to the European Commission on the [Roadmap Binding standards for Equality Bodies](#), August 2021.
- Equality Commission for Northern Ireland's Response to the consultation by The Executive Office on the [draft Refugee Integration Strategy 2022-2027](#), February 2022.
- Equality Commission for Northern Ireland's response to the European Commission's public consultation on Binding standards for Equality Bodies, 16 March 2022.
- Equality Commission for Northern Ireland's response to [The Executive Office Equally Safe Strategy and The Departments for Justice and Health – Domestic and Sexual Abuse Strategy Consultation Response](#), March 2022.

- Equality Commission for Northern Ireland's Response to the Ministry of Justice consultation on [Human Rights Act Reform: A Modern Bill of Rights](#), March 2022.
- Equality Commission for Northern Ireland's Response to Department of Justice consultation on [Improving the effectiveness of Hate Crime Legislation in Northern Ireland](#), March 2022.



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