



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

# **Submission to Seanad Éireann Special Select Committee on UK Withdrawal from the EU**

**21 May 2021**

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## 1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (the NIHRC), pursuant to section 69(1) the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI).
- 1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding but provide further guidance in respect of specific areas.
- 1.3 The Equality Commission for Northern Ireland (ECNI) is an independent public body established under the Northern Ireland Act 1998. Its powers and duties derive from a number of equality statutes providing protection against discrimination on the grounds of age, disability, race, religion and political opinion, sex and sexual orientation. Its remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998.
- 1.4 The EU (Withdrawal Agreement) Act 2020 empowers the Commissions, with new functions to monitor, advise, report on, promote, and enforce the implementation of Article 2(1) of the Ireland/Northern Ireland Protocol ('the Protocol') to the UK-EU Withdrawal Agreement. It empowers the Commissions to initiate, intervene in, and support litigation where there is an alleged breach of the Article 2 commitment. The Commissions will exercise these functions as part of the 'dedicated mechanism' framework established under Article 2; these functions took effect from 1 January 2021.
- 1.5 In accordance with these functions, the Commissions provide this joint submission to the Seanad Éireann Special Select Committee on UK Withdrawal from the EU.<sup>1</sup>

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<sup>1</sup> <https://www.oireachtas.ie/en/committees/33/seanad-committee-on-the-withdrawal-of-the-uk-from-the-eu/>

- 1.6 This submission outlines the scope and significance of Article 2 of the Protocol, which sets out the UK Government's 'no diminution' commitment in relation to certain equality and human rights after Brexit. It also provides an overview of the role of the 'dedicated mechanism' and the work of the three Commissions to provide oversight of, and reporting on, rights and equalities issues falling within the scope of the commitment that have an island of Ireland dimension.
- 1.7 In addition, we include a number of recommendations that we wish to draw to the Committee's attention relating to the implications of the Protocol for citizens' rights and access to public services on the island of Ireland. These recommendations reflect recommendations which the Commissions have also raised with the Northern Ireland Affairs Committee (NIAC) in the context of its Inquiry on the Protocol<sup>2</sup>.
- 1.8 The Commissions ask the Committee to note that although this is a joint submission, it also contains some specific NIHRC recommendations on human rights areas which fell solely within the remit of the NIHRC, prior to the establishment of the dedicated mechanism, or reflect work done with IHREC as part of the Joint Committee. In particular, these refer to issues relating to: the Common Travel Area (CTA); the birthright commitment in the Belfast (Good Friday) Agreement; the rights of Irish citizens, British citizens, EU citizens and frontier workers after EU exit.

## **2.0 Protocol Article 2, the 'no diminution' commitment**

- 2.1 The Protocol guarantees in Article 2(1) that:

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

- 2.2 The rights, safeguards and equality of opportunity provisions set out in the relevant Chapter of the Belfast (Good Friday) Agreement include the following:

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<sup>2</sup> [ECNI, NIHRC, Submission to NIAC on Inquiry on the Protocol \(2020\)](#)

- the right to freedom and expression of religion;
- the right to pursue democratically national and political aspirations;
- the right to seek constitutional change by peaceful and legitimate means;
- the right to freely choose one's place of residence;
- the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
- the right to freedom from sectarian harassment;
- the right of women to full and equal political participation;
- the right of victims to remember as well as to contribute to a changed society;
- respect, understanding and tolerance in relation to linguistic diversity; and
- the need to ensure that symbols and emblems are used in a manner which promotes mutual respect rather than division.<sup>3</sup>

2.3 This amounts, first of all, to a non-regression commitment in respect of the range of rights set out in the relevant chapter of the BGFA and underpinned by EU obligations – EU treaties, Regulations, Directives etc. – in place at the end of the transition period.

2.4 The relevant chapter of the BGFA was not drafted as a comprehensive statement of rights, anticipating, as it did, further work on a Bill of Rights. Research is ongoing by the Commissions to examine the read-across of the rights as expressed in the BGFA, to relevant EU law, but ultimately the courts will interpret the parameters of Article 2

2.5 Annex 1 of the Protocol sets out six EU equality Directives. Under the Protocol, the UK Government has committed not only to ensure that there is no diminution of the rights contained in these Directives but also to ensure that Northern Ireland equality law will keep pace with any changes made by the EU to these rights to improve the minimum levels of protection available, after 1 January 2021. The Directives are:

- Gender Goods and Services Directive;<sup>4</sup>
- Equal Treatment Directive;<sup>5</sup>

<sup>3</sup> [Belfast \(Good Friday\) Agreement](#), 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

<sup>4</sup> Directive 2004/113/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and Services', 13 December 2004.

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

- Racial Equality Directive;<sup>6</sup>
- Equality Framework Directive;<sup>7</sup>
- Self-Employment Equal Treatment Directive;<sup>8</sup> and
- Equal Treatment in Social Security Directive.<sup>9</sup>

2.6 Article 2 binds the UK Government as a matter of international law and has resulted, amongst other things, in a change to the NI Assembly's legislative competence. It adds to existing duties on policy-makers – in the NI Assembly and Westminster – to consider human rights and equality issues in the development of policy and the passage of legislation affecting Northern Ireland. In addition, the keeping pace obligation will require monitoring of amendments to the specified Annex 1 directives, as well as CJEU judgements on their interpretation.

### **3.0 Implications of the Protocol for Citizens' Rights and Access to Public Services on the Island of Ireland**

3.1 The Committee has sought views on the implications of the Protocol for citizens' rights. As highlighted above, this section contains both joint commentary on the implications of the Protocol in terms of rights for citizens in Northern Ireland, as well as specific NIHRC recommendations in this area.

#### **Equality rights**

3.2 There are significant gaps between equality law in Great Britain and Northern Ireland; gaps which have widened following the introduction of single equality legislation – the Equality Act 2010 - in Great Britain. These differences mean that in a number of key areas, individuals in Northern Ireland have less protection against discrimination and harassment than people in other parts of the United Kingdom.<sup>10</sup>

3.1 Northern Ireland does not have a specific equality law which codifies equality safeguards into a single Act. Instead, equality safeguards are protected across a number of legislative instruments. Further, unlike in

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<sup>6</sup> Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000.

<sup>7</sup> Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000.

<sup>8</sup> Directive 2010/41/EU, 'EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity', 7 July 2010.

<sup>9</sup> Directive 79/7/EEC, 'EU Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security', 19 December 1978.

<sup>10</sup> Equality Commission NI, '[Gaps in Equality Law between Great Britain and NI](#)' (ECNI, 2014).

Northern Ireland, in the Republic of Ireland, equality law has been significantly consolidated, codified, and harmonised into two distinct pieces of legislation.<sup>11</sup>

- 3.2 While the UK Government's commitment under Article 2 in relation to keeping pace with any EU changes to the Annex 1 Directives, could result in a strengthening of equality protections in Northern Ireland in certain equality areas, importantly, the Annex 1 Directives do not cover all equality areas, including some areas which are already currently covered by Northern Ireland equality law. For example, the Annex 1 Directives do not cover equality protections in areas outside employment and vocational training on the grounds of age, sexual orientation, disability or religion or belief.
- 3.3 In addition, in some of these areas, such as in the area of discrimination on the grounds of age discrimination in terms of access to goods and services, including public services, there is already stronger protection against discrimination in Great Britain, and in Ireland, than in Northern Ireland. The Article 2 commitment will does not commit the UK Government to introducing such changes in Northern Ireland after the end of the transition period, even if such changes are covered by a subsequent EU Directive introduced by the EU after the end of the transition period.
- 3.4 Further, if the EU was to introduce a subsequent EU equality related Directive (that does not amend or replace the Annex 1 Directives), this could result in stronger equality rights for Irish citizens in Ireland compared to Irish citizens or British citizens in Northern Ireland, including in areas relating to the access of goods and services, such as public services.
- 3.5 **The Commissions have recommended:**
  - **that equality law in Northern Ireland is strengthened, simplified and harmonised into a single equality act, and that gaps, including existing gaps between Northern Ireland and Great Britain equality law, are addressed as a matter of urgency; and**

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<sup>11</sup> The Equal Status Acts 2000-2015 and the Employment Equality Acts 1998-2015.

- **that Northern Ireland equality law keeps pace with changes to equality rights in Ireland that strengthen those rights, specifically rights that are introduced in the Ireland as a result of EU Directives (that do not amend or replace the Annex 1 Directives).**

## **Common Travel Area**

- 3.6 Article 3 of the Ireland/Northern Ireland Protocol recognises that the UK and Ireland “may continue to make arrangements between themselves relating to the movement of persons between their territories”. Article 3(1) further recognises that the Common Travel Area and associated rights and privileges can apply without affecting Ireland’s obligations under EU law.
- 3.7 In 2018, the NIHRC and the Irish Human Rights and Equality Commission commissioned and published research on the Common Travel Area, which explored the legal obligations it created within Ireland and the UK. This research noted that the Common Travel Area is “written in sand”, and that what legal underpinning it had was largely dependent on EU rights.<sup>12</sup> The report identified that putting these rights on a legal footing in a bilateral Common Travel Area treaty would be the strongest form of protection. Such a treaty codifying “common immigration rules, travel rights, residency rights and related rights to education, social security, work, health, and security and justice” would be the ‘Gold Standard’ for safeguarding those rights.
- 3.8 In May 2019, the UK Government and Government of Ireland signed a Memorandum of Understanding setting out what they understand by the Common Travel Area and associated rights and privileges.<sup>13</sup> The Memorandum of Understanding clarifies that the Common Travel Area only extends to the British and Irish citizens and further clarifies that it does not create “legally binding obligations”.<sup>14</sup>
- 3.9 The UK Government and the Government of Ireland have agreed a treaty which codifies the areas relating to social security coordination.<sup>15</sup> However, all other rights associated with the Common Travel Area,

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<sup>12</sup> Sylvia de Mars, Colin Murray, Aoife O’Donoghue and Ben Warwick, ‘[Discussion Paper on the Common Travel Area](#)’ (NIHRC and IHREC, 2018), at 11.

<sup>13</sup> [Memorandum of Understanding between the UK Government and the Government of Ireland Concerning the Common Travel Area and Associated Reciprocal Rights and Privileges](#), 8 May 2019.

<sup>14</sup> *Ibid*, para 2 and 17.

<sup>15</sup> Convention on Social Security between the Government of the UK and the Government of Ireland 2019. This Convention has not yet entered into force.



including free movement of people, the rights to reside and to work, the rights to social housing, social protection, healthcare and education, are based on separate protections in the domestic law in the UK and Ireland alongside reciprocal agreements often through Memorandum of Understanding and other non-judicially enforceable agreements.

- 3.10 The NIHRC recommends that the Common Travel Area and associated rights are enshrined in law by agreeing a comprehensive bilateral treaty between the UK and Irish governments. The NIHRC further recommends that this agreement codifies reciprocal free movement rights and rights to employment, education, health care and justice and security on the basis of maintaining the same level of protection as existed at the end of the transition period and that it is incorporated into domestic legislation.**

### **Birthright Commitment**

- 3.11 In the Belfast (Good Friday) Agreement the UK Government and Government of Ireland commit to recognising “the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose”.<sup>16</sup>
- 3.12 In 2008, the NIHRC submitted its advice on a Bill of Rights for Northern Ireland, which included a recommendation that the right of people of Northern Ireland to identify as British or Irish or both and hold the associated citizenship, “with no detriment or difference of treatment of any kind”, be recognised.<sup>17</sup> In response, the UK Government acknowledged the “considerable symbolic importance” the birthright commitment and proposed that “the right of the people of Northern Ireland to identify themselves and be accepted as Irish or British or both” be included in a Bill of Rights.<sup>18</sup>
- 3.13 In February 2019, the (then) Prime Minister Theresa May’s recognised in that “the birthright to identify and be accepted as British, Irish or both, and to hold both British and Irish citizenship is absolutely central to the Agreement”.<sup>19</sup> The Prime Minister stated that a review of immigration

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<sup>16</sup> Agreement between the Government of the UK and the Government of Ireland, 10 April 1998, at Article 1(vi).

<sup>17</sup> NI Human Rights Commission, ‘[A Bill of Rights for NI – Advice to the Secretary of State for NI](#)’ (NIHRC, 2008), at 41.

<sup>18</sup> NI Office, ‘Consultation Paper: A Bill of Rights for Northern Ireland: Next Steps’ (NIO, 2009), at para 6.6.

<sup>19</sup> Theresa May ‘[PM Speech in Belfast](#)’, 5 February 2019.

rules had been initiated “to deliver a long term solution consistent with the letter and spirit of the Belfast Agreement”.<sup>20</sup>

- 3.14 In *New Decade, New Approach*, the UK Government committed to reviewing its immigration rules “taking into account the letter and spirit of the Belfast Agreement and recognising that the policy should not create incentives for renunciation of British citizenship by those citizens who may wish to retain it”.<sup>21</sup> In May 2020, the Home Office released a Statement of Changes in Immigration Rules which provided for the family member of a “relevant person of Northern Ireland” to access EU free movement law protections.<sup>22</sup> These changes came into force on 24 August 2020 and will remain in place until the EU Settlement Scheme closes to new applications on 30 June 2021. A ‘relevant person of NI’ is defined as someone who is a British citizen, an Irish citizen, or both British and Irish and was born in Northern Ireland to a parent who was British, Irish or both, or otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.<sup>23</sup>
- 3.15 The NIHRC welcomes this change in the immigration rules, however they do not address the birthright commitment to identify and be accepted as British or Irish or both.
- 3.16 In April 2020, the Joint Committee of the NIHRC and Irish Human Rights and Equality Commission published commissioned research on how the birthright commitment in the Belfast (Good Friday) Agreement could be implemented in law. This report set out a number of recommendations on how the birthright commitment could be incorporated into UK immigration and nationality law without undermining or inadvertently risking rights of a person who chooses to identify as either British or Irish, or both.<sup>24</sup>
- 3.17 The NIHRC advises that the birthright commitment in the Belfast (Good Friday) Agreement 1998 recognises the right for all the people of Northern Ireland to identify, and be accepted, as Irish or British or both. The NIHRC has recommended that UK nationality and immigration laws be amended to reflect the birthright**

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<sup>20</sup> Ibid.

<sup>21</sup> NI Office, ‘[New Decade, New Approach](#)’ (NIO, 2020), at Annex A on UK Government Commitments to Northern Ireland, para 13.

<sup>22</sup> Home Office, ‘[Statement of Changes in Immigration Rules CP232](#)’ (HO, 2020), at 10.

<sup>23</sup> NI Human Rights Commission, ‘[EU Settlement Scheme Extended to the People of NI: What does it Mean for Me?](#)’ (NIHRC, 2020).

<sup>24</sup> Alison Harvey, ‘[A Legal Analysis of Incorporating into UK Law the Birthright Commitment under the Belfast \(Good Friday\) Agreement 1998](#)’ (NIHRC and IHREC, 2020).

**commitment to identify, and be accepted, as Irish or British or both without any loss of rights or entitlements.**

### **Rights of Irish citizens**

- 3.18 The UK-EU Withdrawal Agreement protects the rights of EEA nationals who exercised free movement rights to come to the UK before 1 January 2021, provided they apply to the EU Settlement Scheme before the deadline of 30 June 2021, though this deadline may be extended in certain circumstances.
- 3.19 Many Irish citizens in the UK are eligible to register for the EU Settlement Scheme and access the rights under the Withdrawal Agreement and the EU (Withdrawal Agreement) Act 2020. The policy of the UK Government has been to assure Irish citizens that they do not need to apply to the EU Settlement Scheme to protect their rights.<sup>25</sup> Irish citizens who do not apply for the EU Settlement Scheme will not have the protection of the rights contained in Part Two of the UK-EU Withdrawal Agreement and Part Three of the EU (Withdrawal Agreement) Act 2020 and will instead rely on the rights associated with the Common Travel Area. The current recognition of these rights in a Memorandum of Understanding between the UK and Irish Governments does not provide a robust legally enforceable form of protection.
- 3.20 The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 confirms that Irish citizens will have leave to enter or remain in the UK on the basis of nationality, rather than the origin of their journey having been within the Common Travel Area. The Act also provides for the deportation of Irish citizens “on grounds that the Irish citizen’s exclusion is conducive to the public good”.<sup>26</sup>
- 3.21 The EU Citizens’ Directive (Directive 2004/38/EC) set a higher threshold for the expulsion of EU citizens or their family members, who had a right of permanent residence, on “serious grounds of public policy or public security”.<sup>27</sup>
- 3.22 Those granted EU Settled Status in the UK will benefit from the higher threshold for deportation, as set out in the Directive, in respect of conduct

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<sup>25</sup> Gov.uk, ‘Apply to the EU Settlement Scheme (settled and pre-settled status) - Who Should Apply?’. Available at: <https://www.gov.uk/settled-status-eu-citizens-families/eligibility>

<sup>26</sup> Section 2, inserting new section 3ZA(2)(a) into Immigration Act 1971.

<sup>27</sup> Article 28, EU Directive 2004/38/EC ‘Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States’, 29 April 2004.

prior to 31 December 2020. Conduct after that date will be considered under the Immigration Act 1971.<sup>28</sup>

- 3.23 The Immigration Minister, Kevin Foster MP, confirmed that (irrespective of the legal threshold) the current policy on deportation of Irish citizens will not change and stated that “our approach is to deport Irish citizens only where there are exceptional circumstances or where a court has specifically recommended deportation, which is incredibly rare”.<sup>29</sup> This position reflects long-standing UK Government policy in relation to deportation of Irish citizens.<sup>30</sup>
- 3.24 Under the law in Ireland, British citizens are exempt from restrictions on entry and residence and from the possibility of deportation.<sup>31</sup>
- 3.25 Among the stated aims of the Memorandum of Understanding between the UK Government and Government of Ireland on the Common Travel Area, is the commitment to “reaffirm the associated rights and privileges enjoyed by British and Irish citizens in each other’s state”.<sup>32</sup> It further commits the two governments to allow “British and Irish citizens to move freely between the UK and Ireland” and the two governments commit to ensuring their national laws provide for “a right to reside”.<sup>33</sup>
- 3.26 Article 2(1) of the Ireland/Northern Ireland Protocol includes the commitment to protect against the diminution of those rights set out in the ‘Rights, Safeguards and Equality of Opportunity’ section of the Belfast (Good Friday) Agreement resulting from the UK’s withdrawal from the EU. The Belfast (Good Friday) Agreement includes the “right to freely choose one’s place of residence” in that section.<sup>34</sup>
- 3.27 The NIHRC has recommended that, to protect against the diminution of rights contained in Article 2 of the Ireland/Northern Ireland Protocol, Irish citizens maintain the procedural safeguards against deportation contained in the EU Citizens’ Directive and associated case law.**

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<sup>28</sup> Section 10, EU (Withdrawal Agreement) Act 2020

<sup>29</sup> UK Parliament Hansard, ‘Public Bill Committee – Immigration Social Security Coordination (EU Withdrawal) Bill - Minister for Future Borders and Immigration, Kevin Foster MP’, 11 June 2020.

<sup>30</sup> UK Parliament Hansard, ‘Written Ministerial Statement – Irish Nationals (Deportation) - Minister for Immigration, Citizenship and Nationality, Liam Byrne MP – Column 3-4 WS’, 19 February 2007.

<sup>31</sup> Aliens (Exemption) Order 1999; Aliens (Amendment) (No. 2) Order, 1999.

<sup>32</sup> [Memorandum of Understanding between the UK Government and the Government of Ireland Concerning the Common Travel Area and Associated Reciprocal Rights and Privileges](#), 8 May 2019, at para 2.

<sup>33</sup> Ibid, at para 6 and 7.

<sup>34</sup> The [Belfast \(Good Friday\) Agreement](#), 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights, at para 1.

**3.28 As the Common Travel Area is built on reciprocation of rights and equality of treatment in both jurisdictions the NIHRC has recommended that consideration should be given to reciprocating the approach of the law in Ireland, which exempts British citizens from deportation, in UK immigration law.**

## **EU Citizens**

3.29 The UK Government has committed to upholding the rights of EU citizens and EEA migrants through the UK-EU Withdrawal Agreement and its implementing legislation, through the EU Settlement Scheme.<sup>35</sup> EU citizens and EEA migrants who arrived before 1 January 2021 will continue to be entitled to apply to the EU Settlement Scheme before the 30 June 2021.

3.30 EU and EEA migrants arriving in the UK after 31 December 2020 will not be entitled to apply to the EU Settlement Scheme for settled or pre-settled status. Instead migrants from the EU and EEA will be subject to the new immigration rules.

**3.31 The NIHRC has recommended clarification that the rights of all people who are entitled to acquire settled and pre-settled status under the EU Settlement Scheme before 30 June 2021 will continue to be protected and that no one will be subject to any restriction on the basis of not having acquired settled status prior to the closure of the scheme.**

## **Frontier workers**

3.32 An estimated 23,000 to 29,000 people commute across the Northern Ireland/Ireland border every day for work or study.<sup>36</sup> Work related trips account for 35 per cent of all cross-border crossings.<sup>37</sup>

3.33 Under new regulations laid by Government, a new frontier workers' scheme came into effect after the end of the transition period.<sup>38</sup> A frontier worker is an EEA national who is not primarily resident in the UK, but either works or is self-employed in UK (or is treated as such). A

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<sup>35</sup> Part 3, EU (Withdrawal Agreement) Act 2020.

<sup>36</sup> Department for the Economy, 'Background Evidence on the Movement of People Across the Northern Ireland – Ireland Border' (DE, 2018), at 29.

<sup>37</sup> Andrew Doherty, 'Research Bulletin 18/5 – The Movement of People Across the Northern Ireland – Ireland Border', at 10.

<sup>38</sup> The Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020

frontier worker who was working in the UK by 31 December 2020 will need to apply for a permit in order to retain their frontier worker status after 30 June 2021.

- 3.34 A number of civil society organisations have raised concerns about this scheme, including the lack of consultation in advance of the regulations being published. These concerns include that it is limited to only those workers and self-employed people who are frontier workers at the end of the transition period; the lack of clarity for British people who are working in Northern Ireland, but ordinarily live in Ireland; the tight timeframe for applications; and the need for advice organisations to support frontier workers to apply to the scheme.<sup>39</sup>
- 3.35 The NIHRC notes that the clarity of this scheme is to be welcomed for people who are currently frontier workers based in Ireland and commuting to work in Northern Ireland. However, for people living in the interconnected communities in border areas, further clarity is required for people and businesses in border areas as to how this scheme will work in the future for people who do not fall under the definition of frontier workers for the purposes of this scheme, or who lose that status due to the economic instability. This is particularly important in light of the ongoing disruption to people's lives and to the labour market caused by the COVID 19 pandemic. Moreover, it remains unclear how the competing tensions of an open border alongside preventing anti-trafficking will be managed in practice.
- 3.36 **The NIHRC advises that people living and working across the border are in a particularly vulnerable situation as new rules take effect and recommends that support is provided to frontline advisers and to employers to ensure that no eligible worker or self-employed person is left unprotected by the scheme.**

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<sup>39</sup> Letter from the Committee on the Administration of Justice; UNISON; Border People; Centre for Cross Border Studies; Migrant Centre NI; Irish Congress of Trade Unions; Migrant Rights Centre Ireland; Stronger Together; South Tyrone Empowerment Project; Inter Ethnic Forum: Chinese Welfare Association; Omagh Ethnic Community Support Group; Belfast Metropolitan College, College of Sanctuary; North West Migrant Forum; Advice NI; Granite Legal Services NI to the Home Secretary, 26 October 2020.

## **EU Charter of Fundamental Rights and Bill of Rights for NI**

- 3.37 The Commissions have advised that withdrawal from the EU Charter of Fundamental Rights and the jurisdiction of the Court of Justice amounts to a regression in the protection of human rights.
- 3.38 The Belfast (Good Friday) Agreement 1998 identified a Bill of Rights for Northern Ireland as a safeguard, supplementary to the ECHR, to ensure “all sections of the community can participate and work together successfully” and “that all sections of society are protected”.<sup>40</sup> A Bill of Rights for Northern Ireland is yet to be created and implemented, though a number of steps have been taken in the consideration of its creation, including statutory advice provided by the NIHRC to the Secretary of State for Northern Ireland in 2008<sup>41</sup> and, following the New Decade, New Approach agreement, the establishment of the Northern Ireland Assembly Ad Hoc Committee on a Bill of Rights for Northern Ireland in January 2020, which is tasked with providing a report on its findings following extensive evidence gathering, to the Northern Ireland Assembly in early 2022.<sup>42</sup>
- 3.39 In the absence of a Bill of Rights for Northern Ireland, the EU Charter went some way towards filling the gap in rights protection within Northern Ireland that was acknowledged by the Belfast (Good Friday) Agreement 1998, particularly in relation to socio-economic rights. In the absence of a Bill of Rights for Northern Ireland, the Commissions reiterate that the EU Charter is an important addition to the ECHR. It represents a ‘Convention-plus’ framework that aligns to the commitments contained in the 1998 Agreement.
- 3.40 The EU Charter also has continued relevance regarding the parts of the Withdrawal Agreement that relate to EU law. Article 4 of the Withdrawal Agreement makes clear that provisions of the Agreement and the provisions of EU law made applicable by the Agreement “shall produce in respect of and in the UK the same legal effects as those which they produce within the EU and its Member States”. These provisions of EU law include the EU Charter and its general principles, insofar as they are relevant to the provisions enshrined in Annex 1 of the Protocol.

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<sup>40</sup> [Belfast \(Good Friday\) Agreement](#) 1998, at Strand One, para 5(b).

<sup>41</sup> NI Human Rights Commission, ‘[A Bill of Rights for NI: Advice to the Secretary of State for NI](#)’ (NIHRC, 2008).

<sup>42</sup> NI Office, ‘[New Decade, New Approach](#)’ (NIO, 2020), at 16.

- 3.41 The removal of the supplementary protections of the EU Charter re-highlights the need for a Bill of Rights for Northern Ireland.
- 3.42 **The Commissions recommend that the UK Government recognises the prima facie case for a Bill of Rights reflecting the particular circumstances of Northern Ireland, and the fact that this case is amplified by reduced application of the EU Charter.**

## **4.0 The Dedicated Mechanism**

### **Powers and duties**

- 4.1 The Commissions have been given additional powers and responsibilities to ensure that the UK Government's commitment under Article 2 is met.
- 4.2 They are responsible for providing advice to government and monitoring, supervising, enforcing and reporting on the ongoing implementation of this commitment.
- 4.3 Specifically, the Commissions' new powers and duties, which they can exercise either jointly or separately, include:
- monitoring how the commitment is implemented;
  - reporting on its implementation to the Secretary State for Northern Ireland and The Executive Office;
  - advising the Secretary of State and the Northern Ireland Assembly Executive Committee of legislative and other measures that must be taken to implement the commitment;
  - advising the Northern Ireland Assembly (or a committee of the Assembly) whether a Bill is compatible with the commitment;
  - promoting understanding and awareness of how important the commitment is;
  - bringing or intervening in legal proceedings in respect of an alleged breach (or potential future breach of the commitment); and assisting persons in relevant legal proceedings.
- 4.4 Further, the ECNI, NIHRC, and the Joint Committee of NIHRC and IHREC can directly raise matters of relevance to how the commitment is being implemented, with the Specialised Committee on the Protocol.



## **Work to date**

- 4.5 In addition to work involved in establishing the dedicated mechanism, since acquiring their new functions from 1 January 2021, the Commissions have already undertaken a wide range of work further to their powers and duties.
- 4.6 This has included engagement with a wide range of stakeholders, including equality and human rights organisations, the Executive Office and other departmental officials, the EU Delegation to the UK, NIO officials, the Labour Relations Agency, trade unions, and the Independent Monitoring Authority, and participation in meetings of the Ad Hoc Group for North-South and East-West Co-operation.
- 4.7 In addition, all three Commissions have given briefings to the NI Assembly Executive Office Committee, and the ECNI and NIHRC have jointly engaged with the NI Assembly Ad Hoc Committee on a Bill of Rights for Northern Ireland on a Bill of Rights and the implications of Brexit for equality and rights in NI.
- 4.8 In terms of research, ECNI is commissioning research on Article 2 Assembly and Parliamentary scrutiny mechanisms and planning to commission research on the impacts of Brexit on equality groups in Northern Ireland, including the potential impact of loss of EU Funding. The NIHRC has commissioned research on immigration and is planning to commission research in the areas of free movement and healthcare.
- 4.9 In terms of their legal work, the Commissions have progressed work to examine the scope of Article 2, including identifying EU law, and EU derived rights, that could potentially fall within the scope of Article 2, and dealt with legal enquiries.
- 4.10 In addition, as part of our awareness raising work, the Commissions have recently produced a short, animated video and a number of accessible, user-friendly publications.<sup>43</sup>

## **5.0 Island of Ireland Dimension**

- 5.1 Article 2 of the Protocol recognises the importance of the work of NIHRC, ECNI and IHREC pursuant to the BGFA, in upholding human rights and equality standards and commits the UK Government to facilitating that

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<sup>43</sup> See ECNI ([www.equalityni.org/Brexit](http://www.equalityni.org/Brexit)) and NIHRC ([www.nihrc.org/our-work/human-rights-after-brexit](http://www.nihrc.org/our-work/human-rights-after-brexit))

work on a continuing basis. Article 11 commits the signatories to implementing relevant provisions “so as to maintain the necessary conditions for continued North-South cooperation”, making specific mention of justice and security as well as health and other areas. Article 14 of the Protocol further provides that the Commissions may raise issues with the Specialised Committee on the Protocol.

- 5.2 As set out in the UK Government's explainer document of August 2020<sup>44</sup> on Article 2, the ECNI, NIHRC, and IHREC, are tasked with working together to provide oversight of, and reporting on, rights and equalities issues that fall within the scope of the Article 2 commitment that have an island-of-Ireland dimension.
- 5.3 The three Commissions have established a working group to progress the all-island work, which held its inaugural meeting on 9 February and have developed a Memorandum of Understanding (MOU), which has been agreed by the Boards of the three Commissions.
- 5.4 Aligned to the role set out in the UK Government's Explainer document on Article 2 of the Protocol, the MOU confirms that the Commissions will report separately to the Governments of the UK and Ireland, as appropriate, on any issues that they have addressed jointly in the context of monitoring the Article 2 commitment; that the NIHRC and ECNI, and the Joint Committee of NIHRC and IHREC, as established under the BGFA, will bring any matter of relevance to the Article 2 commitment, to the attention of the Specialised Committee; and that any activities undertaken by the three commissions jointly will respect existing reporting structures and statutory roles and responsibilities.
- 5.5 Further to their all island scrutiny role, the Commissions, in partnership with the Centre for Cross Border Studies, held a virtual cross-border stakeholder event on 18 May 2021 aimed at raising awareness of Article 2, the dedicated mechanism, and the Commissions' all- island scrutiny role and to hear any concerns regarding the impact of Brexit on rights and equality of opportunity on cross border communities. Further cross-border civic engagement events are being planned.

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<sup>44</sup> NIO [Explainer: UK Government commitment to no diminution of rights, safe guards and equality of opportunity in Northern Ireland.](#) (2020)

# Contact Us

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