



Submission to Northern Ireland Affairs Committee Inquiry on Brexit and the Northern Ireland Protocol

December 2020

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Summary of Recommendations

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

Equality rights

The Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland (the Commissions) recommend that the Committee calls on the Northern Ireland Executive to progress measures that will:

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

Pet Passport Arrangements

The Commissions recommend the UK Government ensures that there are no adverse impacts on Assistance Dog Owners in Northern Ireland in terms of requirements on pet passport arrangements post the end of the transition period.

Common Travel Area

The Northern Ireland Human Rights Commission (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 exists during the transition period and that it is incorporated into domestic legislation.

Birthright Commitment

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 recommends that UK nationality and immigration laws are amended to reflect the birthright commitment to identify, and be accepted, as Irish or British or both without any loss of rights or entitlements.

Rights of Irish citizens

The NIHRC recommends 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.

EU citizens

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

The NIHRC recommends that there is 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 after January 2021 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

The NIHRC advises that people living and working across the border are in a particularly vulnerable situation as the transition period ends and recommend 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.

Implications of the Protocol for Devolution

Common Frameworks

The Commissions recommend that consideration is given by the UK Government as to how the common frameworks process, including the framework on equality law, could be used to ensure that equality standards are maintained and strengthened across the UK, and so to ensure compliance with international obligations including the UK Government's obligations

under Article 2 of the Protocol and international human rights conventions, such as the UN CRPD.

Post-Brexit trade policy

The Commissions recommend that:

- Human rights impact assessments should be conducted in respect of any future trade agreements, to the standard set out in UN Office of the High Commissioner for Human Rights Guidelines.
- Legislation should be passed to preclude conclusion or ratification of any international trade or investment agreement that would require or permit the reduction of any protections for human rights and fundamental freedoms in Northern Ireland, including those relating to non-discrimination and equality, ensured under UK law.
- Any future trade agreement with the EU should include a commitment to the non-regression of fundamental rights at work, including rights such as non-discrimination and equal pay, fair working conditions and employment standards, as well as a commitment to keep pace with future EU laws that strengthen equality and human rights in Northern Ireland, including protections that enhance equality and human rights in the workplace.

New Legislation and the Protocol

UK Internal Market Bill

The Commissions recommend that the agreement in principle reached by the EU and UK Government is fully implemented and the provisions in the Internal Market Bill that limit the scope of the ECHR are removed and will not be reintroduced through any similar provisions in subsequent legislation, such as the Taxation Bill. Furthermore, the Commissions welcome Lord Callanan's clarifications on how the Internal Market Bill relates to the Ireland/Northern Ireland Protocol, but stress that any subsequent legislation or actions should have no adverse effects on the non-diminution obligation under Article 2 of the Protocol.

Draft Parliamentary legislation and judicial proceedings

The Commissions recommend that the UK Government:

- puts measures in place to ensure that all draft Parliamentary legislation relating to Northern Ireland and relevant to the commitment in Article 2(1) of the Protocol is referred to the Commissions at an early stage to facilitate timely advice, and so as to help ensure compliance with that commitment;
- gives consideration to putting in place additional measures so as to ensure that UK Ministers comply with the Article 2(1) of the Protocol's obligation, including consideration being given to introducing a ministerial statement of compatibility;
- gives consideration to establishing a mechanism by which the dedicated mechanism is informed, in a timely manner, of judicial proceedings and/or court decisions, including Northern Ireland decisions, relevant to the commitment set out in Article 2 of the Protocol.

EU Charter of Fundamental Rights and Bill of Rights for NI

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 will be amplified if the EU Charter no longer has domestic force.

Effective Implementation of the Protocol

Information exchange on EU legislative developments

The Commissions recommend that the UK Government:

- ensures that arrangements are put in place whereby the dedicated mechanism will be kept informed, in a timely manner, of any planned, or adopted new EU acts that fall within the scope of the Annex 1 Directives, as well as of EU acts within the Protocol, that are relevant to the Article 2 commitment, but which neither amend nor replace the Annex 1 Directives.
- provides clarification as to how the Specialised Committee will engage with the dedicated mechanism.

Engagement with the Joint Consultative Working Group

The Commissions recommend that the UK Government gives consideration to putting in place appropriate arrangements so as to ensure that there is regular and meaningful engagement between the Joint Consultative Working Group and the dedicated mechanism, as well as with equality and human rights stakeholders in Northern Ireland, in relation to the commitment set out in Article 2 of the Protocol.

Access to European equality and human rights networks

The Commissions recommend that the UK Government takes steps, in liaison with the EU, to ensure that the Commissions continue to have access to, and/or engagement with, the relevant European networks and agencies on the similar terms that existed prior to Brexit.

Parliamentary Scrutiny

The Commissions recommend that:

- robust arrangements are established to enable effective scrutiny by Parliamentary Committees, including the Northern Ireland Affairs Committee, of the UK Government's compliance with Article 2(1) of the Protocol.
- that relevant Parliamentary Committees, including the Northern Ireland Affairs Committee, provide opportunities for the dedicated mechanism and equality and human rights stakeholders in Northern Ireland to engage with the Committees on matters relating to compliance with the Article 2 of the Protocol.

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 to the UK-EU Withdrawal Agreement. It empowers the Commissions to institute, intervene in, and support litigation where there is a 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 will take effect from 1 January 2021.
- 1.5 In accordance with existing functions, and in light of the new functions that the NIHRC and ECNI ('the Commissions') will shortly have as part of the dedicated mechanism, the Commissions provide this joint submission

to the Northern Ireland Affairs Committee Inquiry on Brexit and the Northern Ireland Protocol.¹

- 1.6 The Commissions ask the Committee to note that although this is a joint submission, it also contains specific NIHRC recommendations on human rights areas relevant to the scope of the Inquiry, and which currently fall solely within the remit of the NIHRC. In particular, the NIHRC recommendations relate to the implications of the Protocol for citizens' rights and access to public services on the island of Ireland on issues relating to: the Common Travel Area (CTA); the birthright commitment in the Belfast (Good Friday) Agreement; the rights of Irish citizens, EU citizens; and frontier workers.
- 1.7 The Commissions welcome this opportunity to provide evidence to this inquiry and are available to provide additional oral evidence if this could provide further assistance to the Committee. The Commissions have focused on those questions raised by the Inquiry relevant to our respective roles and remit.

2.0 Background

- 2.1 The Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement 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:
 - the right to freedom and expression of religion;
 - the right to pursue democratically national and political aspirations;

¹ House of Commons NI Affairs Committee, ‘Inquiry on Brexit and the Northern Ireland Protocol’. Available at: <https://committees.parliament.uk/work/544/brexit-and-the-northern-ireland-protocol/>

- 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.²

2.3 In addition, that part of the Belfast (Good Friday) Agreement includes obligations on the UK Government and the comparable steps by the Government of Ireland to "take steps to further strengthen the protection of human rights in its jurisdiction". This section also includes the commitment to complete incorporation of the ECHR into Northern Ireland law, including ensuring direct access to the courts and remedies for breach. It further includes the commitment to ensure public authorities promote equality of opportunity and to the establishment of ECNI and the NIHRC and a Joint Committee of the two human rights commissions as a forum for the consideration of human rights issues on the island of Ireland.³

2.4 There are particular sections on the promotion of social inclusion, community development and the advancement of women in public life; on the protections for and right of victims; and on the importance of linguistic diversity in Northern Ireland, including the Irish language, Ulster Scots and the languages spoken in ethnic minority languages.⁴

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

² [Belfast \(Good Friday\) Agreement](#), 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

³ Ibid.

⁴ Ibid.

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;⁵
- Equal Treatment Directive;⁶
- Racial Equality Directive;⁷
- Equality Framework Directive;⁸
- Self-Employment Equal Treatment Directive;⁹ and
- Equal Treatment in Social Security Directive.¹⁰

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 and access to public services on the island of Ireland.
- 3.2 As highlighted above, this section contains both joint recommendations 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

- 3.3 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.¹¹

⁵ 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.

⁶ 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.

⁷ 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.

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

⁹ 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.

¹⁰ 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.

¹¹ Equality Commission NI, '[Gaps in Equality Law between Great Britain and NI](#)' (ECNI, 2014).

- 3.4 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.
- 3.5 The UN Committee on Economic, Social and Cultural Rights (UN ICESCR Committee) has expressed its regret that no action had been taken on its earlier recommendations to extend “comprehensive anti-discrimination legislation” to Northern Ireland.¹² The UN ICESCR Committee urged the UK Government and Northern Ireland Executive to ensure “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”.¹³ The UN Committee on the Elimination of All Forms of Discrimination against Women (UN CEDAW Committee) reiterated the UN ICESCR Committee’s concerns, recommending that the legislation in Northern Ireland is revised “to ensure that it affords protection to women there on an equal basis with women in other administrations of [the UK]”.¹⁴
- 3.6 Once the transition period ends on 31 December 2020, Article 2(1) of the Protocol is aimed at ensuring that there will be no diminution of certain equality protections and non-discrimination provisions in Northern Ireland as a result of the UK leaving the EU.
- 3.7 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.
- 3.8 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

¹² E/C.12/GBR/CO/5 ‘UN ICESCR Committee Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’ 12 June 2009, at para 16

¹³ E/C.12/GBR/CO/6, ‘UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’, 14 July 2016, at para 23. See also: CRPD/C/GR/CO/1, ‘UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI’, 3 October 2017 at para 17(b); CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’ 14 March 2019, at para 16(a).

¹⁴ CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI’, 14 March 2019, at para 16.

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 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.

3.9 Further, if the EU was to introduce a subsequent EU Directive (that does not amend or replace the Annex 1 Directives) after the end of the transition period, 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, including public services.

3.10 **The Commissions recommend that the Committee calls on the Northern Ireland Executive to progress measures that will:**

- **ensure 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**
- **ensure 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) introduced after the end of the transition period.**

Pet Passport Arrangements

3.11 It will be noted that concerns had been raised by disability stakeholders in Northern Ireland about the potential impact of additional travel restrictions being imposed on Assistance Dog Owners post Brexit in the event of there being no EU/UK agreement reached on this matter before the end of the transition period, including in the event that the UK is listed as a Part II country by the EU for the purposes of pet travel.¹⁵

¹⁵ Inclusive Mobility Transport Advisory Committee, 'Briefing Paper on Pet Passport Arrangements Post-Brexit' (IMTAC, 2020) (unpublished).

- 3.12 The Commissions note that changes to pet passport requirements, post the end of the transition period, announced by the UK Government on 16 December 2020, mean that Great Britain will be listed as a Part II country by the EU for the purposes of pet travel.
- 3.13 This will result in some additional requirements on assistance dog owners travelling from Great Britain to Northern Ireland, including assistance dog owners returning to Northern Ireland from Great Britain.¹⁶ We note that the UK Government is continuing to press the European Commission to secure Part 1 listed status, and the Commissions support the adoption of measures that will remove any additional requirements that adversely impact on assistance dog owners, including any Northern Ireland assistance dog owners returning to Northern Ireland from Great Britain.
- 3.14 The Commissions draw the Committee's attention to the UK Government's commitments under Article 2 and to its obligations under the UNCRPD, and to the need to ensure that there are no adverse impacts on Assistance Dog Owners in terms of requirements on pet passport arrangements post Brexit.
- 3.15 The Commissions recommend the UK Government ensures that there are no adverse impacts on Assistance Dog Owners in Northern Ireland in terms of requirements on pet passport arrangements post the end of the transition period.**

Common Travel Area

- 3.16 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.
- 3.17 In 2018, the NIHRC and the Irish Human Rights and Equality Commission published commissioned 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 its

¹⁶ Department of Agriculture, Environment and Rural Affairs, 'Q&As for Pet Travel from 1 January 2021', available at <https://www.daera-ni.gov.uk/articles/qas-pet-travel-1-january-2021>

terms are much more limited than is often believed to be the case”.¹⁷ 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 should codify “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.

- 3.18 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.¹⁸ 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”.¹⁹
- 3.19 The UK Government and the Government of Ireland have agreed a treaty which codifies the areas relating to social security coordination.²⁰ However, all other rights associated with the Common Travel Area, 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. These arrangements were often underpinned by EU law, however, the ending of the supremacy of EU law in UK domestic law makes this safeguard no longer certain.
- 3.20 **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 exists**

¹⁷ Sylvia de Mars, Colin Murray, Aoife O’Donoghue and Ben Warwick, ‘[Discussion Paper on the Common Travel Area](#)’ (NIHRC and IHREC, 2018), at 11.

¹⁸ [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.

¹⁹ Ibid, para 2 and 17.

²⁰ Convention on Social Security between the Government of the UK and the Government of Ireland 2019. This Convention has not yet entered into force.

during the transition period and that it is incorporated into domestic legislation.

Birthright Commitment

- 3.21 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”.²¹
- 3.22 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.²² 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.²³
- 3.23 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”.²⁴ The Prime Minister stated that a review of immigration rules had been initiated “to deliver a long term solution consistent with the letter and spirit of the Belfast Agreement”.²⁵
- 3.24 In correspondence with the NIHRC, the Home Secretary confirmed that no formal review had taken place and that the conclusion of this work was set out in New Decade, New Approach and the undertaking was limited to changing the rules governing how the people of Northern Ireland bring their family members to the UK. In addition, the Home Secretary confirmed that the UK Government’s position is that “whilst the people of Northern Ireland are entitled to align their legal citizenship with their

²¹ Agreement between the Government of the UK and the Government of Ireland, 10 April 1998, at Article 1(vi).

²² NI Human Rights Commission, ‘[A Bill of Rights for NI – Advice to the Secretary of State for NI](#)’ (NIHRC, 2008), at 41.

²³ NI Office, ‘Consultation Paper: A Bill of Rights for Northern Ireland: Next Steps’ (NIO, 2009), at para 6.6.

²⁴ Theresa May ‘[PM Speech in Belfast](#)’, 5 February 2019.

²⁵ Ibid.

choice of identity if they wish to do so, the Belfast Agreement does not require UK law to provide for this to happen automatically”.²⁶

3.25 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”.²⁷ 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.²⁸ 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.²⁹

3.26 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.

3.27 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.³⁰

3.28 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 recommends that UK nationality and

²⁶ Letter from the Home Secretary, Priti Patel MP to the NI Human Rights Commission, 4 May 2020.

²⁷ NI Office, ‘[New Decade, New Approach](#)’ (NIO, 2020), at Annex A on UK Government Commitments to Northern Ireland, para 13.

²⁸ Home Office, ‘[Statement of Changes in Immigration Rules CP232](#)’ (HO, 2020), at 10.

²⁹ NI Human Rights Commission, ‘[EU Settlement Scheme Extended to the People of NI: What does it Mean for Me?](#)’ (NIHRC, 2020).

³⁰ Alison Harvey, ‘[A Legal Analysis of Incorporating into UK Law the Birthright Commitment under the Belfast \(Good Friday\) Agreement 1998](#)’ (NIHRC and IHREC, 2020).

immigration laws are amended to reflect the birthright commitment to identify, and be accepted, as Irish or British or both without any loss of rights or entitlements.

Rights of Irish citizens

- 3.29 The UK-EU Withdrawal Agreement protects the principle of freedom of movement during the transition period. Any EEA national who exercises free movement rights to come to the UK before 1 January 2021 will have those rights protected under the EU Settlement Scheme, provided they apply before the deadline of 30 June 2021, though this deadline may be extended in certain circumstances.
- 3.30 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 when the UK leaves the EU.³¹ 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.
- 3.31 The Immigration and Social Security Coordination Bill 2019-2021 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 Bill also provides for the deportation of Irish citizens “on grounds that the Irish citizen’s exclusion is conducive to the public good”.³²
- 3.32 EU Citizens’ Directive clarifies that the expulsion of EU citizens, who have the right of permanent residence, or their family members can only happen on “serious grounds of public policy or public security”.³³ The

³¹ 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>

³² New clause 3ZA (2)(a), Immigration Act 1971.

³³ 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.

Court of Justice of the EU has confirmed that any public policy exception, like all derogations from a fundamental principle of the Treaty, “must be interpreted restrictively”.³⁴ The threshold for deportation under EU law is high and requires consideration of the personal conduct of the individual and whether this creates a “genuine and sufficiently serious threat affecting one of the fundamental interests of society”.³⁵

- 3.33 The circumstances in which an EU citizen can be deported from the UK are interpreted more strictly the longer an EU citizen has been in the UK. In the cases of a child under the age of 18 or a person who has resided in the UK for the previous ten years, a decision to deport must be “based on imperative grounds of public security”.³⁶ The Court of Appeal has recognised that this “connotes a very high threshold” and “a higher hurdle for the Secretary of State than ‘serious grounds’ of public security”.³⁷
- 3.34 The substantive and procedural safeguards in the Immigration EEA Regulations 2016 are the current rules which apply to the deportation of Irish citizens.³⁸ The Immigration and Social Security Coordination (EU Withdrawal Act) 2020 lowers this standard and permits the exclusion of Irish citizens when ‘conducive to public policy’.
- 3.35 The Immigration Minister, Kevin Foster MP, confirmed that 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”.³⁹ This position reflects long-standing UK Government policy in relation to deportation of Irish citizens.⁴⁰
- 3.36 Under the law in Ireland, British citizens are exempt from restrictions on entry and residence and from the possibility of deportation.⁴¹

³⁴ *Donatella Calfa*, Case C 348/96, 19 January 1999, at 27.

³⁵ *Ibid*, at 25.

³⁶ 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.

³⁷ *LG (Italy) v Secretary of State for the Home Department* [2008] EWCA Civ 190, at para 32 and 52.

³⁸ Immigration EEA Regulations 2016

³⁹ 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.

⁴⁰ 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.

⁴¹ Aliens (Exemption) Order 1999; Aliens (Amendment) (No. 2) Order, 1999.

- 3.37 Among the stated aim 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”.⁴² 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”.⁴³
- 3.38 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.⁴⁴
- 3.39 **The NIHRC recommends 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.**
- 3.40 **As the Common Travel Area is built on reciprocation of rights and equality of treatment in both jurisdictions the NIHRC recommends 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

- 3.41 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.⁴⁵ EU citizens and EEA migrants who arrive before 1 January 2021 will continue to be entitled to apply to the EU Settlement Scheme before the 30 June 2021.

⁴² [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.

⁴³ *Ibid*, at para 6 and 7.

⁴⁴ The [Belfast \(Good Friday\) Agreement](#), 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights, at para 1.

⁴⁵ Part 3, EU (Withdrawal Agreement) Act 2020.

- 3.42 EU and EEA migrants who arrive 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.
- 3.43 **The NIHRC recommends that there is 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 after January 2021 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

- 3.44 An estimated 23,000 to 29,000 people commute across the Northern Ireland/Ireland border every day for work or study.⁴⁶ Work related trips account for 35 per cent of all cross border crossings.⁴⁷
- 3.45 Under new regulations laid by Government, a new frontier workers' scheme will come into effect after the end of the transition period.⁴⁸ 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 frontier worker who is 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.
- 3.46 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.⁴⁹

⁴⁶ Department for the Economy, 'Background Evidence on the Movement of People Across the Northern Ireland – Ireland Border' (DE, 2018), at 29.

⁴⁷ Andrew Doherty, 'Research Bulletin 18/5 – The Movement of People Across the Northern Ireland – Ireland Border', at 10.

⁴⁸ The Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020

⁴⁹ 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.

3.47 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 for 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 the 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.

3.48 **The NIHRC advises that people living and working across the border are in a particularly vulnerable situation as the transition period ends and recommend 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.**

4.0 Implications of the Protocol for Devolution

4.1 The Committee has sought views on the implications of the Protocol for devolution, including:

- Northern Ireland's position in the UK internal market;
- Northern Ireland's ability to benefit from the UK's post-Brexit trade policy; and
- how the Protocol interacts with the UK's new system of common policy frameworks.

Common frameworks

4.2 In October 2017, the Joint Ministerial Committee agreed "to work together to establish common approaches" in areas governed by EU and to establish common frameworks to "enable the functioning of the UK internal market, while acknowledging policy divergence" and to "ensure compliance with international obligations".⁵⁰

⁵⁰ Cabinet Office, '[Joint Ministerial Committee Communiqué](#)', 16 October 2017.

4.3 In order to protect against inadvertent divergence of equality and human rights standards across the UK, as highlighted in the above section on the implications of the Protocol on citizens' rights, the Commissions consider that the common framework on equality law provides an opportunity for the UK Government to work with the devolved administrations in Scotland, Wales and Northern Ireland to ensure that equality standards are maintained and strengthened across the UK and to ensure compliance with international obligations; including the UK Government's obligations under Article 2 of the Protocol and international human rights conventions, such as the UN Convention on the Rights of Persons with Disabilities (UN CRPD).

4.4 **The Commissions recommend that consideration is given by the UK Government as to how the common frameworks process, including the framework on equality law, could be used to ensure that equality standards are maintained and strengthened across the UK, and so to ensure compliance with international obligations including the UK Government's obligations under Article 2 of the Protocol and international human rights conventions, such as the UN CRPD.**

Post-Brexit trade policy

4.5 As regards Northern Ireland's ability to benefit from the UK's post-Brexit trade policy, in the interests of consistency with the no diminution commitment in Article 2(1) of the Protocol, the Commissions consider that there is a need to ensure that human rights and equality are respected in future trade agreements.

4.6 In terms of equality and human rights protections, the ability of Northern Ireland citizens to benefit from the UK's post-Brexit trade policy will therefore depend on the extent to which our following recommendations are adopted by the UK Government.

4.7 At the time of writing, trade negotiations between the UK and EU remained in deadlock.⁵¹

⁵¹ '[Brexit stalemate: Boris Johnson and Ursula Von Der Leyen seek to break trade deal deadlock](#)', *BBC News*, 5 December 2020; '[Brexit: Boris Johnson to meet Ursula von der Leyen for trade deal talks](#)', *BBC News*, 9 December 2020.

4.8 **The Commissions recommend that:**

- **Human rights impact assessments should be conducted in respect of any future trade agreements, to the standard set out in UN Office of the High Commissioner for Human Rights Guidelines.**
- **Legislation should be passed to preclude conclusion or ratification of any international trade or investment agreement that would require or permit the reduction of any protections for human rights and fundamental freedoms in Northern Ireland, including those relating to non-discrimination and equality, ensured under UK law.**
- **Any future trade agreement with the EU should include a commitment to the non-regression of fundamental rights at work, including rights such as non-discrimination and equal pay, fair working conditions and employment standards, as well as a commitment to keep pace with future EU laws that strengthen equality and human rights in Northern Ireland, including protections that enhance equality and human rights in the workplace.**

5.0 New Legislation and the Protocol

5.1 The Committee has sought views on the implications of new legislation on the operation of the Protocol.

5.2 The Commissions have set out below our concerns and recommendations in relation to the UK Internal Market Bill the UK Government is seeking to introduce and which is currently progressing through Parliament and the potential introduction of a Bill of Rights for Northern Ireland.

UK Internal Market Bill

5.3 Article 4 of the UK-EU Withdrawal Agreement affirms that “this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States”. This

includes the power of domestic courts and tribunals to disapply any laws or provisions of UK law which are inconsistent with the UK-EU Withdrawal Agreement. In addition, any provisions of EU law referred to in the Agreement shall be interpreted in conformity with the general principles of EU law and the relevant case law of the Court of Justice of the EU delivered before the transition period ends. UK courts and tribunals are required to have due regard to such case law. Article 182 makes clear that the Ireland/Northern Ireland Protocol is an integral part of the UK-EU Withdrawal Agreement.

- 5.4 Sections 21-23 of the EU (Withdrawal Agreement) Act 2020 empower UK Ministers and the devolved administrations to make regulations necessary to implement the Protocol. In addition, Section 7A of the EU (Withdrawal) Act 2018 is a residual clause which gives legal effect and enforceability to the UK-EU Withdrawal Agreement, including the Protocol, without the need for any further enactment.
- 5.5 In its White Paper on the Protocol, the UK Government confirmed that “whilst the Protocol is in force, both the UK and EU must respect and abide by the legal obligations it contains, as well as our other international law obligations”.⁵²
- 5.6 On 8 September 2020, the Secretary of State for Northern Ireland confirmed that the UK Internal Market Bill 2019-2020 “does break international law in a very specific and limited way” as it disapplies “the EU law concept of direct effect, required by Article 4, in certain very tightly defined circumstances”.⁵³
- 5.7 On 10 September 2020, the UK Government published its legal position on the UK Internal Market Bill in which it reaffirmed that “it is an established principle of international law that a state is obliged to discharge its treaty obligations in good faith”. However, it went on to emphasise that “Parliament is sovereign as a matter of domestic law and can pass legislation which is in breach of the UK’s Treaty obligations” and that “Parliament would not be acting unconstitutionally in enacting such legislation”.⁵⁴ This legal position further stated that “treaty obligations

⁵² Cabinet Office, [‘The UK’s Approach to the NI Protocol’](#) (Cabinet Office, 2020).

⁵³ UK Parliament Hansard, ‘House of Commons: Northern Ireland Protocol – UK Legal Obligations – Brandon Lewis MP’, 8 September 2020.

⁵⁴ Cabinet Office, [‘HMG Legal Position: UKIM Bill and Northern Ireland Protocol’](#) 10 September 2020.

only become binding to the extent that they are enshrined in domestic law”.⁵⁵

- 5.8 The UK Government was proposing retaining the provisions within the Internal Market Bill 2019-2021 that insulate regulations made under Clauses 44(1) and 45(1) from scrutiny under section 6 of the Human Rights Act. Therefore, if a regulation is in violation of the ECHR, the courts cannot set aside that provision, nor can they provide individual relief to the applicants. The scrutiny of the court is limited to issuing a Declaration of Incompatibility, usually reserved for primary law, and will require the Minister or parliament to take action to remedy the breach.⁵⁶
- 5.9 The Commissions raised concerns about the way in which the UK Internal Market Bill 2019-2020 seeks to limit the scope of the ECHR and stressed that it risks diminishing the commitment in Article 2(1) of the Protocol to ensure there is no diminution of rights, safeguards and equality of opportunity.⁵⁷
- 5.10 In November 2020, the House of Lords voted to remove the controversial clauses, to which the UK Government responded by promising to reinstate the removed clauses when the Internal Market Bill returned to the House of Commons.⁵⁸ On 8 December 2020, a majority of the House of Commons voted to reinstate the controversial clauses.⁵⁹ However, a matter of hours later the UK Government and European Commission released a joint statement on an agreement in principle, which states that “the UK will withdraw clauses 44, 45 and 47 of the UK Internal Market Bill, and not introduce any similar provisions in the Taxation Bill”.⁶⁰ At the time of writing, the agreement in principle and resulting draft texts were subject to respective internal procedures in the EU and the UK. On agreement, a regular meeting of the EU-UK Joint Committee was to be convened before the end of the year to formally adopt the outcome.⁶¹

⁵⁵ Ibid.

⁵⁶ Clauses 47(2), 47(3) and 47(4), UK Internal Market Bill 2019-2021.

⁵⁷ Equality Commission for NI and the NI Human Rights Commission, ‘[Briefing on the Internal Market Bill](#)’ (ECNI and NIHRC, 2020)

⁵⁸ ‘[Brexit: Government’s bill suffers heavy House of Lords defeat](#)’, *BBC News*, 10 November 2020.

⁵⁹ ‘[Brexit: MPs reinsert controversial sections of the Internal Market Bill](#)’, *BBC News*, 8 December 2020.

⁶⁰ UK Cabinet Office, ‘Press Release: Joint Statement by the co-Chairs of the EU-UK Joint Committee’, 8 December 2020.

⁶¹ Ibid.

5.11 Further, on 26 November 2020, the Minister for Climate Change and Corporate Responsibility, Lord Callanan, wrote to Baroness Ritchie confirming that:

the market access principles do not apply to Northern Ireland as they apply to the rest of the UK. This is due to Clause 11 of the [Internal Market] Bill, which makes clear that the application of the principles in Northern Ireland is affected by the Northern Ireland Protocol, and sections 7A, 7C and 8C of the EU (Withdrawal) Act 2018, which implement – and provide powers to implement – the Protocol. Therefore, where the market access principles would ordinarily disapply requirements relating to the sale of goods in a part of the UK (for example, because a requirement is in scope of the non-discrimination principle and meets one of the tests for discrimination as set out in the [Internal Market] Bill), that requirement would not be disapplied if it stemmed from the Northern Ireland Protocol.⁶²

5.12 Lord Callanan continued that “if the Northern Ireland Assembly adopts requirements relating to the sale of goods in Northern Ireland, and those requirements implement legislation applying to Northern Ireland under the Protocol, the Internal Market Bill will not interfere with those requirements”.⁶³

5.13 Lord Callanan clarified that:

if the [Northern Ireland] Assembly were to choose to adopt requirements outside of the Protocol obligations, and those requirements gave rise to harmful and unwanted barriers to trade, then those requirements could be disapplied by the market access principles – and the UK Government considers that to be the right result.⁶⁴

5.14 The Commissions recommend that the agreement in principle reached by the EU and UK Government is fully implemented and the provisions in the Internal Market Bill that limit the scope of

⁶² [Letter from Lord Callanan \(Minister for Climate Change and Corporate Responsibility\) to Baroness Ritchie of Downpatrick](#), 26 November 2020.

⁶³ Ibid.

⁶⁴ Ibid.

the ECHR are removed and will not be reintroduced through any similar provisions in subsequent legislation, such as the Taxation Bill. Furthermore, the Commissions welcome Lord Callanan's clarifications on how the Internal Market Bill relates to the Ireland/Northern Ireland Protocol, but stress that any subsequent legislation or actions should have no adverse effects on the non-diminution obligation under Article 2 of the Protocol.

Draft Parliamentary legislation and judicial proceedings

5.15 The Commissions advise that the commitment in Article 2(1) of the Protocol is directly effective and binds the UK Parliament and Ministers under international law.

5.16 The Commissions consider that there is a need to establish a mechanism/s by which the dedicated mechanism is informed by Government, in a timely manner, of draft Parliamentary legislation introduced after the end of the transition period, which is relevant to the commitment set out in Article 2 of the Protocol, as well as judicial proceedings/decisions that are relevant to the Article 2 commitment.

5.17 This will assist the dedicated mechanism to monitor compliance with the commitment set out in Article 2 of the Protocol, and also assist with ensuring that there is proper and robust scrutiny of draft Parliamentary Bills, including in the area of non-devolved matters.

5.18 **The Commissions recommend that the UK Government:**

- **puts measures in place to ensure that all draft Parliamentary legislation relating to Northern Ireland and relevant to the commitment in Article 2(1) of the Protocol is referred to the Commissions at an early stage to facilitate timely advice, and so as to help ensure compliance with that commitment.**
- **gives consideration to putting in place additional measures so as to ensure that UK Ministers comply with the Article 2(1) of the Protocol's obligation, including consideration being given to introducing a ministerial statement of compatibility.**

- **gives consideration to establishing a mechanism by which the dedicated mechanism is informed, in a timely manner, of judicial proceedings and/or court decisions, including Northern Ireland decisions, relevant to the commitment set out in Article 2 of the Protocol.**

EU Charter of Fundamental Rights and Bill of Rights for NI

- 5.19 The Commissions continue to advise 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.
- 5.20 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”.⁶⁵ 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 2008⁶⁶ 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 2022.⁶⁷
- 5.21 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.

⁶⁵ [Belfast \(Good Friday\) Agreement](#) 1998, at Strand One, para 5(b).

⁶⁶ NI Human Rights Commission, ‘[A Bill of Rights for NI: Advice to the Secretary of State for NI](#)’ (NIHRC, 2008).

⁶⁷ NI Office, ‘[New Decade, New Approach](#)’ (NIO, 2020), at 16.

- 5.22 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 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.
- 5.23 The removal of the supplementary protections of the EU Charter re-highlights the need for a Bill of Rights for Northern Ireland.
- 5.24 **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 will be amplified if the EU Charter no longer has domestic force.**

6.0 Effective Implementation of the Protocol

- 6.1 The Committee has sought views on how the Protocol can be implemented effectively, including in a scenario where no UK-EU future relationship is agreed.

Information exchange on EU legislative developments

- 6.2 The UK Government Explainer on Article 2(1) of the Protocol states that:

in the event that certain provisions of EU law setting out minimum standards of protection from discrimination - those listed in Annex 1 to the Protocol - are updated or replaced by the EU, relevant domestic law in Northern Ireland will be amended, as necessary, to reflect any substantive enhancements to those protections... [And] future developments in best practices in the area of human rights and equalities in the rest of the UK, the EU and the rest of the world will be taken into consideration as the commitment is implemented.⁶⁸

⁶⁸ NI Office, [‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’](#) (NIO, 2020), at para 7.

6.3 The UK-EU Withdrawal Agreement establishes a number of Specialised Committees, including one on issues related to the implementation of the Ireland/Northern Ireland Protocol. The supervision of the Specialised Committees fall under the remit of the Joint Committee.⁶⁹ The Specialised Committee on the Protocol must:

consider any matter of relevance to Article 2 of this Protocol brought to its attention by the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland.⁷⁰

6.4 Under the Protocol, the EU, via its role on the Joint Consultative Working Group, is required to inform the UK of planned EU acts within the scope of the Protocol, including those amending or replacing the EU acts listed in the Annexes to the Protocol. The EU is also required to inform the UK of planned, ongoing and final relevant implementation measures in relation to the Union acts listed in the Annexes to this Protocol.

6.5 The Commissions consider that the Joint Consultative Working Group should introduce formal arrangements to ensure that the dedicated mechanism is kept informed of, for example, all planned and adopted EU acts that amend or replace the Annex 1 Directives in Article 2 of the Protocol.

6.6 The Commissions consider that such arrangements are needed so as to enable the dedicated mechanism to effectively fulfil its monitoring and reporting duties, including in relation to the UK Government's commitment to keep pace with any EU changes to the Annex 1 Directives.

6.7 In addition, such arrangements should ensure that the dedicated mechanism is kept informed, in a timely manner, of any planned, or adopted new EU acts that fall within the scope of the Protocol, that are relevant to the Article 2 commitment, but which neither amend nor replace the Annex 1 Directives.

⁶⁹ Article 164(4)(b), UK-EU Withdrawal Agreement 2020.

⁷⁰ Article 14(c), Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement 2020.

- 6.8 The Commissions note that the EU is required to inform the UK of a new act that falls within the scope of the Protocol, but which neither amends nor replaces a Union act listed in the Annexes, in the Joint Committee.
- 6.9 Furthermore, as the dedicated mechanism to oversee the implementation of the UK Government's commitment to Article 2(1) of the Protocol and as the bodies responsible to advise the Specialised Committee on the Protocol on matters of relevance to Article 2, any such measures should be referred to the NIHRC and ECNI at an early stage of development.
- 6.10 The UK Government and EU should also identify what avenues will be available to the UK Parliament, the devolved administrations, and the Commissions to formally engage with the UK Government and the EU Commission on developments in EU law and policy of relevance to the operation of the Protocol in Northern Ireland.
- 6.11 As mentioned above, both the ECNI and the NIHRC as well as the Joint Committee on of the NIHRC and the IHREC, have the ability under the Protocol to raise matters with the Specialised Committee on the Protocol.
- 6.12 Aligned to the recommendation of the EU Committee,⁷¹ the Commissions consider that there is a need for clarification of how the Specialised Committee will engage with the dedicated mechanism.
- 6.13 This includes clarity on processes to ensure that there is transparency in terms of decisions or recommendations of the Specialised Committee as regards matters raised with it by the dedicated mechanism and/or Joint Committee of the NIHRC and IHREC.
- 6.14 **The Commissions recommend that the UK Government:**
- **ensures that arrangements are put in place whereby the dedicated mechanism will be kept informed, in a timely manner, of any planned, or adopted new EU acts that fall within the scope of the Annex 1 Directives, as well as of EU acts within the Protocol, that are relevant to the Article 2**

⁷¹ House of Lords European Scrutiny Committee, 'The Protocol on Ireland/Northern Ireland' (ESC, 2020), at Recommendations.

commitment, but which neither amend nor replace the Annex 1 Directives.

- **provides clarification as to how the Specialised Committee will engage with the dedicated mechanism.**

Engagement with the Joint Consultative Working Group

- 6.15 The Commissions consider that there is a need to ensure that there is regular and meaningful engagement between the Joint Consultative Working Group and the dedicated mechanism, as well as with equality and human rights stakeholders in Northern Ireland, in relation to the commitment set out in Article 2 of the Protocol.
- 6.16 This should be in addition to the role that the Joint Consultative Working Group may have in keeping the Dedicated Mechanism informed of EU developments relevant to the 'keeping pace' commitment, as referred to above.
- 6.17 The Commissions consider that this engagement will not only assist the dedicated mechanism in fulfilling its duties, but it will also be of value to the work of the Joint Consultative Working Group in its role as a forum for information exchange and for mutual consultation in respect of the Protocol.
- 6.18 Whilst the Commissions recognise that work is ongoing in respect of the establishment and operation of the Joint Consultative Working Group, the Commissions consider it essential that steps are taken to ensure that such engagement with the Joint Consultative Working Group is both regular, and substantive.
- 6.19 In addition, regular engagement between the Joint Consultative Working Group and equality and human rights stakeholders in Northern Ireland will be mutually beneficial to the Joint Consultative Working Group and such stakeholders, including enabling the Joint Consultative Working Group to hear directly any concerns they may have about the implementation of the Protocol.

6.20 The Commissions draw the Committee's attention to the research report by Queen's University Belfast, that recommended that the access of 'experts' to the Joint Consultative Working Group should not be limited to 'officials', but be specified more precisely in terms of interest groups and that such groups must be inclusive of human rights bodies.⁷²

6.21 The Commissions recommend that the UK Government gives consideration to putting in place appropriate arrangements so as to ensure that there is regular and meaningful engagement between the Joint Consultative Working Group and the dedicated mechanism, as well as with equality and human rights stakeholders in Northern Ireland, in relation to the commitment set out in Article 2 of the Protocol.

Access to European equality and human rights networks

6.22 Since the UK left the EU at the end of January 2020, the nature of ECNI's membership of Equinet, the European Network of Equality Bodies, has changed, as the UK is no longer a Member State. As regards the EU Forum on Disability, the nature of its membership has also changed, with the NIHRC no longer able to attend as the UK is no longer an EU Member State.

6.23 In addition, the Commissions consider that the cooperation and collaboration of the dedicated mechanism with independent decentralised agencies of the EU should be facilitated, post the end of the transition period. In particular, the Commissions consider that continued collaboration with the European Union Agency for Fundamental Rights and the European Institute for Gender Equality should be provided for.

6.24 Further, the Commissions consider that the UK Government facilitating the Commissions' continued access to European equality and human rights networks, would be consistent with its commitment under Article 2 (2) of the Protocol as regards the continued facilitation of the work of the Commissions.

⁷² Katy Hayward et al, '[Anticipating and Meeting New Multilevel Governance Challenges in NI After Brexit](#)' (QUB and The UK in a Changing Europe, 2020), at 52.

- 6.25 Importantly, access to, and/or engagement with, relevant EU networks and agencies will also assist the dedicated mechanism in its role of ongoing monitoring of, advocating of, and advising on, developing EU best practice in the area of human rights and equalities.
- 6.26 **The Commissions recommend that the UK Government takes steps, in liaison with the EU, to ensure that the Commissions continue to have access to, and/or engagement with, the relevant European networks and agencies on the similar terms that existed prior to Brexit.**

7.0 Parliamentary Scrutiny

- 7.1 One of Parliament's primary scrutiny functions is hold Ministers to account in the exercise of their powers. The NIHRC has raised concerns about the broad scope of delegated powers to Ministers, which have the potential to impact on the enjoyment of human rights of people living in the UK.⁷³
- 7.2 Article 2(1) of the Protocol commits the UK Government to ensuring there is no diminution of rights, safeguards and equality of opportunity as a result of the UK leaving the EU. The Commissions' powers have been extended to oversee the implementation of this commitment, including to advise on the extent to which legislative or other measures are required to implement Article 2(1) and on the compatibility of laws and policies with article 2(1).
- 7.3 The UK Government has made clear in its Explainer document that the Article 2 commitment is binding on the UK Government and Parliament, as well as the Northern Ireland Executive and the Assembly, as a matter of international law. Further, it highlights that these obligations under international law have now been enshrined in UK domestic law.
- 7.4 As the UK leaves the EU, Parliamentary scrutiny of the implementation of the commitment in Article 2(1) of the Protocol will be an important

⁷³ NI Human Rights Commission, '[Briefing on the Immigration and Social Security Coordination \(EU Withdrawal\) Bill](#)' (NIHRC, 2020).

safeguard against the diminution of rights, safeguards and equality of opportunity.

- 7.5 The Commissions consider that Parliamentary (and Northern Ireland Assembly) Committees, in addition to the dedicated mechanism, should receive notice in a timely manner of planned and adopted EU law within the scope of the Protocol, including relating to the Article 2 commitment.
- 7.6 In addition, the Commissions consider that such Committees should be able to scrutinise any new EU draft legislation that falls within the scope of Article 2, whether or not it amends or replaces EU Directives listed in Annex 1.
- 7.7 The Commissions are aware that a number of Parliamentary Committees have called for additional scrutiny mechanisms to be established, and that discussions are ongoing, including as part of current EU/UK negotiations, in relation to the opportunities that will be available for Parliamentary Committees to scrutinise the implementation and operation of the Protocol.⁷⁴
- 7.8 Further, the Commissions consider that measures should be put in place to facilitate opportunities for the dedicated mechanism to provide expert evidence to relevant Parliamentary Committees, further to its role in monitoring and reporting on the Article 2 compliance. This would also assist in ensuring effective scrutiny of Article 2. Measures should also be put in place to facilitate opportunities for equality and human rights stakeholders in Northern Ireland to raise any concerns in relation to compliance with Article 2 of the Protocol.
- 7.9 **The Commissions recommend that**
- **robust arrangements are established so as to enable effective scrutiny by Parliamentary Committees, including the Northern Ireland Affairs Committee, of the UK Government's compliance with Article 2(1) of the Protocol.**
 - **that relevant Parliamentary Committees, including the Northern Ireland Affairs Committee, provide opportunities for the dedicated mechanism and equality and human rights**

⁷⁴ Evidence of Penny Mordaunt MP to House of Lords EU Scrutiny Committee, 5 October 2020, at Question 29.

**stakeholders in Northern Ireland to engage with the
Committees on matters relating to compliance with the
Article 2 of the Protocol.**

Contact Us

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