

# The 2018 Annual Statement

Human Rights in Northern Ireland

2018



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION



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## About us

The NI Human Rights Commission (the Commission) protects and promotes the human rights of everyone in NI. We do this by:

- keeping under review the adequacy and effectiveness in NI of law and practice relating to the protection of human rights;
- advising 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;
- advising the NI Assembly whether proposed legislation is compatible with human rights standards;
- promoting understanding and awareness of the importance of human rights in NI, for example, by undertaking or commissioning or otherwise assisting research and educational activities.

In addition, the Commission has powers to:

- 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;
- institute, or 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.

### Our mission statement

The Commission champions and guards the rights of all those who live in NI.


Chief Commissioner: Les Allamby  
Commissioners: Helen Ferguson  
                          Helena Macormac  
                          Paul Mageean  
                          Samuel John McCallister  
                          Edmond Rooney  
                          Graham Shields  
Chief Executive: Dr David Russell


## Acronyms


<b>CAT</b>	Convention Against Torture, Inhuman or Degrading Treatment or Punishment
<b>CERD</b>	Convention on the Elimination of All Forms of Racial Discrimination
<b>CEDAW</b>	Convention on the Elimination of Discrimination Against Women
<b>CRC</b>	Convention on the Rights of the Child
<b>CRPD</b>	Convention on the Rights of Disabled Persons
<b>ECHR</b>	European Convention on Human Rights
<b>ECt.HR</b>	European Court of Human Rights
<b>EU</b>	European Union
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>MLA</b>	Member of the Northern Ireland Assembly
<b>MP</b>	Member of Parliament
<b>NI</b>	Northern Ireland
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations

## Understanding the annual statement

The Commission's annual statement uses a traffic light system to assist readers.

**Red**  identifies a subject that requires immediate action by the UK Government, NI Executive or relevant public authorities and the issue may be an ongoing violation or abuse of human rights within NI.

**Amber**  identifies a subject that initial steps toward providing an effective response could have already been taken or the necessity of taking action acknowledged by the relevant body. Such actions may have commenced, but are not yet completed. The identified subject requires action by the UK Government, NI Executive or relevant public authorities. The issue may not be at a level that constitutes an ongoing violation or abuse of human rights.

**Green**  identifies a subject that has been acknowledged as requiring action to protect human rights in NI and an effective response has been provided by the UK Government, NI Executive or relevant public authorities. A firm commitment to address the matter will have been demonstrated and undertaken.

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## Foreword

This is the second annual statement published against the backdrop of the absence of devolved government in Northern Ireland. The stark implications of the impasse are laid bare, with more issues marked red denoting potential and ongoing violations of human rights needing immediate remedy, than at any time since the annual statement was first published in 2012.

The outstanding issues are profound, including the need to reform the law on access to termination of pregnancy, deal effectively with the past including outstanding investigations and legacy inquests, tackle child sexual exploitation, address the issues of children going missing from care, and the continued absence of a strategy to reduce poverty, despite this being declared unlawful in the High Court three years ago.

Several months have passed since, it was suggested to me that in one Northern Ireland Government department there were over five thousand decisions waiting on sign-off from a new Minister. This in-tray is now presumably even more overflowing. The public mood at the stalemate has turned from anger to indifference; neither of which is healthy given the important job politicians are elected to do.

The other subject dominating public life is the referendum decision to leave the European Union and its implications for Northern Ireland. Here also, the absence of a devolved government in Northern Ireland is felt keenly. The implications for the protection of human rights and equality are substantial. The United Kingdom Government is committed to leaving the Charter of Fundamental Rights of the European Union, which incorporates and supplements the protections contained in the European Convention on Human Rights when dealing with European Union Law.

The Charter with its 'Convention plus' approach is the nearest thing we have to what was envisaged in the Belfast (Good Friday) Agreement for a Bill of Rights for Northern Ireland. There is a strong argument to either, retain the Charter within Northern Ireland, or to incorporate its essence as a Bill of Rights. Moreover, the notion of retaining an equivalency though not the same human rights protections across the island of Ireland in the Agreement is becoming increasingly hollow.

Northern Ireland is failing to keep pace with the rest of the United Kingdom and Ireland on key human rights and equality provisions. It is not in our political, social or economic interests to become 'a place apart'. Leaving the European Union will have implications, not only for protecting existing rights, but also for developing future rights. Many issues have progressed in the past because of the development of European Union law. While in other parts of the United Kingdom may continue to advance following our withdrawal from the European Union, recent history suggests that such confidence in Northern Ireland would be misplaced.

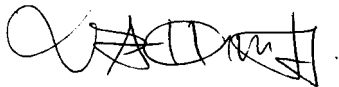
The Commission alongside the Irish Human Rights and Equality Commission in the Joint Committee and, in conjunction with, the Equality Commission has engaged extensively in London, Dublin and Brussels

to make the case for protecting human rights and equality after the European Union exit. This includes ensuring rights of individual redress and remedies before the courts.

The restoration of the Northern Ireland Executive and Assembly and the nature of any agreement reached between the United Kingdom Government and the European Union will significantly determine whether outstanding human rights issues are progressed or not.

In the meantime, the annual statement continues to chart the extent, breadth and value of the Commission's and other organisations work on human rights issues.

I would like to thank my Commissioner colleagues and staff for their work on the annual statement and their support in general as we continue to promote human right values and standards through difficult political and economic times.



**Les Allamby**

Chief Commissioner

## Chapter 1 Introduction

The Commission was established following the Belfast (Good Friday) Agreement 1998. It is a national human rights institution with 'A status' accreditation at the Global Alliance of National Human Rights Institutions.

Having assessed developments affecting human rights protections in NI throughout 2018, the Commission publishes this annual statement, operating in accordance with the NI Act 1998, and recalling its mandate to:

- *keep under review the adequacy and effectiveness in NI of law and practice relating to the protection of human rights; and*
- *to 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.*<sup>1</sup>

The Commission also recalls the UN Paris Principles, and, in particular, the responsibility of a national human rights institution to:

*submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights.*<sup>2</sup>

The Commission's assessment of developments during 2018 is premised on the requirements of domestic human rights standards and those treaty obligations of the UN and European systems that are legally binding in NI on the basis of their ratification by the UK.

The treaties, which the UK has ratified include:

- *European Convention on Human Rights (ECHR) [UK ratification 1951] – given further domestic effect by the Human Rights Act 1998;*
- *European Social Charter [UK ratification 1962];*
- *Framework Convention for the Protection of National Minorities [UK ratification 1998];*
- *Convention on Action against Trafficking in Human Beings [UK ratification 2008];*
- *European Charter for Regional or Minority Languages [UK ratification 2001];*
- *International Covenant on Civil and Political Rights (ICCPR) [UK ratification 1976];*
- *International Covenant on Economic, Social and Cultural Rights, (ICESCR) [UK ratification 1976];*

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1 Section 69, NI Act 1998.

2 A/RES/48/134, 'UN General Assembly Principles relating to the Status of National Institutions', 20 December 1993.

- *Convention on the Elimination of All Forms of Racial Discrimination (CERD) [UK ratification 1969];*
- *Convention on the Elimination of Discrimination Against Women, (CEDAW) [UK ratification 1986];*
- *Convention on the Rights of the Child (CRC) [UK ratification 1991];*
- *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict [UK ratification 2003]*
- *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography [UK ratification 2009]*
- *Convention Against Torture, Inhuman or Degrading Treatment or Punishment (CAT) [UK ratification 1988];*
- *the UN Educational, Scientific and Cultural Organisation Convention on the Protection and Promotion of the Diversity of Cultural Expressions [UK ratification 2007]*
- *Charter of Fundamental Rights of the European Union [UK ratification 2000]*
- *Convention on the Rights of Disabled Persons (CRPD) [UK ratification 2009].*

Human rights law further applies by virtue of the NI Act 1998, section 24(1). Ministers of the Executive Committee of the NI Assembly (NI Executive) and Executive departments are therefore required to ensure that all legislation and actions are compatible with the ECHR.<sup>3</sup>

Moreover, the NI Act 1998, section 26, requires compliance with other international human rights obligations, and that for this purpose the Secretary of State for NI may, by direct order, prevent any proposed action by Ministers of the NI Executive and devolved Executive departments.<sup>4</sup>

The ECHR is given further domestic effect in the UK as a consequence of the Human Rights Act 1998. Subject to section 6(3), all public authorities in NI must ensure that their actions are compatible with the Human Rights Act. The definition of a public authority includes a:

*court or tribunal, and any person certain of whose functions are functions of a public nature.*<sup>5</sup>

This means that private sector contractors may, depending on their role, be subject to the requirements of the Human Rights Act. Government

<sup>3</sup> Section 24 of the NI Act 1998 states: 'A Minister or NI department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act— (a) is incompatible with any of the Convention rights'.

<sup>4</sup> Section 26 of the NI Act 1998 states: 'If the Secretary of State considers that any action proposed to be taken by a Minister or NI department would be incompatible with any international obligations, with the interests of defence or national security or with the protection of public safety or public order, he may by order direct that the proposed action shall not be taken'.

<sup>5</sup> Section 6, Human Rights Act 1998.

departments have the duty to ensure that actions carried out following public procurement exercises comply with the ECHR.

The Commission, in assessing compliance with international human rights standards, takes account of the findings of the international monitoring bodies that are directed to or otherwise apply to NI, as well as the general comments and other interpretive texts adopted by such bodies.

Treaty examinations and reports issued in 2018:

### **UN Convention on the Elimination of Discrimination against Women**

The UN CEDAW Committee examined whether the UK had committed grave and systematic violations of rights under the CEDAW Convention owing to the restrictive access to abortion for women and girls in NI. The Committee published its Inquiry report in February 2018. The report identified a number of violations, including violations of a grave and systemic nature, and made a number of recommendations for effectively remedying these and preventing future violations. These are referenced in the relevant sections of the annual statement. In February 2018, the UK Government published its response to the CEDAW Committee's report. The UK Government does not accept that women from NI have been subject to grave and systematic violations of their rights under the CEDAW Convention. The UK Government committed to provide a substantive response to CEDAW Committee's findings and recommendations once the NI Executive and Assembly are in place to authorise and approve the response.

In August 2018, the UN CEDAW Committee also published its list of issues and questions in relation to the eighth periodic report of the UK, which is due to be examined in May 2019. The Commission's submissions to inform the CEDAW Committee's list of issues are set out in the relevant sections of the annual statement.

### **European Charter for Regional or Minority Languages**

The UK State's fifth periodic report under the European Charter for Regional or Minority Languages was published by the Council of Europe in January 2018.

In May 2018, a delegation from the Committee of Experts for the Charter met the Commission and other groups in Belfast as part of a visit to the UK. Their report is to be published at the end of 2018.

Reference to these reports is made in the relevant sections of the annual statement.

## Chapter 2 Substantive rights and issues

### Equality and non-discrimination

<b>ECHR</b>	Article 14
<b>ICCPR</b>	Article 2(1) Article 3 Article 24 Article 26
<b>CEDAW</b>	Article 1
<b>CERD</b>	Articles 1-5
<b>CRC</b>	Article 2
<b>CRPD</b>	Articles 3-5
<b>ICESCR</b>	Article 2(2) Article 3
<b>Charter of Fundamental Rights of the EU</b>	Article 20 Article 21 Article 23
<b>Framework Convention for the Protection of National Minorities</b>	Article 4 Article 6(2)

#### Consolidating, strengthening and clarifying equality protections

In NI, discrimination is prohibited by a number of laws and regulations, resulting in a complex framework.<sup>6</sup> Three UN treaty bodies have raised concerns that NI law does not provide for a single legislative instrument to consolidate, clarify and enhance existing equality protections.<sup>7</sup>

In August 2017, the UNCRPD Committee recommended reform of equality law in NI:

*to protect persons with disabilities in NI from direct and indirect disability-based discrimination and discrimination through association.*<sup>8</sup>

In 2016, the UN ICESCR Committee stated its regret that, despite its previous recommendation, the situation in NI has not been addressed. It urged:

6 See Employment Equality (Age) Regulations (NI) 2006; Disability Discrimination Act 1995; Special Educational Needs and Disability (NI) Order 2005; Equal Pay Act (NI) 1970; Sex Discrimination (NI) Order 1976; Race Relations (NI) Order 1997; Fair Employment and Treatment (NI) Order 1998; Employment Equality (Sexual Orientation) Regulations (NI) 2003; Equality Act (Sexual Orientation) Regulations (NI) 2006; NI Act 1998.

7 E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI, 14 July 2016, para 23; CERD/C/GBR/CO/21-23, 'UN Committee on the Elimination of Racial Discrimination, Concluding Observations on the Twenty-first to Twenty-third periodic Reports of UK', 26 August 2016, at para 8(c); CEDAW/C/GBR/CO/7, 'UN Committee on the Elimination of Discrimination Against Women, Concluding observations on the seventh periodic report of the UK of Great Britain and NI', 30 July 2013, at para 18.

8 CRPD/C/GR/CO/1, 'UN Committee on Rights of Persons with Disabilities, Concluding Observations on the Initial Report of the UK of Great Britain and NI', 3 October 2017.

*a similar level of protection to rights holders with regard to all grounds of discrimination for all individuals in all jurisdictions of the State party, including NI.*<sup>9</sup>

European Commission against Racism and Intolerance has also recommended, as a priority for implementation, that the authorities:

*consolidate equality legislation into a single, comprehensive equality act, taking inspiration from the Equality Act 2010, and taking account of the recommendations of the Equality Commission NI.*<sup>10</sup>

The Commission notes that the Executive Office previously expressed its intent to review the current equality framework through a step-by-step approach, rather than through a single legislative instrument.<sup>11</sup> In 2018, the Commission has raised the issue of law reform with senior officials within the Executive Office who have emphasised that there are no plans at present for an overview of existing equality law and no agreement on a Single Equality Act.

### Recommendation

The Commission continues to recommend that the Executive Office prioritise the introduction of legislation that will strengthen, simplify and harmonise equality law within a Single Equality Act. It calls on the NI Executive to support the Executive Office and secure necessary political consensus on this matter.

### Age discrimination

In June 2016, the 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.*<sup>12</sup>

There is currently no prohibition on discrimination in the provision of goods, facilities and services in NI on the basis of age. The Office of the First Minister and Deputy First Minister (now the Executive Office) published a consultation document in 2015 proposing to extend age discrimination legislation to cover the provision of goods, facilities and services.<sup>13</sup> The Commission welcomed the initiative but, along with the NI Commissioner for Children and Young People and a number of children's organisations, expressed concern that these proposals exclude children

9 E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at para 23.

10 CRI(2016)38, 'ECRI Report on the UK (Fifth Monitoring Cycle)', 4 October 2016, at para 22.

11 CEDAW/C/GBR/8, 'Eighth Periodic Report Submitted by the UK of Great Britain and NI Under Article 18 of the Convention, due 2017', 16 November 2017; CEDAW/C/GBR/Q/7/Add.1, 'List of Issues and Questions with Regard to the Consideration of Periodic Reports: UK of Great Britain and NI', 5 February 2013, at para 17; OFMdfM, 'A Sense of Belonging: Delivering Social Change through a Racial Equality Strategy for NI 2014 - 2024' (OFMdfM, 2014), at 38 and 40.

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

13 OFMdfM, 'Proposals to Extend Age Discrimination Legislation (Age Goods, Facilities and Services) Consultation Document' (OFMdfM, 2015).



under 16.<sup>14</sup> NI Executive Ministers have stated that the decision to exclude under 16s was made on the basis of seeking to advance legislation as quickly as possible with the aim of eventually extending age discrimination protection to children under 16.<sup>15</sup> The legislation was not progressed prior to the suspension of the NI Assembly. Engagement with officials in 2018 has indicated that the policy content of the proposed legislation is not yet settled.

### Recommendation

The Commission recommends that the Executive Office introduces legislation to extend protections against age discrimination to include the provision of goods, facilities and services at the earliest opportunity and ensures compliance with the recommendation of the UN CRC.



## Discrimination on grounds of sexual orientation

### Homophobic motivated hate crimes

The Police Service NI report that there were 267 homophobic motivated incidents and 163 homophobic motivated crimes recorded in 2017/18; 12 fewer incidents and one more crime when compared with 2016/17.<sup>16</sup>

### Sexual orientation strategy

The Office of the First Minister and Deputy First Minister (now the Executive Office) issued a public consultation in March 2014 on the development of a Sexual Orientation Strategy.<sup>17</sup> Responsibility for the strategy transferred to the Department for Communities in 2016. The Commission has met with officials within the Department for Communities who have informed the Commission that the Sexual Orientation Strategy is being considered within the context of the NI Executive's draft Social Strategy.<sup>18</sup>

### Ashers Case

In the case of *Lee v Ashers Baking Co Ltd* (2015), the NI County Court found that Ashers Baking Company unlawfully discriminated against Mr Lee on the grounds of his sexual orientation, contrary to regulation 5(1) of the Equality Act (Sexual Orientation) Regulations (NI) 2006 by refusing to provide him with a cake with the slogan 'Support Gay Marriage'. The NI County Court also ruled that Ashers had directly discriminated against Mr Lee on the grounds of his religious beliefs/political opinion contrary to Article 3(2) of the Fair Employment and Treatment Order 1998.<sup>19</sup>

14 NI Commission for Children and Young People, 'Don't Exclude Us! Strengthening Protection for Children and Young people when Accessing Goods, Facilities and Services' (NICCY, 2013); NI NGO Alternative Report, 'Submission to the UN Committee on the Rights of the Child for Consideration During the Committee's Examination of the UK of Great Britain and NI Government Report, Children's Law Centre and Save the Children NI' (CLC, 2015), at 14; NIHRC, 'Response to consultation on Proposals to Extend Age Discrimination Legislation (Age Goods, Facilities and Services)' (NIHRC, 2015).

15 Committee for the Office of the First Minister and Deputy First Minister, 'Age Discrimination Legislation: OFMDFM Junior Ministers and Officials', *Hansard*, 15 April 2015.

16 Police Service NI, 'Incidents and Crimes with a Hate Motivation Recorded by the Police in NI, Quarterly Update to 31 March 2018' (PSNI, 2018).

17 OFMDFM, 'Developing a Sexual Orientation Strategy - Consultation Document and Questionnaire' (OFMDFM, 2014).

18 Correspondence between Department for Communities and NIHRC, 15 November 2016.

19 The Fair Employment and Treatment (NI) Order 1998, Statutory Instruments, 16 December 1998.

In delivering judgment, District Judge Brownlie affirmed that the law requires businesses to supply their services to all and noted that Ashers Baking Company were not a religious organisation, but were conducting their business for profit; there were therefore no exceptions to the 2006 regulations in the circumstances of the case.<sup>20</sup>

The judgment was upheld by the NI Court of Appeal in 2016, following an appeal by Ashers Baking Company. In dismissing the appeal, the NI Court of Appeal ruled that the 2006 regulations were lawfully made and did not discriminate against the appellants as the legislation treated all parties in the same way. The NI Court of Appeal noted that the answer, in this case, was not to remove the equality protections in the 2006 regulations, but rather:

*for the supplier of services to cease distinguishing, on prohibited grounds, between those who may or may not receive the service.*<sup>21</sup>

The NI Court of Appeal also did not find any breach of the appellant's Article 9 ECHR, right to manifest their religion, or Article 10 ECHR, right to freedom of expression.

Commencing on 1 May 2018, the UK Supreme Court heard an appeal by Ashers Baking Company.<sup>22</sup> The UK Supreme Court's delivered its judgment on 10 October 2018 and allowed the appeal. The UK Supreme Court held Ashers Baking Company had not discriminated against Mr Lee on the grounds of his sexual orientation. Referencing District Judge Brownlie, the UK Supreme Court did not find that the bakery refused to fulfil the order because of Mr Lee's actual or perceived sexual orientation, but because of their opposition to same-sex marriage. Lady Hale noted:

*as the Court of Appeal pointed out, she did not take issue with the submission that the bakery would have supplied Mr Lee with a cake without the message 'support gay marriage' and that they would also have refused to supply a cake with the message requested to a hetero-sexual customer (para 11). The objection was to the message, not the messenger.*<sup>23</sup>

Regarding the submitted argument that the case was one of associative discrimination, Lady Hale said of the NI Court of Appeal's judgment that:

*this suggests that the reason for refusing to supply the cake was that Mr Lee was likely to associate with the gay community of which the McArthurs disapproved. But there was no evidence that the bakery had discriminated on that or any other prohibited ground in the past. The evidence was that they both employed and served gay people and treated them in a nondiscriminatory way. Nor was there any finding that the reason for refusing to supply the cake was that Mr*

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20 *Lee (Respondent) v Ashers Baking Company Ltd and others (Appellants) NI* [2018] UKSC 49, at para 55.

21 *Gareth Lee v Colin McArthur, Karen McArthur and Ashers Baking Company Limited* [2016] NICA 39, at para 100.

22 Mark Simpson, 'Judgment reserved in 'gay cake' Supreme Court case', *BBC News*, 2 May 2018.

23 *Lee (Respondent) v Ashers Baking Company Ltd and others (Appellants) (NI)* [2018] UKSC 49, at para 22.

*Lee was thought to associate with gay people. The reason was their religious objection to gay marriage.*<sup>24</sup>

She later summarised:

*in a nutshell, the objection was to the message and not to any particular person or persons.*<sup>25</sup>

The UK Supreme Court found Article 9 ECHR right to manifest one's religion or Article 10 ECHR right to freedom of expression were clearly engaged and included the right not to be obliged to manifest beliefs one does not hold. The UK Supreme Court held Ashers Baking Company could not refuse to provide a cake, or any other product, to Mr Lee because of his sexual orientation or his support for same-sex marriage, but:

*that important fact does not amount to a justification for something completely different - obliging them to supply a cake iced with a message with which they profoundly disagreed. In my view they would be entitled to refuse to do that whatever the message conveyed by the icing on the cake - support for living in sin, support for a particular political party, support for a particular religious denomination.*<sup>26</sup>

In reaching the conclusion that there was no discrimination on grounds of sexual orientation in the present case, Lady Hale said she:

*did not seek to minimise or disparage the very real problem of discrimination against gay people.*<sup>27</sup>

Lady Hale continued:

*everyone, as Article 1 of the Universal Declaration of Human Rights put it 70 years ago is 'born free and equal in dignity and rights'. Experience has shown that the providers of employment, education, accommodation, goods, facilities and services do not always treat people with equal dignity and respect, especially if they have certain personal characteristics which are now protected by the law. It is deeply humiliating, and an affront to human dignity, to deny someone a service because of that person's race, gender, disability, sexual orientation or any of the other protected personal characteristics. But that is not what happened in this case and it does the project of equal treatment no favours to seek to extend it beyond its proper scope.*<sup>28</sup>

24 Ibid, at para 28.

25 Ibid, at para 34.

26 Ibid, at para 55.

27 Ibid, at para 35.

28 Ibid.

## Recommendation

The Commission recommends that the Department for Communities publish a robust sexual orientation strategy for NI, accompanied by a measurable plan of action. It calls on the NI Executive to support the Executive Office and secure necessary political consensus on this matter.

The Commission continues to advise the right to hold religious beliefs is absolute, but the right to manifest one's religion or beliefs is qualified. The Commission recommends clear guidance is introduced that provides legal certainty for businesses and customers on what constitutes discrimination, in the wake of the Asher's judgment.



### Extension of civil marriage to same sex couples

The UN Human Rights Committee has welcomed the adoption of the Marriage (Same Sex Couples) Act 2013, which provides for same sex marriage in England and Wales.<sup>29</sup> Similar provision was made in Scotland through the Marriage and Civil Partnership (Scotland) Act 2014.<sup>30</sup> A year later, following a referendum, Ireland also enacted the Constitution (Marriage Equality) Act 2015 to provide for same sex marriage.<sup>31</sup>

The Marriage (Same Sex Couples) Act 2013, Schedule 2, provides for a marriage of a same sex couple under the law of England and Wales to be treated as a civil partnership formed under the law of NI (and accordingly, the spouses are to be treated as civil partners). In August 2017, the NI High Court dismissed an application from a gay man seeking a declaration that his marriage in London was a valid and subsisting marriage under the law of NI. Mr Justice O'Hara held that on the basis of the case law of the ECt.HR, he could not conclude that X's Convention rights had been violated because in NI, X's marriage, whilst legally recognised in England and Wales, is only recognised as a civil partnership.<sup>32</sup> He stated:

*to the frustration of supporters of same sex marriage the [NI] Assembly has not yet passed into law any measure to recognise and introduce same sex marriage.*<sup>33</sup>

The judgment is currently being appealed to the NI Court of Appeal and is anticipated to be heard in early 2019.<sup>34</sup>

On 14 December 2017, the ECt.HR found in *Orlandie and Others v Italy* that:

*as to legal recognition of same-sex couples, the Court notes the movement that has continued to develop rapidly in Europe since*

29 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 3.

30 Same Sex and Civil Partnership (Scotland) Act 2014.

31 Thirty-fourth Amendment, Constitution (Marriage Equality) Act 2015.

32 NI Courts Service, 'Judge dismisses Same Sex Marriage Petition', 17 August 2017.

33 Ibid.

34 NI Marriage Equality Fund, 'Strategic Interest Litigation Collective, Crowd Justice Crowdfunder'. Available at: <https://www.crowdjustice.com/case/silc-nimmarriageequalityfund/>

*the Court's judgment in Schalk and Kopf and continues to do so. indeed at the time of the Oliari and Others judgment, there was already a thin majority of Council of Europe States (twenty-four out of forty-seven) that had already legislated in favour of such recognition and the relevant protection. The same rapid development had been identified globally, with particular reference to countries in the Americas and Australasia, showing the continuing international movement towards legal recognition (see Oliari and Others, cited above, § 178). To date, twenty-seven countries out of the forty-seven Council of Europe Member States have already enacted legislation permitting same-sex couples to have their relationship recognised (either as a marriage or as a form of civil union or registered partnership) (see paragraph 112 above).<sup>35</sup>*

The ECt.HR considered the registration of same-sex marriages that are contracted abroad. The ECt.HR stated that:

*apart from the Member States of the Council of Europe where same-sex marriage is permitted, the comparative law information available to the Court (limited to twenty-seven countries where same-sex marriage was not, at the time, permitted) showed that only three of those twenty-seven other member States allowed such marriages to be registered, despite the absence (to date or at the relevant time) in their domestic law of same-sex marriage (see paragraph 113 above). Thus, this lack of consensus confirms that the States must in principle be afforded a wide margin of appreciation, regarding the decision as to whether to register, as marriages, such marriages contracted abroad.<sup>36</sup>*

On 21 February 2017, the then Council of Europe Commissioner for Human Rights, Nils Muižnieks, commented that:

*States should continue to work towards eliminating discrimination based on sexual orientation in the area of family rights. This requires several measures:*

- The 20 Member States of the Council of Europe that still do not provide any legal recognition to same-sex couples should enact legislation to create - at the very least - registered partnerships that ensure that privileges, obligations or benefits available to married or registered different-sex partners are equally available to same-sex partners.*
- All States should ensure that legislation exists to provide registered same-sex couples with the same rights and benefits as married or registered different-sex couples, for example in the areas of social security, taxes, employment and pension benefits, freedom of movement, family reunification, parental rights and inheritance.*

<sup>35</sup> *Orlandi and Others v Italy* (2017) ECHR 1153, at para 204.

<sup>36</sup> *Ibid*, at para 205.

*- States should promote respect for lesbian, gay and bisexual persons and combat discrimination based on sexual orientation through human rights education and awareness-raising campaigns.<sup>37</sup>*

On 28 March 2018, a Private Members' Bill was introduced to the House of Commons providing for the extension of the legislation of same sex marriage to NI.<sup>38</sup> At the time of writing, it was awaiting its second reading before the House of Commons. A similar Bill was introduced to the House of Lords.<sup>39</sup> At the time of writing, this Bill was awaiting its second reading before the House of Lords.

In June 2018, in response to a written question on the UK Government's policy on same sex marriage in NI, the then Minister of State for NI Shailesh Vara said:

*same-sex marriage is a devolved matter.<sup>40</sup>*

The UK Government's priority therefore remains the re-establishment of a fully-functioning devolved government in NI, so that decisions on same-sex marriage can be taken by locally elected and locally accountable politicians.

In October 2018, Conor McGinn MP and Stella Creasy MP tabled an amendment to the NI (Executive Formation and Exercise of Functions) Bill 2018, which focused on addressing:

*the incompatibility of the human rights of the people of NI with the continued enforcement of section 13(e) of the Matrimonial Causes (NI) Order 1978 where they pertain to the provision and management of public services in NI.<sup>41</sup>*

The amendment was passed by 207 votes to 117 and the Bill received royal assent on 1 November.<sup>42</sup>

## Recommendation

The Commission remains concerned that NI is the only jurisdiction of the UK retaining a statutory bar on same-sex couples from accessing civil marriage. The Commission notes that there should be appropriate legal protections for same-sex couples in a relationship but, while human rights law does not currently require this to include same-sex marriage, there is nothing to prevent a State from going beyond the minimum human rights protections. The other jurisdictions of the UK have gone beyond these standards and the Commission would welcome a similar approach in NI, so that there is an equal level of protection across the UK.

37 Council of Europe Human Rights Commissioner, 'Human Rights Comment: Access to Registered Same-sex Partnerships - It's a Question of Equality', 21 February 2018.

38 Marriage (Same Sex Couples) (NI) (No.2) Bill 2017-19.

39 Marriage (Same Sex Couples) (NI) Bill [HL] 2017-19.

40 Parliament Business, 'Marriage: NI: Written question - 156446', 26 June 2018.

41 Parliament.UK, 'Committee of the Whole House - 24 October 2018: NI (Executive Formation and Exercise of Functions) Bill. Available at: [https://publications.parliament.uk/pa/bills/cbill/2017-2019/0275/amend/niefefof\\_daily\\_cwh\\_1023.8-12.html](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0275/amend/niefefof_daily_cwh_1023.8-12.html)

42 Parliamentary Business, 'NI (Executive Formation and Exercise of Functions) Act', 1 November 2018.

## Gender equality strategy

In July 2018, the Commission raised the lack of an up-to-date gender equality strategy with the UN CEDAW Committee during its pre-sessional working group session.<sup>43</sup>

The Gender Equality Strategy 2006-2016 is the policy framework under which the NI Executive promotes gender equality in NI. Responsibility for the strategy lies with the Department for Communities. In 2013, a midterm review of the strategy considered that while its vision, objectives and key actions were still relevant:

*progress against it had been limited and implementation and monitoring could be improved.*<sup>44</sup>

Among many conclusions, the review noted that:

*outcomes and targets in the action plans were generally not SMART (specific, measurable, achievable, realistic and timebound) and... this made it difficult to judge if a target or outcome had been achieved.*<sup>45</sup>

The review gave an indicative achievement rate of 29 per cent of the action points across all departments.<sup>46</sup>

The Gender Equality Strategy expired in December 2016. In December 2016, the then Minister for Communities indicated that the issue of gender equality would be addressed in a social strategy.<sup>47</sup> At the time of writing, a draft social strategy has not been published nor has a consultation taken place. In July 2018, the Commission raised concerns with the UN CEDAW Committee that subsuming gender equality into a gender-neutral social strategy ignores the intricacies and gender-sensitive elements of this issue.<sup>48</sup>

### Recommendation

The Commission continues to call on the Department for Communities to develop a robust gender equality strategy, accompanied by a measurable action plan for advancing gender equality and effective monitoring arrangements.

## Gender recognition

The Council of Europe High Commissioner for Human Rights has published a number of recommendations pertaining to the rights of intersex persons. The High Commissioner has recommended that:

*Member States should facilitate the recognition of intersex individuals before the law through the expeditious provision of birth certificates,*

43 NI Human Rights Commission, 'Submission to the UN CEDAW Committee: Parallel Report to the Eighth Periodic Report Submitted by the UK of Great Britain and NI' (NIHRC, 2018), at para 4.

44 OFMdfM, 'Gender Equality Strategy 2006-2016 Review' (OFMdfM; NISRA, 2013), at paras 2.1-2.2.

45 Ibid, at para 2.6.

46 Ibid, at para 4.16.

47 NI Assembly, 'AQO 83216-21, Mr Cathal Boylan', 5 December 2016.

48 NI Human Rights Commission, 'Submission to the UN CEDAW Committee: Parallel Report to the Eighth Periodic Report Submitted by the UK of Great Britain and NI' (NIHRC, 2018), at para 4.

*civil registration documents, identity papers, passports and other official personal documentation while respecting intersex persons' right to self-determination. Flexible procedures should be observed in assigning and reassigning sex/gender in official documents while also providing for the possibility of not choosing a specified male or female gender marker. Member States should consider the proportionality of requiring gender markers in official documents.*<sup>49</sup>

The law of NI does not provide for the recognition of intersex persons.

In 2018, the UK Government consulted on the reform of the Gender Recognition Act 2004. Elements of the Act extend across the UK, however the consultation only relates to the future operation of the gender recognition system in England and Wales and for the purposes of the law of England and Wales. The consultation sought to ask how best the UK Government might make the existing process under the Gender Recognition Act a better service for those trans and non-binary people who wish to use it. The consultation closed in October 2018.<sup>50</sup>

### **Recommendation**

The Commission calls for the NI Executive to facilitate the recognition of intersex individuals before the law through the expeditious provision of birth certificates, civil registration documents, identity papers, passports and other official personal documentation while respecting intersex persons' right to self-determination.



### **Hate crimes**

In 2015, the UN Human Rights Committee recommended that the UK seeks to eradicate hate crime through:

- a) *Effectively implementing and enforcing the existing relevant legal and policy frameworks on combating hate crimes;*
- b) *Introducing new awareness-raising campaigns aimed at promoting respect for human rights and tolerance for diversity;*
- c) *Improving the reporting of cases of incitement to discrimination, hostility or violence, and of hate crimes;*
- d) *Thoroughly investigating alleged cases of incitement to discrimination, hostility or violence, and hate crimes, prosecuting perpetrators and, if convicted, punishing them with appropriate sanctions, and providing victims with adequate remedies, including compensation.*<sup>51</sup>

Police Service NI statistics show 2,367 recorded incidents of hate crime and 1,429 crimes for the period July 2017 to June 2018.<sup>52</sup> The number of hate incidents fell across racist, homophobic, sectarian and faith/religion

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49 Council of Europe High Commissioner for Human Rights, 'Human Rights and Intersex People' (CoE, 2015), at 5.

50 Minister for Women and Equalities, 'Reform of the Gender Recognition Act - Government Consultation' (DWE, 2018).

51 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.

52 Police Service NI, 'Incidents and Crimes with a Hate Motivation Recorded by the Police in NI' (PSNI, 2018), at 4.



based hate, and the number of crimes fell across sectarian, disability, faith/religion and transphobic hate crime as compared to the previous 12 months.<sup>53</sup> The largest change was within the sectarian category; there were 105 fewer incidents and 147 fewer crimes recorded when compared to the previous 12 months. For the period July 2017 to June 2018, there were 834 sectarian incidents and 522 sectarian crimes, the lowest of any 12 month period since the data series started in 2005/06.<sup>54</sup>

In December 2017, the Criminal Justice Inspection NI published a report of its inspection of the criminal justice system's response to hate crime in NI. The Criminal Justice Inspection recommended that the:

*Department of Justice should as soon as possible conduct a review of the existing legislative response to hate crime to provide clarity. Any review should include consideration of the statutory aggravated offences model that already exists in England and Wales.*<sup>55</sup>

In response to the report, the Department of Justice intends to undertake a review of hate crime legislation to consider whether existing hate crime law represents the most effective approach for the justice system to deal with criminal conduct motivated by hatred. The review will, inter alia, consider if the current enhanced sentence approach is the most appropriate to take, and determine if there is an evidential basis to support the introduction of statutory aggravated offences. Throughout 2018, the Department of Justice has been developing a terms of reference for the review.

### Recommendation

The Commission welcomes the NI Executive's commitment to addressing hate crimes. It urges the relevant public authorities, particularly the Department of Justice, Executive Office, Police Service NI and Public Prosecution Service, to prioritise actions that prevent, prohibit and prosecute hate crimes and to take all necessary measures to protect victims.

### Intersectional multiple discrimination

In 2016, the UN CERD Committee recommended that the UK Government:

*taking into account the Committee's general recommendation No 25 (2000) on gender-related dimensions of racial discrimination, ensure that equality legislation in all jurisdictions of the State party provides effective protection to victims of dual or multiple discrimination.*<sup>56</sup>

In 2017, the UNCRPD Committee recommended that the UK Government and NI Executive:

53 Ibid.

54 Ibid.

55 Criminal Justice Inspection NI, 'Hate Crime an Inspection of the Criminal Justice System's Response to Hate Crime in NI' (CJINI, 2017).

56 CERD/C/GBR/CO/21-23, 'UN Committee on the Elimination of Racial Discrimination, Concluding Observations on the Twenty-first to Twenty-third periodic Reports of UK', 26 August 2016, at para 8(b).

*explicitly incorporate in its national legislation protection from, in particular multiple and intersectional discrimination on the basis of gender, age, race, disability, migrant, refugee and /or other status, and provide appropriate compensation, and redress for victims, and sanctions proportional with the severity of the violation.*<sup>57</sup>

NI legislation does not provide for intersectional multiple discrimination cases.<sup>58</sup> The Equality Act 2010, which covers other parts of the UK, contains a dual discrimination provision. However, this provision has not been brought into force as of yet, despite a recommendation from the House of Lords Select Committee on the Equality Act 2010 and Disability on the issue.<sup>59</sup> At present, each discrimination ground has to be considered and ruled on separately.<sup>60</sup>

In 2018, the Equality Commission NI reported in engagement with the Commission that there were 389 hybrid complaints/enquiries in 2016/17. Hybrid complaints are those which fall under two or more protected characteristics.

The Executive Office is reviewing the Race Relations (NI) Order 1997, a commitment within the Racial Equality Strategy 2015-2025. The terms of reference of the review include reference to the UN CERD Committee's recommendation on multiple discrimination.<sup>61</sup>

### Recommendation

The Commission recommends that the Executive Office introduce legislation providing for intersectional multiple discrimination claims in NI.



### Persons with disabilities

In March 2017, the NI Executive's Strategy to Improve the Lives of People with Disabilities expired.<sup>62</sup> A new strategy to promote the rights of persons with disabilities has not been introduced or consulted on. The Commission raised specific concerns at the failure of the NI Executive to ensure the effective participation of persons with disabilities in the oversight of the previous strategy.<sup>63</sup> In August 2017, the UN CRPD Committee stated that it was:

*concerned at the lack of State party-led initiatives aimed at assessing and sufficiently addressing the inclusion of and living conditions for persons with disabilities, particularly in NI and the overseas territories. The Committee recommends that the State party collect information*

57 CRPD/C/GBR/CO/1. 'Committee on the Rights of Persons with Disabilities Concluding Observations on the Initial Report of the UK of Great Britain and NI', 29 August 2017, at para 19.

58 'Intersectional discrimination' refers to a discriminatory experience based on two or more grounds taken together, but where each ground could not prove the discrimination if taken individually.

59 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, 24 March 2016.

60 Equality Commission NI, 'Strengthening Protection against Racial Discrimination' Recommendations for Law Reform', (ECNI, 2014), at 38.

61 Eoin Mullan *et al*, 'Racial Equality Legislation Review' (TEO, 2018), at 7-8.

62 OFMdFM, 'Junior Ministers Jennifer McCann and Michelle McIlveen have announced the Executive's Disability Strategy will be extended until the end of March 2017', 12 May 2015.

63 NI Executive, 'A Strategy to improve the lives of people with disabilities 2012-2015: Annual Report' (NI Executive, 2015), at 28.

*and adopt a strategic and measurable plan of action for improving the living conditions of all persons with disabilities, including in close cooperation with authorities in NI and the overseas territories.*<sup>64</sup>

In January 2018, in conjunction with the Equality Commission NI the Commission hosted Coomaravel Pyaneandee, Vice Chairperson of the UN CRPD Committee, to provide further guidance on how the NI Executive can ensure full implementation of the Committee's concluding observations.<sup>65</sup> During the event Mr Pyaneandee emphasised the importance of realising a commitment contained within the draft Programme for Government Delivery Plan: Indicator 42 for the development of a central regional disability forum.<sup>66</sup> The Commission continues to call for the realisation of this commitment.

In July 2018, the UK Government established a new Inter-Ministerial Group on Disability and Society. The Commission welcomed this positive step, which could tackle the current lack of leadership and momentum. However, the Commission remains concerned that the published terms of reference for the Inter-Ministerial Group do not refer to the UN CRPD or the UN CRPD Committee's recommendations, do not specifically provide for the effective participation and involvement of disabled people's organisations or persons with disabilities, and it is not clear if, and to what extent, devolved administrations are involved in the Group.<sup>67</sup>

In the absence of an approved Programme for Government, the Executive Office has developed an Outcomes Delivery Plan 2018-19, which reflects the responsibilities placed on Departments by the previous NI Assembly and NI Executive and sets out actions that the Departments can take without further ministerial approval.<sup>68</sup> In September 2018, the Commission attended an event hosted by the Department for Communities on the Outcomes Delivery Plan 2018/2019 and its relevance to persons with disabilities. Outcomes 8 (care and help for those in need) and 9 (a shared, welcoming and confident society that respects diversity) include a commitment to improve quality of life for persons with disabilities. The identified actions for fulfilling these outcomes include ensuring that eight per cent of new social homes are wheelchair accessible, introducing opportunities for 200 new NI athletes in the Special Olympics and improving understanding of British Sign Language and Irish Sign Language. Progress will be measured every six months, using a number of indicators set out in the draft Programme for Government, including Indicator 42.

At the September event, the Department for Communities acknowledged that the comprehensive disaggregated data required to support Indicator 42 is lacking. In 2018, the Department has conducted a scoping study to identify existing data, which recommended that a new NI disability survey is required. The Department is exploring options for such a survey, but

64 CRPD/C/GBR/CO/1, 'UN Committee on the Rights of Persons with Disabilities Concluding Observations on the Initial Report of the UK of Great Britain and NI', 29 August 2017, at paras 8 and 9.

65 NI Human Rights Commission, 'Press Release: Bringing Disability Rights Home', 30 January 2018.

66 NI Executive, 'Draft Programme for Government Framework: Delivery Plan - Indicator 42' (NI Executive, 2016).

67 Office for Disability Issues, 'About Us'. Available at: <https://www.gov.uk/government/organisations/office-for-disability-issues/about#the-inter-ministerial-group-on-disability-and-society>

68 The Executive Office, 'Outcomes Delivery Plan 2018-2019', (TEO, 2018).

due to the additional resources required to conduct the survey, Ministerial approval is required. With the continued suspension of the NI devolved government, it is currently not possible to obtain the required approval.

Also in September 2018, the Commission as a member of the UK Independent Mechanism for the UN CRPD Convention, submitted a report to the UN commenting on the UK's implementation of the UN CRPD Committee's concluding observations on independent living, work and employment, an adequate standard of living and social protection, as well as some related issues covered in the UN CRPD Committee's 2016 inquiry report. The report raised concerns that the UK government and devolved administrations have taken only limited steps to address the concerns and recommendations of the UN CRPD Committee.<sup>69</sup>

### Recommendation

The Commission calls on the Department for Communities to take effective steps to implement recommendations of the UN CRPD Committee. The Commission continues to call on the Department for Communities to develop a robust disability strategy, accompanied by a measurable plan of action for improving the living conditions of all persons with disabilities and effective monitoring arrangements. This strategy should be developed in conjunction with people with disabilities and representative organisations.



### Racial equality

In the period July 2017 to June 2018, there were 1,045 incidents and 647 crimes recorded where there was a racist motivation.<sup>70</sup> Racist incidents fell slightly compared with the previous 12 months, down by three from 1,048; racist crimes showed an increase of 11, up from 636 in the previous 12 month period.<sup>71</sup>

In June 2017, the NI Policing Board published its Human Rights Thematic Review: Policing Race Hate Crime. The Review examined to what extent the Police Service NI are complying with the Human Rights Act 1998 when dealing with and for those from minority racial groups.<sup>72</sup> It focused on how the Police Service NI identify, record and investigate race hate crime; how victims are encouraged to report incidents; and how they are supported. It provides a detailed account of the domestic and international legal framework and standards relating to hate crime. After examining current police policy, the Review found:

*application of policy in practice occasionally falls below that dictated by policy.*<sup>73</sup>

69 UK Independent Mechanism, 'Progress on Disability Rights in the UK: UK Independent Mechanism Update Report to the UN Committee on the Rights of Persons with Disabilities' (UKIM, 2018).

70 Police Service NI, 'Incidents and Crimes with a Hate Motivation Recorded by the Police in NI' (PSNI, 2018), at 6.

71 Ibid.

72 Policing Board NI, 'Human Rights Thematic Review: Policing Race Hate Crime' (Policing Board NI, 2017).

73 Ibid, at 63.

The NI Policing Board made fourteen recommendations. As the Policing Board have not been legally constituted throughout 2018, formal monitoring of the implementation of the recommendations contained within the report has not been taken forward.

### Review of Race Relations (NI) Order 1997

In October 2016, the UN CERD Committee in its concluding observations recommended that the NI Executive:

*act without further delay to adopt comprehensive legislation prohibiting racial discrimination, in accordance with the provisions of the [CERD].*<sup>74</sup>

In May 2018, the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Tendayi Achiume visited NI. During her visit, the Special Rapporteur noted inconsistency in the data collected by government departments and its current limitations in scope, including its failure to account for the racial impact of immigration and counter terrorism law and policy.<sup>75</sup>

The Office of the First and deputy First Minister (now the Executive Office) recognises that:

*following the enactment of the Equality Act 2010 in England, Scotland and Wales, a significant gap has opened up between the protections offered in Great Britain and [NI].*<sup>76</sup>

Within the Racial Equality Strategy 2015-2025, the Office of the First and deputy First Minister committed to a:

*review of [the] current Race Relations (NI) Order 1997 and other relevant aspects of other legislation.*<sup>77</sup>

In furtherance of this commitment throughout 2018, the Executive Office has brought forward a review of the Race Relations (NI) Order 1997. As part of the review, the Executive Office will consider outstanding recommendations for reform from numerous international human rights treaty bodies.

### Recommendation

The Commission recommends that the NI Executive take effective steps to ensure its data collection is consistent, extensive and disaggregated. This includes extending data collection to include the racial impact of immigration and counter terrorism law and policy.

The Commission recommends that the required steps are taken to fully implement the Policing Board NI's recommendations set out in its review of policing race hate crime in NI.

74 CERD/C/GBR/CO/21-23, 'UN CERD Committee Concluding Observations on the Combined Twenty-first to Twenty-third Periodic Reports of the UK of Great Britain and NI', 3 October 2016, at para 8(c).

75 Office of the High Commissioner for Human Rights, 'UN rights expert hails UK for anti-racism action but raises serious concerns over Immigration Policy, Prevent programme and Brexit', 11 May 2018.

76 The Executive Office, 'Racial Equality Strategy 2015-2025' (TEO, 2015), at para 5.9.

77 Ibid, at para 5.11.

The Commission further recommends that the Executive Office implements the outstanding recommendations for reform of the Race Relations (NI) Order 1997 from international human rights treaty bodies without further delay.

### Sectarianism

The Police Service NI has reported 834 sectarian incidents and 522 sectarian crimes between July 2017 and June 2018.<sup>78</sup> This marks a decrease on the previous year, with 105 fewer incidents and 147 fewer crimes recorded.<sup>79</sup> Nonetheless, the continuance of sectarian violence raises significant human rights concerns, including: individuals being subjected to torture, inhuman and degrading treatment; individuals being forced from their homes and denied the right to choose their place of residence; and individuals being denied the right to express their culture.

In 2017/18, the Public Prosecution Service NI received 83 files from the Police Service NI in relation to sectarian hate crime; 56 of which proceeded to prosecution.<sup>80</sup> There is no category of 'sectarian' under the Criminal Justice (No. 2) (NI) Order 2004, meaning that sentences cannot be considered as 'aggravated by hostility' and therefore attract an enhanced sentence.

Throughout 2018, flags, cultural symbols and emblems remained a source of dispute.<sup>81</sup> The Stormont House Agreement provided for the establishment of a Commission on Flags, Identity, Culture and Tradition. The Commission was established in June 2016 and tasked to report and make recommendations on the way forward with respect to flags, identity, culture and tradition. The final report has not been published.

In June 2018, a case was brought to the NI High Court claiming that the flying of the Union flag at courthouses in NI unlawfully discriminated against nationalists. The applicant claimed that such practice breached a requirement in the Belfast (Good Friday) Agreement 1998 to ensure parity of esteem for both communities. Making its judgment in October 2018, Mrs Justice Keegan, dismissed the challenge stating that:

*in my view it is abundantly clear that the [then] Secretary of State [NI] fulfilled his obligation to have regard to the principles contained in the Agreement in conducting a balancing exercise and as such the Regulations cannot be said to be unlawful.*<sup>82</sup>

The Together: Building a United Community strategy contains a commitment to develop a statutory definition of 'sectarianism' and 'good relations'. In August 2016, the UN CERD Committee reiterated its:

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78 Police Service NI, 'Incidents and Crimes with a Hate Motivation Recorded by the Police in NI' (PSNI, 2018), at 4.

79 Ibid.

80 Public Prosecution Service NI, 'Statistical Bulletin: Cases Involving Hate Crime 2017/18' (PPSNI, 2018), at 11.

81 'UVF flags near mixed Belfast estates removed', *BBC News*, 16 May 2018.

82 *In Matter of an Application for Judicial Review by Helen McMahon* [2018] NIQB 74, at para 22.

*previous concern that measures to tackle racism and sectarianism are kept outside the framework of protections against discrimination provided by the Convention and the Durban Programme of Action.*<sup>83</sup>

The UN CERD Committee recommended that the next periodic report contain information on concrete measures adopted to address racial discrimination and on the impact of the Together: Building a United Community Strategy.<sup>84</sup> In February 2017, the Advisory Committee on the Framework Convention for the Protection of National Minorities recommended that:

*the NI Executive should endeavour to implement the ‘good relations’ duty as provided under the NI Act 1998 in a manner that does not run counter to the equality duty and that does not prevent access to rights of persons belonging to all national and ethnic minorities.*<sup>85</sup>

Throughout 2018, the Executive Office has not consulted on proposed definitions of ‘sectarianism’ or ‘good relations’.

The draft NI (Stormont House Agreement) Bill, which was consulted on over the summer of 2018, proposes the establishment of the Implementation and Reconciliation Group. This group is intended to promote reconciliation and anti-sectarianism. However, a definition of sectarianism is not included in the draft Bill or consultation document.<sup>86</sup>

### Recommendation

The Commission condemns sectarianism and supports a NI that promotes the human rights principles of tolerance, understanding and mutual respect. It welcomes the establishment of a Commission on Flags, Identity, Culture and Tradition. It advises the Executive Office to ensure compliance with relevant human rights treaties and appropriate consideration of related soft law in any future developments. Recognising the legislative commitments set out in the Together: Building a United Community strategy, the Commission calls on the Executive Office to introduce legislation that provides statutory definitions of ‘sectarianism’ and ‘good relations’, as well as amending and strengthening the current domestic legal framework in accordance with its human rights obligations.

83 CERD/C/GBR/CO/21-23, ‘UN Committee on the Elimination of Racial Discrimination Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of UK’, 26 August 2016, at para 36.

84 Ibid, at para 37.

85 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 2.

86 NI Office, ‘Consultation Paper, Addressing the Legacy of NI’s Past’ (NIO, 2018).

## Right to life

<b>ECHR</b>	Article 2
<b>CRC</b>	Article 6(1)
<b>CRPD</b>	Article 10
<b>ICCPR</b>	Article 6
<b>Charter of Fundamental Rights of the EU</b>	Article 2

### Conflict related deaths: transitional justice and individual cases

In 2015, the UN Human Rights Committee recommended that the UK Government and the NI Executive:

- a) *Ensure, as a matter of particular urgency, that independent, impartial, prompt and effective investigations, including those proposed under the Stormont House Agreement, are conducted to ensure a full, transparent and credible account of the circumstances surrounding events in NI with a view to identifying, prosecuting and punishing perpetrators of human rights violations, in particular the right to life, and providing appropriate remedies for victims;*
- b) *Ensure, given the passage of time, the sufficient funding to enable the effective investigation of all outstanding cases and ensure its access to all documentation and material relevant for its investigations.<sup>87</sup>*

In March 2017, the Special Rapporteur on Truth presented a report on his mission to the UK to the UN Human Rights Council. In his report the Special Rapporteur stated that:

*links between the different elements of the architecture are critical to their success; for example, the timeline of each institution must mesh in a reasonable way. Similarly, while the Agreement stipulates a different appointment and selection procedure for staffing each institution, the institutions are meant to work as a coordinated whole; however, the current draft provides no incentive for retaining a group of people that can actually work together. The overall challenge is ensuring that this complex institutional apparatus not only performs better than the earlier efforts it seeks to replace, but also delivers results, which earlier efforts did not envision, necessary for accounting for and redressing the past.<sup>88</sup>*

The UK has continued to fail to implement ECt.HR judgments stipulating measures to achieve effective investigations into 'Troubles-related' deaths since 2001,<sup>89</sup> and this failure is itself resulting in further findings of

87 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 11(b).

88 A/HRC/34/62/Add.1, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the UK of Great Britain and NI', 17 November 2016, at para 17.

89 CoE Committee of Ministers, 'McKerr Group v UK (Application No 28883/95) - Supervision of the Execution of the Court's Judgments', 1259<sup>th</sup> Meeting, 7-8 June 2016.



violations against the UK.<sup>90</sup> The Council of Europe Committee of Ministers has expressed deep regret that the implementation of the judgments has not occurred.<sup>91</sup> In June 2016, the Committee of Ministers:

*called upon the authorities to take all necessary measures to ensure the Historical Investigations Unit can be established and start its work without any further delay, particularly in light of the length of time that has already passed since these judgments became final and the failure of previous initiatives to achieve effective, expeditious investigations.*<sup>92</sup>

### Stormont House Agreement

On 23 December 2014, the Stormont House Agreement was reached.<sup>93</sup> The Agreement sets out a structure for the effective investigation of conflict related deaths. Four bodies and one specific service to deal with 'The Past' are to be established. These are:

- The Oral History Archive, which will provide a central place for peoples from all backgrounds (and from throughout the UK and Ireland) to share experiences and narratives related to the Troubles.<sup>94</sup>
- Victims and Survivors' Services, which will include a Mental Trauma Service, a proposal for a pension for severely physically injured victims, and advocate-counsellor assistance.<sup>95</sup>
- The Historical Inquiries Unit, which will take forward investigations into outstanding Troubles-related deaths.<sup>96</sup>
- The Independent Commission on Information Retrieval, which will enable victims and survivors to seek and privately receive information about the (Troubles-related) deaths of their next of kin.<sup>97</sup>
- The Implementation and Reconciliation Group, which will oversee themes, archives and information recovery and commission an academic report after 5 years analysing themes.<sup>98</sup>

The UK Government has stated that specific measures of the financial package to NI will include up to £150m over 5 years to help fund the bodies to deal with the past.<sup>99</sup>

In May 2018, the NI Office launched a consultation entitled Addressing the Legacy of NI's Past, seeking views on draft legislation to establish the various legacy bodies proposed within the Stormont House Agreement.<sup>100</sup>

90 *Hemsworth Collette and Michael v UK* (2013) ECHR 683.

91 CoE Committee of Ministers, 'McKerr Group v UK (Application No 28883/95) - Supervision of the Execution of the Court's Judgments', 1259<sup>th</sup> Meeting, 7-8 June 2016.

92 *Ibid.*

93 NI Office, 'Stormont House Agreement', 23 December 2014.

94 *Ibid.*, at para 22.

95 *Ibid.*, at para 26-29.

96 *Ibid.*, at para 30.

97 *Ibid.*, at para 41.

98 *Ibid.*, at para 51.

99 NI Office, 'Stormont House Agreement, Financial Annex', 23 December 2014, at 1. The Stormont House Agreement includes a further broad financial commitment to all sections covered within the Agreement. It is stated within the Financial Annex that: 'the total value of the Government's package is additional spending power of almost £2 billion'.

100 NI Office, 'Addressing the Legacy of NI's Past: Consultation Paper' (NIO, 2018).

The Commission broadly welcomed the draft legislation, but raised that the provisions contained within the draft Bill were not fully human rights compliant in law and practice. In particular, the Commission raised concerns about the remit, resourcing, independence and use of closed material proceedings regarding the Historical Investigations Unit. The Commission recommended further consideration of the remits and operations of the Independent Commission of Information Retrieval, Oral History Archive and Implementation and Reconciliation Group. The Commission welcomed the proposals in the draft Bill to extend the accelerated release scheme to those serving sentences for related offences committed on or after 1 January 1968 and before 8 August 1973 and confirmation that the accelerated release scheme extends to the security forces.<sup>101</sup>

The Commission highlighted a number of omissions from the draft Bill including a mechanism to expediently investigate other serious conflict-related human rights abuses and violations in instances where the victims have not been killed, introduction of a pension for severely physically injured victims in NI, and introduction of advocate-counsellor assistance. The Commission also highlighted the lack of funding available for the Lord Chief Justice's plans for addressing outstanding legacy inquests.<sup>102</sup>

### **Statute of limitations**

In April 2017, the Defence Select Committee issued a report on investigation into fatalities in NI involving British military personnel, in the Report the Committee recommended:

*the enactment of a statute of limitations, covering all Troubles-related incidents, up to the signing of the 1998 Belfast Agreement, which involved former members of the Armed Forces.*<sup>103</sup>

In 2017, the Commission advised the NI Office that a statute of limitation restricting the prosecution of State actors would amount to an amnesty, if such an amnesty were to be held to excuse acts constituting gross human rights violations and abuses (including the right to life and the prohibition on torture or other cruel, inhuman or degrading treatment or punishment) this would be incompatible with human rights law.<sup>104</sup>

In November 2017, Richard Benyon MP introduced a Private Members' Bill, the Armed Forces (Statute of Limitations) Bill, which would create statutory limitations on court proceedings against current and former members of the armed forces for certain alleged offences committed during military operations or similar circumstances.<sup>105</sup>

In June 2018, the Prime Minister, in response to a parliamentary question on investigations into conflict related deaths commented:

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<sup>101</sup> NI Human Rights Commission, 'Submission to NIO's Consultation on Addressing the Legacy of NI's Past' (NIHRC, 2018).

<sup>102</sup> Ibid.

<sup>103</sup> House of Commons Defence Select Committee, 'Investigations into Fatalities in NI involving British Military Personnel: Seventh Report of Session 2016-17', HC 1064, 26 April 2017.

<sup>104</sup> NI Human Rights Commission, 'Advice on the House of Commons Defence Committee Report on Investigations in Fatalities in NI involving British Military Personnel' (NIHRC, 2017), at para 34.

<sup>105</sup> Parliament Business, 'Armed Forces (Statute of Limitations) Bill 2017-19'. Available at: <https://services.parliament.uk/bills/2017-19/armedforcesstatuteoflimitations.html>

*the [UK] Government is committed to ensuring that all outstanding deaths in NI should be investigated in ways that are fair, balanced and proportionate.*<sup>106</sup>

In July 2018, Gavin Williamson MP, Secretary of State for Defence announced that a dedicated team within the Ministry of Defence had been established to consider whether serving and former personnel are receiving adequate legal protection and certainty.<sup>107</sup>

### Recommendation

The Commission highlights concern that the UK has continued to fail to implement ECtHR judgments stipulating measures to achieve effective investigations into ‘Troubles-related’ deaths since 2001, and this failure is itself resulting in further findings of violations against the UK.

The Commission welcomes the publication of the draft Stormont House Agreement Bill, but recommends that it is amended to be fully compliant with human rights law and practice. The Commission further recommends that the omissions and other issues highlighted in its response to the draft Bill, be promptly and effectively addressed in either the proposed draft Bill or using other mechanisms.

The Commission continues to advise that a statute of limitation restricting the prosecution of State actors would amount to an amnesty, if such an amnesty were to be held to excuse acts constituting gross human rights violations and abuses (including the right to life and the prohibition on torture or other cruel, inhuman or degrading treatment or punishment), this would be incompatible with human rights law.

### Inquiries Act 2005

In 2015, the UN Human Rights Committee recommended that the UK:

*reconsider its position on the broad mandate of the executive to suppress the publication of Inquiry reports under the Inquiries Act 2005.*<sup>108</sup>

In 2014, a House of Lords Select Committee published a report on the operation of the 2005 Act, containing 33 recommendations.<sup>109</sup> The Select Committee did not recommend amendments to sections 13 and 14 of the 2005 Act, which respectively empower government Ministers to suspend and terminate inquiries.<sup>110</sup> These powers have been the principal source of concern for the Commission and others.<sup>111</sup> Nonetheless, of the Select

<sup>106</sup> Hansard, ‘Terrorism: NI, Prime Minister Written Question’, 15 June 2018.

<sup>107</sup> Hansard, ‘Armed Forces Veterans: Historic Allegations Oral Answers to Questions – Defence – in the House of Commons’, 9 July 2018.

<sup>108</sup> 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 8.

<sup>109</sup> House of Lords Select Committee on the Inquiries Act 2005, ‘Report of Session 2013–14, The Inquiries Act 2005: Post-legislative Scrutiny’ (HoL, 2014).

<sup>110</sup> House of Lords Select Committee on the Inquiries Act 2005, ‘Report of Session 2013–14, The Inquiries Act 2005: Post-legislative Scrutiny’ (HoL, 2015).

<sup>111</sup> NI Human Rights Commission, ‘Submission to the UN Human Rights Committee on the UK’s Seventh Periodic Report on Compliance with the International Covenant on Civil and Political Rights’ (NIHRC, 2015), at paras 6.1.2 and 6.1.3.

Committee's 33 recommendations, the UK Government rejected 14, including all but one recommendation relating to the independence of inquiries.<sup>112</sup>

In correspondence to the Commission in 2017, Dr Philip Lee MP, the then Parliamentary Under-Secretary Ministry of Justice confirmed that the UK Government intends to bring forward legislation to address the Committee's recommendations. However, he was unable to commit to a specific timescale for introduction.

In May 2018, the National Audit Office issued a report of its investigation into government-funded inquiries, inter alia, finding that:

*the Cabinet Office and the Ministry of Justice have not acted on recommendations to improve the way inquiries are run. Since 2014, the Cabinet Office and the Ministry of Justice have committed to various actions to improve the efficiency and effectiveness of inquiries originating from two parliamentary select committee reports. These include updating and publishing its inquiry guidance for Inquiry Chairs, secretaries and sponsor departments; reviewing the Inquiry Rules relating to the Representations Process which allows individuals criticised in inquiries to review and comment on extracts from the report; and requesting and sharing lessons learned reports from inquiries. None of these commitments have been fulfilled.*<sup>113</sup>

### Recommendation

The Commission continues to recommend that the UK Government review and introduce necessary legislative amendments to guarantee the independence of inquiries established under the Inquiries Act 2005.

### Legacy inquests and inquiries

The UN Human Rights Committee recommended that the UK Government and the NI Executive:

*ensure that the Legacy Investigation Branch [of the Police Service NI] and the NI Coroner's Court are adequately resourced and are well-positioned to effectively review outstanding legacy cases.*<sup>114</sup>

As part of the Universal Periodic Review Process, the State of Switzerland recommended that the UK Government:

*increase the necessary resources to the service of the Coroner to allow him to carry out impartial, swift and effective investigations on all the deaths linked to the conflict in NI.*<sup>115</sup>

The UK Government did not accept this recommendation.

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112 Ministry of Justice, 'Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005' (MoJ, 2014).

113 National Audit Office, 'Investigation into Government-funded Inquiries', HC 836, 23 May 2018, at 10.

114 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 11(b).

115 Ministry of Justice, 'UK, British Overseas Territories and Crown Dependencies Annex to the Response to the Recommendations Received on 4 May 2017' (MoJ, 2017).

The Stormont House Agreement does not contain specific commitments relating to legacy inquests but states that:

*processes dealing with the past should be victim-centred. Legacy inquests will continue as a separate process to the [Historical Inquiries Unit]. Recent domestic and European judgments have demonstrated that the legacy inquest process is not providing access to a sufficiently effective investigation within an acceptable timeframe. In light of this, the Executive will take appropriate steps to improve the way the legacy inquest function is conducted to comply with ECHR Article 2 requirements.*<sup>116</sup>

In 2016, the Lord Chief Justice, Sir Declan Morgan, made clear that his plans for addressing legacy inquests were contingent on the necessary resources being allocated to allow for the creation of a Legacy Inquest Unit, to support the Coroner's Service.<sup>117</sup> This Unit is to be established within the NI Courts Service, with the full cooperation of relevant State agencies, including the Police Service NI and Ministry of Defence.

Following a review of the state of readiness of 53 outstanding inquests, at the initiative of the Lord Chief Justice, the Department of Justice prepared a funding request seeking to draw down funds from the allocated £150 million. On the basis that this proposal has not received the approval of the NI Executive, the UK Government has not released the necessary funds.<sup>118</sup>

In March 2017, when presenting his mission report on the UK to the UN Human Rights Council the Special Rapporteur on Truth stated:

*the Lord Chief Justice recently assumed responsibility for the coronial process, implementing reforms to ensure completion of outstanding inquests within five years. Such reforms include applying a thematic approach, creating structured and systematic linkages between cases, sequencing cases, ensuring that the presiding coroner reviews all relevant material in unredacted form, and establishing a dedicated legacy inquest unit. This initiative, as a wisely designed strategy to maximise the truth-telling potential of inquests for individual cases, and illustrating the structural dimensions of violations, deserves strong support.*<sup>119</sup>

In exercising its speaking rights in relation to the mission report the Commission reported to the UN Human Rights Council of:

*the need to provide requisite funding to ensure effective and expedited inquests into conflict related deaths. A practical proposal by the Lord Chief Justice for NI to undertake inquests into a small number of controversial conflict related deaths has not been advanced as the necessary funding has not been made available.*<sup>120</sup>

116 NI Office, 'Stormont House Agreement', 23 December 2014.

117 'Legacy inquests in NI "can be dealt with in five years"', *BBC News*, 12 February 2016.

118 'Legacy inquests: Families launch legal bid over funding', *BBC News*, 3 November 2016

119 A/HRC/34/62/Add.1, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the UK of Great Britain and NI', 17 November 2016, at para 28.

120 Oral Intervention by NI Human Rights Commission to the Human Rights Council Thirty-fourth Session Agenda Item 3: Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, 7 March 2017.

The Lord Chief Justice has continued to highlight the limited progress in dealing with the outstanding legal inquests.<sup>121</sup> Most recently, in June 2018, the Lord Chief Justice stressed that:

*the important matter now is to address the issue of resources and ensure we moved as quickly as possible to provide a resolution on the remaining cases.*<sup>122</sup>

The Lord Chief Justice's views are supported by a NI High Court ruling, in which Sir Paul Girvan stated:

*the delay in dealing with this inquest and other legacy inquests arises from the lack of resources to fund a timely and efficient system to manage and run the statutory inquests having regard to their nature, likely length and complexity.*<sup>123</sup>

The NI Office within the consultation paper, Addressing the Legacy of NI's Past, referred to the Lord Chief Justice's proposal, stating:

*the UK Government supports these proposals, which would implement an important commitment in the Stormont House Agreement.*<sup>124</sup>

However, the consultation paper did not contain proposals for implementing the Lord Chief Justice's proposals.

## **Finucane**

In 2015, the UN Human Rights Committee recommended that the UK Government:

*consider launching an official inquiry into the murder of Pat Finucane.*<sup>125</sup>

In 2015, the Finucane family unsuccessfully challenged in the NI High Court the decision of the then Secretary of State of NI to hold a review into the death rather than a public inquiry of the kind recommended following a judicial review by Judge Peter Cory.<sup>126</sup> A further appeal to the NI Court of Appeal in 2017 was unsuccessful. In delivering the leading judgment in this appeal, Lord Justice Gillen stated:

*we conclude that not only was this reasoning transparent but, based on all the range of public interest factors under consideration, it was a lawful decision by the Government, within its discretion, that it should not be held bound to maintain a policy of instituting a public inquiry in this instance.*<sup>127</sup>

In June 2018, the UK Supreme Court heard a challenge to the decision of the Supreme Court, in which it was argued that the failure to establish

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121 'Top judge Sir Declan Morgan criticises legacy progress', *BBC News*, 5 September 2017.

122 'Lack of resources to hold legacy inquests must be addressed', *Belfast Telegraph*, 11 June 2018.

123 *In the Matter of an Application by Brigid Hughes for Judicial Review* [2018] NIQB 30, at para 12.

124 NI Office, 'Addressing the Legacy of NI's Past: Consultation Paper' (NIO, 2018), at 20.

125 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 8.

126 *Finucane's (Geraldine) Application* [2015] NIQB 57.

127 'Finucane family consider legal options after losing appeal for public inquiry', *Belfast Telegraph*, 21 February 2017.

a public inquiry into the murder of Mr Finucane was incompatible with Article 2 ECHR.<sup>128</sup> The judgment is pending.

### On the Runs administrative scheme

In 2015, the Commission reported to the UN Human Rights Committee that the operation of the On the Runs administrative scheme has potentially hampered the prosecution of individuals for offences committed both during and after the conflict in NI.<sup>129</sup> The UK Government has emphasised that the letters do:

*not amount to immunity, exemption or amnesty from arrest.*<sup>130</sup>

During a parliamentary debate on 10 January 2017, the (then) Secretary of State for NI James Brokenshire MP, reiterated:

*there are no amnesties. We have been clear on that in relation to the 'on-the-runs' scheme, and Lady Justice Hallett's report concluded in 2014 that these things never amounted to an immunity from prosecution.*<sup>131</sup>

The Commission continues to monitor the implications of the administrative scheme and the use of the Royal Prerogative of Mercy in relation to crimes committed during the conflict in NI.

### Recommendation

The Commission calls on the NI Executive to fund the Lord Chief Justice's plans for addressing outstanding legacy inquests. The Commission highlights concern that in the absence of the necessary resources the legal obligation under Article 2 ECHR on the State to deliver these inquests is not being met.

The Commission advises the UK Government's NI Office, that it is required to ensure independent, impartial, prompt and effective investigations into deaths during the conflict in NI. These must be conducted with a view to identifying, prosecuting and punishing the perpetrators of human rights violations and abuses, and providing appropriate remedies for their victims. The Commission continues to monitor the impact of 'comfort letters' on any future prosecutions of recipients.

128 Case ID: UKSC 2017/0058, *In the matter of an application by Geraldine Finucane for Judicial Review (NI)*.

129 NI Human Rights Commission, 'Submission to the UN Human Rights Committee on the UK's Seventh Periodic Report on Compliance with the International Covenant on Civil and Political Rights' (NIHRC, 2015), at paras 6.1 and 6.2.

130 NI Office, 'Statement by Secretary of State following the decision to hold an independent inquiry into the operation of the OTR administrative scheme', 27 February 2014.

131 Hansard, 'NI: Political Developments - in the House of Commons', 10 January 2017.

**Rule of law: non-state actors**

The Police Service NI's security statistics for October 2017 to September 2018 record one security related death, compared to three in the previous 12 months, and 20 casualties of paramilitary style shootings, compared to 24 in the previous 12 months. Following the six-month period between February and July 2018, which saw a notable decrease in this paramilitary style shootings, between August and September 2018 there was an increase with five such attacks having taken place. During the same period, there were 17 bombing incidents, 13 fewer from the previous 12-month period, and 54 casualties because of paramilitary style assaults, 21 less than the previous 12-month period. The number of paramilitary style assaults fell significantly in Belfast (from 31 to 18) and Mid and East Antrim (from 17 to 5) compared to the previous 12 months, while Antrim and Newtownabbey saw the largest increase (from 2 to 10).<sup>132</sup>

In June 2018, Police Service NI head of the Criminal Investigation Branch Detective Chief Superintendent Tim Mairs, when commenting on the reduction in paramilitary style attacks, said:

*while we welcome the reduction in paramilitary-style assaults in Belfast and in Mid and East Antrim... one assault is one too many for the victim. Let me be clear - there is no place for what are often faceless thugs who believe they have a legitimacy to mete out their so-called justice in our communities in an attempt to seek control through fear and violence.*<sup>133</sup>

In 2016, the UN CRC Committee noted that:

*in NI, children face violence, including shootings, carried out by non-State actors involved in paramilitary-style attacks, as well as recruitment by such non-State actors.*<sup>134</sup>

The Committee recommended that the UK:

*take immediate and effective measures to protect children from violence by non-State actors involved in paramilitary-style attacks as well as from recruitment by such actors into violent activities, including through measures relating to transitional and criminal justice.*<sup>135</sup>

**Tackling paramilitarism**

In July 2016, the NI Executive published an action plan on tackling paramilitary activity, criminality and organised crime, modelled on the four goals of; promoting lawfulness, support for transition, tackling criminality and addressing systemic issues.<sup>136</sup> Implementation of the plan has been restricted due to the suspension of the NI Assembly. A dedicated Paramilitary Crime Task Force has been established between the Police

<sup>132</sup> Police Service NI, 'Police Recorded Security Situation Statistics Annual Report covering the period 1 October 2017 - 30 September 2018' (PSNI, 2018).

<sup>133</sup> 'Decline in paramilitary beatings in Belfast is welcomed', *Belfast Telegraph*, 11 June 2018.

<sup>134</sup> CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 47(b).

<sup>135</sup> *Ibid*, at para 47(c).

<sup>136</sup> NI Executive, 'Tackling Paramilitary Activity, Criminality and Organised Crime - Executive Action Plan' (NI Executive, 2016).



Service NI, the National Crime Agency and Her Majesty's Revenue and Customs to focus on the criminality of paramilitary groups.

In the period 2017/18, the task force conducted 193 searches and made 47 arrests, of which 44 people were charged or reported to the Public Prosecution Service.<sup>137</sup>

### Independent Reporting Commission

The NI (Stormont Agreement and Implementation Plan) Act 2016 received royal assent in May 2016. The Act provides for the establishment of an Independent Reporting Commission to promote progress towards ending paramilitary activity connected with NI.<sup>138</sup> In September 2016, the UK Government and the Government of Ireland agreed a Treaty providing for the establishment of the Independent Reporting Commission.<sup>139</sup> The Independent Reporting Commission was legally constituted in August 2017 and its work has been ongoing.<sup>140</sup>

In October 2018, the Independent Reporting Commission published its first annual report, which found that work has proceeded on implementing the Executive's Action Plan and:

*in our view for the first time, a clear, detailed and focused pathway is being mapped out as to how the ending of paramilitarism is to be achieved.*<sup>141</sup>

The Independent Reporting Commission raised concerns that:

*the absence of political decision making in NI, since January 2017, has had a major adverse impact on the implementation of the Fresh Start Agreement commitments to tackle paramilitarism.*<sup>142</sup>

### Recommendation

The Commission recognises as a fundamental principle that human rights must operate and be truly effective within the framework of the rule of law. The Commission welcomes the establishment of the Independent Reporting Commission and calls on the UK Government and NI Executive to expedite the implementation of the Stormont House Agreement in order to combat terrorism and address paramilitary style assaults, in particular those perpetrated against children.

<sup>137</sup> Department of Justice, 'Tackling Paramilitary Programme Newsletter: Issue 1', 21 June 2018, at 8.

<sup>138</sup> Section 2, NI (Stormont Agreement and Implementation Plan) Act 2016.

<sup>139</sup> NI Office, 'Press Release: UK-Ireland treaty brings end to paramilitarism a step closer', 13 September 2016.

<sup>140</sup> Hansard, 'Independent Reporting Commission NI Office Written Question', 22 January 2018.

<sup>141</sup> Independent Reporting Commission, 'First Report' (IRC, 2018), at para 1.12.

<sup>142</sup> Ibid, at para 1.13.

## Right to liberty and security of the person

<b>ECHR</b>	Article 5
<b>CRC</b>	Article 37(b)
<b>CRPD</b>	Article 14
<b>ICCPR</b>	Articles 9-11
<b>Charter of Fundamental Rights of the EU</b>	Article 6

### Definition of terrorism

The present definition of terrorism used in the UK is contained in the Terrorism Act 2000, section 1. Under section 1 ‘terrorism’ means the use or threat of action designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and the use or threat is made for the purpose of advancing a political, religious or ideological cause. Section 1 goes on to list a range of actions and provides that the definition includes actions committed outside of the UK.

In 2015, the Commission provided an update to the UN Human Rights Committee highlighting its support for the recommendation of the Independent Reviewer of Terrorism to reform the definition of terrorism within UK law.<sup>143</sup> The Committee subsequently recommended that the UK Government:

*consider revising the broad definition of terrorism to require intent to coerce, compel, or intimidate a government or section of the public, and implementing the recommendations of the Independent Reviewers of Terrorism Legislation.*<sup>144</sup>

The 2017 Queen’s Speech contained a commitment to develop a commission for countering extremism.<sup>145</sup> In January 2018, Sara Khan, was appointed Lead Commissioner for Countering Extremism, within a new Commission for Countering Extremism. In March 2018, the Lead Commissioner set out plans for the Commission in its first year of operation, stating:

*the Commission [for Countering Extremism] will produce a comprehensive study that exposes the scale and consequences of extremism in this country alongside the great work already being done to tackle it. The Commission will challenge the whole of society on what more can be done, and publish recommendations to the Home Secretary by the end of its first year on what the future structure and priorities of the Commission should be.*<sup>146</sup>

<sup>143</sup> NI Human Rights Commission, ‘Submission to the UN Human Rights Committee on the UK’s Seventh Periodic Report on compliance with the International Covenant on Civil and Political Rights’ (NIHRC, 2015).

<sup>144</sup> 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 14.

<sup>145</sup> Cabinet Office, ‘Queen’s Speech 2017’, 21 June 2017.

<sup>146</sup> Commission for Countering Extremism, ‘Press Release: Extremism Commissioner confirms plans for 2018’, 15 March 2018.

In June 2018, the UK Government introduced the Counter-Terrorism and Border Security Bill 2017-19 to the House of Commons. The Bill, inter alia, strengthens the legal framework addressing those who show support for proscribed organisations and makes provision enabling persons at ports and borders to be questioned for national security and other related purposes.<sup>147</sup> The Commission provided a briefing on the Bill to the Houses of Parliament setting out concerns that a number of clauses which proposed extending existing offences relating to the publication and viewing of material related to terrorism may represent a disproportionate interference to the right to private and family life and the right to freedom of expression.<sup>148</sup> The Commission also raised a concerns relating to a proposed power to stop, question, search and detain people at ports and borders to determine whether they appear to be (or have been) engaged in ‘hostile activity’. The Commission in particular highlighted that the term ‘hostile activity’ was not clearly defined in UK law raising concerns that the power may be used arbitrarily.

In October 2018, the Joint Committee on Human Rights published its second scrutiny report on the Counter-Terrorism and Border Security Bill 2017-19, in which it has suggested a number of amendments. The Joint Committee remains concerned the Bill, by taking the criminal law further into private spaces, is legislating:

*close to the line on rights compliance.*<sup>149</sup>

The Joint Committee remains particularly concerned by the introduction of the new clause establishing a designated area offence, which was introduced at the Report Stage in the House of Commons. In light of the limited opportunity for scrutiny in the House of Commons, the Joint Committee urged the House of Lords to give particular consideration to the necessity and proportionality of the new clause.<sup>150</sup>

At the time of writing, the Counter-Terrorism and Border Security Bill 2017-19 was being considered at the Committee Stage of the House of Lords.<sup>151</sup>

### Recommendation

The Commission endorses the recommendations of both the UN Human Rights Committee and the Independent Reviewer of Terrorism calling for UK Government Home Office to conduct and publish a review of the broad definition of terrorism.

The Commission recommends that the views of the Joint Committee on Human Rights are taken into account and effective steps are taken by the UK Government to ensure that the proposed Counter-Terrorism and Border Security Bill 2017-19 is human rights compliant.

147 Counter-Terrorism and Border Security Bill 2017-19.

148 NI Human Rights Commission, ‘Parliamentary Briefing Paper on Counter-Terrorism and Border Security Bill’ (NIHRC, 2018).

149 UK Joint Committee on Human Rights, ‘10 clauses Government Must Change in Counter-Terrorism and Border Security Bill’, 12 October 2018.

150 Ibid.

151 UK Parliament, ‘Counter-Terrorism and Border Security Bill 2017-19’. Available at: <https://services.parliament.uk/bills/2017-19/counterterrorismandbordersecurity.html>



## **Powers of arrest under the Terrorism Act 2000**

In 2015, the UN Human Rights Committee recommended that the UK Government:

*undertake a review of the exercise of arrest powers under section 41 of the Terrorism Act 2000 to ensure that the principles of necessity and proportionality are strictly observed when using such powers; ensure that any detention of suspects arrested under the Terrorism Act 2000 is based on an individualized determination that it is reasonable and necessary taking into account all the circumstances rather than on the nature of the crime; and, whilst ensuring public safety, make bail available to such persons, as recommended by the Joint Committee on Human Rights and the Independent Reviewer of Terrorism.*<sup>152</sup>

Under the Terrorism Act 2000, section 41, a constable may arrest without a warrant a person whom he/she reasonably suspects to be a terrorist. Of the 176 persons arrested in NI under this provision in 2017/18; 13 were subsequently charged representing 7.4 per cent of those arrested.<sup>153</sup> In his report on the operation of the Terrorism Acts in 2017, the Independent Reviewer, Max Hill QC, raised concerns regarding the low charge rate and, in particular, highlighted that amongst the small proportion of suspects arrested under the 2000 Act who are charged, an even smaller proportion are charged under the Terrorism Act 2000.<sup>154</sup>

In 2018, the Commission met with the then Independent Reviewer of Terrorism, Max Hill QC to discuss, inter alia, the low number of persons arrested under the Terrorism Act 2000, section 41, who are subsequently charged.

### **Recommendation**

The Commission again endorses the recommendation of the UN Human Rights Committee and calls on the Home Office to conduct and publish a review of the exercise of arrest powers under section 41 of the Terrorism Act 2000 to ensure compliance with its human rights obligations.



## **Alternatives to imprisonment**

In 2013, the UN CAT Committee raised concerns regarding the overcrowding of prisons across the UK and recommended a strengthening of efforts and setting of:

*concrete targets to reduce the high level of imprisonment and overcrowding in places of detention, in particular through the wider use of non-custodial measures as an alternative to imprisonment,*

<sup>152</sup> 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 14(d).

<sup>153</sup> Police Service NI, 'Police Recorded Security Situation Statistics Annual Report covering the period 1st April 2017 – 31st March 2018' (PSNI, 2018), at 9.

<sup>154</sup> Max Hill QC, 'Independent Reviewer of Terrorism Legislation: The Operation of the Terrorism Acts 2000 and 2006, the Terrorism Prevention and Investigation Measures Act 2011, and the Terrorist Asset Freezing etc. Act 2010' (Home Office, 2018).

*in the light of the UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) (General Assembly resolution 45/110).*<sup>155</sup>

In September 2018, of 911 sentenced adult male prisoners, 95 were serving sentences of six months or less and of 41 sentenced adult female prisoners, eight were serving sentences of six months or less.<sup>156</sup> The Department of Justice has acknowledged that:

*the actual time served by offenders on short prison sentences provides little opportunity to address offending behaviour. Community sentences, where many offenders are under probation for a prolonged period, provide more opportunities to assist the offender to overcome the difficulties that lead the offender to reoffend.*<sup>157</sup>

In 2018, the Department of Justice published statistics on reoffending rates for those convicted of criminal offences in 2015/16, which demonstrated that 40.8 per cent of persons released from custody reoffended within one year of release,<sup>158</sup> which is an increase from 38.2 per cent in the previous year.<sup>159</sup> Of those who received a supervised community disposal 35.2 per cent reoffended within one year of completion,<sup>160</sup> which was a rise from 34.7 per cent in the previous year.<sup>161</sup>

In 2016, the Department of Justice announced a review of sentencing to consider:

*the legislative framework for certain categories of crime, the setting of tariffs for murder, the arrangements for unduly lenient sentences and the effectiveness of the current sentencing guidelines mechanism to enhance public confidence, consistency and transparency in sentencing.*<sup>162</sup>

The Commission has met with officials to emphasise the importance of developing effective community sentences.

The Probation Board has published results of a pilot of an Enhanced Combination Order developed:

*to divert offenders from short-term custodial sentences by offering judges a more intensive community order with a focus on rehabilitation, reparation, restorative practice and desistance.*<sup>163</sup>

The evaluation report recorded that there was a 40 per cent reduction in the reoffending rate for those who completed the Order and that the number of prison sentences of 12 months or less awarded by courts involved in the pilot decreased by 10.5 per cent, suggesting that the

155 CAT/C/GBR/CO/5, 'UN Committee against Torture, Concluding observations on the Fifth Periodic Report of the UK of Great Britain and NI' 6 May 2013, at para 31.

156 Department of Justice, 'Analysis of NIPS Prison Population from 01/07/2017 to 30/09/2018' (DoJ, 2018).

157 Department of Justice, 'Consultation on a Review of Community Sentences' (DoJ, 2011).

158 Department of Justice, 'Adult and Youth Reoffending in NI (2015/16 Cohort)' (DoJ, 2018), at i.

159 Department of Justice, 'Analytical Services Group: Adult and Youth Reoffending in NI (2013/14 Cohort)', Research and Statistical Bulletin 23/2016' (DoJ, 2016), at 11.

160 Department of Justice, 'Adult and Youth Reoffending in NI (2015/16 Cohort)' (DoJ, 2018), at i.

161 Department of Justice, 'Analytical Services Group: Adult and Youth Reoffending in NI (2013/14 Cohort)', Research and Statistical Bulletin 23/2016' (DoJ, 2016), at 11.

162 Department of Justice, 'Press Release: Justice Minister announces sentencing review', 9 June 2016.

163 Probation Board NI, 'Evaluation of the Enhanced Combination Order Pilot' (PBNI, 2017).

Enhanced Combination Order was impacting on prison numbers.<sup>164</sup> Throughout 2018, the Department of Justice has promoted the Enhanced Combination Order as part of its approach to problem solving justice.<sup>165</sup>

### Recommendation

The Commission recommends that the NI Executive and Department of Justice introduce measures to ensure the wider use of non-custodial measures as an alternative to imprisonment, in particular as an alternative to short term custodial sentences.

### Imprisonment for fine default

In 2013, the UN CEDAW Committee recommended that the UK Government and the NI Executive continue to develop alternative sentencing and custodial strategies for women convicted of minor offences.<sup>166</sup> In 2013, the UN CAT Committee called for effective diversion from the criminal justice system for non-violent women offenders convicted of minor offences.<sup>167</sup>

The Commission notes that the imprisonment of persons for fine default has historically contributed significantly to the prison population in NI. Fine default receptions decreased from 653 during 2016/17 to 611 during 2017/18 (decrease of 6.4 per cent).<sup>168</sup> The Commission continues to raise this issue with UN treaty bodies.<sup>169</sup>

The Justice Act (NI) 2016 (Part 1), which provides for a statutory framework for the collection and enforcement of fines, was commenced on 1 June 2018.<sup>170</sup> The new framework builds on earlier work undertaken by the Department of Justice to strengthen the fine enforcement system.<sup>171</sup> The new arrangement will improve collection rates through new collection options and enforcement powers, reducing the numbers of debtors being imprisoned for fine default.

164 Ibid.

165 NI Direct, 'Background to Problem Solving Justice'. Available at: <https://www.nidirect.gov.uk/articles/background-problem-solving-justice>

166 CEDAW/C/GBR/CO/7, 'UN Committee on the Elimination of Discrimination Against Women, Concluding Observations on the Seventh Periodic report of the UK of Great Britain and NI', 30 July 2013, at para 55(b).

167 CAT/C/GBR/CO/5, 'UN Committee against Torture, Concluding observations on the Fifth Periodic Report of the UK of Great Britain and NI' 6 May 2013, at para 33.

168 NI Prison Service, 'The NI Prison Population 2017/18' (NIPS, 2018), at 10 and Table 7.

169 NI Human Rights Commission, 'Response to Department of Justice Consultation on Fine Default in NI' (NIHRC, 2011); NI Human Rights Commission, 'Submissions to the UN CEDAW Committee: Parallel Report on the 7th Periodic Report of the UK of Great Britain and NI under the Convention on the Elimination of all Forms of Discrimination against Women' (NIHRC, 2013), at paras 32-34; NI Human Rights Commission, 'Shadow Report on the Sixth Periodic Report of the UK of Great Britain and NI' (NIHRC, 2008), at paras 16-19; NI Human Rights Commission, 'Submission to the UN Committee Against Torture, Parallel Report on the 5th Periodic Report of the UK under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (NIHRC, 2013), at paras 5.3-5.5; NI Human Rights Commission, 'Annual Statement 2012' (NIHRC, 2012), at 19-20; NI Human Rights Commission, 'Annual Statement 2013' (NIHRC, 2013), at 20; NI Human Rights Commission, 'Submission to the UN CEDAW Committee: Parallel Report to the Eighth Periodic Report Submitted by the UK of Great Britain and NI' (NIHRC, 2018).

170 Justice (2016 Act) (Commencement No.2) Order (NI) 2018.

171 Department of Justice, 'Press Release: Ford highlights reforms to fine enforcement system', 2 February 2012.

## Recommendation

The Commission welcomes the introduction of the Justice (NI) Act 2016, which provides for a statutory framework for the collection of fines. The Commission continues to monitor the impact of the new fine collection framework on the number of individuals being imprisoned and recommends that the Department of Justice ensure a substantive reduction in the numbers imprisoned for fine default.

## Imprisonment of children with adults

The UN CRC, Article 37(c), requires that:

*every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so.*<sup>172</sup>

In June 2016, the UN CRC Committee recommended that the UK Government and NI Executive:

*ensure that child detainees are separated from adults in all detention settings.*<sup>173</sup>

The Criminal Justice (Children) (NI) Order 1998, makes provision for a 15-17 year old offender, considered likely to injure him or herself or others to be detained in the young offenders centre at Hydebank Wood, which accommodates offenders up to 21 years of age. An administrative scheme has operated effectively to prevent the imprisonment of children at Hydebank Wood. However, the imprisonment of children alongside adults remains legally permissible. In June 2018, the Criminal Justice Inspection NI published a report into an announced inspection into Woodlands Juvenile Justice Centre, which found that the regime at the Juvenile Justice Centre had been redesigned to include 17-year-olds and that they were being successfully managed by the Centre.<sup>174</sup>

The Department has previously committed to abolish provisions of the 1998 Order allowing for the imprisonment of children alongside adults. Officials have confirmed with the Commission that reforms to the 1998 Order will be implemented by way of a proposed Department of Justice Children's Bill, which is planned for introduction to the NI Assembly in 2020.<sup>175</sup>

<sup>172</sup> Article 37 (c), Convention on Rights of the Child 1989.

<sup>173</sup> CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016.

<sup>174</sup> Criminal Justice Inspection NI, 'An Announced inspection of Woodlands Juvenile Justice Centre' (CJINI, 2018), at 6.

<sup>175</sup> Declan McGeown, 'Scoping Study Stakeholder Update' (DoJ, 2017).

## Recommendation

The Commission continues to advise the Department of Justice that the provisions of the Criminal Justice (Children) (NI) Order 1998 permitting the imprisonment of children alongside adults is incompatible with the UN CRC and should be repealed. It recommends that the Department of Justice introduce legislation to the NI Assembly to remove the legal basis for the imprisonment of children alongside adults and that the NI Executive support these measures.

### The remand of children

The UN CRC, Article 37(b), requires that:

*no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*<sup>176</sup>

In June 2016, the UN CRC Committee noted that throughout the UK, including NI:

*the number of children in custody remains high, with disproportionate representation of ethnic minority children, children in care, and children with psycho-social disabilities, and detention is not always applied as a measure of last resort.*<sup>177</sup>

The UN CRC Committee recommended that the UK Government and NI Executive:

*establish the statutory principle that detention should be used as a measure of last resort and for the shortest possible period of time and ensure that detention is not used discriminatorily against certain groups of children.*<sup>178</sup>

The UN CRC Committee concluding observation reflected a similar observation of the UN Human Rights Committee in 2015, which called for actions to:

*ensure that detention on remand of child defendants is used only as a measure of last resort and for the shortest possible period of time and that suitable bail packages are available to child defendants in NI.*<sup>179</sup>

In March 2016, the then Minister of Justice, David Ford announced key findings from an internal scoping study into children in the justice system.<sup>180</sup> One of the recommendations that emerged was:

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<sup>176</sup> Article 37(b), Convention on the Rights of the Child 1989.

<sup>177</sup> 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 77.

<sup>178</sup> Ibid.

<sup>179</sup> NI Human Rights Commission, 'Submission to the UN Committee on the Rights of the Child on the UK's Fifth Periodic Report on compliance with the UN Convention on the Rights of the Child' (NIHRC, 2015), at para 23.

<sup>180</sup> Minister of Justice, 'Children in the Justice System: Scoping Study, Ministerial Statements - in the NI Assembly', 14 March 2016.



*to develop the disposals available to the judiciary and reduce the use of custody to make it truly a measure of last resort.*<sup>181</sup>

In May 2017, the Department of Justice provided an update on actions to take forward key recommendations contained within the scoping study:

*several of the proposals within the scoping study require legislation to be put in place. A 'Children's Bill' has therefore been put onto the Departmental Legislative Programme with a view to introduction in 2020, although this will be subject to the priorities of any new Minister or mandate. As one of the aims of the scoping study was to make the youth justice system simpler, the intention is to use this Bill to consolidate all legislation pertaining to children in justice into one place. Our intention is also to repeal all orders relating to community and custodial disposals for under-18s and create one new community order and one or possibly two custodial orders. It is also likely to include provisions relating to the use of remand and of bail, including the possible introduction of a 'real prospects' test and the potential removal of the Juvenile Justice Centre as a Place of Safety.*<sup>182</sup>

During the period 2017/18, 7 per cent of the movements within the Juvenile Justice Centre related to children and young people under sentence, a decrease of one per cent from the previous year. The remaining 93 per cent were movements within the Juvenile Justice Centre related to children and young people under the Police and Criminal Evidence Act 1984 or on remand, an increase of one per cent from the previous year.<sup>183</sup>

In June 2018, the Criminal Justice Inspection NI issued a report on an announced inspection of Woodlands Juvenile Justice Centre, speaking at the launch of the report the Criminal Justice Inspector Brendan McGuigan stated:

*in 2015, we called for the Youth Justice Agency to work with its statutory partners to reduce the number of children being inappropriately committed to custody in this manner. Yet this inspection found the Juvenile Justice Centre was still being used in this way. This situation must be addressed, particularly as 50 per cent of children admitted to custody under Police and Criminal Evidence Act proceedings were released within 24 hours.*<sup>184</sup>

In its report, the Criminal Justice Inspection NI elaborated on plans for the development of a closely aligned health and justice facility to provide support to children with psychiatric, substance misuse and behavioural problems, encompassing step-up and step-down intensive units. The Criminal Justice Inspection stated:

*the intention is to 'repurpose' the [Juvenile Justice Centre] into a multi-use facility for all children who require secure placements, supporting them in a welfare, rather than justice, setting. It is*

181 Ibid.

182 Declan McGeown, 'Scoping Study Stakeholder Update' (DoJ, 2017).

183 Department of Justice, 'Youth Justice Agency Annual Workload Statistics 2017/18' (DoJ, 2018), at 23.

184 Criminal Justice Inspection NI, 'Press Release, Care standards at Juvenile Justice Centre praised but challenges remain', 20 June 2018.

*envisaged that issues such as the overuse of custody for Police and Criminal Evidence Act placements, and debates about whether health or criminal justice providers should be responsible for the welfare needs of child offenders, could be resolved to a large extent through addressing the locus and purpose of the [Juvenile Justice Centre].<sup>185</sup>*

A number of recent legal cases have highlighted the difficulties in this area, with the High Court considering the duties owed by Health and Social Care Trusts to provide accommodation to children when either looked after or children in need under the Children (NI) Order 1995, where the child is on remand at the Juvenile Justice Centre.<sup>186</sup> Mrs Justice Keegan confirmed that the duty to provide accommodation for looked after children is absolute, that suitable accommodation must be provided in a reasonable time and that there is an obvious urgency due to the deprivation of the child's liberty.<sup>187</sup> Whilst not declaring an absolute prohibition on hotel/bed and breakfast accommodation in circumstances where a child is held on remand, Justice Keegan ruled that its use should be:

*rare, restricted and heavily monitored.*<sup>188</sup>

### Recommendation

The Commission notes the high number of children held in pre-trial detention in NI. The Commission calls on the Department of Justice to introduce legislative amendments that clearly enshrine the principle that a child should be held in pre-trial detention only as a measure of last resort and that suitable accommodation will be provided within a reasonable time if released on bail. In addition, a range of non-custodial accommodation arrangements should be developed for children awaiting trial who cannot return to their homes.

### Women in prison

#### Statistics

In June 2018, there were 43 sentenced adult female, 26 unsentenced adult female, one young offender woman sentenced and three young offender female unsentenced prisoners in NI. The average sentence length for adult females was 4.7 years and three months for young females. The average time on remand was 60.92 days for adult females and 13 days for young female. An assessment of the 2017/2018 prison population has shown that the overall female population and sentence lengths have remained at much the same level. There has been a 37 per cent increase in unsentenced adult females and 33 per cent reduction in the average time on remand for adult females.<sup>189</sup>

<sup>185</sup> Criminal Justice Inspection NI, 'An Announced Inspection of Woodlands Juvenile Justice Centre' (CJNI, 2018), at 19.

<sup>186</sup> *OC's (A Minor) Application and LH's (A Minor) Application In the matter of a decision by a Health and Social Care Trust* [2018] NIQB 34.

<sup>187</sup> *Ibid.*, at para 50.

<sup>188</sup> *Ibid.*, at para. 49.

<sup>189</sup> NI Prison Service, 'Analysis of NIPS Prison Population from 01/04/2017 to 30/06/2018, Department of Justice' (NIPS, 2018).

### Separate facility for women prisoners

The Commission continues to advise that the absence of a discrete prison facility for women and gender appropriate services in NI undermines the reformative and rehabilitative aims which imprisonment should strive towards.<sup>190</sup> This has been supported by the UN CAT Committee and the National Preventative Mechanism, designated under the Optional Protocol to the UN CAT, who recommended that women should no longer be held at Hydebank Wood and that a separate custodial facility should be established.<sup>191</sup> The Commission most recently raised this issue at the UN CEDAW Committee's Pre-Sessional Working Group in July 2018.<sup>192</sup>

In September 2017, the Department of Justice stated it remained committed to the development of a separate facility dedicated to women to provide fit for purpose accommodation that will aid their rehabilitation and enhance public protection.<sup>193</sup> However, capital funding for a separate facility dedicated to women is not yet secured. In July 2018, the NI Prison Service published Prisons 2020 a strategic plan for continuous improvement within the prison service, including through the development of infrastructure.<sup>194</sup> The Year 1 Delivery Plan includes a commitment to deliver a business case for the development of a new female facility at Hydebank Wood.<sup>195</sup>

### Women prisoners and health

In June 2016, the Department for Justice and Department for Health consulted on a draft strategy and action plan to ensure that children, young people and adults in contact with the criminal justice system were healthier, safer and less likely to be involved in offending behaviour.<sup>196</sup> In addition to advising the Department of Justice to publish details of the construction of a separate custodial facility for female prisoners in NI, the Commission advised that the strategy should set out how the healthcare needs of women would be addressed.<sup>197</sup> The final revised draft of the strategy and its action plan was prepared for Ministerial approval, and onward submission to the Executive was planned for early 2017.<sup>198</sup> Due to the suspension of the NI Assembly the strategy and action plan have not been published. However, it is understood that officials are carrying out actions in line with the strategy.

190 NI Human Rights Commission, 'Submission of the NI Human Rights Commission to the Department of Justice and Department of Health Consultation on Improving Health within Criminal Justice' (NIHRC, 2016), at para 7.4.

191 National Preventative Mechanism, 'Report on announced inspection of Ash House, Hydebank Wood Women's Prison 18 - 22 February' (NMP, 2013). Twenty statutory bodies make up the UK National Preventive Mechanism of specific reference to NI the Criminal Justice Inspector NI, the Independent Monitoring Board (NI), the Regulation and Quality Improvement Authority and the NI Policing Board Independent Custody Visiting Scheme are included in the list of bodies.

192 NI Human Rights Commission, 'Submission to the UN CEDAW Committee: Parallel Report to the Eighth Periodic Report Submitted by the UK of Great Britain and NI' (NIHRC, 2018), at 26-27.

193 Permanent Secretary of Department of Justice, 'COR-1076-2017: Letter from Department of Justice to NI Human Rights Commission', 22 September 2017.

194 NI Prison Service, 'Prisons 2020: The Way Forward' (NIPS, 2018).

195 NI Prison Service, 'Prisons 2020: The Way Forward - Year 1 Delivery Plan' (NIPS, 2018).

196 Department of Justice and Department of Health, 'Improving Health with Criminal Justice' (DoJ, 2016).

197 NI Human Rights Commission, 'Submission of the NI Human Rights Commission to the Department of Justice and Department of Health Consultation on Improving Health within Criminal Justice' (NIHRC, 2016), at para 7.4.

198 NI Assembly Committee for Justice, 'Official Report (Hansard) - Improving Health in the Criminal Justice System: NI Prison Service', 1 December 2016.

## Women immigration detainees

In July 2018, the Commission recommended to the UN CEDAW Committee's Pre-Sessional Working Group that the relevant authorities take effective steps to ensure that women immigration detainees are safe and have the option of gender-specific communal areas.<sup>199</sup>

Women immigration detainees are held with men in Larne House. Larne House is NI's immigration removal centre. It holds up to 19 men and women. The Home Office can hold detainees here for up to five days, seven if removal directions have been set. Detainees arrive from Drumkeen House (short-term holding facility) in Belfast, police stations, prisons or directly from enforcement operations in the community. On departure, detainees are often transferred to immigration removal centres in Great Britain, removed from the UK or released into the community. Three rooms, on a single corridor, are designated for women detainees. This corridor is not separate from the rest of the facility and men can walk through to go to the dining room. Women can lock the doors to their rooms, which can be overridden by staff in the event of an emergency. Concerns were raised to the Commission that women were not able to lock their doors if they were under close observation (e.g. if it was believed they were a threat to themselves). Communal areas are shared by men and women and there is no option for a gender-specific communal area.<sup>200</sup>

### Recommendation

The Commission welcomes the commitment of the Department of Justice to develop a separate custodial facility for women. However, 13 years since it first advised on the need for a separate custodial facility, the Commission notes that construction has still not commenced. It recommends that the Department of Justice expedite this project and calls on the NI Executive to provide any necessary support to ensure its completion.

The Commission recommends that effective steps are taken to ensure that women immigration detainees are safe and have the option of gender-specific communal areas.

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199 NI Human Rights Commission, 'Submission to the UN CEDAW Committee: Parallel Report to the Eighth Periodic Report Submitted by the UK of Great Britain and NI' (NIHRC, 2018), at 26-27.

200 HM Chief Inspector of Prisons, 'Report on an Unannounced Inspection of the Short-Term Holding Facility at Larne House' (NIPS, 2016), at Overview and para 1.12; Meeting with Larne House Visitors Group, 11 April 2018.

## Freedom from torture, inhuman and degrading treatment

<b>ECHR</b>	Article 3
<b>CAT</b>	Articles 1-16
<b>CRC</b>	Article 37(a) Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography
<b>CRPD</b>	Article 15 Article 17
<b>ICCPR</b>	Article 7
<b>Charter of Fundamental Rights of the EU</b>	Article 4 Article 19

### Abuse in health and social care settings

In 2017, the UN CRPD Committee recommended that the UK Government and NI Executive:

*establish measures to ensure equal access to justice and to safeguard persons with disabilities, particularly women, children, intersex people and elderly persons with disabilities from abuse, ill-treatment, sexual violence and/or exploitation. [And] ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.<sup>201</sup>*

The Mental Capacity (NI) Act 2016, section 267, makes it an offence to ill-treat, or wilfully neglect a person who lacks capacity. In addition, the Act includes a statutory definition of restraint. The Department of Health is developing Codes of Practice and Regulations required prior to the commencement of the provisions.

During the passage of the then Bill, the Commission advised that the Bill should provide a free standing offence where an individual, who has the care of another individual by virtue of being a care worker, ill-treats or wilfully neglects that individual.<sup>202</sup> This would have reflected provisions within the Criminal Justice and Courts Act 2015, which applies to England and Wales. However, the Bill was not amended to provide for a free standing offence.

### **Dunmurry Manor care home**

In June 2018, the Commissioner for Older People NI published a report of its Investigation into Dunmurry Manor care home. The Commissioner for Older People made 61 findings. Within the report the Commissioner stated:

<sup>201</sup> CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI', 29 August 2017, at para 39.

<sup>202</sup> NI Human Rights Commission, 'Submission to the Consultation on Proposals for New Mental Capacity Legislation for NI' (NIHRC, 2014).

*the investigation findings are deeply concerning and reflect an environment of poor care and treatment, serious safeguarding issues and medicines management issues, compounded by a failure of responsible bodies to act quickly and comprehensively. Evidence of physical and sexual assaults on female residents, residents leaving the home unnoticed and multiple instances of inhuman and degrading treatment were witnessed and reported. Despite Dunmurry Manor being regulated against care home standards within a regime of regulation and inspection, harm still occurred. It became clear as the investigation progressed that none of the organisations involved were aware of the full scale of the issues being experienced by residents in the home.*<sup>203</sup>

The Commissioner for Older People made a number of findings and recommendations relating to safeguarding and human rights. In responding to the report the Regulation Quality and Improvement Authority stated that they:

*did not agree with some of the commissioner's conclusions.*<sup>204</sup>

Following the report, the Department of Health announced a series of actions in order to address standards and public confidence. Among these was an independent review of actions by the health and social care system in relation to failings at Dunmurry Manor,<sup>205</sup> a scoping review on options for additional sanctions for private sector care providers responsible for serious failings, an audit of safeguarding investigations in relation to care homes in the independent sector and a public campaign to build awareness of how to raise concerns and complaints.<sup>206</sup> The Care Inspectorate, the scrutiny body for social care in Scotland, was commissioned by the Department of Health to conduct an independent rapid investigation into the regulatory response to issues at Dunmurry Manor care home by the Regulation and Quality Improvement Authority. In October 2018, the Care Inspectorate published its report, which found that:

*the Regulation and Quality Improvement Authority regulated Dunmurry Manor care home in accordance with the policies and procedures in place at the time.*<sup>207</sup>

The report did recommend that the Regulation and Quality Improvement Authority implemented measures to ensure that residents, relatives and staff are kept informed and receive assurance throughout the enforcement process, and that consideration should be given to the extent to which dementia care and the outcomes for people with dementia is covered by legislation.<sup>208</sup>

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203 Commissioner for Older People NI, 'Home Truths: A Report on the Commissioner's Investigation into Dunmurry Manor Care Home' (COPNI, 2018).

204 Marie-Louise Connolly and Richard Morgan, 'Dunmurry Manor: RQIA accused of failing home residents', *BBC News*, 14 June 2018.

205 Department of Health, 'Press Release: Department commissions independent review of actions around Dunmurry Manor Care Home', 16 July 2018.

206 Department of Health, 'Press Release: Department of Health details series of measures on care home standards, Department of Health', 27 June 2018.

207 Care Inspectorate, 'Rapid Investigation into the Regulatory Response to Issues at Dunmurry Manor Care Home by the Regulation and Quality Improvement Authority' (DoH, 2018), at 9.

208 *Ibid*, at 8.

A number of the findings and recommendations contained in the report mirror those made by the Commission in its 2012 investigation, *In Defence of Dignity*, which looked at the rights of older people in nursing homes.<sup>209</sup> The Commission continues to highlight the need to ensure the criminal law framework is sufficiently robust to protect individuals reliant on others for their health and social care needs and has asked officials responsible for implementation of the 2016 Act to ensure the effectiveness of offences contained within the Act are closely monitored post-implementation.

### Recommendation

The Commission notes that the Commissioner for Older People NI's report has highlighted a range of human rights issues. The Commission continues to recommend changes in the criminal law framework of NI to ensure sufficient robust protection of individuals reliant on others for their health and social care needs. The Department of Justice should prioritise the introduction of a free standing offence where an individual, who has the care of another individual by virtue of being a care worker, ill-treats or wilfully neglects that individual as is the case elsewhere in the UK. The Department of Health should ensure the Care Inspectorate's recommendations and its actions in response to the Commissioner for Older People report into Dunmurry Manor Care Home are effectively implemented.



### Allegations of torture and cruel, inhuman or degrading treatment or punishment overseas

#### Iraq Historic Allegations Team

In its 2015 concluding observations on the UN ICCPR, the UN Human Rights Committee called on the UK to:

*address the excessive delays in the investigation of cases dealt with by the Iraq Historical Allegations Team and consider establishing more robust accountability measures to ensure prompt, independent, impartial and effective investigations.*<sup>210</sup>

The Iraq Historic Allegations Team was established by the UK Government to review and investigate allegations of abuse by UK armed forces personnel in Iraq during the period of 2003 to July 2009. A report by House of Commons' Defence Select Committee published in February 2017 raised serious concerns regarding the fitness for purpose of the investigative procedures within the Historic Allegation team, and serious concerns in regard to the legal industry created around the Team which generated a significant number of cases against service personnel with:

*little or no supporting evidence.*<sup>211</sup>

209 NI Human Rights Commission, 'In Defence of Dignity: The Human Rights of Older People in Nursing Homes' (NIHRC, 2012), at 68-73.

210 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 9 (b).

211 House of Commons Defence Committee, 'Who Guards the Guardians? MoD Support for Former and Serving Personnel: Government Response to the Committee's Sixth Report - Ninth Special Report of Session 2016-17' (HoC, 2017).

The Solicitors Disciplinary Tribunal found that Professor Phil Shiner of Public Interest Lawyers had engaged in misconduct when representing claims against British soldiers - including acting dishonestly.<sup>212</sup> Professor Shiner was struck off the roll of solicitors. Similar allegations against three solicitors at the firm Leigh Day were not upheld. The Iraq Historical Allegations Team closed on 30 June 2017.<sup>213</sup>

### **Intelligence and Security Committee reports**

On 28 June 2018, the Intelligence and Security Committee presented two reports on detainee mistreatment and rendition to Parliament.<sup>214</sup>

The first report considered the extent of detainee mistreatment and rendition in the period 2001-2010, speaking at the launch of the report Committee Chairman Dominic Grieve MP stated:

*the 27 conclusions contained in the body of this Report outline some serious concerns: in our view the UK tolerated actions, and took others, that we regard as inexcusable. That being said, we have found no 'smoking gun' to indicate that the Agencies deliberately overlooked reports of mistreatment and rendition by the US as a matter of institutional policy. The evidence instead suggests a difficult balancing act: the Agencies were the junior partner with limited influence, and concerned not to upset their US counterparts in case they lost access to intelligence from detainees that might be vital in preventing an attack on the UK.*<sup>215</sup>

The second report considered current issues relating to detainee mistreatment and rendition, in this report the Committee considered the application of the UK Government's Consolidated Guidance policy in relation to detainees overseas, established to ensure that the UK is not involved in torture or mistreatment. Speaking at the launch of the report Committee Chairman Dominic Grieve MP stated:

*in the course of our Inquiry we found that that there has been remarkably little attempt to evaluate the guidance over the past seven years: no-one is assessing whether it is achieving its aims, or whether those aims remain the same. The Cabinet Office must take proper and active ownership of the Guidance, rather than leaving it unattended.*<sup>216</sup>

With respect to rendition, the Chairman went on to state:

*we find it astonishing that, given the intense focus on this issue ten years ago, the Government has failed to take action. There is no clear policy, and not even agreement as to who has responsibility for preventing UK complicity in unlawful rendition. We particularly note that Her Majesty's Government has failed to introduce a process to ensure that allies cannot use UK territory for rendition purposes*

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212 Case Number 11502-2016, *Solicitors Regulatory Authority v Martin Jeremy Day, Sapna Malik, Anna Jennifer Crowther and Leigh Day*, 24 April-9 June 2017.

213 Ministry of Defence, 'Press Release: IHAT to close at the end of June', 5 April 2017.

214 Intelligence and Security Committee, 'Detainee Mistreatment and Rendition', 28 June 2018.

215 Intelligence and Security Committee, 'Press Release: Detainee mistreatment and rendition 2001 - 2010', 28 June 2018.

216 Ibid.



*without prior permission. Given the clear shift in focus signalled by the present United States administration, the current reliance on retrospective assurances and the voluntary provision of passenger information is completely unsatisfactory.*<sup>217</sup>

In November 2018, both reports were under consideration by the UK Government.<sup>218</sup>

### **Application of ECHR in overseas operations**

In October 2016, the then Minister of Defence the Rt. Hon Michael Fallon MP issued a statement declaring the UK Government's:

*intention to derogate from the ECHR, if possible in the circumstances that exist at that time, will protect British troops serving in future conflicts from the kind of persistent legal claims that have followed recent operations in Iraq and Afghanistan on an industrial scale.*<sup>219</sup>

Within its report to the UN Human Rights Council, as part of the Universal Periodic Review Process in February 2017, the UK Government reiterated:

*with regard to the ECHR, the UK Government has publicly stated that before embarking on significant overseas military operations it intends derogating from the ECHR, where this is appropriate in the precise circumstances of the operation in question. Any derogation would need to be justified and could only be made from certain articles of the ECHR. Whether such a derogation is made, the UK Armed Forces will continue to be subject to the rule of law at all times, including UK domestic criminal law, and where applicable, the Law of Armed Conflict.*<sup>220</sup>

### **Recommendation**

The Commission continues to recommend that the UK Government establish a full, independent, judge-led inquiry in relation to allegations of complicity of British military personnel, security and secret intelligence services in the ill-treatment of detainees overseas and rendition. This should comply with the investigative obligation under international human rights law. The Commission notes the stated intention of the UK Government to derogate from the ECHR in future conflicts. It calls on the UK Government to ensure that any such derogation must be to the extent strictly required by the exigencies of the situation and remain consistent with other obligations under international law.

217 Intelligence and Security Committee, 'Press Release: Detainee mistreatment and rendition 2001 - 2010', 28 June 2018.

218 Hansard, 'Detainee Mistreatment and Rendition - in the House of Commons', 2 July 2018.

219 Ministry of Defence, 'Press Release: Government to protect armed forces from persistent legal claims in future overseas operations', 4 October 2016.

220 HM Government, 'Universal Periodic Review, UK, British Overseas Territories and Crown Dependencies National Report' (HM Government, 2017), at para 9.



## Deprivation of citizenship

In 2016, the UN Human Rights Committee recommended:

*the [UK Government] should review its laws to ensure that restrictions on re-entry and denial of citizenship on terrorism grounds include appropriate procedural protections, and are consistent with the principles of legality, necessity and proportionality. The [UK Government] should also ensure that appropriate standards and procedures are in place to avoid rendering an individual stateless.*<sup>221</sup>

In 2014, the Westminster Parliament amended the British Nationality Act 1981, empowering the Home Secretary to deprive a naturalised British citizen of their citizenship if they have engaged in conduct 'seriously prejudicial' to the UK's vital interests, and the Home Secretary has reasonable grounds to believe the person is able, under the law of a country or territory outside the UK, to become a national of such a country or territory. The UK Government may exercise powers to deprive an individual of their citizenship both when they are in the UK and when they are abroad.<sup>222</sup>

In April 2016, the Independent Reviewer of Terrorism published a report into the operation of the power in the first 12 months.<sup>223</sup> The Independent Reviewer stated:

*the power under review was not exercised during the period under review, and indeed had still not been exercised as of April 2016, when this report went to print. There is therefore no concrete action to review.*<sup>224</sup>

The Independent Reviewer noted the breadth of the discretion afforded to the Home Secretary and the absence of a requirement to obtain judicial consent before exercise of the power,<sup>225</sup> he stated:

*the power under review is an unusually strong one in international terms. It extends further than the laws of most comparable countries in Europe, North America or Australasia... It remains to be seen whether the power will be used in future – or, if used, whether it will be of any practical benefit in the global fight against terrorism.*<sup>226</sup>

The Counter Terrorism and Security Act 2015 makes provision for Temporary Exclusion Orders. These prohibit the return of an individual to the UK unless the return is in accordance with a permit to return.<sup>227</sup> The Act makes provision for an individual subject to a Temporary Exclusion Order to be able to apply to the court for a statutory review of the Order on their return to the UK.<sup>228</sup> The UK Government has stated that:

221 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 15.

222 Melanie Gower, 'Deprivation of British Citizenship and withdrawal of passport facilities' (HoC, 2015).

223 David Anderson QC, 'Independent Reviewer of Terrorism Legislation, Citizenship Removal Resulting in Statelessness: First Report of the Independent Reviewer on the Operation of the Power to Remove Citizenship Obtained by Naturalisation from Persons who have other Citizenship' (Anderson, 2016).

224 Ibid, at para 1.9.

225 Ibid, at para 3.16.

226 Ibid, at para 4.9.

227 Section 2(1)(a), Counter-Terrorism and Security Act 2015.

228 Section 10, Counter Terrorism and Security Act 2015.

*it is not possible to predict how many temporary exclusion orders will be served.*<sup>229</sup>

During the passage of the Act the Commission provided a briefing to a number of NI peers emphasising the need for appropriate judicial safeguards.<sup>230</sup>

In February 2017, UK Government published the Transparency Report into the use of disruptive and investigatory powers, which included information relating to the use of deprivation of citizenship powers and the use of the temporary exclusion power. In this report, UK Government stated:

*the [UK] Government considers removal of citizenship to be a serious step, one that is not taken lightly. This is reflected by the fact that the Home Secretary personally decides whether such action should be taken, where it is considered that it may be conducive to the public good to deprive an individual of citizenship. Between 1 January 2015 and 31 December 2015, five people were deprived of British citizenship on the basis that to do so was conducive to the public good.*<sup>231</sup>

With respect to the use of temporary exclusion orders the report confirmed that:

*since the power came into force in the second quarter of 2015, it has not been used.*<sup>232</sup>

In April 2017, in response to a Parliamentary question on the use of deprivation of citizenship powers, the then Minister for Immigration Robert Goodwill, stated:

*except where someone has fraudulently obtained British citizenship, deprivation of citizenship is only pursued against dual nationals where the Home Secretary is satisfied that the statutory test that deprivation of citizenship would be “conducive to the public good”, is met. To date, deprivation of citizenship on conducive grounds has been focused on protecting the UK from those involved in terrorism, unacceptable extremist behaviour, espionage or serious organised crime.*<sup>233</sup>

In July 2018, it was reported that two imprisoned suspected members of the Islamic State, who had reportedly had their British citizenship removed, were to be extradited from Syria to the United States of America, without the UK Government seeking an assurance that the individuals would not be sentenced to the death penalty.<sup>234</sup> The mother of one of the suspects has applied to the High Court in England and Wales challenging the Home Office’s decision to provide mutual legal assistance to US prosecutors without seeking assurances from the United States of

229 Home Office, ‘Impact Assessment: Counter-Terrorism and Security Act 2015 - Temporary Exclusion Orders – Royal Assent’, 11 February 2015, at Annex A.

230 Correspondence dispatched from the Chief Commissioner to NI Members of the House of Lords, January 2015.

231 HM Government, ‘Transparency Report 2017: Disruptive and Investigatory Powers’ (HoC, 2017), at 26.

232 Ibid, at 27.

233 Hangars Script, ‘British Nationality Home Office written question’, 24 April 2017.

234 Letter from the Chair of the Home Affairs Committee to Rt Hon Sajid Javid MP Home Secretary, 24 July 2018.

America that the two men would not face the death penalty, judgment is awaited.<sup>235</sup>

### Recommendation

The Commission continues to note the breadth of the discretion afforded to the Home Secretary to deprive an individual of his or her citizenship where they have engaged in conduct ‘seriously prejudicial’ to the UK’s vital interests and when there are reasonable grounds to believe the person is able, under the law of a country or territory outside the UK, to become a national of such a country or territory. It calls on the UK Government, as a minimum, to introduce a requirement to ensure judicial scrutiny before exercising the power to deprive an individual of their UK citizenship.

## Domestic and sexual violence

### Istanbul Convention

The UN CEDAW Committee, in its 2013 concluding observations, urged the UK Government to ratify the Istanbul Convention.<sup>236</sup>

The UK Government has signed the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention). In August 2017, the UK Government, in its response to a recommendation received during the Universal Periodic Review process stated:

*the UK remains committed to ratifying the Istanbul Convention. In most respects, the measures already in place in the UK to protect women and girls from violence comply with or go further than the Convention requires. In order to be compliant with Article 44 of the Convention, the UK must take extra-territorial jurisdiction over certain offences if committed abroad by UK nationals. The UK Government will introduce the extra-territorial jurisdiction measures necessary for compliance for England and Wales as part of the forthcoming Domestic Abuse Bill.*<sup>237</sup>

In July 2018, the Commission raised with the UN CEDAW Committee at its Pre-Sessional Working Group that there is a lack of clarity around the extra-territorial issues that are being attributed to the delay and stressed that the UK should ratify the Istanbul Convention without further delay.<sup>238</sup>

The Preventing and Combating Violence against Women and Domestic Violence (Ratification of Convention) Act 2017 requires the Secretary of State to establish a timeframe for the ratification of the Istanbul

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235 Owen Bowcott, ‘UK has no legal obligations towards Isis suspects, court told’, *The Guardian*, 9 October 2018.

236 CEDAW/C/GBR/CO/7, ‘UN Committee on the Elimination of Discrimination Against Women, Concluding Observations on the Seventh Periodic report of the UK of Great Britain and NI’, 30 July 2013, at para 35(a).

237 Ministry of Justice, ‘Universal Periodic Review, UK, British Overseas Territories and Crown Dependencies, National Report’ (MoJ, 2017), at Recommendation 134.43.

238 NI Human Rights Commission, ‘Submission to the UN CEDAW Committee: Parallel Report to the Eighth Periodic Report Submitted by the UK of Great Britain and NI’ (NIHRC, 2018), at 27-28.

Convention<sup>239</sup> and to annually report on progress.<sup>240</sup> The second report was published on 30 October 2018.<sup>241</sup> The Department for Communities is coordinating NI's input to the progress reports with the assistance of other relevant departments, such as the Department of Justice.

## Statistics

The UN ICESCR Committee highlighted, in its 2016 concluding observations on the UK, that the significant rise in homelessness in NI affected victims of domestic violence amongst other vulnerable groups. The UN ICESCR Committee urged the UK Government and NI Executive:

*to take immediate measures, including allocating appropriate funds to local authorities... to ensure adequate provision of reception facilities, including emergency shelters, hostels and reception, as well as social rehabilitation centres.*<sup>242</sup>

The Commission highlighted to the UN CEDAW Committee during its Pre-Sessional Working Group in July 2018 that there is a need to improve the disaggregation of domestic violence-related data in NI.

Statistics collated by the Police Service NI record that domestic violence has increased significantly since 2004/05 when the data series began. There were 30,595 domestic abuse incidents recorded in between 1 July 2017 and 30 June 2018. This was a 4.8 per cent increase over the previous year. There were 15,049 domestic abuse crimes recorded between 1 July 2017 and 30 June 2018. This is an 8.6 per cent increase on the crimes recorded the previous year.<sup>243</sup> These domestic abuse incidents and crimes figures represent the highest 12-month period recorded since such statistics were first collated. The Department of Justice has highlighted that this equates to over 80 domestic violence and abuse incidents every day in NI and that approximately five people are killed each year in NI by a partner, ex-partner or close family member. The Department stressed that domestic violence and abuse in NI remains significantly under-reported.<sup>244</sup>

## Domestic and sexual violence strategy

The Special Rapporteur on Violence against Women, following her 2014 mission to the UK, recommended that:

*the UK Government and devolved administrations implement comprehensive and co-ordinated strategies to prevent and combat violence against women and girls, introduce robust monitoring and accountability mechanisms to monitor the impact of these strategies, and ensure the provision of services for victims.*<sup>245</sup>

239 UK Parliament, 'Preventing and Combating Violence Against Women and Domestic Violence (Ratification of Convention) Act 2017' (UK Parliament, 2017), at Section 1.

240 Ibid, at Section 2.

241 Parliamentary Business, 'Ratification of the Council of Europe Convention on Combating Violence against Women and Domestic Violence (Istanbul Convention) - 2018 Report and Progress: Written Statement - HCWS1048', 30 October 2018.

242 E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at paras 51 and 52.

243 Police Service NI, 'Domestic Abuse Incidents and Crimes Recorded by the Police in NI: Update to 30 June 2018' (PSNI, 2018).

244 Department of Justice, 'Press Release: Over 80 domestic violence and abuse incidents every day in NI - working together we can help stop it', 4 July 2018.

245 UK National Human Rights Institutions, 'Oral Statement on the Special Rapporteur on Violence against Women Country Report on the UK and NI', 16 June 2015.

The UN CRPD Committee recommended, in its 2017 concluding observations, that the UK Government and NI Executive:

*establish measures to ensure equal access to justice and to safeguard persons with disabilities, particularly, women, children, intersex people and elderly persons with disabilities from abuse, ill-treatment, sexual violence and/or exploitation.*<sup>246</sup>

The Commission in its report to the UN CEDAW Committee's Pre-Sessional Working Group in July 2018, called for the existing domestic violence strategy to be effectively implemented, adopting a gender-sensitive approach.<sup>247</sup>

The Stopping Domestic and Sexual Violence and Abuse in NI Strategy was published in March 2016, with a commitment to publish an annual action plan.<sup>248</sup> In August 2018, the Departments of Health and Justice jointly published the third action plan under the strategy, which covers 2018-19.<sup>249</sup>

### **Domestic and sexual violence offences**

In early 2016, the Department of Justice consulted on whether there should be a specific offence that captured patterns of coercive and controlling behaviour.<sup>250</sup> Following this consultation the Department of Justice began preparing a Domestic Abuse Bill, which it continues to develop.<sup>251</sup> This Bill aims to provide for a new domestic abuse offence capturing patterns of psychological abuse, violence, and/or coercion of a partner, ex-partner or close family member. It also includes a statutory aggravation of domestic abuse, which may attract enhanced sentencing for other offences. The enactment of this Bill is subject to the legislative process, which is delayed due to the suspension of the NI Assembly.

### **Access to justice**

The UN CEDAW Committee, in its 2013 concluding observations, urged the UK Government and NI Executive:

*to ensure effective access by women, in particular women victims of violence, to courts and tribunals.*<sup>252</sup>

A Magistrates' Court pilot scheme was launched in Derry/Londonderry in November 2011. This provided for special listing arrangements for domestic violence cases, whereby domestic violence cases were clustered and heard by one judge on specifically designated days. This enabled the relevant agencies, including the support services, to concentrate their efforts and resources into those days in order to provide moral

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246 CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI', 29 August 2017, at para 39(a).

247 NI Human Rights Commission, 'Submission to the UN CEDAW Committee: Parallel Report to the Eighth Periodic Report Submitted by the UK of Great Britain and NI' (NIHRC, 2018), at 28-31.

248 Department of Health, Social Services and Public Safety and Department of Justice, 'Stopping Domestic and Sexual Violence and Abuse in NI: A Seven Year Strategy' (DHSSPS and DoJ, 2016).

249 Department of Health and Department of Justice, 'Stopping Domestic and Sexual Violence and Abuse Strategy: Draft Year 3 Action Plan' (DoH and DoJ, 2018).

250 Department of Justice, 'Domestic Abuse Offence and Domestic Violence Disclosure Scheme' (DoJ, 2016).

251 Permanent Secretary of Department of Justice, 'COR-1076-2017: Letter from Department of Justice to NI Human Rights Commission, 22 September 2017.

252 CEDAW/C/GBR/CO/7, 'UN Committee on the Elimination of Discrimination Against Women, Concluding Observations on the Seventh Periodic report of the UK of Great Britain and NI', 30 July 2013, at para 23(a).

and practical support to victims. For example, under this arrangement, court staff provide victims with separate entrances and waiting areas, the Public Prosecution Service provides a specially trained prosecutor and Women's Aid or Victim Support NI liaise to mentor and support women. In September 2016, the then Minister for Justice indicated that the arrangements for the pilot scheme:

*should be enhanced, before further consideration is given to rolling out the model across other areas of NI.*<sup>253</sup>

There are currently no plans to expand this scheme across NI.

The 2018-19 Domestic and Sexual Violence and Abuse Action Plan sets out as a key action the commencement of a Crown Court Observers' study to gather information on victims' and witnesses' experience of the court in sexual offence cases.

In 2018, an independent review was conducted into how the NI criminal justice system handles cases of serious sexual assault. The review is chaired by Sir John Gillen and examined how the NI criminal justice system handles cases of serious sexual assault, including support for victims and witnesses, anonymity for defendants and measures to ensure the anonymity of victims amongst others.<sup>254</sup> The interim report was subject to public consultation in November 2018, with the final report due to be published in January 2019.<sup>255</sup>

In November 2018, the Criminal Justice Inspection NI published its report on a thematic inspection of the handling of sexual violence and abuse cases by the criminal justice system in NI. The report highlighted that avoidable delays in the criminal justice process for such cases remains an issue that requires addressing.<sup>256</sup>

### Protection initiatives

In March 2018, the Department of Justice established a Domestic Violence Disclosure Scheme in NI.<sup>257</sup> This scheme allows a victim or a third party known to a potential victim who may have concerns, to apply to the police for information on a partner. The Scheme aims to help ensure the safety of victims, allowing them to make an informed choice about whether they would wish to continue in their relationship.

The Department of Justice also launched a pilot Domestic Violence Perpetrators' Programme in Derry/Londonderry during March 2018.<sup>258</sup> This pilot is expected to run for nine months, involving a maximum of 30 perpetrators. It adopts a problem solving justice approach, aimed at

253 AQO 268/16/21, 'Question from Mr McAleer to Minister of Justice on Domestic Violence: Court Listings', 20 September 2016.

254 Department of Justice, 'Review of arrangements to deliver justice in serious sexual offence cases: Terms of Reference'. Available at: <https://www.justice-ni.gov.uk/publications/review-arrangements-deliver-justice-serious-sexual-offence-cases-terms-reference>

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

256 Criminal Justice Inspectorate, 'Without Witness Public Protection Inspection I: A Thematic Inspection of the Handling of Sexual Violence and Abuse Cases by the Criminal Justice System in NI' (CJINI, 2018).

257 Department of Justice, 'Domestic Violence and Abuse Disclosure Scheme NI Guidance' (DoJ, 2018).

258 'NI pilot scheme launched to change behaviour of domestic violence offenders and help victims', *Belfast Telegraph*, 22 March 2018.

changing behaviours of convicted offenders. The pilot is to be subject to monthly judicial monitoring.

The Department of Justice is developing a local Domestic Homicide Review Model, where a person has died as a result of domestic violence.<sup>259</sup> The Model will seek out and share opportunities for learning, identify what worked well and inform the development of practice to improve services. This is with a view to preventing domestic violence and abuse and domestic homicide happening in the future. In 2018, a consultation of the proposed model was conducted.<sup>260</sup> The Department of Justice has committed to implementing this mechanism in the 2018-19 Domestic and Sexual Violence and Abuse Action Plan.

The Department of Justice plans to introduce Domestic Violence Protection Notices and Domestic Violence Protection Orders.<sup>261</sup> A Protection Notice is an emergency non-molestation and eviction notice, which can be issued to a perpetrator by the police when attending a domestic abuse incident. It is effective from the point of issue, and can be issued without the victim's consent. Within 48 hours of a Protection Notice being served, the police can apply to the Magistrates' Court for a Protection Order. This can prevent the perpetrator from returning to a residence and from having contact with the victim for up to 28 days. The introduction of the Notices and Orders will require legislative change, which is not possible due to the current political impasse.

The 2018-19 Domestic and Sexual Violence and Abuse Action Plan sets out that consideration should be given to how relationships and sexuality education curriculum resources can support teachers in addressing domestic and sexual violence and abuse.<sup>262</sup>

### **Victim support**

The UN CEDAW Committee, in its 2013 concluding observations, urged the UK Government and NI Executive:

*to increase its efforts to protect women, including black and ethnic minority women, against all forms of violence, including domestic violence, and so-called 'honour-killings'.<sup>263</sup>*

This included continuing:

*public campaigns to raise awareness of all forms of violence against women<sup>264</sup> ...stepping up efforts to train police officers in order to eliminate prejudices concerning the credibility of victims of domestic violence<sup>265</sup>...[and continuing] to provide training on gender-sensitive*

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259 Letter from Department of Justice to NI Human Rights Commission, 22 September 2017.

260 Department of Justice, 'Domestic Homicide Reviews - Consultation' (DoJ, 2018).

261 Letter from Department of Justice to NI Human Rights Commission, 22 September 2017.

262 Department of Health and Department of Justice, 'Stopping Domestic and Sexual Violence and Abuse Strategy: Draft Year 3 Action Plan' (DoH and DoJ, 2018).

263 CEDAW/C/GBR/CO/7, 'UN Committee on the Elimination of Discrimination Against Women, Concluding Observations on the Seventh Periodic report of the UK of Great Britain and NI', 30 July 2013, at para 35(b).

264 Ibid, at para 35(c).

265 Ibid, at para 35(d).



*approaches in the treatment of victims of violence to officers who are in charge of immigration and asylum applications.*<sup>266</sup>

In July 2018, the Commission highlighted to the UN CEDAW Committee's Pre-Sessional Working Group that the relevant authorities, particularly the police, should be adequately trained to ensure victim support for domestic violence is effective. The Commission also highlighted that effective steps are required by the relevant authorities to ensure specialised, accessible support for NI victims of domestic violence is sufficiently and promptly available and adequately funded, particularly refuge places.<sup>267</sup>

The Supporting People Programme provides 13 refuges throughout NI (with a total funding of over £4.6 million per year). The Department of Health, Department of Justice and Department of Communities collectively fund a 24-hour Domestic and Sexual Violence Helpline, which is delivered by Women's Aid NI. These Departments also fund the Rowan Sexual Assault Referral Centre for NI, which offers support to for those who have experienced sexual violence and abuse.<sup>268</sup> Furthermore, a variety of places throughout NI, including all police stations are designated as 'Safe Places'. This is an initiative which provides support in a range of settings for people requiring information on domestic violence.<sup>269</sup>

Belfast Area Domestic and Sexual Violence and Abuse Partnership aims to improve services and support for all victims of domestic and sexual violence and abuse. This Partnership brings together specialised agencies, organisations, groups and individuals. It has faced funding cuts and has a limited geographical remit. The Department of Justice is developing a streamlined Advocacy Support Service across NI.<sup>270</sup> This will standardise the level of support to be made available, and respond to the needs of both male and female victims of sexual violence and abuse and domestic violence and abuse.

The 2018-19 Domestic and Sexual Violence and Abuse Action Plan includes the development of policy proposals for a Sanctuary Scheme for victims of domestic abuse.<sup>271</sup>

### **Non-nationals and domestic violence**

The Commission recommended, in its 2016 submission to the UN ICESCR Committee, that the UK should take steps to extend provision for victims of domestic violence to persons who enter the UK other than on a spousal visa.<sup>272</sup> In July 2018, the Commission recommended to the UN CEDAW Committee in its Pre-Sessional Working Group that effective steps are

266 Ibid, at para 59(a).

267 NI Human Rights Commission, 'Submission to the UN CEDAW Committee: Parallel Report to the Eighth Periodic Report Submitted by the UK of Great Britain and NI' (NIHRC, 2018), at 28-31.

268 HM Government, 'UN Periodic Review - UK of Great Britain and NI Update' (HM Government, 2018), at para 15.

269 Police Service NI, 'Safe Place Campaign'. Available at: <https://www.psnl.police.uk/crime/domestic-abuse/safe-place-campaign/>

270 Letter from Department of Justice to NI Human Rights Commission, 22 September 2017.

271 Department of Health and Department of Justice, 'Stopping Domestic and Sexual Violence and Abuse Strategy: Draft Year 3 Action Plan' (DoH and DoJ, 2018).

272 NI Human Rights Commission, 'Submission to the UN Committee on Economic, Social and Cultural Rights 58th Session on the Sixth Periodic Report of the UK's Compliance with ICESCR' (NIHRC, 2016), at 38-40.

taken by the relevant authorities to ensure domestic violence concessions for non-EU women can be accessed promptly.<sup>273</sup>

The no recourse to public funds rule prevents persons with insecure immigration status from accessing benefits, such as refuge support. The Destitute Domestic Violence concession was introduced on 1 April 2012. This concession aims to help non-nationals who are victims of domestic violence and on a spousal visa to leave their partner safely and secure their immigration status in the UK. The concession offers those who meet the eligibility criteria temporary leave for three months, enabling them to apply for access to public funds. During this three month period the person should make a separate application for indefinite leave to remain under the Domestic Violence rule.<sup>274</sup> There are strict eligibility criteria for the concession and so there are some groups, such as EEA women, may not benefit. The issuing of concessions can also be subject to delays.<sup>275</sup>

### UN Security Council Resolution 1325

The UN CEDAW Committee recommended, in its 2013 concluding observations, that the UK Government ensured:

*the participation of women in the post-conflict process in NI, in line with Security Council resolution 1325 (2000).*<sup>276</sup>

Reporting on her 2014 mission to the UK, the Special Rapporteur on Violence Against Women noted concerns in NI regarding:

*the exclusion of women from the peace-building processes and how their experiences of violence during and after the conflict have been mostly unrecognized.*<sup>277</sup>

The Special Rapporteur recommended that the UK Government ensure the full implementation in NI of UN Security Council resolution 1325.<sup>278</sup>

In July 2018, the Commission highlighted this issue at the UN CEDAW Committee's Pre-Sessional Working Group. It raised that during its engagement with civil society organisations the Commission were told that for women in NI there is a historical and ongoing fear of paramilitaries (including paramilitaries from within their own communities) that is causing women to feel threatened, which is preventing the empowerment of women in NI. It was reported that this is closely linked to drug feuds and domestic violence. It was raised that women feel displaced by paramilitaries taking leadership roles in local communities. As a result, women's community groups feel unable to access funding and to engage with particular peacebuilding initiatives.<sup>279</sup>

273 NI Human Rights Commission, 'Submission to the UN CEDAW Committee: Parallel Report to the Eighth Periodic Report Submitted by the UK of Great Britain and NI' (NIHRC, 2018), at 28-31.

274 No Recourse to Public Funds Network, 'The Destitution Domestic Violence (DDV) Concession' (NRPF Network, 2013).

275 Nisan Zerai Kesete, 'Destitution Domestic Violence Concession - Monitoring Research Report' (Unbound Philanthropy, 2013), at 37.

276 CEDAW/C/GBR/CO/7, 'UN Committee on the Elimination of Discrimination Against Women, Concluding Observations on the Seventh Periodic report of the UK of Great Britain and NI', 30 July 2013, at para 43(b).

277 A/HRC/29/27/Add.2, 'Report of the Special Rapporteur on Violence against Women, Its causes and Consequences, Rashida Manjoo Addendum, Mission to the UK of Great Britain and NI', 19 May 2015.

278 Ibid, at para 106(c)(x).

279 NI Human Rights Commission, 'Submission to the UN CEDAW Committee: Parallel Report to the Eighth Periodic Report Submitted by the UK of Great Britain and NI' (NIHRC, 2018), at 10-11.

The Commission welcomed the establishment of the Paramilitary Crime Taskforce in September 2017, which aims to protect communities by tackling all forms of criminality linked to paramilitarism. This Taskforce is made up of officers from the Police Service NI, the National Crime Agency and HM Revenue and Customs. However, the Commission stressed to the UN CEDAW Committee that special measures are required for NI under Resolution 1325,<sup>280</sup> something that is currently not accepted by the UK Government.<sup>281</sup>

## Stalking

In July 2018, the Commission recommended to the UN CEDAW Committee at its Pre-Sessional Working Group that effective steps are required by the relevant authorities to protect and support NI victims of stalking in the absence of specific legislation.<sup>282</sup> The Commission also raised the need to gather, disaggregate and monitor data on stalking in NI.<sup>283</sup>

There is no criminal offence of stalking in NI. There is a lack of data in relation to stalking in NI as there is no legal definition of the term.<sup>284</sup>

In November 2016, the NI Committee for Justice reviewed and consulted on introducing specific stalking legislation in NI. The aim of the review was:

*to assess whether the current legislation in place in NI to deal with stalking is appropriate and effective, identify any gaps and consider the need for and potential benefits of introducing specific stalking legislation.*<sup>285</sup>

The Committee was unable to report to the NI Assembly before its dissolution in January 2017.

In the interim, the Attorney General NI issued guidance in April 2018 providing a definition of stalking with the aim of assisting criminal justice organisations in NI exercising:

*their respective functions diligently in order to prevent, investigate and prosecute acts of stalking and domestic abuse.*<sup>286</sup>

## Voyeurism

In June 2018, the Voyeurism (Offences) (No 2) Bill 2017-19 was introduced to the House of Commons. The Bill, which applies to England and Wales only, seeks to amend the Sexual Offences Act 2003 to include certain acts

280 Ibid.

281 HM Government, 'Eighth Periodic Report Submitted by the UK of Great Britain and NI under Article 18 of the Convention, due in 2017', (HM Government, 2017), at para 75.

282 NI Human Rights Commission, 'Submission to the UN CEDAW Committee: Parallel Report to the Eighth Periodic Report Submitted by the UK of Great Britain and NI' (NIHRC, 2018), at 28-31.

283 Ibid, at 32.

284 RaISE, 'Briefing Paper: Incidence and Prevalence of Stalking in NI' (RaISE, 2017).

285 NI Assembly, 'Review of the Need for Stalking Legislation in NI'. Available at: <http://www.niassembly.gov.uk/assembly-business/committees/2016-2017/justice/inquiries--reviews/review-of-the-need-for-stalking-legislation-in-northern-ireland/>

286 Attorney General NI, 'No 13 Human Rights Guidance for the Police Service of NI, the Public Prosecution Service, the Probation Board for NI and the NI Courts and Tribunals Service: Domestic Abuse and Stalking' (AG NI, 2018).

of voyeurism, including upskirting.<sup>287</sup> At the time of writing, the Bill was awaiting consideration at the Committee stage of the House of Lords.

In October 2018, the Commission met with the Department of Justice who stated that the Department plans to commence a consultation that will consider potential amendments to sexual offences legislation in NI, including introducing the crime of upskirting.<sup>288</sup>

### Recommendation

The Commission calls on the UK government to move from signatory to ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention). It encourages the NI Executive to engage with the UK Government in this regard and ensure the full implementation of the Convention in NI without further delay.

The Commission recommends that the Department of Justice introduces legislation to criminalise coercive and controlling behaviour in an intimate relationship without further delay. It recommends that existing and future mechanisms for tackling domestic violence are effectively implemented in a human rights compliant and gender-sensitive manner, including disaggregation of data and effective training. It further recommends that specialised, accessible support is sufficiently and promptly available and adequately funded, particularly refuge places, for all victims of domestic violence in NI.

The Commission further recommends that the Department of Justice introduce specific legislation to prohibit stalking without further delay.



### Female genital mutilation

#### Application in practice

The UN CRC Committee stated, in its 2016 concluding observations on the UK, that it was:

*concerned at the significant number of children who are affected by harmful practices, including female genital mutilation.*<sup>289</sup>

The Commission recommended to the UN CEDAW Committee at its Pre-Sessional Working Group on the UK that the Departments of Health and Justice adopt and effectively implement a female genital mutilation action plan for NI which requires the collection of thorough data.<sup>290</sup>

In November 2017, the African and Caribbean Support Organisation NI published a scoping study on female genital mutilation highlighting

287 Parliament Business, 'Voyeurism (Offences) (No 2) Bill 2017-19'. Available at: <https://services.parliament.uk/bills/2017-19/voyeurismoffencesno2.html>

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

289 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 46.

290 HM Government, 'Eighth Periodic Report Submitted by the UK of Great Britain and NI under Article 18 of the Convention, due in 2017' (HM Government, 2017), at 31-32.

concerns relating to data collection, service provision and implementation of the guidelines.<sup>291</sup>

There are no systematic estimates of the prevalence of female genital mutilation in NI. The Stopping Domestic and Sexual Violence and Abuse in NI, A Seven Year Strategy states:

*it has been estimated that over 60,000 girls under the age of 15 could be at risk of female genital mutilation in the UK each year. While the number of women and girls potentially at risk in NI is not thought to be large, health professionals have a duty to be aware of the guidance, alert to indications that a girl may be at risk and to comply with extant child protection policy and procedures.*<sup>292</sup>

In July 2018, the BBC reported that a freedom of information request to the Belfast Trust recorded that between April 2017 and January 2018, 17 victims of female genital mutilation presented themselves to the Belfast Trust.<sup>293</sup>

The National Society for the Prevention of Cruelty against Children is working with the Safeguarding Board NI's Female Genital Mutilation Sub-group to develop statistics and data collection on female genital mutilation in NI.<sup>294</sup> Furthermore, the NI Maternity Information System has been adapted to capture cases where female genital mutilation is identified during pregnancy and childbirth. There are no exact figures available, but the Department of Health reported a small number of cases have been identified by this process.<sup>295</sup>

## Prevention

The Commission recommended to the UN CEDAW Committee at its Pre-Sessional Working Group on the UK that the Departments of Health and Justice ensure the existing measures in place to tackle female genital mutilation are effective. The Commission also recommended that a female genital mutilation action plan for NI is adopted and effectively implemented, which ensures specialised, accessible support for victims or potential victims of female genital mutilation in NI, is sufficiently and promptly available and adequately funded.<sup>296</sup>

Female genital mutilation is illegal under the Female Genital Mutilation Act 2003. The Serious Crime Act 2015 provides for Female Genital Mutilation Protection Orders. The NI Executive published the Multi-Agency Practice Guidelines on female genital mutilation in July 2014.<sup>297</sup> Health and social care professionals should operate in accordance with these guidelines. The Commission welcomed the robust measures initiated to combat this ongoing human rights abuse.

291 African and Caribbean Support Organisation NI, 'Female Genital Mutilation: Scoping Study' (ACSONI, 2017).

292 Department of Health, Social Services and Public Safety and Department of Justice, 'Stopping Domestic and Sexual Violence and Abuse in NI: A Seven Year Strategy' (DHSSPS and DoJ, 2016), at para 2.9

293 'Seventeen women with FGM attended Belfast Hospital', *BBC News*, 25 July 2018.

294 Email from Department of Health to NI Human Rights Commission, 6 October 2017.

295 Ibid.

296 NI Human Rights Commission, 'Submission to the UN CEDAW Committee: Parallel Report to the Eighth Periodic Report Submitted by the UK of Great Britain and NI' (NIHRC, 2018), at 31-32.

297 Department of Health, Social Services and Public Safety, 'Multi-Agency Practice Guidelines: Female Genital Mutilation' (DHSSPS, 2014).

In August 2015, a cross-departmental Senior Officials Group was established, led by the Department of Health.<sup>298</sup> This group has agreed a number of initiatives to progress the regional response on female genital mutilation. This includes reviewing the 2014 guidelines, exploring opportunities for data collection and analysis, the development of care pathways, and the production of regional training resources for health and social care professionals. The Safeguarding Board for NI's Female Genital Mutilation Sub-group leads the implementation of a number of these actions.<sup>299</sup>

Additionally, the Safeguarding Board NI's Child Safeguarding Learning and Development Strategy and Framework 2015-2018 sets out that inter-agency training and learning outcomes should be developed regarding female genital mutilation by 2018.<sup>300</sup> The Safeguarding Board NI's Policies and Procedure Committee has developed safeguarding practice guidance on female genital mutilation.<sup>301</sup> The Board has also established a specific Committee that undertakes and oversees the Board's work on female genital mutilation. The Committee's membership is representative of the breadth of agencies working with children and young people in NI.<sup>302</sup>

### **Recommendation**

The Commission recommends that the Departments of Health and Justice ensure the existing measures in place to tackle female genital mutilation are effective. The Commission also recommends that the Departments of Health and Justice adopt and effectively implement a female genital mutilation action plan for NI, which requires the collection of thorough data and ensures specialised, accessible support for victims or potential victims of female genital mutilation in NI is sufficiently and promptly available and adequately funded.



## **Historical abuse of children and adults**

### **Historical Abuse Institutional Inquiry**

On 8 July 2016, the Historical Institutional Abuse Inquiry concluded the programme of hearings, which began in January 2014. The Inquiry report made broad ranging recommendations, including for the erection of a memorial, the establishment of a Commission for Survivors of Institutional Abuse and that a compensation scheme should be established. In addition, the Inquiry recommended the establishment of a publicly funded compensation scheme, to be administered by a Redress Board to make determinations relating to compensation for persons who have suffered abuse in the form of sexual, physical or emotional abuse, or neglect or unacceptable practices, between 1922 and 1995; and were resident in a residential institution in NI.

298 Email from Department of Health to NI Human Rights Commission, 6 October 2017.

299 Ibid.

300 Safeguarding Board NI, 'Child Safeguarding Learning and Development Strategy and Framework 2015-2018' (SBNI, 2016).

301 Safeguarding Board NI, 'Female Genital Mutilation Guidance' (SBNI, Unknown).

302 Safeguarding Board NI, 'Committees and Sub-groups'. Available at: <http://www.safeguardingni.org/committeessub-groups>

Prior to the publication of the report, the NI Executive emphasised that it would be inappropriate to pre-empt the findings of the Inquiry and that:

*the nature or level of any potential redress, as stipulated in the inquiry's terms of reference, is a matter the Executive will discuss and agree following receipt of the inquiry's report.*<sup>303</sup>

The NI Executive did not issue a formal substantive response to the Inquiry Report, prior to the suspension of the NI Assembly.

When officially closing the inquiry on 30 June 2017, Sir Anthony Hart, the Chairman of the Historical Institutional Abuse Inquiry, encouraged the Secretary of State NI:

*because of the wide welcome for, and support of the Report, expressed in the previous Assembly on 23 January, and the clear undertaking by the Prime Minister to the House of Commons on 8 February that the findings of the report will be "taken into account and acted upon" I feel justified in urging you to put in hand the necessary steps to implement the recommendations of the Inquiry in full as a matter of urgency and without delay.*<sup>304</sup>

## Remedy

In August 2017, a request from victims for the then Secretary of State NI, James Brokenshire, to exercise powers within the NI Act 1998 to make an interim compensation payment to victims of institutional abuse was turned down.<sup>305</sup> In March 2018, in response to a Parliamentary Question relating to the Historical Institutional Abuse Inquiry, Shailesh Vara, the then Parliamentary Under-Secretary in the NI Office, stated:

*the report was commissioned by the devolved government, and how to respond to its recommendations should properly be for a devolved government to decide.*<sup>306</sup>

In the absence of a functioning Executive, the Head of the Civil Service has directed the Executive Office to develop draft legislation in respect of a Redress board and a Commissioner of Survivors of Institutional Childhood Abuse, which will be subject to public consultation.<sup>307</sup>

In April 2018, leave for judicial review was granted by the NI High Court, in a case arguing that the Secretary of State NI retains a residual power to set up a scheme in the absence of a restoration of the devolved executive and seeks to compel the Secretary of State NI to act on the recommendations of the Hart Inquiry.<sup>308</sup> At the time of writing, the case is adjourned.<sup>309</sup>

303 '£300 million what it could cost to compensate residents of home', *Belfast Telegraph*, 1 November 2016.

304 Historical Institutional Abuse Inquiry, 'Press Release: HIA Inquiry comes to an end and the Chairman urges the Secretary of State to implement the recommendations of its Report', 30 June 2017.

305 'Brokenshire criticised on historical abuse compensation', *BBC News*, 18 August 2017.

306 Parliament Business, 'Historical Institutional Abuse Inquiry: Written Question - 131709', 16 March 2018.

307 NI Direct, 'Historical Institutional Abuse'. Available at: <https://www.nidirect.gov.uk/articles/historical-institutional-abuse>

308 'Victims of institutional abuse take legal action against NI Secretary of State in absence of Stormont Executive', *Belfast Telegraph*, 6 July 2018.

309 'Legal challenge over compensation for historical abuse survivors put back until November', *Irish News*, 10 September 2018.

## **Abuses outside Historical Institutional Abuse Inquiry's remit**

The Historical Institutional Abuse Inquiry's remit does not extend to adult residents of Magdalene laundry type institutions or those abused in private settings. In July 2018, the Commission recommended to the UN CEDAW Committee at its Pre-Sessional Working Group that effective steps are taken to ensure the victims of historical abuses outside the remit of the Historical Institutional Abuse Inquiry have an effective remedy, including access to thorough and effective independent investigations that offer effective redress (including compensation) and are subject to public scrutiny and effective victim participation.

In February 2016, the then NI Executive agreed to establish an inter-departmental Working Group to take forward work on Mother and Baby Homes and Magdalene Laundries and historical clerical child abuse which fell outside the Historical Institutional Abuse Inquiry.<sup>310</sup>

In January 2018, the Department of Health commissioned research to be carried out on Mother and Baby Homes and Magdalene Laundries in NI to examine the operation of the homes and laundries between 1922 and 1999.<sup>311</sup> In March 2018, Norah Gibbons (the Independent Chair of the Working Group) resigned due to health issues. In November 2018, the appointment of a new chair was awaited.

During its engagement with civil society when preparing for the UN CEDAW Committee's Pre-Sessional Working Group, the Commission were made aware that victims felt they were not effectively consulted on the establishment of the Working Group and the commissioned research.

## **Historical abuse in the home**

Victims of crimes committed before 1 July 1988 are not entitled to criminal injuries compensation, if they were living together with the assailant as members of the same family at the time of the crime.<sup>312</sup>

In July 2018, the Court of Appeal of England and Wales found that the application of the equivalent scheme in England in an individual case was in violation of Article 14 ECHR.<sup>313</sup> The UK Government has subsequently announced plans to abolish the rule.<sup>314</sup>

In May 2018, the NI Court of Appeal heard a case, which argued that the application of the rule was in violation of Article 14 ECHR, in conjunction with Article 1, Protocol 1 ECHR. Judgment is awaited, at the time of writing.

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310 Department of Health, 'Mother and Baby Homes - Magdalene Laundries'. Available at: <https://www.health-ni.gov.uk/articles/mbh-ml>

311 Department of Health, 'Press Release: Research to start on mother and baby homes and Magdalene Laundries in NI', 11 January 2018.

312 Department of Justice, 'NI Criminal Injuries Compensation Scheme 2009' (DoJ, 2009), at paragraph 7(c).

313 *JT v First-Tier Tribunal* [2018] EWCA Civ 1735.

314 'Same-roof' bar on compensation to be lifted to help abuse victims', *The Guardian*, 9 September 2018.



## Recommendation

The Commission recommends that the NI Executive develop and publish a plan to ensure full and effective implementation of the Historical Institutional Abuse Inquiry's Report recommendations, in particular those relating to compensation for victims. The Commission notes that the Inquiry's remit did not include those abused in private settings or adult residents of Magdalene laundry type institutions. The Commission recommends that effective steps are taken to ensure the victims of historical abuses outside the remit of the Historical Institutional Abuse Inquiry have an effective remedy, including access to thorough and effective independent investigations that offer effective redress (including compensation) and are subject to public scrutiny and meaningful victim participation.



## Mechanisms to identify victims of torture detained in immigration facilities

In 2013, the UN CAT Committee recommended that the UK Government:

*conduct an immediate independent review of the application of Rule 35 of the Detention Centre Rules in immigration detention, in line with the Home Affairs Committee's recommendation and ensure that similar rules apply to short term holding facilities.*<sup>315</sup>

In NI, irregular migrants are detained at Larne House short term holding facility.<sup>316</sup> Detainees are held for a maximum period of five days, or seven if removal directions have already been served. Detainees are then released, transferred to Immigration Removal Centres elsewhere in the UK, or removed (including to Ireland). The Immigration Detention Centre Rules make provision for the regulation and management of detention centres.<sup>317</sup> The Rules provide for matters such as the welfare and health care of immigration detainees. Rule 35(3) of the Detention Centre Rules places an obligation on a medical practitioner to report to the manager of the Centre any detained person who he/she is concerned may have been the victim of torture.

The Detention Centre Rules do not apply to Larne House, due to its classification as a short term holding facility. In January 2016, a review of the welfare of immigration detainees by Stephen Shaw, the former Prisoner and Probation Ombudsman for England and Wales, noted the absence of rules governing short term holding centres.<sup>318</sup> It recommended that a discussion draft of the short term holding centre rules be published as a matter of urgency. Following this review in March 2018, the Secretary of State for the Home Department laid the Short-term Holding Facility Rules 2018 before Parliament and these became law on 2 July 2018.

The Rules provide:

<sup>315</sup> CAT/C/GBR/CO/5, 'UN Committee against Torture, Concluding observations on the Fifth Periodic Report of the UK of Great Britain and NI' 6 May 2013, at para 30.

<sup>316</sup> Email correspondence between UK Border Agency and NI Human Rights Commission, 26 March 2013.

<sup>317</sup> The Detention Centre Rules 2001.

<sup>318</sup> Stephen Shaw, 'Review into the Welfare in Detention of Vulnerable Persons' (Home Office, 2016), at Recommendation 21.

*where a health care professional has concerns that a detained person may have been a victim of torture this must be reported to the manager.*<sup>319</sup>

The Rules are to be reviewed following one year of their operation.<sup>320</sup>

### Recommendation

The Commission recommends that the UK Government ensure the Short Term Holding Facilities Rules are effectively implemented to ensure the identification of victims of torture. It calls on the Home Office to increase the effectiveness of inspections and oversight at Larne House.



## Prison review and conditions

### Complaints

The NI Prisoner Ombudsman received 1,953 complaints from prisoners between April 2017-March 2018, which marked a 55 per cent decrease from the previous year. 167 of complaints received were submitted by integrated prisoners, with 1,786 complaints received from separated prisoners on Roe 3 and 4 landings at Maghaberry Prison.<sup>321</sup> The NI Prisoner Ombudsman made 134 recommendations for improvement in response to prisoners' complaints. As of September 2018, 76 per cent of these recommendations had been accepted by the NI Prison Service, with nine per cent having been rejected, and 15 per cent awaiting a decision.<sup>322</sup>

### Health and social care

In 2015, the UN Human Rights Committee recommended robust measures:

*to prevent self inflicted deaths (suicides), including suicides and self-harm in custody, inter alia by:*

- a) Studying and addressing the root causes of the problem, continuing improving the identification of persons at risk of suicide and self-harm and operating effective early prevention strategies and programmes;*
- b) Providing adequate training to prison officials on suicide and self-harm prevention;*
- c) Ensuring adequate protection of, and appropriate mental health and other support services to, prisoners;*
- d) Combating bullying in custody facilities effectively.*<sup>323</sup>

In 2016, the Department of Justice and Department of Health consulted on a strategy to improve health within the criminal justice system. The draft strategy considered the health needs of prisoners. The Commission

319 Short-term Holding Facility Rules 2018.

320 Department of Justice, 'Explanatory Memorandum to the Short Term Holding Centre Rules' (DoJ, 2018), at para 12.1.

321 Prisoner Ombudsman NI, 'Annual Report 2017-18' (PONI, 2018), at 14.

322 Ibid, at 15.

323 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 16.

responded advising on the need to address the recommendation made by the UN Human Rights Committee and to ensure the strategy addresses both the health and social care needs of prisoners.<sup>324</sup> In addition, the Commission highlighted the need to ensure adequate social care provision within prisons. The draft strategy and action plan has not been published; nonetheless, the Commission understands that officials are applying the draft strategy and action plan in the delivery of healthcare services throughout the criminal justice system.

In November 2015, a report on an independent inspection of Maghaberry Prison revealed that significant failures in local leadership combined with an ineffective relationship within senior management of the NI Prison Service contributed to the prison becoming unsafe and unstable for prisoners and staff.<sup>325</sup> Subsequent reports have identified a number of improvements. However, on 22 August 2017, a report of an unannounced inspection of Maghaberry prison recorded:

*there were major shortcomings in the care and support provided to the most vulnerable men in the population of Maghaberry and we were not confident that lessons were being learned from previous self-inflicted deaths in custody. There had been 11 self-inflicted deaths at the prison since 2012 and three in 2016. The death in custody action plan was not being effectively reviewed to drive improvements; minutes of the strategic safer custody meeting did not reflect meaningful discussions about the issues it raised; it was not clear what action had been taken and when; some actions were blank, some contradictory and it was not clear that all the recommendations had been clearly understood. This was a very concerning picture.*<sup>326</sup>

Between January 2007 and September 2018, 50 prisoners have died in NI's prisons. The Prison Ombudsman has confirmed 27 were self-inflicted, 21 were deaths by natural causes and two cannot be easily classified.<sup>327</sup> During the period April 2017 to March 2018, the NI Prisoner Ombudsman commenced investigations into three deaths in custody. One involved a prisoner at Magilligan Prison and two involved prisoners at Maghaberry Prison. The deaths occurred in May, August and September 2017. Two of the deaths appeared to be self-inflicted, whilst the third person appeared to die from natural causes. The NI Prisoner Ombudsman made nine recommendations for improvement in the two death in custody reports that were published; these included two recommendations for the NI Prison Service and seven recommendations for the South Eastern Health and Social Care Trust.<sup>328</sup> All recommendations were accepted, with implementation pending. Since November 2014, 195 recommendations have been made in 13 death in custody reports by the Prison Ombudsman. Of these 173 were accepted by the NI Prison Service and South Eastern Health and Social Care Trust, including 42 recommendations that had

324 NI Human Rights Commission, 'Submission of the NI Human Rights Commission to the Department of Justice and Department of Health Consultation on Improving Health within Criminal Justice' (NIHRC, 2016).

325 Criminal Justice Inspection NI, 'Report on an Unannounced Inspection of Maghaberry Prison 11-22 May 2015' (CJINI, 2015).

326 National Preventative Mechanism, 'Report of an Unannounced Visit to Maghaberry Prison 3-4 April 2017: To Review Progress against the Nine Inspection Recommendations Made in 2015' (NPM, 2017), at 11.

327 Claire Smyth, 'Call for independent inquiry after 206 prisoner deaths in 12 years', *The Detail*, 27 September 2018.

328 Prisoner Ombudsman NI, 'Annual Report 2017-18' (PONI, 2018), at 21.

been previously made and accepted.<sup>329</sup> Commenting on this, the Chief Inspector of the Criminal Justice Inspection NI who is overseeing the work of the Prisoner Ombudsman NI's office until a successor is appointed, Mr Brendan McGuigan, stated:

*I acknowledge that the NI Prison Service and South Eastern Health and Social Care Trust have demonstrated their willingness to work to improve prisoner safety by accepting the recommendations made as a result of death in custody investigations. However, it is a matter of concern that recommendations which have been accepted have not been implemented and on many occasions, recommendations have been repeated. This is an issue which my predecessor Tom McGonigle raised with the then Ministers of Justice and Health in November 2014.*<sup>330</sup>

Since the retirement of the previous Prison Ombudsman on 31 August 2017, the office of Prisoner Ombudsman has been vacant. The appointment of a successor is the responsibility of the Minister for Justice for NI, which is not possible due to the suspension of the NI Assembly. Throughout 2018, the Chief Inspector of Criminal Justice Inspection NI, Mr Brendan McGuigan, has overseen the work of the Prisoner Ombudsman's office.

In August 2018, the Commission conducted a visit to Maghaberry Prison to review the regime and assess compliance with international human rights standards. The Regional Quality Improvement Authority also published its audit of forensic mental health and learning disability services in October 2018. The report found:

*information collected regarding the location within the NI Prison Service from which patients were accepted for admission to Shannon Clinic Regional Secure Unit, over the seven year period from 2010 to 2016, showed a significant proportion coming from the Care and Supervision Unit, following closure of the residential healthcare facility in 2013. The residential healthcare facility, 'healthcare wing', was a high support landing where acutely mentally unwell prisoners could be located and it had 24 hour coverage by general and mental health staff. From 2014-2016, of the total of 31 patients accepted from the NI Prison Service there were 10 referrals accepted from the Care and Supervision Unit to Shannon Clinic Regional Secure Unit compared to none of the 50 referrals accepted from the NI Prison Service between 2010 and 2013.*<sup>331</sup>

The Regional Quality Improvement Authority acknowledged that:

*the placement of mentally ill people within conditions of segregation such as within the Care and Supervision Unit can be detrimental to their mental wellbeing and is not in keeping with the principle of equivalence of care between prison and the wider community. It has also been shown by forensic services in Dublin that the use of*

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329 Claire Smyth, 'Call for independent inquiry after 206 prisoner deaths in 12 years', *The Detail*, 27 September 2018.

330 Ibid.

331 The Regulation and Quality Improvement Authority, 'Baseline Audit of Forensic Mental Health and Learning Disability Services - Adult Services' (RQIA, 2018), at 32.

*seclusion can be reduced by providing a high support unit within a prison.*<sup>332</sup>

It recommended that:

*the Prison Health Commissioning Team should in partnership with NI Prison Service/South Eastern Health and Social Care Trust re-assess the need for a residential healthcare facility within Maghaberry prison.*<sup>333</sup>

Commenting on the report, Dr Adrian East from the Royal College of Psychiatrists in NI, stated:

*the audit presents clear evidence that, in the absence of such a facility, some mentally disordered offenders are being managed in the Care and Supervision Unit in conditions of segregation... Segregating mentally disordered prisoners from the general prison population is harmful to their mental health... Any such segregation must be for the shortest period of time possible and closely monitored... We believe that the residential prison healthcare facility should be re-opened.*<sup>334</sup>

In April 2018, the Criminal Justice Inspection NI conducted an unannounced inspection of Maghaberry Prison. The report on this inspection, which was published in November 2018, concluded that a number of improvements had taken place within Maghaberry, but:

*care planning required improvement, not just to keep prisoners safe but to focus on helping them solve their problems. Families needed more involvement in this process. There were too few Listeners to provide cover for all the men who needed support. A number of Listeners were in training for the role.*<sup>335</sup>

In November 2018, informed by its visit to Maghaberry Prison and an earlier visit to Magilligan Prison in 2017, the Commission hosted a roundtable on the rights of older and disabled prisoners to social care.

## Education

In 2017, responsibility for the provision of education and vocational services in Woodlands Juvenile Justice Centre was transferred from the NI Prison Service to the Department of Education. In May 2018, the Commission met with the staff at the Centre to confirm that the transfer had been successfully executed. The Commission was pleased to note a positive working relationship between the Department for Education and the Youth Justice Agency.

<sup>332</sup> Ibid.

<sup>333</sup> Ibid, at 35.

<sup>334</sup> Claire Smyth, 'Call for re-opening of residential healthcare facility at Maghaberry Prison', *The Detail*, 30 October 2018.

<sup>335</sup> Criminal Justice Inspectorate NI, 'Report on an Unannounced Inspection of Maghaberry Prison (9-19 April 2018) by the Chief Inspector of Criminal Justice in NI; Her Majesty's Chief Inspector of Prisons; the Regulation and Quality Improvement Authority; and the Education and Training Inspectorate' (CJINI, 2018), at Executive Summary.

## Recommendation

The Commission recommends that the Department of Justice and Department of Health publish and implement the strategy on improving health and social care within prisons. This should include a commitment to implement robust measures aimed at preventing self-inflicted deaths, suicides and self-harm in custody. The Commission calls on the Department of Health and Department of Justice to clearly set out the body responsible in NI for the social care of prisoners and ensure specific actions and appropriate resources are allocated to this service.

The Commission also recommends that effective steps are taken by the NI Prison Service to address complaints, with a focus on long-term solutions. Furthermore, the Commission urges the NI Prison Service and South Eastern Health and Social Care Trust to effectively implement the NI Prison Ombudsman's recommendations without delay.

## Physical punishment of children

In July 2016, the UN CRC Committee again recommended an abolition of corporal punishment of children in the UK, recommending that the UK Government and NI Executive:

- a) *Prohibit as a matter of priority all corporal punishment in the family, including through the repeal of all legal defences, such as 'reasonable chastisement';*
- b) *Ensure that corporal punishment is explicitly prohibited in all schools and educational institutions and all other institutions and forms of alternative care;*
- c) *Strengthen its efforts to promote positive and non-violent forms of discipline and respect for children's equal right to human dignity and physical integrity, with a view to eliminating the general acceptance of the use of corporal punishment in child-rearing.*<sup>336</sup>

The Law Reform (Miscellaneous Provisions) (NI) Order 2006 continues to allow for a defence of reasonable punishment of a child, and provides that this is a defence to a charge of common assault tried summarily. In Ireland, the Children Act 2011 and Children First Act 2015 abolished the statutory and common law defence of reasonable chastisement. In Scotland, a Bill to prohibit the physical punishment of children by parents and others caring for them was published in September 2018 and is likely to pass after receiving backing from the Scottish Government.<sup>337</sup>

In February 2017, the UK Government, in its national report for the Universal Periodic Review, stated that it:

<sup>336</sup> CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 40.

<sup>337</sup> 'Smacking ban bill published at Holyrood', *BBC News*, 7 September 2018.

*does not condone any violence towards children and has clear laws to deal with it. But parents should not be criminalised for giving a child a mild smack in order to control their behaviour.*<sup>338</sup>

In 2017, the Commission highlighted the UN CRC Committee's recommendation to the Department of Justice, who indicated that statistics are not currently collated on the number of cases in which the defence of reasonable chastisement is successfully pleaded.<sup>339</sup> In 2018, the Commission has met with the Public Prosecution Service to seek to address the absence of statistics and has written to the Department of Justice to raise the issue with the Permanent Secretary.<sup>340</sup>

In October 2018, the findings of an ecological study of 88 countries were published in the British Medical Journal Open, which reported that:

*in countries where full bans on corporal punishment were in force, the prevalence of physical fighting was 69 per cent lower among young men and 42 per cent lower among young women than it was in countries without any ban. In countries operating a partial ban, which include the UK, the USA and Canada, the prevalence of physical violence was lower only among young women (56 per cent).*<sup>341</sup>

The researchers believed that:

*these results support the hypothesis that societies that prohibit the use of corporal punishment are less violent for youth to grow up in than societies that have not.*<sup>342</sup>

## Recommendation

The Commission recommends that the Department of Justice repeal the defence of reasonable chastisement of a child and devise and implement a strategy to effectively promote positive and non-violent forms of discipline and respect for children's equal right to human dignity and physical integrity, with a view to eliminating the use of physical punishment in child-rearing.



## Strip searches

The Commission has previously acknowledged that the NI Prison Service is committed to the development of a modern approach to searching persons that is less intrusive than the current methods.<sup>343</sup> A trial of millimetre wave scanning equipment had proved unsuccessful and preparation was being made to pilot an x-ray scanner. The pilot of the x-ray scanner was also delayed due to the need to obtain statutory approvals. The Commission has been informed that an alternative

<sup>338</sup> HM Government, 'Universal Periodic Review, UK, British Overseas Territories and Crown Dependencies National Report' (HM Government, 2017), at para 78.

<sup>339</sup> Correspondence to Mr Nick Perry, Permanent Secretary, Department of Justice from NI Human Rights Commission, September 2017.

<sup>340</sup> Correspondence to Mr Nick Perry, Permanent Secretary, Department of Justice from NI Human Rights Commission, 15 March 2018.

<sup>341</sup> British Medical Journal, 'Press Release: National bans on slapping children linked to less youth violence', 15 October 2018.

<sup>342</sup> Ibid.

<sup>343</sup> NI Assembly Committee for Justice, 'Prison Service Reform Programme: Update', 16 May 2013.

approach to strip searches has not yet been identified. However, it is noted that the Department of Justice continue to consider options.

On 15 March 2016, the NI High Court granted an order of certiorari quashing the policy of the NI Prison Service by which forced strip search procedures are recorded on a video camera and then retained for a period of 6 years. The NI High Court found that:

*a search involving the removal of clothing engages Article 8 ECHR. Nakedness is inherently private and forcing it upon someone cannot but engage one's right to privacy.*<sup>344</sup>

As such, an interference with Article 8 must be in accordance with law with a sufficient basis in domestic law, the NI High Court considered:

*the policy of video recording full searches of prisoners are manifestly insufficient to provide such a basis.*<sup>345</sup>

In October 2017, in correspondence with the Commission the NI Prison Service confirmed that the procedure for the video recording of full searches of prisoners has been suspended. This was confirmed during the Commission's visit to Maghaberry in August 2018. The NI Prison Service believes that video recording of full searches helps to safeguard prisoners and prison staff and is considering options that may be available to reintroduce this practice in a way that is in line with Article 8 ECHR.

### Recommendation

The Commission continues to call on the Department of Justice to develop and implement less intrusive methods of searching persons.



## Syrian refugee crisis and unaccompanied child refugees

### Vulnerable Persons Relocation Scheme

In 2016, the Commission raised concerns about the outstanding Refugee Integration Strategy to the UN ICERD Committee.<sup>346</sup> European Commission against Racial Intolerance has also recommended that a refugee integration strategy is developed in NI:

*to assist newly-arrived refugees, in particular as concerns housing, employment, access to welfare and learning English, and that refugee integration is systematically evaluated.*<sup>347</sup>

In September 2015, the UK Government announced a significant expansion of the Vulnerable Persons Relocation Scheme to resettle up to 20,000 Syrian refugees over the course of the current UK Parliament.<sup>348</sup> This commitment has been criticised for not representing a:

<sup>344</sup> *Flannigan's Application* [2016] NIQB 27, at para 44.

<sup>345</sup> *Ibid.*, at para 48.

<sup>346</sup> NI Human Rights Commission, 'Submission to the UN Committee on the Elimination of Racial Discrimination: Parallel Report on the 21st to 23rd Periodic Reports of the UK under the International Convention on the Elimination of All forms of Racial Discrimination' (NIHRC, 2016), at para 65.

<sup>347</sup> CRI(2016)38, 'European Commission against Racial Intolerance Report on the UK (Fifth Monitoring Cycle)', 4 October 2016, at para 116.

<sup>348</sup> Department for Communities, 'Syrian Vulnerable Persons Relocation Scheme: Briefing Document' (DFC, 2017), at 5.



*fair and proportionate share of refugees, both those already within the EU and those still outside it.*<sup>349</sup>

The Scheme is limited to displaced refugees living in camps and countries neighbouring Syria, principally Turkey, Jordan and Lebanon. It does not extend to asylum seekers in Europe or in countries such as Libya.<sup>350</sup> The Scheme is based on need. It prioritises those who cannot be supported effectively in their region of origin, such as women and children at risk, people in severe need of medical care, and survivors of torture and violence. Individuals accepted under the Scheme are granted refugee status (which offers swifter access to student support for those in higher education and an internationally recognised refugee travel document) and entitled to humanitarian protection status for five years, after which time this status is subject to review. Humanitarian protection status offers access to employment, public funds and rights to family reunion.

Between December 2015 and October 2018, 1,181 Syrian refugees were welcomed to NI via this scheme.<sup>351</sup>

Three government-level groups have been established to accommodate the arrival of Syrian refugees to NI.<sup>352</sup> The Executive Office leads a Strategic Planning Group. The Department for Communities leads an Operational Planning Group and has established a Local Government Engagement Group.

The Vulnerable Syrian Refugee Consortium, a collective of local voluntary sector organisations appointed by the Department for Communities provide assistance to refugees on their arrival. These services are funded by the Home Office, which provides at least £11,120 per refugee to cover the first year's costs. The Home Office also provides reducing levels of financial support for the resettlement of the refugees for up to 5 years after their arrival. Additional money may be available to cover additional educational costs and medical costs for any complex needs cases.<sup>353</sup> Furthermore, the Home Office provides £4,500 for the educational costs of a Syrian child aged 5-8 years old and £2,250 for Syrian children aged 3-4 years old for up to one year. In December 2017, the Department of Education received the almost £650,000 that it was owed for this purpose since August 2016. The Home Office has been criticised for this delay.<sup>354</sup>

The NI Housing Executive assists the refugees to identify appropriate permanent housing solutions under the standard homelessness procedures.<sup>355</sup> The Department for the Economy has arranged formal English language classes in the Regional Colleges. The Vulnerable Persons Relocation Scheme has a sub-group with partners from the community,

349 Lawyers Refugee Initiative, 'Press Release: Refugee Crisis, Call from the Legal Community for Urgent Action', 12 October 2015.

350 Department for Communities, 'Syrian Vulnerable Persons Relocation Scheme: Briefing Document' (DfC, 2017), at 5.

351 Department for Communities, 'Syrian Vulnerable Persons Relocation Scheme: Briefing Document, Department for Communities - October 2018' (DfC, 2018).

352 Department for Communities, 'Syrian Vulnerable Persons Relocation Scheme: Briefing Document' (DfC, 2017), at 10-11.

353 Ibid at 11.

354 'Department of Education receives £650,000 to educate Syrian refugees', *Belfast Telegraph*, 21 December 2017.

355 Department for Communities, 'Syrian Vulnerable Persons Relocation Scheme: Briefing Document - October 2018' (DfC, 2018), at 11.

statutory and private sectors who actively run employability projects including work placements and training initiatives.<sup>356</sup>

In July 2018, Participation and the Practice of Rights published a report into substandard housing conditions and recurrent racist abuse experienced by Syrian refugees in Belfast.<sup>357</sup>

A Good Practice Charter has been developed by the Department of Communities to:

*ensure that the rights of Syrian families to privacy and family life are upheld and that best practice is adhered to by everyone while supporting these families to integrate into NI.*<sup>358</sup>

This guidance is centred around five key principles: a rights-based approach; an empowering approach; a person-centred approach; a consent-driven approach; and a collaborative approach.<sup>359</sup>

### **Vulnerable Children's Resettlement Scheme**

In April 2016, the UK Government introduced the Vulnerable Children's Resettlement Scheme.<sup>360</sup> This scheme is specifically tailored to support vulnerable and refugee children at risk and their families of any nationality (including Syrian), located in the Middle East and North Africa region (Turkey, Egypt, Lebanon, Iraq and Jordan). As of June 2017, 280 individuals had been resettled under this scheme in the UK, two of which were Syrian.<sup>361</sup> The statistics on how many were resettled to NI are unavailable. It is intended that 3,000 will be resettled under this Scheme by 2020; this is in addition to those resettled under the Vulnerable Persons Relocation Scheme.

### **Unaccompanied refugee children**

In 2016, 63,300 unaccompanied minors were among asylum seekers registered in the EU. Of this figure, 38 per cent were Afghan and 19 per cent were Syrian.<sup>362</sup>

Section 67 of the Immigration Act 2016 legislates for the Dubs Amendment Scheme. Section 67(1) of the Immigration Act 2016 commits the Secretary of State to:

*make arrangements to relocate to the UK and support a specific number of unaccompanied refugee children from other countries in Europe.*

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356 Ibid, at 14.

357 Participation and the Practice of Rights, 'We Came for Sanctuary: Syrian Refugee Families' Experience of Racism and Substandard Housing Conditions in West Belfast, Participation and Practice of Rights' (PPR, 2018).

358 Department for Communities, 'Syrian Vulnerable Persons Relocation Scheme: Briefing Document, Department for Communities - October 2018' (DfC, 2018), at 16.

359 Ibid.

360 Home Office, 'Press Release: New scheme launched to resettle' 21 April 2016.

361 Home Office, 'National Statistics, Volume 7.4 as 19 q Refugees (and others) resettled, including dependants, by country of nationality' (Home Office, 2017).

362 'Asylum applicants considered to be unaccompanied minors: 63,000 unaccompanied minors among asylum seekers registered in the EU in 2016', Eurostat, 11 May 2017.

Under Section 67(2) of the 2016 Act, the number of children to be resettled shall be determined by the Government in consultation with local authorities.

Section 67(3) of the 2016 Act confirms the determined number is in addition to the resettlement of children under the Vulnerable Persons Relocation Scheme. These provisions extend to NI.<sup>363</sup>

Lord Dubs, who introduced these provisions, had hoped 3,000 of the most vulnerable unaccompanied refugee children would benefit from section 67 of the 2016 Act. However, the UK government announced that the specific number of children to be transferred under section 67 will be 480.<sup>364</sup> This number was determined by the apparent capacity of local authorities. It includes those children already transferred under this scheme and is exclusive of children transferred under the family reunion criteria of the Dublin III Regulation. In February 2017, 200 children had been resettled by the scheme. In November 2017, the UK government stated it remained committed to transferring 480 children in total under this scheme. To date, no children have been resettled in NI under this scheme.<sup>365</sup>

In June 2017, the English High Court heard a legal challenge from Help Refugees against the UK government over the number of unaccompanied child refugees accepted to the UK under section 67 of the Immigration Act 2016. It is alleged that the Home Office adopted a seriously defective process to measure the capacity of local councils to take in child refugees on the basis that many local authorities were not properly consulted. This includes the fact that a consultation was not conducted in NI. The case was dismissed by the High Court.<sup>366</sup> However, an appeal was heard by the England and Wales Court of Appeal in July 2018, with publication of the judgment in October 2018. The Court of Appeal agreed with the High Court, acknowledging the complex nature of the consultation process with the local authorities, conceding that, while cruel, the reliance on percentage-based responses on capacity from local authorities was not irrational or arbitrary. The Court was of the view that the absence of a specified closing date and the confusion around the effect of responding to the consultation process was also immaterial. However, the Court of Appeal did find that the process of informing unsuccessful applicants that the criteria was not met, with no other details given, was a breach of duty of fairness. The Court ruled that all children seeking asylum in the UK are entitled to know the reasons for their rejection, so as to facilitate the appeal of such decisions.<sup>367</sup>

In June 2018, the England and Wales Court of Appeal heard a separate related challenge to the expedited process established by the British and French governments and conducted in Calais in the days leading up to the Jungle's demolition in October 2016. The applicants argued that the process did not comply with Dublin III Regulation. In July 2018, the Court

<sup>363</sup> Section 67, Immigration Act 2016.

<sup>364</sup> Home Office, 'Policy Statement: Section 67 of the Immigration Act 2016' (Home Office, 2017).

<sup>365</sup> Correspondence between Home Office Officials and NI Human Rights Commission, 18 September 2017.

<sup>366</sup> Amelia Gentleman, 'Legal challenge to cap on Dubs child refugee scheme fails', *The Guardian*, 2 November 2017.

<sup>367</sup> *Help Refugees Limited v Secretary of State for the Home Department and the Aire Centre* [2018] EWCA Civ 2098.

of Appeal rejected the arguments under the Dublin III Regulation, but found that:

*there was a serious breach of duty of candour and co-operation by the Secretary of State in this case... [and] that the process adopted in this case was unfair and unlawful as a matter of common law.*<sup>368</sup>

The House of Commons Home Affairs Committee suggested that a further 4,000 places could be available if councils received appropriate funding from central government.<sup>369</sup> The Home Office responded:

*the methodology used to come to a figure of 4,000 is flawed because it assumes that all local authorities would be able to absorb large numbers of unaccompanied asylum seeking children with very specific and diverse needs in a short period of time.*<sup>370</sup>

Yvette Cooper, the Chair of the Home Affairs Committee, found the government's approach to be 'completely inadequate'.<sup>371</sup>

### **Racial Equality Strategy**

The Racial Equality Strategy 2015-2025 was published in December 2015.<sup>372</sup> It includes initiatives relevant to refugees and asylum seekers, such as their inclusion in the membership of the Racial Equality Subgroup, financial support, educational opportunities, and the development of a Refugee Integration Strategy. In June 2017, officials stated they were preparing a draft strategy for consultation, which at the time of writing remained pending.<sup>373</sup> Such a strategy would bring NI into line with Scotland and Wales. It is acknowledged refugee integration is a particular issue for NI as:

*integration is more difficult in a divided society, both in terms of acceptance in communities that have experienced conflict... [and] in terms of the newcomers being seen within the parameters of the conflict.*<sup>374</sup>

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368 *Citizens UK v Home Department* [2018] EWCA Civ 1812.

369 House of Commons Home Affairs Committee, 'Unaccompanied Child Migrants', (HC, 2017).

370 House of Commons Home Affairs Committee, 'Unaccompanied Child Migrants: Government Response to the Committee's Thirteenth Report of Session 2016-17' (HC, 2017), at 2.

371 Andrew Sparrow, 'Efforts to resettle child refugees under Dubs scheme "completely inadequate"', *The Guardian*, 22 December 2017.

372 The Executive Office, 'Racial Equality Strategy 2015-2025' (TEO, 2015).

373 NI Executive, 'Together: Building a United Community Update Report' (NI Executive, 2017), at 4.

374 Michael Potter, 'Refugees and Asylum Seekers in NI' (NI Assembly, 2014), at 14.

### Recommendation

The Commission calls on the UK Government to increase its commitment beyond receiving 20,000 Syrian refugees by 2020, as this figure does not represent a fair and proportionate share of refugees in need of relocation. The Commission calls on the Home Office and NI Executive to put in place arrangements to ensure NI accommodates a proportionate number of unaccompanied asylum seeking children and refugees, such as joining the scheme set up under section 67 of the Immigration Act 2016. The Commission also calls on the Home Office and NI Executive to ensure that the resources are in place to effectively support all refugees resettled in NI. It further highlights the pending Refugee Integration Strategy in NI and recommends the implementation of this Strategy is expedited to assist newly-arrived refugees.

The Commission further calls on the Home Office to take the required steps, including within NI, to remedy and address the violations found by the England and Wales Court of Appeal in the cases brought by Help Refugees and Citizens UK.

## Freedom from slavery

<b>ECHR</b>	Article 4
<b>CRC</b>	Article 34 Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography
<b>ICCPR</b>	Article 8
<b>Charter of Fundamental Rights of the EU</b>	Article 5

### Child, early and forced marriage

In May 2016, the UN CRC Committee recommended that the UK Government and the NI Executive raise the minimum age of marriage to 18 years.<sup>375</sup> The UN CRC Committee, General Comment No 4,<sup>376</sup> strongly recommends the review and, where necessary, reform of legislation and practice to increase the minimum age for marriage to 18 years, for both girls and boys. The UN CRC Committee's General Comment No 20 reaffirmed:

*that the minimum age limit should be 18 years for marriage.*<sup>377</sup>

In July 2018, the Commission raised this issue with Lilian Hofmeister, the UK Country Rapporteur for the UN CEDAW Committee's Pre-Sessional Working Group.

The Marriage (NI) Order 2003, which is a responsibility of the Department of Finance, permits the marriage of a child aged 16 or 17 years with the consent of their parents or legal guardians or the courts. In 2017, 52 children in NI (40 girls and 12 boys) were married.<sup>378</sup>

From 2015-2018, the Commission chaired the Commonwealth Forum of National Human Rights Institutions. The Forum is an informal and inclusive body of Commonwealth National Institutions for the Promotion and Protection of Human Rights and other national accountability mechanisms with a human rights mandate. As a member of the Forum, the Commission is a signatory to the Kigali Declaration on the elimination of child, early and forced marriage in the Commonwealth. The Declaration notes that national human rights institutions are:

*concerned by estimates that over the next decade 140 million girls under the age of 18 years will be forced to marry and that half of these girls live in Commonwealth Member States.*<sup>379</sup>

375 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 19.

376 CRC/GC/2003/4, 'UN Committee on the Rights of the Child, 'General Comment No 4, Adolescent Health and Development in the Context of the Convention on the Rights of the Child'', 1 July 2003, at para 20.

377 CRC/C/GC/20, 'UN Committee on the Rights of the Child General Comment No 20 (2016) on the Implementation of the Rights of the Child during Adolescence', 6 December 2016, at para 40.

378 Correspondence between NI Statistics and Research Agency and NI Human Rights Commission. 9 November 2018.

379 Commonwealth Forum of National Human Rights Institutions, 'Kigali Declaration Moving from Aspiration to Action to Prevent and Eliminate Child, Early and Forced Marriage in the Commonwealth', 6 May 2015.

In September 2018, the Marriage and Civil Partnership (Minimum Age) Bill 2017-19 was introduced to the House of Commons under the ten minute rule. The Bill seeks to raise the minimum age of consent to marriage or civil partnership to eighteen. At the time of writing, the second reading of the Bill is awaited.

### Recommendation

The Commission recommends that the Department of Finance introduce legislation to repeal all legal provisions permitting the marriage of children in NI and increasing the minimum age for marriage to 18 years, for both girls and boys.

## Child sexual exploitation

### Inquiry

An Independent Inquiry into Child Sexual Exploitation in NI was initiated by the Ministers for Health, Justice and Education in 2013 and published its report in November 2014. The Inquiry report includes 17 key recommendations and 60 supporting recommendations for improvement in combating child sexual exploitation, outlining measures for improved inter-agency working, education and awareness raising, training for professionals, funding of preventative services, engagement with communities, support for victims and the development of a regional strategy.<sup>380</sup>

The recommendations address the need for legislative reform in a number of areas, including addressing a gap in protection under the Sexual Offences (NI) Order 2008.<sup>381</sup> Presently for a number of serious sexual offences against children aged between 13 and 18 years the defendant may claim that he/she believed the victim to be above 16 years. Thus, this requires the prosecution to prove that the defendant did not reasonably believe this.

In October 2018, the Commission met with the Department of Justice who stated that the Department plans to commence a consultation in November 2018 that considers a number of proposals aimed at implementing the Inquiry's recommendations.<sup>382</sup>

380 Kathleen Marshall, 'Child Sexual Exploitation in NI Report of the Independent Inquiry' (RQIA, 2014), at 149.

381 Ibid, at Recommendation 14.

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

## Sexual Offences (NI) Order 2008

In its 2014 report on the compatibility of the UK with the Optional Protocol on the sale of children, child prostitution and child pornography, the UN CRC Committee raised concerns that:

*the Sexual Offences (NI) Order 2008, for certain grave offences of sexual exploitation of children between 13 and 16 years of age, such as meeting a child following sexual grooming, engaging in sexual activity with a child, arranging or facilitating a child sex offence, the defendant may claim that he/she believed the victim to be above 16 years.*<sup>383</sup>

The UN CRC Committee recommended reform to the 2008 Order to include:

*a provision that for child victims, the burden of proof would be reversed.*<sup>384</sup>

The Commission reported to the UN CRC Committee on the issue of child sexual exploitation again in 2016, advising that:

*no measures have been taken to ensure that all children up to 18 years of age are protected from all types of offences covered by the Optional Protocol.*<sup>385</sup>

In its report the UN CRC Committee noted that:

*the Sexual Offences Act (2003) in England and Wales and the Sexual Offences (NI) Order (2008) have not been revised to provide full and equal protection to all children under 18 years of age.*<sup>386</sup>

The Department of Justice's Tackling Child Sexual Exploitation in NI Action Plan contains a commitment to consider the 2008 Order and its compatibility with international standards.<sup>387</sup> In September 2016, a progress report on implementation of the Action Plan was issued which recorded that:

*work is continuing towards establishing possible provisions to bring forward for future consultation and presentation to the NI Assembly.*<sup>388</sup>

The progress report therefore did not indicate clear progress towards implementation of the UN CRC Committee's recommendation. Following publication of this report, the Commission met with the then Minister of Justice who informed the Commission of the intention to consult on proposals for reform in April 2017. Due to the suspension of the NI Assembly, proposals for reform have not been published.

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383 CRC/C/OPSC/GBR/CO/1, 'UN Committee on the Rights of the Child, Concluding Observations on the Report Submitted by the UK of Great Britain and NI under Article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography', 8 July 2014, at para 27.

384 Ibid, at para 29.

385 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016.

386 Ibid.

387 Department of Justice, 'Tackling Child Sexual Exploitation in NI: Action Plan' (DoJ, 2015).

388 Department of Justice, 'Tackling Child Sexual Exploitation: Second Progress Report 01 October 2015 to June 2016' (DOJ, 2016).



In June 2018, the UK ratified the Council of Europe Convention on the Protection of Children and Young People against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention).<sup>389</sup> In October 2018, the Lanzarote Convention entered into force in the UK.<sup>390</sup> Parties to the Convention, including the UK Government, are required to undertake preventative measures to combat child sexual exploitation<sup>391</sup> and to take additional steps to raise awareness of the issue amongst children and those who work with children.<sup>392</sup> The Convention further provides a definition of the sexual abuse of children<sup>393</sup> and requires States to prohibit the corruption of children<sup>394</sup> and the solicitation of children via the internet for the purpose of committing sexual abuse<sup>395</sup> and the aiding and abetting of offences against children.<sup>396</sup>

The UK's ratification of the Lanzarote Convention underscores the need for the reform of 2008 Order. In July 2018, the Commission raised its concerns around the burden of proof concerning payment for the sexual services of a child with the UN CEDAW Committee at its Pre-Sessional Working Group.<sup>397</sup>

### Recommendation

The Commission remains deeply concerned that a defendant charged under the Sexual Offences (NI) Order 2008 may claim that he/she believed the victim to be above 16 years, thus requiring the prosecution to prove that the defendant did not reasonably believe this. It calls on the Department of Justice to expedite the fulfilment of its human rights obligations as required by the Convention on the Rights of the Child and to introduce legislation to ensure the burden of proof is reversed to protect child victims of sexual offences.

### Children missing from care

In 2016, the UNCRC Committee expressed concerns about the practice of children in NI being placed in secure accommodation and recommended that the NI Executive:

*ensure that secure accommodation in NI is only used as a measure of last resort and for the shortest possible period of time, address the reasons for repeated or lengthy stays in such accommodation and develop alternatives to secure accommodation.*<sup>398</sup>

<sup>389</sup> Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention), 25 October 2007.

<sup>390</sup> Home Office, 'Press Release: UK government ratifies Lanzarote Convention to tackle child sexual exploitation', 20 June 2018.

<sup>391</sup> Articles 4 and 5, Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention), 25 October 2007.

<sup>392</sup> Articles 6 and 7, Ibid.

<sup>393</sup> Article 18, Ibid.

<sup>394</sup> Article 22, Ibid.

<sup>395</sup> Article 23, Ibid.

<sup>396</sup> Article 24, Ibid.

<sup>397</sup> NI Human Rights Commission, 'Submission to the UN CEDAW Committee: Parallel Report to the Eighth Periodic Report Submitted by the UK of Great Britain and NI' (NIHRC, 2018), at 7-8.

<sup>398</sup> CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016.

In the course of the Commission's community engagements, the issue of children going missing from care facilities was raised on a frequent basis. According to data provided to the Commission by the Police Service NI, from April 2017 to March 2018, the police received 2871 missing persons reports from children's homes, relating to 197 children. During 2016/17, 21 children were reported missing more than 50 times and 2 were reported missing 95 or more times. The Police Service NI has expressed concerns regarding a 'revolving door' effect where a young person is returned to residential care, after which they subsequently abscond again. It has been noted that there is a 'particular link' between children going missing from care and child sexual exploitation.<sup>399</sup>

The Children (NI) Order 1995, Article 44, provides the circumstances under which a child can be placed in secure accommodation, including where they are likely to abscond and likely to suffer significant harm if they do abscond.<sup>400</sup> However, reports have suggested that the use of secure accommodation does not deal with the underlying issue in respect of going missing from care and that there is also a problem with accessing secure accommodation when it is needed.

In May 2017, the Commission met with the Police Service NI to discuss this issue further. During its visit to a secure accommodation unit in August 2017, the Commission discussed the issue of children missing from care. The Department of Health has noted that the issue of children in care 'going missing' continues to be one of 'particular focus' for the Department and the health and social care system.<sup>401</sup> In October 2017, the Health and Social Care Board and Police Service NI jointly hosted a Multi-Agency Workshop on Children Missing from Care, which the Commission attended.

In 2018, the Department of Health and the Department of Education consulted in respect of the draft strategy for Looked After Children.<sup>402</sup> Any outcomes from this consultation are subject to approval by the relevant Minister, which is hindered by the current suspension of the NI Executive. The Health and Social Care Board and the Police Service NI are currently carrying out work under a joint strategic action plan on Children Missing from Residential Care. It is expected that this work will be completed in March 2019. The Commission has also taken forward a project analysing the human rights issues relating to preventing children leaving care institutions without permission. It is anticipated that this will be finalised in March 2019.

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399 Safeguarding Board for NI, 'Getting Focused and Staying Focused, Looked After Children, Going Missing, and Child Sexual Exploitation, A Thematic Review' (QUB, 2015), at 25.

400 Article 44, Children Order (NI) 1995.

401 Correspondence from Department of Health to NI Human Rights Commission, 16 July 2018.

402 Department of Health and Department of Education, 'Strategy for Looked After Children: Improving Children's Lives' (DoH and DoE, 2018).

## Recommendation

The Commission is concerned at the number of children who have regularly gone missing from care and continues to monitor this situation, working with all parties involved. The Commission recommends that the key agencies develop a strategic, human rights based approach to address the factors contributing to the high number of children going missing from care.



## Modern slavery and human trafficking

The National Referral Mechanism is a framework operated by the National Crime Agency for identifying victims of human trafficking or modern slavery and ensuring they receive the appropriate support. Between April 2017 and March 2018, 36 potential victims of human trafficking were referred from NI. This figure included 17 adult males and 19 adult females. Recorded exploitation includes labour exploitation, domestic servitude and sexual exploitation.<sup>403</sup>

Between April 2017 and March 2018, the Police Service NI Modern Slavery and Human Trafficking Unit made eight arrests, conducted 22 searches under warrant and carried out 59 safeguarding visits/ non-warrant operations for labour and sexual exploitation. Over the same period, six persons were charged with modern slavery and human trafficking offences and/or related offences, and two persons were reported to the Public Prosecutions Service NI for human trafficking related offences.<sup>404</sup> In 2018, five persons were prosecuted and two convicted for trafficking in persons to NI for sexual exploitation.<sup>405</sup> The Police Service NI saw a potential upsurge in cases of modern slavery, with 33 victims identified in the first six months of 2018, compared to 36 in the whole of 2017.<sup>406</sup> During that same period, the Department of Justice's contracted support providers, Migrant Help and Women's Aid, supported 18 potential adult victims (three male and 15 female).<sup>407</sup> The Police Service NI highlighted that the actual number of people in NI affected by modern slavery is unknown, as it often goes unreported and undetected within the community.<sup>408</sup>

In July 2018, the Commission recommended to the UN CEDAW Committee at its Pre-Sessional Working Group that an up-to-date Human Trafficking and Exploitation Strategy for NI was published. It also recommended that effective steps were taken by the relevant authorities to address the root causes of human trafficking and exploitation, to ensure existing laws and policies are effectively implemented and to ensure specialised, accessible support for victims of human trafficking and

403 Police Service NI, 'Annual Report and Accounts for the Year Ended 31 March 2018' (PSNI, 2018), at 30.

404 HM Government, '2018 UK Annual Report on Modern Slavery' (HM Government, 2018), para. 2.34.

405 Ibid, Tables 28 and 29.

406 'Potential upsurge in modern slavery in NI', *ITV News*, 18 October 2018.

407 HM Government, '2018 UK Annual Report on Modern Slavery' (HM Government, 2018), at para. 2.125.

408 'Potential upsurge in modern slavery in NI', *ITV News*, 18 October 2018.

exploitation in NI is sufficiently and promptly available when required, and adequately funded, including equal access to social security benefits.<sup>409</sup>

### **Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (NI) 2015**

The Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (NI) 2015 places a requirement on the Department of Justice to produce an annual strategy to address offences related to slavery, servitude and forced or compulsory labour and human trafficking. In furtherance of this obligation, in July 2018, the Department of Justice issued a consultation paper on a draft NI Modern Slavery Strategy 2018-2019.<sup>410</sup> In its response to the strategy, the Commission raised a concern that the consultation exercise on the strategy would conclude six months into the financial year in which the strategy purports to operate. The Commission's response also raised a concern that there was no reference to working with the Department of Health to address the health of victims of sexual exploitation. The Commission recommended that the strategy take into consideration the impact of Brexit on modern slavery, particularly: the vulnerability of those individuals uncertain of settled status who may be at increased risk of exploitation, and the potential loss of the European arrest warrant. The Commission also recommended that the strategy include a commitment to ensure businesses fulfil their human rights obligations, including those within the Modern Slavery Act. The Department plans to publish the strategy in December 2018, but this is subject to Ministerial approval, which is inhibited by the suspension of the NI Executive.

### **Independent Guardian service**

In December 2016, the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) (Independent Guardian) Regulations (NI) 2016 came into operation.<sup>411</sup> The Regulations make provision for the appointment of independent guardians to assist, represent and support children who are believed to be victims of trafficking. The draft strategy makes provision for the roll out of an Independent Guardian service to assist, represent and support separated or trafficked children and victims of modern slavery. On 1 January 2018, Barnardos were awarded the contract for delivery of an Independent Guardian service for three years, with the possibility of two 12 month extensions. Following a three month lead in period to appoint staff and to develop relevant operational procedures, the Independent Guardian Service became fully operational on 1 April 2018. The Health and Social Care Board, which is responsible for monitoring this contract, receives written quarterly monitoring information from the provider and carries out a formal contract monitoring visit and examination of the service on a yearly basis. In addition, the Health and Social Care Board will subject the service to an independent evaluation commencing in Year 2 and reported on mid-point of Year 3. The

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409 NI Human Rights Commission, 'Submission to the UN CEDAW Committee: Parallel Report to the Eighth Periodic Report Submitted by the UK of Great Britain and NI' (NIHRC, 2018), at 7-8.

410 Department of Justice, 'Draft NI Modern Slavery Strategy 2018-2019: Consultation Document' (DoJ, 2018).

411 Human Trafficking and Exploitation (Criminal Justice and Support for Victims) (Independent Guardian) Regulations (NI) 2016.

Department of Health is committed to undertake a review of the service after a period of three years to determine whether it is meeting the needs of young people who are separated, at risk of trafficking or victims of trafficking or modern slavery. This review will specifically consider whether those young people would be better served by opening the role of guardian to other professionals, in addition to qualified social workers.<sup>412</sup>

Up until September 2018, the service worked with over 30 children and young people who are separated, at risk of trafficking or victims of trafficking or modern slavery.<sup>413</sup>

### **Awareness raising**

NI's Modern Slavery Awareness campaign was launched on Anti-Slavery Day in October 2017. Opportunities to promote anti-slavery messages and awareness take place regularly across a range of key sectors and through various media, and a successful workshop took place in January 2018 with all regional organisations with first responder duties, to improve identification of possible victims of modern slavery for referral to the UK's National Referral Mechanism. A more strategic approach to training and awareness is planned and a dedicated resource has been prioritised to develop a regional, multi-agency Training Needs Analysis and Training Plan for NI, with work commencing in June 2018.<sup>414</sup>

A leaflet for the homeless sector in NI has been produced that sets out the common signs and indicators, and signposts the Modern Slavery Helpline, Police Service NI contact numbers, and support providers' contact details.<sup>415</sup>

### **Recommendation**

The Commission recommends that effective steps are taken to address the root causes of human trafficking and exploitation and to ensure existing laws and policies are effectively implemented. It also recommends that effective steps are taken to ensure specialised, accessible support for victims of human trafficking and exploitation in NI is sufficiently and promptly available when required, and properly funded, including equal access to social security benefits.

412 Email correspondence from Department of Health to NI Human Rights Commission, 26 September 2018.

413 Email correspondence from Department of Health to NI Human Rights Commission, 25 September 2018.

414 HM Government, 'UN Periodic Review - UK of Great Britain and NI Update' (HM Government, 2018), at para. 47.

415 HM Government, '2018 UK Annual Report on Modern Slavery' (HM Government, 2018), at para. 2.73.

## Right to fair trial and the administration of justice

<b>ECHR</b>	Articles 6-7
<b>ICCPR</b>	Articles 14-16
<b>Charter of Fundamental Rights of the EU</b>	Article 4

### Access to justice

#### Vulnerable persons

In August 2017, the UN CRPD Committee recommended that the UK Government and NI Executive:

*ensure that all persons with disabilities are provided with the right and adequate procedural accommodation within the justice system, and enable in particular deaf persons through the use of sign language interpreters to fully and equally participate as jurors in court proceedings.*<sup>416</sup>

In 2018, a two year pilot research project commenced assessing barriers to deaf people accessing justice in NI. The project will consider, inter alia, methods for empowering deaf people in coproducing solutions to barriers to accessing the justice system.<sup>417</sup> The project is led by the British Deaf Association in collaboration with Queen's University Belfast, Syracuse University College of Law and Rowan University.

A review and reference group chaired by Lord Justice Gillen to review separately civil justice and family justice, which the Commission was represented on, published its finding in August 2017. Both reports made extensive recommendations to improve civil and family justice. The review recommendations included:

*developing the voice of the child and extending the use of special measures and support for child and vulnerable witnesses to the family courts, with pilot scheme for the use of registered intermediaries and the National Society for the Prevention of Cruelty to Children's young witness service.*<sup>418</sup>

Following publication of the report, a shadow Family Justice Board and a shadow Civil Justice Council were established, composed of relevant public authorities. The work of both bodies include, inter alia, co-ordination of a draft plan for the implementation of the recommendations of the Family Justice Report and Civil Justice Report.<sup>419</sup>

416 CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI', 29 August 2017, at para 33.

417 Disability Research on Independent Living and Learning, 'Implementing Article 13 of the UNCRPD: Enhancing Deaf People's Communication Access to Justice in NI'. Available at: <http://www.drilluk.org.uk/implementing-article-13-uncrpd-enhancing-deaf-peoples-communication-access-justice-northern-ireland/>

418 Review of Civil and Family Justice, 'Review Group's Report on Family Justice' (Office of the Lord Chief Justice, 2017).

419 Judiciary NI, 'Civil and Family Justice Review'. Available at: <https://judiciaryni.uk/civil-and-family-justice-review>

## Litigants in person

On 14 September 2018, Ulster University in conjunction with the Commission published research on the experience of those who take or defend civil and family law cases without legal representation and the impact on an individual's human rights when doing so.<sup>420</sup> As part of the research, the Commission provided a procedural advice clinic for individuals representing themselves in matrimonial or family law cases. The Commission also contributed on analysis of Strasbourg and other case law on Article 6 ECHR (the right to a fair trial) in civil proceedings.

Speaking at the launch of the report the Commission's Chief Commissioner, Les Allamby, stated:

*effective access to justice engages human rights. The research highlights the difficulties individuals face in trying to represent themselves in court. The recommendations provide a road map for lawyers, judges, administrators and personal litigants to tackle the issues identified. It is in all our interests to improve the experience for the thousands of people who have to represent themselves and to ensure justice is both done and seen to be done.*<sup>421</sup>

The report included a number of recommendations for reforms to support litigants in person including the creation of a central information hub and specific training for members of the judiciary on supporting litigants in person.

## Remedy

On 16 July 2018, the UK Government laid its proposal for the Human Rights Act 1998 (Remedial) Order 2019 before both Houses of Parliament. The purpose of the UK Government's proposal is to remedy the incompatibility of section 9(3) of the Human Rights Act 1998 with Article 13 ECHR, the right to effective remedy. The breach of Article 13 identified by the ECtHR relates to the availability of damages under the Human Rights Act for a judicial act done in good faith, and the right to an effective remedy arising out of a specific breach of Article 6 ECHR. The UK Government proposes to address this incompatibility, by amending section 9 Human Rights Act to make damages available in respect of breaches of Article 6 ECHR arising under similar circumstances to those in *Hammerton v UK* (2016). The proposed draft Remedial Order would make a targeted amendment to the Human Rights Act which would have the effect that damages would be available to compensate a person for a breach of Article 6 that resulted in the person spending extra time in prison, or caused them to be committed to prison. However, this would only be available where: a person is committed to prison in proceedings for contempt of court, in which a person does not have legal representation in breach of Article 6 ECHR; and the breach results in the person spending more time in prison than they would otherwise have

420 Gráinne McKeever *et al*, 'Litigants in Person in NI: Barriers to Legal Participation' (UU, NIHRC and Nuffield Foundation, 2018).

421 NI Human Rights Commission, 'Press Release: Research shows right to fair trial can be in danger if individuals go to court without legal representation', 14 September 2018.

spent, or causes them to be committed to prison when they would not otherwise have been committed.<sup>422</sup>

In July 2018, the House of Commons and House of Lords Joint Committee on Human Rights launched an inquiry into the proposal.<sup>423</sup> In September 2018, the Commission submitted written evidence to the Inquiry, which included recommending that the proposed amendment to section 9(3) of the Human Rights Act is widened to effectively address the inability of certain victims of human rights violations from receiving financial compensation.<sup>424</sup>

### Recommendation

The Commission continues to raise concerns over access to justice in the current financial circumstances, particularly for the most vulnerable. This includes ensuring that the substantial number of unrepresented litigants do not have their access to justice impaired. The Commission supports the recommendations contained in the recent Ulster University and Commission research.

The Commission welcomes the House of Commons and House of Lords Joint Committee on Human Rights' inquiry into the proposed Human Rights Act 1998 (Remedial) Order 2019 and recommends that, in light of the ECt.HR's finding in *Hammerton v UK* (2016), that section 9(3) of the Human Rights Act is amended to effectively address the inability of certain victims of human rights violations to receive financial compensation.

### Age of criminal responsibility

The age of criminal responsibility remains at ten years old in NI, England and Wales. Whilst it remains at eight in Scotland, the Criminal Justice and Licensing (Scotland) Act 2010 prohibits the prosecution of a child under twelve.<sup>425</sup>

In 2016, the UN CRC Committee once again recommended that the UK Government and NI Executive:

*raise the minimum age of criminal responsibility in accordance with acceptable international standards.*<sup>426</sup>

The Commission has repeatedly advised that the minimum age of criminal responsibility should be raised to at least twelve, in line with international human rights standards.<sup>427</sup> This is also in line with the findings of a

422 House of Commons and House of Lords Joint Committee on Human Rights, 'Press Release: Proposal for a draft Human Rights Act 1998 (Remedial) Order 2019', 17 July 2018.

423 Ibid.

424 NI Human Rights Commission, 'Response to Joint Committee on Human Rights Inquiry into 20 Years of the Human Rights Act, NI Human Rights Commission' (NIHRC, 2018), at para 4.13.

425 Section 52, Criminal Justice and Licensing (Scotland) Act 2010.

426 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 79.

427 CRC/C/GBR/CO/4, 'UN Committee on the Rights of the Child, Concluding Observations on the Third and Fourth Period Reports of the UK of Great Britain and NI', 17 October 2008; CRC/C/15/Add 188, 'UN Committee on the Rights of the Child, Concluding Observations: UK of Great Britain and NI', 9 October 2002; CRC/C/15/Add 34, 'UN Committee on the Rights of the Child, Concluding Observations on the UK of Great Britain and NI's Initial Report', 15 February 1995.



2010-2011 review of the youth justice system in NI conducted by the Department of Justice, which concluded that:

*the minimum age should be increased to 12 forthwith and, following a period of review and preparation, perhaps to 14, which has some historical and current significance for criminal law in NI.*<sup>428</sup>

In correspondence to the Commission in 2016 the then Minister of Justice, Claire Sugden indicated that due to a lack of cross party support any increase in the age of criminal responsibility was unlikely. However, the Minister identified that removal of children from the formal criminal justice system was a matter of priority for the Department.

In February 2017, the UK Government in its National Report for the Universal Periodic Review stated that:

*the UK Government's position on the minimum age of criminal responsibility remains that children aged 10 are able to differentiate between bad behaviour and serious wrongdoing and it is right that they should be held to account for their actions.*<sup>429</sup>

In responding to recommendations made during the Universal Periodic Process, relating to the age of criminal responsibility in NI, the UK Government stated:

*any change to the age of criminal responsibility would require cross-party support, and there is currently an absence of sufficient political support to implement such an increase. The progressive youth justice system in NI, underpinned by restorative justice principles, has meant that very few children under the age of 12 enter the formal criminal justice system. Those that do are almost always engaged in low-level offending and dealt with by diversionary measures. Criminal justice agencies continue to work in partnership with other statutory and voluntary organisations to divert children from crime and the criminal justice system.*<sup>430</sup>

On 1 December 2016, the Scottish Government announced its intention to raise the minimum age of criminal responsibility, Mark McDonald MSP Minister for Childcare and Early Years announced:

*the low age of criminal responsibility in Scotland—and, indeed, the UK—has continued to attract the attention of the UN Committee on the Rights of the Child, including in its most recent concluding observations from August, when it again called on UK Administrations to raise the minimum age of criminal responsibility in accordance with acceptable international standards. I can announce today that we will raise the minimum age of criminal responsibility in Scotland from eight years to 12, and we will introduce a bill in this session to do so.*<sup>431</sup>

428 Department of Justice, 'A Review of the Youth Justice System in NI' (DoJ, 2011), at 107.

429 HM Government, 'Universal Periodic Review, UK, British Overseas Territories and Crown Dependencies National Report' (HM Government, 2017), at para 38.

430 A/HRC/36/9/Add.1, 'Human Rights Council Report of the Working Group on the Universal Periodic Review: Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State Under Review', 7 September 2017, at Recommendation 134.205.

431 Theyworkforyou, 'Minimum Age of Criminal Responsibility - in the Scottish Parliament on 1st December 2016'. Available at: <https://www.theyworkforyou.com/sp/?id=2016-12-01.15.0>

In furtherance of this commitment, the Age of Criminal Responsibility (Scotland) Bill was introduced to the Scottish Parliament in March 2018.<sup>432</sup> Between May and October 2018, the Scottish Equalities and Human Rights Committee was gathering evidence to analyse in Autumn 2018 and report to the Scottish Parliament thereafter.<sup>433</sup> A separate Private Members Bill which seeks to raise the minimum age of criminal responsibility in England and Wales, received its second reading in 2017.<sup>434</sup>

### Recommendation

The Commission calls on the Department of Justice to introduce legislation to the NI Assembly, which raises the minimum age of criminal responsibility to at least twelve, in line with international human rights standards.



### Avoidable delay

In 2015, the UN Human Rights Committee recommended the introduction of:

*concrete measures to reduce avoidable delays in the criminal justice system in NI, including by introducing custodial time limits.*<sup>435</sup>

Custodial time limits were first introduced to England and Wales in 1991.<sup>436</sup> The Criminal Justice Inspector for NI has stated that failure to introduce statutory custodial time limits in NI:

*consigns the justice process here to continuing unacceptable delay in processing cases.*<sup>437</sup>

In 2016, the Department of Justice consulted on possible amendments to the Criminal Justice (NI) Order 2003 to strengthen the legislative basis for the introduction of a Statutory Time Limit scheme.<sup>438</sup> The consultation invited views on options for the length and trigger for the time limit. The Commission highlighted to officials the extent of delays within the criminal justice system and the need to address the recommendation of the UN Human Rights Committee.

Within the draft Programme for Government Framework 2016-2021, Indicator 32 is the average time taken to complete criminal cases. The delivery plan for this indicator states that a decision is yet to be taken with respect to the introduction of statutory time limits.<sup>439</sup> The plan does state that interim administrative time limits will be developed and sets out a number of measures aimed at speeding up justice. In the absence of a NI Executive, no formal decision has been taken with respect to the introduction of statutory time limits in 2018.

432 Age of Criminal Responsibility (Scotland) Bill 2018.

433 Scottish Equalities and Human Rights Committee, 'Age of Criminal Responsibility (Scotland) Bill - Call for Evidence'. Available at: <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/108313.aspx>

434 Age of Criminal Responsibility Bill [HL] 2017-19.

435 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 22.

436 Fiona O'Connell, 'Statutory Time Limits' (NI Assembly, 2012).

437 Hansard, 'Official Report (Hansard) Session: 2013/2014', 25 June 2014.

438 Department of Justice, 'Consultation Paper: Statutory Time Limits' (DoJ, 2015).

439 NI Executive, 'Programme for Government Delivery Plan: Indicator 38' (NI Executive, 2016).

## Recommendation

The Commission continues to highlight the need to reduce avoidable delay in the criminal justice system in NI. It calls on the Department of Justice to introduce statutory custodial time limits and other concrete measures, in order to reduce avoidable delay.

### Closed material proceedings

The Justice and Security Act 2013 makes provision for closed material proceedings in civil cases allowing for the introduction of sensitive security evidence to proceedings involving the UK Government, without disclosure to the claimant.<sup>440</sup>

The UN Human Rights Committee has raised concerns regarding the 2013 Act and recommended that the UK Government:

*ensure that any restrictions or limitation to fair trial guarantees on the basis of national security grounds, including the use of closed material procedures, are fully compliant with its obligations under the Covenant, particularly that the use of closed material procedures in cases involving serious human rights violations do not create obstacles to the establishing of State responsibility and accountability as well as compromise the right of victims to a fair trial and an effective remedy.*<sup>441</sup>

The Justice and Security Act 2013, section 12(1) requires the Secretary of State for Justice to prepare and lay before Parliament an annual report on the use of the closed material procedure. In December 2017, in furtherance of this obligation, the Secretary of State for Justice published a report on use of closed material procedure (from 25 June 2016 to 24 June 2017). The report identified that thirteen applications for a declaration that a closed material procedures application may be made in proceedings were lodged and fourteen declarations were made during the reporting period.<sup>442</sup>

The draft NI (Stormont House Agreement) Bill, which the NI Office consulted on throughout 2018, provides that in circumstances where the Secretary of State for NI seeks to prevent the disclosure of information on national security grounds within a family report appeal proceedings are to proceed as closed material proceedings (section 21(1)).<sup>443</sup> In its advice on the draft Bill the Commission has emphasised that the discretion of the Secretary of State to prevent disclosure of information within a family report should be used sparingly.<sup>444</sup> The Commission also recommended

440 Section 12(1) of the Justice and Security Act 2013 requires the Secretary of State to prepare an annual report on the use of the closed material procedure under section 6 of the Act. Report on use of closed material procedure (from 25 June 2014 to 24 June 2015), records that nine applications for a declaration that a closed material proceedings application may be made in proceedings during the reporting period were made by the Secretary of State and two were made by the Chief Constable of the Police Service NI.

441 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 22.

442 Ministry of Justice, 'Report on Use of Closed Material Procedure (from 25 June 2016 to 24 June 2017) Presented to Parliament Pursuant to Section 12 of the Justice and Security Act 2013' (MoJ, 2017), at 4-5.

443 NI Office, 'Consultation Paper: Addressing the Legacy of NI's Past' (NIO, 2018), at 37-38.

444 NI Human Rights Commission, 'Submission to NIO's Consultation on Addressing the Legacy of NI's Past' (NIHRC, 2018).

a number of additional procedural safeguards be used to enhance the confidence of the family members of victims.

### **Recommendation**

The Commission advises that the UK Government must ensure the use of closed material procedures in cases involving serious human rights violations does not create obstacles to ensuring accountability for human rights violations and does not compromise the right of victims to a fair trial and an effective remedy.



### **Compensation for a miscarriage of justice**

The Anti-social Behaviour, Crime and Policing Act 2014 redefined the test for a miscarriage of justice to require an applicant who has been wrongfully imprisoned to prove his or her innocence of a crime in order to obtain compensation.<sup>445</sup> This new test applies for all offences in England and Wales and for offences related to terrorism in NI. The new test is contained within Criminal Justice Act 1988, section 133 (1ZA).

The Commission had previously advised that this approach was a disproportionate limitation of the ICCPR, Article 14(6), which states:

*when a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributed to him.*<sup>446</sup>

Prior to the introduction of the 2014 Act, Lord Phillips in a legal judgment observed that:

*the travaux [to the UN ICCPR] clearly demonstrate that the parties intended Article 14(6) to cover the situation where a newly discovered fact demonstrated conclusively that the defendant was innocent of the crime of which he had been convicted. They were not, however, prepared to agree an interpretation which restricted the ambit of Article 14(6) to this situation.*<sup>447</sup>

Noting that the UN Human Rights Committee General Comment on the UN ICCPR, Article 14, does not define the term 'miscarriage of justice', the Commission updated the Committee on the 2014 Act and requested its views.<sup>448</sup>

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445 The Anti-social Behaviour, Crime and Policing Act 2014 makes amendments to section 133 of the Criminal Justice Act 1988.

446 NI Human Rights Commission, 'The 2013 Annual Statement: Human Rights in NI' (NIHRC, 2013), at 29.

447 *R (on the application of Adams) (FC) (Appellant) v Secretary of State for Justice (Respondent)* [2011] UKSC 18, at para 21.

448 CCPR/C/GC/32, 'Human Rights Committee General Comment No 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial', 23 August 2007.

The Committee recommended that the UK Government:

*review the new test for a miscarriage of justice with a view to ensuring its compatibility with Article 14, para 6, of the Covenant.*<sup>449</sup>

In April 2016, the England and Wales Court of Appeal considered an application that Criminal Justice Act 1988, section 133 was unlawful, as it was contrary to the presumption of innocence within Article 6(2) ECHR. Rejecting the application the England and Wales Court of Appeal ruled:

*the critical reason why section 133 is not incompatible with Article 6(2) is that, as the Divisional Court said, it does not require the applicant to prove his innocence generally. The key issue for the purpose of establishing eligibility for compensation under section 133 is the effect of the new or newly discovered fact which led to the conviction being quashed on appeal.... The fact that the Secretary of State is not persuaded beyond reasonable doubt by a new or newly discovered fact that an applicant is innocent does not entail that the Secretary of State casts doubt on his innocence generally. He is merely saying that the applicant's innocence has not been proved by the new or newly discovered fact.*<sup>450</sup>

On 13 April 2017, the applicants in the above case were granted permission to appeal to the UK Supreme Court and a hearing was held in May 2018.<sup>451</sup> Judgment is awaited.

### Recommendation

The Commission calls on the UK Government to review the test for a miscarriage of justice, in line with the UN Human Rights Committee's concluding observation, to ensure its compatibility with the ICCPR, Article 14(6).



### Non-jury trials

In 2013, the UN CAT Committee recommended that the UK Government should:

*take due consideration of the principles of necessity and proportionality when deciding the renewal of emergency powers in NI, and particularly non-jury trial provisions. It encourages the State party to continue moving towards security normalisation in NI and envisage alternative juror protection measures.*<sup>452</sup>

The Justice and Security (NI) Act 2007 makes provision for non-jury trials in NI. The provisions relating to non-jury trials are temporary and must be renewed every two years by way of an order approved in both Houses of Parliament for a period of two years. The relevant provisions have been extended on four occasions since their establishment in 2007. In 2017, the

449 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 22(b).

450 *The Queen, on the applications of Sam Hallam and Victor Nealon - and - the Secretary of State for Justice* [2016] EWCA Civ 355.

451 Case ID: UKSC 2016/0227, *R (on the application of Hallam) (Appellant) v Secretary of State for Justice (Respondent)*.

452 CAT/C/GBR/CO/5, 'UN Committee against Torture, Concluding observations on the Fifth Periodic Report of the UK of Great Britain and NI', 6 May 2013.

Secretary of State for NI, noting that the UK Government continued to assess the threat level from NI related terrorism in NI to be severe, once again extended the provisions on 18 July 2017.<sup>453</sup>

Prior to the extension, the Secretary of State held a public consultation seeking views on the extension and on potential changes to the statutory test applied by the Director of Public Prosecution when considering whether to issue a certificate for non-jury trial.<sup>454</sup>

The Commission advised that, in line with the UN CAT Committee recommendation, the NI Office should consider the development of alternative juror protection measures which may be put in place to avoid the necessity of the non-jury trial provisions.<sup>455</sup> Furthermore, an amendment should be made to the 2007 Act requiring an authorising judge to determine that a non-jury trial is absolutely necessary in the interests of justice before granting authorisation.

In its response on the consultation exercise, the NI Office reported that on the recommendation that alternative juror protection measures be developed the Police Service NI's written evidence:

*stated that the risks posed to administration of justice by suspected members or associates of paramilitary groupings makes the application of available jury measures ineffective in the majority of cases that are considered at risk.*<sup>456</sup>

On the Commission's proposal to amend the interests of justice test, the NI Office stated:

*while it is the NI Office's position that the Department of Public Prosecutions and the Police Service NI will routinely consider these factors under the current system for each individual case before deciding on a non-jury trial certificate, we recognise that having this on a statutory footing may introduce greater clarity and assurance for those affected. If we ultimately pursue this option, this would of course require primary legislation to amend the Act and could not be achieved with secondary legislation used to extend the current provisions. We will seek to explore this possibility after July 2017.*<sup>457</sup>

In October 2017, the NI Office appointed David Seymour, Independent Reviewer of the Justice and Security (NI) Act 2007 to review the effectiveness of the procedures currently in place to issue a non-jury trial certificate. The Commission met with the Independent Reviewer in the context of the review emphasising the need to ensure that non-jury trials were a measure of last resort and utilised only in circumstances where alternative measures have been assessed as unworkable. In April 2018, the Independent Reviewer published the results of his review, within his recommendations the Reviewer stated:

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453 'Justice and Security (NI) Act 2007 (Extension of duration of non-jury trial provisions) Order 2017 - Motion to Approve - in the House of Lords', 18 July 2017.

454 NI Office, 'Consultation Paper: Non-jury Trial Provisions Justice and Security Act (NI) 2017' (NIO, 2016).

455 Correspondence from the Chief Commissioner of NI Human Rights Commission to the Secretary of State for NI, January 2017.

456 NI Office, 'Outcome of the Public Consultation on Non-jury Trial Provisions Justice and Security (NI) Act 2007' (NIO, 2017), at para 4.10.

457 Ibid, at para 4.12.

*juror protection measures are less likely to be effective in NI than in England and Wales. Nevertheless, it should not be an assumption in each case that they will never be appropriate as an alternative to a non-jury trial. The Police Service NI and Public Prosecution Service should continue to consider this option in every case. It would be helpful if the Police Service NI, after consultation with the Public Prosecution Service, could place in the public domain a detailed document explaining the difficulties associated with this option and the reasons why, in the prevailing circumstances, juror protection measures do not provide an easy alternative to non-jury trials in NI. This would inform the legal profession, the wider public and, in due course, Parliament of some of the challenges and concerns involved.*<sup>458</sup>

The Independent Reviewer also recommended that before issuing a non-jury trial certificate the Public Prosecution Service should:

*notify the defendant that they are minded to issue a certificate, specifying the condition or conditions and any other material which is in the public domain, and invite representations within a specified period.*<sup>459</sup>

In September 2018, former soldier Dennis Hutchings, was given leave to appeal to the UK Supreme Court against a decision by the Belfast Crown Court to try him by way of a non-jury trial.<sup>460</sup> Mr Hutchings is due to be tried for attempted murder in connection with the fatal shooting of John Pat Cunningham near Benburb, County Tyrone in 1974. The UK Supreme Court's hearing of the appeal is awaited.

### Recommendation

In light of the UK Government's assessment of the continuing severe threat from terrorism in NI, continued provision for non-jury trials appears appropriate. However, consideration should be given to ensuring the principles of necessity and proportionality are fully reflected within the arrangement for authorising non-jury trials.



### Witness Charter

In 2016, the Department of Justice consulted on a Charter setting out the entitlements, services and support that a witness to a crime should expect from the criminal justice system.<sup>461</sup> In its response, the Commission welcomed the publication of a draft Witness Charter.

A draft Order providing for a Witness Charter was laid before the NI Assembly in 2017. However, as the Order was subject to the affirmative resolution procedure and an affirmative resolution was not passed before the suspension of the NI Assembly, the Charter did not become law.<sup>462</sup>

458 Independent Reviewer of Justice and Security, 'The Tenth Annual Report of the Independent Reviewer of Justice and Security (NI) Act 2007 from 1 August 2016 - 31 July 2017' (NIO, 2018), at 46.

459 Ibid, at 47.

460 'Ex-soldier wins right to appeal against Diplock trial', *BBC News*, 11 September 2018.

461 Department of Justice, 'Press Release: Justice Minister launches Witness Charter Consultation', 5 July 2016; Department of Justice, 'Consultation on Draft Witness Charter' (DOJ, 2016).

462 Witness Charter (Justice Act (NI) 2015) Order (NI) 2017.

In the absence of a legislative measure, throughout 2018 the Charter has been applied by criminal justice bodies and support service providers on an administrative basis.<sup>463</sup>

### **Recommendation**

The Commission advises that the Department of Justice and NI Assembly ensure the Witness Charter is brought into law at the first available opportunity.

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<sup>463</sup> Department of Justice, 'Witness Charter: A Charter for Witnesses of Crime' (DoJ, 2017).



## Right to private and family life

<b>ECHR</b>	Article 8 Article 12
<b>CRC</b>	Article 16 Article 20 Article 21
<b>CRPD</b>	Article 19 Article 22
<b>ICCPR</b>	Article 17 Article 23
<b>ICESCR</b>	Article 10(1)
<b>Charter of Fundamental Rights of the EU</b>	Articles 7-9

### Access to financial support for unmarried couples

In August 2018, the UK Supreme Court ruled that the requirement that couples be married in order to access Widowed Parent's Allowance was in violation of the right to private and family life under Article 8 ECHR and was also discriminatory, contrary to Article 14 ECHR.<sup>464</sup> The UK Supreme Court held that this was so as the purpose of the allowance was to benefit children and it was therefore unjustifiable that the allowance should be restricted to married couples so as to preserve its special status. A declaration of incompatibility was issued by the Supreme Court, although a change to the law in NI may be delayed until the Executive is restored.<sup>465</sup>

### The Commission's case

In August 2018, the Commission issued proceedings on behalf of an individual who was denied access to her late partner's pension by the Ministry of Defence, on the grounds that they were not married. The Commission argues that there is no objective and justifiable reason for treating the individual differently to a married woman in her circumstances and that the failure to make provision for her, and others like her, is in violation of the right to private and family life under Article 8 ECHR, the right to peaceful enjoyment of possessions under Article 1 of the First Protocol ECHR and is discriminatory contrary to Article 14 ECHR.

It is anticipated that the case will be heard in 2019.

<sup>464</sup> *In the matter of an application by Siobhan McLaughlin for Judicial Review (NI)* [2018] UKSC 48

<sup>465</sup> Allan Preston, 'NI mum facing Stormont delay after Supreme Court victory on pensions for unmarried widows', *Belfast Telegraph*, 31 August 2018.

## Recommendation

The Commission is concerned that access to certain social security benefits and pensions on the grounds of marriage/civil partnership discriminates against those who are unmarried, with particular ill effect on women, children and same sex couples. The Commission recommends that the criteria for social security benefits and pensions be widened so as to allow couples in long term, cohabiting relationships to access these benefits.



## Alternative care arrangements for children

In 2016, the UN CRC Committee raised concern at the increase in the number of children in care throughout the UK:

*cases where early intervention measures have not been carried out in a timely manner, parents have not been provided with adequate family support and the best interests of the child have not been properly assessed in the decision of taking a child into care. Children have reportedly been removed from their biological families owing to the family's economic situation or because a foster family may provide a more beneficial environment for the child.*<sup>466</sup>

The Commission published a report in 2015, entitled *Alternative Care and Children's Rights in NI*, which made 29 recommendations and highlighted shortcomings in the provision of suitable and stable care placements for children in care.<sup>467</sup> Little progress has been made on implementing the recommendations and the shortcomings remain valid.

In August 2018, the Department of Health published a statistical bulletin on the experiences of children in care in the financial year 2016/17.<sup>468</sup> It reported that in NI during this period:

*2,325 children and young people that had been in care continuously for at least 12 months represented a rate of 53 children per 10,000 population under 18; a somewhat lower proportion to that in England, where 62 children per 10,000 child population had been in care for 12 months or more at 31 March 2017.*<sup>469</sup>

The bulletin indicates a rise in the proportion of children in care who had not experienced a placement change in 2018, with 82 per cent experiencing no placement change, up from 81 per cent in 2016/2017. However, in terms of outcomes for children in care, only 48 per cent of children in care achieved five or more GCSEs (at A\*-C grade) compared to 85 per cent of the general school population in 2016/17. Furthermore, of children looked after aged ten and over at 30 September 2017, seven per cent (98) had been cautioned or convicted of an offence whilst in care during the year. The equivalent proportion for England was three percentage points lower.

466 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016.

467 NI Human Rights Commission, 'Alternative Care and Children's Rights in NI' (NIHRC, 2015).

468 Information Analysis Directorate, 'Children in Care in NI 2016-17: Statistical Bulletin' (DoH, 2018).

469 Ibid, at 8.

The Children's Services Co-operation Act (NI) 2015 received royal assent in December 2015. The Act places a statutory obligation on certain public authorities and other persons to contribute to the well-being of children and young persons and requires the NI Executive to adopt a children and young persons strategy. In 2017, the Department of Education consulted on a ten year children and young people's strategy.<sup>470</sup> The Commission provided its views on the draft strategy welcoming the alignment of the draft strategy's outcomes and implementation with international human rights standards. The Commission recommended that the strategy be structured in line with the UN CRC and the recommendations of the UN CRC Committee to ensure effective implementation. In addition, the Commission recommended that the Department should ensure continuous engagement with children and young people and rigorous monitoring of the implementation of the strategy. There has been no published output from the consultation and any development faces the barrier of requiring Ministerial approval.

### Adoption reform

In 2016, the UN CRC Committee recommended that the NI Executive and Assembly:

*expedite the approval and enactment of the Adoption and Children Bill in NI.*<sup>471</sup>

In 2017, the Department of Health published and consulted on a draft Adoption and Children (NI) Bill.<sup>472</sup> The Commission responded to the consultation broadly welcoming the Bill, in particular welcoming the emphasis placed within the Bill on the best interests of the child, the Commission recommended that in all decisions relating to adoption, including arrangements for post adoption contact, the best interests of the child should be the paramount consideration. There has been no development on the enactment of this Bill due to suspension of the NI Assembly and NI Executive.

### Secure accommodation

The Children (NI) Order 1995 makes provision for a child to be held in secure accommodation, meaning accommodation provided for the purpose of restricting liberty, under strict circumstances.<sup>473</sup> The Commission's 2015 Report identified that whilst Children Order Guidance and Regulations emphasise that secure accommodation should be used only as a measure of last resort concerns were raised as to whether this is always applied in practice.

In 2016, the UN CRC Committee recommended that the NI Executive:

*ensure that secure accommodation in NI is only used as a measure of last resort and for the shortest possible period of time, address the*

470 Department of Education, 'Children and Young People's Strategy 2017 - 2027' (DoE, 2016).

471 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016.

472 Department of Health, 'Adoption and Children (NI) Bill' (DoH, 2017).

473 Article 44, Children (NI) Order 1995.

*reasons for repeated or lengthy stays in such accommodation and develop alternatives to secure accommodation.*<sup>474</sup>

In August 2017, the Commission conducted a visit to a secure accommodation unit in NI and met senior staff.

### Recommendation

The Commission recommends that the Department of Health expedite the approval and enactment of the Adoption and Children Bill in NI. In doing so, the Commission calls on the Department of Health to ensure that the Bill introduces a framework for adoption which is modelled on the UN CRC and places the best interests of the child as the paramount consideration in all decisions.

In addition, a children and young persons strategy modelled on the UN CRC should be introduced by the Department of Education, in line with the requirements of the Children's Services Co-operation Act (NI) 2015. The Commission further recommends that the Department of Health guarantees that secure accommodation is used as a measure of last resort and for the shortest possible period of time in practice.



### Biometric data

The current law on DNA and fingerprint retention in NI is the Police and Criminal Evidence (NI) Order 1989. In 2008, the ECt.HR found that the provisions relating to DNA retention in the Police and Criminal Evidence (NI) Order were in violation of the Article 8 ECHR.<sup>475</sup> The Criminal Justice Act (NI) 2013 was enacted in order to rectify this violation; however, the sections in relation to DNA retention were not commenced pending political agreement on how these sections would affect legacy investigations.

In 2012, the NI Divisional Court gave judgment that the indefinite retention of Mr Gaughran's DNA profile (distinct from his DNA sample) did not breach Article 8 ECHR. Mr Gaughran had pleaded guilty to a recordable offence and so the court held that the retention was proportionate.<sup>476</sup> In 2015, the UK Supreme Court agreed with the Divisional Court and dismissed the Mr Gaughran's appeal.<sup>477</sup> The UK Supreme Court's judgment has been appealed to the ECt.HR, the hearing is awaited.

In 2017, the Commission instituted judicial review proceedings in respect of the retention of biometric data by the Police Service NI. The case is currently ongoing.

<sup>474</sup> CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 53.

<sup>475</sup> *S and Marper v UK* (2008) ECHR 1581.

<sup>476</sup> *Gaughran, Re Judicial Review* [2012] NIQB 88.

<sup>477</sup> *Gaughran v Chief Constable of the Police Service of NI* [2015] UKSC 29.

## Recommendation

The Commission recommends the DNA retention sections of the Criminal Justice Act (NI) 2013 are commenced and effectively implemented without further delay. The Commission further recommends the Police Service NI ensures its policy on biometric data retention is human rights compliant, effectively implemented and expediently published in accessible formats.

## Environmental regulation

There is an intrinsic link between the environment and the realisation of human rights. The rights to health, water, food, housing, life and privacy all place obligations on the NI Executive and Departments to take actions to prevent adverse environmental impact on the individual. Environmental rights including noise and pollution issues have been found to be covered by Article 8 ECHR (the right to private and family life) by the ECt.HR.<sup>478</sup>

## Climate change

The Climate Change Act 2008 is the basis for the UK's approach to tackling and responding to climate change. It requires that emissions of carbon dioxide and other greenhouse gases are reduced and that climate change risks are prepared for. The 2008 Act also establishes the framework to deliver these requirements and Part 2 of the Act established the Committee on Climate Change to ensure that emissions targets are evidence-based and independently assessed. The 2008 Act, section 1, commits the UK Government to reducing the UK's greenhouse gas emissions by at least 80 per cent of 1990 levels by 2050. This includes reducing the emissions from the devolved administrations (Scotland, Wales and NI), which account for about 20 per cent of the UK's emissions. Under the 2008 Act, Part 4, the UK Government is also required to produce a UK Climate Change Risk Assessment every five years, which assesses current and future risks to and opportunities for the UK from climate change. Furthermore, responsible departments across the UK are required to produce their own national adaptation programmes and policies, this includes the Department of Agriculture, Environment and Rural Affairs in NI.

In May 2010, the NI Executive approved a proposal by the then Minister for the Environment to establish what was then known as the Cross-Departmental Working Group on Greenhouse Gas Emissions.<sup>479</sup> The initial focus of the group was on climate change mitigation. However, the group recommended that its remit was expanded to encompass climate change adaptation. The NI Executive agreed, in addition, that a sub-group of departmental analysts was established to support the Working Group. The group was then reconstituted as the Cross-Departmental Working Group on Climate Change, which produced an annual progress report. Due to the suspension of the NI Assembly and NI Executive, the last progress report

478 *Moreno Gómez v Spain* (2004) ECHR 633; *López Ostra v Spain* (1994) ECHR 46.

479 Department of Agriculture, 'Environment and Rural Affairs, Cross-Departmental Working Group on Climate Change'. Available at: <https://www.daera-ni.gov.uk/articles/cross-departmental-working-group-climate-change>

to be published by the group was in March 2016 and the last mitigation action plan produced was for 2016/17.<sup>480</sup>

In Scotland, the Climate Change (Scotland) Act 2009, sets Scotland-specific targets for reducing greenhouse gas emissions and creates a statutory framework for achieving this. In Wales, the Well-being of Future Generations (Wales) Act 2015 requires public authorities to consider the long-term impact of decisions, including on climate change. The Environment (Wales) Act 2016 provides Welsh Ministers with the powers to put in place Wales-specific statutory emission reduction targets. NI has not developed NI-specific legislation concerning climate change.<sup>481</sup> Instead, the NI Executive in its Programme for Government 2011-2015 set a target of continuing to work towards reducing its greenhouse gas emissions by at least 35 per cent compared with 1990 levels by 2025.<sup>482</sup> In 2016, the then Minister of Environment, Michelle McIlveen MLA stated there were no plans to introduce NI-specific legislation on climate change because it was deemed unnecessary.<sup>483</sup> Indicator 29 of the draft Programme for Government 2016-2021 committed to increase environmental sustainability. This indicator reiterated NI's target from the previous Programme for Government and reported that:

*total greenhouse gas emissions for NI show an increase of less than 1 per cent between 2012 and 2013. The 2012 to 2013 trend is predominantly driven by a shift from natural gas to coal in the Energy Supply sector and the forest fires that occurred in 2012. Greenhouse gas emissions have fallen 16 per cent since 1990.*<sup>484</sup>

In 2017, the Committee on Climate Change published the Climate Change Risk Assessment 2017 Evidence Report: Summary for NI, this included identifying a number of research gaps that existed in NI.<sup>485</sup>

### St Julian's Declaration

In 2015, the St Julian's Declaration on Climate Justice Commonwealth Forum of National Human Rights Institutions was unanimously adopted by the relevant national human rights institutions, including the Commission. This Declaration promotes the approach that:

*human rights obligations and commitments have the potential to inform and strengthen international and national policy-making in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes. The concept of climate justice, which links human rights and development, provides a new approach to look at these issues and creates a platform to discuss a sustainable climate agenda.*<sup>486</sup>

480 Ibid.

481 Unlike in Scotland (Climate Change (Scotland) Act 2009) and Wales (Well-being of Future Generations (Wales) Act 2005 and Environment (Wales) Act 2016).

482 OFMdFM, 'Programme for Government 2011-15' (OFMdFM, 2012), at 9.

483 'Environment minister rules out separate climate change laws', *Belfast Telegraph*, 5 December 2016.

484 NI Executive, 'Draft Programme for Government Framework 2016-21' (NI Executive, 2016), at 92.

485 Committee on Climate Change, 'UK Climate Change Risk Assessment 2017 Evidence Report: Summary for NI' (CCC, 2017).

486 Commonwealth Forum of National Human Rights Institutions, 'St Julian's Declaration on Climate Justice', 25 November 2015.

It commits the signatory national human rights institutions, including the Commission, to take proactive steps to promote and encourage implementation of this approach within the respective jurisdictions.

### **Environmental Better Regulation (NI) Act 2016**

The Environmental Better Regulation (NI) Act 2016, inter alia, provides for a review of powers of entry and associated powers relating to the protection of the environment and for the repeal or rewriting of such powers and for safeguards in relation to them.<sup>487</sup> The Act is an enabling piece of legislation which grants the Department of Agriculture, Environment and Rural Affairs the power to introduce secondary legislation which may amend primary legislation.<sup>488</sup> Legislation amending powers of entry and associated powers interfere with the right to private and family life and must be formulated with sufficient precision to afford adequate legal protection against arbitrariness.<sup>489</sup>

In correspondence with the Commission, officials confirmed that a review of powers of entry under section 10 of the Act has been carried out, and a copy of the report will be laid before the Assembly in due course. A code of practice in relation to powers of entry under section 13 of the Act will also be laid before the Assembly on restoration.

The Commission remains concerned that NI is the only part of the UK not to have an independent environmental regulator.

### **Recommendation**

The Commission calls on the NI Executive and NI Assembly to take effective steps to ensure NI plays its role in tackling and preventing climate change. The Commission recommends that NI-specific legislation and statutory targets are expediently developed and implemented.

The Commission recommends that the NI Executive ensure that secondary legislation enacted under the Environmental Better Protection Act 2016 is fully compliant with international human rights obligations and is subject to robust oversight.



### **Health and Social Care (Control of Data Processing) Act 2016**

The Health and Social Care (Control of Data Processing) Act 2016 provides a statutory framework, including safeguards, which provides for the use of health and social care information for the benefit of health and social care research.<sup>490</sup>

During passage of the then Bill, the Commission advised that the ECt.HR has held that the protection of medical data falls within the ambit of the right to private and family life,<sup>491</sup> protected by Article 8

487 Environmental Better Regulation (2016 Act) (Commencement No. 1) Order (NI) 2016.

488 Committee for the Environment, 'Report on the Environmental Better Regulation Bill' (CCC, 2015).

489 *S and Marper v UK* (2008) ECHR 1581.

490 Section 2(1), Health and Social Care (Control of Data Processing) Act (NI) 2016.

491 NI Human Rights Commission, 'Advice on the Health and Social Care (Control of Data Processing)' (NIHRC, 2015).

ECHR, and that laws which interfere with the right to private and family life must be formulated with sufficient precision to afford adequate legal protection against arbitrariness and indicate with sufficient clarity the scope of discretion conferred on the competent authorities.<sup>492</sup> The 2016 Act makes provision for a Committee to authorise the processing of confidential information, the Committee is a key safeguard against arbitrariness. In 2018, the Commission has engaged with Departmental officials who confirmed that due to the suspension of the NI Assembly and lack of an Executive, that the regulations to establish the Committee have not been made. It is anticipated that the Committee will not be in place until at least 2019/2020.

### Recommendation

The Commission advises that the Department of Health urgently establish a Committee to authorise the processing of confidential information under the Health and Social Care (Control of Data Processing) Act 2016 to ensure adequate legal protection against arbitrariness.



### Stop and search

The Commission has previously referred to the NI Policing Board recommendation of 2013 that the Police Service NI, as soon as reasonably practicable, consider how it records the community background of all persons stopped and searched under powers contained within the Terrorism Act 2000 and within the Justice and Security (NI) Act 2007.<sup>493</sup>

In 2015, the UN Human Rights Committee called for implementation:

*as a matter of priority [of], the recommendation of the Policing Board to the Police Service of NI concerning the inclusion in the Police Service NI's recording form of community background of persons stopped and searched under the Justice and Security (NI) Act 2007.*<sup>494</sup>

The statistics for 2016/2017 show that under the Justice and Security (NI) Act 2007:

- *powers to stop and question were used 2,034 times (down from 2,858 - a 29 per cent decrease from 2015/2016);*
- *powers of entry of premises were used 6 times (up from 2 - a threefold increase from 2015/2016);*
- *powers to stop and search for munitions were used 7,502 times (down from 7,793 - a 4 per cent decrease from 2015/2016);*
- *powers to enter premises were used 169 times (down from 188 - a 10 per cent decrease from 2015/2016); and*

<sup>492</sup> Ibid, at para 14.

<sup>493</sup> NI Policing Board, 'Human Rights Thematic Review on the Use of Police Powers to Stop and Search and Stop and Question under the Terrorism Act 2000 and the Justice and Security (NI) Act 2007' (NIPB, 2013).

<sup>494</sup> 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 11(b).



- *powers to search vehicles were used 19,312 times (down from 27,028 - a 29 per cent decrease from 2015/2016).*<sup>495</sup>

In 2016/2017, under the Terrorism Act 2000:

- *powers to stop and search of person reasonably believed to be a terrorist were used 144 times (down from 252 - a 43 per cent decrease from 2015/2016);*
- *powers to stop and search a vehicle reasonably believed to be used for terrorism were used 47 times (down from 149 - a 68 per cent decrease from 2015/2016); and*
- *powers to stop and search without reasonable suspicion where senior police officer reasonably believes an act of terrorism will take place were not used, which is the same as 2015/2016.*<sup>496</sup>

The Independent Reviewer of the 2007 Act in his annual report 2016/17, Sir David Seymour makes a number of observations on these statistics:

- a) on average 170 people are stopped and questioned under section 21 every month (this represents a daily average of 6 per day);*
- b) the greatest use of this power was in Belfast (555), Derry City and Strabane (330), Lisburn and Castlereagh (323) and, in relation to the threat posed by Loyalist paramilitaries, Mid and East Antrim (297). This accounts for almost three quarters of the use of the power;*
- c) the use of the most controversial power to stop and search without reasonable suspicion has fallen by 4 per cent. The total of 7,502 people stopped and searched under this power represents a monthly average of 625 and a daily average of 21. There are daily spikes when the power has been used up to 88 times per day. The Independent Reviewer has been briefed on the operational reasons why the power was used so much more on those particular days; and*
- d) the majority of these stop/searches take place in Derry City and Strabane (1,812), Belfast (1,502), Armagh Banbridge and Craigavon (904) and, in relation to the threat posed by Loyalist paramilitaries, Mid and East Antrim (814). These are the areas where most paramilitary activity takes place.*<sup>497</sup>

The Independent Reviewer highlighted that:

*little progress has been made on finding a practicable way of recording the background of those who affected by the use of [Justice and Security Act] powers. As one independent commentator observed 'there has been a substantial degree of inertia'. There is nothing to add to what was said in my last Report (paragraphs 8.1 to 8.7) other than to mention that the Police Service NI are conducting another three month trial in Lisburn and Castlereagh commencing 1st*

<sup>495</sup> David Seymour, 'Report of the Independent Reviewer Justice and Security (NI) Act 2007 - Tenth Report: 1st August 2016 - 31st July 2017' (NIO, 2018), at para 6.2.

<sup>496</sup> Ibid, at para 6.2.

<sup>497</sup> Ibid, at para 6.5.

*February 2018 which will be similar to the one run in Derry for three months from December 2015.*<sup>498</sup>

The Independent Reviewer also noted that:

*the sharp rise in the use of powers last year has not continued. Based on an analysis of statistics available for this reporting period, it has not only levelled off but decreased. Almost half of the stops/searches take place in Derry, Strabane and Belfast where most of the dissident Republican activity takes place; arrest rates following a stop and search under the Justice and Security (NI) Act remain low and there is a very low rate of finds following such a search.*<sup>499</sup>

He found that:

*there are good operational reasons why Justice and Security (NI) Act powers are used more against dissident Republicans than they are against loyalist paramilitaries.*<sup>500</sup>

The Independent Reviewer believes that:

*although there has been considerable debate throughout the UK about the effectiveness of stop and search powers generally, the use of these powers in the Justice and Security (NI) Act is effective as it address the unique threat posed by the use and transportation of munitions across NI and they should be retained for so long as the current security position remains the same.*<sup>501</sup>

He further recommended that:

*consideration should be given to amending the Justice and Security (NI) Act to allow an officer not only to search for munitions but also to deter, prevent or disrupt their transportation or use.*<sup>502</sup>

In commenting on this suggested amendment to the Justice and Security (NI) Act, Professor Clive Walker Special Adviser to the Independent Reviewer of Terrorism Legislation stated:

*given the inability to predict when or how the current search power can be applied with any level of precision or objectively justified purpose in any given instance, such an accretion of power would not really amount to a search power but a power to intimidate an area or a population. If persons are not stopped for munitions, then what is it they are being stopped for, other than something about their profile relating to their antecedents, friends, or beliefs? Such a power would undoubtedly exacerbate community apprehensions of the kinds described in the report and which are already said to be 'toxic' (as stated in the Report of the Independent Reviewer, paras.7.3, 7.4).*<sup>503</sup>

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498 Ibid, at para 9.1.

499 Ibid, at para 2.4.

500 Ibid.

501 Ibid.

502 Ibid.

503 Correspondence from Professor Clive Walker to NI Human Rights Commission, 12 July 2018.



### **Recommendation**

The Commission calls on the Police Service NI to expedite the development and implementation of a suitable methodology for recording the community background of individuals stopped and searched under the Terrorism Act 2000 and the Justice and Security (NI) Act 2007 throughout NI.

## Freedom of religion and belief, expression, association and right to participate in public and political life

<b>ECHR</b>	Articles 9-11 Protocol 1, Article 3
<b>CEDAW</b>	Article 3
<b>CRC</b>	Articles 13-15
<b>CRPD</b>	Article 19 Article 21 Article 29
<b>ICCPR</b>	Articles 18-22 Article 25
<b>Charter of Fundamental Rights of the EU</b>	Articles 10-12

### Blasphemy

The UN Human Rights Committee welcomed the introduction of the Criminal Justice and Immigration Act 2008 abolishing the common law offence of blasphemy in England and Wales as a positive measure to ensure compliance with the ICCPR, Article 19 on the right to freedom of expression and opinion.<sup>504</sup>

The common law offences of blasphemy and blasphemous libel were recorded in the 2016 Booklet of Criminal Offences in NI and, whilst a prosecution has not occurred since 1855, an individual may be subject in law to prosecution for committing either of these offences.<sup>505</sup> If such a prosecution were to occur it would be in breach of ICCPR, Article 19. In 2018, there have been no legislative initiatives to abolish the offences of blasphemy and blasphemous libel.

In October 2018, following a referendum,<sup>506</sup> blasphemy was removed as an offence from the Constitution of Ireland.<sup>507</sup>

### Recommendation

The Commission recommends that the NI Executive introduce legislation to the NI Assembly to abolish the common law offence of blasphemy and blasphemous libel to ensure compatibility with the ICCPR, Article 19.

504 CCPR/C/GC/34, 'UN Human Rights Committee, General Comment No 34 on Article 19: Freedoms of Opinion and Expression', 12 September 2011.

505 BJAC Valentine, 'Booklet of Criminal Offences in NI' (LSNI 2016).

506 Emma Graham-Harris, 'Ireland votes to oust "medieval" blasphemy law', *The Guardian*, 27 October 2018.

507 Article 40(6)(1)(i), Constitution of Ireland 1937.

## Defamation

In 2008, the UN Human Rights Committee raised concerns that the:

*practical application of the law of libel [in the UK] has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as ‘libel tourism’... The State party should re-examine its technical doctrines of libel law, and consider the utility of a so-called ‘public figure’ exception, requiring proof by the plaintiff of actual malice in order to go forward on actions concerning reporting on public officials and prominent public figures.*<sup>508</sup>

The Defamation Act 2013, elsewhere in the UK to some extent, addressed this recommendation. However, the Act does not include NI.

In July 2016, the Department of Finance published the report of Dr Andrew Scott on reform to the law of defamation in NI. The Report recommends that:

*to a significant extent, measures equivalent to the provisions of the Defamation Act 2013 should be introduced into NI law.*<sup>509</sup>

The Report, in particular, recommended the introduction of a new defence of honest opinion, similar to section 3 of the Defamation Act 2013 with some additions.<sup>510</sup>

The then Minister of Finance welcomed the publication of the report and stated:

*this will help to inform the policy development process as we seek to ensure that a fair balance is maintained between the right to free speech and the right of the ordinary man and woman in the street, to protect their reputation.*<sup>511</sup>

In 2017, proposals for reform of defamation law in NI were not brought forward. The review of Civil and Family Justice in NI conducted in 2017, inter alia, made recommendations for reform of the 2011 Pre-Action Protocol on Defamation.<sup>512</sup>

In April 2018, the Commission hosted a roundtable meeting on libel reform in NI. At the meeting Dr Andrew Scott provided an overview of the recommendations contained within the report and stakeholders considered how to advance discussions regarding reform.<sup>513</sup>

508 CCPR/C/GBR/CO/6, ‘UN Human Rights Committee Concluding Observations of the Human Rights Committee on the Sixth Periodic Report of the UK of Great Britain and NI’, 21 July 2008.

509 Andrew Scott, ‘Reform of Defamation Law in NI: Recommendations to the Department of Finance’ (LSE, 2016).

510 Ibid.

511 Department of Finance, ‘Press Release: Ó Muilleoir announces publication of defamation report’, 19 July 2016.

512 Office of the Lord Chief Justice, ‘Review of Civil and Family Justice in NI: Review Group’s Report on Civil Justice’ (Office of the Lord Chief Justice, 2017).

513 ‘Campaign for NI libel law reform is stepped up’, *Belfast Telegraph*, 28 April 2018.

## Recommendation

The Commission recommends that the NI Executive introduce legal measures to ensure the law of NI strikes a fair balance between the right to freedom of expression and the right to private life.

### Freedom of expression of journalists

In August 2018, journalists Barry McCaffery and Trevor Birney were arrested as part of an investigation into the suspected theft of confidential documents from the Police Ombudsman NI, relating to a police investigation into the 1994 murder of six men at Loughinisland, Co Down.<sup>514</sup>

The Police Service NI had asked Durham Constabulary to conduct an independent investigation into the alleged theft of sensitive material, which was used in a documentary made by the two journalists. Detectives from Durham Constabulary, supported by Police Service NI officers, searched two homes and a business premises in Belfast. During the searches documents and computer equipment were seized, however this is not to be examined by police until the outcome of a legal challenge by the company that produced the film.

Lawyers for Fine Point Films brought emergency proceedings to the Belfast High Court challenging the legality of the search warrant used by police. During these proceedings, they suggested that a mutually acceptable independent lawyer or retired judge could be appointed to examine material held by police and filter out those items not covered by the search warrant. In September 2018, the emergency proceedings were adjourned to take further instructions on the proposal for an independent assessment of everything seized by the police.<sup>515</sup>

Durham Constabulary maintains that the arrests were a:

*significant development in what has been a complex investigation... The terms of reference given to our inquiry were clear in that the investigation is solely into the alleged theft of material from the Police Ombudsman NI... The theft of these documents potentially puts lives at risk and we will follow the evidence wherever it leads us.*<sup>516</sup>

The Committee on the Administration of Justice has raised concerns internationally around the human rights compliance of these arrests and the resulting erosion of journalists' freedom of expression more broadly, including making submissions to the Organisation for Security and Cooperation in Europe and the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye.

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514 'Loughinisland: Journalists arrested over documents investigation', *BBC News*, 31 August 2018.

515 Alan Erwin, 'Arrest of Loughinisland journalists attempt to intimidate whistleblowers, court told', *Belfast Telegraph*, 7 September 2018.

516 'Loughinisland: Journalists arrested over documents investigation', *BBC News*, 31 August 2018.

Commenting on the arrests, the Organisation for Security and Cooperation in Europe's Representative on Freedom of the Media, Harlem Désir stated:

*I am seriously concerned by the arrest of two journalists in NI. Journalists have the right to use any confidential information for reporting on stories of public interest... It is positive that independent judiciary will decide whether journalists' property can be examined since it is essential that journalists' privilege to confidential sources is protected and that journalists are free to do their work.*<sup>517</sup>

The acting General Secretary of the National Union of Journalists, Seamus Dooley stated the Union had:

*grave concern [about the arrests].*<sup>518</sup>

He continued that reporters must be:

*free to operate in the public interest without police interference... The protection of journalistic sources of confidential information is of vital importance... These journalists are entitled to claim journalistic privilege and to seek the protection of the legal system if there is any attempt to force them to reveal sources.*<sup>519</sup>

A spokesperson for the relatives of those killed during the Loughinisland attack, Clare Rogan expressed that they were:

*shocked and appalled [by the arrests].*<sup>520</sup>

She continued that:

*these actions are the latest attempt to deter the work of families and journalists.*<sup>521</sup>

The UK Government has responded to the criticism by stating:

*the requirement for journalists to obey the ordinary criminal law is not incompatible with their right to operate independently and to freely express their views. The right to freedom of expression, as reflected in Article 10 of the [ECHR] and given further effect in the UK through the Human Rights Act 1998, is not an absolute right, and does not prevent the authorities from taking legitimate and proportionate action to prevent and investigate crime. The UK condemns strongly any attempts by governments to restrict the freedom of the media, or to intimidate or detain journalists for political purposes, or to restrict the right to express opinion or hold those in authority to account. There is nothing in this case that calls into question this position by the UK.*<sup>522</sup>

517 OSCE Representative on Freedom of the Media, 'Press Release: OSCE media freedom representative seriously concerned by arrest of journalists in UK', 1 September 2018.

518 'Loughinisland: Journalists arrested over documents investigation', *BBC News*, 31 August 2018.

519 Ibid.

520 Ibid.

521 Ibid.

522 Letter from the UK Permanent Representation to the Council of Europe, 19 September 2018.

## Recommendation

The Commission stresses that any limitation of journalists' freedom of expression must be human rights compliant.

The Commission further stresses that the right to a fair trial and right to an effective remedy for journalists facing allegations are fulfilled, respected and protected.

In the context of the allegations against journalists, Barry McCaffery and Trevor Birney, the Commission welcomes the proposal for an independent assessment of everything seized by the police and urges that this is conducted without further delay.

## Parades and protests

The Commission has previously referred to the call by the UN Special Rapporteur on peaceful assembly, parades and association for:

*political resolution of the issues – such as parades, flags and emblems – that still make the enjoyment of freedom of peaceful assembly problematic in NI.*<sup>523</sup>

The Stormont House Agreement proposed that responsibility for parades and related protests should, in principle, be devolved to the NI Assembly.<sup>524</sup> It also proposed that the Office of Legislative Counsel, working in conjunction with the Office of the First Minister and Deputy First Minister (now the Executive Office), should produce a range of options on how the remaining key issues which include the Code of Conduct, criteria and accountability could be addressed in legislation. The Office of the First Minister and Deputy First Minister (now the Executive Office) was to bring forward proposals to the NI Executive by June 2015.<sup>525</sup>

In 2017/18, the Parades Commission were notified of 2,435 loyalist/unionist, 126 nationalist/republican and 1,938 other parades.<sup>526</sup>

A judicial review challenged the Police Service NI on its understanding of its powers under the Public Processions (NI) Act 1998 in that the police failed to recognise and make use of their powers to prevent parades taking place during the flag protests of December 2012 and January 2013. In January 2017, the UK Supreme Court gave judgment in this case and found that:

*in their handling of the flags protest in Belfast during the months of December and January, Police Service NI misconstrued their legal powers to stop parades passing through or adjacent to the Short Strand area.*<sup>527</sup>

The Commission has consistently advised all those participating or responsible for the regulation of parades and protests that a broad range

523 A/HRC/23/39/Add.1, 'Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai, on his Mission to the UK (14-23 January 2013)', 17 June 2013, at para 96.

524 NI Office, 'Stormont House Agreement', 23 December 2014, at para 17.

525 Ibid, at para 18.

526 Parades Commission NI, 'Annual Report and Financial Statements for the Year Ended 31 March 2018' (PCNI, 2018), at 10.

527 *DB (Appellant) v Chief Constable of Police Service of NI (Respondent) (NI)* [2017] UKSC 7.



of human rights and state obligations are engaged. Human rights law, in particular the jurisprudence of the ECtHR, is a valuable resource for resolving disputes relating to parades, protests and related adjudicative processes. Furthermore, it is sufficiently flexible to accommodate alternative mechanisms for resolution which seek to develop innovative compromise agreements.<sup>528</sup>

### Recommendation

The Commission recommends that responsibility for parades and protests be devolved to the NI Assembly in line with the Stormont House Agreement. In addition, the NI Executive should work in conjunction with the Office of Legislative Counsel to produce a range of options on how issues relating to parades and protests, including a Code of Conduct could be addressed in legislation.



### Participation of women in public and political life

#### Public life

Within its 2016 concluding observations on the UK, the UN ICESCR Committee noted its concern at the persistent under-representation of women in decision-making positions in the public and private sectors. The UN ICESCR Committee recommended that the UK Government and NI Executive:

*intensify its efforts to increase the level of representation of women in decision-making positions, in both the public and private sectors.*<sup>529</sup>

The UN CRPD Committee, in its 2017 concluding observations, recommended the UK Government and NI Executive:

*adopt inclusive and targeted measures, including disaggregated data, to prevent multiple and intersectional discrimination of women and girls with disabilities, in particular those with intellectual and/or psychosocial disabilities, in education [and] employment.*<sup>530</sup>

The UN CRPD Committee further recommended the UK Government and NI Executive:

*in close consultation with organisations of women and girls with disabilities, mainstream the rights of women and girls with disabilities into disability and gender-equality policies.*<sup>531</sup>

Additionally, in 2015 the UN Human Rights Committee recommended:

*that all existing and future gender equality strategies and policies, including the Gender Equality Strategy for NI, identify and address*

528 NI Human Rights Commission, 'Parades and Protests in NI' (NIHRC, 2013), at 2.

529 E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at para 17(d).

530 CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI', 29 August 2017, at para 19.

531 Ibid.

*effectively the barriers hindering women's access to high positions in the civil service and in the judiciary.*<sup>532</sup>

In October 2014, it was found that there was:

*a significant degree of inequality in the gender composition at executive level of the NI public sector: males and females holding 70.8 per cent and 29.2 per cent of all executive positions respectively.*<sup>533</sup>

A number of barriers to career progression amongst women in the civil service were identified, including: those related to caring responsibilities, a lack of recognition of work life balance, long hours' culture and exclusion from informal networks of communication.<sup>534</sup> As of 31st March 2017, 42 per cent of public appointments and 28 per cent of chair appointments were held by women; an increase of one per cent and four per cent respectively. There are to be 50/50 public appointments by 2020/2021.<sup>535</sup> Between April 2016 and March 2017, 40 per cent of applications received for public appointments were from women, an increase of three per cent from the previous year. Gender is known for 82 of the 131 appointments in 2016/17, of which 37 per cent were women. In the year 2016/17, 28 per cent of applications for chair appointments were from women, a decrease of nine per cent from the previous year.<sup>536</sup> As of December 2018, of the nine NI permanent secretaries, three are women. These are the first women appointments to such roles.

### Judicial appointments

The UN CEDAW Committee, in its 2013 concluding observations, called on the UK Government and NI Executive:

*to continue to take specific targeted measures to improve the representation of women, in particular black and ethnic minority women and women with disabilities, in... the judiciary.*<sup>537</sup>

In 2016/2017, 51 per cent of applicants for judicial appointments (including legal, lay and medical appointments) were female. Of those that applied, 26 female applicants (46 per cent) were recommended for appointment.<sup>538</sup> In September 2017, 46 per cent of those holding judicial office and 31 per cent of those holding substantive court roles were female.<sup>539</sup> According to NI Judicial Appointments Commission:

*progress is steadily being made in the representation of women in [NI's] courts, near or actual equality has been achieved in tribunals and Lay Magistrates.*<sup>540</sup>

532 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 12.

533 Joan Ballantine *et al*, 'An Investigation of Gender Equality Issues at the Executive Level in NI Public Sector Organisations' (TEO, 2014).

534 *Ibid*, at 118.

535 NI Statistics and Research Agency, 'Public Appointments Annual Report for NI 2016/17' (TEO, 2018).

536 *Ibid*.

537 CEDAW/C/GBR/CO/7, 'UN Committee on the Elimination of Discrimination Against Women, Concluding Observations on the Seventh Periodic report of the UK of Great Britain and NI', 30 July 2013, at para 43(a).

538 Email from NI Judicial Appointments Commission to NI Human Rights Commission, 28 September 2017.

539 *Ibid*.

540 *Ibid*.

For the first time in the history of the NI judiciary two women, Denise McBride QC and Siobhan Keegan QC, were appointed in 2015 as NI High Court judges.<sup>541</sup> In September 2017, Lady Hale became the first female President of the UK Supreme Court.<sup>542</sup> Lady Justice Black was appointed on 1 October 2017 as the second female Justice of the UK Supreme Court.<sup>543</sup>

### Political life

The UN CEDAW Committee, in its 2013 concluding observations, called on the UK Government:

*to continue to take specific targeted measures to improve the representation of women, in particular black and ethnic minority women and women with disabilities, in Parliament.*<sup>544</sup>

The Sex Discrimination (NI) Order 1976, section 43A allows political parties to take positive measures to reduce inequality between men and women elected to Parliament, the NI Assembly, District Councils and the European Parliament.<sup>545</sup> The Commission notes, however, that this provision has not been utilised in NI and women continue to be under-represented in political life (albeit there are variations in the patterns of representation depending on the particular office concerned).

There have been some positive steps forward. Elected female representation within the UK Parliament rose from 191 (29 per cent) in May 2015 to 208 (32 per cent) in June 2017.<sup>546</sup> The NI Assembly saw an increase of 50 per cent in the number of women MLAs, from 20 (19 per cent) in 2011 to 30 (28 per cent) in 2016 elections.<sup>547</sup> This rose further following the March 2017 snap election. The actual number of seats that women held following this election fell to 27, but with the reduction in the number of seats available (90 instead of 108), this represented an increase to 30 per cent.<sup>548</sup> Since January 2017, three of the five main parties have female leaders and the last NI Executive was 41 per cent female.<sup>549</sup> At a local government level, 25 per cent of councillors elected in 2014 were women.<sup>550</sup>

541 Department of Justice, 'Courts and Tribunals'. Available at: <https://www.courtsni.gov.uk/en-GB/AboutUs/OrganisationalStructure/Pages/Judiciary-of-Northern-Ireland.aspx>

542 UK Supreme Court, 'Biographies of the Justices'. Available at: <https://www.supremecourt.uk/about/biographies-of-the-justices.html>

543 Prime Minister's Office, 'Press Release: Appointment of Justices of the Supreme Court', 21 July 2017.

544 CEDAW/C/GBR/CO/7, 'UN Committee on the Elimination of Discrimination Against Women, Concluding Observations on the Seventh Periodic report of the UK of Great Britain and NI', 30 July 2013, at para 43(a).

545 Section 43A, Sex Discrimination (NI) Order 1976. The provisions have been extended to 2030 by section 105(3) of the Equality Act 2010.

546 HM Parliament, 'Parliament and Women'. Available at: <http://www.parliament.uk/women>

547 'NI Assembly Election: Number of women MLAs increases by 50%', *BBC News*, 9 May 2016.

548 Allison Morris, 'Poll returns most female MLAs in assembly's history', *The Irish News*, 6 March 2017.

549 NI Assembly, 'Executive Ministers'. Available at: <http://aims.niassembly.gov.uk/mlas/ministers.aspx>

550 North South Inter-parliamentary Association, 'Briefing Paper for the Seventh Meeting of the North-South Inter-Parliamentary Association: Women in Public Life' (NSIPA, 2015).



### **Recommendation**

Recognising recent progress, nonetheless, the Commission remains concerned over the continued under-representation of women in public and political life. It recommends that all existing and future gender equality strategies and policies, including the Gender Equality Strategy for NI, identify and address effectively the barriers hindering women's access to high positions in the civil service and in the judiciary. It acknowledges the increase in female political representation and recommends efforts continue to encourage political representation that is reflective of society.

## Right to work and to just and favourable conditions of work

<b>CEDAW</b>	Article 11
<b>CERD</b>	Article 5(d)
<b>CRPD</b>	Article 27
<b>ICESCR</b>	Articles 6-7
<b>European Social Charter</b>	Articles 1-6 Article 19
<b>Charter of Fundamental Rights of the EU</b>	Article 15 Article 31

### Accessible childcare

In 2016, the UN ICESCR Committee recommended that the UK Government and NI Executive increase its efforts to ensure the availability, accessibility and affordability of childcare services throughout the UK. The Committee also recommended that the UK Government and NI Executive review the system of shared parental leave and modify it with a view to improve the equal sharing of responsibilities within the family and in the society.<sup>551</sup> In addition, in 2017 the UN CRPD Committee recommended that the UK Government and NI Executive develop and implement policies:

*securing sufficient and disability-sensitive childcare as a statutory duty across the State party.*<sup>552</sup>

The Equality Commission NI reported in 2016, that although there has been an increase in the number of childcare places in NI over the last decade:

*the cost of childcare remains high and it is higher than other parts of the UK.*<sup>553</sup>

The cost of childcare in NI continued to rise in 2017 and childcare continues to be a barrier to work in NI.<sup>554</sup>

In 2016, the NI Executive consulted on a draft strategy.<sup>555</sup> The Commission provided advice and recommended that the NI Executive introduce an adequately funded childcare strategy which ensures affordable and accessible childcare is available throughout NI.<sup>556</sup> Responsibility for the development of a childcare strategy was allocated to the Department of Education under the transfer of functions.<sup>557</sup> In January 2017, in response to an Assembly question, the then Minister for Education Peter Weir stated:

551 E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at para. 44.

552 CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI', 29 August 2017, at para 21.

553 Equality Commission NI, 'Gender Equality: Policy Priorities and Recommendations' (ECNI, 2016), at 29.

554 Employers for Childcare, 'NI Childcare Cost Survey 2017' (Employers for Childcare, 2018).

555 OFMdfM, 'A Ten Year Strategy for Affordable and Integrated Childcare 2015-2025' (OFMdfM, 2015).

556 NI Human Rights Commission, 'Response to the OFMdfM Consultation on a Ten Year Strategy for Affordable and Integrated Childcare 2015-2025' (OFMdfM, 2015).

557 NI Assembly, 'Briefing by OFMdfM Officials to the Committee for OFMdfM', 2 March 2016.

*the Childcare Strategy is being delivered on a phased basis. The first phase was published in 2013 and contained a number of Key First Actions to address childcare needs which had been identified through consultation and research as priority issues. These Actions are continuing to be implemented and included the establishment of the Bright Start School Age Childcare Grant Scheme, which financially supports low cost childcare places and has, to date, supported some 3,000 low cost childcare places across NI. A draft Childcare Strategy was launched for consultation in the latter half of 2015 by the former Office of the First Minister and Deputy First Minister. Some 300 consultation responses were received in addition to the views expressed during the formal consultation and stakeholder events. This is indicative of the extent of public interest in this policy area and I want to ensure that the revised version of the strategy fully reflects the outcome of the consultation and the existing research and evidence which highlights the importance of high quality childcare in promoting positive early childhood development. The transfer of policy responsibility for childcare to my Department in May 2016 has also created opportunities to ensure that childcare is better aligned with Department of Education's Early Years initiatives. I want to ensure that I have fully considered the opportunities for integrating these services in line with the strategy's objectives. The strategy is at an advanced stage of development.*<sup>558</sup>

In 2018, the Commission has engaged with officials, who have confirmed that the strategy remains at an advanced stage, but its publication remains subject to Ministerial approval.

### **Recommendation**

The Commission calls on the NI Executive to publish the final Childcare Strategy as soon as possible and to clarify the availability of necessary resources. The Commission further recommends a Childcare Strategy for NI ensures a model that operates outside traditional working hours to meet the needs of those working shift patterns, as is the case for many parents in NI.

<sup>558</sup> AQO 955/16-21, 'Mrs Jenny Palmer (UUP - Lagan Valley)', 12 January 2017.

## Armed Forces Covenant

In 2013, the NI Select Affairs Committee reported that it had received mixed evidence about the level of progress on implementing the Armed Forces Covenant in NI, compared to other parts of the UK.<sup>559</sup> In particular, certain benefits were not available in NI, including improved access to in vitro fertilisation treatment, priority in accessing healthcare, additional priority in accessing social housing, schools and other educational entitlements.<sup>560</sup> However, the NI Affairs Committee also received evidence that indicated local solutions could be found in most cases where the above differences affected the Armed Forces community and that there was no significant disadvantage to veterans who chose to settle in NI.

On 15 December 2016, the Ministry of Defence presented a report to Parliament relating to the Armed Forces Covenant. The report set out a number of measures taken to support the implementation of the Covenant in NI, in particular the report highlighted measures taken with respect to social housing, education and waiting times for health services to support armed forces personnel and their families.<sup>561</sup>

The report set out activities funded under the Covenant, it stated:

*Combat Stress received one of the Covenant Fund's largest awards with £467,000 to run a three year programme of work in NI. They aim to support the integration of Veterans and Service leavers experiencing mental health problems back into the civilian community through one-to-one work, counselling, and activities to promote wellbeing and life skills.*<sup>562</sup>

The report further stated:

*we are much encouraged by the recent decision by the NI Government to send a representative to future meetings of the Covenant Reference Group. [The Confederation of Service Charities] is already committed to helping to develop and support the NI Veterans Support Committee to enhance the level of cooperation and collaboration across the Service charity sector in the Province.*<sup>563</sup>

The nomination of a representative of NI to the Reference Group was positively acknowledged by the Defence Select Committee which reported:

*that implementation of the Covenant is not as developed in NI as it is in the rest of the UK. This was recognised in oral evidence and a commitment was made to place a particular focus on NI in 2017.*<sup>564</sup>

<sup>559</sup> House of Commons NI Affairs Select Committee, 'Implementation of the Armed Forces Covenant in NI: First Report of Session 2013/14' (NIAC, 2013), at 7.

<sup>560</sup> Ibid, at 3.

<sup>561</sup> Ministry of Defence, 'Armed Forces Covenant: Proudly Supporting Those Who Serve' (MoD, 2016).

<sup>562</sup> Ibid, at 53.

<sup>563</sup> Ibid, at 16.

<sup>564</sup> House of Commons Defence Select Committee, 'Armed Forces Covenant Annual Report 2016' (HoC, 2017), at 4.

However, whilst the NI Assembly appointed a nominee to the Reference Group, this has not been implemented due to the suspension of the NI Assembly.<sup>565</sup>

The Confidence and Supply Agreement between the Conservative Party and the Democratic Unionist Party states:

*both parties are committed to the Armed Forces Covenant and to its implementation throughout the UK.*<sup>566</sup>

In 2017, Ulster University published research highlighting that, through both the statutory and voluntary sectors, there is a fairly well established support infrastructure for veterans in the regions, however there are no veteran specific services in the statutory sector. The report noted that organisations do not collect data to allow for the monitoring of outcomes for veterans, nor to assess the level of discrimination which may or may not be faced by this population.<sup>567</sup> The report also notes that there is a deficit of evidence available about the mental health of veterans, however preliminary findings from the research indicate that mental health was a significant concern for this group.<sup>568</sup> The report concluded:

*there is a need for a well resourced forum, formally recognised in NI where key stakeholders in the region can meet to develop recommendations, provide responses to consultations and engagement exercises and support key agencies in developing guidance and protocols which affect veterans.*<sup>569</sup>

In May 2018, Tobias Ellwood, the Parliamentary Under-Secretary of State for Defence, informed the House of Commons:

*the newly-formed NI Veterans Support Office - embedded in the Reserve Forces and Cadets Association for NI and acting on behalf of the confederation of service charities - functions as a single point of contact for veterans who feel unable to access public bodies or service charities for services. We have allocated £300,000 over five years to improve the capacity and capability of local authorities and other service providers in NI to apply for Covenant Funding. Any UK Armed Forces veteran living in NI who feels that they cannot access the support they require from public sector service providers should contact the NI Veterans Support Office, either direct or via the network of local veteran's champions. The NI Veterans Support Office can provide bespoke support and advice through its partner organisations tailored to the specifics of each individual case.*<sup>570</sup>

On 14 November 2018, the UK Government published a UK-wide strategy on the delivery of support for veterans.<sup>571</sup> The strategy was produced

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565 Ulster University, 'NI Veterans Health and Wellbeing Study: Supporting and Serving Military Veterans in NI' (UU, 2017), at 50.

566 Prime Minister's Office, 'Confidence and Supply Agreement between the Conservative and Unionist Party and the Democratic Unionist Party' (PMO, 2017).

567 Ulster University, 'NI Veterans Health and Wellbeing Study: Supporting and Serving Military Veterans in NI' (UU, 2017), at 21.

568 Ibid, at 19.

569 Ibid, at 21.

570 Ministry of Defence, 'Written Statement: Armed Forces Covenant in NI - Response to a Resolution of the House - 7 March 2018', 23 May 2018.

571 UK Government, 'Press Release: First ever UK-wide veterans strategy launched', 14 November 2018.



jointly between the UK, Scottish and Welsh Governments, and included the NI Office. The strategy identifies six key areas of focus: community and relationships, employment and skills, health and wellbeing, finance and debt, housing, and contact with the law.

### Recommendation

The Commission advises the NI Executive to commit to reviewing the needs of Armed Forces personnel in NI in the areas of health, housing and education to ensure, as is the case in the UK, that they do not suffer disadvantage compared to the rest of the population.

### Children in the Armed Forces

The law of the UK permits the recruitment of children between the ages 16-18 to the Armed Forces, provided it is voluntary and there are safeguards in place.<sup>572</sup> The UK is the only country in Europe which routinely recruits minors into the armed forces. In 2009, the Joint Committee on Human Rights recommended the raising of the minimum age of recruitment to age 18.<sup>573</sup> In July 2016, the UN CRC Committee raised concerns over the UK's current recruitment of children in the Armed Forces. The Committee stated:

- a) *the State Party maintains the wide scope of its interpretative declaration on article 1 of the Optional Protocol, which may permit the deployment of children to areas of hostilities and their involvement in hostilities under certain circumstances;*
- b) *the minimum age for voluntary recruitment as 16 years has not been changed and child recruits makes up 20 per cent of the recent annual intake of UK Regular Armed Forces;*
- c) *the Army Board endorsed increasing the recruitment of personnel under 18 years old to avoid undermanning, and children who come from vulnerable groups are disproportionately represented among recruits;*
- d) *safeguards for voluntary recruitment are insufficient, particularly in the light of the very low literacy level of the majority of under-18 recruits and the fact that briefing materials provided to child applicants and their parents or guardians do not clearly inform them of the risks and obligations that follow their enlistment; [and]*
- e) *in the army, child recruits can be required to serve a minimum period of service up to two years longer than the minimum period for adult recruits.*<sup>574</sup>

With reference to their concerns, the UN CRC Committee recommended that the UK Government:

572 Article 3, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

573 House of Commons and House of Lords Joint Committee on Human Rights, 'Children's Rights, Twenty-fifth Report of Session 2008-2009' (JCHR, 2009), at para 143.

574 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 84(e).

*consider reviewing its position and raise the minimum age for recruitment into the armed forces to 18 years in order to promote the protection of children through an overall higher legal standard.*<sup>575</sup>

### Recommendation

The Commission raises concern over the UK's recruitment of children to the Armed Forces. In particular, it highlights the disproportionate representation of children from vulnerable groups in the Armed Forces. The Commission recommends the UK raise the minimum age of recruitment to the Armed Forces from 16 to 18 to ensure the protection of children.



### Gender pay gap

In 2016, the UN ICESCR Committee in their concluding observations on the UK recommended that the UK Government and NI Executive:

*adopt effective measures to eliminate the persistent gender pay gap.*<sup>576</sup>

PriceWaterhouseCooper's 2018 Women in Work index reported that NI's gender pay gap is at 6 per cent, the lowest in the UK.<sup>577</sup> The overall better result in NI is due to the larger share of women working in public administration, which as a sector has a:

*relatively low pay gap.*<sup>578</sup>

However, the index also reports that since 2016, NI has seen a widening of the pay gap:

*largely driven by growth in male employment exceeding growth of their female counterparts, coupled with sluggish growth in median female pay relative to median male pay.*<sup>579</sup>

The Equality Commission NI made a number of recommendations to reform sex equality and/or equal pay legislation.<sup>580</sup> Recommendations include:

- *permit hypothetical comparators in equal pay cases and introduce mandatory equal pay audits;*
- *introduce new protections for employees against pay secrecy clauses aimed at prohibiting employers from preventing or restricting their employees from having discussions about their pay, where such discussions are aimed at establishing whether or not there is pay discrimination;*

575 Ibid, at paras 85(a)-(d).

576 E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at para 27(b).

577 PriceWaterhouseCooper, 'Women in Work Index 2018' (PWC, 2018).

578 Ibid, at 20.

579 Ibid, at 5.

580 Equality Commission NI, 'Chief Executive's Blog: Gender equality must be a priority', 8 March 2017.

- *require tribunals to order a respondent who has been found by the tribunal to have committed an equal pay breach to carry out an equal pay audit; and*
- *introduce Regulations requiring large private and voluntary sector employers to publish information about the differences of pay between their male and female employees.*<sup>581</sup>

The Employment Act (NI) 2016 seeks, inter alia, the elimination of the gender pay gap, creating reporting requirements and requiring the adoption of action plans by employers with a gender pay gap and by the former Office of the First and Deputy First Minister (now the Executive Office).

Regulations are required to give effect to the relevant provisions of the 2016 Act stipulating which employers it is applicable to and the scope of their reporting requirements. The necessary regulations were not published prior to the suspension of the NI Assembly.

### **Recommendation**

The Commission recommends that regulations are introduced to give effect to the protections contained within the Employment Act (NI) 2016.

<sup>581</sup> Equality Commission NI, 'Gender Equality: Policy Priorities and Recommendations' (ECNI, 2016), at 53-54.

## Right to an adequate standard of living and to social security

<b>CEDAW</b>	Article 14
<b>CRC</b>	Articles 26-27
<b>CRPD</b>	Article 28
<b>ICESCR</b>	Article 9 Article 11
<b>European Social Charter</b>	Articles 12-14
<b>Charter of Fundamental Rights of the EU</b>	Article 34

### Anti-poverty strategy

In June 2015, the NI High Court ruled that the NI Executive had failed to adopt an identifiable strategy setting out how it proposes to tackle poverty, social exclusion and patterns of deprivation based on objective need in furtherance of its obligation to do so under the NI Act 1998, section 28E.

The Commission informed the UN ICESCR Committee in April 2016 that an anti-poverty strategy based on objective need remains outstanding, despite the NI High Court ruling in 2015.<sup>582</sup> This remains the case to date. The UN ICESCR Committee, in its 2016 concluding observations, recommended that the UK Government and NI Executive takes steps to introduce measures to guarantee targeted support to all those living in poverty or at risk of poverty, in particular, persons with disabilities, persons belonging to ethnic, religious or other minorities, single parent families, and families with children. The UN ICESCR Committee also recommended that the NI Executive adopts an anti-poverty strategy in NI.<sup>583</sup>

The Households Below Average Income Report published in 2018 outlined a number key findings with regard to poverty in NI:

- *in 2016/17 the average (median) income before housing costs in NI increased by three per cent from £440 in 2015/16 to £452 in 2016/17;*
- *the proportion of individuals in relative poverty (before housing costs) was 18 per cent. This compares to 17 per cent in 2015/16;*
- *the proportion of working age adults in relative poverty (before housing costs) remained 16 per cent, the same as the previous year. The proportion of working age adults in absolute poverty (before housing costs) remained the same as the previous year at 14 per cent; and*

582 NI Human Rights Commission, 'Submission to the UN Committee on Economic, Social and Cultural Rights on the 6th Periodic Report of the UK's compliance with ICESCR' (NIHRC, 2016), at paras 26.1-26.5.

583 E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at para 48.

- *the proportion of pensioners living in relative poverty (before housing costs) increased by 2 percentage points to 19 per cent in 2016/17 from 17 per cent the previous year.*<sup>584</sup>

There has been a statistically significant change for relative poverty (after housing costs) for all individuals in 2016/17. During this year, 20 per cent (approximately 360,000 individuals) were in poverty, compared to 18 per cent in 2015/16. This can be attributed to a number of factors: an increase in housing costs, the fall in NI earnings, the fall in NI's economic activity rate, and the impact of social security reforms. It is possible that the 'lag in the implementation' of social security reforms in NI compared to the rest of the UK and:

*the introduction of mitigation schemes could possibly counter any negative effects of these other economic factors on the relative poverty rate in NI.*<sup>585</sup>

With the exception of pensioners, the percentages of absolute poverty (before housing costs) remained at their lowest levels.<sup>586</sup>

In 2016, the then Minister for Communities, Paul Givan, indicated that poverty would be tackled within a wider social strategy.<sup>587</sup> To date, this strategy has not been published for consultation.

In November 2018, the UN Special Rapporteur on extreme poverty and human rights, Professor Philip Alston, undertook an official visit to the UK. The Special Rapporteur met with stakeholders in NI, including the Commission, who highlighted the absence of a robust policy framework to address poverty.<sup>588</sup> The Special Rapporteur's report on the visit will be available in 2019.

## Recommendation

The continued failure of the NI Executive to introduce an Anti-poverty Strategy in NI based on objective need is unacceptable and should be remedied urgently. The Commission continues to highlight the disproportionate, adverse impact that social security measures introduced between 2010 and the present time are having on the enjoyment of economic, social and cultural rights by disadvantaged and marginalized individuals and groups. It recommends that the NI Executive introduce measures to guarantee targeted support to all those living in poverty or most at risk of poverty, including persons with disabilities, persons belonging to ethnic minorities, single parent families and families with children.

584 NI Statistics and Research Agency, 'Households Below Average Income: NI 2016/17' (DfC, 2018).

585 Ibid, at 5.

586 NI Statistics and Research Agency, 'Poverty Bulletin: NI 2016/17' (DfC, 2018), at 2.

587 AQO 431/16-21, 'Mr Declan McAleer, MLA', 10 October 2016.

588 Meeting between the UN Special Rapporteur on extreme poverty, Philip Alston, the NI Human Rights Commission and civil society organisations, 10 November 2018.

## Carers

In November 2014, the Commission published a report into the human rights of carers.<sup>589</sup> The report measures the recorded experiences of carers, set against the international human rights obligations of the NI Executive and other relevant public authorities.<sup>590</sup> The report specifically focused on the experiences of younger carers and older carers. The Commission made 15-targeted recommendations relating to the rights of carers, directed to the Departments of the NI Executive.

In December 2017, the Expert Advisory Panel on Adult Care and Support published proposals to ‘reboot’ adult care and support in NI. The proposals emphasised:

*the fundamental importance of a human rights approach in which people with care and support needs enjoy the same entitlements to quality of life and well being as all other citizens.*<sup>591</sup>

The Expert Advisory Panel drew extensively on the Commission’s 2014 report; the proposals included:

*that the rights of family carers are put on a legal footing and that a strategy to bring them into the heart of transformation of adult care and support is adopted.*<sup>592</sup>

In February 2018, the Department for Communities published statistics indicating at November 2017 there were 38,480 working age carers in NI in receipt of social security benefits.<sup>593</sup> There has been a steady rise in working age carers since August 2011, when the number was 27,590.<sup>594</sup> In July 2018, the NI Assembly Research and Information Service published research highlighting that:

*NI is lagging behind the rest of the UK in addressing carers’ issues, in terms of both strategy and law development. Caring for Carers (2006) is the most recent NI strategy, whereas more recent strategies have been published in Scotland in 2010, in Wales in 2013, and in England in 2014.*<sup>595</sup>

Throughout 2018, the Department of Health has been taking forward a process to reform adult care and support, which will include consideration of support for informal carers.

During Carers Week 2018, the results of a survey by a number of carer organisations indicated that 70 per cent of carers in NI state that they have suffered mental ill health as a result of their caring responsibilities.<sup>596</sup>

589 NI Human Rights Commission, ‘Film on Carers’ Rights’, 8 June 2016.

590 NI Human Rights Commission, ‘The Human Rights of Carers in NI’ (NIHRC, 2015).

591 Expert Advisory Panel on Adult Care and Support, ‘Power to People’ (DoH, 2017), at 25.

592 Expert Advisory Panel on Adult Care and Support, ‘Power to People’ (DoH, 2017), at 39.

593 Department for Communities, ‘NI Benefits Statistics Summary November 2017’ (DfC, 2017), at 9.

594 Department for Social Development, ‘NI Benefits Statistics Summary February 2013’ (DSD, 2013), at 15.

595 Janice Thompson, ‘Carers in NI: Where are we with legislation and policy to support them?’ (Research Matters, 2018).

596 Carers NI, ‘Press Release: The physical and mental strain of caring “jeopardising” the ability of unpaid carers in NI to care in the future’, 7 June 2018.

## Recommendation

The Commission continues to monitor the implementation of 15-targeted recommendations it has made relating to the rights of carers in NI. The Commission notes that progress is not being made in a sufficiently timely manner and that NI is out of step with the rest of the UK. It calls on the Department of Health to conduct a review of the Carers Strategy and develop a new strategy as a priority.

## Child poverty strategy

In 2016, the Commission recommended that the eradication of child poverty in NI was analysed against the (now former) targets set by the UK Government to eliminate Child Poverty by 2020.<sup>597</sup> The UN ICESCR Committee subsequently expressed concern that the UK:

*does not have a specific definition of poverty and that the new Life Chances Strategy, as contained in the Welfare Reform and Work Act 2016, has repealed the duty to meet time-bound targets on child poverty, which remains high and is projected to increase in the future, especially in NI (Article 11).*<sup>598</sup>

The UN ICESCR Committee urged the UK Government and NI Executive to develop a comprehensive child poverty strategy and to reinstate the targets and reporting duties on child poverty.<sup>599</sup> The UN CRC Committee also reviewed UK's performance in 2016. The UN CRC Committee noted that:

*the rate of child poverty remains high... and affects children in Wales and NI the most.*<sup>600</sup>

The UK Government and NI Executive was urged by the UN CRC Committee to:

- a) *Set up clear accountability mechanisms for the eradication of child poverty, including by re-establishing concrete targets with a set time frame and measurable indicators, and continue regular monitoring and reporting on child poverty reduction in all parts of the State party;*
- b) *Ensure clear focus on the child in the State party's poverty reduction strategies and action plans, including in the new 'Life Chances Strategy', and support the production and implementation of child poverty reduction strategies in the devolved administrations;*
- c) *Conduct a comprehensive assessment of the cumulative impact of the full range of social security and tax credit reforms introduced between 2010 and 2016 on children, including children with disabilities and children belonging to ethnic minority groups;*

<sup>597</sup> NI Human Rights Commission, 'Submission to the UN Committee on Economic, Social and Cultural Rights 58th Session on the Sixth Periodic Report of the UK's Compliance with ICESCR' (NIHRC, 2016), at 44.

<sup>598</sup> E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at para 48.

<sup>599</sup> Ibid.

<sup>600</sup> Ibid, at para 70(a).

- d) *Where necessary, revise the mentioned reforms in order to fully respect the right of the child to have his or her best interests taken as a primary consideration, taking into account the different impacts of the reform on different groups of children, particularly those in vulnerable situations.*<sup>601</sup>

The Households Below Average Income report, published in 2018, set out that the proportion of children living in relative poverty (before housing costs) rose by one percentage point to 22 per cent, up from 21 per cent the previous year. The proportion of children living in absolute poverty (before housing costs) remained the same at 18 per cent. This report also noted that:

*the long term trend shows that children are at a higher risk of living in poverty than the overall NI population in both relative and absolute measures.*<sup>602</sup>

The Institute for Fiscal Studies noted that in the UK between 2017/18 and 2021/2022:

*relative child poverty is projected to increase substantially over the period, rising from 29.7 per cent to 36.6 per cent. There are two main reasons for this projected rise. First, poorer families with children get a relatively small share of their income from earnings – Belfield et al. (2016) show that households in the bottom quintile of the child income distribution received 42 per cent of their income from earnings in 2014–15. This means that when earnings rise, median income tends to increase faster than the incomes of poor households with children. Second, the incomes of these households are particularly sensitive to planned benefit cuts: both because benefits make up a large share of their income and because the limiting of the child element of tax credits and universal credit to two children (henceforth described as ‘the two-child limit’) will lead to significant income losses for poor households with three or more children.*<sup>603</sup>

The Welfare Reform and Work Act 2016 repealed the duty to meet time-bound targets on child poverty as originally set out in the Child Poverty Act 2010 (now Life Chances Act 2010). These targets have been replaced by a statutory duty to publish an annual report on the extent of child poverty and educational attainment of those impacted. These changes extend to NI.

The revised NI Child Poverty Strategy and its initial action plan were published in March 2016.<sup>604</sup> The strategy adopts an outcomes based approach. It sets out the indicators that will be used to measure its achievements, including two headline indicators, which are two of the measures set out in the Child Poverty Act 2010; absolute child poverty and relative child poverty. In line with the Life Chances Act, the 2017/2018

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601 Ibid, at paras 71(a)-71(d).

602 NI Statistics and Research Agency, ‘Households Below Average Income: NI 2016/17’ (DfC, 2018), at 6.

603 Andrew Hood and Tom Waters, ‘Living Standards, Poverty and Inequality in the UK: 2017-18 to 2021-22’ (Institute for Fiscal Studies, 2017).

604 NI Executive, ‘The Executive’s Child Poverty Strategy’ (NI Executive, 2016).



annual report on the strategy was published in March 2018.<sup>605</sup> The report recorded that in 2015/2016, 93,000 children (21 per cent) were living in relative poverty and 78,000 children (18 per cent) were living in absolute poverty, before housing costs in NI. This was a reduction from 25 per cent and 23 per cent respectively in 2014/15.<sup>606</sup> There is to be cross-over between the Child Poverty Strategy and the proposed new Social Strategy, which aims to tackle poverty, social exclusion and patterns of deprivation.<sup>607</sup> The publication of the Social Strategy has yet to occur.

### Recommendation

The Commission remains concerned that the Welfare Reform and Work Act 2016 repealed the statutory duty to meet time-bound targets on child poverty. It is particularly concerned about the social security and tax credit reforms introduced from 2010 onwards and how these have and will affect children. Child poverty remains high and is projected to increase in NI. In the Commission's view, the new reporting mechanisms on child poverty are less effective than their predecessors. It calls on the UK Government to introduce clear accountability mechanisms for the eradication of child poverty, including the re-establishment of concrete targets with set time frames and measurable indicators. It recommends that the NI Executive analyse the eradication of child poverty in NI against (former) targets set by the UK Government to eliminate Child Poverty by 2020. It further recommends the UK Government conduct a comprehensive assessment of the cumulative impacts social security and tax credit reforms from 2010 onwards have had on children. Where required, necessary changes should be made in order to fully respect the right of the child to have his or her best interests reflected as a primary consideration.

### Crisis fund

In 2016, the UN ICESCR Committee called on the UK Government and NI Executive to introduce measures to guarantee targeted support to all those living in poverty or at risk of poverty, including persons belonging to ethnic, religious or other minorities.<sup>608</sup>

In January 2016, NI Community of Refugees and Asylum Seekers published a series of case studies outlining the impact of destitution on refugees and their families.<sup>609</sup> The report found that Home Office, Jobs and Benefits Office and Her Majesty's Revenue and Customs practices make refugees extremely vulnerable in the transition from asylum support:

605 Department for Communities, 'A Report on the NI Executive's Child Poverty Strategy 2017/18' (DfC, 2018).

606 Department for Communities, 'Poverty Bulletin: NI 2015/16' (DfC, 2017).

607 Department for Communities, 'Annual Report on Child Poverty 2015-2016' (DfC, 2016), at 59.

608 E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at para 48.

609 NICRAS, 'The Effects of Destitution on Refugees in NI' (NICRAS, 2016).

*as they have to negotiate a confusing range of government agencies that do not always consult with each other.*<sup>610</sup>

A Crisis Fund was available between September 2017 and March 2018 and from September 2018 to March 2019. The Crisis Fund, which is managed by the Executive Office, aims:

*to help minority ethnic individuals with no other means of support through emergency situations, such as vulnerable migrants, refugees and asylum seekers and other vulnerable groups.*<sup>611</sup>

### **Recommendation**

The Commission continues to recommend that the UK Government and NI Executive address the causes of destitution in the first instance, rather than rely on a discretionary fund to address destitution when it emerges. It calls on the UK Government and NI Executive to introduce measures to guarantee targeted support to all those living in poverty or at risk of poverty, including asylum seekers, refugees, migrants and other vulnerable groups.



### **Homelessness**

#### **Statistics**

The UN ICESCR Committee, in its 2016 concluding observations urged, the UK Government and NI Executive:

*to take immediate measures, including by allocating appropriate funds to local authorities, to reduce the exceptionally high levels of homelessness, particularly in England and NI, and to ensure adequate provision of reception facilities, including emergency shelters, hostels and reception, as well as social rehabilitation centres.*<sup>612</sup>

The UN ICESCR Committee also urged the UK Government and NI Executive to:

*take specific measures to deal with the inability of renters in the private rental sector to pay rents on account of the limits imposed on housing allowance and to effectively regulate the private rental sector, including through security of tenure protection and accountability mechanisms.*<sup>613</sup>

The Commission raised these issues with the UN ICESCR Committee in June 2016<sup>614</sup> and the Special Rapporteur on Adequate Housing in July 2016.<sup>615</sup>

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610 Ibid, at 6.

611 NI Executive, 'Press Release: Junior Ministers Jennifer McCann and Jonathan Bell today outlined the benefits of the new Crisis Fund for vulnerable minority ethnic people,' 4 February 2015.

612 E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at para 52.

613 Ibid, at para 50(b).

614 NI Human Rights Commission, 'Submission to the UN Committee on Economic, Social and Cultural Rights 58th Session on the Sixth Periodic Report of the UK's Compliance with ICESCR' (NIHRC, 2016), at 49-50.

615 Ibid.

In 2017/18, 18,180 households presented as homeless to the NI Housing Executive, with 11,877 being accepted as full duty applicants. The number presenting as homeless fell by 2.1 per cent and the number of accepted full duty applicants decreased by 0.1 per cent from 2016/17.<sup>616</sup> Of the full duty applicants, 50 per cent are single, which remains the highest category of applicant.

A report by the NI Audit Office found that between 2012 and 2017 the number of households designated as 'statutory homeless' increased by 32 per cent and that the NI Housing Executive's strategic approach had limited success in reducing statutory homeless acceptances.<sup>617</sup> The cost to the public purse for this same period was approximately £226 million.<sup>618</sup> Civil society organisations have also raised concerns about the 'hidden homeless'. These are those whose applications were rejected (6,303 in 2017/18) and the unknown number of homeless who do not apply in the first place.

Research has shown that the rates for statutory homeless acceptances are higher in NI than anywhere elsewhere in the UK. In 2015/16, statutory acceptances per 1,000 households in NI ran at 14.8 per cent compared to 11.7 per cent in Scotland, 3.6 per cent in Wales and 2.3 per cent in England.<sup>619</sup> The NI Audit Office's 2017 research raised concerns that the NI Housing Executive were unable to fully demonstrate the impact of its work in reducing homelessness. This was due to weaknesses in its analysis, interpretation and presentation of data. The data sets and statistics published by the Department for Communities were also found to be less comprehensive than those published in other jurisdictions.<sup>620</sup> The NI Housing Executive reports that it has begun work with the Department for Communities to address the NI Audit Office's nine recommendations.<sup>621</sup>

Homelessness arises due to a combination of factors. The primary reasons cited by the NI Housing Executive are:

*sharing breakdown/family dispute, accommodation not reasonable and loss of rented accommodation.*<sup>622</sup>

Overall, 59 per cent of presenters are in these categories. Economic pressures, mental health and addiction can also have an impact.<sup>623</sup>

The new strategy, Ending Homelessness Together - the Homelessness Strategy for NI 2017-2022, was published by the NI Housing Executive in April 2017.<sup>624</sup> It aims to prevent homelessness, to ensure that households experiencing homelessness are supported to find suitable accommodation and support solutions as quickly as possible, and to ensure a cross-

616 NI Housing Executive, 'Homelessness Information'. Available at: [http://www.nihe.gov.uk/homelessness\\_information](http://www.nihe.gov.uk/homelessness_information)

617 NI Audit Office, 'Homelessness in NI: Report by the Comptroller and Auditor General' (NI Audit Office, 2017), at 14 and 28.

618 Ibid, at 13.

619 Suzanne Fitzpatrick et al, 'The Homelessness Monitor: NI 2016' (Crisis, 2016), at 52.

620 NI Audit Office, 'Homelessness in NI: Report by the Comptroller and Auditor General' (NI Audit Office, 2017), at 26-30.

621 NI Housing Executive, 'Homelessness Strategy 2017-22 Annual Progress Report 2017-18' (NIHE, 2018), at Foreword.

622 NI Housing Executive, 'Homelessness Information'. Available at: [http://www.nihe.gov.uk/homelessness\\_information](http://www.nihe.gov.uk/homelessness_information)

623 Patient and Client Council, 'Issues Faced by People who are Homeless in Accessing Health and Social Care Services - Report of an Initial Scoping Exercise' (HSCNI, 2015), at 5; Suzanne Fitzpatrick et al, 'The Homelessness Monitor: NI 2013' (Crisis, 2013), at ix.

624 NI Housing Executive, 'Ending Homelessness Together: Homelessness Strategy for NI 2017-22' (NIHE, 2016).

departmental and inter-agency approach to ending homelessness. It acknowledges:

*how failing to prevent homelessness costs the public purse thousands of pounds more per individual than would be the case were timely interventions to take place.*<sup>625</sup>

The strategy includes a NI Housing Executive led action plan with a number of short term (year one), medium term (year two/three) and long term (year four/five) actions.<sup>626</sup> In November 2018, the NI Housing Executive reported that:

*action has commenced on all 18 actions [included in the strategy] and 15 of the 18 had been completed to the milestones associated with Year 1 of the Action Plan within the Homelessness Strategy.*<sup>627</sup>

Of these actions, the NI Housing Executive particularly highlighted that:

- *nine inter-agency homelessness Local Area Groups have been created to ensure the strategy is effective at a local and regional level;*
- *a communications strategy has been developed which focuses on ensuring those who are threatened with homelessness are aware of the assistance available at the earliest possible stage; and*
- *a training package has been developed which identifies pre-crisis homeless indicators.*<sup>628</sup>

### Preventing rough sleeping

The UN ICESCR Committee, in its 2016 concluding observations on the UK, urged the UK Government and NI Executive:

*to adopt all necessary measures to avoid the criminalisation of 'rough sleeping' in the State Party and to develop appropriate policies and programmes to facilitate the social reintegration of homeless persons. In this respect, the Committee draws the attention of the State Party to its General Comment No 4 (1991) on the right to adequate housing.*<sup>629</sup>

A Belfast Street Needs Audit conducted by the NI Housing Executive in 2015, identified an average of six people per night were rough sleeping in Belfast.<sup>630</sup> A small, unidentified number are also rough sleeping in Londonderry/Derry.<sup>631</sup> In 2017/18, the NI Housing Executive carried out a rough sleeping street count in Belfast and Newry. It identified five rough sleepers in Belfast and three in Newry.<sup>632</sup> It is believed that if services were not available that this figure would rise to 100 individuals.<sup>633</sup>

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625 Ibid, at 17.

626 Ibid, at paras 5.0-5.5.

627 NI Housing Executive, 'Homelessness Strategy 2017-22 Annual Progress Report 2017-18' (NIHE, 2018), at Foreword.

628 Ibid.

629 E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at para 52.

630 NI Housing Executive, 'Ending Homelessness Together: Homelessness Strategy for NI 2017-22' (NIHE, 2016), at para 4.3.1.

631 Ibid, at para 4.3.1.

632 NI Housing Executive, 'Homelessness Strategy 2017-22 Annual Progress Report 2017-18' (NIHE, 2018), at 8.

633 NI Housing Executive, 'Homelessness Strategy for NI 2012-2017' (NIHE, 2012), at 22.

## Homelessness and health

The average age of life expectancy for homeless people sleeping rough or residing in shelters and homeless hostels is 43 years of age for women and 48 for men.<sup>634</sup> The average life expectancy for the wider population in NI is 82.3 years for women and 78.3 years for men.<sup>635</sup> A number of homeless persons died on the street in Belfast in early 2016;<sup>636</sup> some of these individuals were to varying degrees users of homelessness services.<sup>637</sup> There is a lack of comparative data available, but the indications are that the deaths of homeless people are significantly increasing across the UK, including NI.<sup>638</sup> Between October 2017 and August 2018, according to NI Housing Executive figures, 148 people registered as homeless in NI died while waiting for social housing. This equates to 13 homeless people per month having their housing applications closed due to death. Of the 148, 63 per cent were aged 60 or younger, the youngest was 18 years old and 66 per cent were male. The NI Housing Executive did not record the cause of death.<sup>639</sup>

The NI Housing Executive's Housing and Health Strategy recognises the need for partnership working with the health sector and also statutory, voluntary and community sectors.<sup>640</sup> It also recognises a link between inadequate housing and health. Similarly, the Ending Homelessness Together - the Homelessness Strategy for NI 2017-2022 acknowledges the:

*catastrophic effect... with far reaching and long term implications for health and well being that homelessness can have on a household.*<sup>641</sup>

In October 2018, the Department of Health published a report on improving access to primary healthcare and other health and social care services for individuals who are homeless. The report considered a number of possible service models for better serving the needs of people who are homeless in NI. The report recommended that a hybrid approach was adopted that included dedicated inclusion practice, a risk sharing approach and enhanced community and voluntary sector/peer led service.<sup>642</sup> Following this recommendation, the Department announced it was launching a new hub in Belfast to support the health and social care needs of homeless people.<sup>643</sup>

The new hub will be managed by the Belfast Health and Social Care Trust and will initially be run as an 18-month pilot with an investment of £225,000 from the Department of Health's Transformation Fund. It will

634 Patient and Client Council, 'Issues Faced by People who are Homeless in Accessing Health and Social Care Services – Report of an Initial Scoping Exercise' (HSCNI, 2015), at 5.

635 Information Analysis Directorate, 'Health Inequalities: Life Expectancy Decomposition 2017' (DoH, 2017), at 5.

636 'Belfast city centre: Homeless man found dead "loveable rogue"', *BBC News*, 8 February 2016; Allan Preston, 'City homelessness summit after three deaths in fortnight', *Belfast Telegraph*, 19 February 2016; Angela Rainey, 'Homeless action call as fourth man dies in Belfast', *Belfast Telegraph*, 26 February 2016; 'Belfast: Homeless woman dies in shop doorway', *BBC News*, 19 March 2016.

637 Committee for Social Development Meeting, 3 March 2016.

638 Patrick Greenfield and Sarah Marsh, 'Deaths of UK homeless people more than double in five years', *The Guardian*, 11 April 2018.

639 Rory Winters, 'NI's homeless death figures: "brutally shocking"', *The Detail*, 8 October 2018.

640 NI Housing Executive, 'Homelessness Strategy for NI 2012-2017' (NIHE, 2012), at 7.

641 NI Housing Executive, 'Ending Homelessness Together: Homelessness Strategy for NI 2017-22' (NIHE, 2016), at para 4.1

642 Task and Finish Group, 'Options Paper – Improving Access to Primary Health Care and Other Health and Social Care Services for Individuals who are Homeless' (DoH, 2018).

643 Department of Health, 'Press Release: Healthcare Hub to transform services for the homeless', 18 October 2018.

build on the existing Belfast Trust homeless public health nursing service and on services provided by the voluntary sector. The Department intends the pilot to:

*provide invaluable evidence and learning to help inform future service development for people who are homeless across all of NI.*<sup>644</sup>

The Department of Health has not provided an exact date for the opening of the hub, but has stated that:

*it is anticipated that premises for the hub will be identified in the near future.*<sup>645</sup>

### **Repossession and mortgages**

In February 2018, research from the Joseph Rowntree Foundation reported that:

*twice as many of NI's mortgaged households are behind with their mortgage payments (14 per cent) compared to the whole of the UK (7 per cent).*<sup>646</sup>

NI's households with mortgages also:

*had more than three times the incidence of negative equity (11 per cent) than those across the UK (3 per cent).*<sup>647</sup>

The Mortgage Repossession Taskforce's final report investigating the impact of negative equity, repayment arrears and repossessions in NI was published in May 2015.<sup>648</sup> A number of recommendations made by the Taskforce have been implemented. Housing Rights also hosts an online mortgage interest rate calculator that enables clients to stress-test themselves for higher interest rates.<sup>649</sup> The NI Housing Executive's Housing Solutions model assists households affected by repossession to access homelessness assessments. Furthermore, the Behavioural Insights Team has published a report on how to encourage borrowers facing mortgage arrears to take action earlier.<sup>650</sup>

The waiting time for the financial support for new claimants on certain means tested benefits, the Support for Mortgage Interest, was reinstated as 39 weeks in April 2016.<sup>651</sup> In April 2018, the Support for Mortgage Interest was ended and replaced by a system of loans. These loans are to be repaid when a claimant transfers ownership or sells the home.<sup>652</sup> The take-up of the new loan arrangements have been low to date in NI - a trend across the UK.

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644 Ibid.

645 Ibid.

646 Alison Wallace *et al*, 'Home-owners and Poverty in NI' (JRF, 2018).

647 Alison Wallace *et al*, 'Summary: Home-owners and Poverty in NI' (JRF, 2018).

648 Department for Social Development, 'Housing Repossession Taskforce: Final Report' (DSD, 2015).

649 Housing Rights, 'Rate Rise Calculator'. Available at: <https://www.housingadviceni.org/diy/rate-rise-calculator>

650 Behavioural Insights Team, 'Applying Behavioural Insights to Encourage Earlier Engagement from Borrowers in Mortgage Arrears' (Behavioural Insights Team, 2015)

651 NI Direct, 'Support for Mortgage Interest'. Available at: <https://www.nidirect.gov.uk/articles/support-mortgage-interest>

652 Gov.UK, 'Support for Mortgage Interest'. Available at: <https://www.gov.uk/support-for-mortgage-interest>

## Recommendation

The Commission recommends that a collaborative approach is taken between statutory, voluntary and community sectors to eliminate all forms of homelessness. The Commission urges that all reasonable steps should be taken to prevent any further deaths of rough sleepers in NI. It recommends that the Ministerial High-Level Group actively engage with practitioners working in organisations dealing with homelessness to develop practical and comprehensive measures to address the complex needs of individuals who find themselves homeless. The Commission calls on the Department for Communities to implement the Mortgage Repossession Taskforce's recommendations by considering introducing a Mortgage Rescue Scheme in NI and robustly monitoring the effectiveness of the new loan arrangement. The Commission welcomes the Department of Communities proposals to protect against homelessness within the private rental sector and recommends their expedited implementation.

## Reduction in asylum financial support

The Immigration and Asylum Act 1999, section 95 provides for support for asylum seekers and their dependants who appear to the Home Secretary to be destitute or who are likely to become destitute. In July 2015, the UK Government introduced a flat rate in asylum support. The standard rate is £37.75 per week provided to each person supported, of all ages.<sup>653</sup> Extra money to buy healthy food is provided to asylum seekers that are pregnant or a mother of a child under three. The amount (between £3 and £5 per week) depends on the individual's situation. A one-off maternity payment of £300 can be applied for if an individual's baby is due in eight weeks or less, or if the individual's baby is under six weeks old.<sup>654</sup>

The Immigration Act 2016 amended the Asylum and Immigration Act 1999 by creating a new power to support failed asylum seekers who can demonstrate that they are destitute and face a genuine obstacle to leaving the UK at the point their appeal rights have been exhausted.<sup>655</sup> The 2016 Act amends the 1999 Act so that persons who have children in their household at the time their asylum claim and any appeal is finally rejected will no longer be treated as though they were still asylum seekers and so will no longer be eligible for support under section 95. Those refused asylum will be given somewhere to live and £35.39 per person on a payment card for food, clothing and toiletries. They will not be given any money and will not be given the payment card if they do not take the offer of somewhere to live. Those refused asylum can apply for a one-off £250 maternity payment if the baby is due in eight weeks or less, or if the baby is under six weeks old.<sup>656</sup>

653 Regulation 2, Asylum Support (Amendment) Regulations 2018.

654 Gov.UK, 'What You'll Get'. Available at: <https://www.gov.uk/asylum-support/what-youll-get>

655 Schedule 11, Immigration Act 2016.

656 Gov.UK, 'What You'll Get'. Available at: <https://www.gov.uk/asylum-support/what-youll-get>

In 2017, the British Red Cross came to the aid of 15,000 people, including dependants, without adequate access to food, housing or healthcare. This included giving out nearly 20 per cent more food parcels and 43 per cent more baby supplies than in 2016.<sup>657</sup> In September 2017, a report by the Refugee Council found that a number of newly recognised refugees were forced to rely on charities, friends and family and foodbanks once their asylum support was terminated, as Home Office support had dropped away and employment had not been secured. The Refugee Council recommended that when an application for welfare payments has been made within the 28 day move on period, the Home Office should not cease asylum support until the first payment has been made.<sup>658</sup>

### Recommendation

The Commission is concerned that reductions in asylum support resulting from the Immigration Act 2016 have had a retrogressive impact on the right to an adequate standard of living and the right to social security. The Commission recommends the UK Home Office increase the level of support provided to asylum seekers, including through the daily allowance, in order to ensure that they enjoy their economic, social and cultural rights, in particular the right to an adequate standard of living. It also calls on the UK Home Office to review the restrictions placed on asylum seekers which prevent the taking up of work while claims are being processed. The Commission further recommends the UK Home Office review and increase the length of the 28 day grace period which, without revision of current safeguards, is contrary to the best interests of the child.

## Social housing

### Housing supply

The UN ICESCR Committee, in its 2016 concluding observations, urged the UK Government and NI Executive to:

*adopt all necessary measures to address the housing deficit by ensuring a sufficient supply of housing, in particular social housing units, especially for the most disadvantaged and marginalised individuals and groups, including middle-and-low-income individuals and households, young people and persons with disabilities.*<sup>659</sup>

At 31 March 2018, the total number of applicants on the social housing waiting list was 36,198; this is a decrease of 1,413 since March 2017. Of these applicants, 23,964 were in housing stress, where they had 30 or more points under the Common Selection Scheme. This has increased by 184 (0.8 per cent) since March 2017. Of those in housing stress, 17,520 households were deemed to be statutorily homeless.<sup>660</sup> There is an overall

657 British Red Cross, 'Ending Refugee Poverty'. Available at: <https://www.redcross.org.uk/about-us/what-we-do/we-speak-up-for-change/improving-the-lives-of-refugees/ending-refugee-poverty>

658 Refugee Council, 'Refugees without Refuge: Findings from a Survey of Newly Recognised Refugees' (Refugee Council, 2017), at 4.

659 E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at para 50(a).

660 NI Housing Executive, 'Waiting Lists'. Available at: [http://www.nihe.gov.uk/waiting\\_lists](http://www.nihe.gov.uk/waiting_lists)



requirement of 190,000 new dwellings needed in NI between 2008 and 2025, an annual figure of 11,200.<sup>661</sup> Current targets fall significantly short of this. During 2017/18, 1,759 new builds were started and 1,507 new builds were completed under the Social Housing Development Programme.<sup>662</sup> The NI Housing Executive has reported that it may be forced to allow half of its 86,500 homes to fall into a state of disrepair from 2020, if it cannot secure additional funding to address an estimated £140 million annual budgetary shortfall.<sup>663</sup>

The Facing the Future: Housing Strategy for NI 2012-2017 commits to ensuring access to decent affordable sustainable homes across all tenures and to meet housing need and support the most vulnerable.<sup>664</sup> This Strategy expired at the end of 2017 and we continue to await its final evaluation.<sup>665</sup> In August 2015, 21 actions set out in the Strategy had been achieved or were on track for achievement, nine actions were broadly on track for achievement, two actions had some risk of delay and one action was not expected to be achieved within the timescale.<sup>666</sup> The new housing strategy is set out in the draft Programme for Government. This adopts an outcomes based approach, which includes a Housing Delivery Plan. The Draft Programme aims:

*to address (i) the number of households in housing stress and (ii) the gap between the number of houses we need, and the number of houses we have. The draft proposes a number of measures, including providing an additional 9,600 social homes and supporting 3,750 first time buyers into home ownership. It also includes a proposal to release more public sector land for housing development.*<sup>667</sup>

However, without a NI Executive the new strategy cannot be implemented.

The Housing Supply Forum was established as a result of the 2012-2017 strategy. It published its report in January 2016, concluding that there were not enough homes being constructed in NI to meet demand.<sup>668</sup> The Forum made a number of recommendations, including: the completion of a mapping exercise, assessing demand and availability; and increased support and encouragement from Government for joint ventures between Housing Associations and private developers. It also recommended that powers be made available to the new local councils to enable sites to be developed for the benefit of the whole community and to ensure appropriate delivery of housing need.<sup>669</sup>

In 2016, following reviews by the Office of National Statistics of the statistical classification of registered social landlords and housing associations across the UK, social housing providers were reclassified

661 NI Housing Executive, 'NI Housing Market Review and Perspectives 2015-2018' (NIHE, 2015), at 23.

662 Correspondence from the NI Housing Executive to the NI Human Rights Commission, 27 September 2018.

663 Claire Smyth, 'Half of NI Housing Executive homes at risk of decommissioning amid funding crisis', *The Detail*, 18 October 2018.

664 Department for Social Development, 'Facing the Future: The Housing Strategy for NI 2012-17' (DSD, 2012); Department for Social Development, 'Facing the Future: The Housing Strategy for NI Action Plan Update: September 2015' (DSD, 2015).

665 Email from Department for Communities to NI Human Rights Commission, 28 September 2017.

666 Department for Social Development, 'Facing the Future: The Housing Strategy for NI Action Plan Update' (DSD, 2015), at 10.

667 AQW 7338/16-21, 'Carál Ní Chuilín - Sinn Fein', 28 November 2016.

668 Housing Supply Forum, 'Report and Recommendations: January 2016' (Housing Supply Forum, 2016), at 10.

669 *Ibid*, at 13-19.

as Public Financial Corporations. In effect this made such housing providers public sector bodies.<sup>670</sup> The Department for Communities ran a consultation between December 2016 and February 2017, which considered a reversal of the reclassification in NI. The then Minister for Communities, Paul Givan was concerned that the reclassification had:

*the potential to significantly reduce the amount of money available to Registered Social Housing Providers and therefore the number of social homes that are built each year.*<sup>671</sup>

Officials continue to develop policy options and legislative proposals for consideration by an incoming Minister, to facilitate a reversal of the reclassification.<sup>672</sup> A report on the consultation is awaited.

### Segregation

The UN ICESCR Committee, in its 2016 concluding observations, urged the NI Executive to:

*intensify its efforts to address the challenges to overcome persistent inequalities in housing for Catholic families in North Belfast, including through meaningful participation of all actors in decision-making processes related to housing.*<sup>673</sup>

The Equality Commission NI, in its Statement on Key Inequalities on Housing and Communities in NI, found that the applicants from households with a Catholic reference person continue to experience longest waiting times for social housing in NI as a whole. It further found:

*while median waiting times had increased for all groups, more substantive increases were noted for households with a 'Catholic' or 'Other' religion household reference person.*<sup>674</sup>

In 2018, the Commission has engaged with political parties and the NI Housing Executive on housing issues in North Belfast.

One of the key priorities under the Together: Building a United Community Strategy is the creation of new shared communities, as the NI Life and Times Survey indicates that 77 per cent of respondents would prefer to live in a mixed neighbourhood.<sup>675</sup> One of the commitments under the strategy was the creation of ten new Shared Neighbourhood Developments. Five of the new shared neighbourhood developments have been completed, with the development of the remaining five underway.<sup>676</sup> All new residents of the shared neighbourhoods:

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670 Office for National Statistics, 'Statistical Classification of Registered Providers of Social Housing in Scotland, Wales and NI: September 2016'. Available at: <https://www.ons.gov.uk/economy/nationalaccounts/uksectoraccounts/articles/statisticalclassificationofregisteredprovidersofsocialhousinginScotlandWalesandNorthernIreland/September2016>

671 Department for Communities, 'Proposals to Seek Reversal of the Reclassification of Registered Social Housing Providers in NI' (DfC, 2016), at 3.

672 Email from Department for Communities to NI Human Rights Commission, 28 September 2017.

673 E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 14 July 2016, at para 50(e).

674 Equality Commission NI, 'Statement on Key Inequalities in Housing and Communities in NI: Full Statement' (ECNI, 2017), at para 1.9.

675 NI Life and Times, 'Community Relations'. Available at: [http://www.ark.ac.uk/nilt/2016/Community\\_Relations/MXRLGNH.html](http://www.ark.ac.uk/nilt/2016/Community_Relations/MXRLGNH.html)

676 The Executive Office, 'Together: Building a United Community Update Report' (TEO, 2017), at 3.

*are required to sign up to a voluntary Good Neighbour charter, which promotes good relations and the right to diversity within the development.*<sup>677</sup>

The Community Cohesion Strategy 2015-20 is delivered across five themes including segregation/integration. In this regard, the strategy contains a number of actions including: supporting research into segregated and shared housing including updating the Mapping Segregation report; facilitating and encouraging mixed housing schemes in the social and affordable sector; and work with the Executive Office, the Department for Communities, Housing Associations and others to bring proposals forward for ten Shared Future capital build projects of mixed housing schemes in the medium term. The strategy also commits to developing programmes of action to address issues of residential segregation and integration across three years, as well as developing legacy programmes targeting young champions in neighbourhoods.<sup>678</sup> Despite these actions, in October 2017, two families were intimidated out of a mixed housing scheme in Belfast following a threat from a paramilitary group.<sup>679</sup> The public authorities have been criticised for not addressing the root of the problem and not having a strategy in place that offers mitigation measures.<sup>680</sup>

### Data collection

The Equality Commission NI's assessment of the Facing the Future: Housing Strategy for NI 2012-2017 and Building Successful Communities found that, despite monitoring guidance for public authorities, there is a lack of robust housing and communities data relating to a number equality grounds including: gender, gender identity, religion, race, political opinion, and sexual orientation.<sup>681</sup>

### Recommendation

The Commission recommends the Department for Communities adopt measures to implement the recommendations of the Housing Supply Forum in NI. It also recommends sufficient funding is made available to effectively maintain current housing stock. The Commission highlights continued high levels of segregation in social housing in NI and persistent inequalities in housing for Catholic families. It welcomes the NI Housing Executive's Community Cohesion Strategy 2015-20 and calls on the NI Executive and Department for Communities to fully implement the strategy.

677 Ibid, at 14.

678 NI Housing Executive, 'Community Cohesion Strategy 2015-2020' (NIHE, 2015), at 34.

679 Brett Campbell, 'Belfast families living in fear on mixed estate where Catholics forced to flee', *Belfast Telegraph*, 29 September 2017.

680 Ibid.

681 Equality Commission NI, 'Investigation Report under Schedule 9 of the NI Act 1998: Department for Social Development - Housing Policy Proposals' (ECNI, 2015).

It further recommends the Department for Communities intensify its efforts to address the challenges to overcome persistent inequalities in housing for Catholic families in North Belfast, including through meaningful participation of all actors in decision-making processes related to housing. The Commission also calls for the Department of Communities to robustly address sectarian intimidation and to take effective steps to ensure no more families find themselves in a similar situation to the families forced out of their Belfast homes in October 2017.

The Commission calls on the Department for Communities to ensure the collection of robust equality data to assess, monitor and allow for evaluation of Department actions to address housing inequalities in NI.

### Social security

In its previous annual statements, the Commission reported on the advice provided to the NI Assembly in relation to the Welfare Reform Bill, which identified a number of potential consequential impacts on the protection of human rights.<sup>682</sup>

In 2016, the UN ICESCR Committee made a number of recommendations relating to social security reform in the UK. These included:

- a) *review the entitlement conditions and reverse the cuts in social security benefits introduced by the Welfare Reform Act 2012 and the Welfare Reform and Work Act 2016;*
- b) *restore the link between the rates of State benefits and the costs of living and guarantee that all social security benefits provide a level of benefit sufficient to ensure an adequate standard of living, including access to health care, adequate housing and food;*
- c) *review the use of sanctions in relation to social security benefits and ensure they are used proportionately and are subject to prompt and independent dispute resolution mechanisms; and*
- d) *provide in its next report disaggregated data on the impact of social security reforms on women, children, persons with disabilities, low income families and families with two or more children.*<sup>683</sup>

Following on from the findings of its Inquiry, in August 2017, the UNCRPD Committee recommended that the UK Government and NI Executive:

*carry out a cumulative impact assessment, with disaggregated data, about the recent and coming reforms on the social protection for persons with disabilities, and in close collaboration with organisations of persons with disabilities define, implement and monitor measures*

<sup>682</sup> NI Human Rights Commission, 'The 2012 Annual Statement: Human Rights in NI' (NIHRC, 2012).

<sup>683</sup> E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 14 July 2016.

*to tackle retrogression in their standard of living and use it as a basis for policy development across the State party.*

With respect to NI, the Committee specifically recommended that relevant authorities extend support packages to mitigate negative impacts of the social security reform in NI.

In November 2018, the UN Special Rapporteur on extreme poverty and human rights, Professor Philip Alston, undertook an official visit to the UK. During his visit the Special Rapporteur met with stakeholders in NI, including the Commission, to discuss austerity, Universal Credit, child poverty and the use of new technologies in the welfare system.<sup>684</sup> The Special Rapporteur's report on the visit will be available in 2019.

Westminster legislated for social security reform in NI, broadly equivalent to the reforms in the Welfare Reform Act 2012. The NI Executive agreed to allocate a total of £585 million from NI Executive funds over four years to top up the UK welfare arrangements in NI, with a review in 2018-19. A NI Executive-established working group published its recommendations in January 2016. The First Minister of NI agreed to fully implement the recommendations made by the working group to mitigate the impact of social security reform.<sup>685</sup>

In May 2018, the Commission, alongside the Equality Commission NI, Equality and Human Rights Commission and Scottish Human Rights Commission, met with the Minister for Disabilities, Sarah Newton MP, to highlight the need to address the recommendations of the UN CRPD Committee.

The full implications of social security reform are not yet clear, with a number of the reform measures yet to be fully implemented in NI.

### **Bedroom tax**

The Social Sector Size Criteria for housing benefit, commonly known as bedroom tax came into effect in 2017.<sup>686</sup> Under new criteria, Housing Benefit for NI Housing Executive and housing association tenants, aged between 16 and State Pension age will be calculated on the number of bedrooms in their home and the number of people living there. It allows one bedroom for: a couple, a person aged 16 or over, two children of the same sex aged under 16, two children aged under 10, any other child (other than a foster child or child whose main home is elsewhere), children who do not share because of a disability or medical condition, and a non-resident carer or carers providing overnight care. An extra bedroom may be allowed for foster carers, households where students or a member of the armed forces is away from home, a disabled person, or someone who is recently bereaved.<sup>687</sup>

684 UN Office for High Commissioner on Human Rights, 'Call for Written Submission - Visit by the UN Special Rapporteur on extreme poverty and human rights to the UK of Great Britain and NI from 5 to 16 November 2018'. Available at: <https://www.ohchr.org/EN/Issues/Poverty/Pages/CallforinputUK.aspx>

685 'NI Welfare Reform: Arlene Foster "will fully implement" welfare mitigation proposals', *BBC News*, 22 January 2016.

686 NI Housing Executive, 'Social Sector Size Criteria'. Available at: [https://www.nihe.gov.uk/index/news/news\\_archive\\_2017/january\\_2017/news-social-sector-size-criteria.htm](https://www.nihe.gov.uk/index/news/news_archive_2017/january_2017/news-social-sector-size-criteria.htm)

687 NI Direct, 'Changes to Housing Benefit'. Available at: <https://www.nidirect.gov.uk/changes-to-housing-benefit>

The NI Assembly introduced a fund to offset the bedroom tax for the vast majority of claimants and this is due to remain in place until March 2020.

### **Benefit cap**

The High Court in London ruled in June 2017 that the further reduced benefit cap introduced by the UK Government unlawfully discriminated against lone parents with children under two years of age. The claimants argued that the imposition of the cap on lone parents with children under two amounted to unlawful discrimination contrary to Articles 8, 14 and Article 1 Protocol 1 ECHR. Mr Justice Collins said:

*whether or not the defendant accepts my judgment, the evidence shows that the cap is capable of real damage to individuals such as the claimants. They are not workshy but find it, because of the care difficulties, impossible to comply with the work requirement. Most lone parents with children under two are not the sort of households the cap was intended to cover and, since they will depend on Discretionary Housing Payments, they will remain benefit households. Real misery is being caused to no good purpose.<sup>688</sup>*

The UK Government appealed this decision. The Court of Appeal in London found in the UK Government's favour by a majority of two to one. The Court reasoned that the circumstances of lone parents with children under two are not sufficiently different from other lone parents as to require an exception to be made to the benefit cap. The Court of Appeal recognised that parents and children's rights under Article 8 of the ECHR are impacted by the cap and that the cap caused extreme hardship to many families. In July 2018, this case and a similar one supported by Child Poverty Action Group were both heard in the UK Supreme Court; judgment is awaited.<sup>689</sup>

### **Child tax credit**

Since April 2017, new claimants have generally not been able to claim Child Tax Credit for third or subsequent children or qualifying young persons born on or after 6 April 2017,<sup>690</sup> save in limited circumstances. This also applies to Universal Credit, as it is introduced. The Institute for Fiscal Studies has noted that from 2017-18 to 2021-22:

*absolute child poverty is projected to rise by around four percentage points, primarily due to the impact of planned reforms... [The] 'two-child limit' is projected to increase overall absolute poverty by a little under one percentage point and absolute child poverty by over two percentage points. Some regions are affected much more heavily than others: NI and the West Midlands, with twice as many large poor families as Scotland and the South West, are projected to see a larger increase in poverty as a result of the policy.<sup>691</sup>*

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688 *DA and Others v Secretary of State for Work and Pensions* [2017] EWHC 1446 (Admin), at para 43.

689 Child Poverty Action Group, 'Revised Benefit Cap'. Available at: <http://www.cpag.org.uk/content/revised-benefit-cap-cpag-ds-and-others-v-secretary-state-work-and-pensions>

690 Gov.UK, 'Child Tax Credits: Exceptions to the 2 Child Limit'. Available at: <https://www.gov.uk/guidance/child-tax-credit-exceptions-to-the-2-child-limit>

691 Andrew Hood and Tom Waters, 'Living Standards, Poverty and Inequality in the UK: 2017-18 to 2021-22' (Institute for Fiscal Studies, 2017), at 6.

The Child Poverty Action Group lodged a judicial review claim in Britain challenging the lawfulness of the two child limit on human rights grounds, covering both the ECHR and UN CRC. In April 2018, England and Wales High Court Judge Mr Justice Ouseley found that only exempting the third child, or subsequent kinship care children, was:

*not rationally connected with the purposes of the legislation and indeed it is in conflict with them.*<sup>692</sup>

The judge identified:

*the purpose of the exception is to encourage, or at least avoid discouraging, a family from looking after a child who would otherwise be in local authority care, with the disadvantages to the child over family care which that can entail and the public expenditure it can require.*<sup>693</sup>

Following the ruling, the Secretary of State for Work and Pensions announced that all children who are adopted will not be taken into account for the purposes of the two-child limit in tax credits and universal credit. The Child Poverty Action Group welcomed this exception, but:

*urged the Secretary of State to go further and ensure that all children born as a result of non-consensual sex are also not taken into account for the purposes of the two-child limit.*<sup>694</sup>

The Child Poverty Action Group are appealing the rest of the judgment, which is to be heard by the England and Wales Court of Appeal in December 2018.

Concerns have been raised with one of the exemptions to the Child Tax Credit changes namely, a child being born as a result of rape or coercive conception.<sup>695</sup> The regulations require women to prove that they conceived their third child through rape to access child tax credit for that child. Women's Aid Federation NI said:

*this ill-thought out law will be devastating and re-traumatising for victims of rape who need to access child tax credits. The policy is discriminatory towards women, and towards poor women in particular.*<sup>696</sup>

In April 2018, the Attorney General laid human rights guidance before the NI Assembly for the Public Prosecution Service in respect of the two child rule relating to the obligation to disclose information relating to rape offences.<sup>697</sup>

692 SC, CB, CC and CD and 11 Children v Secretary of State for Work and Pensions and Others [2018] EWHC 864.

693 Ibid.

694 Child Poverty Action Group, 'Press Release: Child Poverty Action Group Wins More Exemptions to Two Child Rule', 27 April 2018.

695 Gov.UK, 'Child Tax Credits: Exceptions to the 2 Child Limit'. Available at: <https://www.gov.uk/guidance/child-tax-credit-exceptions-to-the-2-child-limit>

696 Women's Aid Federation NI, 'Press Release: Women's Aid NI statement on 2-child tax credit rule and 'rape clause'', 30 March 2017.

697 Attorney General NI, 'Guidance by the Attorney General for NI Pursuant to Section 8 of the Justice (NI) Act 2004: No 14 Human Rights Guidance for the Public Prosecution Service the Application of Section 5 of the Criminal Law Act (NI) 1967 to Rape Victims and those to Whom they make Disclosures in Connection with a Claim for Social Security, Child Tax Credit or Anonymous Registration on the Electoral Roll' (AG NI, 2018).

In 2018, Attorney General NI made a reference to the UK Supreme Court on a number of focused issues concerning the two child tax credit rule.<sup>698</sup> At the time of writing, further details were awaited.

### **Universal Credit**

Universal Credit has been introduced on a phased geographical basis from September 2017 for new claims, and between July 2019 and March 2022 for existing claimants.<sup>699</sup> Universal Credit will replace: income based Jobseeker's Allowance; income related Employment and Support Allowance; Income Support; Child Tax Credit; Working Tax Credit; and Housing Benefit (rental).

It has been reported that delays and waiting times in the processing of Universal Credit applications in other parts of the UK has resulted in claimants reporting they were in rent arrears. One in four new universal credit claimants waited more than 42 days for a first payment, while nearly half of families said moving on to the benefit had led them to fall behind with rent for the first time.<sup>700</sup> As a result, the seven day waiting period was ended in February 2018, reducing the waiting period from six to five weeks. The UK Government has announced its intention to roll out Universal Credit more slowly and to make further changes to the benefit.<sup>701</sup>

The House of Commons Public Accounts Committee published a report on benefit sanctions in 2017 recommending that the Department for Work and Pensions should undertake a trial of warnings rather than sanctions for first sanctionable offences. Furthermore, the Committee recommended that the Department should monitor variations in sanctions referrals and assess reasons for differences across job centres.<sup>702</sup>

In November 2017, the Equality and Human Rights Commission published a report on the impact that changes to all tax, social security and public spending reforms since 2010 will have on people by 2020. The report found the poorest were set to lose ten per cent of their incomes, while the richest lose barely one per cent. Moreover, specific groups will do particularly badly including lone parents and families with a disabled adult and/or disabled child.<sup>703</sup>

### **Jobseeker's Allowance**

In April 2016, the England and Wales Court of Appeal upheld the decision of the England and Wales High Court that the retrospective validation of the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 by the Jobseeker's (Back to Work Schemes) Act 2013 was incompatible with Article 6 ECHR.<sup>704</sup> In 2013, the England and Wales Court of Appeal had found the 2011 Regulations to be ultra vires

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698 Schedule 10, para 34, NI Act 1998.

699 Department for Communities, 'Universal Credit'. Available at: <https://www.communities-ni.gov.uk/articles/universal-credit>

700 'Universal credit is in 'total disarray', says Labour', *The Guardian*, 15 September 2017.

701 Michael Buchanan, 'Universal credit rollout delayed yet again', *BBC News*, 16 October 2018.

702 House of Commons, 'Benefit Sanctions - HC 775', 21 February 2017.

703 Equality and Human Rights Commission, 'Distributional results for the impact of tax and welfare reforms between 2010-17' (EHRC, 2017).

704 *Reilly and Hewstone v Secretary of State for Work and Pensions* [2016] EWCA Civ 413.



in a separate case.<sup>705</sup> The Court of Appeal concluded in the 2016 case that the 2013 Act continues to be effective and that it was up to the UK Government, subject to any further appeal, to decide what action to take in response.<sup>706</sup>

In 2018, the UK Government responded by proposing a draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2018, which would amend the Jobseekers (Back to Work Schemes) Act 2013. In October 2018, the House of Commons and House of Lords Joint Committee on Human Rights recommended that the proposed Order be approved. The Joint Committee advised that once in force, the Order will:

*remedy the incompatibility of the 2013 Act with Article 6 [ECHR] by providing that the decision-maker (the Secretary of State or Tribunal) must ignore the provisions of the 2013 Act that retrospectively validate the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 for those whose cases were pending before a Court when the 2013 Act entered into force. In doing so, the proposed draft Order restores to the claimants their right of appeal.*<sup>707</sup>

### Recommendation

The Commission remains concerned over the disproportionate impact cuts to social security have on low income households. It recommends that the UK Government ensures social security benefits, as a minimum, guarantee an adequate standard of living for all recipients, including access to health care, adequate housing and food. It calls on the UK Government to review the entitlement conditions and reverse the cuts in social security benefits introduced by the Welfare Reform Act 2012 and the Welfare Reform and Work Act 2016 and to cease the freezing of the rates of a number of means-tested social security benefits. The Commission also calls for the UK Government to conduct a cumulative impact assessment that is specific to NI.

The Commission welcomes the proposed draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2018 and recommends that it is expediently approved.

### Travellers' accommodation

In September 2016, the Commission launched an investigation into Travellers' accommodation in NI. The investigation exercised the Commission's powers under Section 69 of the NI Act 1998. The Investigation focused on providing a human rights analysis of good practices and issues related to the right to adequate housing, in the context of Travellers' accommodation. It involved gathering and analysing

<sup>705</sup> *Queen (on application of) Caitlin Reilly and Jamieson Wilson v Secretary of State for Work and Pensions* [2013] EWCA Civ 66.

<sup>706</sup> *Reilly and Hewstone v Secretary of State for Work and Pensions* [2016] EWCA Civ 413.

<sup>707</sup> Parliamentary Business, 'Proposal for a Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2018. Available at: <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1451/145102.htm>

evidence from the relevant public authorities, civil society organisations and members of the Traveller communities in NI.<sup>708</sup> The findings of the investigation were published in March 2018.<sup>709</sup> Thirteen systemic issues were identified, which are outlined below.

### **Domestic legal framework**

The Commission's investigation found:

*domestic laws and policies regarding Travellers' accommodation in NI largely satisfy human rights requirements. However... there are particular issues identified with respect to clarifying the legislative requirements regarding the licencing of Travellers' sites and the provision of portable accommodation (such as caravans, trailers and chalets). Additionally, public authorities are relying on a 1997 version of the 'Design Guide for Travellers' Sites in NI', as the subsequent reviews have not been published. The 1997 version lacks sufficient details and is not sufficiently prescriptive.<sup>710</sup>*

### **Domestic practice**

The Commission's investigation confirmed:

*there are persistent issues with implementing the legal framework in practice. How policy and legislation is implemented determines the outcomes for those people the policies and practice are aimed at. Across the board for all Travellers' accommodation types, the domestic laws and policies are not necessarily translating into practice, which impacts adversely on the ability of Travellers to enjoy the rights set out therein.<sup>711</sup>*

### **Racial discrimination**

The Commission's investigation found that:

*in the context of Travellers' accommodation, there is evidence that Travellers have been subject to discriminatory behaviours and attitudes from public authorities and the settled community. This emerges through actions, but also through inaction and general inertia regarding Travellers' issues. Negative public opinions and bias towards Travellers also impacts negatively on Travellers, in particular concerning planning applications.<sup>712</sup>*

### **Race legislation**

The Commission's investigation confirmed that:

*the Race Relations (NI) Order 1997 places a duty on local Councils to have due regard to the need to promote good relations. Although this broadly corresponds to human rights standards, the duty is not extended to all public authorities. Furthermore, the lack of structured race relations programmes to improve relations between the settled*

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708 NI Human Rights Commission, 'Travellers' Accommodation Investigation Terms of Reference' (NIHRC, 2016).

709 NI Human Rights Commission, 'Out of Sight, Out of Mind: Travellers' Accommodation in NI' (NIHRC, 2018).

710 Ibid, at 288.

711 Ibid, at 287.

712 Ibid, at 288.

*and Traveller communities contributes to discrimination against Travellers that has persisted for decades. This will continue to do so without proactive and systematic changes in attitude at all levels - grass roots, civil society and public authorities.*<sup>713</sup>

### **Resource availability**

The Commission's investigation identified that:

*while the NI Housing Executive maintains it is satisfied with the resources available to it for developing and maintaining Traveller-specific accommodation, the existing accommodation is insufficient to the need. In addition, a spend per pitch has been reducing on an annual basis.*<sup>714</sup>

### **Resource and policy accountability**

The Department for Communities:

*allocates funding to the NI Housing Executive, but there is no robust mechanism in place for the Department to monitor how funding is allocated to Travellers' accommodation and what outcomes are being achieved.*<sup>715</sup>

### **Provision of Traveller-specific accommodation**

The UN CEDAW Committee recommended, in its 2013 concluding observations, that the UK Government and NI Executive:

*provide adequate sites designated for use by Traveller women and members of their families.*<sup>716</sup>

The UN ICESCR Committee, in its 2016 concluding observations, found within the UK, including NI, there is a:

*shortage of adequate stopping sites for Roma/Gypsies and Irish Travellers.*<sup>717</sup>

The UN ICESCR Committee urged the UK Government and NI Executive to:

*ensure adequate access to culturally appropriate accommodation and stopping sites for the Roma, Gypsy and Traveller communities, as appropriate, take steps to avoid all discrimination in the provision of accommodation.*<sup>718</sup>

The UN ICERD Committee, in its 2016 concluding observations, recommended the UK Government and NI Executive:

*develop a comprehensive strategy, in consultation with members of Gypsy, Traveller and Roma communities, to ensure a systematic and*

713 Ibid.

714 Ibid, at 289.

715 Ibid.

716 CEDAW/C/GBR/CO/7, 'UN Committee on the Elimination of Discrimination Against Women, Concluding Observations on the Seventh Periodic report of the UK of Great Britain and NI', 30 July 2013, at para 61(b).

717 E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at para 30.

718 Ibid, at para 50(d).

*coherent approach in addressing the challenges that members of these communities continue to face in the fields of... housing.*<sup>719</sup>

The UN ICERD Committee continued the UK Government and NI Executive should:

*ensure the provision of adequate and culturally appropriate accommodation and stopping sites as a matter of priority.*<sup>720</sup>

The Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities, in its 2016 report on the UK, found:

*access to campsites by Gypsies and Travellers continues to be problematic, particularly in... NI.*<sup>721</sup>

Furthermore:

*local authorities appear to struggle with the task of providing adequate permanent and temporary sites for these groups.*<sup>722</sup>

The Advisory Committee acknowledged that there is a:

*link between poor health conditions and inadequate and insecure campsite availability.*<sup>723</sup>

The Advisory Committee recommended for immediate action that:

*a multi-agency taskforce on Traveller sites in NI [is setup]... to cater to the needs of Irish Travellers.*<sup>724</sup>

The Commission, in its 2016 parallel report, advised the UN ICESCR Committee to recommend that the NI Executive ensure planning rules take into account the needs of Travellers in NI.<sup>725</sup>

The Commission's investigation found:

*there is insufficient culturally adequate Travellers' accommodation available. In particular, the NI Housing Executive is failing to provide sufficient adequate Travellers' sites. Its actions and inaction suggest a preference for developing and maintaining bricks and mortar accommodation, over Travellers' sites. Third party objections and delays in planning often obstruct the development of required new Travellers' sites. Furthermore, the legislative framework does not enable the NI Housing Executive to provide nomadic housing structures, such as caravans, trailers or chalets. These factors are contributing to the number of Travellers moving into bricks and*

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719 CERD/C/GBR/CO/21-23, 'UN Committee on the Elimination of Racial Discrimination, Concluding Observations on the Twenty-first to Twenty-third periodic Reports of UK', 26 August 2016, at para 25(a).

720 E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at para 25(b).

721 Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities, 'Fourth Opinion on the UK adopted on 25 May 2016', 27 February 2017, at 2.

722 Ibid, at 2.

723 Ibid, at para 139.

724 Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities, 'Fourth Opinion on the UK adopted on 25 May 2016', 27 February 2017, at 2.

725 NI Human Rights Commission, 'Submission to the UN Committee on Economic, Social and Cultural Rights 58th Session on the Sixth Periodic Report of the UK's Compliance with ICESCR' (NIHRC, 2016), at 59-60.

*mortar accommodation and restricting Travellers' ability to practice their cultural traditions.*<sup>726</sup>

### Monitoring needs for Travellers' accommodation

The UN ICERD Committee, in its 2016 concluding observations, recommended the UK Government and NI Executive:

*ensure its effective implementation by adopting specific action plans, putting in place effective oversight and monitoring mechanisms to track progress, and providing adequate human and financial resources.*<sup>727</sup>

The Commission's investigation also found:

*there is evidence that the monitoring process for Travellers' accommodation needs in NI is inaccurate. The NI Housing Executive's 'Traveller Needs Assessment' surveys are criticised for insufficiently engaging with all Travellers in NI and not reflecting the views expressed by the Travellers that were surveyed.*<sup>728</sup>

### Inadequacy of Travellers' sites

The UN ICESCR Committee, in its 2016 concluding observations, on the UK expressed concern that:

*Travellers continue to face barriers in accessing adequate and culturally appropriate accommodation across [the UK], with adequate access to basic services, such as water and sanitation.*<sup>729</sup>

A quarter of respondents to the Equality Commission NI's 2009 research on Travellers' accommodation in NI considered their place of residence to be unhealthy or very unhealthy, with 29 per cent describing their residence as unsafe.<sup>730</sup> A lack of footpaths, public lighting, fire hydrants, safe play areas, plumbing, washing facilities, electricity and refuse management has been reported.<sup>731</sup> Research suggests that the standard of Travellers' sites, in particular, is inadequate. The Commission, in its 2016 parallel report, advised the UN ICESCR Committee to recommend that the UK complies with the Housing (NI) Order 2003 to improve basic living conditions on serviced and halting sites in NI.<sup>732</sup>

The Commission's investigation found that:

*some Travellers' sites are inadequate in the provision of standard services and facilities (electricity, water, heating, drainage, sanitation, waste disposal). This is particularly true of Travellers' sites intended*

<sup>726</sup> NI Human Rights Commission, 'Out of Sight, Out of Mind: Travellers' Accommodation in NI' (NIHRC, 2018), at 289.

<sup>727</sup> CERD/C/GBR/CO/21-23, 'UN Committee on the Elimination of Racial Discrimination, Concluding Observations on the Twenty-first to Twenty-third periodic Reports of UK', 26 August 2016, at para 25(a).

<sup>728</sup> NI Human Rights Commission, 'Out of Sight, Out of Mind: Travellers' Accommodation in NI' (NIHRC, 2018), at 289.

<sup>729</sup> E/C.12/GBR/CO/5, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations of the CESCR: UK of Great Britain and NI, the Crown Dependencies and the Overseas Dependent Territories', 22 May 2009, para 30; E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at para 49.

<sup>730</sup> Equality Commission NI, 'Outlining Minimum Standards for Traveller Accommodation' (ECNI, 2009), at 9-10.

<sup>731</sup> Safa Abdella *et al*, 'Our Geels: All Ireland Traveller Health Study' (UCD, 2010), at 46; NICEM, 'The Annual Human Rights and Racial Equality Benchmarking Report 2013/14' (OFMdfM, 2014), at 96.

<sup>732</sup> NI Human Rights Commission, 'Submission to the UN Committee on Economic, Social and Cultural Rights 58th Session on the Sixth Periodic Report of the UK's Compliance with ICESCR' (NIHRC, 2016), at 59-62.

*as transient in nature, but that are operating as permanent sites in practice. The lack of effective management of Travellers' sites exacerbates these problems.*<sup>733</sup>

## Participation

The Commission's investigation found that:

*efforts to ensure the participation of Travellers in decision-making processes regarding accommodation by public authorities are ineffective and inadequate. There is a lack of emphasis on supporting Traveller advocates. There is also a heavy burden placed on Traveller support groups by public authorities, in terms of the roles they are expected to fulfil. These groups are also under-resourced for both their contracted role and remuneration for the additional uncontracted assistance sought by public authorities. Each of these factors is hindering Travellers' ability to represent their own views. Travellers feel ignored and feel they are not offered sufficient opportunities to raise concerns about their accommodation.*<sup>734</sup>

## Information on Travellers' accommodation

The Commission's investigation found that:

*there is a general lack of information on Travellers' accommodation, such as how to access such accommodation or how to make a complaint, for instance regarding maintenance. Such information is required to enable Travellers' effective participation. Public authorities do attempt to adapt such information to Travellers' needs; however, such adaptations are largely ineffective.*<sup>735</sup>

## Data collection

The Commission's investigation into Travellers' accommodation found that:

*there is a general lack of data and disaggregation of data regarding the Traveller population in NI. This makes it impossible to assess whether Travellers' accommodation is sufficient and to strategically plan for the future.*<sup>736</sup>

The official figures for the Traveller population in NI do not appear to reflect reality, making it difficult to create and evaluate appropriate policies and strategies. The NI Housing Executive has recorded that between 2002 and 2014, the Traveller population in NI fluctuated between 1,220 and 1,480.<sup>737</sup> The NI Government Partnership on Travellers' issues estimated that a more accurate approximation would be a Traveller population of between 3,500 and 4,000 persons.<sup>738</sup>

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733 NI Human Rights Commission, 'Out of Sight, Out of Mind: Travellers' Accommodation in NI' (NIHRC, 2018), at 289.

734 Ibid, at 290.

735 Ibid.

736 Ibid.

737 NI Housing Executive, 'Traveller Accommodation Needs Assessment 2002' (NIHE, 2002), at 10; NI Housing Executive, 'Traveller Accommodation Needs Assessment 2008' (NIHE, 2008), at 10; NI Housing Executive, 'Traveller Accommodation Needs Assessment 2014' (NIHE, 2014), at 9.

738 Minutes of the 429th Meeting of the NI Housing Council, Armagh City Hotel, 14 April 2016, at 3.

## Complaints mechanisms

In terms of complaints, the Commission's investigation confirmed that:

*Travellers are not engaging with or availing of the formal mechanisms available to them. The relevant public authorities are not taking steps to investigate and address why this is. This means Travellers are not receiving effective redress, when required. The resulting lack of investigation into concerning acts and omissions of public authorities is also hindering the feedback processes for improving services.<sup>739</sup>*

## Implementation of recommendations

The Commission made 45 recommendations aimed at addressing the investigation's findings.<sup>740</sup> Five recommendations were identified as requiring immediate action that were to be delivered by September 2018. These concerned:

- *the NI Housing Executive and relevant housing associations providing sufficient practical support for Travellers transitioning from Travellers' sites to bricks and mortar accommodation;*
- *the NI Housing Executive carrying out immediate health and safety assessments of all Travellers' sites and addressing the hazards identified;*
- *the NI Housing Executive and relevant housing associations ensuring there are adequate fire safety measures in place and adhered to within all Travellers' accommodation;*
- *the NI Housing Executive and relevant housing associations ensuring that Travellers on all types of Travellers' sites are provided with and sign an agreement attached to their pitch, clearly setting out their rights and responsibilities in an understandable language and format; and*
- *the NI Housing Executive ensuring that it submits a completed application for a site licence for all Travellers' sites currently operating unlicensed.<sup>741</sup>*

The NI Housing Executive and relevant housing associations have reported that four of the five urgent recommendations have been addressed.

Concerning the fifth urgent recommendation, the NI Housing Executive has submitted site licence applications to the relevant local Councils for existing Travellers' sites, however these applications have been returned to the NI Housing Executive as incomplete. One of the issues is that the NI Housing Executive is submitting applications on the basis of its own categorisation of a Travellers' site, as opposed to its actual use. For example, the NI Housing Executive may categorise a site as transit, but in practice it is used as a serviced (permanent) site. A serviced site requires more facilities and services to ensure it is adequately habitable. As the Commission stated in its report:

<sup>739</sup> NI Human Rights Commission, 'Out of Sight, Out of Mind: Travellers' Accommodation in NI' (NIHRC, 2018), at 290.

<sup>740</sup> Ibid, at Chapter 15.

<sup>741</sup> Ibid.

*an effective site licencing system assists with ensuring Travellers' sites are meeting a minimum standard of provision and safety related to their actual use. The need for such a safeguard is evidenced by the existing inadequacies in relation to habitability and services.*<sup>742</sup>

The Commission continues to work with the Department for Infrastructure, relevant local Councils and NI Housing Executive to resolve this issue.

The remaining 40 recommendations are to be implemented by March 2019. The Commission has established a 12-month implementation plan, involving continuous participation of key stakeholders (relevant public authorities, relevant civil society organisations and Travellers) and aimed at guiding effective and timely implementation of all 45 recommendations.

### Recommendation

The Commission recommends that long-term strategies are in place to ensure that four of the five urgent recommendations that were implemented by September 2018, as required, continue to be adhered to. The Commission recommends that the Department for Infrastructure, local Councils and NI Housing Executive effectively work together to address the issues concerning site licencing of Travellers' sites in NI and that all Travellers' sites in NI are appropriately licenced according to actual use without further delay.

The Commission also recommends that the remaining recommendations set out in its investigation report are effectively and promptly implemented by March 2019, to ensure human rights standards and requirements are met.

### Unauthorised Encampments (NI) Order 2005

The UN ICESCR Committee has consistently expressed concern at how the Unauthorised Encampments (NI) Order 2005:

*makes Roma/Gypsies and Irish Travellers liable to be evicted from their homes, to have their homes destroyed and then to be imprisoned and/or fined.*<sup>743</sup>

The UN ICESCR Committee has called for this legislation to be repealed,<sup>744</sup> in line with the Commission's advice.<sup>745</sup> The Commission also found during its Travellers' accommodation investigation that:

*the existence of the Unauthorised Encampments (NI) Order 2005 has a disproportionate impact on the Traveller communities and threatens their nomadic culture.*<sup>746</sup>

<sup>742</sup> Ibid, at 169.

<sup>743</sup> E/C.12/GBR/CO/5, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations of the CESCR: UK of Great Britain and NI, the Crown Dependencies and the Overseas Dependent Territories', 22 May 2009, para 30; E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at para 49.

<sup>744</sup> E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at para 50(d).

<sup>745</sup> NI Human Rights Commission, 'Submission to the UN Committee on Economic, Social and Cultural Rights 58th Session on the Sixth Periodic Report of the UK's Compliance with ICESCR' (NIHRC, 2016), at 13.

<sup>746</sup> NI Human Rights Commission, 'Out of Sight, Out of Mind: Travellers' Accommodation in NI' (NIHRC, 2018), at 288.



The Police Service NI attended 102 incidents regarding unauthorised encampments between 2006/2007 and 2015/2016. The powers under the 2005 Order are used sparingly. Over the period 2015/2016, there were nine reported incidents engaging the 2005 Order, six involving Irish Travellers and one involving a member of another Traveller community. Some representatives of the Police Service NI and civil society organisations believe the 2005 Order bears more heavily on Traveller communities.<sup>747</sup>

The NI Housing Executive operates a co-operation policy. This policy permits Travellers to set up an unauthorised encampment on public land for which there is no current or immediate use and permits them to occupy the land provided it does not create a public health or traffic hazard and the land is maintained in a reasonable and orderly manner.<sup>748</sup> The NI Housing Executive emphasises that the policy is not a substitute for permanent or transit sites but is intended to act as a way of dealing with a humane requirement.<sup>749</sup> In its 2016 parallel reports to the Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities<sup>750</sup> and the UN ICESCR Committee,<sup>751</sup> the Commission welcomed the co-operation policy, but advised that the measures in the 2005 Order potentially have a chilling impact; these measures enable a national minority to become liable to criminal prosecution for following their traditional lifestyle in a context of inadequate site provision.

The Department for Communities accepts that the powers under the 2005 Order have a particular impact on Travellers in NI, but states that annual monitoring of the impact of the 2005 Order:

*indicates that the provisions of the 2005 Order have been applied sensitively, pragmatically and proportionately and are effective in balancing the rights of the Irish Travellers, landowners and the settled community.*<sup>752</sup>

The Department has no plans to repeal the 2005 Order,<sup>753</sup> but has highlighted that any proposed change to legislation would require the approval of an incoming Minister and NI Executive and the agreement of the NI Assembly.<sup>754</sup>

747 Ibid.

748 Department for Social Development, 'Guide to the Unauthorised Encampments (NI) Order 2005' (DSD, 2006).

749 NI Housing Executive, 'Our Cooperation Policy for Travellers'. Available at: [http://www.nihe.gov.uk/index/advice/advice\\_for\\_travellers/co-operation\\_policy.htm](http://www.nihe.gov.uk/index/advice/advice_for_travellers/co-operation_policy.htm)

750 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 Fourth Monitoring Report of the UK' (NIHRC, 2016), at 104.

751 NI Human Rights Commission, 'Submission to the UN Committee on Economic, Social and Cultural Rights 58th Session on the Sixth Periodic Report of the UK's Compliance with ICESCR' (NIHRC, 2016), at 59-62.

752 Letter from Leo O'Reilly, Permanent Secretary of Department for Communities, to NI Human Rights Commission, 18 May 2018.

753 NI Human Rights Commission, 'Out of Sight, Out of Mind: Travellers' Accommodation in NI' (NIHRC, 2018), at 301.

754 Letter from Leo O'Reilly, Permanent Secretary of Department for Communities, to NI Human Rights Commission, 18 May 2018.

### **Recommendation**

The Commission welcomes the NI Housing Executive's co-operation policy with Travellers. The Commission continues to raise concerns with regards the applicability of the Unauthorised Encampments (NI) Order 2005. The measures therein enable a national minority to become liable to criminal prosecution for following their traditional lifestyle in a context of inadequate site provision. As a result, the Commission endorses the recommendation of the UN ICESCR Committee for the NI Executive to repeal the provisions of the Unauthorised Encampments (NI) Order 2005 in NI.

## Right to health

<b>CRPD</b>	Article 25
<b>ICESCR</b>	Article 12
<b>European Social Charter</b>	Article 11
<b>Charter of Fundamental Rights of the EU</b>	Article 35

### Access to healthcare for irregular migrants

In its 2016 submission to the UN ICESCR Committee, the Commission expressed concern that there are practical barriers impeding refused asylum seekers accessing healthcare. In response, the UN ICESCR Committee expressed concern that, among others, asylum seekers and refused asylum seekers continue to face discrimination in accessing health-care services. The UN ICESCR Committee noted that the Immigration Act 2014 had further restricted access to health services by temporary migrants and undocumented migrants. The Committee recommended that the UK Government and NI Executive:

*take steps to ensure that temporary migrants and undocumented migrants, asylum seekers, refused asylum seekers... have access to all necessary health-care services and reminds the State party that health facilities, goods and services should be accessible to everyone without discrimination, in line with article 12 of the Covenant.*<sup>755</sup>

The UN ICERD Committee reaffirmed, in its 2016 concluding observations, that the UK Government and NI Executive:

*should take effective measures to ensure the accessibility and availability of quality health-care services to persons belonging to ethnic minorities, through its jurisdiction.*<sup>756</sup>

The UN CRC Committee highlighted, in its 2016 concluding observations, to the UK Government and NI Executive that:

*asylum-seeking, refugee and migrant children and their families face difficulty in accessing basic services, such as... health care.*<sup>757</sup>

The UN CRC Committee recommended that migrant, refugee and asylum-seeking children were provided with:

*sufficient support... to access basic services [including health care].*<sup>758</sup>

The Provision of Health Services to Persons Not Ordinarily Resident Regulations (NI) 2015 and the Health and Personal Services (General Medical Services Contracts) (Amendment) Regulations (NI) 2015 confirm that all asylum seekers who have made an application to be granted

<sup>755</sup> E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 14 July 2016, at para 56.

<sup>756</sup> CERD/C/GBR/CO/21-23, 'UN Committee on the Elimination of Racial Discrimination, Concluding Observations on the Twenty-first to Twenty-third periodic Reports of UK', 26 August 2016, at para 31.

<sup>757</sup> CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 76(f).

<sup>758</sup> Ibid, at paras 77-78.

temporary protection, asylum or humanitarian protection are entitled to free primary, secondary and emergency healthcare. This includes asylum seekers who have exhausted the appeals process and remain in NI. However, the Commission has received reports that there are a number of barriers to migrants, including irregular migrants, accessing healthcare they are entitled to. Delays in the Home Office issuing asylum registration cards and HC2 certificates have been reported. One or both of these documents are required to register and receive full support for many health care services, particularly General Practitioner and dental services. There are difficulties in migrants, including irregular migrants, getting to healthcare appointments because the financial support provided by the government is in the form of vouchers. This means for example, no cash to pay for transport to appointments. The Commission has also received reports of pregnant migrant women, including irregular migrants, not receiving financial support until late in their pregnancy. This has been due to delays in the decision-making process and in the issuance of awards.<sup>759</sup>

Since May 2012, a number of the health trusts in NI offer the NI New Entrants Service. It is the first point of contact to the health services for new migrants, including asylum seekers; it offers initial health assessments, health promotion advice, and information on accessing health services in NI.<sup>760</sup>

During its engagement with civil society when preparing for the UN CEDAW Committee's Pre-Sessional Working Group in 2018, the Commission was made aware that asylum seekers are still experiencing procedural barriers when attempting to access healthcare. These barriers include form-filling and the production of satisfactory identification as well as engagement with services without the required translation and interpretation services.

The Commission remains concerned that there is still a potential gap in respect of undocumented or irregular migrants (i.e. those who have not made an asylum application) and their children. They are not entitled to primary and secondary healthcare under the Regulations. The Commission continues to recommend that an amendment or policy direction may be required to ensure that the full set of General Practitioner services, including access to a General Practitioner list (subject to discretion) is genuinely available to any person.<sup>761</sup>

### Recommendation

The Commission remains concerned that undocumented or irregular migrants and their children, beyond in emergencies, are not entitled to primary and secondary healthcare. The Commission recommends that the NI Executive commit to monitoring and reviewing the operation of the Regulations to identify the implications of this exclusion and to devise appropriate remedies.

759 NI Human Rights Commission, 'Submission to the UN Committee on Economic, Social and Cultural Rights 58th Session on the Sixth Periodic Report of the UK's Compliance with ICESCR' (NIHRC, 2016), at paras 49.1-49.5.

760 Belfast Health and Social Care Trust, 'Screening service for new entrants to NI', 24 May 2012.

761 NI Human Rights Commission, 'Access Denied or Paying When You Shouldn't. Access to Publicly Funded Medical Care, Residency, Visitors and Non-British/Irish Citizens' (NIHRC, 2011), at 49.

## Emergency healthcare

In 2015, the Commission published its report into emergency health care in NI. The inquiry report included over 100 key findings. On publication of the report, the Commission stated it:

*considered quality, accountability and governance of the service. We visited emergency departments throughout NI during the day and night. We heard from dedicated staff striving to maintain patient dignity in an often challenging and crowded environment. In such circumstances there were reported instances where patients did not receive assistance with personal care needs, no pain relief, and no access to food and fluids. Of particular concern were cases involving end of life care, the inappropriate transfer of older patients from nursing homes and the experiences of those presenting to Accident and Emergency in mental health crisis, with dementia or disabilities.<sup>762</sup>*

The Commission made 26 recommendations including a recommendation that the Department of Health develop dedicated Emergency Department minimum care standards rooted in human rights and providing a benchmark for patient experience within Emergency Departments. The standards should include criteria on, inter alia:

- *the promotion of dignity in Emergency Departments;*
- *participation by individuals, their family members and other carers in the care provided in the Emergency Department setting;*
- *measures covering staff behaviour and attitude, adequate facilities;*
- *accessible mechanisms to provide feedback of Emergency Department experiences including complaints;*
- *the policies and procedures each Emergency Department should have including a hospital wide escalation policy to address overcrowding; and,*
- *ways of helping to guarantee equality of access for particular groups of patients including older people, patients with dementia, rare diseases, sensory impairments and those presenting in mental health crisis.<sup>763</sup>*

In November 2015, the then Minister for Health, Social Services and Public Safety, Simon Hamilton, set out significant changes to the health and social care system in NI, stating:

*we have too many layers in our system. I want to see the Department take firmer, strategic control of our Health and Social Care system with our Trusts responsible for the planning of care in their areas and the operational independence to deliver it.<sup>764</sup>*

<sup>762</sup> NI Human Rights Commission, 'Press Release: A&E Inquiry Findings Published', 27 May 2015.

<sup>763</sup> NI Human Rights Commission, 'Human Rights Inquiry: Emergency Health Care' (NIHRC, 2015), at Recommendations.

<sup>764</sup> Department of Health, Social Services and Public Safety, 'Press Release: Health Minister Simon Hamilton has today announced radical changes to the way health and social care in NI is delivered', 4 November 2015.

Subsequently, in October 2016, the then Minister of Health, Michelle O'Neill MLA, published a ten year vision for the transformation of the health and social care system, entitled Health and Wellbeing 2026: Delivering Together. Speaking at the launch of the vision the then Minister stated:

*whole system transformation will take time and it will only be truly sustainable if there is meaningful engagement with clinicians, staff and patients to build a collective way forward. I believe by working in partnership with those who use and those who deliver services we can co-design, co-produce and implement the changes our population deserves.*<sup>765</sup>

In September 2017, the Commission obtained an update from the Health and Social Care Board on its implementation of the recommendations from the emergency healthcare inquiry report.<sup>766</sup> The Commission is tracking the progress of the Inquiry recommendations and is engaging with Health and Social Care Trusts in progressing implementation of the recommendations.

### Recommendation

The Commission continues to track the progress of their inquiry recommendations and calls on the NI Executive and Department of Health to expedite implementation of recommendations, in particular the introduction of dedicated Emergency Department minimum care standards.



### Mental capacity

In August 2017, the UN CRPD Committee recommended that the UK Government and NI Executive:

*abolish all forms of substituted decision-making concerning all spheres and areas of life by reviewing and adopting new legislation in line with the Convention to initiate new policies in both mental capacity and mental health laws. It further urges the State party to step up efforts to foster research, data and good practices of, and speed up the development of supported decision-making regimes.*<sup>767</sup>

The Mental Capacity (NI) Act 2016 received royal assent on 9 May 2016; it has not yet been brought into effect. The Act provides a single legislative framework governing situations where a decision needs to be made in relation to the care, treatment (for a physical or mental illness) or personal welfare of a person aged 16 or over, who lacks capacity to make the decision for themselves. The Act therefore continues to make provision for substitute decision making. An act done or decision made for or, on behalf of, a person lacking the mental capacity must be done or made in their best interests and with special regard to their past and present wishes and feelings. The Act has been described as innovative in its emphasis on supported decision making. Throughout 2018, the Department of

<sup>765</sup> Department of Health, 'Press Release: O'Neill launches 10 year vision for Health and Social Care', 25 October 2016.

<sup>766</sup> NI Human Rights Commission, 'Human Rights Inquiry: Emergency Health Care' (NIHRC, 2015).

<sup>767</sup> CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI', 29 August 2017, at para 30.

Health has continued to develop a Code of Practice required to ensure the effective implementation of the Act.

The 2016 Act will introduce a presumption of capacity in all persons over the age of 16 only.<sup>768</sup> For under 16 year olds, the Department for Health had committed to review how the current legal framework, principally the Children (NI) Order 1995, reflects the emerging capacity of children in a health and welfare context. In a previous annual statement, the Commission advised that a project plan with a clearly defined timetable for this project should be developed and made publicly available.<sup>769</sup> However, during the second stage debate on the Bill the Minister for Health stated that there are:

*simply no available resources and arguably no time to undertake such a wide-ranging project at this moment.*<sup>770</sup>

In 2016, the UNCRC Committee raised concern that:

*children under the age of 16 years are excluded from the protection under the Mental Capacity Act (2005) in England and Wales, as well as under the Mental Capacity Act (2016) in NI, including with regard to medical treatment without consent.*<sup>771</sup>

The UN CRC Committee further recommended that the UK Government and NI Executive:

*review current legislation on mental health to ensure that the best interests and the views of the child are taken duly into account in cases of mental health treatment of children below the age of 16, in particular with regard to hospitalisation and treatment without consent.*<sup>772</sup>

### Recommendation

The Commission welcomes the introduction of the Mental Capacity (NI) Act 2016 and continues to advocate for the effective implementation of the Act in a manner in line with the CRPD, Article 12. The Commission remains concerned that children under the age of 16 are excluded from the application of the Act. To that end, the Commission calls on the Department of Health to conduct a review of current legislation on mental health to ensure that the best interests and the views of the child are taken duly into account in cases of mental health treatment of children below the age of 16, in particular with regard to hospitalization and treatment without consent.

768 NI Human Rights Commission, 'The 2013 Annual Statement: Human Rights in NI' (NIHRC, 2013), at 45.

769 NI Human Rights Commission, 'Submission to the Consultation on Proposals for New Mental Capacity Legislation for NI' (NIHRC, 2014), at para 90.

770 NI Assembly, 'Official Report', 16 June 2015.

771 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 60(g).

772 Ibid, at para 61(e).



## Termination of pregnancy

In July 2016, the UN ICESCR Committee recorded its concern that termination of pregnancy was still criminalised in all circumstances in NI, save for where the life of the mother was in danger.<sup>773</sup> The Committee noted that this could lead to unsafe terminations and discriminated against women from low income families who could not afford to travel to access termination services. The Committee recommended that NI legislation on termination of pregnancy be amended to make it compatible with women's rights to health, life and dignity. The UN CRC Committee also recommended that legislation in NI be reviewed to ensure girls have access to safe abortion and post-abortion care services.<sup>774</sup>

### The Commission's case

In December 2014, the Commission issued judicial review proceedings against the Department of Justice maintaining that the law on termination of pregnancy in NI violates the rights of women and girls by criminalising them when they seek a termination of pregnancy in circumstances of fatal and serious foetal abnormality, rape or incest. The Commission has repeatedly advised the Department of Justice that the existing law is, in the Commission's view, a violation of human rights. The case was heard in June 2015. The Attorney General NI, among others, intervened in the case.

Speaking at the commencement of the case, the Commission's Chief Commissioner, Les Allamby, stated:

*it is appropriate for the [NI] Human Rights Commission to take this legal challenge in our own name. We recognise the particular sensitivities of the issue. It is a matter of significant public interest to ensure that the rights of vulnerable women and girls in these situations are protected. It is in everyone's interest that the law is clarified in this area.*<sup>775</sup>

Mr Justice Horner ruled, on the 30 November 2015, that the law in NI breached Article 8 ECHR: the right to private life and a women's right to personal autonomy by the absence of exceptions to the general prohibition on abortions in the cases of: (a) fatal foetal abnormalities at any time; and (b) pregnancies which are a consequence of sexual crime up to the date when the foetus becomes capable of existing independently of the mother.<sup>776</sup>

In January 2016, the Attorney General NI and the Justice Minister both lodged appeals to the NI High Court's ruling. The Commission also cross-appealed the decision and reintroduced all of the original grounds brought before the NI High Court. In June 2016, the NI Court of Appeal hearing took place and judgment was reserved.

773 E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 14 July 2016.

774 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016.

775 NI Human Rights Commission, 'Press Release: Human Rights Commission's Review of Termination of Pregnancy Law to begin', 15 June 2015.

776 *The NI Human Rights Commission's Application* [2015] NIQB 96.



The Court of Appeal delivered their judgment on 29 June 2017 and allowed the appeal of the Department of Justice and Attorney General NI and did not uphold the Commission's own challenge to the law on termination of pregnancy.<sup>777</sup> The three judge panel were divided on two specific issues: whether the laws breached Article 8 ECHR, and whether the common law should be extended to allow termination of pregnancies in certain circumstances beyond the *R v Bourne* [1938] case. The Court of Appeal gave leave to appeal to the UK Supreme Court and an expedited three-day hearing commenced on 24 October 2017.

The UK Supreme Court handed down its judgment on 7 June 2018. The Supreme Court held that the Commission did not have the standing to take the case without a victim. The Supreme Court, nonetheless, also gave its views on the substantive issues before it. A majority of the Court recognised that the law on termination of pregnancy in NI is incompatible with Article 8 ECHR in respect of not providing access to women and girls in situations of rape, incest and fatal foetal abnormality. It further recognised the real possibility of an individual case, falling within the scope of Article 3 ECHR and reaching the threshold of severity required to be considered inhuman and degrading.

President of the Court, Lady Hale observed that:

*for those women who become pregnant, or who are obliged to carry a pregnancy to term, against their will there can be few greater invasions of their autonomy and bodily integrity (para 6).*<sup>778</sup>

Lord Kerr, former Lord Chief Justice of NI, noted the extreme distress of women and girls in an already vulnerable position.<sup>779</sup>

Despite not being able to make a declaration of incompatibility, Lord Mance described the current position as 'untenable' and in need of 'radical reconsideration'.<sup>780</sup> He called on those responsible for ensuring ECHR compliance to consider:

*whether and how to amend the law, in light of the ongoing suffering being caused by it as well as the likelihood that a victim of the existing law would have standing to pursue similar proceedings.*<sup>781</sup>

The NI Assembly and Executive remain suspended, with no indication of a resolution being reached. Despite UK Parliament debates on the issue, where parliamentarians from Great Britain declared support for the law to be changed, the UK Government views it as a devolved matter and has no plans to take any action.<sup>782</sup> In response to a written question submitted by Lady Sylvia Hermon MP in June 2018, the Secretary of State outlined:

<sup>777</sup> *The NI Human Rights Commission's Application* [2017] NICA 42.

<sup>778</sup> *In the matter of an application by the NI Human Rights Commission for Judicial Review (NI) Reference by the Court of Appeal in NI pursuant to Paragraph 33 of Schedule 10 to the NI Act 1998 (Abortion)* [2018] UKSC 27, at para 6.

<sup>779</sup> *Ibid*, at para 238.

<sup>780</sup> *Ibid*, at para 135.

<sup>781</sup> *Ibid*, at para 135.

<sup>782</sup> UK Parliament, 'Emergency Debate: Sections of the Offences against the Persons Act', 5 June 2018; Stella Creasy MP, 'Urgent Question on Supreme Court Ruling: Abortion in NI', House of Commons Hansard, Column 453, Volume 642, 7 June 2018; Baroness Suttie, 'Abortion: NI: Written Question - HL8740', 18 June 2018.

*abortion is a devolved matter in NI. I am aware of the many strongly held views across all sides of the debate on this extremely sensitive issue. My priority is to secure the restoration of devolved government in NI, so that locally elected, democratically accountable politicians can consider changes to NI's abortion law, and the people of NI can contribute to the discussions and debate.*<sup>783</sup>

### Legislative initiatives

In March 2016, the then Justice Minister and Health Minister jointly established an inter-departmental working group to make recommendations on how the issue of fatal foetal abnormalities could be addressed. The Working Group report was published on 25 April 2018 and details evidence from clinicians, highlighting the medical risks for women and girls with a diagnosis of a fatal fetal abnormality and the:

*increased risk of harmful physical and mental health outcomes for women who travelled to other jurisdictions.*<sup>784</sup>

The report highlights gaps in health care including that:

*health professionals working with the PHA have identified a number of scenarios where they consider that their duty of care is compromised and the existing law and guidance is insufficiently clear.*<sup>785</sup>

The Working Group concluded that the evidence:

*strongly suggested that there was a fundamental need to adjust abortion law [and proposed three options for legislative change].*<sup>786</sup>

In June 2017, the UK Supreme Court gave judgment in a case that considered whether National Health Service England should make provision for women from NI to undergo a termination of pregnancy free of charge.<sup>787</sup> The Supreme Court, by a 3-2 majority, held that the decision of the Secretary of State for Health not to provide termination free of charge struck a fair balance between the appellants' rights and the interests of the UK community as a whole and was, therefore, justified.<sup>788</sup> However, on 29 June 2017, the Chancellor Philip Hammond announced that the National Health Service would fund terminations for women travelling from NI.<sup>789</sup> In a subsequent letter from the Minister for Women and Equalities, it was announced that the funding will be made available to the National Health Service through the Government Equalities Office.<sup>790</sup> A further announcement by the Minister for Women and Equalities, on 23 October 2017, confirmed that support with travel costs will also be funded if the woman meets financial hardship criteria.<sup>791</sup>

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783 Parliament Business, 'Abortion: NI: Written question - 150603', 6 June 2018.

784 Department of Justice and Department of Health, 'Report of the Working Group on Fatal Fetal Abnormality, Healthcare and the Law on Termination of Pregnancy for Fatal Fetal Abnormality, Proposals to the Minister of Health and the Minister of Justice' (DoH and DoJ, 2016), at para 4.11.

785 Ibid, at para 5.5.

786 Ibid, at para 5.51.

787 *R (on application of A and B) v. Secretary of State for Health* [2017] UKSC 41.

788 Ibid, at para 35.

789 House of Commons, 'Vol. 626, Col. 791 - Mr Phillip Hammond', 29 June 2017.

790 Letter from Rt Hon Justine Greening MP, Minister for Women and Equalities, 29 June 2017.

791 Minister for Women and Equalities, 'Written statement', 23 October 2017.

A centralised booking system is also intended to be established before the end of the year, to simplify the process.<sup>792</sup>

Official statistics for 2017 show that, in England and Wales, there were 919 terminations for women travelling from NI, the highest level since 2011.<sup>793</sup> The statistics also show that there was an increase in women from NI following the funding announcement on 29 June 2017.<sup>794</sup>

On 20 September 2018, the Women and Equalities Committee of the House of Commons, announced an inquiry into abortion law in NI. The Chair of the Committee, Maria Miller MP, stated:

*the Women and Equalities Select Committee has decided to hold a formal Inquiry into abortion law in NI following renewed concerns raised by [UN] CEDAW Committee about restricted access and the UK Supreme Court ruling in June. The committee is seeking evidence from the people of NI and organisations involved to inform this Inquiry.*<sup>795</sup>

The Inquiry has issued a call for both written and oral evidence on the views of the public and professionals on the law; the experiences of women affected by the law; and the responsibilities of the UK Government under its international obligations. The Commission produced a written submission and gave oral evidence to the CEDAW Committee, for the purposes of its Inquiry.

In May 2018, the public voted in favour of a referendum proposing that the Eighth Amendment to the Constitution of Ireland, which granted an equal right to life to the mother and unborn, was repealed and replaced with:

*provision may be made by law for the regulation of termination of pregnancies.*<sup>796</sup>

In October 2018, the Health (Regulation of Termination of Pregnancy) Bill 2018 was introduced to the Dáil. This legislation provides for legal terminations without restrictions up to 12 weeks, and in specified circumstances thereafter. The Government of Ireland's Minister of Health, Simon Harris, intends that termination services provided for by this legislation will be available free of charge from 1 January 2019.<sup>797</sup> The Minister of Health also confirmed that women from NI will be able to access termination services in Ireland, when the new regime is introduced.<sup>798</sup>

The British-Irish Parliamentary Assembly has restarted its inquiry into the cross-jurisdictional implications of abortion policy in British-Irish Parliamentary Assembly's jurisdictions, commenced in 2017 and paused due to the Irish referendum. A hearing of the Committee took place in

792 Ibid.

793 Department of Health and Social Care, 'Abortion Statistics, England and Wales: 2017' (DHSC, 2018), at para 2.57.

794 Ibid, at para 2.59.

795 Women and Equalities Committee, 'Press Release: New inquiry – Abortion law in NI', 20 September 2018.

796 'Irish abortion referendum: What is the law?', *BBC News*, 26 May 2018.

797 Pat Leahy, 'Cabinet to approve legislation providing for abortion', *The Irish Times*, 26 September 2018.

798 Seanín Graham, 'Landmark move to allow NI women access to abortion services in Republic confirmed', *The Irish News*, 9 August 2018.

October 2018 in Belfast and the Commission gave evidence. A report is to be published in spring 2019.

In October 2018, Diana Johnson MP brought forward a Ten Minute Rule Bill to decriminalise consensual terminations in England, Wales and NI on the basis that:

*abortion is fundamentally a women's healthcare and human rights issue. The law should reflect this. If we don't act now, women will continue to suffer under an outdated and ineffective regime regulating abortion. Our Government cannot sit by and watch that happen. The Ten Minute Rule Bill I'm launching today gives us an opportunity to do the right thing for the women and girls of NI.*<sup>799</sup>

At the time of writing, the Bill was awaiting its second reading.

Also in October 2018, Stella Creasy MP and Conor McGinn MP tabled an amendment to the then NI (Executive Formation and Exercise of Functions) Bill 2018, which focused on addressing:

*the incompatibility of the human rights of the people of NI with the continued enforcement of sections 58 and 59 of the Offences against the Person Act 1861 with the Human Rights Act 1998.*<sup>800</sup>

The amendment was passed by 207 votes to 117 and the now NI (Executive Formation and Exercise of Functions) Act 2018 received royal assent on 1 November 2018.<sup>801</sup>

### Relevant prosecutions

In March 2016, a woman who bought drugs on the internet to induce a miscarriage received a suspended prison sentence following a successful prosecution. It was reported that she had been unable to raise the funds to travel to England for a termination. Other criminal proceedings under the Offences Against the Person Act 1861 are currently before the courts. In January 2017, the NI Divisional Court granted leave for a judicial review against a prosecution under the Offences against the Person Act 1861. A mother is being prosecuted for procuring abortion medication on behalf of her 15 year old daughter.<sup>802</sup> The hearing took place in November 2018 and judgment is awaited.

In October 2018, research published by the University of Texas found that women in NI are still using illegal abortion medication, even though the procedure is freely available in England. The research found that:

- *women experience multiple barriers to travelling for abortion services, even when abortion is provided free of charge;*
- *self-management is often preferred over travel, but its criminalisation engenders fear and isolation;*

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799 Amnesty International UK, 'Press Release: NI abortion: 75% of UK public want government to change law - new polls', 10 October 2018.

800 Parliament.UK, 'Committee of the Whole House - 24 October 2018: NI (Executive Formation and Exercise of Functions) Bill. Available at: [https://publications.parliament.uk/pa/bills/cbill/2017-2019/0275/amend/niefeof\\_daily\\_cwh\\_1023.8-12.html](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0275/amend/niefeof_daily_cwh_1023.8-12.html)

801 Parliamentary Business, 'NI (Executive Formation and Exercise of Functions) Act', 1 November 2018.

802 Amelia Gentleman, 'Woman who bought abortion pills for daughter can challenge prosecution', *The Guardian*, 26 January 2017.

- *obstruction of import of abortion medications by NI Customs contributes to stress, anxiety, a higher risk of complications, and trial of ineffective or unsafe methods; and*
- *lack of clarity surrounding the obligations of healthcare professional in NI causes mistrust of the healthcare system.*<sup>803</sup>

### Intimidation at family planning clinics

In 2017, the Commission conducted a number of engagement events in preparation for its submission to the UN CEDAW Committee. During these events, a number of civil society organisations raised that women attempting to access services are being intimidated outside the NI Family Planning Clinic and requested that a buffer zone was implemented to protect those attempting to access such services.<sup>804</sup> The Green Party's Claire Bailey MLA has also raised this issue with MPs at the House of Commons.<sup>805</sup>

### Recommendation

The Commission recommends that the Department of Justice introduce legislation to end the criminalisation of women and girls in NI if they seek a termination of pregnancy. In line with international human rights standards, it recommends that the Department of Health ensure that women and girls have access to termination of pregnancy in at least circumstances of a threat to physical or mental health, serious foetal abnormality, rape or incest. In addition, women and girls should have access to appropriate aftercare services.

The Commission recommends that the current guidance from the Department of Health is reviewed to ensure that it provides sufficient direction for healthcare professionals to provide termination of pregnancy within the present legal framework. The Commission recommends that appropriate information is provided to women and girls in respect of their options relating to sexual and reproductive health. This includes the current pathway available in the rest of the UK to access a lawful termination of pregnancy.

The Commission further recommends that effective steps are taken by the NI Executive and Police Service NI to ensure that NI women can access family planning services without intimidation, including imposing a buffer zone outside the relevant clinics.

803 Abigail Aiken *et al*, 'The Impact of NI's Abortion Laws on Women's Abortion Decision-making and Experiences', *British Medical Journal Sexual and Reproductive Health*, 19 October 2018.

804 NI Human Rights Commission, 'Submission to the UN CEDAW Committee: Parallel Report to the Eighth Periodic Report Submitted by the UK of Great Britain and NI' (NIHRC, 2018), at 15.

805 Allan Preston, 'Family planning clinic visitor 'ran on to road to flee' anti-abortion rally', *Belfast Telegraph*, 17 November 2017.

## Right to education

<b>ECHR</b>	Protocol 1, Article 2
<b>CRC</b>	Article 28
<b>CRPD</b>	Article 24
<b>ICESCR</b>	Article 13
<b>Charter of Fundamental Rights of the EU</b>	Article 14 Article 32

### Academic selection

In 2016, the UN CRC Committee recommended that the NI Executive:

*abolish the practice of unregulated admission tests to post-primary education in NI.*<sup>806</sup>

In commenting on this concluding observation, the then Minister of Education Peter Weir MLA stated:

*I am committed to respecting and progressing the rights of children and young people and it is important that a collective approach across Executive Departments is taken when considering UN CRC Committee recommendations. On the issue of selection, I have made it clear that I support the right of schools to select on the basis of academic ability. I will be discussing this issue with a wide range of stakeholders and will want to consider very carefully how any changes might be taken forward.*<sup>807</sup>

In September 2016, the then Minister of Education issued revised guidance entitled The Procedure for Transfer from Primary to Post-primary Education. The guidance endorses the use of academic selection.<sup>808</sup> In correspondence to the Commission, the then Minister indicated his support for:

*the right of schools to select on the basis of academic ability.*<sup>809</sup>

The guidance sets out how primary schools may help children prepare for admissions tests.

In October 2016, the Minister of Education announced the appointment of Professor Peter Tymms, from the school of education at Durham University to work with the Association of Quality Education and the Post-Primary Transfer Consortium to develop a common post-primary assessment for the purposes of academic selection.<sup>810</sup> A discussion paper was published in March 2017; it did not consider the human rights implications of academic selection.<sup>811</sup>

806 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 72(a).

807 AQW 1175/16-21, 'Stewart Dickson - Alliance Party', 14 June 2016.

808 Department of Education, 'The Procedure for Transfer From Primary to Post-Primary Education', Circular Number 2016/15' (DoE, 2016).

809 Letter from Minister of Education to NI Human Rights Commission, 2016.

810 'Department seeks single transfer test by 2017', *BBC News*, 31 October 2016.

811 Peter Tymms *et al*, 'Towards a Common Assessment for Academic Selection - Discussion Paper' (DoE, 2017).

In June 2018, the two organisations who operate the two post primary assessments issued a joint statement indicating that they had made progress on the development of a common post-primary assessment model for the purposes of academic selection, including in relation to style of test paper and the number of separate tests.<sup>812</sup>

### Recommendation

Noting the lack of political consensus, the Commission raises concern over the continued existence of the two-tier system of education in NI. It highlights that as a result of continued unregulated post-primary academic selection and the prevalence of privately funded tutoring, children from poor socio-economic backgrounds are disadvantaged in current academic selection processes. The Commission continues to call for the Department of Education to introduce a non-selective system of post-primary school admission in order to abolish the two-tier system of education in NI.



### Bullying in schools

The Addressing Bullying in Schools (NI) Act 2016 introduced a statutory definition of bullying and introduced duties around preventing bullying and recording bullying incidents for all grant-aided schools.<sup>813</sup> The Commission broadly welcomed the introduction of the 2016 Act. During the passage of the Bill, the Commission emphasised the need to ensure the duty to record incidents of bullying fully reflects all grounds protected under international human rights law.<sup>814</sup>

The provisions of the Act have not yet been commenced. The Department of Education has produced draft statutory guidance, along with an associated training programme and a new incident reporting mechanism, which will be accessible to all grant maintained schools. The Department of Education anticipates:

*that training will commence in November, initially targeting schools within the Education Authority's Southern Region. The current Schools+ database identified 1,156 schools and it is estimated that 462 (40 per cent) will receive training between September 2018 to March 2019 with the remaining 694 (60 per cent) being trained between April and June 2019.*<sup>815</sup>

The Department believes that:

*this timescale would allow the Act to potentially be brought into effect in the 2019/20 academic year.*<sup>816</sup>

812 'Academic selection: Plans for common transfer test agreed', *BBC News*, 26 June 2018.

813 Addressing Bullying in Schools Act (NI) 2016.

814 NI Human Rights Commission, 'Submission on Addressing Bullying in Schools Bill' (NIHRC, 2016).

815 Letter from the Department of Education to the NI Human Rights Commission, 18 October 2018.

816 *Ibid.*

## Recommendation

The Commission welcomes the Addressing Bullying in Schools (NI) Act 2016. The Commission recommends that the Department monitor levels of bullying in schools across all vulnerable groups and review protected categories within the 2016 Act accordingly



### Educational needs of Traveller children

In its 2016 concluding observations, the UN CRC Committee raised concerns that:

- a) *Substantial inequalities persist in educational attainment, particularly for boys, children living in poverty, Roma, gypsy and traveller children, children with disabilities, children in care and newcomer children;*
- b) *Among children subject to permanent or temporary school exclusions, there is a disproportionate number of boys, Roma, gypsy and traveller children, children of Caribbean descent, children living in poverty and children with disabilities.*<sup>817</sup>

In November 2013, the then Minister of Education for NI, John O'Dowd MLA, published the Traveller Child in Education Action Framework. At the launch of the Framework the Minister stated:

*this is very much a Framework for action. It is the start of the journey of inclusion, to ensure that Traveller children have the opportunity to benefit from the educational opportunities on offer.*<sup>818</sup>

The then Minister further stated:

*an independent Monitoring and Evaluation Group will be established within the next few months to monitor the Action Framework. That group will report progress directly to me.*<sup>819</sup>

In January 2016, in responding to a written question the then Minister stated that:

*the Traveller Education Monitoring Group has not yet been established.*<sup>820</sup>

In 2016, the then Minister of Education indicated to the Commission that the Department monitors implementation of the Framework through its oversight work of the regional Traveller Education Support Service.

In April 2017, the Traveller Education Support Services was amalgamated with the Inclusion and Diversity Service to form the Intercultural Education Service, which provides support and assistance to Traveller families in accordance with the Action Framework. In correspondence to the

817 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016.

818 NI Executive, 'Press Release: Traveller children and young people should be encouraged to value education and supported to reach their full potential', Wednesday 13 November 2013.

819 Ibid.

820 AQW 53269/11-16, 'Jonathan Craig - DUP', 22 January 2016.



Commission, the Permanent Secretary indicated that the Department monitors the support provided to Traveller children through regular reporting and updates from the Education Authority.

In September 2018, the Commission met with representatives of the Education Authority to discuss the first year of operation of the Intercultural Education Service, including assistance offered to Traveller children and their families.

### Recommendation

The Commission highlights the need to address the substantial inequalities in educational outcomes for members of the Traveller communities in NI. The Commission calls on the Department of Education and Education Authority to take effective action to ensure barriers to accessing education are addressed.



### Integrated education

In May 2016, the UN CRC Committee recommended that the UK Government, including the NI Executive:

*actively promote a fully integrated education system.*<sup>821</sup>

In its 2008 concluding observations, the UN CRC Committee expressed concern regarding the problem of segregation of education in NI and recommended that measures be taken to address this.<sup>822</sup> The UN CRC Committee had previously noted the low percentage of schools that were integrated and recommended the NI Executive:

*increase the budget for and take appropriate measures and incentives to facilitate the establishment of additional integrated schools in NI to meet the demand of a significant number of parents.*<sup>823</sup>

In 2016, an independent review of the planning, growth and development of integrated education was conducted. One of the objectives of this review was to:

*develop short and medium term proposals to develop a more integrated education system based on current legislation, enhance the network of viable schools and are cost effective and value for money.*<sup>824</sup>

The Review was published on 2 March 2017. The Review Team made 39 recommendations including:

821 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 72(e).

822 CRC/C/GBR/CO/4, 'UN Committee on the Rights of the Child, Concluding Observations on the Third and Fourth Period Reports of the UK of Great Britain and NI', 17 October 2008, at para 66.

823 CRC/C/15/Add.188, 'UN Committee on the Rights of the Child, Thirty-first session Consideration of Reports submitted by State Parties under Article 44 of the Convention, Concluding Observations: UK of Great Britain and NI', 9 October 2002, at para 48.

824 Department of Education, 'Terms of Reference: Review of the Planning, Growth and Development of Integrated Education' (DoE, 2016).

*that the Education Authority should pro-actively plan, set objectives for, and monitor progress towards, increasing the places available in the integrated sector; [and]*

*...that Department of Education brings forward legislation to place a duty on Department of Education and the Education Authority and a power on all other arm's length bodies to encourage, facilitate and promote integrated education.<sup>825</sup>*

In the absence of a NI Assembly, legislation to promote integrated education has not been brought forward. However, the Commission understands that Departmental officials are attempting to progress recommendations of an operational nature, including the development of guidance on the process of transformation to an integrated school.

### **Recommendation**

The Commission is concerned that no new integrated schools have been established in NI since 2008. It advises the NI Executive to continue to take appropriate measures to facilitate the establishment of additional integrated schools in NI to meet the demand of a significant number of parents. The Commission welcomes the report of the Independent Review Panel relating to the current arrangements for the planning and development of integrated education and recommends that the Department of Education set out its plans to implement the Panel's recommendations.



### **Shared education**

In 2016, the UN CRC Committee recommended that the UK Government and NI Executive:

*carefully monitor the provision of shared education, with the participation of children, in order to ensure that it facilitates social integration.<sup>826</sup>*

In addition, the UN ICESCR Committee recommended:

*that the State party take all necessary measures to reduce the attainment gaps, particularly among children belonging to low-income families, including by reconsidering the austerity programmes adopted and effectively implementing measures aimed at reducing de facto discrimination and segregation of students based on their religion, national or social origin, as well as their economic background.<sup>827</sup>*

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825 Department of Education, 'Review of Integrated Education: Integrating Education in NI: Celebrating Inclusiveness and Fostering Innovation in our Schools' (DoE, 2016), at Recommendation 2.

826 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 73.

827 E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI' 14 July 2016, at, at para 64.

The Shared Education Act (NI) 2016 received royal assent on 9 May 2016.

This Act places an obligation on the Department of Education to promote: ‘shared education’, which is defined in the Act as:

*the education together of—(a) those of different religious belief, including reasonable numbers of both Protestant and Roman Catholic children or young persons; and (b) those who are experiencing socio-economic deprivation and those who are not, which is secured by the working together and co-operation of two or more relevant providers.*<sup>828</sup>

The Fresh Start Agreement includes provision of up to £500 million over ten years (2016-2026) of new capital funding to support shared and integrated education. In its May 2018 report on implementation of the 2016 Act, the Department of Education reported:

*funding is provided through the Fresh Start Agreement (£50m per year to March 2026 for shared and integrated schools). There have been three calls for applications to date, the first two of which identified five projects to progress to planning – Limavady, Ballycastle, Moy, Brookeborough and Duneane/Moneynick. The third call for applications ran from September 2016 to January 2017, with decisions on projects approved to proceed in planning (subject to confirmation of access to Fresh Start Agreement capital funds) made by the Permanent Secretary in July 2017. Confirmation of funding discussions are currently ongoing with the NI Office and the Department of Finance. In the reporting period, approximately £305k has been spent on the Shared Education Campuses Programme. This is expected to increase in the coming years as projects progress through to design and construction.*<sup>829</sup>

The Department of Finance has confirmed that unspent funds amounting to:

*£91m from 2016-17 and 2017-18 can be used for proposals that meet the objectives of increasing the provision of shared education and housing, including schools or campuses where children from different communities are educated together.*<sup>830</sup>

The Strule shared education campus, which is being built on the former Lisanelly army base in Omagh in County Tyrone, has been subject to significant delays. In 2013, work began on developing six schools on the site, with a view to all six opening in 2020. In 2018, only one of the six schools was open. In June 2018, it was announced that the completion of the campus would be delayed until at least 2022.<sup>831</sup> In September 2018, concerns were raised that the delay was causing extra work and uncertainty for the staff of all schools involved.<sup>832</sup>

828 Section 2, Shared Education Act (NI) 2016.

829 Department of Education, ‘Advancing Shared Education’ (DoE, 2018).

830 ‘£91m education cash to be made available in NI’, *BBC News*, 20 April 2018.

831 Robbie Meredith, ‘Strule campus: School project delayed until at least 2022’, *BBC News*, 18 June 2018.

832 ‘Strule Campus Uncertainty, “causing extra work”’, *Ulster Herald*, 20 September 2018.

In October 2018, the Education and Training Inspectorate published a report into shared education recording that almost 60,000 pupils and about 580 schools participate in shared education projects across NI.<sup>833</sup> The Education and Training Inspectorate found that:

*through learning with others, the pupils developed positive attitudes, including empathy, respect and inclusion.*<sup>834</sup>

However, the Inspectorate acknowledged the obstacles to measuring attitudinal change amongst pupils.

### **Recommendation**

The Commission welcomes the Shared Education Act (NI) 2016 and the reporting obligations on the Department. The Commission recommends the Department of Education carefully monitors the provision and promotion of shared education in order to ensure that it facilitates social integration.



### **Special educational needs**

The NI Executive is required by the CRPD, Article 24, to ensure that children with intellectual impairments have access to an inclusive education system.<sup>835</sup>

In 2016, the UN CRC Committee noted:

*many children with disabilities are still placed in special schools or special units in mainstream schools and many school buildings and facilities are not made fully accessible to children with disabilities.*<sup>836</sup>

Furthermore:

*with reference to its general comment No. 9 (2006) on the rights of children with disabilities, the UN CRC Committee recommends that the State party adopt a human rights-based approach to disability, set up a comprehensive strategy for the inclusion of children with disabilities... [and] set up comprehensive measures to further develop inclusive education, ensure that inclusive education is given priority over the placement of children in specialised institutions and classes and make mainstream schools fully accessible to children with disabilities.*<sup>837</sup>

The Special Educational Needs and Disability (NI) Act 2016 received royal assent in March 2016. In 2017, the Department of Education consulted on Regulations required to implement the new legislation. The Commission has engaged with the relevant officials highlighting the recommendations of the UN CRC Committee relating to special educational needs, and continues to advise on the need to ensure no retrogression in the

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833 '60,000 pupils in shared education in NI', *BBC News*, 12 October 2018.

834 *Ibid.*

835 CRC/C/GC/9/Corr.1, 'UN Committee on the Rights of the Child, General Comment No 9 (2006) The Rights of Children with Disabilities', 13 November 2007, at para 66.

836 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 56(b).

837 *Ibid.*, at para 56.

enjoyment of the right to education for children with disabilities.<sup>838</sup> The Commission has also highlighted that provision for the piloting of appeal rights for children under 16 should be introduced as soon as possible, in line with the UN CRC Committee's previous concluding observation.<sup>839</sup> In June 2018, the Commission met with officials to discuss progress on the implementation of the Act where it was noted that development of the Code of Conduct and Regulations had been delayed due to the suspension of the NI Assembly.

In 2018, the Commission provided advice to the Education Authority on the draft framework of educational provision for children in the early years with special educational needs.<sup>840</sup> In its advice, the Commission welcomed the draft framework as a means to remove barriers and progressively realise the right to education for children with special educational needs. The Commission recommended that the framework would be strengthened by further reference to relevant human rights standards and by clarifying that the necessary resources to ensure implementation of the framework will be available and effective, respecting the principles of progressive realisation, using maximum available resources, non-retrogression and non-discrimination.<sup>841</sup> The Commission welcomed that the 'inclusive' principle would be one of the principles underpinning the framework and advised that the framework elaborate on what is meant by inclusive education and provide a sense of how it will be achieved in practice.

In June 2017, the NI Audit Office published a report that concluded:

*neither the Department [of Education] nor the Education Authority can currently demonstrate value for money in terms of economy, efficiency or effectiveness in the provision of support to children with special educational needs in mainstream schools.*<sup>842</sup>

This report provided a number of recommendations aimed at effective provision and monitoring of resources for children with special educational needs.

### Recommendation

The Commission welcomes the Special Educational Needs and Disability (NI) Act 2016. The Commission recommends that the Department of Education ensures Regulations to implement the provision for the piloting of appeal rights for children under 16 should be introduced as soon as possible, in line with the UN CRC Committee's previous concluding observation.

838 NI Human Rights Commission, 'Response to the Consultation on the SEND Bill (2015)' (NIHRC, 2015), at para 27.

839 CRC/C/GBR/CO/4, 'UN Committee on the Rights of the Child, Concluding Observations on the Third and Fourth Period Reports of the UK of Great Britain and NI', 17 October 2008, at paras 66-67.

840 NI Human Rights Commission, 'Response to Public Consultation on a Future Framework of Educational Provision for Children in the Early Years with Special Educational Needs in NI' (NIHRC, 2018).

841 Ibid, at para 11.0.

842 NI Audit Office, 'Special Educational Needs' (NIAO, 2017), at 3.

## Right to participate in the cultural life of the community

<b>CEDAW</b>	Article 13(c)
<b>CRC</b>	Article 31
<b>CRPD</b>	Article 30
<b>ICESCR</b>	Article 15
<b>ICCPR</b>	Article 27
<b>European Charter for Regional or Minority Languages</b>	Articles 1-14
<b>Charter of Fundamental Rights of the EU</b>	Article 13 Article 22
<b>Framework Convention for the Protection of National Minorities</b>	Article 5

### The Irish language and Ulster Scots

The Commission has consistently highlighted the need to ensure adequate legal protection for the Irish language and for Ulster Scots.

In February 2017, the Advisory Committee for the Framework Convention for the Protection of National Minorities published their fourth advisory opinion. The Advisory Committee noted that there had been little progress on an Irish language bill or the strategy for the development of the language. It commented that it regards:

*appropriate legislation by the NI Assembly as a necessity to protect and promote the Irish language.*<sup>843</sup>

As a recommendation for immediate action, the Advisory Committee called for the NI Executive and NI Assembly to:

*adopt appropriate legislation protecting and promoting the Irish language and take measures to ensure progress on language rights of persons belonging to the Irish minority.*<sup>844</sup>

The Advisory Committee also advised the UK Government to:

*engage in a dialogue to create the political consensus needed for adopting legislation.*<sup>845</sup>

An Irish language organisation, Conradh na Gaeilge, initiated judicial review proceedings against the NI Executive over its failure to adopt or implement an Irish language plan. In February 2017, the NI High Court made a declaration that:

*the Executive Committee has failed in its statutory duty, under section 28D(1) of the NI Act 1998, to adopt a strategy setting out*

843 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 150.

844 Ibid, at 2.

845 Ibid, at 49.

*how it proposes to enhance and protect the development of the Irish language.*<sup>846</sup>

In December 2016, it was reported that the Department for Communities had withdrawn funding for an Irish language bursary scheme.<sup>847</sup> However in January 2017, the Minister for Communities announced that he had identified the necessary funding to advance the scheme.<sup>848</sup> The Equality Commission NI conducted an investigation into whether the Department complied with its Equality Scheme commitments relating to screening and equality impact assessment in respect of funding decisions regarding the Líofoa Gaeltacht Bursary Scheme, reporting in May 2018. The Equality Commission concluded that the Department for Communities had failed to comply with its approved Equality Scheme.<sup>849</sup> It made a number of recommendations and requested that the Department report on implementation of the recommendations within 6 months.<sup>850</sup>

The issue of an Irish language Act remains a focus of ongoing negotiations to re-establish the NI Assembly and Executive. In March 2017, Irish-language organisation Conradh na Gaeilge published a discussion document on the cost of an Irish language Act. It predicted a one-off cost of £9 million with an annual cost of £2 million.<sup>851</sup> The total cost over the initial 5 years is predicted to be £19 million.<sup>852</sup>

NI has been without an Executive since January 2017. One of the key points of disagreement is how to protect the Irish language. Talks to resolve the disagreements between the political parties have been ongoing, but as yet there is no agreement to restore the NI Executive. Extracts from a draft agreement put forward to the parties in February 2018 indicated that the parties at that time were discussing the enactment of three pieces of legislation relating to respect for language and diversity, one of which would have related to the Irish language and another would have related to Ulster Scots. However, full details of this draft agreement are not publicly available.<sup>853</sup> The leader of the Democratic Unionist Party, Arlene Foster, has made it clear that her party will not support a standalone Irish language Act in any new set of negotiations aimed at restoring the NI institutions.<sup>854</sup>

The Commission notes the inconsistent provision for bilingual street signs across NI. In February 2018, Antrim and Newtownabbey Borough Council took a decision to ban the provision of bilingual signage, adopting an 'English only' policy,<sup>855</sup> before installing plant pots in Ulster Scots.<sup>856</sup> This was challenged by a local resident on the basis that the policy was

846 *In the matter of an application by Conradh Na Gaeilge* [2017] NIQB 27.

847 'Irish gaeltacht scheme for young 'cut by £50,000', *BBC News*, 23 December 2016.

848 'Irish language bursary funding "found" says Paul Givan', *BBC News*, 12 January 2012.

849 Equality Commission NI, 'Investigation Report under Schedule 9 of the NI Act 1998: Department for Communities: The Application of Equality Scheme Commitments for Funding Decisions on the Líofoa Gaeltacht Bursary Scheme for 2017 and the Community Halls Pilot Programme' (ECNI, 2018), at paras 9.4-9.10.

850 *Ibid.*, at para 10.7.

851 Conradh na Gaeilge, 'Irish Language Act: Discussion Document' (Conradh na Gaeilge, 2017), at 9.

852 *Ibid.*, at 29.

853 'Disputed Stormont "deal" pages leaked', *BBC News*, 21 February 2018.

854 Gerry Moriarty, 'Arlene Foster "will not accept" standalone Irish language Act', *The Irish Times*, 1 August 2018.

855 Newtownabbey and Antrim Council, 'Council Meeting Minutes', 26 February 2018.

856 Lisa Smyth, '"English only" council installs Ulster Scots planters', *Belfast Telegraph*, 19 April 2018.

in breach of the Local Government Act 1995 and the UK's obligations under the European Charter for Regional and Minority Language. The proceedings were brought to an end in September 2018 as the Council withdrew the policy. An Irish language group, Ionad Teaghlaigh Ghlrann Darach, has recently indicated that it will lodge a complaint with the Equality Commission NI regarding refusal of requests for Irish street signs by Antrim and Newtownabbey Borough Council.<sup>857</sup>

On 23 January 2018, the UK State's fifth periodic report under the European Charter for Regional or Minority Languages was published by the Council of Europe.<sup>858</sup> As with previous reports, there was no input from NI and no reasons were advanced in the paper as to the absence. On 14 May 2018, a delegation from the Committee of Experts for the Charter met the Commission and other groups in Belfast as part of an 'on the spot' visit to the UK. Their report is to be published at the end of 2018.

### **Recommendation**

The Commission recommends that the NI Executive commit to the implementation of the Irish language strategy and to support the introduction of legislation in order to protect and promote the Irish language in NI. The Commission recommends that the NI Executive further commit to the establishment of the Ulster Scots academy and ensuring that necessary support is in place to guarantee the full implementation of the Ulster Scots strategy in NI.

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857 Ibid.

858 HM Government, 'Fifth Periodical Report Presented to the Secretary General of the Council of Europe in Accordance with Article 15 of the Charter' (HoC, 2018).



## Constitutional protections

### A Bill of Rights for NI

As required by the Belfast (Good Friday) Agreement and the NI Act 1998, the Commission provided advice to the UK Government on a Bill of Rights for NI in 2008. On receipt of its advice, the NI Office sought views from the public by way of a public consultation.<sup>859</sup>

In December 2010, the then Minister of State within the NI Office reported that there was:

*considerable support from human rights and community groups for a wide-ranging Bill of Rights along the lines of that recommended by the NI Human Rights Commission.*<sup>860</sup>

Since 2010, it has been consistently stated by Government ministers that there has been a lack of political consensus around a Bill of Rights for NI.<sup>861</sup> The Commission has repeatedly reported on the absence of any significant development to progress a Bill of Rights for NI.

In 2016, the Commission updated the UN CRC Committee on the lack of progress in relation to a Bill of Rights for NI. The Committee subsequently recommended that the UK Government and NI Executive:

*expedite the enactment of a Bill of Rights for NI, agreed under the Good Friday Agreement.*<sup>862</sup>

The Commission also updated the UN ICESCR Committee who noted that a Bill of Rights for NI has not yet been adopted, as provided by the Belfast (Good Friday) Agreement. The Committee's concluding observations stated:

*the Committee recalls its previous recommendation (see E/C.12/GBR/CO/5, para. 10) and urges the State party to take all necessary measures to expedite the adoption of a bill of rights for NI.*<sup>863</sup>

The development of a Bill of Rights for NI has been considered as part of ongoing discussions to restore the NI Assembly and in discussions concerning Brexit.<sup>864</sup> These discussions have been informed by a draft model Bill of Rights for NI based on the Commission's advice.<sup>865</sup> Speaking at an event on the implications of leaving the EU on constitutional protections in NI, the Commission's Chief Commissioner, Les Allamby, stated that the lack of a Bill of Rights for NI was:

859 NI Office, 'Consultation Paper: A Bill of Rights for NI: Next Steps' (NIO, 2009).

860 Minister of State Hugo Swire MP, 'Written Ministerial Statement to Parliament', 16 December 2010.

861 'Column 190WH Bill of Rights (NI)', Westminster Hall, 16 July 2003.

862 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 9.

863 E/C.12/GBR/CO/6, 'UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 14 July 2016, at para 10.

864 Laura Hughes and Kate McCann, 'Powersharing talks in NI could continue into next week', *The Telegraph*, 3 July 2017.

865 Colin Harvey and Anne Smyth, 'Good Friday Agreement at 20: The Return of the Bill of Rights?' (QPOL, 2018).

*the missing piece in the jigsaw of the implementation of the agreement.*<sup>866</sup>

In January 2018, at a meeting of the North-South Joint Committee with the Tánaiste, the Commission raised concerns that:

*the potential loss of the Fundamental Charter of EU Rights alongside the continuing absence of a Bill of Rights for NI means human rights protections could be heading in the wrong direction.*<sup>867</sup>

A discussion paper commissioned by the Commission and the Irish Human Rights and Equality Commission identified that the EU-UK Report on Phase 1 of Negotiations specifically states that there is to be no diminution of rights in NI. The discussion paper found that a Bill of Rights for NI:

*would ensure that para 53 is fully implemented... [and recommended that] the UK and Irish Governments should revisit the NI Human Rights Commission's draft proposals on a Bill of Rights for NI as way of preventing a diminution of rights in the Brexit process.*<sup>868</sup>

The commitment in the EU-UK report on Phase 1, to no diminution, was diluted in scope in the Draft Withdrawal Agreement issued in March 2018. The non-diminution commitment currently refers to the rights, safeguards and equality of opportunity section of the Belfast (Good Friday) Agreement 1998.

The Commission has also raised the importance of retaining the Fundamental Charter of EU Rights as a 'Convention plus' approach at least until a Bill of Rights for NI is in place.

### Recommendation

The Commission recommends that the NI Office meet its commitment to implement a Bill of Rights for NI and work towards developing a consensus among the political parties on a Bill of Rights for NI and in the interim retain the EU Charter of Fundamental Rights.



### A Charter of Rights for the island of Ireland

The Commission and the then Irish Human Rights Commission were mandated by the Belfast (Good Friday) Agreement 1998 to consider through a Joint Committee:

*the possibility of establishing a charter, open to signature by all democratic political parties, reflecting and endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland.*<sup>869</sup>

A Charter should recognise the commonality of rights protected in both jurisdictions and that an equivalence of human rights protections, if

866 Colm Kelpie, 'UK could breach Good Friday Agreement with U-turn over human rights, says Flanagan', *Irish Independent*, 14 February 2017.

867 NI Human Rights Commission, 'Press Release: North-South Joint Committee to Focus on Human Rights and Equality Impacts of Brexit with Tánaiste', 22 January 2018.

868 Colin Murray *et al.*, 'Discussion Paper on Brexit' (IHREC and NIHRC, 2018), at vii and xii.

869 Joint Committee of the NI Human Rights Commission and the Irish Human Rights Commission, 'The Advice of the Joint Committee on a Charter of Rights for the Island of Ireland' (NIHRC, 2011).

achieved, could assist in underpinning peace in both jurisdictions. This task was completed in June 2011 when the Commissions together presented advice to the Governments of the UK and Ireland, the Speaker of the NI Assembly and the Ceann Comhairle of Dáil Éireann.<sup>870</sup> The Speaker and Ceann Comhairle both agreed to forward the advice to political parties in their respective legislative bodies for further consideration. Since then no further communication has been received on this matter.

In June 2015, both Commissions made a presentation to the Joint Oireachtas Committee on the Implementation of the Good Friday/Belfast Agreement.<sup>871</sup> In its presentation to the Committee, the Commissions referred to the establishment of the North-South Parliamentary Forum and the potential for the Charter to form part of its work plan as part of an active consideration on the establishment of a Charter of Rights for the island of Ireland. The work of the Forum since 2017 has been hampered due to the failure to re-establish the NI Assembly.

The issue of a Charter of Rights for the Island of Ireland has arisen in the context of discussions regarding the implications of Brexit for the island of Ireland.<sup>872</sup> A Seanad Special Select Committee on Withdrawal of the UK from the European Union published the report *Brexit: Implications and Potential Solutions*. Within the report, the Committee stated:

*an all-island approach to human rights should be explored, with possible solutions including a reimagined role for the Joint Committee on Human Rights and a Charter of Rights for the island of Ireland. Additionally, the Bill of Rights project in NI should also be revisited.*<sup>873</sup>

### Recommendation

The Commission, in accordance with advice provided by the Joint Committee, recommends that political parties in both NI and Ireland adopt a Charter of Rights for the island of Ireland. The Commission calls on the UK and Irish governments to endorse a proposed Charter of Rights for the island of Ireland as co-guarantors of the peace process.

### A UK Bill of Rights

In 2017, the Commission raised the issue of reform of the Human Rights Act 1998 during the Universal Periodic Review process. In its report to the UN Human Rights Council as part of process the UK Government stated that it:

*remains committed to reforming the domestic human rights framework. We will consider further the Bill of Rights once we know the arrangements for the EU exit and consult fully on our proposals*

870 Ibid.

871 NI Human Rights Commission and the Irish Human Rights Commission, 'Joint Statement', 25 June 2015.

872 Professor Colin Harvey, 'Brexit, NI and Human Rights', 5 May 2017.

873 Seanad Special Select Committee, 'Withdrawal of the UK from the European Union, Brexit: Implications and Potential Solutions' (Houses of the Oireachtas, 2017), at 34.

*in the full knowledge of the new constitutional landscape that will create.*<sup>874</sup>

In July 2017, the Report of the UN Working Group on the Universal Periodic Review was published and included a number of recommendations for the UK concerning the Human Rights Act and a possible UK Bill of Rights. These focused on ensuring that there was no regression in rights protections and that there was effective participation of all stakeholders (including minorities and the most vulnerable) in drafting and adopting new rights legislation.<sup>875</sup> It also recommended that the UK Government:

*in view of the process of leaving the European Union, ensure that any new legislation aims at strengthening human rights in the entire jurisdiction of the country.*<sup>876</sup>

Specific to NI, the UN Working Group recommended that the UK Government:

*provide reassurance that any proposed British Bill of Rights would complement rather than replace the incorporation of the ECHR in NI law and acknowledging this is a primary matter for the NI Executive and Assembly - that a Bill of Rights for NI to reflect the particular circumstances of NI should be pursued to provide continuity, clarity and consensus on the legal framework for human rights there.*<sup>877</sup>

The UK Government noted these recommendations.<sup>878</sup> This means that it has taken some steps, but has no plans to fully implement them. In July 2017, during its oral submissions to the UN Working Group, the UK Government stated that it had no plans to withdraw from the European Convention on Human Rights. In a letter dated October 2017, the UN Working Group on the Universal Periodic Review encouraged the UK Government to implement its recommendations concerning the Human Rights Act, a UK Bill of Rights and any rights-based legislative change.<sup>879</sup> In July 2018, the UK Government provided an update on implementation of the UN Working Group's recommendations. In its update, the UK Government stated its:

*position on the domestic human rights framework has not substantively changed since August 2017. The UK has a longstanding tradition of ensuring our rights and liberties are protected domestically and of fulfilling our international human rights obligations. Our commitment to human rights pre-dates the UK membership of the European Union, and the decision to leave does not change this commitment. There are no plans to withdraw from*

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874 Ministry of Justice, 'Universal Periodic Review, UK, British Overseas Territories and Crown Dependencies, National Report' (MoJ, 2017), at 6.

875 A/HRC/36/9, 'UN Working Group on the Universal Periodic Review, 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.

876 Ibid, at para 134.76.

877 A/HRC/36/9, 'UN Working Group on the Universal Periodic Review, Report of the Working Group on the Universal Periodic Review - UK of Great Britain and NI', 14 July 2017, at para 134.67.

878 A/HRC/36/9/Add.1, 'Human Rights Council Report of the Working Group on the Universal Periodic Review: Views on conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review', 7 September 2017.

879 Letter from UN Working Group on the Universal Periodic Review to UK Government, 23 October 2017.

*the ECHR. The UK Government will consider further the human rights legal framework when the process of leaving the EU concludes.*<sup>880</sup>

Speaking following a visit to the UK, Nils Muižnieks, the former Council of Europe Commissioner for Human Rights stated:

*the repeatedly delayed launch of the consultation process for repeal of the Human Rights Act has created much speculation and an atmosphere of anxiety and concern in civil society and in some parts of the devolved administrations. There is a real fear of regression in terms of rights' protection in the UK.*<sup>881</sup>

On 24 January 2017, David Nuttall MP asked a Parliamentary Question namely:

*our manifesto commitment to replace the Human Rights Act remains on the Government's agenda, but does my right hon. and learned friend agree that leaving the EU and freeing the UK from the bonds of the charter of fundamental rights must be their top priority?*<sup>882</sup>

The then Minister of State for the Ministry of Justice replied:

*I do agree with that. I think it important for us to sort out the EU side of matters, and the exit from the EU, before we return to that subject.*<sup>883</sup>

In July 2017, the NI Human Rights Consortium reported that 84 per cent of the population believe the Human Rights Act is good for NI.<sup>884</sup>

## Recommendation

The Commission opposes any reduction in the current legal protections of human rights in the UK. Establishing a Bill of Rights, or other similar statute, for the UK, or any of its constituent parts, which seeks to repeal the Human Rights Act 1998, in part or whole, risks being regressive. The Commission recognises the commitment to delay any review of the Human Rights Act until after the EU exit. Nonetheless, the Commission continues to recommend that the UK Government recognise the Human Rights Act 1998 as a constitutional statute and ensure any reform builds on the Act as part of further progress in the promotion and protection of human rights.



## Business and human rights

### National action plan

In 2013, the UK was the first State to produce a business and human rights National Action Plan, entitled Good Business: Implementing the UN Guiding Principles on Business and Human Rights,<sup>885</sup> which has been

880 UN Universal Periodic Review, 'UK of Great Britain and NI: Update', 26 July 2018.

881 Council of Europe, 'Press Release: UK - Forthcoming reforms to human rights law must not weaken protection', 22 January 2016.

882 Hansard, 'Human Rights Act 1998, Oral Answers to Questions — Justice - in the House of Commons', 24 January 2017.

883 Ibid.

884 NI Human Rights Consortium, 'Attitudes to Human Rights in NI: Polling Data' (NI Human Rights Consortium, 2017), at 11.

885 HM Government, 'Good Business, Implementing the UN Guiding Principles on Business and Human Rights' (HM Government, 2013).

welcomed by the UN.<sup>886</sup> In 2016, the UK was the first State to produce an update on its inaugural national action plan in the Good Business, Implementing the UN Guiding Principles on Business and Human Rights, Updated May 2016.<sup>887</sup>

Although the UK Update notes ‘government commitments’, it does not provide concrete steps with time-frames or budgets attached to specific government departments or public authorities to take forward a business and human rights agenda. The UK update focuses largely on pillar one of the UN Guiding Principles, the State duty to protect human rights, and is not designed as a practical guide for business. The case studies provided in the UK update are largely focused on UK Government’s interactions and projects. The consultation process in developing the UK update did not extend to NI.

In June 2017, the Commission made an oral intervention at the UN Human Rights Council on the Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, highlighting concerns regarding the process of updating the national action plan.<sup>888</sup> The Commission’s Chief Commissioner, Les Allamby, stated:

*small and medium sized companies’ limited capacity to engage reinforces the importance of supporting their participation. We highlight that the process of updating the UK’s National Action Plan provided limited opportunities for stakeholder consultation, and no consultation in the devolved jurisdictions. This had a direct impact on small and medium sized companies’ involvement.*<sup>889</sup>

### **NI Business and Human Rights Forum**

The NI Business and Human Rights Forum was established in 2015. It has a multi-stakeholder membership which allows government, business, and civil society to engage on business and human rights. The aim of the Forum is to help answer the question of how human rights are relevant to business, and to allow the sharing of information and good practice amongst businesses.

The Forum has developed and adopted a human rights policy statement, which those attending can also adopt themselves. The Forum has further developed a Guide to Business and Human Rights. The current Chair of the Forum is Glenn Bradley, Ethical Trade Manager of Hardscape, while the Vice-Chair is Kerry Kelly, Head of Compliance for Staffline Ireland.

The Forum has agreed to begin work on drafting a NI action plan on business and human rights. In its 2018/19 Business Plan, the Commission committed to supporting the Forum to develop a draft NI action plan. This work is ongoing.

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886 CRC/C/GBR/CO/5, ‘UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016, at para 11.

887 HM Government, ‘Good Business, Implementing the UN Guiding Principles on Business and Human Rights: Updated’ (HM Government, 2016).

888 A/HRC/35/32, ‘Human Rights Council Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’, 24 April 2017.

889 ‘Oral Statement Submitted by the NI Human Rights Commission (A Status NHRI) to the 35th Session of UN Human Rights Council Agenda’, June 2017

In June 2018, the Commission spoke at a review of Business and Human Rights National Plans event organised by the Scottish government, Danish Institute of Human Rights, and St Andrews University.

### Public Procurement

The UN Guiding Principles on Business and Human Rights provide that:

*States should promote respect for human rights by business enterprises with which they conduct commercial transactions.*<sup>890</sup>

The UN Guiding Principles further provide that:

*States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States – individually and collectively – with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States’ relevant obligations under national and international law.*<sup>891</sup>

In 2013, the Commission produced a report, entitled Public Procurement and Human Rights in NI,<sup>892</sup> to advise on the applicable human rights standards in the context of awarding Government contracts. In 2017, the Central Procurement Directorate (within the Department of Finance) began to undertake a project to embed human rights within the public procurement process and has piloted a human rights-based approach to procurement.

In January and February 2018, the Commission conducted training for staff at the Central Procurement Directorate. In its 2018/19 Business plan, the Commission has committed to continue to work in partnership with the Department of Finance to develop guidance for government departments on procurement and human rights compliance, and provide further advice on its implementation.

### Recommendation

The Commission recommends that measures giving effect to the UN Guiding Principles on Business and Human Rights should provide for the effective participation of all relevant stakeholders in NI. The Commission further recommends that the NI Executive consider adopting a National Action Plan on Business and Human Rights specific to NI.



### National human rights institution

#### Monitoring

Recent amendments to the NI Act 1998 provide that the functions of the Secretary of State NI relating to the Commission may be transferred to

<sup>890</sup> UN Office of the High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights, Implementing the UN "Protect, Respect and Remedy Framework' (UNOHCHR, 2011), at para 6.

<sup>891</sup> Ibid, at para 6.

<sup>892</sup> NI Human Rights Commission, 'Public Procurement and Human Rights in NI (NIHRC, 2013).

the competency of the NI Assembly through the laying of an Order in Council before Parliament.<sup>893</sup> No such Order has been laid to date.

Prior to the laying of such an Order the Secretary of State NI must provide a report to the Houses of Parliament relating to the potential implications of a transfer, on the effectiveness and independence of the Commission.<sup>894</sup> The Commission remains of the view that any transfer of the responsibilities of the Secretary of State NI should be to the NI Assembly, in line with the Belgrade Principles.

### **Budget**

In 2009/10, the Commission's cash budget was £1,702,000. The Commission's grant-in-aid budget for 2018/19 is £1,099,000 and this is to decrease by £25,000 in 2019/20, when the budget is planned to be £1,074,000. The Commission raised concerns regarding its funding with the UN Human Rights Committee.<sup>895</sup> The UN Human Rights Committee recommended that:

*the State party should provide the NI Human Rights Commission with adequate funding to enable it to discharge its mandate effectively and independently, in full compliance with the Paris Principles (General Assembly resolution 48/134, annex).<sup>896</sup>*

As required by the UN, the Commission, as a national human rights institution, is subject to a five-year review by the Global Alliance of National Institutions for the Promotion and Protection of Human Rights. In May 2016, the Commission was successfully re-awarded A-status.<sup>897</sup> It was noted that the Commission had experienced a significant cut in its budget since 2009 and that this will continue until 2019. The Commission was encouraged to advocate for an appropriate level of funding to effectively carry out its mandate and to advocate for amendments to its enabling law to allow it to receive donor funding without prior government approval.

In July 2018, the House of Commons and House of Lords Joint Committee on Human Rights published its 2017/18 report on enforcing human rights in the UK. In the report, the Joint Committee considered the funding cuts affecting the three UK national human rights institutions, including the Commission, and recommended that:

*the Commissions have the potential to play a more significant role in the enforcement of human rights. If they are given the necessary powers and use them assertively, then there is a case for their budgets to be increased to at least partially reverse the impact of the funding reduction they have experienced. This additional cost would be off-set to some extent by a reduction in legal costs as fewer individual cases would reach the Courts. At the same time, if they are to play a more significant role then greater scrutiny of their*

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893 NI (Miscellaneous Provisions) Act 2014.

894 NI Human Rights Commission, 'The 2013 Annual Statement: Human Rights in NI', (NIHRC, 2013), at 50.

895 NI Human Rights Commission, 'Submissions to the UN Human Rights Committee on the UK's Seventh Periodic Report on compliance with the ICCPR' (NIHRC, 2015), at para 2.6.

896 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 7.

897 Global Alliance of National Human Rights Institutions, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation, 9-13 May 2016' (GANHRI, 2016), at 46-47.



*work by their respective Parliament or Administrations would be appropriate.*<sup>898</sup>

The Joint Committee found the Commission to be:

*the most well-established of the UK's national human rights institutions, and historically it has exercised the most comprehensive human rights powers of the three UK Commissions.*<sup>899</sup>

## **Powers**

In February 2017, the Attorney General NI referred two devolution issues to the UK Supreme Court in respect of the Commission's legal powers. The Attorney General's reference, under the NI Act 1998, Schedule 10, paragraph 33, questioned whether the Commission can institute human rights proceedings where there is no unlawful act and whether the Commission is empowered to seek a Declaration of Incompatibility under the Human Rights Act 1998, section 4. The Department of Justice was also a party to these proceedings and invited the Court to answer these questions in the negative. In October 2017, these issues were heard by the UK Supreme Court, alongside the Commission's ongoing challenge to termination of pregnancy legislation in NI.

On 7 June 2018, the UK Supreme Court handed down its judgment. The UK Supreme Court concluded by a majority of four to three that the Commission did not have the requisite standing to bring the case where the issue concerned primary legislation.<sup>900</sup> Consequently, the relief sought could not be provided, notwithstanding the comments made by the Court, in respect of the law in NI being incompatible with Article 8 ECHR.<sup>901</sup> The Commission is now seeking an amendment to its statutory powers to restore its ability to take cases in its own name without a victim, in cases of primary legislation.

## **Joint Committee of the NI Human Rights Commission and the Irish Human Rights and Equality Commission**

The Belfast (Good Friday) Agreement 1998's section on rights, safeguards and equality of opportunities, provides for a Joint Committee of representatives of the Irish Human Rights and Equality Commission and the NI Human Rights Commission, as a North-South forum for consideration of human rights issues on the island of Ireland.

In 2018, the NI Office approved funding for the Commission to undertake work as part of the Joint Committee. The Government of Ireland has also committed funding to the Irish Equality and Human Rights Commission for this work.

<sup>898</sup> House of Commons and House of Lords Joint Committee on Human Rights, 'Enforcing Human Rights: Tenth Report of Session 2017-19' (JCHR, 2018), at para 132.

<sup>899</sup> *Ibid.*, at para 128.

<sup>900</sup> *In the matter of an application by the NI Human Rights Commission for Judicial Review (NI) Reference by the Court of Appeal in NI pursuant to Paragraph 33 of Schedule 10 to the NI Act 1998 (Abortion)* [2018] UKSC 27, at para 73.

<sup>901</sup> *Ibid.*, at para 135.

## Recommendation

The Commission calls on the UK Parliament to urgently restore the powers to take cases in its own name without a victim, covering both primary and secondary legislation. The Commission supports the recommendation of the Global Alliance of National Human Rights Institutions that the Commission continues to advocate for the NI Office to provide an appropriate level of funding for the institution so that it can continue to carry out its mandate effectively, in accordance with the UN Paris Principles.

## UK membership of the European Union

A referendum on whether the UK should leave or remain in the EU took place on Thursday 23 June 2016. The overall vote was to leave, although the majority of people in NI voted to remain.

In October 2016, the Commission made a submission to an inquiry by the Joint Committee of Human Rights on the human rights implications of the UK's withdrawal from the EU. In its submission, the Commission highlighted the potential implications of withdrawal from the EU on freedom of movement for persons living close to the border with Ireland.<sup>902</sup>

The EU (Notification of Withdrawal) Act 2017 received royal assent on 16 March 2017. On 29 March 2017, the UK formally invoked Article 50(2) initiating the two year countdown before EU Treaties shall cease to apply to the UK.<sup>903</sup> The UK is due to withdraw from the EU on 29 March 2019, though, subject to overall agreement on the terms of withdrawal, there will be a transitional period, which is due to last until 31 December 2020.<sup>904</sup>

In August 2017, the UNCRPD Committee issued concluding observations relating to the UK and raised concern at:

*the lack of information on policies, programmes and measures that will be put in place by the State party to protect persons with disabilities from being negatively affected, on triggering article 50 of the Treaty on EU.*<sup>905</sup>

The Committee recommended that the UK Government:

*prevent any negative consequences for persons with disabilities by the decision of the triggering article 50 of the Treaty on EU, in close consultation with organizations of persons with disabilities.*<sup>906</sup>

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902 'Parliament 'should scrutinise' NI EU exit', *BBC News*, 6 October 2016.

903 Prime Minister's Letter to European Council President Donald Tusk - Invoking Article 50, 29 March 2017.

904 EU Commission and UK Government, 'Draft Agreement on the Withdrawal of the UK of Great Britain and NI from the European Union and the European Atomic Energy Community, EU Commission and UK Government', 19 March 2018, at Articles 121-126.

905 CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI', 29 August 2017, at para 6(e).

906 *Ibid*, at para 6(e).

## EU-UK report on phase 1 of negotiations

The EU-UK Report on Phase 1 of Negotiations was published on 8 December 2017. This joint political statement set out agreement reached on three areas: citizenship rights for UK citizens currently living/working in the EU and vice versa; financial matters and Ireland/NI.

The Ireland/NI sections of the report, included commitments to protect the Belfast (Good Friday) Agreement 1998; to the effective operation of each of the institutions and bodies established under and arising from it; to ensure no diminution of rights as a result of withdrawal; and to enable continuing EU citizenship for the people of NI who assert Irish nationality. It also set out three options for avoiding a hard border.<sup>907</sup>

## Court Cases

In February 2018, in considering *Minister for Justice v O'Connor* [2018], the Supreme Court of Ireland delayed execution of a European Arrest Warrant and forwarded questions to the Court of Justice of the EU, in relation to the implications of the UK having withdrawn from the EU Charter by the time any sentence imposed would be served.<sup>908</sup>

In September 2018, the Court of Justice of the EU ruled on *Minister for Justice and Equality v RO* (2018), which was referred by the High Court of Ireland. The *RO* case posed similar questions to the *O'Connor* case. The Court of Justice of the EU held that in the absence of substantial grounds to believe a person is at risk of being deprived of their rights under EU law, the arrest warrant must be executed while the UK remains in the EU. However, it remains the task of judicial authorities to examine whether there are substantial grounds to believe rights are being deprived once the UK has left the EU.<sup>909</sup>

In October 2018, the Supreme Court of Ireland decided that the *RO* case had answered its questions and proceeded with the *O'Connor* case. Concerning this case, the Supreme Court of Ireland found no substantial reasons to refuse to execute the European Arrest Warrant, stating:

*a mere theoretical possibility of impairment of rights is not sufficient to override the obligation to surrender.*<sup>910</sup>

However, the Supreme Court of Ireland adjourned the case to allow the applicant to pursue the matter with the Court of Justice of the EU and seek to distinguish his case from the *RO* case.<sup>911</sup> At the time of writing, the outcome was awaited.

## Draft Withdrawal Agreement

Translating the EU-UK political agreement of December 2017 into proposed legal text, the Draft Withdrawal Agreement was first published

907 European Commission and UK Government, 'Joint Report from the Negotiators of the European Union and the UK Government on Progress during Phase 1 of the Negotiations under Article 50 TEU on the UK's Orderly Withdrawal from the European Union' (European Commission and UK Government, 2017), at paras. 42-56.

908 *Minister for Justice v O'Connor* [2018] IESC 3.

909 Case C-327/18 PPU, *Minister for Justice and Equality v RO*, Preliminary Opinion, 19 September 2018.

910 *Minister for Justice and Equality v O'Connor* [2018] IESC 47.

911 *Ibid.*

in February 2018 and a version as agreed at negotiator level was published on 14 November 2018.<sup>912</sup>

Article 4 of the Protocol on Ireland/NI enshrined the UK's commitment to no diminution of rights but confined it to the Rights, Safeguards and Equality of Opportunity section of the Belfast (Good Friday) Agreement. It also makes reference to an Annex of EU law (including discrimination) to be retained in NI and to the implementation of the Article via 'dedicated mechanisms'. The Article further set out the UK commitment to 'facilitate the related work' of bodies including the Commission, the Joint Committee of the Commission and Irish Human Rights and Equality Commission, and the Equality Commission NI.

In November 2018, the Commission agreed in principle to form part of the dedicated mechanism, provided by Article 4 of the Protocol, which provides for monitoring, supervision, advice, reporting and enforcement of the non-diminution commitment. The Commission's case for retention of the EU Charter of Fundamental Rights and recognition of an equivalency of rights contained in the Belfast (Good Friday) Agreement was not reflected in the Draft Withdrawal Agreement.

The commitment to continuing EU citizenship for the people of NI who choose to assert their right to Irish citizenship, was placed in recitals to the Protocol, raising concern in relation to clarity and enforceability.

### **Joint Committee of the NI Human Rights Commission and the Irish Human Rights and Equality Commission**

In January 2018, the Joint Committee of the NI Human Rights Commission and the Irish Human Rights and Equality Commission met in Dublin with the Tánaiste Simon Coveney TD, to discuss the human rights implications of Brexit.

In March 2018, the Joint Committee published its Policy Statement on the UK's Withdrawal from the EU, together with the academic discussion paper on Brexit it had commissioned. The Joint Committee recommended that the Withdrawal Agreement:

- 1) *Ensure 'no diminution of rights' is evident and enforceable in Withdrawal Agreement;*
- 2) *Safeguard North-South equivalence of rights on an ongoing basis;*
- 3) *Guarantee equality of citizenship within NI;*
- 4) *Protect border communities and migrant workers;*
- 5) *Ensure evolving justice arrangements comply with commitment to non-diminution of rights; and*
- 6) *Ensure continued right to participation in public life for EU citizens in NI.*<sup>913</sup>

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912 EU Commission and UK Government, 'Draft Agreement on the Withdrawal of the UK of Great Britain and NI from the European Union and the European Atomic Energy Community, as agreed at negotiators' level', 14 November 2018.

913 NI Human Rights Commission, 'Press Release: Belfast (Good Friday) Agreement Joint Committee Warns of Brexit Human Rights and Equality Concerns, 13 March 2018.

The Joint Committee met in Belfast on 27 April 2018. Lord Duncan, Under Secretary of State in the NI Office, joined the meeting to discuss the negotiations and the EU (Withdrawal) Bill. Further to discussions, the Joint Committee decided to explore specific issues arising from Brexit including the Common Travel Area and justice matters, in respect of which research was later commissioned.

A delegation from the Joint Committee met Michel Barnier and his officials from the Article 50 Taskforce in Dundalk on 30 April 2018. They discussed the Joint Committee's policy statement and the content of the Draft Withdrawal Agreement. Further detailed meetings followed in Brussels on 23 May 2018 with Sir Tim Barrow (the UK Permanent Representative to the EU), Declan Kelleher (Permanent Representative of Ireland), and officials in the Article 50 Taskforce. The Joint Committee delegation acknowledged the reference to rights, but raised concerns that, as drafted, the Draft Withdrawal Agreement did not fully address the Joint Committee's six areas of concern.

A delegation from the Joint Committee met Robin Walker, Parliamentary Under Secretary of State at Department for Exiting the EU in London on 20 June 2018.

In November 2018, the Joint Committee published a commissioned paper examining the role of the Common Travel Area in light of the UK Government's exit from the EU.

### **EU (Withdrawal) Act**

The EU (Withdrawal) Act was granted Royal Assent on 26 June 2018. Introduced in the House of Commons in July 2017, its main aims include ensuring legal continuity on the day the UK leaves the EU, by retaining in UK law the body of EU/EU-derived law applying in the UK at the moment of exit, unless or until amended. It gave Ministers temporary powers to correct legislation, including primary legislation, using secondary legislation (Henry VIII powers), attracting criticism in terms of parliamentary scrutiny. Another key purpose was to end the supremacy of EU law over UK law in terms of legislation and court decisions made after withdrawal. The Bill excluded from the body of 'retained EU law' the Charter of Fundamental Rights of the EU and, while it retained EU general principles, the Bill stated that they were unenforceable and could be relied on for interpretive purposes only. The Bill also excluded the right of an individual to seek compensation for harm caused by a government breach of EU law (Francovich damages).

The UK Government produced a right-by-right analysis, aiming to show that EU Charter rights were adequately protected in UK law by various means.<sup>914</sup> An independent legal opinion by Jason Coppel QC, commissioned by the Equality and Human Rights Commission, suggested that rights would be diminished by the loss of the Charter.<sup>915</sup> This

914 HM Government, 'Charter of Fundamental Rights of the EU Right by Right Analysis' (HM Government, 2017).

915 Jason Coppel, 'EU (Withdrawal) Bill - EU Charter of Fundamental Rights' (EHRC, 2017).

conclusion was also reached by the House of Commons and House of Lords Joint Committee on Human Rights.<sup>916</sup>

The Commission worked with and supported the Equality and Human Rights Commission in respect of amendments seeking, in particular, to retain the Charter of Fundamental Rights of the EU; to legislate for no regression in human rights and equality standards after withdrawal; and to ensure appropriate parliamentary scrutiny in respect of any proposed amendments to human rights or equality law.<sup>917</sup>

A limited number of amendments were made in respect of human rights concerns. The Act now provides for a three-year period from exit day, during which challenges can be brought on the basis of EU general principles for actions that occurred before exit day, but not to dis-apply or quash primary or subordinate legislation or any rule of law.<sup>918</sup> In a similar vein, amendments provide for a two-year period of grace for Francovich claims for harm arising before exit.<sup>919</sup> In terms of Henry VIII powers, Ministers will be required to publish explanatory statements alongside statutory instruments as regards their impact on equality legislation and related obligations; and a 'sift committee' in each House will consider whether the higher level of parliamentary control should be applied to relevant subordinate legislation.<sup>920</sup>

To comply with commitments made in the Draft Withdrawal Agreement, the Act will have to be amended, by way of the Withdrawal Agreement and Implementation Bill, to provide for the transition period, the continuing application of EU law and ongoing jurisdiction of the Court of Justice of the EU during that time. Amendments will also be required to allow referral of citizenship issues to the Court of Justice of the EU for a period of eight years.<sup>921</sup>

### **UK Government White Paper on the future relationship**

In July 2018, the UK Government published a White Paper on the Future Relationship between the UK and EU, which will be formally negotiated after withdrawal.<sup>922</sup> The paper, which became known as the Chequers paper, proposed that the UK and EU commit to the non-regression of labour standards.<sup>923</sup> It also advocated continuing or increased levels of justice and security cooperation, in the context of the UK remaining a signatory to the ECHR.<sup>924</sup> It went on to provide that, where the UK participates in an EU body/agency, it would respect the role of the Court of Justice of the EU<sup>925</sup> and that UK courts would pay due regard to

916 House of Commons and House of Lords Joint Committee on Human Rights, 'The Human Rights Implications of Brexit – Fifth Report of Session 2016-17' (JCHR, 2016).

917 Equality and Human Rights Commission, 'Joint Statement: The UK's human rights and equality bodies in Brexit', 13 June 2018.

918 Schedule 1, para 2 and 3, EU Withdrawal Act 2018; Schedule 8, para 39(5) and 39(6), EU Withdrawal Act 2018.

919 Schedule 1, para 4, EU Withdrawal Act 2018; Schedule 8, para 39(7), EU Withdrawal Act 2018

920 Schedule 7, para 3 and 28, EU Withdrawal Act 2018.

921 EU Commission and UK Government, 'Draft Agreement on the Withdrawal of the UK of Great Britain and NI from the European Union and the European Atomic Energy Community', 19 March 2018, at Part Four (Transition) and Article 151 (References to the Court of Justice of the EU concerning Part Two).

922 HM Government, 'The Future Relationship between the UK and the EU' (HM Government, 2018).

923 HM Government, 'White Paper on the Future Relationship between the UK and EU' (HM Government, 2018), at Chapter 1.6.5, para 123.

924 Ibid, at Chapter 2, para 5.

925 Ibid, at Chapter 4, para 38.

Court of Justice of the EU's case law, where relevant.<sup>926</sup> A new mobility framework was proposed including co-operation on social security; and continuation of the European Health Insurance Card system. Continuing co-operation was proposed on mutual recognition of professional qualifications and a new data protection agreement.<sup>927</sup>

Responding to the UK's proposals, EU Chief Negotiator, Michel Barnier stated that the UK's proposed commitment to membership of the ECHR and recognition of the role of the Court of Justice of the EU's proposals on a future security partnership marked:

*a real step forward.*<sup>928</sup>

He added that these safeguards:

*enlarge the possibility of what we can do together [referencing DNA, fingerprints and]... swift and effective extradition, based on... procedural rights for suspects.*<sup>929</sup>

On 14 November 2018, the UK Cabinet agreed the Draft Withdrawal Agreement and the Outline Political Declaration on the future relationship of the UK with the EU.<sup>930</sup>

Concerns about the possibility of a 'no deal' Brexit have called into question the status of political agreement reached to date on aspects of withdrawal including citizenship, a transition period and the commitment to no diminution of rights and avoiding a hard border. The Home Secretary, Sajid Javid MP, has said, however, that the agreement on citizens' rights will be:

*honoured, even if the UK is unable to reach an acceptable deal with the EU 27... [and that] EU citizens living lawfully in the UK will be able to stay. No matter what happens.*<sup>931</sup>

### Recommendation

The Commission calls on the UK Government and the EU to ensure that the commitment to 'no diminution of rights' is evident and enforceable in the final Withdrawal Agreement and is carried through in UK domestic legislation. Individuals must be entitled to go directly to court to defend these rights and seek an effective remedy.

The Commission calls for retention in NI of the Charter of Fundamental Rights of the EU. The Commission further recommends that the North-South equivalence of rights obligation is protected on an ongoing basis; and continuing EU citizenship rights within NI are delivered in a way that is consistent with the Belfast (Good Friday) Agreement 1998.

926 Ibid, at Chapter 4, para 34.

927 Ibid, at 73.

928 European Commission, 'Press Release: Statement by Michel Barnier at the press conference following his meeting with Dominic Raab, UK Secretary of State for Exiting the EU', 26 July 2018.

929 Ibid.

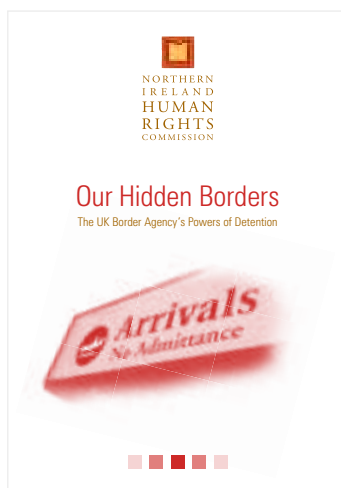
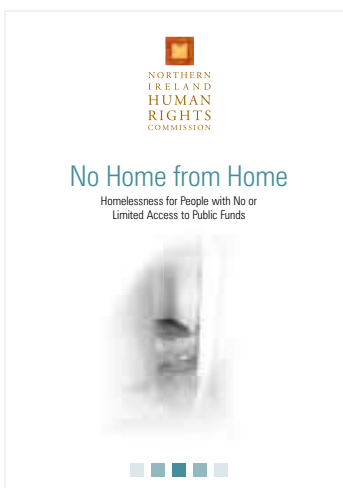
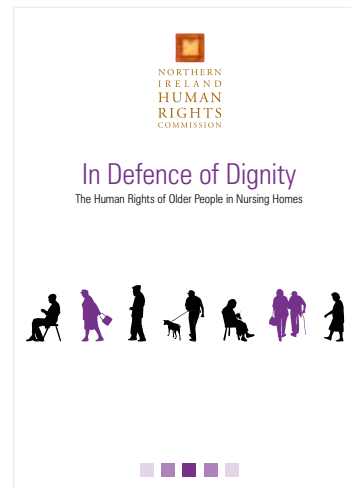
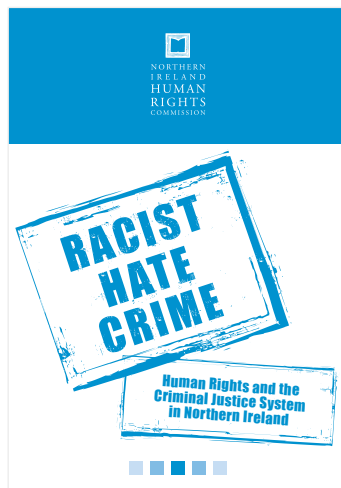
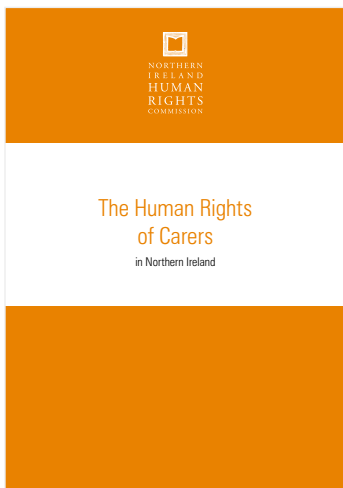
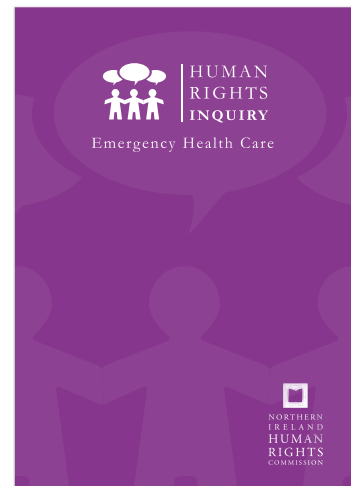
930 Prime Minister's Office, 'Press Release: PM's statement on Brexit', 14 November 2018.

931 'Oral evidence to the House of Lords Select Committee on the EU Justice Sub-Committee', 21 June 2018.

The Commission also recommends that the free exercise of rights across the border and protection for border communities and migrant workers continues post-Brexit and that evolving justice arrangements are fully human rights compliant. The Commission further calls on the UK and Irish Governments to ensure that rights under the Common Travel Area are clear, comprehensive and made enforceable.



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