

# EU Developments in Equality and Human Rights:

Impact of Brexit on the Divergence of  
Rights and Best Practice on the Island of  
Ireland: Update Paper on Developments  
post January 2022

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**November 2024**

Equality Commission

FOR NORTHERN IRELAND



Coimisiún na hÉireann um Chearta  
an Duine agus Comhionannas  
Irish Human Rights and Equality Commission



NORTHERN IRELAND  
HUMAN RIGHTS  
COMMISSION



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This report was commissioned by the Equality Commission for Northern Ireland (ECNI) further to its role, with the Northern Ireland Human Rights Commission (NIHRC), as the Dedicated Mechanism under Article 2(1) of the Ireland/Northern Ireland Protocol. This paper was written by Sarah Craig, Claire Lougarre and Rory O’Connell for the Equality Commission for Northern Ireland, the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission. The views expressed within this paper are those of the authors and do not necessarily represent the views of the Equality Commission for Northern Ireland, the Northern Ireland Human Rights Commission or the Irish Human Rights and Equality Commission, nor the employers of the authors. Responsibility for any statements, errors or omissions in this report rests with the authors. This paper is not intended to be relied upon as legal advice applicable to any individual case.

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## List of Abbreviations

<b>AG</b>	Advocate General
<b>BGFA</b>	The Good Friday or Belfast Agreement, 1998
<b>CEO</b>	Chief Executive Officer
<b>CFR</b>	Charter of Fundamental Rights of the European Union
<b>CJEU</b>	Court of Justice of the European Union
<b>ECHR</b>	European Convention on Human Rights
<b>ECNI</b>	Equality Commission of Northern Ireland
<b>EU</b>	European Union
<b>EWHC</b>	England and Wales High Court
<b>GDPR</b>	General Data Protection Regulation
<b>HRBA</b>	Human Rights Based Approach
<b>IHREC</b>	Irish Human Rights and Equality Commission
<b>ISEQ20</b>	Ireland Overall Stock Exchange Index
<b>LGBTI+</b>	Lesbian, Gay, Bisexual, Transgender, Intersex, Plus
<b>NDICI</b>	Neighbourhood, Development and International Cooperation Instrument
<b>NI</b>	Northern Ireland
<b>NICA</b>	Northern Ireland Court of Appeal
<b>NIHRC</b>	Northern Ireland Human Rights Commission
<b>NIKB</b>	Northern Ireland King's Bench
<b>NIQB</b>	Northern Ireland Queen's Bench
<b>NISRA</b>	Northern Ireland Statistics and Research Agency
<b>SPUC</b>	Society for the Protection of Unborn Children
<b>TCA</b>	Trade and Cooperation Agreement
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UK</b>	United Kingdom
<b>UKSC</b>	United Kingdom Supreme Court
<b>UN</b>	United Nations
<b>UNGA</b>	United Nations General Assembly
<b>WF</b>	Windsor Framework
<b>WFDSC</b>	Windsor Framework Democratic Scrutiny Committee

# List of Key Terms

## **1998 Agreement**

The Good Friday or Belfast Agreement, 1998.

## **Article 2**

Article 2 of the Protocol on Ireland / Northern Ireland, now called the Windsor Framework.

## **Dynamic alignment (also keeping pace)**

The requirement to amend law in Northern Ireland to ensure it has the same effect as any amendments to or replacements of EU law under Windsor Framework.

## **Exit day**

31 December 2020, the day on which the UK ceased to be a member of the EU.

## **Joint Committee**

The EU-UK Joint Committee established under the Withdrawal Agreement.

## **Keeping pace**

The requirement to amend law in Northern Ireland to ensure it has the same effect as any amendments to or replacements of EU law under the Windsor Framework.

## **Lords Sub-committee**

The House of Lords Sub-committee on the Protocol, now the House of Lords Sub-committee on the Windsor Framework.

## **Transition period**

The period from 1 February 2020 to 31 December 2020, during which EU law generally still applied within the UK according to the terms of the Withdrawal Agreement, Article 127.

## **Schengen acquis**

This refers to the laws which permit people to travel across Schengen countries without checks. Ireland is not a member of Schengen.

**Specialised Committee**

The Specialised Committee is established by Article 165 of the Withdrawal Agreement and facilitates the implementation and application of the Windsor Framework.

**Static alignment**

The requirement not to diminish the protections offered by certain EU laws in Northern Ireland as they existed prior to the end of the transition period.

**Stormont Brake**

The mechanism in the Windsor Framework for the UK Government to veto the application of new EU law to Northern Ireland modelled on the petition of concern process in the Assembly.

**Windsor Framework**

Formerly the Protocol on Ireland/Northern Ireland, and including the new provisions adopted under the Windsor Framework Agreement.

**Windsor Framework Democratic Scrutiny Committee**

The Assembly Committee established following the adoption of the Windsor Framework to help scrutinise new EU legislation that may apply in Northern Ireland under Article 13(3a) and (4) of the Windsor Framework.

# Executive Summary

This report examines issues of divergence in the protection of rights and equality on the island of Ireland focusing on the period from 1 January 2022 to 31 August 2023 (though includes some more recent developments). It updates an initial report on divergence<sup>1</sup> and we generally do not replicate the recommendations in that initial report, except where we wish to draw attention to subsequent developments or outstanding issues. We include our most significant recommendations in this Executive Summary. We do not include all our recommendations in this Executive Summary – see the full chapters or the full list of recommendations at the end of the report.

## Introduction and Background

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The Belfast or Good Friday Agreement (BGFA or the 1998 Agreement)<sup>2</sup> includes significant human rights and equality protections, many of which are underpinned by European Union law as recognised in the Brexit negotiations. The 1998 Agreement also contains a principle of equivalence and while the specific reference appears limited to the need for Ireland to maintain a level of protection equivalent to that in Northern Ireland, the wider context of the Agreement suggests the desirability of equivalence in rights protection on the island of Ireland.

The Protocol on Ireland / Northern Ireland (now called the Windsor Framework<sup>3</sup>) provides legal protections for the rights of the individual in its Article 2. This includes dynamic alignment in relation to 6 equality directives in Annex 1 and the non-diminution principle in relation to other EU law underpinning the rights in the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement. By virtue of Article 4 of the Withdrawal Agreement<sup>4</sup> and section 7A of the European Union (Withdrawal) Act,<sup>5</sup> these protections have a status equivalent to EU law in the European Union that is, people can rely on directly effective provisions

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- 1 Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, [European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (2022).
  - 2 [Belfast Good Friday Agreement 1998](#), Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, Preamble.
  - 3 The term 'Windsor Framework' refers to what was originally called the Protocol on Ireland/Northern Ireland; we use the term 'Protocol' where necessary for historical reasons.
  - 4 Article 4 reads:
    1. The provisions of 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.  
Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.
    2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.
  - 5 European Union (Withdrawal) Act 2018, [section 7A](#).

of the Withdrawal Agreement and the UK must allow for the disapplication of inconsistent domestic law including inconsistent acts of parliament. The Protocol<sup>6</sup> provides that case law of the Court of Justice of the European Union continues to be relevant in interpreting EU law or concepts mentioned in the Protocol.

Following some controversy over the free movement of goods parts of the Protocol, the UK and EU agreed new arrangements at Windsor in 2023, including renaming the Protocol the Windsor Framework.<sup>7</sup> The new arrangements introduced the Stormont Brake procedure modelled on the petition of concern process in the Assembly. While this does not apply to the Annex 1 directives or measures amending or updating Annex 1 directives, it does apply to measures updating or amending Union acts in other annexes and proposals to add new measures to the annexes (which does apply to the Annex 1 Directives). While the political agreement at Windsor includes provisions amending the Protocol, there does not appear to be a consolidated version of the Protocol (Windsor Framework). This is harmful to the clarity of the law as it is necessary to cross-reference different legal measures to understand the legal position.

**We recommend that that EU and UK publish a consolidated version of the Windsor Framework text.**

The political agreement at Windsor did not solve all disputes about the operation of the Protocol but in 2024 the Government published a command paper *Safeguarding the Union* which paved the way for the return of devolved institutions.<sup>8</sup> The command paper though contains brief and misleading comments on the scope and implications of Article 2 WF.<sup>9</sup>

Article 2 WF also recognises the role of the Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland (ECNI) as well as the joint committee of the two human rights commissions on the island. The UK Government has designated the first two as the ‘dedicated mechanism’ mentioned in Article 2 WF. The Commissions have played a significant role in publishing research, policy positions and consultation responses relating to Article 2 WF as well as intervening in cases; they collaborate with the Irish Human Rights and Equality Commission where there are all-island dimensions to rights protection. The Commissions’ work has provided guidance in the issues of equivalence and the risk of divergence as well as providing a systematic study of the scope of Article 2 WF. There is apparent disagreement between the UK Government and Commissions on this scope. The high court judgment in the

6 [EU-UK Withdrawal Agreement, including the Protocol on Ireland/Northern Ireland](#) 2019, Article 13(2).

7 UK Government, [The Windsor Framework: A New Way Forward](#) CP 806 (February 2023).

8 UK Government, [Safeguarding the Union](#) (2024) CP 1021.

9 See below section 1.2.5.

*Legacy Act cases (Dillon and others)* supports the proposition that Article 2 WF and the 1998 Agreement require a ‘generous and purposive’ interpretation.<sup>10</sup>

## Human Rights and Equality Developments in Northern Ireland and the United Kingdom since January 2022 and the Risk of Divergence

In Northern Ireland the institutions had been non-operational for most of the period under review and so there are few developments to comment on. One significant development was the consultation on the reform of the Race Relations Order. This was a welcome initiative during a moribund period though the consultation did not adequately consider Article 2 WF or EU developments or the current review of Irish equality legislation.

**We recommend that the Executive Office explicitly refer to, and consider, the Windsor Framework obligations in its work on the Race Relations Order. This should include reference to relevant CJEU case law.**

**We recommend that the Executive Office and other relevant NI Departments consider any plans for amendments to EU law where they may trigger the keeping pace requirement because they amend or replace an Annex 1 directive or may represent an opportunity for voluntary alignment to ensure best practice in the protection of rights and equality.**

**We recommend that the Executive Office and other relevant NI Departments consider any proposals for amendments to the Irish equality legislation where they highlight a risk of divergence of rights or an opportunity for voluntary alignment to strengthen rights and reflect international human rights standards and best practice.**

We also examine legislation from the United Kingdom Parliament. Several pieces of legislation raise significant issues about human rights and equality protections, including Article 2 WF obligations and related steps to disapply Human Rights Act protections. Given the centrality of the European Convention on Human Rights to the 1998 Agreement including the commitment to make its rights directly enforceable, efforts to disapply the Human Rights Act or significant parts of it are troubling in the context of the 1998 Agreement system.

<sup>10</sup> [The Legacy Act cases \(Dillon and others\)](#); *In the matter of an application by Martina Dillon, John McEvoy and Lynda McManus for judicial review; in the matter of an application by Brigid Hughes to apply for judicial review; in the matter of an application by Teresa Jordan for judicial review; in the matter of an application by Gemma Gilvary for judicial review; and in the matter of an application by Patrick Fitzsimons for judicial review; and in the matter of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023* [2024] NIKB 11, (28 February 2024).

**We recommend that the UK Government introduce amendments into Parliament to amend any enacted legislation that has included provisions limiting the application of section 3 of the Human Rights Act to remove that limitation.**

We note problems identified by civil society, the NIHRC and ECNI and parliamentary committees about the Nationality and Borders Act 2022,<sup>11</sup> the Elections Act 2022,<sup>12</sup> the Illegal Migration Act 2023,<sup>13</sup> the Safety of Rwanda (Asylum and Immigration) Bill (now the Safety of Rwanda Act),<sup>14</sup> the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023,<sup>15</sup> the Data Protection and Digital Information (No 2) Bill,<sup>16</sup> and the Victims and Prisoners Bill 2023 (now Victims and Prisoners Act 2024).<sup>17</sup> These all raise serious issues of compatibility with Article 2 WF. The High Court has already had occasion to disapply sections of the Legacy Act and Illegal Migration Act due to incompatibility with Article 2 WF. We make a number of **recommendations in Chapter 2, section 2.3 concerning these legislative provisions.**

On a more procedural matter, we are concerned that legislative proposals from the Government frequently do not show any evidence that the Government has adequately considered possible Article 2 WF issues. Correspondence from the UK Government to the Lords Sub-committee indicates that departments are working to provide an account of retained EU law, including where retained EU law falls within the scope of Article 2 WF.<sup>18</sup> We are struck by the relative inattention that legislators and policymakers in Northern Ireland and especially at UK level seem to give to Article 2 WF.

**We recommend that, in the interests of transparency, the Government publish details of its account of retained EU law, including details on the methodology used to identify relevant issues.**

**We recommend that the Government ensure that the Explanatory Notes for any draft legislation impacting on Northern Ireland explicitly state, in detail, whether the Government considers that Article 2 WF is engaged by the proposals and if so, how the draft legislation respects the keeping pace and non-diminution aspects of Article 2 WF.**

11 [Nationality and Borders Act 2022.](#)

12 [Elections Act 2022.](#)

13 [Illegal Migration Act 2023.](#)

14 [Safety of Rwanda \(Asylum and Immigration\) Bill 2023.](#)

15 [Northern Ireland Troubles \(Legacy and Reconciliation\) Act 2023.](#)

16 [Data Protection and Digital Information \(No 2\) Bill.](#)

17 [Victims and Prisoners Bill 2023.](#)

18 House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, [Letter from Nusrat Ghani MP \(Minister of State for Industry and Economic Security at the Department for Business and Trade\) re: Retained EU Law \(Revocation and Reform\) Bill \(now Act\), 11 September 2023](#) (House of Lords, 2022-2023) (11 September 2023).



## Human Rights and Equality Developments in Ireland since January 2022 and the Risk of Divergence

After the pandemic the Government of Ireland announced an ambitious programme of economic and social reform.

One significant possible development is the review of Ireland's equality legislation. Ireland has two single equality acts (one for employment and one for goods, facilities and services). This already represents a significant divergence with respect to Northern Ireland where equality legislation is fragmented across numerous different sources. The consultation on the Irish legislation has prompted several suggestions for improvements to the legislation which, if implemented, would increase divergence and mean that Northern Ireland was not aligning with best practice on the island of Ireland: see our recommendation above for the NI Executive and relevant departments to monitor Irish legislative proposals to reform Irish equality law.

Ireland must implement several EU directives in the area of gender. These address pay transparency and equal pay, work-life balance and gender balance on boards. All these measures are crucial for gender equality. The Pay Transparency Directive has important commitments on improving equal pay which is directly relevant to an Annex 1 directive<sup>19</sup> and the ECNI and NIHRC have concluded that it triggers the keeping pace requirement in Article 2 WF.<sup>20</sup> The Work-Life Balance Directive will assist in addressing the division of care labour in the home which is central to gender equality objectives. Improving gender balance on boards will also contribute to better decision-making in listed companies (see below for our recommendations on these directives).

In several areas we are concerned that issues raised in the initial divergence report highlighting significant problems of divergence have not been addressed - for example on age discrimination and gender identity. It remains necessary to address these.

In some instances, Irish law would seem to fall short of EU standards and fall short of standards achieved in Northern Ireland.

**We recommend that the Irish Department for Children, Equality, Disability, Integration and Youth include proposals to amend Irish law on 'religious belief' to include 'religion or belief' to bring it into line with EU law.**

19 [Council Directive 2006/54/EC](#) of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, recast 2006.

20 Equality Commission for Northern Ireland and Northern Ireland Human Rights Commission, [The EU Pay Transparency Directive: The UK Government's dynamic alignment obligations relating to Windsor Framework Article 2](#) (ECNI and NIHRC, 2024).

**We recommend that the Government of Ireland include proposals to amend the equality acts provisions on the religious ethos exemption to bring them into line with EU standards.**

**We recommend the Government of Ireland consider, as part of its Adequate Minimum Wage Directive Action Plan, legislation on statutory recognition of trade unions, bearing in mind the Northern Ireland model.**

As well as these substantive points, we note with concern that the authorities in Northern Ireland and Ireland often seem to put forward proposals without necessarily considering legal developments in the other jurisdiction. This is problematic in terms of respect for the concept of equivalence in the 1998 Agreement, as well as undesirable on pragmatic grounds that there may frequently be cross-border issues to consider.

**We recommend that the Northern Ireland Executive and the Government of Ireland consider how to ensure more systematic mutual consideration of legal developments in both jurisdictions to avoid divergence of rights on the island of Ireland post-Brexit, to facilitate equivalence, to strengthen rights and reflect international human rights standards and best practice.**

## **Tracking EU Legal Developments since January 2022: Adopted and Proposed Directives and Regulations**

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We systematically examined EU legislative developments between January 2022 and August 2023 to identify legislation which the EU has adopted or has proposed which could potentially amend or update an Annex 1 directive or which do not potentially amend an Annex 1 directive but have human rights and equality implications. EU legislative measures amending or updating an Annex 1 directive would trigger the keeping pace requirement in Article 2 WF. EU measures which do not amend or update an Annex 1 Directive may be relevant as raising an issue of possible voluntary alignment as best practice and to enhance and strengthen rights in NI.

The legislative measures identified in the chapter which relate to human rights and equality primarily relate to the right to health (including the right to a healthy environment), the right to privacy (including the right to data protection) and gender discrimination. We make several recommendations regarding EU measures on the right to health to ensure access to medical products in Northern Ireland, to guarantee control of personal medical data, and to improve responses to serious cross-border health threats. The EU has also adopted measures related to data in relation to the exchange of information regarding cross-border criminal activity

and in relation to the protection of personal data in criminal or related civil or administrative procedures. We make several recommendations regarding the need for relevant authorities in Northern Ireland to cooperate with Ireland in compliance with such requirements, and to better protect personal data in legal proceedings.

Since we consider that these measures fall within the scope of Article 2 WF and raise (potential) issues of divergence through the principle of non-diminution of rights (especially given their relevance to cross-border cooperation), we suggest that the Northern Ireland Executive should review these developments to see if voluntary alignment is desirable.

Several of these measures amend or replace Annex 1 directives and so Northern Ireland law must dynamically align with these Directives further to obligations relating to Article 2 WF. We make the following recommendations to ensure compliance with Article 2 WF and to avoid divergence:

**We recommend that the NI Executive and relevant NI Departments bring into force the necessary measures to comply with the requirements set by the Pay Transparency Directive EU Directive 2023/970 by June 2026.**

**We agree with the ECNI and NIHRC recommendation that all relevant portions of the Pay Transparency Directive should be transposed into Northern Ireland law, further to obligations in the WF.**

**We recommend that the UK Government, NI Executive and relevant departments bring into force the necessary measures to comply with any requirements set by the Equality Bodies Directives on gender equality in the workplace and on equal treatment in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation and gender equality in social security and goods and services further to obligations in the WF.**

There have also been other significant measures in relation to equality and rights which are closely related to the Annex 1 directives. These concern, notably; work-life balance; gender balance among directors of listed companies; violence against women and domestic violence; and adequate minimum wages. We consider that these measures fall within the scope of Article 2 WF and the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement and raise (potential) issues of divergence. We recommend voluntary alignment and further consideration as to whether the directives amend or replace an Annex 1 directive:

**We recommend that the Department for the Economy, as a matter of voluntary alignment, introduce legislation mirroring the provisions of the Work-Life Balance Directive where these strengthen rights and reflect international human rights standards and best practice insofar as they are not part of Northern Ireland law.**

**We recommend that the Department for the Economy should ensure that NI law voluntarily aligns with the requirements of the Gender Balance on Boards Directive where these strengthen rights and reflect international human rights standards and best practice.**

**We recommend that the ECNI and NIHRC conduct an analysis to determine if the Gender Balance on Boards Directive amends or replaces an Annex 1 directive.**

**We recommend that the NI Executive and relevant departments implement the standards in the Violence Against Women and Domestic Violence Directive to the extent that these strengthen rights and reflect international human rights standards and best practice.**

**We recommend that the ECNI and NIHRC conduct an analysis to determine if the Violence Against Women and Domestic Violence Directive amends or replaces an Annex 1 directive.**

**We recommend that the UK Government and NI Executive implement the standards in the Adequate Minimum Wages Directive, as a matter of voluntary alignment, to the extent that these strengthen rights and reflect international human rights standards and best practice.**

**We recommend that the ECNI and NIHRC conduct an analysis to determine if the Adequate Minimum Wages Directive amends or replaces an Annex 1 directive.**

The EU is considering legislative proposals to protect certain vulnerable groups including victims of trafficking and children in relation to child sexual abuse online. These initiatives are important in the context of the open border on the island of Ireland.

**We recommend the UK Government and relevant NI Executive monitor EU measures to combat trafficking in human beings and proposals to combat child sexual abuse online with a view to assessing whether Northern Ireland law needs amendment to reflect best international practice and deal with cross-border challenges. We recommend voluntary alignment in order to strengthen rights and to reflect international human rights standards and best practice.**

## Domestic Case Law Developments since January 2022

The outworkings of Brexit and the Withdrawal Agreement has created a somewhat complex picture where the role of EU law and concepts, the role of the CJEU and the status of EU law will differ depending on whether courts are dealing with retained (or assimilated) EU law, dealing with the Withdrawal Agreement or dealing with the Windsor Framework including Article 2 WF. When dealing with the Withdrawal Agreement, courts are bound by CJEU case law handed down prior to the end of the Brexit implementation period while they must have due regard to later CJEU case law. Withdrawal Agreement domestic cases therefore may still refer to matters like the Charter of Fundamental Rights in appropriate cases. In Northern Ireland the obligation is stronger due to the Windsor Framework: as courts must continue to rely on CJEU case law interpreting relevant EU law and legal concepts even if the CJEU case law postdates the end of the implementation period.

We examine important case law interpreting Article 2 WF in this chapter. The Court of Appeal *SPUC case*<sup>21</sup> critically established a six-element test for the application of Article 2 WF. The subsequent High Court *Angesom case*<sup>22</sup> establishes that asylum-seekers are members of the community for the purposes of Article 2 WF; it also rejects a UK Government attempt to limit the relevance of the 1998 Agreement provisions on rights to the context of the conflict in 1998.

In the *Legacy Act cases (Dillon and others)*,<sup>23</sup> the High Court for the first time (under the Windsor Framework) has disapplied sections of an Act of Parliament, a possibility contemplated by Article 4 of the Withdrawal Agreement and section 7(a) of the European Union (Withdrawal) Act 2018. Significantly the *Legacy Act cases (Dillon and others)* provides that the courts must adopt a ‘generous and purposive’

21 [In re SPUC Pro-Life Ltd \(Abortion\)](#) [2022] NIOB 9, (8 February 2022) and [In re SPUC Pro-Life Ltd \(Abortion\)](#) [2023] NICA 35, (25 May 2023).

22 [In the matter of an application by Aman Angesom for judicial review and in the matter of a decision by the Secretary of State for the Home Department, Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland intervening](#) [2023] NIKB 102, (18 October 2023).

23 [The Legacy Act cases \(Dillon and others\)](#); *In the matter of an application by Martina Dillon, John McEvoy and Lynda McManus for judicial review; in the matter of an application by Brigid Hughes to apply for judicial review; in the matter of an application by Teresa Jordan for judicial review; in the matter of an application by Gemma Gilvary for judicial review; and in the matter of an application by Patrick Fitzsimons for judicial review; and in the matter of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023* [2024] NIKB 11, (28 February 2024).

approach to interpreting Article 2 WF and the 1998 Agreement section on Rights, Safeguards and Equality of Opportunity. This case is currently under appeal to the Court of Appeal. The High Court has also subsequently disapplied significant portions of the Illegal Migration Act, again confirming that the 1998 Agreement and Article WF protect the rights of everyone in the community, including asylum-seekers.<sup>24</sup>

## CJEU Case Law that Relates to the Windsor Framework Annex 1 Directives since January 2022

We examine the CJEU case law in relation to the Annex 1 directives since January 2022. The UK courts must implement and apply the six equality directives in Annex 1 in respect of Northern Ireland law in conformity with CJEU case law.

*EB v BVAEB*<sup>25</sup> concerned an Austrian law capping inflationary adjustments for high earners; this disproportionately affected men who brought an indirect discrimination claim. The Court ultimately rejected the claim. In so doing it highlights the importance of social justice arguments as a justification for restriction of the benefits. It scrutinises the justification closely and appears willing to accept there is prima facie indirect discrimination on the basis of relatively simple statistical evidence. Importantly, if only implicitly, the Court seems open to a more contextual approach, recognising that part of the justification for the Austrian measure is the long-standing inequality experienced by women as regards pay.

*J.K. v TP S.A.*<sup>26</sup> clarifies the personal and material scope of the prohibition on sexual orientation discrimination. It specifies that the prohibition applies to self-employed workers in the context of a legal relationship characterised by a degree of stability. It also clarifies that freedom of contract cannot be used to justify a refusal on grounds of sexual orientation to conclude or renew a contract concerning the performance of specific work.

*HR Raii*<sup>27</sup> has strengthened protections for persons with disabilities by specifying that genuine occupational requirements exemption cannot justify an absolute bar on employment; reasonable accommodation measures are required in such cases.

*CJ v TGSS*<sup>28</sup> offers important protection for domestic workers. The CJEU holds that a Spanish rule excluding domestic workers (the vast majority of them female) from unemployment benefit is unjustified indirect sex discrimination.

24 Northern Ireland Human Rights Commission's Application and JR295's Application and In the matter of The Illegal Migration Act 2023; [2024] NIKB 35, (13 May 2024) ([Illegal Migration Act case](#)).

25 C-405/20, [EB v BVAEB](#), judgment of 5 May 2022, ECLI:EU:C:2022:347.

26 C-356/21 [J.K. v TP S.A.](#), judgment of 12 January 2023, ECLI:EU:C:2023:9.

27 C-485/20 [HR Rail](#), judgment of 10 February 2022, ECLI:EU:C:2022:85.

28 C-389/20 [CJ v TGSS](#), judgment 24 February 2022, ECLI:EU:C:2022:120.

Despite the decline in the number of cases, these cases arguably demonstrate a concern to support more substantive notions of equality with their recognition of existing factual and material inequality and the need for social justice arguments and reasonable accommodation measures to support substantive equality.

**We recommend that there needs to be continued monitoring and tracking of CJEU case law by the UK Government, NI Executive and NI Departments to ensure compliance with the Annex 1 Directives.**

## Tracking EU Policy Developments and Initiatives since January 2022

We review EU policy developments since January 2022. These policies may be relevant in at least two ways. First the policies often include a wide suite of activities including legislative developments some of which may trigger the Article 2 WF keeping pace or dynamic alignment requirement. Second even where this is not the case, they may point to examples of possible divergence in rights on the island of Ireland should Ireland adopt measures in light of EU policies and so may represent an opportunity for voluntary alignment to reflect best practice.

The European Commission has adopted five strategies as part of its Union of Equality commitments. These represent a wide-ranging series of initiatives across the different protected characteristics. We note especially the Gender Action Plan<sup>29</sup> and Gender Equality Strategy,<sup>30</sup> the Anti-Racism Action plan,<sup>31</sup> the Roma Strategic Framework,<sup>32</sup> the LGBTIQ Equality Strategy<sup>33</sup> and the Strategy for the Rights of Persons with Disabilities.<sup>34</sup> These are wide-ranging plans which identify many different types of action to pursue equality, including legislative actions which may amend or update Annex 1 directives.

**We recommend that the Department for Communities, and other relevant NI Departments, consider developments in EU Gender policy where this may raise issues of Article 2 WF requirements or with which Northern Ireland may wish to voluntarily align where it strengthens rights and reflects international human rights standards and best practice.**

29 European Commission, [Gender equality and empowering women and girls](#); and European Commission, [EU Gender Action Plan III](#) (2020).

30 European Commission, [Gender equality strategy](#).

31 European Commission, [A Union of Equality: EU Anti-racism Action Plan 2020-2025](#) (2020).

32 European Commission, [EU Roma Strategic Framework for Equality, Inclusion and Participation for 2020 - 2030](#) (2020).

33 European Commission, [Union of Equality: LGBTIQ Equality Strategy 2020-2025](#) (2020).

34 European Commission, [Union of Equality: Strategy for the rights of persons with disabilities 2021-2030](#) (2020).

**We recommend that the Executive Office consider developments in the EU Anti-Racism Action Plan and Roma Strategic Framework where this may identify best practice with which Northern Ireland may wish to voluntarily align where it strengthens rights and reflect international human rights standards.**

**We recommend that the Executive Office consider developments in the LGBTIQ Equality Strategy where this may identify examples of best practice with which Northern Ireland may wish to voluntarily align where they strengthen rights and reflect international human rights standards.**

**We recommend that the Executive Office consider developments in the Strategy for the Rights of Persons with Disabilities 2021-2030 where this may identify best practice with which Northern Ireland may wish to voluntarily align where they strengthen rights and reflect international human rights standards.**

We also note European Union plans to address the position of groups who are vulnerable such as children,<sup>35</sup> migrants and asylum-seekers<sup>36</sup> and trafficking victims.<sup>37</sup>

**We recommend that the Northern Ireland Department of Justice review the EU strategy on victims' rights to identify examples of best practice that could strengthen rights and reflect international human rights standards and best practice.**

**We recommend relevant NI departments review EU policy developments aimed at protecting the rights of all children, including combating child poverty, securing vulnerable children's access to basic services, including children living in poverty, children with disabilities and special educational needs, children refugees and children in care, with a view to taking measures that strengthen rights and reflect international human rights standards and best practice.**

35 European Commission, [The EU Strategy on the Rights of the Child and the European Child Guarantee](#).

36 European Commission, [Migration and Home Affairs](#).

37 European Commission, [EU Strategy on Combatting Trafficking in Human Beings \(2021-2025\)](#).



# Chapter 1: Introduction and Background

## 1.1 Introduction

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The 1998 Belfast or Good Friday Agreement (the 1998 Agreement or BGFA) contains extensive references to human rights and equality in Northern Ireland and on the island of Ireland and includes a reference to the concept of equivalence of rights on the island.

The UK's exit from the European Union always had the potential to reduce the protections for human rights and equality in Northern Ireland and to produce divergence in the protection of rights north and south, undermining the equivalence of rights on the island. As we elaborate on later, this reduction in rights protection and consequent risk of divergence has occurred.

Article 2 Windsor Framework (WF) provides some protections against divergence though there remains considerable potential for divergence in rights and equality protections on the island of Ireland following the UK's exit. Many of these have been highlighted in the initial divergence report commissioned by the Equality Commission for Northern Ireland, Northern Ireland Human Rights Commission, and the Irish Human Rights and Equality Commission<sup>38</sup> and the policy recommendations of the Equality Commission for Northern Ireland, Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission.<sup>39</sup>

The judgment in the *Legacy Act cases (Dillon and others)* demonstrates the relevance and potency of the Article 2 WF protections for human rights.<sup>40</sup> In that case the High Court disapplied parts of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, relying on the Windsor Framework which provides protections for the European Union law underpinnings of the rights, safeguards and equality of opportunity provisions of the 1998 Agreement.<sup>41</sup> The importance of Article 2 WF for protecting human rights in areas of politically sensitive policy was reaffirmed in the *Illegal Migration Act case* where the High Court disapplied significant portions of the Act.<sup>42</sup>

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38 Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, [European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (2022).

39 Equality Commission for Northern Ireland, Irish Human Rights and Equality Commission and Northern Ireland Human Rights Commission, [Policy Recommendations: European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (ECNI, IHREC and NIHRC, 2023).

40 [The Legacy Act cases \(Dillon and others\)](#) [2024] NIKB 11, (28 February 2024).

41 [Belfast Good Friday Agreement 1998](#), Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, Preamble.

42 Northern Ireland Human Rights Commission's Application and JR295's Application and In the matter of The Illegal Migration Act 2023; [2024] NIKB 35, (13 May 2024) ([Illegal Migration Act case](#)).

This current report considers the implications of Article 2 WF for Northern Ireland and issues of divergence in the protections of rights and equality on the island of Ireland, since January 2022, and aims to update the initial divergence report which analysed the impact, and/or potential impact, of Brexit as regards the divergence of equality and human rights protections and EU best practice on the island of Ireland. It is based on a mapping exercise covering the period 1 January 2022 to 31 August 2023 but has been updated to include some important developments after 31 August 2023.

## 1.2 Background

### 1.2.1 The 1998 Agreement

The 1998 Belfast or Good Friday Agreement (1998 Agreement or BGFA) contains extensive provisions on rights and equality especially in the section on Rights, Safeguards and Equality of Opportunity. The BGFA includes a ‘commitment to the mutual respect, the civil rights and religious liberties of everyone in the community’, and a list of some rights affirmed ‘in particular’; the use of the phrase ‘in particular’ indicates the list of rights is non-exhaustive.<sup>43</sup> The international treaty between the two states (UK and Ireland) affirms the states’ commitment ‘to the protection of civil, political, social, economic and cultural rights in their respective jurisdictions’.<sup>44</sup> This is a reference to the full gamut of rights recognised in international human rights law.

In the 1998 Agreement, the UK undertakes to implement certain protections including incorporation of the European Convention on Human Rights (ECHR), the adoption of an equality mainstreaming duty, work on a Bill of Rights, and the creation of rights-based institutions such as the NIHRC and ECNI.

Ireland also promises to strengthen the protection of human rights in its jurisdiction and especially to bring forward measures to ‘ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland’.<sup>45</sup> While this equivalence reference is specific to Irish steps, other aspects of the Agreement suggest that equivalence of rights protection on the island of Ireland is desirable: the commitments in the opening paragraph of the section are not specific to either jurisdiction, there is reference to joint work by the two human rights commissions on the island and the possibility of an all-island charter of rights.<sup>46</sup> The three Commissions therefore point to a ‘broad expectation of equivalence in rights protection in Ireland as in Northern Ireland’.<sup>47</sup>

43 Alison Harvey, [Article 2 of the Windsor Framework and the Rights of Refugees and Asylum-seekers](#) (Northern Ireland Human Rights Commission, 2023) 10.

44 [Belfast Good Friday Agreement 1998](#), Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, Preamble.

45 [Belfast Good Friday Agreement 1998](#), Rights, Safeguards and Equality of Opportunity, 9.

46 *Ibid.*, 10.

47 Irish Human Rights and Equality Commission, Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland, [Equality and Human Rights on the Island of Ireland after Brexit: Annual joint report of IHREC, ECNI and NIHRC on the implementation of Article 2 of the Windsor Framework. October 2022 – September 2023](#) (December 2023) 2.

The 1998 Agreement refers to the European Union in several places and more generally the European Union has provided important underpinnings for the Agreement and the wider peace process, including rights and equality protections. As part of the negotiations around the UK's exit from the European Union, both the UK and EU agreed that European law had provided such underpinning and this needed to be protected in any agreement on the UK's exit. According to paragraph 53 of the EU-UK Joint Report in 2017:

The 1998 Agreement also includes important provisions on Rights, Safeguards and Equality of Opportunity for which EU law and practice has provided a supporting framework in Northern Ireland and across the island of Ireland. The United Kingdom commits to ensuring that no diminution of rights is caused by its departure from the European Union, including in the area of protection against forms of discrimination enshrined in EU law. The United Kingdom commits to facilitating the related work of the institutions and bodies, established by the 1998 Agreement, in upholding human rights and equality standards.<sup>48</sup>

### 1.2.2 UK EU Withdrawal Agreement

These principles have found their way into the arrangements for the UK exit from the EU provided for in the UK EU Withdrawal Agreement. Before turning to the specific provisions on Northern Ireland, we note some aspects of the overall Withdrawal Agreement.

Article 4 of the Withdrawal Agreement includes important provisions on its status.<sup>49</sup> Article 4(1) provides that the Agreement shall have the same legal effects in the UK as in the EU and Member states. This includes the possibility to rely in court on directly effective provisions of the Agreement. Article 4(2) spells out the implication that the UK must give its courts power to disapply UK legislation inconsistent or incompatible with the Withdrawal Agreement. Article 4(3) provides that Union law or concepts 'shall be interpreted and applied in accordance with the methods and general principles of Union law'. Article 4(4) provides that Union law or concepts must be interpreted in conformity with case law of the Court of Justice of the European Union (CJEU) handed down before the end of the transition period, while Article 4(5) provides that UK courts, when applying the Agreement should have 'due regard' to CJEU judgments handed down after the end of the transition period.

48 European Commission, [Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union](#) (8 December 2017) para 53.

49 [EU-UK Withdrawal Agreement, including the Protocol on Ireland/Northern Ireland](#) 2019. The Court of Appeal in England and Wales has provided extensive commentary on Article 4 in [Secretary of State for Work and Pensions v AT, intervenors: Advice on Individual Rights in Europe \(AIRE\) Centre; Independent Monitoring Authority for the Citizens' Rights Agreements](#) [2023] EWCA Civ 1307, (8 November 2023) discussed in chapter five.

Consistent with Article 4, the Withdrawal Agreement has an entrenched status in UK law akin to that enjoyed by EU law under the repealed European Communities Act 1972. This is achieved by section 7A of the European Union Withdrawal Act, as amended by section 5 of the European Union (Withdrawal Agreement) Act 2020. The decision of the High Court in the *Legacy Act cases (Dillon and others)* to disapply sections of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 is the first occasion the courts have used the power to disapply legislation but this is a logical outworking of the Withdrawal Agreement arrangements.

As part of the UK EU Withdrawal Agreement the UK and EU agreed the Protocol on Ireland / Northern Ireland (now the Windsor Framework), which, in its preamble recognises the importance of the BGFA which ‘should be protected in all its parts’.<sup>50</sup> The preamble also recognises that EU law has provided an underpinning for the 1998 Agreement’s section on Rights, Safeguards and Equality of Opportunity. The WF is part of the Withdrawal Agreement and so Article 4 of the Withdrawal Agreement generally applies to it, though in some respects the WF has rules concerning its application which enhance the protections offered by Article 4 (see below on Article 13 WF).

### 1.2.3 Article 2 of the Windsor Framework

The key provision of the WF for the purposes of this briefing paper is Article 2 on the Rights of Individuals.<sup>51</sup> This reads:

#### Article 2

##### Rights of individuals

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

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

<sup>50</sup> In the *Legacy Act cases (Dillon and others)* the High Court noted the importance of this phrase as it permitted the court to look at the wider text of the 1998 Agreement in order to interpret the section on Rights, Safeguards and Equality of Opportunity: [Legacy Act cases \(Dillon and others\)](#), [2024] NIKB 11 [548].

<sup>51</sup> [EU-UK Withdrawal Agreement, including the Protocol on Ireland/Northern Ireland](#) 2019.

This provision has some important features. It is an obligation on the UK, not the EU.<sup>52</sup> The UK will implement this obligation through ‘dedicated mechanisms’ (see later).

Article 2(1) requires the UK to ensure there is no diminution of rights, safeguards or equality of opportunity as set out in the relevant chapter of the 1998 Agreement resulting from the UK’s exit from the EU. This obligation has two elements to it: a non-diminution requirement (or static alignment) and a keeping pace (or dynamic alignment) requirement. The non-diminution requirement is that the UK must not reduce those EU protections for rights and equality that existed in Northern Ireland prior to the end of the Brexit transition period and which provided an underpinning for the rights in the relevant section of the 1998 Agreement.

The keeping pace requirement relates specifically to the six directives listed in Annex 1 WF, which are all anti-discrimination directives.<sup>53</sup>

- Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (Gender Goods and Services Directive)
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Gender Equality (Employment) Directive)
- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Equality Directive)
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (General Framework Directive)
- Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (Self-Employment Equality Directive)
- Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Equality in Social Security Directive)

Article 4 of the Withdrawal Agreement (see above) and Article 13 WF provide some important rules for applying and interpreting Article 2.<sup>54</sup>

52 According to the Government this means that Article 2 WF does not lead to the direct application of EU law, nor is there any direct role for the Court of Justice of the EU or the European Commission: UK Government, [Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland](#) (2020) paragraph 16.

53 The WF and Annexes 2-5 specify other EU legislative measures that must be applied in Northern Ireland to avoid a hard border on the island of Ireland; Annex 2 covers customs and free movement of goods, Annex 3 VAT, Annex 4 the single electricity market, and Annex 5 state aid.

54 [EU-UK Withdrawal Agreement, including the Protocol on Ireland/Northern Ireland](#) 2019. UK Government, [Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland](#) (2020) paragraph 29.

Article 13(2) WF provides a slightly different approach to the role of the case law of the CJEU than that provided for in Article 4 of the Withdrawal Agreement. Article 13(2) requires that Union law or concepts be interpreted and applied in accordance with CJEU case law; unlike Article 4 there is no reference to a difference between judgments handed down before the end of the transition period and after.

The commitment to keeping pace stems from Article 13(3) WF which specifies that any reference to a Union act in the Protocol refers to that act ‘as amended or replaced’. This means that when, after the UK’s exit from the EU, the EU amends or replaces one of the acts in Annex 1 then the UK must ensure that the law in Northern Ireland reflects this.<sup>55</sup> The UK Government has thus committed to ensuring that NI equality law keeps pace with any changes made by the EU that improve the minimum levels of protection available under the Annex 1 Equality Directives, on or after 1 January 2021. Article 13(4) of the original Protocol also allows for the Joint Committee<sup>56</sup> to add a Union act to one of the Annexes to the Protocol (on changes to the workings of Article 13(3) and 13(4) see later under the Windsor Framework).

Article 2 WF is not subject to the democratic consent mechanism in Article 18 WF. So even if the Assembly votes to end the applications of Articles 5-10 WF, this will not affect the applicability of the Article 2 requirements.

The UK has implemented its Article 2 obligations in the European Union (Withdrawal Agreement) Act 2020. Schedule 3 of this Act amends the Northern Ireland Act 1998 to provide that the Assembly cannot legislate incompatibly with Article 2(1)<sup>57</sup> and similarly the Executive must not act incompatibly with Article 2(1).<sup>58</sup> The 2020 Act also amends the European Union (Withdrawal) Act 2018, inserting a new section 7A. Under section 7A, the rights and powers in the Withdrawal Agreement are given legal effect in the UK and significantly, ‘every enactment (including an enactment contained in this Act) is to be read and has effect subject to’ the subsection giving legal effects to the right and powers in the Withdrawal Agreement.<sup>59</sup> This in effect replicates the principle of supremacy that had previously been used under the European Communities Act 1972. The effect of all this is that individuals can rely on their Article 2 rights in domestic litigation (see further chapter five).

55 UK Government, [Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland](#) (2020) para 7.

56 The Joint Committee is established by Article 164 of the [Withdrawal Agreement](#). Comprising representatives of the UK and the EU, it supervises and facilitates the implementation of the Withdrawal Agreement and has powers under different provisions to make decisions about the implementation of the Withdrawal Agreement.

57 Northern Ireland Act 1998, [section 6\(2\)\(ca\)](#).

58 Northern Ireland Act 1998, [section 24\(1\)\(aa\)](#).

59 European Union (Withdrawal) Act 2018, [section 7A](#).

While a short provision, Article 2 is perhaps deceptively simple. Its brief language contains several important issues that require elaboration. Litigation will be important for understanding Article 2's implications. Already several cases, notably *SPUC*<sup>60</sup> and *Angesom*<sup>61</sup> and most notably the *Legacy Act cases (Dillon and others)*<sup>62</sup> and Illegal Migration Act case<sup>63</sup> (see further chapter five) have begun this process.

The *SPUC* case has highlighted the analytical approach that is required in applying Article 2, while *Angesom* has clarified that asylum seekers are part of the community and their rights are protected under the 1998 Agreement; *Angesom* also clarifies that the rights in the 1998 Agreement are not limited to the issue of the conflict in the context of 1998. The *Legacy Act cases (Dillon and others)* has clarified several details of how the courts will approach the application of Article 2 and provided the first instance where the courts have upheld a claim under Article 2 and disapplied legislation; that it has done so in relation to a core human rights issue demonstrates the relevance and potency of Article 2. All these cases also acknowledge the important role of the ECNI and NIHRC in relation to Article 2. As discussed later the Commissions have published work which seeks to clarify Article 2 including its scope.

#### 1.2.4 The Windsor Framework

While the provisions on Article 2 did not give rise to much political controversy for some time,<sup>64</sup> the same is not true of those parts of the Protocol relating to the free movement of goods and the customs union. The UK and EU have adopted a series of measures to address issues with the working of these elements of the Protocol in a series of declarations, decisions and frameworks. As part of these changes, the Windsor Framework is the new name for the Protocol (and will be used for the rest of this report). Following the political agreement by the UK and EU on a new way forward on the original Protocol, the UK Government decided to drop the contentious Northern Ireland Protocol Bill.<sup>65</sup>

The UK-EU Joint Committee did not make any direct changes to Article 2 or to Annex 1. The Joint Committee did adopt changes to the text of the original Protocol introducing a new Article 13(3a), based on the Assembly's petition of concern

60 [In re SPUC Pro-Life Ltd \(Abortion\)](#) [2022] NIQB 9, (8 February 2022) and [In re SPUC Pro-Life Ltd \(Abortion\)](#) [2023] NICA 35, (25 May 2023).

61 [In the matter of an application by Aman Angesom for judicial review and in the matter of a decision by the Secretary of State for the Home Department, Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland intervening](#) [2023] NIKB 102, (18 October 2023).

62 [Legacy Act cases \(Dillon and others\)](#), [2024] NIKB 11.

63 Northern Ireland Human Rights Commission's Application and JR295's Application and In the matter of The Illegal Migration Act 2023; [2024] NIKB 35, (13 May 2024) ([Illegal Migration Act case](#)).

64 The debate on the Safety of Rwanda Bill indicates some differing views on the merits, operation and indeed applicability of Article 2 – see the interventions by Jim Shannon, Sammy Wilson, Claire Hanna and Michael Tomlinson in Hansard, [Safety of Rwanda \(Asylum and Immigration\) Bill Second Reading](#) (12 December 2023). Also, in response to the *Legacy Act cases (Dillon and others)* the Democratic Unionist Party has published a [statement](#) suggesting the interpretation of Article 2 is contentious.

65 [Northern Ireland Protocol Bill](#).

procedure, for proposals to amend or replace EU acts relating to the movement of goods; the Stormont Brake does not apply to the Annex 1 directives.<sup>66</sup>

The Brake would be triggered by 30 MLAs from two or more parties and would require the UK Government to consult with parties on the proposed EU act. The Stormont Brake would not be available for trivial matters and would give the UK Government a veto on the application of the new act to Northern Ireland; as a consequence of any UK veto the EU would be authorised to take appropriate remedial matters.<sup>67</sup>

The Stormont Brake does not apply to the Annex 1 directives, and this feature has been welcomed by the two Commissions.<sup>68</sup> However the Stormont Brake does apply to EU acts listed in Annex 2, and some of these may have implications for rights and equality. These include provisions on lifts and safety components,<sup>69</sup> machinery and access for persons with disabilities,<sup>70</sup> vulnerable road users,<sup>71</sup> etc. These and other Annex 2 Acts have been identified by the Commissions as relevant to the rights in the Rights, Safeguards and Equality of Opportunity section of the 1988 Agreement.<sup>72</sup> The Commissions have urged that equality and human rights considerations be made central in any process for the application of the Stormont Brake.<sup>73</sup>

In addition to the Stormont Brake for acts amending or replacing Union acts in Article 13(3) and (3a), the UK has adopted rules on how it will exercise its powers under Article 13(4). Article 13(4) allows the Joint Committee to add a Union act to one of the annexes where it does not amend or replace a Union Act in the annexes but does fall within the scope of the WF. Under the original text of the Protocol, the UK had a veto in the Joint Committee on this. Now following changes to the WF it has set out how it will exercise this power, effectively replicating the Stormont Brake approach in respect of decisions it will make under Article 13(4).<sup>74</sup>

66 Joint Committee Established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from The European Union and the European Atomic Energy Community of 24 March 2023 Laying Down Arrangements Relating to The Windsor Framework 2023) (24 March 2023). The new provisions apply in respect of ‘first indent of heading 1 and headings 7 to 47 of Annex 2 to this Protocol, and the third subparagraph of Article 5(1) thereof that is they do not apply to the Annex 1 directives.

67 UK Government, [The Windsor Framework: A New Way Forward](#) CP 806 (February 2023) 22-24.

68 ECNI and NIHRC, [Submission of the NIHRC and ECNI to the House of Lords Sub-Committee on the Protocol’s call for evidence for its inquiry on the Windsor Framework](#) (2023) 6. The Commissions have also welcomed other aspects of the Windsor Framework in relation to the supply of medicines and movement of assistance animals, at 8-9.

69 [Directive 2014/33/EU](#) of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to lifts and safety components for lifts 2014.

70 [Directive 2006/42/EC](#) of the European Parliament and of the Council of 17 May 2006 on machinery, and amending Directive 95/16/EC (recast) 2006.

71 [Regulation \(EC\) No 78/2009](#) of the European Parliament and of the Council of 14 January 2009 on the type approval of motor vehicles with regard to the protection of pedestrians and other vulnerable road users, amending Directive 2007/46/EC.

72 ECNI and NIHRC, [Submission of the NIHRC and ECNI to the House of Lords Sub-Committee on the Protocol’s call for evidence for its inquiry on the Windsor Framework](#) (2023) 11-12.

73 ECNI and NIHRC, [Submission of the NIHRC and ECNI to the House of Lords Sub-Committee on the Protocol’s call for evidence for its inquiry on the Windsor Framework](#) (2023) 13.

74 [Windsor Framework \(Democratic Scrutiny\) Regulations 2024](#).



To facilitate the workings of Articles 13(3a) and 13(4), domestic regulations now provide for a Windsor Framework Democratic Scrutiny Committee (WFDSC) of the Assembly.<sup>75</sup> There has been controversy over the operation of the petition of concern mechanism in Northern Ireland and in particular that the mechanism has been used for many purposes not contemplated in the 1998 Agreement and has effectively halted opportunities for progressive change in Northern Ireland.<sup>76</sup> Prior to the UK's exit from the EU, the petition of concern process could not ultimately prevail over changes introduced by EU law, but this new arrangement could provide an effective veto, apart from EU acts amending or replacing Annex 1 directives. The Commissions have emphasised (and we agree) that equality and rights concerns need to be made central in the work of the WF institutions including the WFDSC.<sup>77</sup>

While the WF includes provisions amending the original Protocol, there does not appear to be a consolidated version of the text. This is harmful to the clarity of the law as it is necessary to cross-reference different legal measures to understand the legal position.

**We recommend that that EU and UK publish a consolidated version of the Windsor Framework text.**

### 1.2.5 Return of the Devolved Institutions and Safeguarding the Union

In January 2024 the UK Government published a new Command paper, *Safeguarding the Union*, explaining the arrangements it had agreed as part of the deal for restoration of the Executive and Assembly.<sup>78</sup> As part of this package the Government also published draft regulations. These regulations provide statutory recognition of the constitutional position of Northern Ireland, preclude ratification of UK-EU agreements creating new regulatory borders between Northern Ireland and Great Britain, and provide for recognition in the European Union (Withdrawal) Act 2018 section 7A of the processes of democratic consent and scrutiny.<sup>79</sup> These processes apply to the trade elements of the WF and do not directly apply to Article 2 WF.

The *Safeguarding the Union* paper contains only a brief discussion of Article 2 WF. It makes the misleading claim that the WF only applies to trade in goods. While as a general proposition this is true, it is not correct in respect of every implication of the Windsor Framework and in particular does not apply to Article 2, as evident in the *Legacy Act cases (Dillon and others)* and *Illegal Migration Act*

75 Windsor Framework (Democratic Scrutiny) Regulations 2024, 2024 No 118, [schedule](#).

76 Daniel Holder 'Stormont's vetoes – Turning equality on its head?' 13 October 2023 [Could rights-based safeguards make Stormont functional?](#) Ulster University, Belfast.

77 ECNI and NIHRC, [Submission of the NIHRC and ECNI to the House of Lords Subcommittee on the Protocol's call for evidence for its inquiry on the Windsor Framework](#) (2 May 2023) 1, 10.

78 UK Government, [Safeguarding the Union](#) (2024) CP 1021.

79 [Draft Windsor Framework \(Constitutional Status of Northern Ireland\) Regulations 2024](#).

case (both discussed in chapter five). The paper goes on to state that Article 2 ‘does not apply EU law or ECJ jurisdiction, and only applies in the respect of rights set out in the relevant chapter of the 1998 Agreement and a diminution of those rights which arises as a result of the UK’s withdrawal from the EU’. According to the Government, Article 2 is not engaged by the Safety of Rwanda Bill.<sup>80</sup> This interpretation is highly contentious. *Angesom*, the *Legacy Act cases (Dillon and others)* and the *Illegal Migration Act case* establish that Article 2 WF at least applies to situations aside from the free movement of goods.

### 1.2.6 The Role of the Commissions

Under the terms of Article 2(2) WF the UK must facilitate the work of the 1998 Agreement institutions including the ECNI, NIHRC, and the joint committee of the two human rights commissions on the island. The UK Government has identified these two institutions as the ‘dedicated mechanisms’ required by Article 2(1) WF, and the European Union (Withdrawal Agreement) Act 2020 amends the Northern Ireland Act 1998 to specify the Article 2 WF functions of these bodies. These functions include monitoring the implementation of Article 2 WF, reporting to the Secretary of State, providing advice to the Secretary of State and the Executive, advising the Assembly (or a Committee thereof) of compatibility issues concerning legislation, and promoting understanding and awareness of Article 2 WF.<sup>81</sup> To carry out these functions the Commissions have been given additional powers, for example, to require the NI Secretary of State or the Executive to reply in writing to recommendations;<sup>82</sup> to bring matters to the attention of the Specialised Committee on the Protocol,<sup>83</sup> to bring or intervene in litigation<sup>84</sup> and to assist persons in legal proceedings.<sup>85</sup> As part of the function of promoting understanding and awareness the Commissions may undertake or commission research and publish the research.<sup>86</sup> The Commissions may cooperate with each other in this work. They may also collaborate with the Irish Human Rights and Equality Commission in order to oversee and report on rights and equalities falling within scope of Article 2 matters that have an island of Ireland dimension. The ECNI, NIHRC, and the joint committee of the NIHRC/IHREC also have the possibility to bring matters to the attention of the Specialised Committee under Article 14(C) of the WF.<sup>87</sup>

80 UK Government, [Safeguarding the Union](#) (2024) CP 1021, paragraph 46.

81 Northern Ireland Act 1998, [sections 78A and 78B](#).

82 Northern Ireland Act 1998, [section 78A\(3\)](#) and [section 78B\(3\)](#).

83 Northern Ireland Act 1998, [section 78A\(9\)](#) and [section 78B\(9\)](#).

84 Northern Ireland Act 1998, [section 78C](#).

85 Northern Ireland Act 1998, [section 78D](#).

86 Northern Ireland Act 1998, [section 78A\(7\)-\(8\)](#) and [section 78B\(7\)-\(8\)](#).

87 The Specialised Committee is established by Article 165 of the Withdrawal Agreement and facilitates the implementation and application of the WF; it can make recommendations to the Joint Committee.

In this regard the Commissions have already published several reports<sup>88</sup> relevant to the scope of this report and have worked closely with the Irish Human Rights and Equality Commission.<sup>89</sup> These reports have stressed the issue of equivalence (see below 1.2.7). They have also developed important arguments on the scope of Article 2 WF (see below 1.2.8).

### 1.2.7 Equivalence and Divergence

On equivalence, the Commissions have expressed the view that the 1998 Agreement includes a ‘broad expectation of equivalence in rights protection in Ireland as in NI’.<sup>90</sup> The principle of equivalence is important to ensure there is no diminution of rights in Northern Ireland and to ensure ‘continual improvement’ in human rights and equality protections.<sup>91</sup> This should ‘reflect international human rights standards and best practice’.<sup>92</sup> This suggests that Northern Ireland should keep pace with changes to EU rights and equality laws that strengthen protections even outside the areas of the Annex 1 directives and that the jurisdictions on the island should work to harmonise equality and human rights ‘so as to strengthen protections’.<sup>93</sup> It is worth emphasising here that the intention should be to strengthen protections, so it is a matter of levelling up not down. The Irish Human Rights and Equality Commission has published details of its survey indicating that very significant majorities (81%) in Ireland believe it is important (26%) or very important (55%) that there be an equivalent level of protections of equality and human rights in Ireland and Northern Ireland, and agree (37%) or strongly agree (39%) that more should be done to harmonise protections on the island of Ireland after Brexit.<sup>94</sup>

In addition, the Commissions have commissioned various research reports on Article 2 WF including the initial report on divergence of rights on the island of Ireland.<sup>95</sup> This current report serves as an update to that initial divergence report.

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- 88 NIHRC and ECNI, [Annual Report 2021-22: Implementation of Protocol Article 2](#) (2022); ECNI and NIHRC, [Annual Report 2022-2023: Implementation of Protocol Article 2](#) (2023); NIHRC and ECNI, [Working Paper: The Scope of Article 2\(1\) of the Ireland/Northern Ireland Protocol](#) (2022).
- 89 IHREC, NIHRC and ECNI, [Equality and Human Rights on the Island of Ireland after Brexit: Annual joint report of IHREC, ECNI and NIHRC on the implementation of Article 2 of the Windsor Framework. October 2022 – September 2023](#) (2023); IHREC, NIHRC and ECNI, [Policy Recommendations: European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (2023).
- 90 IHREC, NIHRC and ECNI, [Equality and Rights on the island of Ireland after Brexit: Annual joint report of IHREC, ECNI and NIHRC on the implementation of Article 2 of the Ireland/Northern Ireland Protocol. January 2021-September 2022](#) (28 November 2022) 1.
- 91 IHREC, NIHRC and ECNI, [Equality and Human Rights on the Island of Ireland after Brexit: Annual joint report of IHREC, ECNI and NIHRC on the implementation of Article 2 of the Windsor Framework. October 2022 – September 2023](#) (6 December 2023) 7.
- 92 ECNI and NIHRC, [Submission of the NIHRC and ECNI to the House of Lords Sub-Committee on the Protocol’s call for evidence for its inquiry on the Windsor Framework](#) (2023) 10.
- 93 IHREC, NIHRC and ECNI, [Policy Recommendations: European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (2023) 27.
- 94 IHREC, NIHRC and ECNI, [Equality and Human Rights on the Island of Ireland after Brexit: Annual joint report of IHREC, ECNI and NIHRC on the implementation of Article 2 of the Windsor Framework. October 2022 – September 2023](#) (6 December 2023) 11.
- 95 Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, [European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (2022).

We agree with the analysis and recommendations in that initial report, though note many of the recommendations remain outstanding. We generally do not replicate the recommendations in the initial report, except where we wish to draw attention to subsequent developments or outstanding issues. The Commissions have produced policy recommendations based on the initial divergence report. The Commissions make numerous recommendations ‘in line with international human rights best practice and to avoid a divergence of rights on the island of Ireland’,<sup>96</sup> including in relation to:

- Age discrimination legislation and goods facilities and services;<sup>97</sup>
- Pay transparency;<sup>98</sup>
- Standards for equality bodies;<sup>99</sup>
- The EU Accessibility Act;<sup>100</sup>
- The EU Work-Life Balance directive;<sup>101</sup>
- CJEU case law on the Citizens’ Rights Directive;<sup>102</sup>
- CJEU case law on access to court and effective remedies;<sup>103</sup>
- CJEU case law on compensation;<sup>104</sup>
- Giving effect to the UN Convention on the Rights of Persons with Disabilities;<sup>105</sup>
- Giving priority to disability discrimination;<sup>106</sup>
- The introduction of a single equality act in NI.<sup>107</sup>

The UK Government does not agree with the analysis of the Commissions that the 1998 Agreement envisages a broad concept of equivalence in rights protection North and South.<sup>108</sup> The Government does however agree that future developments in international best practice is relevant, as the Article 2 commitment is implemented.<sup>109</sup>

96 IHREC, NIHRC and ECNI, [Policy Recommendations: European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (2023) 32.

97 Ibid 33.

98 Ibid 35.

99 Ibid 37.

100 Ibid 39.

101 Ibid 40.

102 Ibid 43.

103 Ibid 45.

104 Ibid 46.

105 Ibid 48.

106 Ibid 50.

107 Ibid 51.

108 UK Government, [Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland](#) (2020) paragraph 23.

109 UK Government, [Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland](#) (2020) paragraph 7, 23.

### 1.2.8 Scope of Article 2 WF

The UK Government has accepted in its explainer that Article 2 WF covers some aspects of EU law in addition to the Annex 1 directives. It specifically says that these ‘include’ the Victims’ Directive,<sup>110</sup> Parental Leave Directive<sup>111</sup> and Pregnant Workers’ Directive<sup>112</sup> and measures aimed at protecting persons with disabilities.<sup>113</sup> The explainer also indicates that Charter of Fundamental Rights of the European Union (CFR) continue to be relevant where ‘captured’ in retained EU law or domestic law and relevant to the rights in the Rights, Safeguards and Equality of Opportunity chapter of the 1998 Agreement.<sup>114</sup>

The Commissions have published work on the scope of Article 2 WF.<sup>115</sup> The Commissions’ view is that the relevant chapter of the 1998 Agreement must cover at least the rights in the European Convention on Human Rights, where there was underpinning EU legislation in force on or before 31 December 2020.<sup>116</sup> The language of the 1998 Agreement though also embraces the right to equality of opportunity and envisages a Bill of Rights that would draw on ‘international instruments and experience’, while the British-Irish treaty part of the Agreement refers to civil, political, social, economic and cultural rights. So for the ECNI and NIHRC this makes it ‘arguable’ that the language in the Agreement covers all ‘human rights standards ratified by the UK’.<sup>117</sup>

In the *Legacy Act cases (Dillon and others)* the High Court considers that it is entitled to rely on the Vienna Convention on the Law of Treaties when interpreting Article 2 WF and the 1998 Agreement; for this reason it takes a ‘generous and purposive approach in interpreting Article 2 WF’.<sup>118</sup> In looking at the wider text of the 1998 Agreement the Court draws attention to the Declaration of Support which refers to ‘the protection and vindication of the human rights of all’.<sup>119</sup> The Court also notes that taking a narrow interpretation of the phrase ‘civil rights’ in the 1998 Agreement would undermine the ‘forward-facing’ element of Article 2 WF.<sup>120</sup>

110 [Directive 2012/29/EU](#) of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA 2012.

111 [Directive 2010/18/EU](#) of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Parental Leave Directive) 2010

112 [Directive 92/85/EEC](#) of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

113 UK Government, [Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland](#) (2020) paragraph 13.

114 UK Government, [Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland](#) (2020) paragraph 15.

115 ECNI and NIHRC, [Working Paper: The Scope of Article 2\(1\) of the Ireland/ Northern Ireland Protocol](#) (December 2022).

116 *Ibid.*, 13.

117 *Ibid.*, 15, 17.

118 [Legacy Act cases \(Dillon and others\)](#), [2024] NIKB 11 [535].

119 *Ibid.*, [545].

120 *Ibid.*, [554].

### 1.3 Report Outline

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This briefing paper consists of an introduction, seven chapters, a chapter listing conclusions and recommendations and appendices. This introductory chapter has set out the background, aims and objectives and methodology of the briefing paper.

Chapter two examines the key developments in equality and human rights in Northern Ireland and the UK since January 2022. It highlights areas where there is a risk of divergence especially where UK legislation potentially diminishes rights protections and where there seem to be misunderstandings of the meaning of Article 2 WF.

Chapter three examines the rights and equality developments in Ireland since January 2022, highlighting areas where there is a risk of divergence. This is often because Ireland has adopted or is considering adopting measures representing best practice but also instances where Ireland has not adequately implemented EU law.

Chapter four presents the developments in EU law in relation to human rights and equality since January 2022 focusing on directives and regulations. It identifies developments since January 2022 relating to proposed and/or adopted EU law (directives and regulations), that relates to equality and human rights, which did not apply in NI domestic law before the end of the Brexit transition period (31 December 2021), and which could potentially amend and/or update an Annex 1 Directive; or which do not amend and/or update an Annex 1 Directive but do relate to human rights and equality and would have applied to NI had the UK remained in the EU.

Chapter five explores the domestic developments in relation to case law and the role of CJEU case law since January 2022. It provides an update, analysis and implications in terms of domestic legislative developments, if any, since January 2022 relating to how the jurisprudence of the CJEU on equality and human rights related matters is to be, or will be, taken into account or complied with by the respective courts in NI post the end of the Brexit transition period.

Chapter six analyses the CJEU case law on the Annex 1 directives since January 2022. It sets out the details and implications, including potential implications, of this CJEU case law on equality and human rights law, including implications for NI.

Chapter seven looks at EU policy developments on rights and equality since January 2022. It identifies EU initiatives that encourage or support the Governments of Member States to progress equality or human rights, and/or support civil society organisations in their work to progress equality or human rights.

Chapter seven is followed by a summary list of recommendations.

# Chapter 2: Human Rights and Equality Developments in Northern Ireland and the United Kingdom since January 2022 and the Risk of Divergence

## 2.1 Introduction

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This chapter provides an update on any developments in terms of equality and human rights in NI and the UK since January 2022, including, in respect of NI, in areas of law and policy that are reserved or excepted as well as those which are transferred (devolved). It highlights areas where there is a risk of divergence between Ireland and Northern Ireland (or the UK), often stemming from UK legislation which potentially diminishes rights protection, as well as some misunderstandings or failures to consider Article 2 WF.

## 2.2 Northern Ireland

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In Northern Ireland itself the most notable development has been the absence of functioning local devolved institutions. First Minister Paul Givan resigned in February 2022, automatically triggering the resignation of deputy First Minister Michelle O'Neill. The Northern Ireland Assembly was able to carry on some business for the remainder of its mandate before the Assembly election on 5 May 2022. The Assembly election resulted in Sinn Féin becoming the largest political party and so entitled to nominate the First Minister. Following the election however the Democratic Unionist Party refused to support any nominee for Speaker; the election of the Speaker requires a cross-community vote. This has meant that Northern Ireland was without a functioning Executive or Assembly from 2022 until 3 February 2024, when the institutions were restored.

The absence of a functioning Executive or Assembly meant civil servants had to maintain public services while the Secretary of State had to establish a budget. In this context, there were limits to the local developments in relation to rights and equality.

The Assembly managed to pass some legislation in 2022 prior to the 5 May 2022 election. Acts passed during 2022 relevant to rights and equality include measures on climate change,<sup>121</sup> defamation,<sup>122</sup> domestic abuse,<sup>123</sup> period products,<sup>124</sup> fair employment law,<sup>125</sup> hospital parking charges,<sup>126</sup> trafficking,<sup>127</sup> stalking,<sup>128</sup> integrated education,<sup>129</sup> and autism.<sup>130</sup>

Of these the Fair Employment (School Teachers) Act (Northern Ireland) 2022 is noteworthy for addressing an important exception in fair employment law. By virtue of Article 71 of the Fair Employment and Treatment Order 1998, fair employment law did not generally apply to recruitment as a teacher in a school.<sup>131</sup> This was a significant exception to the prohibition on religious (or political) discrimination in employment. When the European Union adopted the General Framework Directive prohibiting discrimination on the ground of religion or belief (among other grounds), the Directive included a special provision preserving this Northern Ireland exception.<sup>132</sup> The Directive provided for this exception insofar as authorised by national legislation. The ECNI and NIHRC had expressed concerns about this exemption. The ECNI had recommended that the exemption no longer apply at secondary school level and consideration be given to ending it at primary school level,<sup>133</sup> while the NIHRC had welcomed the Bill as providing for a more robust protection of anti-discrimination law.<sup>134</sup>

For most of the period from the 5 May 2022 election until February 2024 there has not been a functioning Assembly and so there has been no legislative business coming through the Assembly. This has not led to a complete halt to all policy and legislative work on rights and equality.

Most notably the Executive Office has held a consultation on plans to reform the Race Relations (NI) Order 1997.<sup>135</sup> Both the ECNI<sup>136</sup> and the NIHRC have published extensively on issues around race law reform.<sup>137</sup>

121 [Climate Change Act \(Northern Ireland\) 2022](#).

122 [Defamation Act \(Northern Ireland\) 2022](#).

123 [Domestic Abuse \(Safe Leave\) Act \(Northern Ireland\) 2022](#).

124 [Period Products \(Free Provision\) Act \(Northern Ireland\) 2022](#).

125 [Fair Employment \(School Teachers\) Act \(Northern Ireland\) 2022](#).

126 [Hospital Parking Charges Act \(Northern Ireland\) 2022](#).

127 [Justice \(Sexual Offences and Trafficking Victims\) Act \(Northern Ireland\) 2022](#).

128 [Protection from Stalking Act \(Northern Ireland\) 2022](#).

129 [Integrated Education Act \(Northern Ireland\) 2022](#).

130 [Autism \(Amendment\) Act \(Northern Ireland\) 2022](#).

131 Fair Employment and Treatment Order 1998, [art 71](#).

132 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation 2000, [art 15\(2\)](#). The Directive also permitted the policy of 50:50 recruitment to the Police Service of Northern Ireland in art 15(1).

133 ECNI, [Briefing: FETO Teachers' Exception](#) (ECNI, Belfast 2021).

134 ECNI and NIHRC, [Annual Report 2021-22: Implementation of Protocol Article 2](#) (2022) 74-75; NIHRC, [The 2022 Annual Statement: Human Rights in Northern Ireland](#) (2022) 192.

135 [Consultation on the Review of the Race Relations \(NI\) Order 1997](#).

136 [Race Law Reform](#), ECNI, [Consultation Response: The Executive Office: Consultation on the Review of the Race Relations \(NI\) Order 1997](#) (June 2023); ECNI, [Response to consultation: European Commission - Addressing possible gaps in the Racial Equality Directive](#) (April 2022).

137 NIHRC, [Response to the European Commission Consultation on the Racial Equality Directive](#) (12 April 2022); NIHRC, [NIHRC response to The Executive Office's consultation on the Review of the Race Relations \(NI\) Order 1997](#) (June 2023).



It is noteworthy that the Executive Office consultation document contains only three references (apart from the glossary) to European Union directives and contains no reference to the Protocol/WF. There is therefore no discussion of any possible need to amend Northern Ireland law to keep pace with any EU measures amending or replacing the Race Directive.<sup>138</sup> The Consultation includes references to Ireland's Equal Status Act 2000 and Employment Equality Act 1998, which is welcome, but does not mention the current Irish review of these Acts. As will be discussed later this review of the Irish legislation opens up the possibility of greater divergence in terms of equality legislation on the island of Ireland.

The two Commissions have responded to the consultation on the Race Relations Order and made several recommendations to comply with Article 2 WF. These include: ensuring that any changes to the order are compatible with the EU Race Equality directive and CJEU case law, taking into account the ongoing review of the Race Directive,<sup>139</sup> considering the EU law on victimisation,<sup>140</sup> considering any EU standards on equality bodies,<sup>141</sup> and ensuring real and effective judicial protection of rights in line with the Charter.<sup>142</sup>

The responses also include numerous other recommendations such as the need to introduce single equality legislation,<sup>143</sup> to consider combined or multiple intersectional discrimination,<sup>144</sup> and to have an inclusive definition of racial ground and specifically name caste and descent.<sup>145</sup>

Notwithstanding the numerous areas for improvement identified by the two Commissions, the consultation on the Race Relations (NI) Order is nevertheless to be lauded as a departmental initiative to make progress on rights and equality issues. Other initiatives on rights and equality have been held up because of the lack of a functioning Assembly and Executive for most of the period since early 2022.

138 This is addressed in the summary of responses which refers to processes for monitoring compliance with the Windsor Framework: The Executive Office, [Review of the Current Race Relations \(NI\) Order 1997 Consultation Response Report \(2024\)](#) 77.

139 ECNI [Consultation Response: The Executive Office: Consultation on the Review of the Race Relations \(NI\) Order 1997](#) (June 2023) 3-4; NIHRC, [Response to the European Commission Consultation on the Racial Equality Directive](#) (12 April 2022) 13.

140 NIHRC, [Response to the European Commission Consultation on the Racial Equality Directive](#) (12 April 2022) 18.

141 ECNI, [Consultation Response: The Executive Office: Consultation on the Review of the Race Relations \(NI\) Order 1997](#) (June 2023) 58, 72-77; NIHRC, [Response to the European Commission Consultation on the Racial Equality Directive](#) (12 April 2022) 30.

142 ECNI, [Consultation Response: The Executive Office: Consultation on the Review of the Race Relations \(NI\) Order 1997](#) (June 2023) 77; NIHRC, [Response to the European Commission Consultation on the Racial Equality Directive](#) (12 April 2022) 32.

143 ECNI, [Consultation Response: The Executive Office: Consultation on the Review of the Race Relations \(NI\) Order 1997](#) (June 2023) 1.

144 ECNI, [Consultation Response: The Executive Office: Consultation on the Review of the Race Relations \(NI\) Order 1997](#) (June 2023) 17; NIHRC, [Response to the European Commission Consultation on the Racial Equality Directive](#) (12 April 2022) 15.

145 ECNI, [Consultation Response: The Executive Office: Consultation on the Review of the Race Relations \(NI\) Order 1997](#) (June 2023) 87.

**We recommend that the Executive Office explicitly refer to, and consider, the Article 2 WF obligations in its work on reform of the Race Relations Order. This should include as regards relevant CJEU case law.**

**We recommend that the Executive Office and other relevant NI Departments consider any EU proposals for amendments to EU law where they may trigger the keeping pace requirement because they amend or replace an Annex 1 directive or may represent an opportunity for voluntary alignment to strengthen rights and reflect international human rights standards and best practice.**

**We recommend that the Executive Office and other relevant NI Departments consider any proposals for amendments to the Irish equality legislation where they highlight a risk of divergence of rights or an opportunity for voluntary alignment to strengthen rights and reflect international human rights standards and best practice.**

## 2.3 United Kingdom

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*The July 2024 election resulted in a change of UK Government; all references in this report to past actions of 'UK Government' refer to the Conservative UK Government prior to the election unless specified otherwise.*

As part of the United Kingdom, Northern Ireland is also affected by UK legislative developments with respect to reserved and excepted matters and there have been several developments since 1 January 2022. These have included the adoption of the WF discussed above which resulted in the UK Government dropping its contentious Northern Ireland Protocol Bill.<sup>146</sup> In respect of several of these developments the UK Government has supported changes to the law which arguably reduce the rights and equality protections that had been available under EU law prior to the end of the transition period. This risks introducing divergence in rights protection North and South as Ireland will still have to respect the EU standards (or possibly new EU standards).

### 2.3.1 Bill of Rights Bill and the ECHR

One of the most concerning initiatives has been the debate about a new Bill of Rights Bill to replace the Human Rights Act. While the proposed Bill of Rights Bill would have retained Convention rights, the Bill would have proposed numerous

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<sup>146</sup> [Northern Ireland Protocol Bill](#). This Bill, as introduced would have severely affected the operation of the Protocol. The Bill would have removed the protection offered by the European Union (Withdrawal) Act 2018 from excluded provisions of the Protocol. This would have applied to provisions on movement of goods for instance and Ministers would have been given the power to designate other Protocol provisions excluded; article 2 of the Protocol was exempted from this power.

restrictions about the interpretation of rights, the use of positive obligations, restrictions on remedies and other complications for the protection of rights across the UK. The Bill of Rights Bill was the subject of extensive, detailed and trenchant criticism, including from the NIHRC<sup>147</sup> and ECNI,<sup>148</sup> while the Joint Committee on Human Rights published a highly critical report.<sup>149</sup> The Commissions, among numerous other criticisms, flagged issues about compatibility with Article 2 WF. The Equality Commission expressed concern that the Government did not explain its position on the Bill and Article 2 WF and that the Bill contained no safeguards for Article 2 WF.<sup>150</sup> The NIHRC expressed concerns that the Bill of Rights Bill would ‘create uncertainty and confusion’ and so make the interpretation of Article 2 WF more ‘challenging’.<sup>151</sup> Furthermore the NIHRC warned that Article 2 WF meant that the case law of the European Court of Human Rights would remain relevant even though the Bill sought to downplay the case law of that court with a proposal to remove the obligation on UK courts to take into account the Strasbourg case law.<sup>152</sup>

Following a change in the Secretary of State for Justice the Bill of Rights Bill was withdrawn on 27 June 2023.<sup>153</sup> While the Bill of Rights Bill has been withdrawn, the Government has adopted an approach of specific changes to the human rights framework in different pieces of legislation.<sup>154</sup> So there has been a policy of including provisions amending<sup>155</sup> or disapplying parts of the Human Rights Act in some subsequent acts<sup>156</sup> and bills.<sup>157</sup>

More recently there has been some renewed speculation about the United Kingdom leaving the European Convention on Human Rights, some of the speculation coming from the then-Home Secretary.<sup>158</sup>

Significant changes to the Human Rights Act or withdrawal from the European Convention on Human Rights would have potentially serious consequences for NI. The ECHR is central to the 1998 Agreement which contains several commitments respecting the ECHR, for example:

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- 147 NIHRC, [Response to the UK Joint Committee on Human Rights call for evidence Legislative Scrutiny: Bill of Rights Bill](#) (2022).
- 148 ECNI, [Response to the UK Joint Committee on Human Rights call for evidence Legislative Scrutiny: Bill of Rights Bill](#) (2022).
- 149 Joint Committee on Human Rights, [Ninth Report - Legislative Scrutiny: Bill of Rights Bill](#) (House of Commons and House of Lords, 2022-2023) HC 611 / HL Paper 132.
- 150 ECNI, [Response to the UK Joint Committee on Human Rights call for evidence Legislative Scrutiny: Bill of Rights Bill](#) (2022) 20-21; also ECNI, [Response to consultation: Human Rights Act Reform: a Modern Bill of Rights, Ministry of Justice](#) (2022) 10-12.
- 151 NIHRC, [Response to the UK Joint Committee on Human Rights call for evidence Legislative Scrutiny: Bill of Rights Bill](#) (2022) 8, 16.
- 152 *Ibid.*, 11.
- 153 [Bill of Rights Bill](#).
- 154 Secretary of State for Justice Alex Chalk, [Hansard](#), 27 June 2023.
- 155 Overseas Operations (Service Personnel and Veterans) Act 2021, [section 11](#).
- 156 Illegal Migration Act 2023, [section 1\(5\)](#) disapplying the interpretative obligation in section 3 of the Human Rights Act 1998;.
- 157 The Victims and Prisoners Bill and the Safety of Rwanda Bill.
- 158 Peter Walker, Matthew Weaver and Diane Taylor ‘[Suella Braverman restates wish for UK to leave European court of human rights](#)’ (28 August 2023) *The Guardian*.

- Neither the Assembly nor public bodies can infringe the ECHR;<sup>159</sup>
- ‘arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for Northern Ireland’;<sup>160</sup>
- Possibility for the Assembly to appoint a committee to examine a measure or legislation for compatibility with the ECHR;<sup>161</sup>
- incorporation of the ECHR into Northern Ireland law ‘with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency’.<sup>162</sup>

The NIHRC has rightly stressed the ‘integral role of both the Human Rights Act and ECHR in the complex fabric of the NI Peace Process and devolution’.<sup>163</sup> Given the centrality of the ECHR to the 1998 Agreement, significantly downgrading Human Rights Act protections or withdrawal from the European Convention itself would breach its terms.<sup>164</sup> Actual withdrawal from the European Convention would also effectively make it impossible for the UK to remain a member of the Council of Europe. We also note that the tendency to disapply section 3 of the Human Rights Act seems unnecessary in a system that upholds parliamentary sovereignty; Parliament always has the possibility to amend the law in an instance where it does not feel a judicial interpretation has been appropriate. It would seem more compatible with the idea of a balance between the different branches of government for Parliament to wait to see what interpretation the courts devise, rather than pre-emptively disapplying the section 3 power.

In addition, the provisions of the UK EU Trade and Cooperation Agreement (TCA) are relevant.<sup>165</sup> In the TCA the UK and EU reaffirm their commitment to human rights,<sup>166</sup> and undertake to include human rights in consultative processes.<sup>167</sup> The Part on Law Enforcement and Judicial Cooperation in Criminal Matters rests on respect for rights in the Universal Declaration of Human Rights and the European Convention on Human Rights ‘and on the importance of giving effect to the rights and freedoms in that Convention domestically’.<sup>168</sup> This part of the TCA can be terminated for any reason and, if so, such termination takes place nine months following notification of same; however if the reason for termination is because the UK or a Member State has denounced the Convention, then termination takes place either upon denunciation taking effect or 15 days after notification of termination.<sup>169</sup>

159 [Belfast Good Friday Agreement 1998](#), Strand One Democratic Institutions in Northern Ireland, Safeguards, 5.

160 *Ibid.*, Safeguards, 5 and Legislation, 26.

161 *Ibid.*, Operation of the Assembly, 11

162 *Ibid.*, United Kingdom legislation, 1.

163 NIHRC, [Response to the UK Joint Committee on Human Rights call for evidence Legislative Scrutiny: Bill of Rights Bill \(2022\)](#) 26.

164 CRG Murray, Aoife O’Donoghue and Ben TC Warwick, ‘The Implications of the Good Friday Agreement for UK Human-Rights Reform’ (2017) *Irish Yearbook of International Law* (2017); [open access version](#).

165 The [European Union \(Future Relationship\) Act 2020](#) gives effect to the Trade and Cooperation agreement.

166 [Trade and Cooperation Agreement](#), Preamble.

167 *Ibid.*, articles 13 and 14.

168 *Ibid.*, articles 524(1).

169 *Ibid.*, articles 692.

**We recommend that the UK Government introduce amendments into Parliament to amend any enacted legislation that has included provisions limiting the application of section 3 of the Human Rights Act to remove that limitation.**

### 2.3.2 Nationality and Borders Act 2022

The Nationality and Borders Act 2022 makes wide-ranging changes to UK nationality, immigration and asylum law. It addresses anomalies (typically arising from discrimination on grounds of sex or marital status) in nationality law.<sup>170</sup> It seeks to reform the asylum system by discouraging irregular immigration and allowing the removal of persons before their asylum claim has been decided.<sup>171</sup> It streamlines the appeals process for asylum and related claims. The Act reforms the law on modern slavery,<sup>172</sup> includes measures to tackle people smuggling and provides for an Electronic Travel Authorisation (ETA) scheme.<sup>173</sup> Section 68 of the Act expressly disapplies the Trafficking Directive as retained EU law in so far as it is inconsistent with the Act or provisions made under the act.<sup>174</sup>

The Joint Committee on Human Rights examined the Bill in some detail, producing four reports.<sup>175</sup> In some cases these highlighted positive aspects of the Bill which are welcome from human rights perspectives;<sup>176</sup> in many other cases they called for clarifications. Worryingly the Joint Committee on Human Rights identified numerous concerns about possible breaches of international human rights obligations including in relation to refugee protection, the Convention on the Rights of the Child, and the obligation to protect victims of modern slavery. Some of the concerns include that the UK might risk the lives of some people in breach of Article 2 ECHR obligations.<sup>177</sup>

A joint briefing paper by the NIHRC and ECNI highlights concerns about the compatibility of the then Bill with Article 2 WF.<sup>178</sup> The briefing paper notes that the

170 Nationality and Borders Act 2022, [part 1](#).

171 Ibid., [part 2](#) and [part 3](#).

172 Ibid., [part 5](#).

173 Ibid., [section 75](#).

174 Ibid., [section 68](#).

175 Joint Committee on Human Rights, [Eleventh Report - Legislative Scrutiny: Nationality and Borders Bill \(Part 5\)—Modern Slavery](#) (House of Commons and House of Lords, 2021-2022) HC 964 / HL 135; Joint Committee on Human Rights, [Twelfth Report - Legislative Scrutiny: Nationality and Borders Bill \(Parts 1, 2 and 4\) – Asylum, Home Office Decision-Making, Age Assessments, and Deprivation of Citizenship Orders](#) (House of Commons and House of Lords, 2021-2022) HC 1007 / HL 143; Joint Committee on Human Rights, [Ninth Report - Legislative Scrutiny: Nationality and Borders Bill \(Part 3\) – Immigration offences and enforcement](#) (House of Commons and House of Lords, 2021-2022) HC 885 / HL 112; Joint Committee on Human Rights, [Seventh Report - Legislative Scrutiny: Nationality and Borders Bill \(Part 1\) – Nationality](#) (House of Commons and House of Lords, 2021-2022) HC 764 / HL 90.

176 Joint Committee on Human Rights, [Seventh Report - Legislative Scrutiny: Nationality and Borders Bill \(Part 1\) – Nationality](#) (House of Commons and House of Lords, 2021-2022) HC 764 / HL 90.

177 Joint Committee on Human Rights, [Ninth Report - Legislative Scrutiny: Nationality and Borders Bill \(Part 3\) – Immigration offences and enforcement](#) (House of Commons and House of Lords, 2021-2022) HC 885 / HL 112.

178 Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland, [Joint NIHRC/ECNI Briefing Paper on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill](#) (January 2022).

Government has accepted that the Victims' Directive is within the scope of Article 2 WF and argues that the Trafficking Directive is also. The paper recommends that Northern Ireland be excluded from the provision disapplying the Trafficking Directive (clause 67, now section 68).<sup>179</sup> It also recommends that Northern Ireland be removed from the extent of certain clauses that arguably diminish protections available under the Trafficking Directive.<sup>180</sup> The paper raises concerns about the impact of the new Electronic Travel Authorisation (ETA) on people moving across the Irish land border and draws attention to the need for consideration more generally of Article 2 in the Bill and accompanying Explanatory Notes.<sup>181</sup> These concerns have been reiterated by the two Commissions along with the Irish Human Rights and Equality Commission.<sup>182</sup>

Correspondence between the Lords Subcommittee and the Home Office indicates that the Home Office at least favours a somewhat narrow scope of Article 2 WF. The Home Office refers to the provision in the 1998 Agreement on the right of victims to remember and to contribute to a changed society. For the Home Office this implies that the Victims' Directive can only fall within the scope of Article 2 WF in so far as it relates to the victims of conflict-related violence to remember and to contribute; furthermore this means that the Trafficking Directive does not fall within the scope of Article 2 WF at all.<sup>183</sup> This effort to limit the scope of Article 2 WF came up in the *Angesom case* (discussed later) where the High Court robustly rejected this attempt to limit the understanding of rights in the 1998 Agreement as being limited to conflict-related issues. This sort of argument from the Home Office also runs counter to the view of the High Court in the *Legacy Act cases (Dillon and others)* that Article 2 WF should be given a generous and purposive interpretation.<sup>184</sup> The *Illegal Migration Act case* now confirms that Article 2 WF covers issues of asylum and immigration, including the Trafficking Directive.<sup>185</sup>

### 2.3.3 Retained EU Law (Revocation and Reform) Act 2023

This Bill was introduced to remove significant elements of retained EU law. When originally introduced as a Bill, this was drafted to provide a sunset clause for retained EU law, except where such law was expressly saved. This would have caused serious issues for legal certainty and the political accountability of the Government to Parliament as much legislation would have been repealed without any consideration by Parliament. The ECNI and NIHRC criticised the original

179 Ibid 7.

180 Ibid 7-10.

181 Ibid 12-14.

182 IHREC, NIHRC and ECNI, [Equality and Rights on the island of Ireland after Brexit: Annual joint report of IHREC, ECNI and NIHRC on the implementation of Article 2 of the Ireland/Northern Ireland Protocol. January 2021-September 2022](#) (28 November 2022).

183 House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, [Letter from Baroness Williams of Trafford, Minister of State, Home Office, re: Nationality and Borders Bill, 1 April 2022](#) (House of Lords, 2022-2023) (1 April 2022).

184 [Legacy Act cases \(Dillon and others\)](#), [2024] NIKB 11 [535].

185 [Illegal Migration Act case](#) and specifically on the Trafficking Directive: [147]-[158].

draft, highlighting numerous concerns including several specific to Northern Ireland. Among the Commissions' concerns were the risk to the UK constitutional convention that policy changes should be a matter for Parliament, that the failure to protect retained EU law within the scope of Article 2 WF would breach Article 2 WF, and that the speed of adoption of the bill and the sunset clause would preclude proper consultation, including that required under section 75 of the Northern Ireland Act.<sup>186</sup>

In light of the criticisms, the draft of the Bill was changed during its passage through Parliament. Nevertheless, the Act makes some important changes to the law and leaves some matters uncertain.<sup>187</sup>

Section 1 of the Act provides for the sunset of specified legislation in schedule 1. Section 2 of the Act provides for the sunset of EU law retained by virtue of section 4 of the European Union (Withdrawal) Act 2018. Sections 3 and 4 of the Act abolish the remnants of EU supremacy and general principles of law after the end of 2023. Section 5 renames retained aspects of EU law as 'assimilated'. Section 6 provides for how the courts should deal with retained EU case law. Sections 9 to 16 of the Act create powers to amend or revoke retained EU law.

Professor Catherine Barnard has highlighted that the effect of the Act may be more significant than the changes to the original text of the bill might suggest.<sup>188</sup> The effect of Section 2 for instance would be to end the applicability of Article 157 Treaty on Functioning of the European Union (TFEU) on equal pay, while the effect of section 3 and 4 (when brought into force) would end important EU law principles such as supremacy and effectiveness which make EU measures like Article 157 TFEU very important when domestic law falls short of EU standards. Barnard speculates the Government may restate article 157 TFEU and the effects of supremacy etc using powers in section 11 of the Act.

While the effects of the Retained EU Law (Revocation and Reform) Act 2023 may appear significant at UK level, its effect in Northern Ireland is not so clear. The Act extends to Northern Ireland but none of the legislation listed in Schedule 1 appears to be NI specific. In addition, the Government provided assurances during the debate on the bill that it did not 'disturb' section 7A of the European Union (Withdrawal) Act 2018 and that the Government would ensure that legislation was in place to respect the Article 2 WF commitments.<sup>189</sup> While this statement of principle is clear, there may still be scope for misunderstandings.

186 ECNI and NIHRC, [Annual Report 2022-2023: Implementation of Protocol Article 2](#) (2023) 16-17; ECNI and NIHRC, [NIHRC and ECNI Briefing on the Retained EU Law \(Revocation and Reform\) Bill](#) (2023).

187 The High Court provides a helpful summary at [E-Accounting Solutions Ltd \(t/a Advancetrack\) v Global Infosys Ltd \(t/a GI Outsourcing\)](#) [2023] EWHC 2038 (Ch), (4 August 2023) [13].

188 Professor Barnard is Professor of European and Employment Law in Trinity College, Cambridge and Deputy Director of 'UK In A Changing Europe'. The argument is developed in [10 posts on X/Twitter](#).

189 ECNI and NIHRC, [Annual Report 2022-2023: Implementation of Protocol Article 2](#) (2023) 17.

Already for instance the NIHRC has had to write to the Department for Business and Trade to highlight that two provisions the Department was proposing to change apply in Northern Ireland.<sup>190</sup>

The Retained EU Law (Revocation and Reform) Act 2023 leaves in place section 7A of the 2018 Act which means that the 2023 Act must be interpreted subject to the powers and rights etc in the Withdrawal Agreement, including the WF. Correspondence from the UK Government confirms that the Withdrawal Agreement, including the WF, constitute ‘relevant separation agreement law’ and so any domestic law will be interpreted in line with that Agreement including any general principles of law and EU law supremacy.<sup>191</sup> As discussed further in chapter five, this means the approach of the courts to matters like CJEU case law and issues like the Charter of Fundamental Rights and general principles of law will differ depending on whether what is at issue is the WF, the Withdrawal Agreement or retained EU law.

### 2.3.4 Elections Act 2022

The Elections Act 2022 makes wide-ranging and sometimes controversial<sup>192</sup> changes to electoral law, including in relation to voter identification, proxy votes, expenditure, disqualification etc.

One specific change has been highlighted of concern in Northern Ireland. Section 15 and schedule 8 make provision for voting rights of EU citizens in England and in Northern Ireland (this is a devolved matter in Scotland and Wales). These provisions provide that EU citizens can only vote in local elections if they are ‘qualifying’ EU citizens or EU citizens ‘with retained rights’, that is, if they come from an EU country which has a treaty with the UK recognising reciprocal voting rights, or were EU citizens resident before 31 December 2020.<sup>193</sup>

The Equality Commission for Northern Ireland and the Northern Ireland Human rights Commission provided a briefing on the Bill to the House of Lords arguing that this may breach Article 2 WF.<sup>194</sup> The Commissions note that the 1998 Agreement contains several civil and political rights; while the right to vote is not explicitly mentioned other political rights are (‘the right of free political thought’; ‘the right to pursue democratically national and political aspirations’; ‘the right to seek constitutional change by peaceful and legitimate means’). Furthermore, that part

190 NIHRC, [The 2023 Annual Statement: Human Rights in Northern Ireland](#) (2023) 40.

191 House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, [Letter from Nusrat Ghani MP \(Minister of State for Industry and Economic Security at the Department for Business and Trade\) re: Retained EU Law \(Revocation and Reform\) Bill \(now Act\), 11 September 2023](#) (House of Lords, 2022-2023) (11 September 2023).

192 Joint Committee on Human Rights, [Fifth Report - Legislative Scrutiny: Elections Bill](#) (House of Commons and House of Lords, 2021-2022) HC 233 / HL Paper 58, 11-13, 18.

193 Elections Act 2022, [schedule 8](#).

194 ECNI and NIHRC, [Briefing on the provisions on Voting/Candidacy Rights of EU citizens in Northern Ireland in the Elections Bill](#) (4 March 2022).



of the Agreement applies to ‘everyone in the community’, a point supported by the High Court in the *Angesom* case (see chapter five). The Commissions have recommended that there is no reduction of rights of certain EU citizens who arrive in Northern Ireland after the end of the Brexit transition period in terms of voting and candidacy rights in local elections in NI.<sup>195</sup> The Windsor Framework Sub-Committee has followed up on this point with the Government. The Government view is that the voting rights under Article 22 TFEU are not within the scope of Article 2 WF.<sup>196</sup> The ECNI and NIHRC have stated that they disagree with the Government’s analysis and that the issue is not one of Article 22 TFEU but Article 2 WF.<sup>197</sup>

The 1998 Agreement devotes considerable language to describing political rights (quoted above) and protects the rights of everyone in the community. Removing the right to vote of EU citizens would appear to remove a right that existed before the end of the transition period. The protections offered by Article 2 WF cannot be limited to persons who arrived before that date – the rights of everyone in the community are ongoing.

It might be argued that including the right to vote in local elections for EU nationals also raises the prospect that one could also argue that free movement rights should be extended to EU citizens arriving after 1 January 2021. This does not though cause an insuperable argument as a distinction can be drawn between entitlements that one has when a member of the community and one’s interest in moving to a territory to become part of a community. There may well be other arguments: would such a right extend to members of new European Union states for instance, and would there be reciprocity for people from Northern Ireland if they moved to an EU state. Considering the second point first, most people in Northern Ireland can claim to be British or Irish or both and insofar as entitled to Irish citizenship could presumably claim the right to vote in local elections in EU states. This would also apply to any new EU state. This solution though does leave those people of Northern Ireland who chose to identify as British only without this option. As Article 2 WF does not create obligations for the European Union, we would encourage the EU as a matter of good faith to allow all persons who form part of the community in Northern Ireland to vote in local elections in the Union.

**We recommend that the UK Government introduce legislation into Parliament to amend the Elections Act to restore the rights of all EU citizens to vote in local elections in Northern Ireland and to ensure compliance with Article 2 WF.**

195 Ibid., 4-5.

196 House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, [Letter from The Rt. Hon. Conor Burns MP, Minister of State, Northern Ireland Office to Lord Jay of Ewelme re Article 2 of the Protocol](#), 25 March 2022 (House of Lords, 2022-2023).

197 ECNI and NIHRC, [Annual Report 2022-2023: Implementation of Protocol Article 2](#) (2023) 88.

**We recommend that the European Union should review current arrangements as regards the rights of UK citizens who were born and residing in NI who move to EU Member States to vote in local elections in that Member State.**

### 2.3.5 Illegal Migration Act 2023

The Illegal Migration Act 2023 is another wide-ranging and controversial piece of legislation.<sup>198</sup> The Joint Committee on Human Rights produced a critical report highlighting concerns, including about the rights of children, age assessments, and victims of slavery and trafficking; the Committee identified possible breaches of the Convention on the Rights of the Child as well as the European Convention on Human Rights.<sup>199</sup>

The Act provides for the removal of people who enter the UK in breach of immigration control; it limits the possibility for people subject to the Act to invoke legal protections including human rights protections. The Act disapplies section 3 of the Human Rights Act (the interpretive application<sup>200</sup>) in relation to the 2023 Act or provisions made by virtue of it.<sup>201</sup>

The NIHRC provided a briefing on the Bill to the House of Lords, noting the widespread criticism of the Bill as constituting an attack on the right to seek asylum.<sup>202</sup> The NIHRC<sup>203</sup> and ECNI<sup>204</sup> have identified several provisions of EU law relevant to Article 2 WF and the Illegal Migration Act, as follows: EU Reception Directive,<sup>205</sup> Procedures Directive,<sup>206</sup> Qualification Directive,<sup>207</sup> Dublin III Regulation,<sup>208</sup> Victims Directive<sup>209</sup> and Human Trafficking Directive.<sup>210</sup>

198 [Illegal Migration Act 2023](#).

199 Joint Committee on Human Rights, [Twelfth Report - Legislative Scrutiny: Illegal Migration Bill](#) (House of Commons and House of Lords, 2022-2023) HC 1241 / HL Paper 208 (11 June 2023).

200 Section 3 requires that 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights'.

201 Illegal Migration act, [section 1\(5\)](#).

202 NIHRC, [Northern Ireland Human Rights Commission submission to House of Lords on the Illegal Migration Bill](#) (16 May 2023) 4-5.

203 NIHRC, [Northern Ireland Human Rights Commission submission to House of Lords on the Illegal Migration Bill](#) (16 May 2023) 18.

204 ECNI, [Submission to the House of Lords on the Illegal Migration Bill](#).

205 [EU Directive 2003/9/EC](#) laying down minimum standards for the reception of asylum seekers.

206 [Council Directive 2005/85/EC](#) of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status 2005.

207 [Council Directive 2004/83/EC](#) of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive).

208 [Regulation 604/2013/EU](#), Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, 26 June 2013.

209 [Directive 2012/29/EU](#) of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA 2012.

210 [Directive 2011/36/EU](#) of the European Parliament and Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA 2011.

The Charter of Fundamental Rights is also relevant.<sup>211</sup>

The failure of the Government to address this EU law/WF dimension is concerning. As noted in correspondence from the Lords Subcommittee, the Government believes that the Trafficking Directive does not fall within the scope of Article 2 WF,<sup>212</sup> but does not explain its views on the other measures identified by the Commissions, nor do Government publications on the Bill, now Act, explicitly address Article 2 WF.<sup>213</sup> Also concerning is the willingness to exclude section 3 of the Human Rights Act and to limit human rights claims, which is inconsistent with the 1998 Agreement.<sup>214</sup>

The Act's provisions deeming applications to be automatically inadmissible seem inconsistent with the Qualification Directive and the Procedures Directive.<sup>215</sup> The failure to consider safeguards for persons at risk or with individual needs also seems incompatible with the Reception and Qualification Directives.<sup>216</sup> The detention of people without regard to vulnerability engages the Procedures, Reception and Qualification directives and Charter.<sup>217</sup> Similarly the Act potentially limits the right to a remedy in the Procedures and Reception Directives and the Charter.<sup>218</sup> The provisions on unaccompanied children mean the children affected may not have access to procedures that reflect the best interests of the child, contrary to the Procedures, Qualification and Reception Directives and Dublin III Regulations.<sup>219</sup>

In October 2023 the NIHRC commenced a legal challenge in the High Court to the Illegal Migration Act on the basis of Article 2(1) WF and the Human Rights Act/ European Convention on Human Rights.<sup>220</sup>

The High Court has now ruled that the Illegal Migration Act breaches Article 2 WF (see below section 5.4.4).<sup>221</sup>

211 NIHRC, [Northern Ireland Human Rights Commission submission to House of Lords on the Illegal Migration Bill](#) (16 May 2023) 18.

212 Hansard, [‘Illegal Migration Bill Volume 831: debated on Wednesday 28 June 2023’](#).

213 House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, [Letter from Lord Jay of Ewelme to Lord Murray of Blidworth, Parliamentary Under Secretary of State for Migration and Borders, Home Office, re: Illegal Migration Bill \(now Act\), 14 September 2023](#) (House of Lords, 2022-2023) (14 September 2023).

214 NIHRC, [Northern Ireland Human Rights Commission submission to House of Lords on the Illegal Migration Bill](#) (16 May 2023) 10.

215 Ibid 11-12.

216 Ibid 13.

217 Ibid 18.

218 Ibid 19-20.

219 Ibid 22-23.

220 NIHRC, [Illegal Migration Act Challenge Factsheet](#) (NIHRC, 2023) (6 October 2023).

221 [Northern Ireland Human Rights Commission's Application and JR295's Application and In the matter of The Illegal Migration Act 2023; \[2024\] NIKB 35](#), (13 May 2024).

### 2.3.6 Safety of Rwanda (Asylum and Immigration) Bill

Following the UK Supreme Court judgment in the Rwanda case (see chapter five), the UK has introduced the Safety of Rwanda (Asylum and Immigration) Bill 2023 to further the Government's plans to deport certain migrants to Rwanda.<sup>222</sup> The Bill is seriously problematic from the viewpoint of Article 2(1) WF and the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement.

The Secretary of State in introducing the Bill has indicated he cannot say that the Bill is compatible with the rights in the European Convention on Human Rights. The Bill applies to Northern Ireland and there is no discussion in the Explanatory Notes or Human Rights Memorandum about either Article 2(1) WF or the 1998 Agreement or the Trade and Cooperation Agreement.

Clause 1 gives details of the treaty between the UK and Rwanda. Clause 2 of the Bill requires decision-makers to treat Rwanda as a safe country and courts or tribunals are precluded from hearing arguments that Rwanda is not a safe country; the sub-clauses are said to apply notwithstanding the Immigration Acts, Human Rights Act, any domestic law (including the common law) and any interpretation of international law.

Clause 3 disapplies sections 2, 3 and 6-9 of the Human Rights Act to certain questions under the Bill; section 3 is disapplied in its entirety in respect of the Bill. Section 2 Human Rights Act requires courts to take into account the case law of the European Court of Human Rights; section 3 requires courts to interpret legislation in so far as it is possible to do so to be compatible with Convention rights, while section 6 requires public authorities to act compatibly with Convention rights. The disapplication of sections 6-9 Human Rights Act<sup>223</sup> is 'unprecedented' and 'particularly alarming'.<sup>224</sup> Under clause 5 of the Bill courts or tribunals may not have regard to any interim measure of the European Court of Human Rights relating to the removal of a person to Rwanda.

The ECHR Memorandum attached to the Bill recognises that the rights to life, freedom from torture inhuman or degrading treatment or punishment, respect for private and family life and right to a remedy are engaged by the Bill.<sup>225</sup> It argues that the Bill will not breach the right to life or the right to freedom from torture, inhuman or degrading treatment or punishment because the Bill still allows individualised arguments to be made that an individual would risk their safety if removed to Rwanda.<sup>226</sup> The memorandum argues that Article 8 ECHR is

222 [Safety of Rwanda \(Asylum and Immigration\) Bill 2023](#).

223 Section 6 is the obligation for a public authority to act compatibly with a Convention right; section 7-8 provide for proceedings and remedies in relation to this obligation and section 9 regulates the position of judicial acts.

224 Joint Committee on Human Rights, [Safety of Rwanda \(Asylum and Immigration\) Bill 2023-2024](#) HC 435 / HL 62, para 85 and 89.

225 [Safety of Rwanda \(Asylum and Immigration\) Bill European Convention on Human Rights Memorandum 2023](#) para 5.

226 *Ibid.*, paras 10-11, 14.

not breached because removal is justified. It also argues that the right to a remedy (Article 13 ECHR) is not breached as different satisfactory remedies exist under the Bill.<sup>227</sup> The recent Command Paper *Safeguarding the Union* has reiterated the Government position that Article 2 WF is not engaged by the Bill.<sup>228</sup>

The Bill raises serious issues about the 1998 Agreement, Article 2(1) WF and the Trade and Cooperation Agreement.

The 1998 Agreement includes an undertaking by the UK Government to ‘complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention’.<sup>229</sup> The disapplication of sections 6-9 Human Rights Act interfere with direct access to the courts, as does the disapplication of section 2 Human Rights Act. Direct access must mean that persons can plead their Convention rights when a public authority acts in breach and those Convention rights need to reflect what the European Court of Human Rights has said on this matter. It is difficult to see how the right to a remedy is respected if section 3 Human Rights Act is disapplied; this leaves the remedy only of a section 4 Human Rights Act declaration of incompatibility which is non-binding and does not offer an effective remedy to a successful litigant.

As discussed in chapter five, the Supreme Court considered arguments about the Procedures Directive in the Rwanda flights case.<sup>230</sup> In the Supreme Court judgment the Secretary of State accepted that if this Directive applied the policy would be in breach of the Directive.<sup>231</sup> The Supreme Court concluded the Directive no longer applied because of changes made by the Immigration and Social Security Coordination (EU Withdrawal) Act 2020. But that argument did not consider Northern Ireland or Article 2(1) WF. That the Secretary of State has already accepted that the policy would breach the Procedures Directive therefore would appear to be confirmation the bill is a diminution of rights within the terms of Article 2(1) WF.

Article 524 of the Trade and Cooperation Agreement provides that the cooperation in that Part (Law Enforcement and Judicial Cooperation in Criminal Matters) is based on respect for democracy, the rule of law and fundamental rights and freedoms as set out in the Universal Declaration of Human Rights and the European Convention on Human Rights ‘and on the importance of giving effect to the rights and freedoms in that Convention domestically’.

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227 Ibid., paras 16, 21, 27.

228 UK Government, [Safeguarding the Union](#) (2024) CP 1021, paragraph 46.

229 [Belfast Good Friday Agreement 1998](#), Rights, Safeguards and Equality of Opportunity, 2.

230 [Council Directive 2005/85/EC](#) of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status 2005.

231 [R \(on the application of AAA and others\) \(Respondents/Cross Appellants\) v Secretary of State for the Home Department \(Appellant/Cross Respondent\)](#) [2023] UKSC 42, (15 November 2023) [108].

The Safety of Rwanda Bill would seem to undermine the domestic effect of the Convention in the UK. Whilst there does not seem to be any automatic consequence for this provided for in Article 524 it should presumably be a matter of concern for the UK Government and the EU that the UK is proposing to so undermine the domestic protection of the Convention rights.

The NIHRC has published a research report<sup>232</sup> and a briefing document<sup>233</sup> highlighting serious concerns about the protection of asylum seekers and refugees under Article 2(1) WF. It has also published its advice on the Rwanda Bill.<sup>234</sup> In its advice on the Rwanda Bill the Commission has indicated that certain EU laws on asylum are within the scope of Article 2 WF: the Temporary Protection Directive,<sup>235</sup> the original Asylum Reception Directive,<sup>236</sup> the Qualification Directive,<sup>237</sup> the Procedures Directive<sup>238</sup> and the Dublin Convention.<sup>239</sup> The Commission highlights numerous problems with the Bill, including compatibility with Article 2 WF but also international law more generally and UK constitutional principles. The Bill may also conflict with section 7A of the European Union (Withdrawal) Act.<sup>240</sup> The Equality Commission for Northern Ireland has similarly published a submission critical of the Bill, expressing concerns at its implication for the Human Rights Act, Article 2 WF, and constitutional principles including the rule of law and separation of powers.<sup>241</sup> The Bill may raise issues for extradition to the UK.<sup>242</sup>

The Bill received royal assent on 25 April 2024 and became an Act. It appears though that the Labour Government has dropped the Rwanda scheme.

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- 232 Alison Harvey, [Article 2 of the Windsor Framework and the Rights of Refugees and Asylum-seekers](#) (Northern Ireland Human Rights Commission, 2023).
- 233 NIHRC, [Briefing Note on Article 2 of the Windsor Framework and the Rights of Refugees and Asylum-seekers](#) (2023).
- 234 NIHRC, [Advice on the Safety of Rwanda \(Asylum and Immigration\) Bill](#) (2024).
- 235 [Council Directive 2001/55/EC](#) of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (Temporary Protection Directive).
- 236 [Council Directive 2003/9/EC](#) of 27 January 2003 laying down minimum standards for the reception of asylum seekers (Reception Directive) 2003
- 237 [Council Directive 2004/83/EC](#) of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive).
- 238 [Council Directive 2005/85/EC](#) of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (Procedures Directive).
- 239 [Regulation 604/2013/EU](#), Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, 26 June 2013. 2013
- 240 NIHRC, [Advice on the Safety of Rwanda \(Asylum and Immigration\) Bill](#) (2024) 24.
- 241 ECNI, [Submission on the Safety of Rwanda \(Asylum and Immigration\) Bill](#) (ECNI, 2024).
- 242 The Irish High Court has noted this could be an issue in a case involving the designation of the UK as a safe country; the High Court found the designation was unlawful because of inadequate safeguards in the but did not have to decide the issue as to whether the UK was a safe country: [In the Matter of Section 5 of the Illegal Immigrants \(Trafficking\) Act 2000 as amended](#) [2024] IEHC 183, (22 March 2024). In a separate case the Irish Supreme Court has referred a question about extraditing a person to the UK to the Court of Justice; the Advocate General opinion recommends that courts could decide in a specific case that extradition to the UK would breach Article 49 of the Charter of Fundamental Rights: *Minister for Justice and Equality v MA* [Opinion of Advocate General](#) Case C-202/24.

**We recommend that the UK Government introduce legislation to repeal the Safety of Rwanda Act or to amend it to remove provisions that do not comply with Article 2 WF or the Human Rights Act.**

### 2.3.7 Northern Ireland Troubles (Legacy and Reconciliation) Act 2023

The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (the Legacy Act)<sup>243</sup> has been controversial. The Legacy Act is the UK Government approach to dealing with the legacy of conflict-related crimes. It dispenses with significant elements of the approach agreed in the Stormont House Agreement and has attracted widespread criticism from Northern Ireland political parties and civil society. The Joint Committee on Human Rights produced a report on the Bill which agreed with the assessment of numerous stakeholders that the Bill had multiple serious flaws, undermined the rule of law and was likely incompatible with ECHR rights including the right to life and freedom from torture, inhuman and degrading treatment.<sup>244</sup> Some aspects of the Bill were modified in an attempt to deal with some of these criticisms, though it is far from clear the amendments resolve all these issues.

The Legacy Act creates an Independent Commission for Reconciliation and Information Recovery (ICRIR). The ICRIR can carry out reviews into deaths and other harmful conduct committed during the conflict. On foot of such a review the ICRIR may refer the matter to the relevant prosecution authorities.<sup>245</sup> It has power to grant immunity from prosecution in some circumstances.<sup>246</sup> When the relevant section comes into force the ICRIR will be the exclusive means for any criminal investigation into Troubles-related offences.<sup>247</sup> The Legacy Act also provides for mechanisms to remember the conflict.<sup>248</sup>

The Act prohibits new coroner inquests into Troubles-related deaths and stops existing inquests unless they are only lacking a verdict.<sup>249</sup> It also prohibits new civil actions, or civil actions begun on or after the day of First Reading of the Bill.<sup>250</sup>

243 [Northern Irish Troubles \(Legacy and Reconciliation\) Act 2023](#).

244 Joint Committee on Human Rights, [Sixth Report - Legislative Scrutiny: Northern Ireland Troubles \(Legacy and Reconciliation\) Bill](#) (House of Commons and House of Lords, 2022-2023) HC 311 / HL Paper 79.

245 Legacy Act, [section 25](#).

246 *Ibid.*, [section 19](#).

247 [Northern Irish Troubles \(Legacy and Reconciliation\) Act 2023, section 38](#).

248 Legacy Act, [part 4](#).

249 *Ibid.*, [section 44](#).

250 *Ibid.*, [section 43](#).

Since the passage of the Legacy Act, the Government of Ireland has announced that it will take a rare interstate case against the United Kingdom alleging the Act breaches the ECHR.<sup>251</sup> The Labour Party has indicated its intention to repeal the Legacy Act if elected to government.<sup>252</sup>

Most of the criticisms of the Act have focused on compliance with the ECHR and other human rights treaties. However, there are also issues around compatibility with Article 2 WF. Article 2 WF provides for non-diminution where EU law provided an underpinning for the rights in the rights, safeguards and equality of opportunity section of the 1998 Agreement. One such EU law is the Victims Directive, interpreted in the light of general principles of EU law and the Charter of Fundamental Rights.<sup>253</sup>

The NIHRC raised several concerns about the compatibility of the Legacy Bill with the Victims Directive. The NIHRC specifically criticised the conditional immunity scheme in the Bill, highlighting that the Directive required ‘sufficient access to justice’ for victims and the next-of-kin, required the state to provide victims with information including on decisions not to investigate and prosecute and provided for a right to review a decision not to prosecute.<sup>254</sup> The conditional immunity scheme, according to the NIHRC, appeared to fall foul of these standards in that there was no involvement for victims and their families in the immunity scheme and no possibility to seek a review of a decision to grant immunity. The NIHRC also raised concerns about the closing down of other avenues of redress apart from the ICIR as interfering with the right to an effective remedy as a general principle of EU law relevant to the Directive.<sup>255</sup>

The UK Government did introduce some amendments to the Bill, but these did not address the Article 2 WF concerns identified by the NIHRC.<sup>256</sup>

In a letter to the House of Lords sub-committee, the Government sought to allay the NIHRC concerns.<sup>257</sup> According to the Government, they ‘would expect’ that the ICIR standards for involving victims and families would be at least equivalent to that applied by police forces. The Government disagreed that the granting of

251 Department for Foreign Affairs, [Statement by the Tánaiste, Micheál Martin, on the Government decision to initiate an inter-State case against the United Kingdom](#) (20 December 2023); Northern Ireland Office, [Statement in response to legacy inter-state case by the Irish Government](#) (20 December 2023).

252 Hansard, [Northern Ireland Troubles \(Legacy and Reconciliation\) Bill; Volume 737: debated on Wednesday 6 September 2023](#), speech by Hilary Benn.

253 [Directive 2012/29/EU](#) of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA 2012.

254 NIHRC, [Advice on the Northern Ireland Troubles \(Legacy and Reconciliation\) Bill](#) (2022) 48, referring to the recitals, Article 6 and Article 11 of the Directive.

255 *Ibid.*, 52.

256 NIHRC, [NIHRC Supplementary Briefing: UK Government’s Proposed Amendments to NI Troubles \(Legacy and Reconciliation\) Bill](#) (2023).

257 House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, [Letter from Lord Caine to Lord Jay of Ewelme, 20 December 2022](#) (House of Lords, 2022-2023).



immunity amounted to a decision not to prosecute. The Government ‘would also expect’ the ICIR to provide reasons for immunity decisions and these could be subject to judicial review. The Government rejected the NIHRC interpretation that the immunity panel would only rely on information provided by the person seeking immunity. The Government also disagreed that EU law required a public hearing on any decision about immunity or prosecution.

The NIHRC sent a letter to the House of Lords sub-committee providing more detail on its concerns around the Victims’ Directive.<sup>258</sup> The NIHRC letter explained that the Victims’ Directive provision on review of decisions not to prosecute was not limited to decisions of prosecuting authorities but included other agencies (apart from courts). For the NIHRC an immunity decision was a decision tantamount to a decision not to prosecute. The Bill made no provision for appeal of a decision to grant immunity and the NIHRC noted that judicial review, while important, was not a substitute for an appeal process. The NIHRC also elaborated on the inadequacy of the Bill in terms of considering information from victims in relation to the immunity process. In a separate briefing for the Council of Europe the NIHRC also flagged that it was looking at issues around compensation and the Victims’ Directive requirements.<sup>259</sup>

The eventual Act does not address these concerns of the NIHRC in relation to the Victims’ Directive. The UN Human Rights Committee has also criticised (among other matters) the legislation’s immunity scheme, the weakness of the ICIR review function, allegations about lack of independence, and procedural barriers to legal investigations.<sup>260</sup> The Committee has called for the repeal or reform of the Act.

The *Legacy Act cases (Dillon and others)*, in which both Commissions intervened, has now vindicated the position that the immunity provisions of the Act are inconsistent not just with Convention rights but also Article 2 WF and specifically rights in the Charter of Fundamental Rights corresponding to the relevant Convention rights and rights in the Victims’ Directive.<sup>261</sup>

### 2.3.8 Data Protection and Digital Information (No 2) Bill

This bill has been introduced by the Government and introduced as an effort to create a new data regime post-Brexit.<sup>262</sup> Some commentators have noted that there is a risk that the Bill will be regressive with respect to existing protections including

258 House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, [Letter from Alyson Kilpatrick BL, Chief Commissioner, Northern Ireland Human Rights Commission to Lord Jay of Ewelme re: Letter from Lord Caine on Protocol Article 2 and the NI Troubles \(Legacy and Reconciliation\) Bill, 30 January 2023](#) (House of Lords, 2022-2023).

259 NIHRC, *Rule 9 Submission to the CoE Committee of Ministers in Relation to the Supervision of the Cases Concerning the Actions of the Security Forces in NI: Advice on NI Troubles (Legacy and Reconciliation) Bill* (2022).

260 Human Rights Committee, [Concluding Observations of the Human Rights Committee: United Kingdom 3 May 2024](#) United Nations 2024) CCPR/C/GBR/CO/8 para 10.

261 [Legacy Act cases \(Dillon and others\)](#), [2024] NIKB 11 (28 February 2024) para 710(ii). See further chapter five.

262 Hansard, [‘Data Protection and Digital Information \(No.2\) Bill Volume 729: debated on Wednesday 8 March 2023’](#).

European Union General Data Protection Regulation protections (EU GDPR).<sup>263</sup> Much of the Bill extends to Northern Ireland. While the Government has published Explanatory Notes and a Human Rights Memorandum there is nothing to indicate that it has considered the implications of Article 2(1) WF. The NIHRC has published a briefing highlighting concerns that several provisions in the Bill could diminish protections available under the EU GDPR; these include matters like the automatic processing of information, the potential transfer of data to other countries, the definition of scientific research.<sup>264</sup> The ECNI similarly submitted evidence critical of the Bill, highlighting how it expanded the possibility for a data controller to refuse an access request, limited the prohibition on automatic data processing in relation to sensitive personal data, permitted departments to obtain information about bank accounts used for social security payments.<sup>265</sup> There is a risk here not just of diminution but also that the changes might endanger the European Union's adequacy decision as regards the UK (that is, the decision that UK data protection laws are equivalent to EU protections) and so endanger cross-border cooperation; this could be particularly serious in the North-South context.<sup>266</sup>

The Bill fell with the prorogation of Parliament. We highlight it here as an example of how any changes to UK data protection law must consider the implications for Article 2 WF.

### 2.3.9 Victims and Prisoners Bill 2023

This Bill makes provisions about the appointment of advocates for victims of major incidents, the release of prisoners and restrictions on the right of certain prisoners to marry. Most of the Bill does not apply to Northern Ireland. We note it here as it is an example of a recent legislative proposal containing provisions disapplying parts of the Human Rights Act, in this case the section 3 interpretative obligation.<sup>267</sup> The Bill has now become the Victims and Prisoners Act 2024.<sup>268</sup>

### 2.3.10 Article 2 WF and the legislative process

There does not seem to be a systematic process employed by the UK Government for examining whether UK legal measures (or NI legal measures) are in breach of Article 2 WF. Meanwhile correspondence from the UK Government to the House of Lords sub-committee indicates that departments are working to provide an account of retained EU law, including where retained EU law falls within the scope of Article 2 WF; as part of this the Brexit Opportunities' Unit is working with the Northern

263 Open Rights Group [‘The Data Grab Bill Attacks our Data Rights’](#) (2023).

264 NIHRC, [NIHRC Briefing on the Data Protection and Digital Information Bill](#) (January 2024).

265 ECNI, [Submission on the Data Protection and Digital Information Bill](#) (March 2024).

266 NIHRC, [NIHRC Briefing on the Data Protection and Digital Information Bill](#) (January 2024) 21.

267 Victims and Prisoners Bill 2023, [clauses 49-51](#).

268 See [sections 69-72](#) on the disapplication of section 3 of the Human Rights Act.

Ireland Office to understand the effects of Article 2 WF.<sup>269</sup> In response the House of Lords sub-committee has noted that the Government apparently does not have a list of measures falling within the scope of Article 2 WF and has asked the Government to consider producing such a list; the sub-committee has also asked how the Government is producing an account of retained EU law in the absence of such a list.<sup>270</sup> The Commissions have already drawn attention to the need for the Government to make clear how it ensures that legislation is compatible with Article 2 WF through publications in the Guide to Making Legislation and in explanatory materials.<sup>271</sup> The Guide to Making Legislation has not been updated with any references to Article 2 WF (as of 27 February 2024).<sup>272</sup> We have already noted how Government publications on legislative proposals frequently do not include any discussion of Article 2 WF concerns.

The Northern Ireland Executive has started to publish Article 2 Impact Assessments.<sup>273</sup> This is welcome and a better approach than that existing at UK Government level, though we note the impact assessments seem to consider the scope of Article 2 to be more limited than that supported by the two Commissions.

**We recommend that, in the interests of transparency, the Government publish details of its account of retained EU law, including details on the methodology used to identify relevant issues.**

**We recommend that the Government ensure that the Explanatory Notes for any draft legislation impacting on Northern Ireland explicitly state, in detail, whether the Government considers that Article 2 WF is engaged by the proposals and if so, how the draft legislation respects the keeping pace and non-diminution aspects of Article 2 WF.**

269 House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, [Letter from Nusrat Ghani MP \(Minister of State for Industry and Economic Security at the Department for Business and Trade\) re: Retained EU Law \(Revocation and Reform\) Bill \(now Act\), 11 September 2023](#) (House of Lords, 2022-2023) (11 September 2023).

270 House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, [Letter from Lord Jay of Ewelme to Nusrat Ghani MP \(Minister of State for Industry and Economic Security at the Department for Business and Trade\), 19 October 2023](#) (House of Lords, 2022-2023) (19 October 2023).

271 ECNI and NIHRC, [Submission of the NIHRC and ECNI to the House of Lords Sub-Committee on the Protocol's call for evidence for its inquiry on the Windsor Framework](#) (2023) ECNI and NIHRC, [Submission of the NIHRC and ECNI to the House of Lords Subcommittee on the Protocol's call for evidence for its inquiry on the Windsor Framework](#) (2023) 20.

272 Cabinet Office, [Guide to Making Legislation](#) (2022)

273 See for instance the [Impact Assessment for the Draft Strategic Framework to End Violence Against Women and Girls](#).

## 2.4 Conclusion

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In this chapter we have reviewed legal developments in Northern Ireland and at the United Kingdom level. At the Northern Ireland level the story, as often the case in this jurisdiction, has been one of relative limbo as the institutions were not functional for most of the period under review. There have been some notable initiatives such as the consultation on the Race Relations Order.

We note with extreme concern that several high-profile legislative initiatives at UK level diminish European Union protections for rights; this is particularly in the area of immigration and asylum but also in relation to the investigation of human rights violations from the conflict in Northern Ireland. The High Court in Belfast has confirmed this with the ruling in the *Legacy Act cases (Dillon and others)* disapplying part of the 2023 Legacy Act.

We share the concern of others at the increasing tendency of the UK Government to introduce bills including provisions to disapply parts of the Human Rights Act. The 1998 Agreement makes the domestic protection of the Convention rights central to its concerns and this practice of disapplying the Act without any regard to the implications for the Agreement risks unpicking a core element of the Agreement and peace process.

We are struck by the relative inattention that legislators and policymakers in Northern Ireland and at UK level seem to give to Article 2 WF. In Northern Ireland we note that the consultation on the Race Relations Order does not show a full awareness of the significance of Article 2 WF. This problem seems if anything to be more serious at UK level, especially given more recent steps by the Ni Executive to conduct Article 2 Impact Assessments. There is a consistent problem that proposals for new UK legislation do not discuss Article 2 WF and even human rights memoranda, while they may discuss the ECHR, do not meaningfully engage with the specific requirements of Article 2 WF. Most strikingly the command paper *Safeguarding the Union* seriously misrepresents the scope of Article 2 WF, as now made evident in the *Legacy Act cases (Dillon and others)* and *Illegal Migration Act case*.

# Chapter 3: Human Rights and Equality Developments in Ireland since January 2022 and the Risk of Divergence

## 3.1 Introduction

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This chapter examines developments in human rights and equality in Ireland since January 2022. It examines measures relevant to the scope of Article 2 WF and in particular measures relating to equality. The chapter highlights important areas especially in relation to the reform of equality legislation where there is a risk of divergence in the protection of rights and equality.

## 3.2 Background

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Ireland has introduced, is introducing or is considering the introduction of numerous reforms in relation to human rights and equality during the period since 1 January 2022.

Some of these reforms relate to the EU laws falling under the scope of Article 2 WF in different ways. Some of these reforms in Ireland relate to the Annex 1 equality directives; others relate to EU laws which applied in Northern Ireland prior to the UK's exit from the European Union. Some of the Irish reforms relate to new or proposed EU measures. Many other reforms are based on other international standards or form part of a wider reform process not tied to EU or international law. In many cases the reforms or proposed reforms highlight a risk of divergence in how human rights and equality are protected in Ireland and Northern Ireland; they also represent opportunities to consider possible reforms to the law in Northern Ireland.

A convenient starting place is the programme agreed by the coalition government in Ireland after the 2020 general election: *Programme for Government: Our Shared Future*.<sup>274</sup> This was adopted during the COVID19 pandemic and contains numerous commitments on economic and political reform, including a commitment to deliver 'equality within society'.<sup>275</sup>

The Programme has several sections on equality issues. On immigration, it promises to address the position of long-term undocumented persons and their

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274 Government of Ireland, [Programme for Government: Our Shared Future](#) (29 October 2020).

275 Ibid., 6.

dependents, to publish a new Action Plan against Racism, to develop a Migration Integration Strategy, to implement EU and UN standards on trafficking and to end Direct Provision.<sup>276</sup> LGBTI+ commitments include a ban on conversion therapy, adoptive leave and benefits for male same-sex adoptive couples, implementation of the LGBTI+ and LGBTI+ Youth strategies, a health policy for Trans people, and amending the gender ground in equality legislation to include gender identity.<sup>277</sup> There are commitments for Travellers and Roma, including the implementation of a Health Action Plan.<sup>278</sup> Gender commitments include a new national strategy for women and girls, a referendum to amend Article 41.2 of the Constitution, legislation on gender pay gap reporting, and expanding the equality budgeting programme.<sup>279</sup>

The Programme undertakes to revise the law on gender recognition for 16 and 17 year olds, moving to a system of self-declaration with parental consent, to examine the law for under-16s, and to recognise the position of non-binary persons.<sup>280</sup> The Programme promises to examine the introduction of a new ground of socio-economic disadvantaged status in equality legislation.<sup>281</sup> The Programme contains extensive commitments on disability including ratifying the Optional Protocol to the Convention on the Rights of Persons with Disabilities.<sup>282</sup> The Programme makes promises about supporting the family and children, including improving parental leave and childcare.<sup>283</sup> The Government will reform hate crimes legislation,<sup>284</sup> and address the ‘epidemic of domestic, sexual and gender-based violence.’<sup>285</sup> The Programme commits to full implementation of the Victims’ Directive, to enact the Online Safety and Media Regulation Bill<sup>286</sup> and to look at whistleblowing legislation in light of EU considerations.<sup>287</sup> There will be an Anti-Poverty, Social Inclusion and Community Development Plan based on the Sustainable Development Goals.<sup>288</sup> In the political sphere there are initiatives to improve gender and ethnic balance at local level, and to reform the Constitution (amending Article 41.2, introducing an amendment on housing, and amending the franchise for Presidential elections).<sup>289</sup>

Overall, this is an ambitious programme. There are some in Ireland that would go even further. IHREC for instance has recommended constitutional amendments to better protect economic social and cultural rights, including incorporation

276 Government of Ireland, [Programme for Government: Our Shared Future](#) (29 October 2020) 76. Direct provision refers to the system of providing asylum seekers with accommodation, meals, some financial resource and a medical card.

277 Government of Ireland, [Programme for Government: Our Shared Future](#) (29 October 2020) 77.

278 Ibid., 77.

279 Ibid., 77.

280 Ibid., 77.

281 Ibid., 77.

282 Ibid., 78-79.

283 Ibid., 80.

284 Ibid., 78, 86.

285 Ibid., 86.

286 Ibid., 87.

287 Ibid., 121.

288 Ibid., 91.

289 Ibid., 119-120.

at a sub-constitutional level of the International Covenant on Economic Social and Cultural Rights.<sup>290</sup> The programme is ambitious, but it has not been without problems. The referendum on the change to the constitutional provision about women's work in the home was delayed<sup>291</sup> and was ultimately rejected by the people in a referendum. And as will be seen there have been delays in fully implementing some EU directives.<sup>292</sup>

Having set the context, the following sections examine specific areas where there is a risk of divergence.

### 3.3 Review of Equality Legislation

The current review of equality legislation in Ireland might lead to increasing divergence in rights protection on the island of Ireland. This is speculative as the Government has not yet announced its plans much less introduced legislation. It has carried out a consultation and many stakeholders responded to this.<sup>293</sup>

Some of the changes being considered in Ireland would have the effect of bringing it more into line with EU (and Northern Ireland) law.<sup>294</sup> Other proposals would be more innovative. These include the possibility of including protection for carers,<sup>295</sup> introducing protections on grounds of socio-economic status<sup>296</sup>. Furthermore, it looks at recognising intersectional discrimination,<sup>297</sup> as well as considering issues around gender identity<sup>298</sup> and better data on equality.<sup>299</sup>

290 Irish Human Rights and Equality Commission, [The Incorporation of Economic, Social and Cultural Rights into the Irish Constitution](#) (14 February 2023).

291 Harry McGee '[Wording for Referendum to Replace Constitutional Reference to Women's Place in the Home Due Shortly](#)' (24 August 2023) *Irish Times*.

292 Some aspects of equality legislation do not adequately implement EU directives while the transposition of the Work-Life Balance directive has been inadequate and given rise to the possibility of European Commission enforcement action.

293 Government of Ireland, [The Equality Acts Review: Summary of the Submissions Received to the 2021 Public Consultation on the Review of the Equality Acts](#) (Department of Children, Equality, Disability, Integration and Youth, Dublin 2023).

294 For instance specifying that harassment is a form of discrimination, ensuring that non-religious belief is a protected characteristic, amending the definition of racial discrimination, removing or modifying problematic exemptions: Government of Ireland, [The Equality Acts Review: Summary of the Submissions Received to the 2021 Public Consultation on the Review of the Equality Acts](#) (Department of Children, Equality, Disability, Integration and Youth, Dublin 2023) 6, 16, 31, 46, 48, 51, 52.

295 Government of Ireland, [The Equality Acts Review: Summary of the Submissions Received to the 2021 Public Consultation on the Review of the Equality Acts](#) (Department of Children, Equality, Disability, Integration and Youth, Dublin 2023) 10.

296 The consultation resulted in suggestions on the introduction of a socio-economic ground, including drawing on the definition of 'socio-economic disadvantage' in the [Equality \(Miscellaneous Provisions\) Bill 2021](#).

297 Government of Ireland, [The Equality Acts Review: Summary of the Submissions Received to the 2021 Public Consultation on the Review of the Equality Acts](#) (Department of Children, Equality, Disability, Integration and Youth, Dublin 2023) 65 discussing Sandra Fredman, [Intersectional discrimination in EU gender equality and non-discrimination law](#) (European Commission, 2016). The consultation received many responses on recognising intersectionality. Several respondents provided examples of people experiencing discrimination because of intersecting identities for example young LGBTI+ people with disabilities, gay people in direct provision, women from minority communities or of a lower socio-economic class: *ibid* 68.

298 Government of Ireland, [The Equality Acts Review: Summary of the Submissions Received to the 2021 Public Consultation on the Review of the Equality Acts](#) (Department of Children, Equality, Disability, Integration and Youth, Dublin 2023) 39-43. On gender identity, the consultation discloses three different views: one group arguing for the need to protect transgender persons and align with international standards, one group that favours sex-specific protections, and one group opposed to any change that might open up single-sex spaces to discrimination challenges.

299 Government of Ireland, [The Equality Acts Review: Summary of the Submissions Received to the 2021 Public Consultation on the Review of the Equality Acts](#) (Department of Children, Equality, Disability, Integration and Youth, Dublin 2023) 73.

The Irish Human Rights and Equality Commission (IHREC) has submitted two responses to this consultation, informed by a specially convened expert panel.<sup>300</sup> The Commission has recommended among other changes the inclusion of provisions on principle, purpose and structural discrimination<sup>301</sup> and protections on grounds of socioeconomic status, gender identity, carer status and criminal conviction<sup>302</sup> as well as the recognition of intersectional discrimination.<sup>303</sup> IHREC notes that some issues like the digital divide, artificial intelligence, physical appearance and menopause need further consideration.<sup>304</sup>

The divergence between Northern Ireland and Ireland (and indeed Great Britain) in respect of single equality legislation is well documented.<sup>305</sup> It is likely that Ireland's single equality legislation will be further improved, thus increasing the risk of divergence. The exact nature of any changes to the Irish equality legislation remains uncertain but there is a risk of significant divergence if Ireland for instance decides to include socioeconomic disadvantage, gender identity, carers or criminal convictions as a ground, or to recognise intersectional discrimination. If introduced, several of these changes would reflect international best practice; the United Nations Committee on Economic Social and Cultural Rights for instance has highlighted that effective non-discrimination protections must consider cases of multiple and intersecting discrimination; and that discrimination may take place on grounds such as gender identity or a person's 'social and economic situation when living in poverty or being homeless'.<sup>306</sup> If Ireland introduces changes in these areas to strengthen rights and reflect international human rights standards and best practice then the Northern Ireland Executive should consider voluntary alignment even where it goes beyond the requirements in relation to the Annex 1 directives.

Whilst at the moment many of the changes being discussed in Ireland go beyond the current state of EU law, there have been discussion by different groups of reforms to European equality law.<sup>307</sup> An Equinet report highlights particularly strong arguments for prohibiting discrimination based on socio-economic status, as well as health status and gender identity.<sup>308</sup> The European Commission has consulted on reforms to race equality law.<sup>309</sup> This raises the prospect that there will be changes

300 Irish Human Rights and Equality Commission, [Submission on the Review of the Equality Acts](#) (December 2021); Irish Human Rights and Equality Commission, [Submission on the Review of the Equality Acts](#) (July 2023).

301 Irish Human Rights and Equality Commission, [Submission on the Review of the Equality Acts](#) (July 2023) 19-21.

302 Ibid., 49-67.

303 Ibid., 69.

304 Ibid., 16-17.

305 ECNI and NIHRC, [Annual Report 2022-2023: Implementation of Protocol Article 2](#) (2023) 39-43.

306 CESCR, [General Comment No. 20 on Non-Discrimination in Economic, Social and Cultural Rights](#) (United Nations, 2009) E/C.12/GC/20, paras 17, 27, 32, 35.

307 See for example Sarah Ganty and Juan Carlos Benito Sánchez, [Expanding the List of Grounds in Non-Discrimination Law](#) (Equinet, 2021); Equinet, [Legislating for stronger, more effective equality bodies: Key elements for and expectations from future EU legislation on equality bodies](#) (2021).

308 Sarah Ganty and Juan Carlos Benito Sánchez, [Expanding the List of Grounds in Non-Discrimination Law](#) (Equinet, 2021) iv.

309 The Northern Ireland commissions have responded to this: NIHRC, [Response to the European Commission Consultation on the Racial Equality Directive](#) (12 April 2022); ECNI, [Response to consultation: European Commission - Addressing possible gaps in the Racial Equality Directive](#) (April 2022).



in European and Irish law which might represent best practice in the protection of human rights and equality. If European amendments replace or amend the Annex 1 directives, then that will trigger the keeping pace obligations in Article 2 WF. In that context we reiterate our earlier recommendation:

**We recommend that the Executive Office and other relevant NI Departments consider any proposals for amendments to the Irish equality legislation where they highlight a risk of divergence of rights or an opportunity for voluntary alignment with international human rights standards and best practice.**

### 3.4 Gender

Ireland has undertaken some initiatives in respect of gender equality which risk creating some divergence in rights and equality on the island of Ireland. Several of these have an EU law basis while others are based on Irish constitutional law or international law. With regards to international law, Ireland has ratified the Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) in 2019; the UK has ratified this more recently in 2022.<sup>310</sup> Ireland's National Strategy for Women and Girls 2017-2020 set out key objectives to advance socio-economic equality for women and girls, advance physical and mental health and wellbeing, ensure visibility, advance women in leadership, combat violence and embed gender equality in decision-making.<sup>311</sup>

#### 3.4.1 Pay Transparency

The European Union has adopted the **Pay Transparency Directive**, the deadline for transposition of which is 7 June 2026 (see further details in Chapter 4, section 4.3.1.1).<sup>312</sup> This directive is a significant EU measure on equality and is discussed in more detail later in chapter four. The ECNI and NIHRC have concluded that it triggers the keeping pace obligation in Article 2 WF and that the UK Government, NI Executive and Department for the Communities ensure that, with some minor exceptions, all other provisions of the Directive should be transposed into NI law.<sup>313</sup>

310 [Chart of signatures and ratifications of Treaty 210](#).

311 Department of Justice and Equality, [National Strategy for Women and Girls 2017-2020: creating a better society for all](#) (April 2017).

312 [Directive \(EU\) 2023/970](#) of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

313 Equality Commission for Northern Ireland and Northern Ireland Human Rights Commission, [The EU Pay Transparency Directive: The UK Government's dynamic alignment obligations relating to Windsor Framework Article 2](#) (ECNI and NIHRC, 2024) 4.

Even prior to the adoption of the Directive, Ireland had passed the Gender Pay Gap Information Act 2021.<sup>314</sup> The Act empowers the Minister for Children, Equality, Disability, Integration and Youth to make regulations requiring employers with more than 50 employees to report on gender pay gaps, the reasons for such gaps and any measures to address the gaps. The regulations will be introduced in a graduated manner, applying first to employers with more than 250 employees, then it will apply to employers with more than 150 employees.

There is a risk for divergence here in that while Northern Ireland has legislation on gender pay gap reporting, the legislation has not been brought into force. The first divergence report has recommended that the relevant Northern Ireland legislation, the Employment Act (Northern Ireland) 2016, section 19 be brought into force.<sup>315</sup>

Regulations have been made under the Gender Pay Gap Information Act 2021 which have enabled reporting from 2022 by employers with over 250 employees. The Regulations also require employers to publish a statement setting out, in the employers' opinion, the reasons for the gender pay gap in their company and what measures are being taken or proposed by the employer to eliminate or reduce that pay gap. Employers are required to publish their report and statement in a manner easily accessible to the public, such as on their website. The Government may in the future introduce regulations to provide for a central website to hold such information.<sup>316</sup>

**We recommend that the NI Executive and relevant NI Departments bring into force the necessary measures to comply with the requirements set by the Pay Transparency Directive EU Directive 2023/970 by June 2026.**

**We agree with the ECNI and NIHRC recommendation that all relevant portions of the Pay Transparency Directive should be transposed into Northern Ireland law, further to obligations in the WF.**

### 3.4.2 Work-Life Balance

The European Union has adopted a directive on **Work-Life Balance** for parents and carers.<sup>317</sup> The Directive explicitly provides for two-month non-transferable period of leave for parents so as to encourage fathers to take up their leave (rather than

314 [Gender Pay Gap Information Act 2021](#).

315 Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, [European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (2022) 47.

316 [Written answer to question in gender equality, 14 November 2023](#).

317 [Directive 2019/1158/EU](#) of the European Parliament and of the Council of 20 June 2019 work-life balance for parents and carers 2019.

transferring it to mothers).<sup>318</sup> The Directive repeals the Parental Leave Directive;<sup>319</sup> this leaves Northern Ireland in the incongruous position that the non-diminution requirements in Article 2 WF require it to keep aligned with the standards in the repealed Parental Leave Directive.

Ireland has passed the Work Life Balance and Miscellaneous Provisions Act 2023 to give effect to this Directive.<sup>320</sup> The Act makes important changes to Irish law, providing for leave for medical care purposes (5 days)<sup>321</sup> and domestic violence leave (5 days);<sup>322</sup> providing for a right to request flexible working for caring purposes,<sup>323</sup> and a right to request remote working.<sup>324</sup> The Act also enhances protections for breastfeeding mothers and other persons.<sup>325</sup>

Ireland has adopted a wider strategy on remote working.<sup>326</sup> The strategy sees remote-working as potentially contributing to gender equality in the workplace, though there are also risks.<sup>327</sup> The strategy notes that the Work-Life Balance directive covers remote working but also that other EU directives such as the Workplace Directive<sup>328</sup> and the Display Screen Equipment Directive<sup>329</sup> may be amended to address the realities of remote working. In Northern Ireland there is some suggestion a similar strategy might be welcome.<sup>330</sup> This has an all-island dimension as it affects cross-border workers; a recent report finds that cross-border workers who move from Ireland to Northern Ireland feel remote working is more difficult for them.<sup>331</sup>

Whilst the Work Life Balance and Miscellaneous Provisions Act 2023 implements important provisions of the Directive, it does not do so perfectly. Most notably the Act does not make provision for non-transferable parental leave periods. In November 2023 the European Commission decided to refer Ireland and some other countries to the Court of Justice for failing to transpose fully the Directive.<sup>332</sup>

318 [Directive 2019/1158/EU](#) of the European Parliament and of the Council of 20 June 2019 work-life balance for parents and carers 2019 recital 20 of the preamble and article 5(2).

319 [Directive 2010/18/EU](#) of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Parental Leave Directive).

320 [Work Life Balance and Miscellaneous Provisions Act 2023](#).

321 Ibid., [section 6](#).

322 Ibid., [section 7](#). This provision came into force in November 2023: Government of Ireland, [New right to domestic violence leave comes into force](#) (27 November 2023).

323 Work Life Balance and Miscellaneous Provisions Act 2023, [section 8](#).

324 Ibid., [section 20](#).

325 Ibid., [section 34](#).

326 Government of Ireland, [Making Remote Work: National Remote Work Strategy](#) (2021).

327 Ibid., 24.

328 Consolidated text: Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work ([89/391/EEC](#)) 1989.

329 [Council Directive 90/270/EEC](#) of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment (fifth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

330 Eoin Magennis, Anastasia Desmond and Gareth Hetherington, [The Future of Remote Working in Northern Ireland](#) (Ulster University EPC, 2022) 22.

331 Seamus McGuinness, Adele Bergina and Anne Devlin, [A Study of Cross-Border Working on the Island of Ireland](#) (ESRI, 2024).

332 European Commission, [Work-life balance: Commission decides to refer BELGIUM, IRELAND AND SPAIN to the Court of Justice of the European Union for failing to fully transpose the Work-Life Balance Directive](#) (16 November 2023)

Northern Ireland legislation does not provide for non-transferable parental leave and the first divergence report recommended that this be introduced as a matter of good practice.<sup>333</sup> The ECNI and NIHRC have recommended that the NI Executive and relative NI Departments ‘should ensure that NI law voluntarily aligns with any changes that enhance equality and human rights protections further to the EU Work-Life Balance Directive’.<sup>334</sup>

Issues of work-life balance and especially the fair division of caring responsibilities are central to achieving gender equality. Legal provisions on non-discrimination in relation to pay and conditions are important for gender equality but cannot achieve this goal without wider structural changes outside the workplace. These include changes in how the responsibility for care is handled in the home. It is valuable that the Annex 1 directives include four directives on sex discrimination but given the centrality of care to gender equality and the cross-border nature of economic activity on the island of Ireland, the EU norms on parental leave also need to be considered part of the gender equality agenda. Therefore, we recommend that the Work Life Balance directive be added to Annex 1; this would also address the anomaly of Northern Ireland having to maintain alignment with the standards in the repealed Parental Leave Directive.

**We recommend that the Government of Ireland legislates to provide for non-transferable parental leave as required under the Work-Life Balance Directive.**

**We recommend that the Department for the Economy, as a matter of voluntary alignment, introduce legislation mirroring the provisions of the Work-Life Balance Directive where these strengthen rights and reflect international human rights standards insofar as they are not part of Northern Ireland law.**

**We recommend the Department for the Economy consider the possible need for a remote working strategy in Northern Ireland to avoid divergence of rights on the island of Ireland where this strengthens rights and reflects international human rights standards and best practice. The Department for the Economy in considering the need for this strategy should consider any relevant EU law developments in this area.**

333 Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, [European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (2022) 77.

334 ECNI and NIHRC, [Policy Recommendations: European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (2023) 40.

### 3.4.3 Gender Balance on Boards

The European Union has passed legislation dealing with gender balance on boards (see further details in Chapter 4, section 4.3.1.2).<sup>335</sup> The **Gender Balance on Boards Directive** requires member states to ensure by 2026 that listed companies have at least 40% of non-executive directors or 33% of all director positions to be of the underrepresented sex.<sup>336</sup> States must adopt rules to require companies to report on gender balance annually.<sup>337</sup> States must adopt effective, proportionate and dissuasive penalties for any breach of the requirements and have to designate a body or bodies to promote or monitor the gender balance requirements; these may be equality bodies.<sup>338</sup> Member states have until 28 December 2024 to transpose the Directive.

Ireland has been making some progress in terms of female representation on boards, though not so much in terms of senior leadership roles. Ireland has reported figures of 35% of women on boards of ISEQ20 companies, and 32% on all listed companies; however figures for CEO, chair and chief financial officer positions are much lower.<sup>339</sup> When it comes to State Boards, a 2022 report indicates that 46.1% of board members are female, though only 59.3% of boards meet the target of having 40% male and female members.<sup>340</sup> Ireland has not yet announced its specific plans to transpose the Directive.<sup>341</sup>

Up-to-date figures on female representation on Northern Ireland company boards are not easily accessible. A survey by the Northern Ireland Assembly in 2015 suggested that 15.4% of Board members of the top 100 companies in Northern Ireland were women; 42 Boards had no women at all.<sup>342</sup> In terms of public appointments, the Northern Ireland Executive has set targets for gender equality in public appointments but the Commissioner for Public Appointments and NISRA report that the absence of a functioning Executive impacted on the possibility to meet this target.<sup>343</sup> Overall on 31 March 2022 42% of public appointments were female, 58% male.<sup>344</sup> The ECNI has published research and recommendations that highlight key inequalities in participation in public life, including

335 [Directive \(EU\) 2022/2381](#) of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures 2022.

336 Ibid., Article 5.

337 Ibid., Article 7.

338 Ibid., Articles 8 and 10.

339 Government of Ireland, [‘Progress continues towards gender balance on boards but more work needed to see women advance into senior leadership roles’](#) (7 March 2023).

340 NDP Delivery and Reform Department of Public Expenditure, [Gender Balance Diversity on State Boards: the next steps](#) (17 December 2022) 8.

341 Fine Gael [‘New legislation will ensure companies achieve gender balance on boards – Higgins’](#) (8 March 2023) Last Accessed 1 March 2024.

342 Michael Potter, [Women on Boards of the Top 100 Companies in Northern Ireland](#) (Northern Ireland Assembly Research and Information Service Briefing Note 2015) 3.

343 Commission for Public Appointments, 6; also Northern Ireland Statistics and Research Agency, [Public Appointments Report for Northern Ireland: 2019/20; 2020/21; 2021/22](#) (2023) 6.

344 Northern Ireland Statistics and Research Agency, [Public Appointments Report for Northern Ireland: 2019/20; 2020/21; 2021/22](#) (2023) 21.

underrepresentation of women and people with disabilities in government public appointments, underrepresentation of women and people of minority ethnic background in elected positions and significant data gaps.<sup>345</sup> There is no Northern Ireland legislation comparable to the Gender Balance on Boards Directive.

**We recommend that the Department for the Economy should ensure that NI law voluntarily aligns with the requirements of the Gender Balance on Boards Directive where these strengthen rights and reflect international human rights standards and best practice.**

### 3.4.4 Domestic violence

As noted above Ireland's Work Life Balance and Miscellaneous Provisions Act 2023 provides for domestic violence leave (5 days).<sup>346</sup> This is an additional measure not required in the Work-Life Balance Directive. This is an area where Northern Ireland has legislation. One of the acts passed by the Assembly in 2022 was indeed the Domestic Abuse (Safe Leave) Act 2022, providing for ten days' paid leave each year to address domestic violence. This protection is more extensive than in the Irish Act (5 days). This Northern Ireland Act does not appear to have been commenced (as of 29 June 2024). When implementing measures to voluntarily align with the Work-Life Balance Directive, as set above, we would encourage the Department for the Economy to go beyond the minimum requirements in the Directive and commence the relevant provisions in the Domestic Violence (Safe Leave) Act 2022 relating to paid leave for domestic violence. To promote an equivalent protection for rights and to avoid divergence in the protection of rights on the island of Ireland post-Brexit we would encourage the Government of Ireland to harmonise its provisions upwards in line with the Northern Ireland legislation.

**We recommend the Department for the Economy commence sections 1-3 of the Domestic Violence (Safe Leave) Act 2022.**

**We recommend the Government of Ireland amend the Work Life Balance and Miscellaneous Provisions Act 2023 to provide for ten days paid domestic violence leave as to be provided for under the Northern Ireland legislation.**

345 ECNI, [Equality in Public Participation in Public Life: Full Report: Policy Recommendations](#) (May 2019); ECNI, [Key Inequalities in Public Participation in Public Life](#) (September 2018); Graeme Banks, Eoin Hamilton and Fiona Rooney, [Inequalities in Participation in Public Life in Northern Ireland: An investigation of the nine Section 75 grounds](#) (2015).

346 Work Life Balance and Miscellaneous Provisions Act 2023, [section 7](#). This provision came into force in November 2023: Government of Ireland, [New right to domestic violence leave comes into force](#) (27 November 2023).

Ireland has now passed the Domestic, Sexual and Gender-Based Violence Agency Act 2023.<sup>347</sup> The Act creates a new agency, the Domestic, Sexual and Gender-Based Violence Agency, to support and oversee refuge provision for victims of such violence, to fund the provisions of services for victims and people at risk of such violence, to coordinate strategies in this area, to raise awareness of domestic, sexual and gender-based violence and carry out research in this area.

This measure is not required by any EU legislation however its adoption does reflect concerns about these issues in EU policies (see further details in Chapter 8, section 8.3). A report by the Oireachtas Library and Research Service contextualises the Bill in relation to EU concerns from the Commission and the Fundamental Rights Agency about the problems of gender-based violence.<sup>348</sup> The Irish Human Rights and Equality Commission has advised that the Government should consider its human rights and equality obligations in respect of this initiative and in particular highlights the Victims' Rights Directive,<sup>349</sup> Trafficking Directive<sup>350</sup> (and proposed changes<sup>351</sup>) and the new EU-wide proposal for a directive<sup>352</sup> to combat violence against women and domestic violence.<sup>353</sup>

While the Irish Act is not directly based on the implementation of EU law, it is an initiative in the area of human rights and equality and one where EU law is relevant and where there are now further EU legal developments: the EU has now adopted the **Violence against Women and Domestic Violence Directive** in May 2024; states have until 14 June 2027 to transpose the Directive into domestic law.<sup>354</sup>

In Northern Ireland work is being done on a new Domestic and Sexual Abuse Strategy being led by the Department of Health and Department of Justice, and the departments have already consulted in a call for views on such a strategy.<sup>355</sup>

347 [Domestic, Sexual and Gender-Based Violence Agency Act 2023](#).

348 Jessica Doyle, Cliona Loughnane and Anne Timoney, [Domestic, Sexual and Gender Based Violence Agency Bill](#) (Oireachtas Library and Research Service, 2023) 6.

349 [Directive 2012/29/EU](#) of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA 2012.

350 [Directive 2011/36/EU](#) of the European Parliament and Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA 2011.

351 [Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims 2022](#).

352 European Commission, [Commission Proposal for a Directive on Combating Violence against Women and Domestic Violence](#) (European Commission, Brussels 2022). The ECNI has responded to this consultation: Equality Commission for Northern Ireland, [Response to consultation: European Commission – Combating Violence Against Women and Domestic Violence Directive](#) (May 2022)

353 Irish Human Rights and Equality Commission, [Submission on the General Scheme of the Domestic, Sexual and Gender-Based Violence Agency Bill](#) (12 July 2023) 10.

354 [Directive \(EU\) 2024/1385](#) of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence (Violence against Women and Domestic Violence Directive) 2024. For commentary on this new legislation see Ronagh McQuigg 'The New EU Directive on Combating Violence Against Women and Domestic Violence' QPOL (2024) Last Accessed on 3 July 2024.

355 Department of Health and Department of Justice 'Consultation - New Domestic and Sexual Abuse Strategy and Violence Against Women and Girls Strategy' (January 2022) Last Accessed 1 March 2024.

The Executive Office has also published a Strategic Framework on Ending Violence Against Women and Girls.<sup>356</sup>

**We recommend that the NI Department of Health and NI Department of Justice consider any lessons learnt from the Irish experience under the Domestic, Sexual and Gender-Based Violence Agency Act 2023 to determine if it demonstrates strengthened rights and reflects international human rights standards and best practice.**

**We recommend that the NI Department of Justice monitor possible new EU initiatives in the areas of anti-trafficking and violence against women which may offer opportunities to adopt policies which strengthen rights and reflect international human rights standards and best practice.**

### 3.5 Race

As noted above, the Executive Office has held a consultation on plans to reform the Race Relations (NI) Order 1997<sup>357</sup> and at the same time Ireland is reviewing its equality legislation. Whilst there has been some effort to look at cross-border lessons in this area it has not been systematic. The Northern Ireland consultation refers to the Irish legislation but does not refer to the review in Ireland; the Irish review does not refer to any lessons or initiatives from Northern Ireland. This seems unfortunate, especially as both Irish and NI legal systems must implement the Race Equality Directive and implement/keep pace with any amendments to it respectively.<sup>358</sup>

The European Commission has adopted multiple strategies to promote equality as part of the 'Union of Equality' agenda. In its Anti-racism Action Plan 2020-2025 it has committed to undertake a comprehensive review of anti-racism legislation, to determine how to improve implementation, whether it remains fit for purpose and how to address gaps.<sup>359</sup> The Northern Ireland Commissions have responded to this consultation.<sup>360</sup>

356 The Executive Office, [Strategic Framework to Ending Violence Against Women and Girls](#) (2023).

357 [Consultation on the Review of the Race Relations \(NI\) Order 1997](#).

358 [Council Directive 2000/43/EC](#) of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin 2000.

359 European Commission, [A Union of Equality: EU Anti-racism Action Plan 2020-2025](#) (2020) 4.

360 NIHRC, [Response to the European Commission Consultation on the Racial Equality Directive](#) (12 April 2022); ECNI, [Response to consultation: European Commission - Addressing possible gaps in the Racial Equality Directive](#) (April 2022).



**We recommend that the Northern Ireland Executive and the Government of Ireland consider how to ensure more systematic mutual consideration of legal developments in both jurisdictions to avoid divergence of rights on the island of Ireland post-Brexit, to facilitate equivalence, to ensure consideration of international human rights standards and best practice and to strengthen rights and equality.**

### 3.6 Religion or Belief

In some respects, the protections against discrimination on ground of religion or belief are broader in Northern Ireland. The Northern Ireland legislation prohibits discrimination on grounds of religion and political opinion<sup>361</sup> and also recognises that religious belief includes any religion or ‘similar philosophical belief’.<sup>362</sup> The Irish legislation seems to only prohibit discrimination on grounds of religious belief.<sup>363</sup> This is narrower than the requirements of the **EU General Framework Directive** which refers to ‘religion or belief’.<sup>364</sup> The consultation on the Irish equality legislation has noted this already<sup>365</sup> and in this context the Irish Human Rights and Equality Commission has recommended that the religion ground be amended to the ‘religion or belief’ ground to comply with EU law.<sup>366</sup> The narrowness of the Irish legislation also means that Ireland is not respecting the principle of equivalence in the 1998 Agreement as well as not fully implementing EU law.

**We recommend that the Irish Department for Children, Equality, Disability, Integration and Youth include proposals to amend Irish law on ‘religious belief’ to include ‘religion or belief’ to bring it into line with EU law.**

### 3.7 Sexual Orientation

Ireland has committed in its Programme for Government to banning conversion therapy (practices intended to change a person’s sexual orientation or gender identity). The Department for Children, Equality, Disability, Integration and Youth has commissioned a report on the practice<sup>367</sup> and reiterated the promise to legislate for a ban but to date does not seem to have published legislation.<sup>368</sup>

361 Fair Employment and Treatment Order 1998, [article 3](#).

362 Ibid., [article 2](#).

363 Equal Status Act 2000, [section 2](#); Employment Equality Act 1998, [section 2](#).

364 [Council Directive 2000/78/EC](#) of 27 November 2000 establishing a General Framework for Equal Treatment in Employment and Occupation 2000.

365 Government of Ireland, [The Equality Acts Review: Summary of the Submissions Received to the 2021 Public Consultation on the Review of the Equality Acts](#) (Department of Children, Equality, Disability, Integration and Youth, Dublin 2023) 16.

366 IHREC, [Submission on the Review of the Equality Acts](#), December 2021.

367 B. Keogh, C. Carr, L. Doyle, A. Higgins, J. Morrissey, G. Sheaf and Jowett A, [An Exploration of Conversion Therapy Practices in Ireland](#) (School of Nursing and Midwifery, Trinity College Dublin, 2023).

368 Equality Department of Children, Disability, Integration and Youth [‘Minister O’Gorman announces the publication of the report ‘An Exploration of Conversion Therapy Practices in Ireland’](#) (17 February 2023) Last Accessed on 1 March 2024.

We note that research on this practice in Northern Ireland has also been published.<sup>369</sup> A UN independent expert, and the Council of Europe Commissioner for Human Rights have called for the practice to be banned.<sup>370</sup> The European Union does not have legislation on conversion therapy but the European Parliament has criticised the practice and called on national authorities to ban it.<sup>371</sup>

The consultation on the Irish equality legislation also highlighted that exemptions in the equality legislation to protect the religious ethos of institutions was too broad and likely in breach of the requirements of the Framework Equality Directive.<sup>372</sup> Consultation responses indicated the exemptions were used to harm the interests of LGBTI+ persons.<sup>373</sup> The Irish Human Rights and Equality Commission has recommended that the provisions be tightened.<sup>374</sup>

**We recommend that the Government of Ireland and NI Executive consider legislative proposals as regards a ban on conversion therapy that takes into consideration any EU developments in this area and ensures that any published legislative proposals strengthen rights and reflect international human rights standards and best practice.**

**We recommend that the Government of Ireland include proposals to amend the equality acts provisions on the religious ethos exemption to bring them into line with EU standards.**

### 3.8 Gender Identity

The Irish Gender Recognition Act 2015 provides a mechanism for an individual to change their gender officially. Anyone over the age of 18 can apply to change their gender. There is no requirement of any medical diagnosis or process for this recognition; the applicant has to provide certain details including a statutory declaration that he or she is not married or in a civil partnership and has a settled intention of remaining permanently in the new gender.<sup>375</sup> There is a more involved process for someone who is 16 or 17 and in that situation there is a requirement for certificates from medical professionals.<sup>376</sup>

369 Fidelma Ashe and Danielle Mackle, [A Study of Conversion Practices in Northern Ireland](#) (2024).

370 Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, [Practices of so-called “conversion therapy”](#) (2020) A/HRC/44/53;

371 European Parliamentary Research Service, [Bans on conversion ‘therapies’: The situation in selected EU Member States](#) (2022).

372 [Council Directive 2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

373 Government of Ireland, [The Equality Acts Review: Summary of the Submissions Received to the 2021 Public Consultation on the Review of the Equality Acts](#) (Department of Children, Equality, Disability, Integration and Youth, Dublin 2023) 52.

374 Irish Human Rights and Equality Commission, [Submission on the Review of the Equality Acts](#) (December 2021) 36, 40.

375 Gender Recognition Act 2015, [section 10](#).

376 *Ibid.*, [section 12](#).

It is possible for a person to apply to revoke their gender recognition certificate if they wish to revert to their previous gender.<sup>377</sup>

The Irish approach is in line with a recommendation of the Parliamentary Assembly of the Council of Europe that states should adopt ‘quick, transparent and accessible procedures, based on self-determination for changing the name and registered sex of transgender people’ and abolish a ‘mental health diagnosis’ as a requirement for such a process.<sup>378</sup> A Council of Europe report has highlighted the Irish legislation as an example of good practice in several respects, for example the focus on self-identification and the no cost element of the process.<sup>379</sup> A Fundamental Rights Agency report also makes clear that the current trend is to de-pathologise gender recognition.<sup>380</sup> This is supported by recommendations from the UN Office of the High Commissioner for Human Rights,<sup>381</sup> and a UN Independent Expert.<sup>382</sup>

An Irish review on the Act has recommended further changes including allowing children an easier route to changing their gender and introducing recognition for non-binary individuals.<sup>383</sup> The Government has indicated its intention to make it easier for 16- and 17-year-olds to change their gender,<sup>384</sup> but does not yet appear to have introduced legislation to this effect.

There is disagreement on some of these policies in Ireland. Currently for instance there is a private member’s bill in the Oireachtas on single-sex accommodation in prison to ensure that persons born male are not put in a women’s prison following a change in their gender.<sup>385</sup> And, as was noted above, the consultation on the Irish equality legislation resulted in a lack of consensus on how to deal with gender identity.

377 Ibid., [section 15](#).

378 Parliamentary Assembly of the Council of Europe, [Resolution 2048 \(2015\) on discrimination against transgender people in Europe 2015](#) para 6.2.1 and 6.2.2.

379 Steering Committee on Anti-discrimination, Diversity and Inclusion (CDADI), [Thematic Report on Legal Gender Recognition in Europe](#) (2022)

380 Fundamental Rights Agency (European Union), [Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU: Comparative legal analysis, Update 2015](#) (2015) 18-19, again mentioning Ireland as an example.

381 Office of the High Commissioner for Human Rights (OHCHR), [Discrimination and violence against individuals based on their sexual orientation and gender identity](#) (2015) A/HRC/29/23 para 79(i).

382 Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, [Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity](#) (2018) A/73/152, para 81(d); Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, [The law of inclusion - Report of the Independent Expert on sexual orientation and gender identity](#) (2021) A/HRC/47/27 paras 36-47, 91.

383 Review Group, [Review of the Gender Recognition Act 2015, Report to the Minister for Employment Affairs and Social Protection](#) (2018).

384 Department of Social Protection, [‘Minister Doherty Publishes her Report on the Review of the Gender Recognition Act’](#) (2019), Last Accessed 1 March 2024.

385 [Gender Recognition \(Amendment\) \(Prisons\) Bill 2023](#).

While Ireland has adopted a policy based on self-identification, the situation is different in the UK including Northern Ireland. The Gender Recognition Act 2004 (UK) adopts a medical approach requiring that an applicant for a gender recognition certificate be found to have gender dysphoria,<sup>386</sup> a condition the Act labels a ‘disorder’.<sup>387</sup>

The High Court in Belfast considered a Human Rights Act challenge to the Act and while it found that the requirement that an applicant provide evidence of a diagnosis was lawful, there was no necessity for this to be described in the Act as a ‘disorder’ and this breached Article 8 ECHR.<sup>388</sup> The Court subsequently issued a declaration of incompatibility in respect of sections 2(1)a and 25(1) of the Act.<sup>389</sup> The Government has said it would remove the language of ‘disorder’ via a remedial order.<sup>390</sup>

An effort by the Scottish Parliament to adopt legislation similar to Ireland’s position was vetoed by the UK Government;<sup>391</sup> the Court of Session rejected a legal challenge to the veto.<sup>392</sup>

The position in European Union law is unclear. The Gender Directive refers to ‘gender reassignment’ but does not define this.<sup>393</sup> Some EU measures in the area of asylum and immigration refer to ‘gender identity’, again without defining it.<sup>394</sup>

The initial divergence report recommended that this divergence in terms of gender recognition receive urgent consideration.<sup>395</sup> We echo that recommendation. The matter is particularly urgent given the reality of people being able to cross the border and live cross-border lives.

386 Gender Recognition Act 2004, [section 2](#).

387 *Ibid.*, [section 25](#).

388 [JR111 Application for Judicial Review](#) [2021] NIQB 48, (13 May 2021)

389 [JR111 Application for Judicial Review](#) [2021] NIQB 130, (21 May 2021).

390 Women and Equalities Committee, [Reform of the Gender Recognition Act: Government response to the Committee’s Third Report Fifth Special Report of Session 2021–22](#) (2021-2022) HC 129 para 20.

391 David Torrance and Doug Pyper, [The Secretary of State’s veto and the Gender Recognition Reform \(Scotland\) Bill](#) (House of Commons Library, 2023).

392 [Petition of the Scottish Ministers for Judicial Review of the Gender Recognition Reform \(Scotland\) Bill \(Prohibition on Submission for Royal Assent\) Order 2023 made and laid before the UK Parliament by the Secretary of State](#) [2023] CSOH 89, (8 December 2023).

393 [Directive 2006/54/EC](#) of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

394 [Directive 2011/95/EU](#) of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast); [Directive 2013/33/EU](#) of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast). The UK did not opt in to either of these directives.

395 Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, [European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (2022) 47.

### 3.9 Disability

The **European Accessibility Act** provides new standards on accessibility for a range of products and services; products include computers, smartphones, TV equipment, e-readers and other products. Services include phone, banking, e-commerce, websites and others. The Accessibility Act requires member states to adopt measures by June 2022 and to apply those measures from June 2025.<sup>396</sup>

Ireland has somewhat belatedly (the Commission had warned Ireland it might face action before the Court of Justice)<sup>397</sup> adopted measures to implement this.<sup>398</sup>

The Irish implementation of this raises issues of divergence in the enjoyment of rights and equality on the island of Ireland. While not amending an Annex 1 Directive, the substance of the Accessibility Act relates to age discrimination and disability discrimination. The Accessibility Act specifically references the Convention on the Rights of Persons with Disabilities which is also a treaty binding on the UK (and insofar as it was within EU law competence part of Northern Ireland law prior to 31 December 2020). Enhancing the ability of people with disabilities to make use of quite basic services must be considered best practice. Again, bearing in mind the reality of people crossing the border and living cross-border lives, it would be problematic for them to experience different standards of accessibility; divergence may also undermine the ability of NI business to trade. The initial divergence report recommended that Northern Ireland should consider alignment in this field given its relevance to Article 2 WF and the equality rights of older people and people with a disability.<sup>399</sup> The NIHRC and ECNI also recommended that the NI Executive and relevant departments voluntarily align with the provisions of the Accessibility Act which enhance rights for older persons and persons with disabilities.<sup>400</sup>

**We recommend the NI Executive draft legislation to give effect to the standards as are provided for in Ireland in its implementation of the European Accessibility Act as a matter of voluntary alignment where these strengthen rights and reflect international human rights standards and best practice.**

396 [Directive \(EU\) 2019/882](#) of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services (Text with EEA relevance) (European Accessibility Act) 2019, Article 31.

397 Naomi O'Leary '[European Commission gives Ireland deadline to act over consumer protection and disability access failures](#)' (14 July 2023) *Irish Times*.

398 [S.I. No. 636/2023 - European Union \(Accessibility Requirements of Products and Services\) Regulations 2023](#). Ireland had adopted a more limited measure on accessibility of public sector websites implementing earlier EU directives: [S.I. No. 358/2020 - European Union \(Accessibility of Websites and Mobile Applications of Public Sector Bodies\) Regulations 2020](#), as had the UK: [Public Sector Bodies \(Websites and Mobile Applications\) \(No. 2\) Accessibility Regulations 2018](#).

399 Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, [European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (2022) 104.

400 ECNI and NIHRC, [Policy Recommendations: European Union Developments in Equality and Human Rights The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (2023) (February 2023) 12.

### 3.10 Age

The initial divergence report examined the disparity in age discrimination regulations on the island, noting that Irish legislation prohibited age discrimination in goods facilities and services while Northern Ireland does not. This disparity remains and still requires urgent consideration by the Northern Ireland authorities.<sup>401</sup>

### 3.11 Other Measures

Finally, we outline some measures in areas more broadly related to rights and equality.<sup>402</sup> The Irish Human Rights and Equality Commission has noted the adoption of important EU legislation such as the **EU Adequate Minimum Wages Directive** and the **EU Corporate Sustainability Reporting Directive**.<sup>403</sup>

The **EU Adequate Minimum Wages Directive** requires Member states to promote collective bargaining (see also section 4.3.4.1 below). States with a coverage of less than 80% of collective bargaining will be required to develop an action plan to promote collective bargaining.<sup>404</sup> The Directive also gives guidance on setting minimum wages to promote a decent standard of living, reducing in-work poverty, promote social cohesion and reduce the gender pay gap. The Directive does not require Member states to introduce minimum wages if they do not already have these but does give guidance on what they should consider.<sup>405</sup> Ireland is one of the states with inadequate collective bargaining coverage so will need to develop an action plan. Research published by the Irish Human Rights and Equality Commission found that there are no conflicting rights in the Irish Constitution that would prevent the Government from introducing a statutory framework and protections for collective bargaining.<sup>406</sup> The Directive must be transposed into national law by November 2024.

401 ECNI, [Age Discrimination Law Needs Strengthened in Northern Ireland](#), (3 February 2023).

402 We leave out discussion of some of the many other important initiatives related to equality in Ireland such as the Equal Budgeting initiative as meriting more detailed study than as an aspect of divergence. We note though it has been discussed by the OECD: OECD, [OECD Scan: Equality Budgeting in Ireland](#). We also leave out discussion on the recent [Online Safety and Media Regulation Act 2022](#). This gives effect to [Directive \(EU\) 2018/1808](#) of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities. The UK has implemented this Directive in [UK Audiovisual Media Services Regulations 2020](#). The Directive requires states to ensure that media service providers do not share anything that incites violence or hate directed at one of the groups referenced in Article 21 of the Charter of Fundamental Rights or that constitutes provocation to commit terrorism, and to take appropriate measures to protect minors from material that might impair their physical, mental or moral development.

403 Irish Human Rights and Equality Commission, [Ireland and the Sustainable Development Goals Submission to the 2023 UN High-Level Political Forum on the second Voluntary National Review of Ireland](#) (May 2023).

404 [Directive \(EU\) 2022/2041](#) of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union 2022, Article 4.

405 *Ibid.*, Article 5.

406 Alan Eustace and David Kenny, [Collective Bargaining and The Irish Constitution—Barrier or Facilitator?](#) (Irish Human Rights and Equality Commission, 2023) 24-27.

Northern Ireland differs from Ireland in having legislation providing for the statutory recognition of trade unions.<sup>407</sup> According to one research report, union coverage in Northern Ireland is 53%<sup>408</sup> and so Northern Ireland would have to develop a strategy to promote collective bargaining if the Directive were to apply. The research report also highlights that increased collective bargaining could address several economic challenges in Northern Ireland around low productivity and skills underutilisation.<sup>409</sup>

**We recommend the Government of Ireland consider as part of its EU Adequate Minimum Wage Directive Action Plan, legislation on the statutory recognition of trade unions, bearing in mind the Northern Ireland model.**

**We recommend the NI Executive and relevant departments conduct a review on why collective bargaining coverage remains so low in Northern Ireland.**

The **EU Corporate Sustainability Reporting Directive** requires large companies to report in their management reports on their social and environmental impacts.<sup>410</sup> Member states are required to implement this by 6 July 2024. The Directive will require companies to report on the risks they face from social and environmental issues and their impact on people and the environment.<sup>411</sup> Companies will have to report on matters like climate change, pollution, water and marine resources, biodiversity and ecosystems, the circular economy, their own workforce (including working conditions, equal treatment and other work-related rights), workers in the value chain (again including working conditions, equal treatment and other work-related rights), affected communities and their rights, consumers and end-users and business conduct.<sup>412</sup> The Directive requirements will apply to different companies at different times depending on factors such as their size.

The Government of Ireland does not seem to have published legislation yet implementing this Directive but has published some guidance.<sup>413</sup> We note that the reporting requirements concern significant human rights and equality issues most notably equality rights in the workplace but also rights and equality issues more broadly as well as matters of environmental reporting.

407 [The Trade Union and Labour Relations \(Northern Ireland\) Order 1995 No. 1980 \(N.I. 12\)](#).

408 Paul MacFlynn, [The Impact of Collective Bargaining on pay in Northern Ireland](#) (2020) NERI Working Paper Series No. 66, 9.

409 Ibid., 21-22.

410 [Directive \(EU\) 2022/2464](#) of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (Text with EEA relevance) 2022

411 European Commission, [Questions and Answers on the Adoption of European Sustainability Reporting Standards](#) (31 July 2023).

412 [Commission Delegated Regulation \(EU\) 2023/2772](#) of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards.

413 Department of Enterprise Trade and Employment, [Preparing Your Business for the Corporate Sustainability Reporting Directive](#).

Given the role of cross-border companies it is possible that some Irish based-companies may have to report on activities related to Northern Ireland.

**We recommend that, as a matter of voluntary alignment with good practice, the Northern Ireland Executive and UK Government consider the need to introduce reporting requirements mirroring those in the EU Corporate Sustainability Reporting Directive, where these strengthen rights and reflect international human rights standards and best practice.**

(See also section 4.3.4.4 below for corporate social responsibility developments.)

The Government of Ireland has announced plans to adopt a **National Equality Data Strategy**.<sup>414</sup> An audit by the Central Statistics Office had revealed significant gaps in equality data on grounds such as race, members of the Traveller community, sexual orientation and religion.<sup>415</sup> While there were plans to publish and adopt the strategy during 2023 the timeline appears to have slipped and it has not been published. The Irish Human Rights and Equality Commission has recommended priority publication, promotion and implementation of the forthcoming strategy, and that Government Departments and public bodies be adequately resourced to deliver on it.<sup>416</sup> The IHREC has also noted the guidance from the EU on equality data collection and the work of the EU Subgroup on Equality Data.<sup>417</sup> This Subgroup does have representation from Norway which is not an EU member state. Given the centrality of the Annex 1 Directives to Northern Ireland we find there is an opportunity here for more cooperation were the Subgroup also to include a Northern Ireland representative. The ECNI has frequently commented on the lack of adequate equality data in Northern Ireland<sup>418</sup> and so it is recommended that the Northern Ireland authorities should monitor the development of the Strategy in Ireland to see if it provides a model for improving equality data collection in Northern Ireland.

**We recommend that the NI Executive, relevant NI departments and others, address gaps in equality data, ensure where possible that equality data is comparable with international frameworks including at EU level, and consider any examples of best practice from the EU Equality Data Collection guidance and from any developments on a National Equality Data Strategy in Ireland.**

414 Government of Ireland, '[Minister O’Gorman announces the development of a National Equality Data Strategy](#)' (21 March 2022).

415 Council of Europe '[Creating the conditions for an equality data strategy in Ireland](#)'.

416 Irish Human Rights and Equality Commission, '[Ireland and the International Covenant on Economic, Social and Cultural Rights](#) (2024) 51-52.

417 [Equality Data Collection](#).

418 See for instance ECNI, '[Equality in Public Participation in Public Life: Full Report: Policy Recommendations](#)' (May 2019); ECNI, '[Key Inequalities in Public Participation in Public Life](#)' (September 2018).



**We recommend that the EU and UK Government provide for a Northern Ireland representative on the EU Equality Data Subgroup.**

Ireland has now passed legislation<sup>419</sup> to implement the **EU Whistleblowing Directive**.<sup>420</sup> The deadline for transposition of this Directive was 17 December 2021.<sup>421</sup> The Whistleblowing Directive aims to harmonise a level of protection for whistleblowers across the EU and, for instance, requires employers above a certain size to adopt a channel for reporting disclosures.<sup>422</sup> There is some divergence as regards protections under the Directive and protections in the UK under the public interest disclosure rules.<sup>423</sup> This is the case for the duty on employers to adopt internal reporting channels but also the Directive has a wider definition of the protected workers who can make disclosures.<sup>424</sup> In Great Britain, the Department for Business and Trade is carrying out a review of the public interest disclosure framework.<sup>425</sup> Given the nature of cross-border business it may well be desirable for there to be similar rules North and South for employers and employees and so as a matter of voluntary alignment the Northern Ireland authorities should consider adopting examples of best practice in the Directive.

**We recommend the NI Executive review Northern Ireland public interest disclosure legislation in light of the review in Great Britain and the changes in Ireland as a result of implementing the EU Whistleblowing Directive, with a view to amending legislation to strengthen rights and reflect international human rights standards and best practice, in particular to expand the scope of people protected and to require companies to adopt internal reporting channels.**

### 3.12 Conclusion

We have highlighted some important developments on rights and equality in Ireland during the relevant period. It is striking that, in the wake of the pandemic, Ireland has announced many important commitments to enhance human rights and equality protections. Often, these relate to European Union law initiatives such as the **Pay Transparency Directive, Work-Life Balance Directive, European Accessibility Act, Whistleblowing Directive**. Many of them raise issues of the risk of divergence in rights protection on the island of Ireland and so we have highlighted instances where the Northern Ireland (or UK) authorities need to consider amending Northern Ireland law to reflect best practice as a matter of voluntary alignment.

419 [Protected Disclosures \(Amendment\) Act 2022](#).

420 [Directive \(EU\) 2019/1937](#) of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (Whistleblowing Directive).

421 *Ibid.*, Article 26.

422 *Ibid.*, chapter 2.

423 [Public Interest Disclosure \(Northern Ireland\) Order, 1998 No. 1763 \(N.I. 17\) 1998](#); [Public Interest Disclosure Act 1998](#).

424 Protect [‘Protect’s View of the Whistleblowing Review’](#) (2023).

425 Department for Business and Trade, [Review of the Whistleblowing Framework: Terms of Reference](#).

We have also noted instances where Ireland has not yet implemented EU law (**Gender Balance on Boards Directive, Adequate Minimum Wages Directive, Corporate Sustainability Reporting Directive**) or has not yet adequately implemented EU law (for example the **Work-Life Balance Directive** as regards non-transferable leave, the **General Framework Directive** as regards religious ethos exemption and the definition of religion or belief).

Some of these developments relate to EU law initiatives which are central to the promotion of rights and equality and to the objectives of the existing Annex 1 Directives. We agree with the ECNI and NIHRC recommendation that all relevant portions of the Pay Transparency Directive should be transposed into Northern Ireland law.

We also recommend the Northern Ireland authorities take steps to ensure voluntary alignment where this reflects best practice and promotes rights and equality in respect of the **Work-Life Balance Directive, Gender Balance on Boards Directive, European Accessibility Act, EU Corporate Sustainability Reporting Directive**.

We especially highlight the importance of the ongoing review of the Irish equality legislation. The protection of equality is core to the 1998 Agreement and to Article 2 WF. The problems with Northern Ireland equality law - notably the lack of a single equality act – have often been commented upon. Those problems remain but there is a risk that the divergence will become more significant if Ireland legislates for many of the suggestions that have been made in its consultation on the equality legislation, for instance around **intersectional discrimination**, or the **recognition of new grounds such as socioeconomic disadvantage, criminal conviction, carers, and gender identity**.

While most of our recommendations have been for the Northern Ireland authorities, we are concerned also that in several respects Irish legislation seems to lack protections existing in Northern Ireland, including protections that should exist because of underpinning EU legislation. This goes to the heart of the equivalence understanding in the 1998 Agreement. So, we have also made recommendations where Irish law could benefit from adopting measures equivalent to Northern Ireland provisions on length of **domestic violence leave** and **trade union recognition**.

A more procedural concern we have is that, looking at developments in both Northern Ireland and Ireland, it often appears that there is minimal consideration of the legal developments in the other jurisdiction. This is problematic. Given the proximity of the jurisdictions and multiple close ties, a good awareness of legal developments across the border is advisable. This is true as a matter of good practice but is also crucial to avoiding divergence of rights on the island of Ireland post-Brexit and ensuring equivalent protections of rights and equality, in line with international best practice.

# Chapter 4: Tracking EU Legal Developments since January 2022: Adopted and Proposed Directives and Regulations

## 4.1 Introduction

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This chapter provides an update on and identifies EU legal developments since January 2022 regarding adopted or proposed EU law (directives and regulations) that relate to human rights and equality. It discusses EU legal developments which did not apply in NI domestic law before the end of the Brexit transition period (31 December 2021), and which:

- could potentially amend and/or update an Annex 1 directive;
- do not amend and/or update an Annex 1 directive but would have applied to NI, had the UK remained in the EU.

Pursuant to our methodology and through the use of relevant websites such as the official EU legal database EUR-lex, the European Commission and the European Parliamentary Research Service (see Appendix 2),<sup>426</sup> we identified:

- 52 EU directives adopted between 1 January 2022 and 31 August 2023 (37 directives in 2022 and 15 directives in 2023)
- 138 EU regulations adopted between 1 January 2022 and 31 August 2023, regarding topics potentially relevant to human rights and equality (86 Regulations in 2022 and 52 regulations in 2023)
- 17 EU directives and regulations proposed between 1 January 2022 and 31 August 2023 (focusing on those that have already been adopted by the Commission and on topics sufficiently relevant to human rights and equality).

It is worth noting that a number of the directives and regulations referred to primarily relate to the promotion of equality and human rights, however, it should be noted that in some instances not all of the provisions of the noted directives and regulations do. The recommendations set out below relate only to those provisions which relate to equality and human rights. The recommendations relating to voluntary alignment relate to where the provisions of the directive/regulation (proposed directive/regulation) will strengthen equality and human rights and align with international human rights standards and best practice.

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426 For adopted EU legislation, we used EUR-lex which can be [accessed online](#). For proposed EU legislation, we used: European Commission, '[Published Initiatives](#)'; and European Parliamentary Research Service, '[EU Legislation in Progress](#)'.

Section 4.2 presents an overview of the research findings from the mapping exercise. Section 4.3 examines specific areas (discrimination, privacy, health, etc) and their implications for Northern Ireland.

## 4.2 EU legislation: overview

### 4.2.1 Adopted EU Directives

Out of the 52 EU directives adopted between 1 January 2022 and 31 August 2023:

- 36 EU directives do not relate to human rights and equality (that is, either completely irrelevant or too peripheral); and
- 1 EU directive does relate to human rights and equality but does not apply to Ireland due to its opt out in the area of freedom, security and justice.<sup>427</sup>

These directives will not be discussed in the report but can be identified in the mapping data in Appendix 2.

Amongst the 52 EU directives adopted between 1 January 2022 and 31 August 2023, 15 EU Directives sufficiently relate to human rights and equality (and therefore potentially fall under the scope of the 1998 Agreement), justifying further discussion in this report. The themes most commonly touched upon are: the right to health, including the right to a healthy environment (6 EU directives); the right to privacy, including the right to data protection (4 EU directives – although one of them does not apply to Ireland); and the prohibition of gender discrimination (2 EU directives). Other themes discussed to a lesser extent include: general human rights protection (1 EU directive); human rights at work (1 EU directive) and the right to an adequate standard of living (1 EU directive). Some EU directives are more technical than others and, therefore, will not be discussed at length in this report, although more details can be found in the mapping data in Appendix 2. Others, however, set more substantial requirements worth noting in this chapter.

Furthermore, amongst the 15 EU directives adopted between 1 January 2022 and 31 August 2023 that sufficiently relate to human rights and equality, three are especially relevant for issues of rights and equality.<sup>428</sup>

427 [EU Directive 2022/228](#) amending Directive 2014/41/EU, as regards its alignment with Union rules on the protection of personal data

428 [Council Directive 2004/113/EC](#) of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; [Directive 2006/54/EC](#) of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; [Council Directive 2000/43/EC](#) of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; [Council Directive 2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; [Directive 2010/41/EU](#) of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC; [Council Directive 79/7/EEC](#) of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

One of these amends an Annex 1 Directive and so triggers the keeping pace obligations; the other two have significant implications for human rights and equality issues. These three are:

- **Pay Transparency Directive:** EU Directive 2023/970 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms;<sup>429</sup> The Commissions and the authors of this paper agree that the Pay Transparency Directive does amend Annex 1.
- **Gender Balance on Boards Directive:** EU Directive 2022/2381 on improving the gender balance among directors of listed companies and related measures;<sup>430</sup>
- **Adequate Minimum Wages Directive:** EU Directive 2022/2041 on adequate minimum wages in the European Union.<sup>431</sup>

Outside of the period of the mapping exercise, but prior to the finalisation of this report, two further key directives which amend or replace Annex 1 directives became law. These are the directives on equality bodies that relate to human rights and equality amend and/or update an Annex 1 directive; in May 2024 these proposals became law:

- Directive (EU) 2024/1500 on standards for Equality Bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and amending Directives 2006/54/EC and 2010/41/EU.<sup>432</sup>
- Directive (EU) 2024/1499 on standards for Equality Bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and amending Directives 2000/43/EC and 2004/113/EC.<sup>433</sup>

429 [EU Directive 2023/970](#) to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

430 [EU Directive 2022/2381](#) on improving the gender balance among directors of listed companies and related measures.

431 [EU Directive 2022/2041](#) on adequate minimum wages in the European Union.

432 [Directive \(EU\) 2024/1500](#) on standards for Equality Bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and amending Directives 2006/54/EC and 2010/41/EU.

433 [Directive \(EU\) 2024/1499](#) on standards for Equality Bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and amending Directives 2000/43/EC and 2004/113/EC.

#### 4.2.2 Adopted EU Regulations

Out of the 138 EU regulations adopted between 1 January 2022 and 31 August 2023, in relation to topics potentially relevant to human rights and equality:

- 67 EU regulations do not sufficiently relate to human rights and equality (that is, too peripheral);<sup>434</sup> and
- 2 EU regulations do sufficiently relate to human rights and equality but do not apply to Ireland due to its opt out in the area of freedom, security and justice.<sup>435</sup>

These regulations will not be discussed in the report but can be identified in the mapping data in Appendix 2. However, it is worth noting that a high number of EU regulations deemed not sufficiently related to human rights and equality (due to being too peripheral or too technical), have indirect implications for the right to health, including the right to a healthy environment.

Amongst the 138 EU Regulations adopted between 1 January 2022 and 31 August 2023 in relation to topics potentially relevant to human rights and equality, **69 EU Regulations sufficiently relate to human rights and equality (and, therefore, fall under the scope of the 1998 Agreement), justifying further discussions in this report.** The theme most touched upon, by far, is the right to health, including the right to a healthy environment (46 EU regulations); followed by: general human rights protection (6 EU regulations); the right to privacy, including the right to data protection (5 EU regulations); asylum-seekers and refugees' protection (4 EU regulations). Other themes discussed to a lesser extent (in one or two EU regulations) include: freedom of expression; right to a fair trial; right to food; right to a minimum standard of living and right to social security; work rights; prohibition of gender discrimination. Some EU regulations are more technical than others (or involve minor amendments of previous Regulations) and, therefore, will not be discussed at length in this report, although more details can be found in the mapping data in Appendix 2. Others, however, set more substantial requirements worth noting in this chapter.

Furthermore, amongst those 69 EU regulations adopted between 1 January 2022 and 31 August 2023 that sufficiently relate to human rights and equality, no EU regulation could potentially amend and/or update an Annex 1 directive. However, all would have applied to NI, had the UK remained in the EU.

434 These include, for instance, regulations listing particular products as harmful or hazardous substances (mostly in the context of the right to a healthy environment and -to a lesser extent, in the context of food safety). We deemed such regulations as not sufficiently relevant to human rights and equality due to their highly technical nature.

435 [EU Regulation 2022/850](#) of the European Parliament and of the Council of 30 May 2022 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726. [Regulation \(EU\) 2022/585](#) of the European Parliament and of the Council of 6 April 2022 amending Regulations (EU) No 514/2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management, (EU) No 516/2014 establishing the Asylum, Migration and Integration Fund and (EU) 2021/1147 establishing the Asylum, Migration and Integration Fund).

While Ireland is bound to respect all the 69 EU regulations mentioned above, note that 19 of them explicitly mention Ireland. Specific mentions were made in relation to: Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice;<sup>436</sup> Protocol No 19 on the Schengen acquis integrated into the framework of the European Union;<sup>437</sup> the Withdrawal Agreement; or when listing Ireland amongst the countries specified in the Annexes of the regulations.

#### 4.2.3 Themes most legislated upon in our sample of adopted EU legislation

Most EU directives and regulations adopted between 1 January 2022 and 31 August 2023 that relate to human rights and equality, concern the **right to health, including the right to a healthy environment**. Two factors may explain this.

Firstly, in the context of EU regulations, we had to select thematic filters to identify documents that sufficiently related to human rights and equality; and the number of filters relevant to the right to health (including the right to a healthy environment) was higher than the number of filters relevant to other rights (that is, a total of four thematic filters: ‘environment’; ‘health and safety’; ‘pollution’; and ‘public health’).

Secondly, this focus on the right to health (including the right to a healthy environment) is not surprising given the significant amount of work the EU has historically dedicated towards protecting consumers’ rights when it comes to the health and safety of food and other products circulating in the Union (perhaps heightened by the COVID-19 pandemic). It is not surprising either given the EU’s global leading role in environmental protection, with continuous attempts at setting high standards across the Union (especially as the climate crisis escalates). Following Brexit, the UK (including NI) is no longer under the obligation to follow high EU standards regarding the quality of goods and services that can impact negatively on human health and the environment. This is particularly problematic for the island of Ireland, which represents a ‘single biogeographic unit with shared land and sea borders [...and] environmental issues do not respect borders, [...thereby requiring] close cross-border cooperation’, including for instance to conserve species and habitats, protect shared waters and tackle illegal waste.<sup>438</sup> Divergence of laws and practices regarding the protection of the right to a healthy environment could, therefore, trigger a diminution of rights for individuals in NI, and affect the rights of individuals in Ireland.

436 [Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice.](#)

437 [Protocol No 19 on the Schengen acquis integrated into the framework of the European Union.](#)

438 Northern Ireland Environment Link and Environmental Pillar, [Joint Briefing: Brexit and cross-border environmental cooperation on the island of Ireland.](#)

Various EU directives and regulations adopted between 1 January 2022 and 31 August 2023 that relate to human rights and equality, concern the **right to privacy, including the right to data protection**. These instruments, primarily aimed at facilitating the sharing of information and evidence across EU Member States in the context of criminal proceedings and anti-terrorism activities, also consider the rights to data protection of both suspects and victims of such crimes. This development is not surprising, given the relatively recent adoption of the General Data Protection Regulation (GDPR),<sup>439</sup> which imposes obligations on organisations targeting or collecting personal data, to protect individuals' data privacy and security. The GDPR has had a widespread impact across the Union, including in areas that strongly relate to human rights and equality such as cross-border criminal proceedings. Furthermore, this focus on the right to privacy, including the right to data protection, is not surprising given the increasing use of new technologies by criminal and terrorist groups, mentioned across different EU directives and regulations in our sample. This is particularly important for the island of Ireland, given '(m)uch of the cooperation on criminal justice matters between the United Kingdom and the Republic of Ireland is based on EU level instruments', including in migration control, smuggling of commodities and resurgence of domestic terrorism.<sup>440</sup> Divergence of laws and practices regarding the protection of the right to data protection could, therefore, trigger a diminution of rights for crimes' victims and suspects in Northern Ireland.

To be sure this report includes EU legislation on refugees' rights, human trafficking, child exploitation and gender discrimination, focal points of the Commissions' work, we ran an additional search looking for EU adopted directives or regulations adopted between 1 January 2022 and 31 August 2023, which title may include the words 'refugee' or 'trafficking' or 'exploitation' or 'child' or 'gender'. No further document than what was already included in the mapping data was found (see Appendix 2).<sup>441</sup>

#### 4.2.4 Proposed EU legislation (Directives and Regulations)

Amongst the 17 EU directives and regulations proposed between 1 January 2022 and 31 August 2023 (focusing on those that have already been adopted by the European Commission and on topics sufficiently relevant to human rights and equality), most concerned the justice system. Several pieces of EU law that were proposed between 1 January 2022 and 31 August 2023 concerned public health, employment rights / corporate social responsibility, and general human rights matters focusing on the protection of vulnerable groups (women, victims of human rights trafficking, children).

439 [EU Regulation 2016/679](#) of the European Parliament and the Council (27 April 2016) on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

440 G. Davies, '[Facilitating Cross-Border Criminal Justice Cooperation Between the UK and Ireland After Brexit: 'Keeping the Lights On' to Ensure the Safety of the Common Travel Area](#)' (2021) 85(2) *The Journal of Criminal Law* 77-97.

441 See the EUR lex database '[Advanced search](#)'.



Finally, some pieces of EU law that were proposed between 1 January 2022 and 31 August 2023 concerned the right to privacy, including data protection, and the right to a minimum standard of living.

#### 4.2.5 Relevance to Northern Ireland

The themes relevant to human rights and equality on which the EU has most legislated upon from 1 January 2022 until 31 August 2023 (that is, adopted and proposed EU directives and regulations) are all relevant to Northern Ireland, in the context of Brexit. Those which amend Annex 1 directives represent matters of **dynamic alignment**; while others are examples where **voluntary alignment** might be appropriate where they align with international human rights standards and best practice and strengthen the protection of rights and equality.

Some pieces of EU legislation discussed below are relevant to Northern Ireland as matters of **dynamic alignment**, since they amend or replace (or potentially amend) the Annex 1 directives. As explained by the initial divergence report, '(t)his means that, if these measures are amended or replaced (...) the law in force in Northern Ireland will have to reflect these changes.'<sup>442</sup> Please note that Annex 1 directives regulate the following topics:

- Prohibition of gender discrimination in the access to and supply of goods and services.
- Prohibition of gender discrimination in matters of employment and occupation, including self-employment.
- Prohibition of gender discrimination in matters of social security.
- Prohibition of discrimination based on racial or ethnic origin both inside and outside the workplace.
- Prohibition of discrimination in employment and occupation on a range of equality grounds.

In addition to those measures that are relevant to the dynamic alignment obligation, the other EU legislative acts discussed below are relevant to Northern Ireland as matters of **voluntary alignment**, since they are connected to the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement. Indeed, under Article 2 WF: '(t)he United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union'.

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442 Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, [European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (2022) 21.

The initial divergence report outlines that the Agreement provisions ‘reflect the most prominent aspirations of the parties to the Agreement for Northern Ireland’, which ‘cover a broad range of civil, political, economic and social rights’ and ‘are not presented as an exhaustive list’.<sup>443</sup> This approach aligns with recent reports written by the ECNI and NIHRC.<sup>444</sup> It also is in line with the generous and purposive approach to interpretation adopted in the *Legacy Act cases (Dillon and others)* (see chapter five).

In our sample of EU legislation, many EU directives and regulations (adopted and proposed) concern the right to health (including the right to a healthy environment) or the right to privacy (including the right to data protection); while some concern human rights topics such as the principle of non-discrimination or rights to fair justice systems. Since all those aspects underpin the Rights, Safeguards and Equality of Opportunity part of the 1998 Agreement, we **recommend** the Northern Ireland Executive and relevant Northern Ireland departments to voluntarily align with relevant EU legislative developments to avoid divergence of human rights and equality protection across the island of Ireland to the extent that these strengthen rights and align with international human rights standards and best practice.

#### 4.2.6 Key updates from previous report

The last report recommended that the European Union provide a user-friendly website to track law and policy developments which it deems relevant to obligations triggered by Article 2 WF.<sup>445</sup> Unfortunately, this has not been implemented. While the official EU online legal database we used to track EU adopted legislation is relatively user-friendly (although less so regarding the year of adopted legislation – see Appendix 2); it does not always clearly outline which pieces of legislation are particularly relevant to obligations triggered by Article 2 WF.<sup>446</sup>

Furthermore, the EU websites listing recently proposed EU legislation are set in different places (the European Commission and the European Parliamentary Research Service) which do not always echo each other; and neither of them clearly outlines which pieces of legislation are particularly relevant to obligations triggered by Article 2 WF.<sup>447</sup>

443 Ibid. 16.

444 ECNI and NIHRC, [Working Paper: The Scope of Article 2\(1\) of the Ireland/ Northern Ireland Protocol](#) (December 2022), Section 3.9.

445 Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, [European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (2022) 114.

446 See the official EU legal database EurLex, which can be [accessed online](#). It is possible to search by the details of the Annex 1 directives (or other individual legal measures) and find which subsequent measures modify them.

447 European Commission, [‘Published Initiatives’](#); and European Parliamentary Research Service, [‘EU Legislation in Progress’](#).

When tracking adopted and proposed EU legislation, the last report identified key areas NI should keep pace with:<sup>448</sup>

- Work-life balance (Chapter 4);
- Integration of persons with disabilities both in the context of employment law and beyond it (Chapter 5);
- Human trafficking (Chapter 5);
- Gender pay transparency reporting requirements (Chapter 6);
- Accessibility of products and services within the internal market (including for consumers who are older people or people with a disability) (Chapter 6);
- Gender balance in non-executive director roles (Chapter 6);
- Violence against women and domestic violence (Chapter 6).

In this Chapter, our report identifies similar themes and also discusses recent developments regarding:

- Equality bodies legislation (see section 4.3.1.3 below);
- The right to privacy, including the right to data protection (section 4.3.2 below);
- The right to health, including the right to a healthy environment (section 4.3.3 below);
- Adequate minimum wages (section 4.3.4.1 below);
- Justice systems (see proposed EU legislation, in section 4.3.4.3 below);
- Employment rights and corporate social responsibility (section 4.3.4.4 below);
- Vulnerable groups in relation to human trafficking, migrants, children (section 4.3.4.5 below).

## 4.3 Updates in specific areas

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### 4.3.1 Discrimination

Out of those 15 EU directives adopted between 1 January 2022 and 31 August 2023 and that relate to human rights and equality, 2 EU directives relate to the prohibition of gender discrimination. With respect to one of these (the Pay Transparency Directive) it amends an Annex 1 directive and so dynamic alignment is required. A second directive (Gender Balance on Boards Directive) could potentially amend an Annex 1 directive.

Two Directives on Equality Bodies have also recently been adopted outside the mapping period of 1 January 2022 to 31 August 2023 which amend Annex 1 Directives.

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448 Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, [European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (2022), Chapters 4-6.

#### 4.3.1.1 Pay Transparency Directive

The **Pay Transparency Directive**<sup>449</sup> requires that:

- Member States must eliminate direct and indirect pay discrimination, including by ensuring pay transparency prior to and during employment (for example giving access to criteria used to determine pay levels and progression; reporting on pay gap; providing sufficient resources to equality bodies; guaranteeing access to justice for claimants);
- Member States must bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 7 June 2026. States must immediately inform the Commission thereof, including by providing a summary of the results of an assessment regarding the impact of their transposition measures on workers and employers with fewer than 250 workers and a reference to where such assessment is published (Article 34).
- Member States must bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 7 June 2026.

The application of the Pay Transparency Directive (EU Directive 2023/970) is inherently linked with an Annex 1 Directive: that is, the Gender Employment Directive.<sup>450</sup> Indeed, it promotes pay transparency prior to and during employment, and encourages measures to address the gender pay gap by allowing employers and women to detect and avoid discriminatory pay patterns. The ECNI and NIHRC have concluded that this Directive triggers the keeping pace obligations in Article 2 WF.<sup>451</sup>

At present, Section 19 of the Employment Act (Northern Ireland) 2016 requires that employers publish information relating to the pay of employees for the purpose of showing whether by reference to factors of such description as is prescribed, there are differences in the pay of male and female employees. However as of the date of the report, Section 19 has not been brought into force (see above section 3.4.1).

**We agree with the ECNI and NIHRC recommendation that all relevant portions of the Pay Transparency Directive should be transposed into Northern Ireland law, further to obligations in the WF.**

449 [EU Directive 2023/970](#) to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

450 [Directive 2006/54/EC](#) of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

451 ECNI and NIHRC, [The EU Pay Transparency Directive: The UK Government's dynamic alignment obligations relating to Windsor Framework Article 2](#) (ECNI and NIHRC, 2024).

#### 4.3.1.2 Gender Balance on Boards Directive

The **Gender Balance on Boards Directive**<sup>452</sup> requires that:

- Member States must ensure that listed companies are subject to either of the following objectives, to be reached by 30 June 2026 (and, if needed, that they adjust the recruitment process):
  - a) members of the underrepresented sex hold at least 40% of non-executive director positions;
  - b) members of the underrepresented sex hold at least 33% of all director positions, including both executive and non-executive directors.
- Member States must adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 28 December 2024; and must immediately inform the Commission thereof (Article 11).

The application of the recently adopted Gender Balance on Boards Directive (EU Directive 2022/2381) seems inherently linked with an Annex 1 directive that is, the Gender Equality (Employment) Directive.<sup>453</sup> Indeed, it promotes the representation of women in director positions, including both executive and non-executive directors) and encourages the fight against the under-representation of women at high levels of managerial positions by setting clear targets. Both directives are adopted in pursuance of the Union principle of promoting equal opportunities and equal treatment of men and women in matters of employment and occupation.<sup>454</sup> Both directives specifically countenance the possibility of positive action.<sup>455</sup>

At present, there is no NI legislation aimed at improving the gender balance on companies' boards. The UK Financial Conduct Authority published a Policy Statement on diversity and inclusion for company boards and executive management in April 2022. Its revised Listing Rules apply to certain listed companies and include, inter alia, a requirement that a minimum of 40% women be on their executive boards. However, failure to meet such targets does not constitute a breach of the Listing Rules if the company discloses its reasons for not meeting the relevant target.

Ireland will need to comply with the terms of the Gender Balance on Boards Directive and so this represents a risk of divergence on the island of Ireland; it may particularly affect companies engaged in cross-border work.

452 [EU Directive 2022/2381](#) on improving the gender balance among directors of listed companies and related measures. Member States must adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 28 December 2024.

453 [Directive 2006/54/EC](#) of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

454 Recital 2 of the Gender Balance on Boards Directive [EU Directive 2022/2381](#), recital 4 of the Gender Equality (Employment) Directive [Directive 2006/54/EC](#), referring to Article 157 TFEU (formerly Article 141). Both also reference Articles 2 and 3 on equality as a value and the promotion of equality of men and women.

455 Recitals 3, 6, 25, 38, 40 of the Gender Balance on Boards Directive [EU Directive 2022/2381](#), Article 3 of the Gender Equality (Employment) Directive, [Directive 2006/54/EC](#).

**We recommend that the Department for the Economy should ensure that NI law voluntarily aligns with the requirements of the Gender Balance on Boards Directive where these strengthen rights and reflect international human rights standards and best practice.**

**We recommend that the ECNI and NIHRC conduct an analysis to determine if the Gender Balance on Boards Directive amends or replaces an Annex 1 directive.**

#### 4.3.1.3 Equality Bodies Directives

EU law on Member States' equality bodies has recently been amended in several respects, with two substantial legal standards worth noting in this report.

- Directive (EU) 2024/1500 on standards for Equality Bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and amending Directives 2006/54/EC and 2010/41/EU.<sup>456</sup>
- Directive (EU) 2024/1499 on standards for Equality Bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and amending Directives 2000/43/EC and 2004/113/EC.<sup>457</sup>

The recent **Equality Bodies Directives** amend various Annex 1 directives and so trigger the keeping pace obligation in Article 2 WF. These Directives strengthen the role and independence of equality bodies by setting out standards that address their mandate, tasks, independence, structure, powers, accessibility and resources to engage in the prevention of discrimination, promote equal treatment and awareness raising activities and effectively assist victims of discrimination to access justice. Therefore, they promote equality in the workplace and in other key areas by strengthening equality bodies' capacity to fight against related discrimination. Given these proposals concern equality bodies' mandate, it is particularly relevant to the work of the ECNI. However, they are also of importance to individuals in NI as they benefit those who have been subjected to discrimination and are seeking or accessing the services of ECNI.

456 [Directive \(EU\) 2024/1500](#) on standards for Equality Bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and amending Directives 2006/54/EC and 2010/41/EU.

457 [Directive \(EU\) 2024/1499](#) on standards for Equality Bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and amending Directives 2000/43/EC and 2004/113/EC.

Furthermore, the UK Government has accepted that the principle of dynamic alignment would apply in relation to these two Directives, as have the ECNI and the NIHRC.<sup>458</sup>

**We recommend that the UK Government, NI Executive and relevant departments bring into force the necessary measures to comply with any requirements set by the Equality Bodies Directives on gender equality in the workplace and on equal treatment in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation and gender equality in social security and goods and services, further to obligations in the WF.**

#### 4.3.1.4 Violence Against Women and Domestic Violence Directive

Since various Annex 1 directives prohibit gender discrimination (at work, in social security matters and in the provision of goods and services), EU legislative developments on gender equality are often likely to trigger dynamic alignment requirements for NI. However, this is not always the case. Matters falling outside that scope may need to be considered as matters of good practice to avoid divergence of rights in the realisation of gender equality on the island of Ireland. Northern Ireland authorities should consider voluntarily aligning with these EU developments where they strengthen rights and align with international human rights standards and best practice. One example of this is the **Violence against Women and Domestic Violence Directive**.

EU law on Member States' policies on **gender-based violence** has been amended, with substantial legal standards worth noting in this report as matters of good practice to avoid divergence in the realisation of gender equality on the island of Ireland.<sup>459</sup>

- Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence (**Violence against Women and Domestic Violence Directive**) requires States to combat violence against women and domestic violence more effectively, through measures such as: the criminalisation of relevant offences; the creation of sanctions for relevant offences; the protection of victims, their access to justice and their access to victim support; as well as prevention, coordination and cooperation measures.<sup>460</sup>

458 ECNI and NIHRC, '[Annual Report of the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission on the Implementation of Article 2 of the Windsor Framework 2022–2023](#)' (July 2023), Section 4.84 p. 44.

459 However, the NIHRC highlighted that this development *may* engage the dynamic alignment requirement, this has not been confirmed yet: NIHRC, '[Submission to the Executive Office's Consultation on the Ending Violence Against Women and Girls Strategic Framework](#)' (October 2023):

460 [Directive \(EU\) 2024/1385](#) of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence (Violence against Women and Domestic Violence Directive) 2024.

We note that the current legislative framework is the Domestic Abuse and Civil Proceedings Act (NI) 2021, on which the Department of Justice published Statutory Guidance in 2022. We also note that the NI Executive Office adopted a Strategy to End Violence Against Women and Girls in 2021. We welcome these developments. Ireland has agreement to participate in the adoption of the Violence against Women and Domestic Violence Directive and will have to transpose it into national law by 14 June 2027. Early commentary on the Directive has drawn attention to its gender-neutral approach to domestic violence and its approach to cyber violence<sup>461</sup> as well as its acknowledgment of intersectional discrimination.<sup>462</sup>

**We recommend that the NI Executive and relevant departments implement the standards in the Violence Against Women and Domestic Violence Directive to the extent that these strengthen rights and reflect international human rights standards and best practice.**

**We recommend that the ECNI and NIHRC conduct an analysis to determine if the Violence Against Women and Domestic Violence Directive amends or replaces an Annex 1 directive.**

#### 4.3.2 The right to privacy (including data protection)

Out of the 15 EU directives and 69 EU regulations adopted between 1 January 2022 and 31 August 2023 that sufficiently relate to human rights and equality, 4 EU directives (bar one which does not apply to Ireland) and 5 EU regulations relate to the right to privacy, including data protection. The Rights, Safeguards and Equality of Opportunity part of the 1998 Agreement explicitly mention the ‘civil rights’ of everyone in the community and the right to privacy (including data protection) should be considered as included within that. This is confirmed by the Agreement’s protection for the European Convention on Human Rights. Article 8 ECHR protects the right to respect for family and private life and includes therefore privacy and data protection. This entails that EU law underpinning these rights in Northern Ireland prior to 31 December 2020, such as the General Data Protection Regulation, must not be diminished. Furthermore, the EU directives and regulations discussed below should be considered as matters of good practice to avoid divergence in the realisation of the right to privacy on the island of Ireland. Northern Ireland authorities may wish to voluntarily align with these developments where they strengthen rights and reflect international human rights standards and best practice.

461 Ronagh McQuigg ‘[The New EU Directive on Combating Violence Against Women and Domestic Violence](#)’ QPOL (2024) Last Accessed on 3 July 2024.

462 Ceren Kasim ‘[Advancing Gender Equality: The EU’s Landmark Directive 2024/1385 on Violence Against Women](#)’ EU Law Analysis (2024) Last Accessed 13 July 2024.



#### 4.3.2.1 Recently adopted EU Directives on privacy

One of the 3 EU directives adopted between 1 January 2022 and 31 August 2023 that relate to the right to privacy (and thus, fall under the scope of the 1998 Agreement) sets requirements of rather a technical nature.<sup>463</sup> However, the other two (see below) set more substantial requirements worth noting.

- EU Directive 2023/977 on the exchange of information between the law enforcement authorities of Member States (which explicitly mentions that Ireland is taking part in this Directive). In the context of transnational criminal activities, Member States must exercise due diligence in assessing whether the request for information submitted to their Single Point of Contact represents a manifest breach of fundamental rights. States must bring into force measures necessary to comply with this requirement by 12 December 2024.<sup>464</sup>
- EU Directive 2022/211 on the alignment with Union rules on the protection of personal data: Member States must process personal data used for criminal or related administrative or civil procedures or parliamentary scrutiny in alignment with EU rules on the protection of personal data. States must bring into force measures necessary to comply with this requirement by 11 March 2023.<sup>465</sup>

The UK Data Protection Act 2018 updates and modernises UK data protection law in line with the GDPR, but does not guarantee alignment with EU rules on the protection of personal data. We note that there is no available information regarding the continuation of Single Points of Contact in Northern Ireland, following Brexit. It is unclear why this is the case. Given the importance of cross-border security cooperation we recommend voluntary alignment in this area.

**We recommend that, as a matter of voluntary alignment, the UK Government, NI Executive ensures that NI law complies with the standards in EU Directive 2023/977 on exchange of information between law enforcement authorities and EU Directive 2022/211 on the protection of personal data, so as ensure continued cross border criminal justice cooperation, where this will strengthen rights and reflect international human rights standards and best practice.**

463 [EU Directive 2023/1544](#) of the European Parliament and of the Council of 12 July 2023 laying down harmonised rules on the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings. It requires that Member States ensure that service providers offering services in the Union designate or appoint at least one addressee for the receipt of, compliance with and enforcement of decisions and orders for the purpose of gathering electronic evidence.

464 [EU Directive 2023/977](#) of the European Parliament and of the Council of 10 May 2023 on the exchange of information between the law enforcement authorities of Member States and repealing Council Framework Decision 2006/960/JHA.

465 [EU Directive 2022/211](#) of the European Parliament and of the Council of 16 February 2022 amending Council Framework Decision 2002/465/JHA, as regards its alignment with Union rules on the protection of personal data.

#### 4.3.2.2 Recently adopted EU Regulations on privacy

A number of EU regulations adopted between 1 January 2022 and 31 August 2023 relate to the right to privacy and set substantial requirements worth noting.

- When requesting a European Production Order (to obtain subscriber data or user's identity) or a European Preservation Order (to prevent the removal, deletion or alteration of data), Member States must comply with the conditions set in EU law, including about handling user's information and confidentiality, to protect individuals' right to data protection, from 18 August 2026 onwards.<sup>466</sup>
- When exchanging information and evidence through joint investigation teams in the context of cross-border crimes, Member States must ensure that these teams comply with the conditions set in EU law, including when handling personal data, to protect individuals' right to data protection, from 13 May 2023 onwards.<sup>467</sup>
- When carrying out criminal investigations as well as its role in research and innovation, Europol must process personal data by considering the fundamental rights and freedoms of the data subject concerned, from 27 June 2022 onwards.<sup>468</sup> Eurojust must do the same when preserving, analysing and storing evidence relating to genocide, crimes against humanity, war crimes and related criminal offences, from 31 May 2022 onwards.<sup>469</sup>

We note that these affect **areas of cross-border security cooperation** and so may be especially pertinent in the context of Ireland and Northern Ireland.

Since the UK is no longer part of the EU, it does not participate in EU institutions' or agencies' activities and cannot request European Production or Preservation Orders. However, cooperation is possible with Europol and Eurojust, as well as through joint investigation teams (see EU-UK Trade and Cooperation Agreement).<sup>470</sup>

**We recommend that the UK Government, NI Executive and relevant departments review data protection standards as they relate to cross-border security and voluntarily align with EU standards where they strengthen rights and reflect international human rights standards and best practice.**

466 [EU Regulation 2023/1543](#) of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings.

467 [EU Regulation 2023/969](#) of the European Parliament and of the Council of 10 May 2023 establishing a collaboration platform to support the functioning of joint investigation teams and amending EU Regulation 2018/1726.

468 [EU Regulation 2022/991](#) of the European Parliament and of the Council of 8 June 2022 amending EU Regulation 2016/794, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role in research and innovation.

469 [EU Regulation 2022/838](#) of the European Parliament and of the Council of 30 May 2022 amending EU Regulation 2018/1727 as regards the preservation, analysis and storage at Eurojust of evidence relating to genocide, crimes against humanity, war crimes and related criminal offences.

470 [Trade and Cooperation Agreement](#) between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part. EU Doc. Document 22021A0430(01), Title V, Title VI and Article 642.

#### 4.3.2.3 Recently proposed EU legislation on privacy

EU law on Member States' data protection policies will soon be amended in several respects, with one substantial legal standard worth noting in this report.

- States may soon be bound to streamline cooperation between national data protection authorities when enforcing the General Data Protection Regulation (GDPR) in cross-border cases.<sup>471</sup>

The current UK legislative framework on this topic is the UK Data Protection Act 2018 which updates and modernises UK data protection law in line with the GDPR, but does not guarantee alignment with EU rules on the protection of personal data. As regards Northern Ireland, we consider that Article 2 WF entails the UK must not allow any diminution of rights in the GDPR.

**We recommend the UK Government and the NI Executive ensure that EU standards are respected in cross-border cases in order to avoid divergence in the realisation of the right to privacy on the island of Ireland.**

#### 4.3.3 The right to health, including the right to a healthy environment

Given the Annex 1 directives require that the law in Northern Ireland respects EU principles of equal treatment including irrespective of sex, racial or ethnic origin (including at work, in social security matters and in the provision of goods and services) and keeps pace with any EU changes in those areas, dynamic alignment is not required for topics that fall outside that scope. None of the recent EU legal developments regarding the right to health, including the right to a healthy environment, fall within the scope of the dynamic alignment duty. However, those will be discussed (below) as sources of possible divergence and good practice in NI since they remain connected to Article 2 WF, as argued by Hervey.<sup>472</sup>

Out of the 15 EU Directives and 69 Regulations adopted between 1 January 2022 and 31 August 2023 that sufficiently relate to human rights and equality, 6 EU directives and 46 EU regulations relate to the right to health (including the right to a healthy environment). These correspond to an aspect underpinning the Rights, Safeguards and Equality of Opportunity part of the 1998 Agreement. This interpretation of the Agreement, which refers to the full range of human rights standards ratified by the UK and not solely civil and political rights, aligns with recent reports written by or for the ECNI and NIHRC,<sup>473</sup> including in the context of the right to health.<sup>474</sup>

471 Proposal for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679, COM(2023) 348 final. More info [here](#).

472 Tamara Hervey, [Brexit, Health and its potential impact on Article 2 of the Ireland/Northern Ireland Protocol](#) (NIHRC, March 2022)

473 ECNI and NIHRC, [Working Paper: The Scope of Article 2\(1\) of the Ireland/ Northern Ireland Protocol](#) (December 2022), Section 3.9; Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, [European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (2022)..

474 Tamara Hervey, [Brexit, Health and its potential impact on Article 2 of the Ireland/Northern Ireland Protocol](#) (NIHRC, March 2022).2006), §196

Furthermore, in international law, the right to a healthy environment has been widely interpreted as part of the right to health,<sup>475</sup> as part of the right to life,<sup>476</sup> and as part of the right to respect for private and family life,<sup>477</sup> or as an independent right indivisible and interdependent with other key human rights such as the right to life, the right to health, as well as the rights to adequate food, housing and water.<sup>478</sup>

Therefore, the 6 adopted EU directives and 46 EU regulations mentioned above need to be considered as matters of good practice to avoid divergence in the realisation of the right to health on the island of Ireland. Northern Ireland may wish to voluntarily align with these developments where they strengthen rights and reflect international human rights standards and best practice.

#### 4.3.3.1 Recently adopted EU Directives on health

Most of the 6 EU Directives adopted between 1 January 2022 and 31 August 2023 that relate to the right to health are of a technical nature (especially regarding the right to a healthy environment).<sup>479</sup> However, one of them establishes more substantial requirements worth noting.

- EU Directive 2022/642 amending Directives 2001/20/EC and 2001/83/EC as regards derogations from certain obligations concerning certain medicinal products for human use made available in the United Kingdom in respect of Northern Ireland and in Cyprus, Ireland and Malta: As a derogatory and temporary measure, competent authorities in Northern Ireland, Cyprus, Ireland, Malta must allow investigational medicinal products to be imported from England, Scotland and Wales without the need to provide the authorisation normally requested at EU level, provided a number of set conditions are fulfilled (these States must bring into force measures necessary to comply with this requirement immediately).<sup>480</sup>

475 For example, European Committee of Social Rights, [Marangopoulos Foundation for Human Rights \(MFHR\) v. Greece](#), Complaint No. 30/2005 (Decision on the Merits of 6 December)

476 For example European Court of Human Rights, [Budayeva v Russia](#), App No. 15339/02, 20058/02, 11673/02 and 15343/02, 21166/0) (2008) 59 EHRR 2 (20 March 2008).

477 For example European Court of Human Rights, [Cordella v Italy](#), App No. 54414/13 and 54264/15 (24 January 2019).

478 Joint statement by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, '[Statement on human rights and climate change](#)' UN Doc. HRI/2019/1 (14 May 2020); UN General Assembly, '[The human right to a clean, healthy and sustainable environment](#)' UN Doc. A/76/L.75 (26 July 2022).

479 Of these 6 EU directives, 2 mention Ireland explicitly:

- [EU Directive 2022/642](#) amending Directives 2001/20/EC and 2001/83/EC as regards derogations from certain obligations concerning certain medicinal products for human use made available in the United Kingdom in respect of Northern Ireland and in Cyprus, Ireland and Malta
- [EU Commission Delegated Directive 2022/1326](#) amending the Annex to Council Framework Decision 2004/757/JHA as regards the inclusion of new psychoactive substances in the definition of 'drug' C/2022/1552. In this Directive, Member States are required to categorise new psychoactive substances that have caused seizures, poisoning and deaths as 'drugs' to assist the EU in its fight against illicit drug trafficking. Ireland is listed as one of the Member States for whom this requirement applies.

480 [EU Directive 2022/642](#) of the European Parliament and of the Council of 12 April 2022 amending Directives 2001/20/EC and 2001/83/EC as regards derogations from certain obligations concerning certain medicinal products for human use made available in the United Kingdom in respect of Northern Ireland and in Cyprus, Ireland and Malta.

The UK Government has integrated this standard into its revised guidance, which refers to EU Directive 2022/642.<sup>481</sup>

#### 4.3.3.2 Recently adopted EU Regulations on health (focus on substantial standards)

Most of the 46 EU regulations adopted between 1 January 2022 and 31 August 2023 that relate to the right to health (and thus, fall under the scope of the 1998 Agreement) set requirements of rather technical nature (especially regarding the right to a healthy environment). However, some of them (see below) set more substantial requirements worth noting.

- The competent UK authorities in respect of Northern Ireland may allow certain medicinal products for human use to be imported into Northern Ireland from other parts of the UK without a manufacturing authorisation, provided such products fulfil other conditions set by EU law, a requirement which should apply one month after the provision of written guarantees from the UK or from 1 January 2025 at the latest.<sup>482</sup> This also concerns (temporarily) their import into Cyprus, Ireland and Malta, a requirement which should apply from 31 January 2022.<sup>483</sup>
- Member States must set up all measures required by EU law to prevent, prepare and plan their response to serious cross-border health threats; they must also meet EU requirements on epidemiological surveillance, EU reference laboratories and ad hoc monitoring; and set up an early warning and response system, as well as a public health emergency framework at an EU level, from 26 December 2022 onwards.<sup>484</sup>
- The European Centre for Disease Prevention and Control will have expanded missions and tasks to enhance its capacity to provide the required scientific expertise to Member States and to support actions which combat serious cross-border threats to health in the Union, from 13 December 2022 onwards.<sup>485</sup>
- The European Medicines Agency will have a reinforced role in crisis preparedness and management for medicinal products and medical devices to better address the impact of public health emergencies, from 1 March 2022 onwards.<sup>486</sup>

481 UK Medicines and Healthcare products Regulatory Agency, '[Guidance: Supplying authorised medicines to Northern Ireland](#)' (published 2020, last updated 2023).

482 [EU Regulation 2023/1182](#) of the European Parliament and of the Council of 14 June 2023 on specific rules relating to medicinal products for human use intended to be placed on the market in Northern Ireland and amending Directive 2001/83/E.

483 [EU Regulation 2022/641](#) of the European Parliament and of the Council of 12 April 2022 amending EU Regulation No 536/2014 as regards a derogation from certain obligations concerning investigational medicinal products made available in the United Kingdom in respect of Northern Ireland and in Cyprus, Ireland and Malta.

484 [EU Regulation 2022/2371](#) of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision No 1082/2013/EU (see previously adopted: EU Council Regulation 2022/2372 of 24 October 2022 on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level).

485 [EU Regulation 2022/2370](#) of the European Parliament and of the Council of 23 November 2022 amending EC Regulation No 851/2004 establishing a European centre for disease prevention and control.

486 [EU Regulation 2022/123](#) of the European Parliament and of the Council of 25 January 2022 on a reinforced role for the European Medicines Agency in crisis preparedness and management for medicinal products and medical devices.

Since the UK is no longer part of the EU, it does not participate in EU institutions' or EU agencies' activities such as the European Centre for Disease Prevention and Control or the European Medicines Agency. However, their mandate must be respected in instances of cooperation. The overarching rationale as to why these Regulations make a difference in terms of the right to health relates to the need to respond effectively to cross border health matters and/or threats.

Regarding the import of certain medicinal products into Northern Ireland, we note that the UK Government has integrated EU standards into its revised guidance, which explicitly refers to EU Directive 2022/642, but not to the EU Regulations 2023/1182 and 2022/641, discussed above.<sup>487</sup> Therefore it is necessary to address this discrepancy.

**We recommend that the UK Government and the NI Executive ensure compliance with EU Regulations 2023/1182 and 2022/641 on rules relating to medicinal products.**

#### 4.3.3.3 Recently proposed EU legislation on health

EU law on Member States' public health policies will soon be amended in a number of respects, with some substantial legal standards worth noting in this report.

- States may soon be bound to a revised EU pharmaceutical legislative package aimed at making medicines more available, accessible and affordable, while supporting the competitiveness and attractiveness of the EU pharmaceutical industry, with higher environmental standards.<sup>488</sup>
- States may soon be bound to regulate European health data in order to improve individuals' access to and control of their electronic personal data, while facilitating data re-use for the good of society across the EU.<sup>489</sup>

We note that the current UK legislative frameworks on those two topics are the Human Medicines Regulations 2012 and the Data Protection Act 2018.

487 UK Medicines and Healthcare products Regulatory Agency, '[Guidance: Supplying authorised medicines to Northern Ireland](#)' (published 2020, last updated 2023).

488 Proposal for a Regulation of the European Parliament and of the Council laying down Union procedures for the authorisation and supervision of medicinal products for human use and establishing rules governing the European Medicines Agency, amending Regulation (EC) No 1394/2007 and Regulation (EU) No 536/2014 and repealing Regulation (EC) No 726/2004, Regulation (EC) No 141/2000 and Regulation (EC) No 1901/2006. Proposal for a Directive of the European Parliament and of the Council on the Union code relating to medicinal products for human use, and repealing Directive 2001/83/EC and Directive 2009/35/EC. More info [here](#).

489 Proposal for a Regulation of the European Parliament and of the Council establishing the Union Health Data Space COM/2022/197 final. More info [here](#).

**We recommend that the UK Government and the NI Executive ensure that access to, and the prices of, medicines in NI, as well as individuals' control of personal medical data in NI, match any revised EU standards in order to avoid divergence in the realisation of the right to health on the island of Ireland to the extent that these strengthen rights and reflect international human rights standards and best practice. This may involve amendments of the current legislative frameworks governing those topics.**

#### 4.3.4 Other human rights and equality matters

As discussed in previous sections, a vast number of EU developments on human rights matters arguably correspond to aspects underpinning the Rights, Safeguards and Equality of Opportunity part of the 1998 Agreement. This interpretation of the Agreement, which refers to the full range of human rights standards ratified by the UK and not solely civil and political rights, follows recent reports written by or for the ECNI and NIHRC,<sup>490</sup> and reflects the generous and purposive approach to interpretation in the *Legacy Act cases (Dillon and others)* (see chapter five). Therefore, the EU legislative developments mentioned below need to be considered as matters of good practice to avoid divergence in the realisation of human rights and equality on the island of Ireland. Northern Ireland may wish to voluntarily align with these developments where they strengthen rights and reflect international human rights standards and best practice.

##### 4.3.4.1 Adequate Minimum Wages Directive

One EU directive adopted between 1 January 2022 and 31 August 2023 relates to the right to an adequate standard of living. This is:

- EU Directive 2022/2041 on adequate minimum wages in the European Union (the **Adequate Minimum Wages Directive**).<sup>491</sup> This Directive requires that Member States must ensure that they involve social partners when setting and updating national criteria defining minimum wages, that these criteria be clear, and these criteria take into account (at least):
  - a. purchasing power, taking into account the cost of living;
  - b. general level of wages and their distribution;
  - c. growth rate of wages;
  - d. long-term national productivity levels and developments.

490 ECNI and NIHRC, Working Paper: The Scope of Article 2(1) of the Ireland/ Northern Ireland Protocol (December 2022), Section 3.9; Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, [European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (2022).

491 [EU Directive \(EU\) 2022/2041](#) of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union.

Member States must adopt the measures necessary to comply with this Directive by 15 November 2024.

The recently adopted Adequate Minimum Wages Directive is relevant to the provisions of the Belfast Good Friday Agreement 1998 on economic and social matters; the Agreement refers to the right to equal opportunity in all social and economic matters, policies for sustained economic growth and promoting social inclusion. The ECNI and NIHRC have not to date identified this Directive as falling within the scope of Article 2 WF.

The Directive is arguably inherently linked with an Annex 1 Directive: that is, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Indeed, it promotes the uptake of fair criteria to determine minimum wages and therefore, encourages the fight against in-work poverty that affect certain professions more prone to minimum wages and in which vulnerable groups are often over-represented (for example, women as nursery workers).

Given minimum wages are determined at a national level and is a reserved matter,<sup>492</sup> there is no NI legislation on that matter but instead, a UK National Minimum Wage Act 1998. In this piece of legislation, social partners are involved in defining the national minimum wage, through their participation in the Low Pay Commission (sections 5-8 and Schedule 1). However, it is unclear what national criteria are used to define the minimum wage.

**We recommend that the UK Government and NI Executive implement the standards in the Adequate Minimum Wages Directive, as a matter of voluntarily alignment, to the extent that these strengthen rights and reflect international human rights standards and best practice.**

**We recommend that the ECNI and NIHRC conduct an analysis to determine if the Adequate Minimum Wages Directive amends or replaces an Annex 1 directive.**

#### 4.3.4.2 EU Regulations regarding migration and non-discrimination

All 15 EU directives adopted between 1 January 2022 and 31 August 2023 that sufficiently relate to human rights and equality have already been discussed in previous sections, as have many EU regulations, in the context of the right to health, the right to privacy and gender equality. However, two more EU regulations set some substantial requirements worth noting, in the context of **migration and non-discrimination**.

492 Northern Ireland Act 1998, [Schedule 3](#), para 21.



- Member States must provide an annual performance report on the Asylum, Migration and Integration Fund and on the Internal Security Fund, by providing particular information as requested by EU law, including how they complied with requirements on equality between men and women and the promotion of gender mainstreaming, as well as to avoid discrimination based on gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation, from 29 January 2023.<sup>493</sup>

Since the UK is no longer part of the EU, it does not participate in EU institutions' or agencies' activities such as the Asylum, Migration and Integration Fund or the Internal Security Fund. We consider it desirable that the NI Executive Office ensure compliance with EU standards on non-discrimination, regardless of whether the UK must submit an annual performance report in relation to these Funds.

**We recommend that the UK Government, NI Executive and relevant departments voluntarily report annually on how asylum and migration policies comply with requirements on equality and non-discrimination.**

#### 4.3.4.3 EU legislation regarding justice systems

Under the recently passed Directive 2024/1226, states are bound to recognise the violation of EU restrictive measures as criminal offences, subject to penalties (EU restrictive measures are usually taken against non-EU countries, entities or persons to promote EU values such as international peace and security, democracy, the rule of law and human rights. They consist in targeted financial sanctions – that is, asset freezes; restrictions on admissions – that is, travel bans; and sectoral measures – e.g., arms embargoes or economic and financial measures).<sup>494</sup> The directive must be transposed by 20 May 2025.<sup>495</sup>

EU law on Member States' justice systems will soon be amended in various respects, with several substantial legal standards worth noting in this report.

- States may soon be bound to protect persons who engage in public participation from manifestly unfounded or abusive court proceedings participation (these usually target journalists and human rights defenders and are often initiated by powerful individuals, lobby groups, corporations and state organs in order to censor, intimidate and silence critics).<sup>496</sup>

493 [EU Commission Implementing Regulation 2023/169](#) of 25 January 2023 establishing the template for the annual performance reports on the Asylum, Migration and Integration Fund for the 2021-2027 programming period, pursuant to EU Regulation 2021/1147 of the European Parliament and of the Council, Annex, Item 5.2. [Commission Implementing EU Regulation 2023/170](#) of 25 January 2023 establishing the template for the annual performance reports on the Internal Security Fund for the 2021-2027 programming period, pursuant to EU Regulation 2021/1149 of the European Parliament and of the Council C/2023/559, Annex, Item 5.2.

494 [Directive \(EU\) 2024/1226](#) of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673.

495 [Directive \(EU\) 2024/1226](#) of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673, Article 20.

496 Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation"), 2022/0117 (COD). More info [here](#).

- States may soon be bound to develop targeted measures improving victims' ability to rely on their rights under Directive 2012/29/EU (the Victims' Directive), including the right to information, the right to support and protection based on victims' individual needs, procedural rights, and the right to receive a decision on compensation from the offender at the end of criminal proceedings.<sup>497</sup>

We note that the proposals in particular may be relevant to human rights issues under the scope of Article 2 WF. Victims' rights were indeed central to the ruling in the *Legacy Act cases (Dillon and others)*.

**We recommend the NI Executive monitor EU proposals on the protection of people from manifestly unfounded or abusive court processes and victims' rights with a view to assessing whether Northern Ireland law needs amendment to strengthen rights and reflect international human rights standards and best practice. We recommend voluntary alignment with EU proposals in these areas where they strengthen rights and reflect international human rights standards and best practice.**

#### 4.3.4.4 EU legislation regarding employment rights and corporate social responsibility

EU law has recently been amended to provide for important new provisions in relation to employment rights and corporate social responsibility.

The **Corporate Sustainability Due Diligence Directive** requires states to encourage companies to better manage sustainability-related matters in their own operations and value chains regarding human rights and climate change. This would involve comprehensive mitigation processes for adverse impacts; and focus on sustainability, human rights and climate change at management level including how business decisions are framed.<sup>498</sup>

The European Parliament has approved the text of the **Platform Work Directive** in April 2024; the text needs approval by the Council. The Platform Work Directive will address employment rights in the 'gig economy' and provide guidance as to when a worker in the gig economy should be treated as an employee and so entitled to greater protections.<sup>499</sup>

497 Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, COM(2023) 424 final, 2023/0250 (COD). More info [here](#).

498 [Directive \(EU\) 2024/1760](#) of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (Text with EEA relevance) (Corporate Sustainability Due Diligence Directive).

499 [Parliament adopts Platform Work Directive](#) (24 April 2024).

In addition, EU law on Member States' protection of employment rights will soon be amended in various respects, with several substantial legal standards worth noting in this report:

- States may soon be bound to further protect workers against exposure to asbestos (at present, most occupational cancers in the EU are related to asbestos; and construction workers are the ones most exposed, the vast majority of which are men).<sup>500</sup> These measures may be indirectly relevant to an Annex 1 Directive as a result (that is, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation). States may also soon be bound to further protect workers against exposure to lead.<sup>501</sup> We recommend that commissions monitor this in terms of assessing compliance in the future.
- States may soon be banned from allowing products made with forced labour to be placed or made available on the EU internal market; and from allowing their exportation from the EU.<sup>502</sup>

These recent directives and proposals all affect workers' rights and may be particularly relevant in an all-island cross-border context where companies may be operating on both sides of the border or have different dealings on both sides of the border.

**We recommend the NI Executive monitor EU proposals on the protection of workers, forced labour, corporate sustainability and the gig economy with a view to assessing whether Northern Ireland law needs amendment to reflect best international practice. We recommend voluntary alignment where they will strengthen rights and reflect international human rights standards and best practice.**

#### 4.3.4.5 EU legislation regarding vulnerable groups

States are now bound to further prevent and combat the trafficking of human beings and to further protect its victims, following **amendments to the Trafficking Directive**. Implementation measures include: recognising forced marriage, illegal adoption and online trafficking as forms of exploitation; differentiating sanctions for standard offences and for aggravated offences regarding legal persons; creating

500 Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/148/EC on the protection of workers from the risks related to exposure to asbestos at work, COM/2022/489 final. More info [here](#).

501 Proposal for a Directive of the European Parliament and of the Council amending Council Directive 98/24/EC and Directive 2004/37/EC of the European Parliament and of the Council as regards the limit values for lead and its inorganic compounds and diisocyanates, COM(2023) 71 final, 2023/0033 (COD). More info [here](#). This Directive has now become law: [Directive \(EU\) 2024/869](#) of the European Parliament and of the Council of 13 March 2024 amending Directive 2004/37/EC of the European Parliament and of the Council and Council Directive 98/24/EC as regards the limit values for lead and its inorganic compounds and for diisocyanates.

502 Proposal for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market 2022 (COM(2022) 453 final, procedure ref.: 2022/0269 (COD). More info [here](#).

offences concerning the use of services which are the object of exploitation with knowledge that the person is a victim of trafficking.<sup>503</sup> The deadline for transposing this Directive is 15 July 2026.<sup>504</sup>

In addition, EU law on Member States' protection of vulnerable groups will soon be amended in various respects, with several substantial legal standards worth noting in this report:

- States may soon be supported when facing a situation of **instrumentalisation of migrants**. Such instrumentalisation occurs when State actors, for example Belarus authorities, artificially create and facilitate irregular migration, using migratory flows as a tool for political purposes to destabilise EU Member States. This proposal would involve a specific emergency migration and asylum management procedure and, where necessary, support and solidarity measures to manage the arrival of persons having been instrumentalised by a third country in an orderly, humane and dignified manner.<sup>505</sup>
- States may soon be bound to **further combat child sexual abuse online**, by obliging interpersonal communication services to proactively detect online CSAM materials and activities involving child grooming, while balancing this with concerns regarding privacy, security and law enforcement investigations.<sup>506</sup>

The proposals on human trafficking and child sexual abuse are especially relevant in the context of cross-border cooperation and the open border on the island of Ireland. Given the ease with which it is possible to cross the border it would be undesirable for very different provisions on trafficking to exist which might cause confusion for victims and survivors or offer opportunities to criminals. Similarly possible cross-border criminal activity involving child sexual abuse should be deterred by having robust and equivalent provisions on both sides of the border. Furthermore, as this currently falls within the non-diminution aspect of Article 2 WF, any updates have the potential to lead to divergence of rights on the island of Ireland.

**We recommend the UK Government and relevant NI Departments monitor EU measures to combat trafficking in human beings and proposals to combat child sexual abuse online with a view to assessing whether Northern Ireland law needs amendment to reflect best international practice and deal with cross-border challenges. We recommend voluntary alignment in order to strengthen rights and to reflect international human rights standards and best practice.**

503 [Directive \(EU\) 2024/1712](#) of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims.

504 *Ibid.*, Article 2.

505 Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum COM/2021/890 final. More info [here](#).

506 Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse COM/2022/209 final. More info [here](#).

## 4.4 Conclusion

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In this chapter we have identified several legislative developments where the dynamic alignment requirement of Article 2 WF is triggered or arguably triggered. This is especially the case for the **Pay Transparency Directive** and the two **Directives on Equality Bodies where dynamic alignment is required**.

We consider that the Commissions should do an analysis of the **Gender Balance on Boards Directive**, the **Adequate Minimum Wages Directive** and the **Violence against Women and Domestic Violence Directive** to determine if they amend Annex 1 directives, and that the NI Executive should ensure **voluntary alignment** with these directives where they strengthen rights and reflect international human rights standards and best practice.

We have also highlighted several pieces of adopted EU legislation through which the EU encourages the adoption of new measures representing improvements in the protection of human rights and equality. These legislative developments concern the right to health, the right to privacy and the right to be free from gender discrimination. Several of these relate to matters which might have a cross-border dimension and so where there is a particular risk of divergence. In these cases, we recommend Northern Ireland should consider voluntary alignment where this will strengthen rights and equality and align with international human rights standards and best practice.

Finally, we have also highlighted several pieces of EU legislation and proposed legislation where the EU is looking at improving human rights and equality standards and we recommend the Northern Ireland authorities to monitor these developments and consider voluntary alignment. These proposals aim at improving the fairness of justice systems; enhancing corporate social responsibility, including through a better protection of work rights; and further protecting the rights of vulnerable groups such as victims of human trafficking, migrants and children.

# Chapter 5: Domestic Case Law Developments since January 2022

## 5.1 Introduction

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This chapter provides an update and analysis of domestic legislative developments since January 2022 relating to how the jurisprudence of the Court of Justice of the European Union (CJEU) on equality and human rights related matters is to be, or will be, taken into account or complied with by the respective courts in Northern Ireland post the end of the Brexit transition period. It considers how the courts have approached EU law in different situations.

How the courts will interact with the CJEU case law will differ depending on the type of case before it. There will be different approaches depending on whether the courts are dealing with retained EU (now ‘assimilated’) law, the Withdrawal Agreement or the Windsor Framework.

In brief, courts must apply and interpret references to *EU law in the WF* in conformity with CJEU case law whether the case law is from before or after the end of the transition period;<sup>507</sup> this means EU concepts like the Charter of Fundamental Rights and general principles of law are relevant. When the Withdrawal Agreement is concerned, courts must interpret EU law or concepts in conformity with CJEU law handed down before the end of the transition period and must have due regard to CJEU case law after the end of the transition period.<sup>508</sup> In other cases, involving retained EU (now ‘assimilated’) law, the higher courts are free to depart from CJEU case law, and lower courts can refer questions about any retained case law binding on them to higher ones.<sup>509</sup>

Accordingly, the attitude of the courts dealing with the Withdrawal Agreement and Article 2 WF will be different from that of courts dealing with matters where the Withdrawal Agreement and Article 2 WF are not relevant.

## 5.2 Retained EU Law

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The European Union (Withdrawal) Act 2018 introduces the concept of ‘retained’ EU law. Retained EU law refers to EU law that continues after the UK’s exit from the EU and the repeal of the European Communities Act 1972.<sup>510</sup>

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507 [EU-UK Withdrawal Agreement, including the Protocol on Ireland/Northern Ireland](#) 2019, Article 13(2).

508 *Ibid.*, Article 4(4) and 4(5).

509 Retained EU Law (Revocation and Reform) Act 2023, [Section 6](#)

510 European Union (Withdrawal Act) 2018, [Section 6\(7\)](#).

This retention was essential to prevent legal chaos if all law adopted under the European Communities Act were to disappear automatically. The Act does not continue all EU law in this way; most notably the Charter of Fundamental Rights was not to be continued on or after exit day.<sup>511</sup> As we will see later though the Charter is still relevant in Withdrawal Act cases and Article 2 WF cases.

The European Union (Withdrawal) Act 2018, as amended by the European Union (Withdrawal Agreement) Act 2020, contains a provision on the interpretation of retained EU law. A domestic court or tribunal is not bound by any decision or principle decided by the CJEU after the implementation period completion date (31 December 2020), nor may they refer any matter to the CJEU.<sup>512</sup> Despite this, the domestic courts can refer to case law of the CJEU or other EU acts where relevant.<sup>513</sup> In deciding on the meaning, validity or effect of any unmodified retained EU law, the domestic courts must consider retained EU case law and any retained EU general principles and the pre-exit competences of the EU.<sup>514</sup> The Supreme Court is not bound by any retained EU case law and no court is bound by retained domestic case law that it would not otherwise be.<sup>515</sup>

Sections 5A-5D (inserted by the 2020 Act) permitted a Minister of the Crown to make regulations as to how the domestic courts should treat retained EU case law.<sup>516</sup> The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations designate certain courts as relevant courts and provides that they are not bound by any retained EU case law (unless a relevant UK court has decided otherwise).<sup>517</sup> The courts so designated include the Court of Appeal of England and Wales, the Court of Appeal in Northern Ireland and the Inner House of the Court of Session.

The European Union (Withdrawal) Act 2018 provides that the Charter of Fundamental Rights is not part of domestic law but retains ‘fundamental rights or principles’ which exist irrespective of the Charter.<sup>518</sup> This reference to fundamental rights or principles is a reference to the EU general principles of law. This is significant because the general principles of law (like the Charter) are often influential in interpreting other EU laws.

The Retained EU Law (Revocation and Reform) Act 2023 declares the general principles of law to no longer be part of domestic law after 2023.<sup>519</sup> The Retained EU Law (Revocation and Reform) Act 2023 also eliminates the principle of EU

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511 Ibid., [Section 5\(4\)](#).

512 Ibid., [Section 6\(1\)](#).

513 Ibid., [Section 6\(2\)](#).

514 Ibid., [Section 6\(3\)](#).

515 Ibid., [Section 6\(4\)](#).

516 Ibid., [Section 6\(5A-5D\)](#).

517 [The European Union \(Withdrawal\) Act 2018 \(Relevant Court\) \(Retained EU Case Law\) Regulations](#), 2020 No. 1525.

518 European Union (Withdrawal Act) 2018, [Section 5\(4\)-5\(5\)](#).

519 Retained EU Law (Revocation and Reform) Act 2023, [Section 4](#).

law supremacy from domestic law.<sup>520</sup> The 2023 Act gives guidance on the factors (among others) courts must consider when deciding whether to depart from retained EU case law: that decisions of a foreign court are not binding, any change of circumstances and ‘the extent to which the retained EU case law restricts the proper development of domestic law’; this section has not been commenced as of 3 July 2024.<sup>521</sup> The 2023 Act restyles ‘retained EU law’ (and similar terms) as ‘assimilated law’ after the end of 2023.<sup>522</sup>

### 5.2.1 UK Case Law on EU law

The UK’s exit from the EU and the changing nature of the legislation, including changes legislated for in the Retained EU Law (Revocation and Reform) Act, means that the position of EU law and case law in the UK courts is not straightforward and requires proactive consideration when issues come before the courts.<sup>523</sup>

UK courts may still need to consider CJEU case law and respect the principle of EU supremacy as regards pre-exit legislation, until the relevant parts of the Retained EU Law (Revocation and Reform) Act 2023 are brought into force. So for instance the First Tier Tribunal in Great Britain has indicated that it remains bound to follow EU case law decided before 1 January 2021 for now.<sup>524</sup> The High Court in England and Wales has clarified though how the law has changed since the UK’s exit from the EU, confirming that ‘we are now in different times’ and the European Communities Act 1972 ‘is now legal history’.<sup>525</sup> For legislative provisions unamended since 31 December 2020, the principle of EU supremacy still applies along with indirect effect<sup>526</sup> and the obligation for the High Court to follow retained EU case law. If, however, the legislation has been modified since then, the applicability of EU supremacy (and indirect effect) will depend on the intention of the modified law.<sup>527</sup>

There remains scope therefore for EU law, or rather retained EU law (rebranded ‘assimilated’ law) to be relevant in cases before the UK courts. There have been some important examples of this. The High Court for instance has found an Immigration Exemption rule to be in breach of the General Data Protection Regulation rights.<sup>528</sup> EU law has been pleaded, albeit unsuccessfully, in the most high-profile Supreme Court case of 2023, the Rwanda flights judgment.

520 Ibid., [Section 3](#).

521 Ibid., [Section 6](#).

522 Ibid., [Section 5](#).

523 [Lipton v BA City Flyer Ltd](#) [2021] EWCA Civ 454, [2021] 1 WLR 2545 [53], [83], this case considered some of the interplay with the Trade and Cooperation Agreement as well; [E-Accounting Solutions Ltd \(t/a Advancetrack\) v Global Infosys Ltd \(t/a GI Outsourcing\)](#) [2023] EWHC 2038 (Ch), (4 August 2023) [14].

524 [Piramal Healthcare UK Ltd v Revenue and Customs Commissioners](#) [2023] UKFTT 891 (TC), [2023], (17 October 2023) [27]-[33].

525 [E-Accounting Solutions Ltd \(t/a Advancetrack\) v Global Infosys Ltd \(t/a GI Outsourcing\)](#) [2023] EWHC 2038 (Ch), (4 August 2023) [12].

526 [Dukes Bailiffs Ltd v Breckland Council](#) [2023] EWHC 1569 (TCC) [43].

527 [E-Accounting Solutions Ltd \(t/a Advancetrack\) v Global Infosys Ltd \(t/a GI Outsourcing\)](#) [2023] EWHC 2038 (Ch), (4 August 2023) [12].

528 [R \(on the application of The3Million and Open Rights Group\) v Secretary of State for the Home Department](#) [2023] EWHC 713 (Admin), (29 March 2023).



In the Rwanda flights judgment the Supreme Court found that the scheme to send certain migrants to Rwanda for asylum claim processing to be unlawful.<sup>529</sup> The Court found that there was a real risk that asylum claims would not be properly considered in Rwanda and that therefore asylum seekers might be subject to refoulement.<sup>530</sup>

In addition one of the asylum seekers claimed that the policy breached retained EU law, articles 25 and 27 of the Procedures Directive, because the scheme was an application of a safe third country policy in the absence of legislation and without a requirement of a link between the asylum seeker and the third country.<sup>531</sup> The Secretary of State argued that the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 ended the applicability of the Procedures Directive in domestic law. The relevant parts of the 2020 Act took effect on IP completion day.<sup>532</sup> The Supreme Court accepted the Secretary of State's argument that the 2020 Act ended the application of the Procedures Directive in UK law; notably the Secretary of State had conceded that if the Directive applied then the policy would be in breach of the Directive.<sup>533</sup>

While this argument based on the Procedures Directive was unsuccessful in the Rwanda case, the outcome might have been different if there had been a Northern Ireland dimension to the case. In that scenario the policy would represent a diminution of rights existing prior to the UK's exit and which could not have happened but for the UK's exit from the EU. That scenario would appear to fall within the scope of Article 2 WF as interpreted in Northern Ireland cases to date (see below). As discussed above in section 2.3.6 the NIHRC and ECNI have criticised the Safety of Rwanda Bill (now Act) in terms of its compliance with Article 2 WF.

### 5.3 Withdrawal Agreement Case Law

Where courts are dealing with the Withdrawal Agreement (WA) then Article 4 of the Withdrawal Agreement and section 7A of the European Union (Withdrawal) Act 2018 apply. Article 4(1) WA provides that the Agreement shall have the same legal effects in the UK as in the EU and Member states. This includes the possibility to rely in court on directly effective provisions of the Agreement. Section 7A effectively recognises the direct effect and supremacy of the powers and rights, etc in the Withdrawal Agreement; its purpose is to 'mimic' the European Communities Act 1972 effect.<sup>534</sup> When considering EU laws or concepts under the Withdrawal Agreement, these must be interpreted and applied consistent with

529 [R \(on the application of AAA and others\) \(Respondents/Cross Appellants\) v Secretary of State for the Home Department \(Appellant/Cross Respondent\) \(Rwanda flights judgment\)](#) [2023] UKSC 42, (15 November 2023).

530 [Rwanda flights judgment](#) [2023] UKSC 42, (15 November 2023) [105].

531 *Ibid.*, [108].

532 *Ibid.*, [121].

533 *Ibid.*, [108] [148].

534 Explanatory Notes to the European Union (Withdrawal Agreement) Act 2020, [paragraph 32](#).

CJEU case law handed down prior to the end of the Brexit transition period; when interpreting and applying the Withdrawal Agreement, UK courts shall have due regard to CJEU case law handed down after the end of the transition period.<sup>535</sup>

It follows that CJEU case law and EU general principles and Charter rights remain relevant in cases involving the Withdrawal Agreement. The Court of Appeal in England and Wales has confirmed this in *AT v Secretary of State for the Home Department*. In that case, AT, a Romanian national had come to the UK with her husband and child. She was granted Pre-Settled Status under the EU Settlement Scheme. She was the victim of domestic violence and had to flee her home with her child; she was also HIV positive and had a diagnosis of depression. She was in a difficult personal and financial situation, relying mostly on the charity of others. Despite this she was denied universal credit because of her immigration status. The First Tier Tribunal and Upper Tribunal had found for AT, relying on the right to dignity in Article 1 of the Charter of Fundamental Rights which the tribunal held still applied in some circumstances.

The Court of Appeal agreed. Within the limits of the Withdrawal Agreement the Charter still applied in some circumstances. This followed from the text of the Withdrawal Agreement and indeed the very purpose of the Agreement to provide reciprocal rights for UK citizens in the EU and EU citizens in the UK.<sup>536</sup> Given that EU member states would have to act compatibly with the Charter when applying the Withdrawal Agreement protections for UK citizens, it was logical that the UK authorities would also have to act compatibly with the Charter. The Court of Appeal judgment also paid close attention to CJEU case law, most notably the *CG* case.<sup>537</sup> The case is significant for upholding the right to dignity under the Charter (albeit in limited circumstances).<sup>538</sup>

## 5.4 Article 2 Windsor Framework Case Law

Article 13(2) of the Windsor Framework is unambiguous in stating that ‘the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union’. This unambiguous language is important: when the Windsor Framework is in play courts must adopt a different approach from that in other cases where courts have some issue of retained EU law before them.

535 [EU-UK Withdrawal Agreement, including the Protocol on Ireland/Northern Ireland](#) 2019, Article 4(4) and 4(5).

536 [Secretary of State for Work and Pensions v AT, intervenors: Advice on Individual Rights in Europe \(AIRE\) Centre; Independent Monitoring Authority for the Citizens’ Rights Agreements](#) [2023] EWCA Civ 1307, (8 November 2023) paragraph 85.

537 [CG v The Department for Communities in Northern Ireland](#) Case C-709/20, [2022] 1 CMLR 26 (15 July 2021). This is discussed in Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, [European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (2022) 86.

538 The Court noted though the right had ancient origins including in the English common law, citing the reference to the law of humanity in *Reg. v Inhabitants of Eastbourne* (1803) 3 East 103.

Several Northern Irish cases have considered Article 2 WF in some depth, in particular the *SPUC case*, in both the High Court and Court of Appeal,<sup>539</sup> *Angesom*, in the High Court<sup>540</sup> and most recently the *Legacy Act cases (Dillon and others)*.<sup>541</sup>

#### 5.4.1 The SPUC case

In *SPUC* the applicants challenged the legality of the Abortion (Northern Ireland) Regulations 2021 on several grounds and, in particular, for breaching Article 2(1) WF, EU law and the Convention on the Rights of Persons with Disabilities,<sup>542</sup> all of these points made in connection with Article 2(1) WF. In essence, the applicant argued that the Convention on the Rights of Persons with Disabilities (CRPD) was part of EU law and that the CRPD prohibited abortion based on disability.<sup>543</sup>

Both the ECNI and NIHRC intervened in this case.

The High Court rejected all the applicant's arguments, including the Article 2(1) WF ones, but provided extensive reasoning on Article 2 WF.

The Court outlined the key provisions in the Withdrawal Agreement and quoted from the UK Government explainer on the diminution requirements.<sup>544</sup> The Court explained that Article 2 WF can be relied on in domestic courts (pursuant to Article 4 of the Withdrawal Agreement) and permits the Northern Ireland courts to refer to the Charter of Fundamental Rights and general principles of EU law.<sup>545</sup> The Court noted that 'EU law' for the purposes of Article 2 of the Withdrawal Agreement included international agreements to which the EU was a party,<sup>546</sup> this therefore included the CRPD.<sup>547</sup> The Court then referred to the role of CJEU case law in Article 4 of the Withdrawal Agreement: this provided that UK courts were bound when applying the Withdrawal Agreement by CJEU case law handed down before the end of the transition period; this temporal limitation does not apply to the Protocol (now the Windsor Framework) as Article 13(2) WF makes clear.<sup>548</sup>

The central question was what was the scope of the CRPD as EU law?<sup>549</sup> In becoming party to the CRPD, the EU had indicated that this was limited by its own competences.<sup>550</sup> The Court accepted the ECNI argument that the EU lacked

539 [In re SPUC Pro-Life Ltd \(Abortion\)](#) [2022] NIQB 9, (8 February 2022) and [In re SPUC Pro-Life Ltd \(Abortion\)](#) [2023] NICA 35, (25 May 2023).

540 [In the matter of an application by Aman Angesom for judicial review and in the matter of a decision by the Secretary of State for the Home Department, Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland intervening](#) [2023] NIKB 102, (18 October 2023).

541 [Legacy Act cases \(Dillon and others\)](#), [2024] NIKB 11 (28 February 2024).

542 [In re SPUC Pro-Life Ltd \(Abortion\)](#) [2022] NIQB 9, (8 February 2022) [18].

543 *Ibid.*, [80], [97], [102].

544 UK Government, [Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland](#) (2020) quoted in [77] of the judgment.

545 [In re SPUC Pro-Life Ltd \(Abortion\)](#) [2022] NIQB 9, (8 February 2022) [77]-[78].

546 *Ibid.*, [91].

547 *Ibid.*, [104].

548 *Ibid.*, [93].

549 *Ibid.*, [107].

550 *Ibid.*, [108]-[111].

competence, generally speaking, for the regulation of abortion.<sup>551</sup> This lack of competence also meant the arguments based on the Charter of Fundamental Rights and general principles of law were unsuccessful. The Court accepted a further argument by the ECNI that the CRPD lacked direct effect as a matter of EU law.<sup>552</sup> The Court noted that the CRPD did not expressly prohibit abortion on grounds of severe foetal impairment,<sup>553</sup> and that the relevant change in the law dated to 14 May 2020, prior to the end of the transition period.<sup>554</sup>

The High Court's ruling, though finding no violation of Article 2 WF in this case, is important. It clarifies that Northern Ireland courts must consider the case law of the CJEU without temporal limits; furthermore, that the courts may rely on the Charter of Fundamental Rights and EU general principles of law when Article 2 WF is in play. The Court also accepts that the CRPD provides an underpinning for the protection of the right not to be discriminated against on grounds of disability, at least within the areas where the EU has competence.<sup>555</sup>

The applicant appealed to the Court of Appeal. The Court of Appeal set out a six-part test for the application of Article 2 WF:

- (i) A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged.
- (ii) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020.
- (iii) That Northern Ireland law was underpinned by EU law.
- (iv) That underpinning has been removed, in whole or in part, following withdrawal from the EU.
- (v) This has resulted in a diminution in enjoyment of this right; and
- (vi) This diminution would not have occurred had the UK remained in the EU.<sup>556</sup>

The Court of Appeal was unimpressed with the appellant's arguments.<sup>557</sup> The Court of Appeal agreed with the High Court that the regulation of abortion did not fall within EU competence and so the appellant's arguments failed.<sup>558</sup>

The Court of Appeal recognised the role of the ECNI and NIHRC as the 'two statutory bodies established to monitor and enforce Article 2'; the Court drew 'particular assistance' from their submissions and from their working paper on the scope of Article 2 WF.<sup>559</sup>

551 Ibid., [112]-[113].

552 Ibid., [125]-[126].

553 Ibid., [133].

554 Ibid., [143].

555 Ibid., [104]-[107].

556 [In re SPUC Pro-Life Ltd \(Abortion\)](#) [2023] NICA 35, (25 May 2023) [54].

557 Ibid., [57], [71].

558 Ibid., [58].

559 Ibid., [72].

### 5.4.2 *Angesom*

The *Angesom* case concerned a single male asylum seeker in Northern Ireland. The Secretary of State for the Home Department decided to transport the applicant to Scotland. The applicant received a letter informing him of this and that his removal would take place the next day; he was unable to read the letter and consulted his solicitor. The applicant pleaded a range of violations including breach of Article 8 ECHR rights and breach of Article 2 WF. The ECNI and NIHRC intervened in this case; the Court noted the Commissions' role in relation to Article 2 WF.<sup>560</sup>

On the Article 2 WF point the Court set out a five-part test:

- (i) Does the right, safeguard or equality of opportunity protection fall within the relevant part of the Belfast (Good Friday) Agreement?
- (ii) Was the right, safeguard or equality of opportunity protection underpinned by EU law binding on the UK on or before 31 December 2020?
- (iii) Was the right, safeguard or equality of opportunity protection given effect in NI law, in whole or in part on or before 31 December 2020?
- (iv) Has there been a diminution in the right, safeguard or equality of opportunity protection on or after 1 January 2021?
- (v) Would this diminution not have occurred had the UK remained in the EU?<sup>561</sup>

The High Court confirms some points evident from the *SPUC case*. In particular, that Article 2(1) WF has direct effect and individuals can rely on it in domestic courts.<sup>562</sup> Also that the Charter of Fundamental Rights remains enforceable in Northern Ireland and falls within the ambit of Article 2(1).<sup>563</sup>

In this case the Charter of Fundamental Rights was relevant as the UK, when adopting regulations on asylum seekers in 2005, was implementing an EU directive.<sup>564</sup> This satisfied the scope requirement in Article 51 of the Charter of Fundamental Rights.

For the High Court the issue was whether the applicant had suffered a diminution in rights because either he could not rely on the Charter in Scotland or because the Article 8 ECHR protections in Scotland were different from what the Charter would provide.<sup>565</sup> The Court rejected any claim of diminution as the applicant could rely on the Article 8 ECHR rights in Scotland.<sup>566</sup> The Court's reasoning here is open to question. The Court rightly noted that the ECHR (via the Human Rights Act) has a wider scope than the Charter would have, and rightly suggests there is overlap in

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560 [Angesom](#) [16].

561 *Ibid.*, [86].

562 *Ibid.*, [91].

563 *Ibid.*, [94].

564 *Ibid.*, [96].

565 *Ibid.*, [100].

566 *Ibid.*, [103].

the substantive protection offered by the instruments. However, this overlooks the entrenched aspect of Article 2 WF rights which allows them to prevail over contrary legislation. This is an important protection Article 8 ECHR cannot offer.

The applicant also relied on two rights in the 1998 Agreement by virtue of Article 2 WF: the right to freely choose one's residence and the right to equal opportunity in all social and economic activity. While the applicant could not have relied on a 1998 Agreement right outside the scope of Article 2 WF<sup>567</sup> he could rely on these rights within Article 2 WF. The parties, including the Secretary of State, accepted that asylum seekers could invoke the rights in the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement.<sup>568</sup> Although the Secretary of State argued that the Agreement had to be understood in the context of the conflict in 1998<sup>569</sup> the Court rejected this robustly:

The court rejects the submission by the respondent that the rights protected by Strand Three of the GFA are frozen in time and limited to the political context of 1998. The GFA was drafted with the protection of EU fundamental human rights in mind and was therefore intended to protect the human rights of "everyone in the community" even "outside the background of the communal conflict."<sup>570</sup>

The Court however rejected the applicant's argument that the right to choose one's place of residence applied to this particular situation; furthermore, the power to move asylum seekers existed as long ago as 2000 so there could not be an argument his rights had been infringed because of the UK's exit from the EU.<sup>571</sup> The Court rejected the argument based on his right to equality of opportunity as 'unparticularised assertions'.<sup>572</sup>

The applicant also relied on the Reception Directive.<sup>573</sup> The Court accepted that Article 7(1) was directly effective but found it was not breached; other provisions in the directive were not directly effective;<sup>574</sup> in any event they had been transposed into UK laws and there was no evidence of diminution.<sup>575</sup>

567 [In The Matter of an Application by Caoimhe Ní Chuinneagain For Leave To Apply For Judicial Review](#) [2021] NIQB 79, (24 September 2021).

568 [Angesom](#) [107].

569 This point had also been made by the Government during correspondence on the National and Borders Bill (see above).

570 [Angesom](#) [108].

571 *Ibid.*, [109].

572 *Ibid.*, [112].

573 [EU Directive 2003/9/EC](#) laying down minimum standards for the reception of asylum seekers.

574 [Angesom](#) [124], finding that articles 7(2), (3), (4) were not unconditional.

575 [Angesom](#) [124]-[127]. In the *Legacy Act cases (Dillon and others)*, the High Court clarified that where national measures implementing a directive had not been applied so as to achieve the objectives of the directive, then applicants could still rely on the provisions of the directive: [567].

The *Angesom* case is important in that the respondent was the Secretary of State for the Home Department, quashing any suggestion that Article 2 WF only applies to NI authorities. Further the Court accepted that asylum seekers could invoke Article 2 WF, and that the 1998 Agreement should not be read as limited to the specific context of the conflict in 1998.

#### 5.4.3 The Legacy Act cases (Dillon and others)

The *Legacy Act cases (Dillon and others)* is the most high-profile case to be decided under Article 2 WF and the first where the courts have found a violation resulting in the disapplication of primary legislation, as envisaged under the Withdrawal Agreement and section 7A of the European Union (Withdrawal) Act 2018.<sup>576</sup>

The case concerned judicial reviews brought by victims and survivors of the conflict in relation to the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023. They were concerned that inquests, investigations and civil actions that they were involved in would be brought to an end by the Act. There were also several intervenors including the ECNI and NIHRC. The applicants argued that the conditional immunity provisions breached human rights and that the Act's Independent Commission for Reconciliation and Information Recovery (ICRIR) would not be able to carry out human rights-compliant investigations. The applicants relied on Convention rights and Article 2 WF as well as an argument that the legislation breached common law constitutional principles.

On the Convention arguments the High Court agreed that the immunity provisions in section 19 and related provisions breached Convention rights (Articles 2 and 3),<sup>577</sup> that the prohibition on criminal prosecution for a Troubles offence other than a serious or connected Troubles-related offence breached Convention rights (Articles 2 and 3),<sup>578</sup> that the ending of civil actions in so far as it had retrospective effect breached Article 6 ECHR,<sup>579</sup> that the prohibition on the disclosure of certain evidence breached Article 6 ECHR.<sup>580</sup> The Court issued declarations of incompatibility in relation to these breaches.<sup>581</sup>

The Court rejected other Convention arguments at this stage and in particular said that it could not find that the ICRIR was incapable of carrying out human rights-compliant investigations.<sup>582</sup> The High Court noted that there was ample case law offering guidance on Convention compliance in this area and that the ICRIR would be subject to review by the courts to ensure it complied with Convention rights.<sup>583</sup>

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576 [Legacy Act cases \(Dillon and others\)](#), [2024] NIKB 11 (28 February 2024).

577 [Legacy Act cases \(Dillon and others\)](#), [187].

578 *Ibid.*, [208].

579 *Ibid.*, [413].

580 *Ibid.*, [461].

581 *Ibid.*, [710].

582 *Ibid.*, [339], [367].

583 *Ibid.*, [367]-[368].

The Court then considered the Article 2 WF arguments. It found that legislation in breach of the Article 2 WF must be disapplied.<sup>584</sup> The Court considered Article 2 WF and adopted the analytical framework used by the Court of Appeal in *SPUC*.<sup>585</sup> As a preliminary matter the Court held that it could rely on the Vienna Convention on the Law of Treaties provisions on interpretation when interpreting both Article 2 WF and the 1998 Agreement; this required a 'generous and purposive approach' to interpreting Article 2 WF.<sup>586</sup>

On the first question as to whether a right included in the relevant part of the 1998 Agreement was engaged, the Court relied on this generous and purposive approach to examine the Rights, Safeguards and Equality of Opportunity section of the Agreement, in the wider context of the Agreement and supplementary material.

The Declaration of Support in the Agreement refers to 'the protection and vindication of the human rights of all'<sup>587</sup> and the Downing Street Declaration refers to 'the systematic and effective protection of common specified civil, political, social and cultural rights'.<sup>588</sup> The Court also drew on the UK Government explainer on Article 2 WF with its reference to 'future developments in the area of human rights and equalities in the rest of the UK, the EU and the rest of the world'.<sup>589</sup>

This language is all important as the High Court has adopted an inclusive approach to understanding what rights are covered in the relevant part of the 1998 Agreement. In the specific case the Court also drew attention to the Agreement's provisions on victims.<sup>590</sup> This led the Court to conclude that the right to life, the right to be free from torture, cruel, inhuman or degrading treatment, the right to access a court, the right to freedom from discrimination and the right to dignity were all encompassed by the term civil rights.<sup>591</sup>

The second element of the test was whether the right was given effect (in whole or in part) in Northern Ireland before 31 December 2020. Here the Court helpfully clarified earlier comments in *Angesom* and recognised that an EU directive might have been directly effective at the time if the national measures implementing it did not correctly implement it.<sup>592</sup> The Court concluded that relevant parts of the Victims' Directive and Charter of Fundamental Rights were given effect in Northern Ireland prior to 31 December 2020.<sup>593</sup>

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584 Ibid., [520-527].

585 Ibid., [529].

586 Ibid., [535].

587 Ibid., [546].

588 Ibid., [551].

589 Ibid., [551].

590 Ibid., [557].

591 Ibid., [561].

592 Ibid., [567].

593 Ibid., [570].



The third element of the test was whether the Northern Ireland law was underpinned by EU law. Here the Court concluded that both the Victims' Directive and Charter of Fundamental Rights provided such an underpinning and noted that support for victims of crime is a shared competence in the EU.<sup>594</sup>

The Court held that the fourth element of the test – whether that underpinning had been removed in whole or part following withdrawal from the EU was best dealt with as part of the last two elements of the test.<sup>595</sup>

The fifth element was whether the removal of the EU underpinning had resulted in diminution in the enjoyment of the right. Again, the Court took the opportunity to clarify language in *Angesom*. The Court made it clear that the implication of the WF is that disapplication of an act of Parliament is possible; this is an additional remedy not available in cases involving only Convention rights. Given the Court had found a breach of Articles 2,3 and 6 ECHR, it followed there had been diminution in relation to equivalent articles in the Charter of Fundamental Rights (Articles 2, 4 and 47(2)).<sup>596</sup> The Court also found diminution in relation to Article 11 of the Victims' Directive on the right to request a review of a decision not to prosecute. That right presupposed that prosecution was possible, a possibility that the immunity scheme in the Act removed entirely.<sup>597</sup> The Court rejected arguments that there had been diminution in respect of Article 1 of the Charter (the right to dignity) or Article 16 of the Victims' Directive.<sup>598</sup>

The sixth element of the test was to confirm that the diminution could not have occurred if the UK had remained in the EU. The Court had no hesitation in finding that the provisions were incompatible with the Victims' Directive and Charter of Fundamental rights and announcing the appropriate remedy: 'the remedy in respect of sections 7(3), 8, 12, 19, 20, 21, 22, 39, 41, 42(1) of the 2023 Act is disapplication.'<sup>599</sup>

The *Legacy Act cases (Dillon and others)* is significant in several respects. It is the first case in which the courts have found a breach of Article 2 WF and the first in which an Act of Parliament has been disapplied. It demonstrates convincingly that, contrary to the UK Government position in the *Safeguarding the Union* Command paper, Article 2 WF applies beyond the limited area of free movement of goods. The case confirms the courts will apply the 6-element test adopted by the Court of Appeal in *SPUC*. It also clarifies some of the language in *Angesom*. Of most importance the Court adopts a purposive approach to the interpretation of Article 2 WF and of the 1998 Agreement, relying on the principles in the Vienna Convention.

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594 Ibid., [578].

595 Ibid., [583].

596 Ibid., [588].

597 Ibid., [608]-[609].

598 Ibid., [590], [602].

599 Ibid., [613].

This requires the Court to consider the purpose and context of the measures and entitles it to look at relevant supplementary material. The case is under appeal to the Court of Appeal and a decision is awaited.

#### 5.4.4 The Illegal Migration Act case

The High Court decided a judicial review brought by two applicants, the NIHRC and a 16-year-old asylum seeker on 13 May 2024, concerning the Illegal Migration Act 2023.<sup>600</sup> The Court ruled that significant sections of the Act should be disapplied as they breached Article 2 WF.

The High Court noted that Article 2 WF and Annex 1 were part of the Withdrawal Agreement and so the obligations in Article 4(1) and 4(2) of the Withdrawal Agreement applied.<sup>601</sup> The High Court also explained how Colton J in the *Legacy Act cases (Dillon and others)* clarified earlier language in *Angesom* and made clear that directives could have direct effect if they had been correctly transposed but were not being applied so as to achieve the required results.<sup>602</sup>

The High Court in the Illegal Migration Act case reiterated the duty to implement and apply the non-diminution principle in line with the case law of the Court of Justice of the European Union.<sup>603</sup> It reaffirmed the view in *Angesom* that there was no reason to exclude asylum seekers ‘from the wide compass of “everyone in the community”’.<sup>604</sup> The High Court proceeded to state and apply the six element test adopted by the Court of Appeal in the SPUC case.<sup>605</sup>

The High Court made the following findings. Section 5(2) of the Act diminished rights under the Procedures Directive and the Qualification Directive in precluding the ‘appropriate examination’ of an asylum claim and denying refugee protection or subsidiary protection to someone entitled to it.<sup>606</sup> The effect of sections 5(2), 5(4) and 54 was to diminish the right to an effective remedy in the Procedure Directive as they provided for no appeal against a declaration that a protection claim or human rights claim was inadmissible.<sup>607</sup> Sections 2, 5 and 6 of the Act led to a diminution of rights in the Procedures Directive as the Act permitted persons to be removed without having their claims individually determined and a number of the countries listed as safe do not meet the Directive’s definition.<sup>608</sup>

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600 Northern Ireland Human Rights Commission’s Application and JR295’s Application and In the matter of The Illegal Migration Act 2023; [2024] NIKB 35, (13 May 2024) ([Illegal Migration Act case](#)).

601 [Illegal Migration Act case](#) [56]-[57].

602 *Ibid.*, [58].

603 *Ibid.*, [66].

604 *Ibid.*, [69]. The Court did not find it necessary to rely on the Vienna Convention interpretative approach to support this view: [70].

605 *Ibid.*, [73].

606 *Ibid.*, [99].

607 *Ibid.*, [112].

608 *Ibid.*, [127]-[133].

Section 6 also led to diminution in that it might permit refoulement, inconsistent with the Qualification Directive.<sup>609</sup> The Act led to a further diminution in that it did not protect the right to a speedy judicial review for those in detention as required by the Procedures Directive.<sup>610</sup> Section 22 led to a diminution of rights protecting victims of slavery or trafficking, inconsistent with the Trafficking Directive.<sup>611</sup> The Act also led to a diminution in respect of the rights of children as protected by the Qualifications Directive interpreted in the light of the Charter of Fundamental Rights.<sup>612</sup> The Act also caused a diminution in the rights of unaccompanied children as protected by the Dublin III regulations.<sup>613</sup> Finally the Act's removal of a fact-based judicial review challenge to age assessments led to a diminution of rights.<sup>614</sup>

The Court concluded on Article 2 WF arguments that disapplication was the required remedy in line with 'the will of Parliament'<sup>615</sup> and ordered the disapplication as regards Northern Ireland of sections 2(1), 5(1), 5(2), 6, 13(4), 22(2), 22(3), 25, 54 and 57.<sup>616</sup>

## 5.5 Conclusion

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In this chapter we have explained the approaches which courts in the UK must now take to matters of EU law and the role of the CJEU. In particular, we have discussed the different approaches required where the courts are dealing with retained (or assimilated) EU law, dealing with the Withdrawal Agreement and dealing with the Windsor Framework. EU law principles and CJEU precedent have greatest salience in relation to the Windsor Framework. All these areas of case law are novel and the courts are still in the early stages of developing relevant principles.

The Northern Ireland courts have now elaborated on some important aspects of Article 2 WF. In a relatively short period of time, they have developed commendably clear principles for the application of Article 2 WF.

The Court of Appeal in the *SPUC case* adopted a six-part test for the application of Article 2 WF which has been followed now in the *Legacy Act cases (Dillon and others)* and the *Illegal Migration Act case. Angsom* and the *Illegal Migration Act case* confirm that aspects of EU asylum legislation fall within the scope of Article 2 WF, and that asylum-seekers are members of the community for the purposes of the 1998 Agreement. The cases also reject an effort by the UK Government to limit the scope of the 1998 Agreement section on rights, safeguards and equality

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609 Ibid., [137].

610 Ibid., [144]-[146].

611 Ibid., [157]-[158].

612 Ibid., [159]-[164].

613 Ibid., [161]-[164] (note the paragraph numbers are repeated).

614 Ibid., [169].

615 Ibid., [175].

616 Ibid., [178]. The Court also issued declarations of incompatibility under the Human Rights Act for inconsistency with Article 3,4 and 8 ECHR: [255].

of opportunity to conflict-related issues. The *Legacy Act cases (Dillon and others)* provides the first instance where the courts have used their powers to disapply legislation incompatible with Article 2 WF; this has now been followed by the *Illegal Migration Act case*.

The cases demonstrate the relevance of Article 2 WF to core human rights and equality issues, and that the WF is not limited to issues about the free movement of goods. Crucially the cases demonstrate that the courts will take a purposive approach to interpreting Article 2 WF and the 1998 Agreement, the *Legacy Act cases (Dillon and others)* specifically relying on the Vienna Convention to justify a generous and purposive approach.

# Chapter 6: CJEU Case Law that relates to each of the Windsor Framework Annex 1 Directives delivered since January 2022.

## 6.1 Introduction

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This chapter identifies and provides an update on selected case law of the CJEU that relates to each of the Windsor Framework Annex 1 directives delivered since January 2022 (up to the end of August 2023) and provides an appraisal of the current state of play since the last published report.<sup>617</sup> Furthermore, the chapter sets out the details and implications (including potential implications) of this CJEU case law on equality and human rights matters.

The positive obligations stemming from the Article 2 WF non-diminution requirement for equality protections within Northern Ireland as outlined within this report is not to be taken lightly. When read alongside the Annex 1 directives, there is a clear requirement not only of non-diminution (or static alignment) which allows for no backsliding on rights protections, but significantly the additional obligation of dynamic alignment or keeping pace with developments in EU law. The need for the latter element is significant when considering these Annex 1 directives as they continue to be interpreted and applied by the Court of Justice. These directives for the purposes of the chapter are:

- Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (Gender Goods and Services Directive)
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Gender Equality (Employment) Directive)
- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Equality Directive)
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (General Framework Directive)

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617 Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, [European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (2022).

- Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (Self-Employment Equality Directive)
- Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Equality in Social Security Directive)

The chapter provides a comprehensive account of how the Directives are interpreted by recent CJEU case law. Further, it makes recommendations and considers the implications for Northern Ireland law as a result of developments stemming from CJEU case law considering the requirement as required under the Windsor Framework.

## 6.2 Methodology

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The analysis within this chapter is underpinned by the mapping exercise which is included within Appendix 1 of the report. The mapping exercise was a systematic review of CJEU case law which relate and reference Annex 1 directives. The case-law mapping was based upon a date range search on each Annex 1 directive (01/01/2022 to 31/08/2023) to provide an update on the previous mapping and report commissioned. All case law searches took place on the curia.eu database and all the cases were systematically analysed. Seminal judgments are outlined with reference to the relevant Directive and within thematic groupings for the purposes of clarity within this chapter. However, for completeness and transparency of the process, all case law mapped has been included within Appendix 1 notwithstanding if it has been referenced to within the final report below.

## 6.3 Key Developments in EU Case Law relating to Annex 1 Directives (January 2022 – August 2023)

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### 6.3.1 Directive 2004/113/EC Gender Goods and Services Directive

There was no CJEU case law within the defined date period and parameters dealing with Directive 2004/113/EC as outlined in the Appendix 1 mapping. This should continue to be monitored in light of any future developments after the mapping date range concluded on 31 August 2023.

### 6.3.2 Directive 2006/54/EC Gender Equality (Employment) Directive

#### 6.3.2.1 Thematic Area: Employment, Pensions and Social Security

There continues to be notable developments in CJEU case law related to pension entitlements, specifically with reference to Directive 2006/54/EC.

The Court has continued to clarify key equality protections, ensuring that the overarching non-discrimination provisions set forth in Directive 2006/54/EC are upheld. The pivotal case within the date period dealing with Directive 2006/54/EC was *EB v BVAEB*.<sup>618</sup>

In *EB v BVAEB* the request for a preliminary ruling from the Court stemmed from three separate disputes from civil servants in Austria concerning the annual adjustment of their retirement pension. The applicants in this case were male high pension earners, and rather uniquely, challenged the lack of a proportionate inflationary adjustment to their pensions by arguing that this disproportionately affected males more than females. The case brought before the Court argued that the Austrian Law at issue, which capped high ceiling earners (many of whom were male) for revaluation of their pension, would give rise to indirect discrimination on the grounds of sex, contrary to EU law.<sup>619</sup>

The Court noted that the onus is on the State to explain any apparent discrepancies by showing that the relevant measure was objectively and coherently applied and justified. This is due to Article 5(c) of Directive 2006/54/EC which prohibits any direct or indirect discrimination based on sex in occupational social security schemes with regards to the calculation of benefits. Article 5(c) of Directive 2006/54/EC reads:

‘Without prejudice to Article 4, there shall be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular as regards:

- (a) the scope of such schemes and the conditions of access to them;
- (b) the obligation to contribute and the calculation of contributions;
- (c) the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.’

The Court ultimately held that the national legislation at issue in the main proceedings ‘pursues legitimate social-policy objectives wholly unrelated to any discrimination based on sex’<sup>620</sup> insofar as aim of the national legislation ‘is to preserve the purchasing power of recipients of retirement pensions by favouring, by means of ‘social balancing’, lower retirement pensions compared with higher pensions, to prevent an excessively large gap opening between those pensions and to ensure their long-term funding’.<sup>621</sup> Whilst men were disproportionately affected over women by the Austrian law, the Court reached the conclusion that such a measure was justified as above.

618 C-405/20, [EB v BVAEB](#), judgment of 5 May 2022, ECLI:EU:C:2022:347.

619 *Ibid.*, para. 16.

620 *Ibid.*, para. 58.

621 *Ibid.*, para. 56.

This case raises significant and important themes which are likely to influence the development of discrimination and social security law in Northern Ireland in the future.<sup>622</sup>

First, the Court remains willing to accept coherent ‘social justice’ justifications for the restriction of pension entitlements and other occupational benefits. Secondly, though, it appears to scrutinise more closely such justifications for objectivity and coherence and is prepared to accept prima facie evidence of discrimination, thus placing a greater burden on the state to justify its policies. In particular, EU law now recognises that relatively simple statistical evidence is sufficient to establish discrimination, thereby triggering the duty to justify it coherently and systematically. This could be an important development in the adjudication and settling of pension disputes, as it clarifies the ways in which the relevant comparators under section 7 of the Sex Discrimination (Northern Ireland) Order 1976 may be established. Finally, the Court appears to be more willing to treat equality questions contextually. This is very strongly felt in *EB v BVAEB*, albeit that it is still only implicit in that judgment: there, recognising perhaps that any indirect discriminatory impacts on male pensioners were the result of the long-standing inequality suffered by women in respect of pay, the Court appeared more willing to accept state justifications in the social interest than in other similar cases.

While current CJEU case law on this matter may be criticised for inconsistency and further case law is needed before a move towards a contextual interpretation of sex discrimination can be authoritatively established, it appears that the CJEU is – at least to an extent – alive to the complexity that questions of past or compounded discrimination raise and is starting to develop its case law accordingly. Whilst no change to NI law is currently required, this continues to be a matter which should be closely monitored through continued analysis of CJEU case law to determine whether this could have future implications for Northern Ireland.

### 6.3.3 Directive 2000/43/EC Race Equality Directive

As the Appendix 1 mapping outlines, there were two CJEU cases dealing with Directive 2000/43/EC within the defined date period and parameters. However, the Directive was only mentioned briefly within the Advocate General Opinion, and in both cases not referred to in the final judgment of the Court. This should continue to be monitored in light of any future developments after the mapping date range concluded on 31 August 2023.

### 6.3.4 Directive 2000/78/EC General Framework Directive

As the Appendix 1 mapping outlines, Directive 2000/78/EC is where the most substantive developments have been made within the CJEU case law. Numerous cases have been decided across various thematic areas as outlined below.

622 For further discussions on this, see Eleni Frantziou and Sarah Craig, ‘[Understanding the implications of article 2 of the Northern Ireland Protocol in the context of EU case law developments](#)’, (2022) 73 Northern Ireland Legal Quarterly 65.



#### 6.3.4.1 Thematic Area: Employment, Pensions and Social Security with a specific focus on age discrimination

Significant development within the CJEU case law within the defined date and parameters has been in the thematic area of employment, pensions, and social security.

In *BVAEB (Adjustment of retirement pensions)*<sup>623</sup> and *BVAEB (Amount of retirement pensions)*<sup>624</sup> decisions were delivered within one week of one another on 20 April 2023 and 27 April 2023 respectively. Both of which stemmed from a series of reforms to the Austrian pension systems for public/civil servants which was introduced to those born after 1 January 1955 and raised questions for the Court in remedying potential age discrimination within the context of pension entitlements.

In *BVAEB (Adjustment of retirement pensions)* the Court ultimately held that there was no discrimination with the national scheme insofar as ‘the national legislation at issue in the main proceedings is capable of pursuing legitimate social policy objectives wholly unrelated to any discrimination based on age’.<sup>625</sup> This related specifically to different time periods for pension entitlement under the new reformed scheme.

Conversely, the Court in *BVAEB (Amount of retirement pensions)*, in a complex judgment, held that where retrospective action is taken in the form of reducing pension entitlements this can be precluded by the terms of Directive 2000/78/EC. The Court further clarified that ‘a measure implementing EU law may only exceptionally be given retroactive effect, where an overriding reason in the public interest so demands and where the legitimate expectations of those concerned are duly respected’.<sup>626</sup> The issue hinged on the fact that despite the group in question having favourable pension grounds on the basis of their age, the retrospective reduction was one that was based on the age of a group of persons and ultimately was not sufficiently justified (at least before the Court).<sup>627</sup> As such the Court ruled that:

‘In the light of the foregoing considerations, the answer to the question raised is that Article 2(1) and (2)(a) and Article 6(1) of Directive 2000/78 must be interpreted as precluding, in the absence of an overriding reason in the public interest, national legislation which, in order to end discrimination on grounds of age, provides for the retirement pension scheme for a category of civil servants previously advantaged by the national legislation relating to retirement pension rights to be treated, with retroactive effect, in the same way as the retirement pension scheme for the category of civil servants previously disadvantaged by that legislation.’<sup>628</sup>

623 C-52/22 [BVAEB](#), judgment of 20 April 2023, ECLI:EU:C:2023:309.

624 C-681/21 [BVAEB](#), judgment of 27 April 2023, ECLI:EU:C:2023:349.

625 C-52/22 [BVAEB](#), judgment of 20 April 2023, ECLI:EU:C:2023:309, para. 59.

626 C-681/21 [BVAEB](#), judgment of 27 April 2023, ECLI:EU:C:2023:349, para. 51.

627 *Ibid.*, para. 52.

628 *Ibid.*, para. 54.

This case related to a very specific set of pension reforms implemented within the Austrian public/civil service and we are not aware of any immediate need for NI law to be changed in light of this.

Another important judgment on age discrimination in the context of employment was also handed down in April 2023 in a highly active month for the Court on such matters given the two cases noted above. The case of **Landespolizeidirektion Niederösterreich and Finanzamt Österreich**<sup>629</sup> remains highly specialised to the facts at issue, stemming from remedial action taken to rectify previous incompatibility of EU law on the remuneration and advancement of civil servants. Specifically, the new laws implemented aimed to ‘put an end to the discrimination on grounds of age resulting from the remuneration and advancement system previously in force’<sup>630</sup> in which certain apprenticeship schemes for under-18 were not included for determining levels of seniority. Due to the highly specific nature of this case, whilst no change is currently envisaged within the NI context, this continues to be a matter which should be closely monitored through continued analysis of CJEU case law to determine whether this could have future implications for Northern Ireland should similar situations arise.

Another relevant case is that of **VT v Ministero dell’Interno**<sup>631</sup> which concerned a question of whether age discrimination was legitimate within the context of the given factual situation and in light of Directive 2000/78/EC. The Court highlighted that whilst Article 1 of Directive 2000/78/EC lays down a general framework for non-discrimination (age included) with regards to employment and occupation,<sup>632</sup> in limited circumstances differing treatment may be permissible.

The question before the Court was whether specific provisions within Directive 2000/78/EC, read in light of Article 21 of the Charter, precluded national legislation from having an upper age limit in the recruitment policies of police commissioners. The CJEU held that the national legislation ‘has the consequence that certain persons are treated less favourably than other persons in comparable situations on the sole ground that they have exceeded the age of 30 years’<sup>633</sup> and thus was a matter to determine whether such difference in age treatment as regards the recruitment of police commissioners was justified within Directive 2000/78.

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629 C-650/21 [Landespolizeidirektion Niederösterreich and Finanzamt Österreich](#), judgment of 20 April 2023, ECLI:EU:C:2023:300.

630 Ibid., para. 8.

631 C-304/21 [VT v Ministero dell’Interno and Ministero dell’interno](#), judgment of 17 November 2022, ECLI:EU:C:2022:897.

632 Ibid., para. 4.

633 Ibid., para. 41.

On the possible justification, the Court outlined that:

‘Article 4(1) of Directive 2000/78 provides that a difference of treatment which is based on a characteristic related to one of the grounds referred to in Article 1 of that directive is not to constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.’<sup>634</sup>

The Court initially also outlined Recitals 18 and 23 of Directive 2000/78:

‘(18) This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.

...

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to ... age ... constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. ...’<sup>635</sup>

However, the CJEU ultimately found that:

‘Having regard to all the foregoing considerations, the answer to the question referred is that Article 2(2), Article 4(1) and Article 6(1) of Directive 2000/78, read in the light of Article 21 of the Charter, must be interpreted as precluding national legislation which provides for the fixing of a maximum age limit of 30 years for participation in a competition aimed at recruiting police commissioners, in so far as the duties actually performed by those police commissioners do not require particular physical capacities or, if such physical capacities are required, it is apparent that such legislation, while pursuing a legitimate aim, imposes a disproportionate requirement, which it is for the national court to determine.’<sup>636</sup>

634 Ibid., para. 44.

635 Ibid., para. 3.

636 Ibid., para. 83.

Whilst no change is currently needed within the NI context, this continues to be a matter which should be closely monitored through continued analysis of CJEU case law.

In *Curtea de Apel Alba Iulia and Others*,<sup>637</sup> another case dealing with potential age discrimination, seven Romanian judges argued for compensation of salary which they deemed they should be entitled to under the national legislation. The backdrop to this was that during the period 2006-2009, the majority of judges working in Romania obtained judicial decisions entitling them to increased gross monthly management allowances.<sup>638</sup> The issue for the applicants in the given case was that they were not yet judges during the period 2006-2009, the entitlements should continue to apply to them insofar as they performed comparable duties during the period 2010-2015.<sup>639</sup> The referring Court had the overarching concerns as follows:

‘The referring court also notes that it is only because the judges in question are younger and were appointed to their posts subsequently to the actions brought by the existing judges in the period 2006 to 2009 that the courts concerned are denying them those rights, since they worked under the same conditions during the period 2010 to 2015. It therefore enquires whether an interpretation of EU law according to which proceedings can no longer be brought to claim the salary increases because the right to bring proceedings is time-barred gives rise to discrimination between, on the one hand, the existing judges, in respect of whom the courts concerned acknowledged and paid those increases in December 2019 and January 2020, and, on the other, the judges, such as the judges in question, in respect of whom those courts have not acknowledged entitlement to those increases and who brought proceedings in 2020, even though during the same period both categories of judges worked for the same employer and performed the same duties.’<sup>640</sup>

The CJEU ultimately held that on the basis of the information presented for the preliminary ruling there was no discrimination on the basis of age<sup>641</sup> insofar as the referring Court ‘has not identified any specific category of judges that has been placed at a particular disadvantage associated with age, and has merely noted that the refusal to grant a salary increase to the judges in question for the period between 2010 and 2015 is the result, on the one hand, of the fact that they began work after Framework Law No 330/2009 came into force and, on the other, of the fact that they had not, before that law came into force, obtained judicial decisions

637 C-301/21 [Curtea de Apel Alba Iulia and Others](#), judgment of 20 October 2022, ECLI:EU:C:2022:811.

638 *Ibid.*, para. 24.

639 *Ibid.*, para. 31.

640 *Ibid.*, para. 33.

641 *Ibid.*, para. 59.

confirming their entitlement to salary increases.<sup>642</sup> Thus it was deemed not to be an issue of age discrimination given the specific facts of the case.

The case of *HK v Danmark and HK/Privat*<sup>643</sup> concerned the matter of age restrictions standing for election of a Danish trade union. The applicant had stood every year since 1993 having been re-elected during each four-year cycle. In 2011, however, the applicant was 63 and was thus barred from standing on the basis that the trade union law had an age restriction of 60. The case was referred to the CJEU for a preliminary ruling on the question of whether the application was protected under the provisions of Directive 2000/78.

The imperative question was on the scope of Directive 2000/78, ‘in essence, whether Article 3(1)(a) and (d) of Directive 2000/78 are to be interpreted as meaning that an age limit laid down in the statutes of an organisation of workers for eligibility to stand as sector convenor of that organisation falls within the scope of that directive.’<sup>644</sup> Importantly, the Court clarified the scope of Article 3(1)(a) of Directive 2000/78, noting that:

‘[...] that the scope of that directive is not limited solely to the conditions for accessing posts occupied by ‘workers’, within the meaning of Article 45 TFEU. Thus, in accordance with the wording of Article 3(1)(a) of Directive 2000/78, that directive applies to ‘all persons, as regards both the public and private sectors, including public bodies ... whatever the branch of activity and at all levels of the professional hierarchy’.<sup>645</sup>

The Court further outlined that Article 3(1)(d) of Directive 2000/78 also applies to the involvement in an organisation of workers.<sup>646</sup> On the facts presented, the Court ultimately held that:

‘In the light of all the foregoing considerations, the answer to the question referred is that Article 3(1)(a) and (d) of Directive 2000/78 must be interpreted as meaning that an age limit laid down in the statutes of an organisation of workers for eligibility to stand as sector convenor of that organisation falls within the scope of that directive.’<sup>647</sup>

This underscores the importance through which CJEU case law tracking and developments are required and the importance of this ruling is not to be understated within the Northern Ireland context. Specifically, the aforementioned

642 Ibid., para. 54.

643 C-587/20 *HK v Danmark and HK/Privat*, judgment of 2 June 2022, ECLI:EU:C:2022:419.

644 Ibid., para. 20.

645 Ibid., para. 29.

646 Ibid., para. 49.

647 Ibid., para. 54.

CJEU case was relied upon in the Northern Ireland case of *Geoffrey Wilson and Alliance Party for Northern Ireland*.<sup>648</sup> However, the Northern Ireland Court of Appeal took a very narrow reading of the ‘employment/occupation’ requirement compared with the *HK v Danmark and HK/Privat* case. The Court stated that:

‘For the assorted reasons adumbrated in paras [31]–[32] and having considered the further written submissions of the parties, we are not persuaded that the decision in *HK* lends support to the appellant’s fundamental contention, namely that Directive 2000/78 applied to the decision of the Alliance Party declining to nominate him as a party candidate in a forthcoming public election.’<sup>649</sup>

As such, these judgments remain highly important in tracking developments considering the dynamic alignment requirement of Annex 1 Directives. As noted above, a narrow reading was taken by the Northern Ireland Court of Appeal and it would be important to track the development of this interpretation (in light of the CJEU judgment) in the coming years ahead.

#### 6.3.4.2 Thematic Area: Employment with a specific focus on sexual orientation discrimination

The ruling in *J.K. v TP S.A.*<sup>650</sup> arguably has significant and broader implications for the development of the scope of the non-discrimination provisions on the grounds of sexual orientation, contained within Directive 2000/78 on equal treatment in employment and occupation.

The first significant element to note with regards to this case was that it substantially confirmed the personal scope of application of Directive 2000/78/EC insofar as the prohibition of discrimination on the grounds of sexual orientation extends to self-employed workers where that relationship was ‘in the context of a legal relationship characterised by a degree of stability’.<sup>651</sup> The applicant was self-employed but had been contracted to complete audio-visual work on a series of short-term contracts spanning over the course of 7 years. The applicant’s regular monthly shifts were cancelled, and no further contracts provided following the release of a video promoting same-sex couples, with the applicant alleging this was due to discrimination on the basis of sexual orientation.

The next question for the Court to determine was whether the issue at hand fell within the material scope of Article 3(1)(a) and (c) of Directive 2000/78, and whether the Polish law was incompatible with EU law provisions.

648 [Geoffrey Wilson and Alliance Party for Northern Ireland \[2024\] NICA 12.](#)

649 *Ibid.*, para. 33.

650 C-356/21 [J.K. v TP S.A.](#), judgment of 12 January 2023, ECLI:EU:C:2023:9.

651 *Ibid.*, para. 45.

The issue specifically was that the applicable Polish law prohibited discrimination on the grounds of sexual orientation in employment contracts, which remained a significant question given the self-employed work of the applicant. The issue being that whilst the transposition of the Directive into Polish law prohibits discrimination on the grounds of sexual orientation in employment, the same guarantees are not applicable for freedom of contract whereby discrimination is limited to grounds of sex, race, ethnic origin and nationality.

The Court ultimately stated that:

‘to accept that freedom of contract allows a refusal to contract with a person on the ground of that person’s sexual orientation would be tantamount to depriving Article 3(1)(a) of Directive 2000/78 of its practical effect in so far as that provision specifically prohibits any discrimination based on that ground as regards access to self-employment.’<sup>652</sup>

This ruling by the Court highlights the significant scope of Directive 2000/78, ruling that:

‘Article 3(1)(a) and (c) of Directive 2000/78 must be interpreted as precluding national legislation which has the effect of excluding, on the basis of the freedom of choice of contracting parties, from the protection against discrimination to be conferred by that directive, the refusal, based on the sexual orientation of a person, to conclude or renew with that person a contract concerning the performance of specific work by that person in the context of the pursuit of a self-employed activity.’<sup>653</sup>

Whilst no change is currently envisaged within the NI context, this continues to be a matter which should be closely monitored through continued analysis of CJEU case law.

#### 6.3.4.3 Thematic Area: Religion in the Workplace and Fixed Term Employment

The case of *MIUR*<sup>654</sup> dealt with the issue of discrimination on the basis of religion, with specific attention to those able to access permanent contracts. The applicants in the case were Catholic religious education teachers employed in public education establishments under successive fixed-term contracts.<sup>655</sup> The issue at hand being that the applicants argued that the inability for said fixed-term contracts to be converted into permanent contracts due to national legislation amounted to discrimination on the basis of religion within the parameters laid

652 Ibid., para. 77.

653 Ibid., para. 79.

654 C-282/19 *MIUR*, judgment of 13 January 2023, ECLI:EU:C:2022:3

655 Ibid., para. 26.

down in Directive 2000/78. The Court further detailed that Directive 2000/78 is ‘a specific expression, within the field that it covers, of the general principle of non-discrimination now enshrined in Article 21 of the Charter’ in light of the *Szpital Kliniczny*<sup>656</sup> ruling and highlighting the importance through which the Charter continues to apply.<sup>657</sup>

The Court ultimately held that:

‘In the present case, it is apparent from the request for a preliminary ruling that the national legislation at issue in the main proceedings deprives Catholic religious education teachers in public education establishments, such as the applicants in the main proceedings, of the possibility of transforming their fixed-term contracts into a contract of indefinite duration and/or obtaining compensation for the damage suffered on account of the succession of fixed-term contracts not on the ground of their religion but, similarly to the other teachers in those establishments, because they come under the public education sector [...]’<sup>658</sup>

It follows that reasoning by explaining:

‘[...] assuming that Catholic religious education teachers in public education establishments are in a situation comparable to that of teachers of other subjects in those same establishments, employed under a fixed-term contract and having benefitted from that Article 399 or from that plan, such difference in treatment is not based on religion, but relates only to the regime applicable to the employment relationship.’<sup>659</sup>

At present there is no comparable implication for the Northern Ireland context, this continues to be a matter which should be closely monitored through continued analysis of CJEU case law should there be any future legislative changes within this area.

#### 6.3.4.4 Thematic Area: Disability Discrimination and Employment

Another significant development within CJEU with reference to Directive 2000/78/EC within the updated time period has been within the realm of disability discrimination. The case of *HR Rail*<sup>660</sup> concerned reliance on ‘genuine occupational requirements’ under article 4 of the General Framework Directive as justifications

656 C-16/19 *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, judgment of 26 January 2021, ECLI:EU:C:2021:64.

657 For a substantive discussion on the role of the Charter, see Eleni Frantziou, ‘[The Binding Charter Ten Years On: More Than a Mere Entreaty?](#)’ (2019) 38 Yearbook of European Law 73.

658 C-282/19 *MIUR*, judgment of 13 January 2023, ECLI:EU:C:2022:3, para. 64.

659 *Ibid.*, para. 65.

660 C-485/20 *HR Rail*, judgment of 10 February 2022, ECLI:EU:C:2022:85



for excluding disabled persons from certain professional roles. The Court found that absolute bars on employment were unjustifiable and required the adoption of reasonable accommodation measures, including adjustments and assignment to a different service, in line with article 5 of the Directive, read in the light of articles 21 and 26 of the Charter of Fundamental Rights of the European Union, as well as article 5 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD).

This draws on the cases highlighted in the previous report and the above case has strengthened the position of persons with disabilities, specifically in relation to justifications for the exclusion of persons with disabilities from certain professional roles.<sup>661</sup> Drawing upon earlier case law, there requires continued scrutiny on matters relating to absolute bars to employment to persons with a disability to ensure compliance of this within the Northern Ireland context. It therefore remains an area which requires close tracking given the ongoing developments within the CJEU caselaw and the strengthening of disability discrimination provisions.

### 6.3.5 Directive 2010/41/EU Self-Employment Equality Directive

There was no CJEU case law within the defined date period and parameters dealing with Directive 2010/41/EU as outlined in the Appendix 1 mapping. This should continue to be monitored in light of any future developments after the mapping date range concluded on 31 August 2023.

### 6.3.6 Directive 79/7/EEC of 19 December 1978 Equality in Social Security Directive

#### 6.3.6.1 Thematic Area: Employment, Pensions and Social Security

In addition to what has been outlined above with reference to Directive 2006/54/EC there has also been notable CJEU developments related to pension entitlements with reference to Directive 79/7/EEC. Important case law within the date period dealing with Directive 79/7/EEC specifically includes *CJ v TGSS*<sup>662</sup> and *KM v INSS*<sup>663</sup>.

In *CJ v TGSS*, the matter before the Court concerned the fact that Spanish social security legislation excluded domestic workers from unemployment benefits. The justification of such exclusion was considered before the Court in light of the non-discrimination provisions set forth in Directive 79/7. As a starting point, it is worth stating that the Court noted that whilst Directive 79/7 was applicable, Directive 2006/54/EC was not within the confinements of the facts of the given case.<sup>664</sup> It was ultimately a question of indirect discrimination before the Court; whether exclusion from unemployment benefits for domestic workers in a social security scheme could be justified. The backdrop to this was that the majority of domestic

661 Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, [European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#) (2022) 68-72.

662 C-389/20 *CJ v TGSS*, judgment 24 February 2022, ECLI:EU:C:2022:120

663 C-625/20 *KM v INSS*, judgment of 30 June 2022, ECLI:EU:C:2022:508

664 C-389/20 *CJ v TGSS*, ECLI:EU:C:2022 :120, para. 37.

workers were women (95.53%) and thus disproportionately placed women in a particularly unfavourable position. The question was whether such exclusion could be objectively justified.<sup>665</sup>

The Court in *CJ v TGSS*, ultimately held that such exclusion was not justified and that the provision of such an exclusion was incompatible with Directive 79/7, specifically Article 4(1). The Court held that:

‘Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security should be interpreted as meaning that it precludes a national provision which excludes unemployment benefits from the social security benefits granted to domestic workers by a statutory social security scheme, since this provision places female workers at a particular disadvantage compared to male workers, and that it is not justified by objective factors unrelated to any discrimination based on sex.’<sup>666</sup>

This case is important in that it presents significant consideration to the legal provisions and treatment surrounding domestic work, specifically in relation to social security benefits. Whilst there are no immediate implications for Northern Ireland at present, this remains a noteworthy and significant development within CJEU case law that will need continued tracking to understand the potential forthcoming implications this may have within the Northern Ireland context.

In *INSS* the matter before the Court posed another concern of Spanish social security law and indirect discrimination on the grounds of sex, specifically in relation to the cumulation of multiple invalidity pension benefits from those no longer able to work on health grounds (one from the applicant’s administrative assistant position and the other from a nursery assistant position in the given case). Under domestic legislation, this was prohibited as they originated from the same scheme (despite the fact that cumulation was permissible should they originate from different pension schemes).<sup>667</sup>

The referring Court noted that it was:

‘inclined to take the view that the application of such a rule leads to indirect discrimination on ground of sex, prohibited by Article 4 of Directive 79/7 and Article 5 of Directive 2006/54, in so far as, even if that rule makes no distinction on the basis of sex and is, therefore, apparently neutral in that regard, it could nevertheless have a greater impact on women.’<sup>668</sup>

665 Ibid., paras. 45ff.

666 Ibid., para. 72.

667 C-625/20 [KM v INSS](#), judgment of 30 June 2022, ECLI:EU:C:2022:508, para. 19.

668 Ibid., para. 20.

This was on the basis of statistical data which also confirmed this position. This is a similar matter to what was discussed above in detail in *EB v BVAEB*<sup>669</sup> under Directive 2004/113/EC, a significant question before the Court was the use of statistical data in determining indirect discrimination within the scope of pensions.

The Court ultimately held that the possibility of adverse impact on women was sufficient to render it incompatible with the provisions set forth in Directive 79/7. Whilst no immediate change is required to NI law, it is worth tracking such developments on whether the CJEU will continue to develop its case law on the statistical data used to inform questions of indirect discrimination cases, specifically those within the social security realm.

## 6.4 Conclusion

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There remains a theme of quantitative decline in the number CJEU cases on equality and non-discrimination which has been generally noted amongst pivotal academics within the field.<sup>670</sup> That theme remains true within the scope of this update report, with the predominant rulings specifically looking at Directive 2000/78/EC. The most substantive updates have taken place also within the thematic area of employment, pensions and social security and with a specific focus in the recent case law on age discrimination.

*EB v BVAEB*<sup>671</sup> concerned an Austrian law capping inflationary adjustments for high earners; this disproportionately affected men who brought an indirect discrimination claim. The Court ultimately rejects the claim. In so doing it highlights the importance of social justice arguments as a justification for restriction of the benefits. It scrutinises the justification closely and appears willing to accept there is prima facie indirect discrimination on the basis of relatively simple statistical evidence. Importantly if only implicitly the Court seems open to a more contextual approach, recognising that part of the justification for the Austrian measure is the long-standing inequality experienced by women as regards pay.

*J.K. v TP S.A.*<sup>672</sup> clarifies the personal and material scope of the prohibition on sexual orientation discrimination. It specifies that the prohibition applies to self-employer workers in the context of a legal relationship characterised by a degree of stability. It also clarifies that freedom of contract cannot be used to justify a refusal on grounds of sexual orientation to conclude or renew a contract concerning the performance of specific work.

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669 C-405/20, [EB v BVAEB](#), judgment of 5 May 2022, ECLI:EU:C:2022:347.

670 Colm O’Cinneide, [Overview of CJEU Discrimination Jurisprudence 2023](#) (2023) .

671 C-405/20, [EB v BVAEB](#), judgment of 5 May 2022, ECLI:EU:C:2022:347.

672 C-356/21 [J.K. v TP S.A.](#), judgment of 12 January 2023, ECLI:EU:C:2023:9.

*HR Rail*<sup>673</sup> has strengthened protections for persons with disabilities by specifying that genuine occupational requirements exemption cannot justify an absolute bar on employment; reasonable accommodation measures are required in such cases.

*CJ v TGSS*<sup>674</sup> offers important protection for domestic workers. The CJEU there holds that a Spanish rule excluding domestic workers (the vast majority of them female) from unemployment benefit is unjustified indirect sex discrimination.

Despite the decline in the number of cases, these cases arguably demonstrate a concern to support more substantive notions of equality with their recognition of existing factual and material inequality and the need for social justice arguments and reasonable accommodation measures to support substantive equality.

**We recommend that there needs to be continued monitoring and tracking of CJEU case law by the UK Government, NI Executive and NI Departments to ensure compliance with the Annex 1 Directives.**

673 C-485/20 [HR Rail](#), judgment of 10 February 2022, ECLI:EU:C:2022:85

674 C-389/20 [CJ v TGSS](#), judgment 24 February 2022, ECLI:EU:C:2022:120

# Chapter 7: EU Policy Developments and Initiatives since January 2022

## 7.1 Introduction

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This chapter provides an update on and identifies EU policy developments and initiatives since January 2022 regarding projects that relate to equality and human rights. It discusses EU policies that were ongoing during the period 1 January 2022 – 31 August 2023 and which no longer apply to NI (and, when possible, it identifies EU policies that did not apply to NI before the end of the Brexit transition period, that is, 31 December 2021).

Given the significant number of EU policy developments and initiatives in relation to human rights and equality, it is a large effort to track whether, when and to what extent those policies were adopted by the UK. This chapter will outline:

- Key EU policies that were ongoing during the period 1 January 2022-31 August 2023, in the field of equality and non-discrimination
- Key EU policies that were ongoing during the period 1 January 2022-31 August 2023, in the field of human rights.

Through the use of the three official EU websites outlining ongoing EU policies, initiatives and actions; and by filtering down topics relevant to equality and human rights,<sup>675</sup> we identified:

- 16 key ongoing EU policies in the field human rights and equality; half of which are relevant to the application of an Annex 1 Directive.
- A strong interest from the EU in non-discrimination (to strengthen a ‘Union of Equality’, including in relation to gender discrimination and racism); as well as in further protecting the rights of victims of crimes, children and migrants (including victims of human trafficking).

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675 Three main sources were used: a) European Commission, ‘[EU action by topic](#): What the EU is doing in the area of fundamental rights, anti-discrimination, supporting democracy and international justice’ (topics: all); b) European Commission, ‘[Strategy and Policy](#)’ (topic: ‘Justice and Fundamental Rights’, subtopics in which most EU policies that would have involved NI were recently adopted: The Union of Equality; Criminal justice; Combatting discrimination; Rights of the Child; Gender Equality); c) EU Commission, ‘[Migration and Home Affairs: Policies](#)’.

## 7.2 Relevance to Northern Ireland

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Arguably, all EU policies discussed below are relevant to Northern Ireland as matters of voluntary alignment, as they are connected to the Rights, Safeguards and Equality of Opportunity section of the 1998 Agreement. Indeed, under Article 2 WF: '(t)he United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union'. Furthermore, and as discussed earlier in this report, while this part of the 1998 Agreement seems to focus on civil and political rights and language rights, the initial divergence report outlines that this list is not exhaustive and covers a wide range of civil, political, economic, social and cultural rights.<sup>676</sup> The Commissions and previous report have highlighted the importance of the principle of equivalence in rights protection on the island of Ireland,<sup>677</sup> and where EU proposals align with best practice in human rights and equality there is a case for Northern Ireland to voluntarily align.<sup>678</sup> This is strongly advocated again within this report.

EU policies are not legally binding upon Member States. However, by strengthening human rights and equality protection across the EU, these policies can assist Member States in implementing legally binding EU legislation (such as adopted EU Directives and Regulations), some of which already apply or would have applied to NI, had the UK remained in the EU. As a result, we encourage relevant Northern Ireland departments to reflect upon recent EU policy developments on human rights and equality protection to consider where they provide examples of good practice that should be adopted as a matter of voluntary alignment. This would allow NI to avoid divergence of human rights and equality protection across the island of Ireland.

## 7.3 Equality and non-discrimination

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### 7.3.1 A Union of Equality

To combat discrimination and build a 'Union of Equality',<sup>679</sup> the EU has recently adopted five key strategies:

- The Gender Equality Strategy 2020-2025
- The EU Anti-racism Action Plan 2020-2025

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676 Craig and al., '[European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#)' (ECNI, IHREC, NIHRC) December 2022, 16

677 IHREC, NIHRC and ECNI, '[Equality and Human Rights on the Island of Ireland after Brexit: Annual joint report of IHREC, ECNI and NIHRC on the implementation of Article 2 of the Windsor Framework. October 2022 – September 2023](#)' (December 2023) 2.

678 Craig and al., '[European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland](#)' (ECNI, IHREC, NIHRC) December 2022, 110.

679 See more information: European Commission, '[The Union of Equality](#)'.

- The EU Roma strategic framework for equality, inclusion, and participation 2020-2030
- The LGBTIQ Equality Strategy 2020-2025
- The Strategy for the Rights of Persons with Disabilities 2021-2030

Our report focuses on developments that occurred between 1 January 2022 and 31 August 2023 and the five EU equality strategies listed above were adopted in 2020 and 2021. However, these equality strategies highlight areas in which the EU wishes to develop targeted measures (for example, equality legislation or awareness raising activities) and in which it wishes to mainstream equality with the support of the EU Task Force on Equality, until 2025-2030.<sup>680</sup> As a result, one can expect particularly dynamic EU protection (including legislative developments) against discrimination based on gender, ethnicity (including Roma communities), sexual orientation and disability during that time.

At present, Northern Ireland has a number of laws in force protecting individuals against discrimination on the grounds of gender, race, sexual orientation and disability. The Equality Commission has regularly commented on the need for better data collection,<sup>681</sup> including the need to collect data on race equality that is comparable with international frameworks including the EU.<sup>682</sup>

In addition to the implementation of these laws and before looking at specific thematic elements below, we encourage the NI Executive to continue or start gathering data on contemporary forms of discrimination affecting these individuals, designing measures that protect them from discrimination, and monitoring their efficacy, in order to follow examples in the EU equality strategies listed above of best practice which strengthen rights and reflect international human rights standards and best practice.

**We recommend the Northern Ireland Executive, relevant NI Departments and others consider how to gather disaggregated equality data in relation to the full list of protected characteristics in Northern Ireland law in a way which not only meets the needs of NI but where possible is comparable with common international frameworks, including at EU level; it may be helpful to reflect on Ireland's plans to develop an Equality Data strategy.**

### 7.3.2 Gender equality

Another priority amongst EU policy developments and initiatives in relation to equality, is to combat gender discrimination. According to the European Commission, the EU has developed a number of policies recently, including two that reflect key

680 Ibid.

681 ECNI, [Briefing Note on the Need for Equality Data](#) (November 2020).

682 ECNI, [Racial Equality Policy: Priorities & Recommendations](#) (May 2014) 42.

aspects in which the EU wishes to support Member States: the Gender Equality Strategy (2020-2025);<sup>683</sup> and the Gender Action Plan III (2021-2025).<sup>684</sup>

The EU Gender Equality Strategy aims at progressing towards a gender-equal Union by adopting both a gender mainstreaming approach combined with targeted actions, and an intersectionality approach for its implementation. Its 7 objectives are:

- Ending gender-based violence;
- Challenging gender stereotypes;
- Closing gender gaps in the labour market;
- Achieving equal participation across different sectors of the economy;
- Addressing the gender pay and pension gaps;
- Closing the gender care gap; and
- Achieving gender balance in decision-making and in politics.

The Gender Action Plan III sets out the EU's political and operational roadmap towards a gender-equal world, by taking a transformative and rights-based approach, and by addressing the intersectionality of gender with other forms of discrimination. Its 5 pillars are listed below:

- Making gender equality and women and girls' empowerment a cross-cutting priority of EU external action;
- Working together with EU Member States and fostering partnership with stakeholders, civil society organisations, women's organisations;
- Accelerating progress by focusing on key areas of engagement (that is, gender-based violence; sexual and reproductive health and rights; economic and social rights and empowerment; equal participation and leadership; women, peace and security; green and digital transformations);
- Leading by example, by striving for a gender-responsive and balanced leadership;
- Putting the focus on results, accountability and transparency through qualitative, quantitative and inclusive monitoring.

Our report focuses on developments that occurred between 1 January 2022 and 31 August 2023 and these policies were adopted in 2020. However, they both highlight priority areas in which one can expect particularly dynamic EU protection (including legislative developments) to promote gender equality until 2025, as evidenced by recent Directives and Regulations discussed in chapter four.

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683 See European Commission, [Gender equality strategy](#).

684 See European Commission, [Gender equality and empowering women and girls](#); and see European Commission, [EU Gender Action Plan III](#) (2020).



The NI Assembly and Executive and the UK Government have taken action on a number of aspects reflecting the 5 objectives of the Gender Equality Strategy and the 5 pillars of the Gender Action Plan III, such as the Domestic Violence (Safe Leave) Act 2022 and the Abortion Regulations 2020. However, we encourage NI to continue or start gathering data on contemporary forms of discrimination affecting women (for example, absence of first trimester antenatal screening preventing women from availing of Abortion Regulations 2020 section 7 -which allows termination on grounds of severe or fatal foetal abnormality- until late in the pregnancy, causing preventable harm).<sup>685</sup>

**We recommend that, the Department for Communities, and other relevant NI Departments, consider developments in EU Gender policy where this may raise issues of Article 2 WF requirements or with which Northern Ireland may wish to voluntarily align where it strengthens rights and reflects international human rights standards and best practice.**

### 7.3.3 Race equality

We note that the EU has also begun considerable work in the area of race equality. The EU Anti-racism Action Plan provides a comprehensive overview of racial equality measures and notes possible problems.<sup>686</sup> The Plan highlights that racism takes different forms including unconscious bias and structural racism.<sup>687</sup> The Plan also commits the European Commission to lobby for its 2008 proposals to extend EU anti-discrimination rules on religion or belief, age, sexual orientation and disability to areas beyond employment and training.<sup>688</sup> The Plan highlights the need to combat hatred and notes EU initiatives such as the Audiovisual Media Services Directive, Digital Services Act and a voluntary code of conduct on combating online racial hatred.<sup>689</sup> The Plan notes new challenges for racial equality such as in the development of Artificial Intelligence programmes.<sup>690</sup> The Plan also stresses the need for anti-racism to be pursued within a wider framework that considers structural racism, the need to confront history (colonialism, slavery and the Holocaust), and the need to address social fairness for everyone; tackling racism will require an intersectional lens.<sup>691</sup> The Commission has also published a separate EU Roma Strategic Framework to promote equality, inclusion and participation.<sup>692</sup>

685 Lougarre, Heaney and Bloomer, 'Antenatal screening in Northern Ireland and Women's Rights: Policy Paper' (2024).

686 European Commission, [A Union of Equality: EU Anti-racism Action Plan 2020-2025](#) (2020).

687 Ibid., 1-2.

688 Ibid., 4-5.

689 Ibid., 5-7.

690 Ibid., 9.

691 Ibid., 9-13.

692 European Commission, [EU Roma Strategic Framework for Equality, Inclusion and Participation for 2020 - 2030](#) (2020).

The NIHRC and ECNI have contributed to a consultation on the race equality directive as part of this European Union Action Plan.<sup>693</sup> The Executive Office has consulted on reforming the Race Relations Order but as we noted in chapter two this process has paid insufficient attention to Article 2 WF and EU law.

**We recommend that the Executive Office consider developments in the EU Anti-Racism Action Plan and Roma Strategic Framework where this may identify best practice with which Northern Ireland may wish to voluntarily align where it strengthens rights and reflect international human rights standards.**

### 7.3.4 Sexual orientation

The European Commission has adopted an LGBTIQ Equality Strategy 2020-2025.<sup>694</sup> The Strategy sets out targeted actions in respect of tackling discrimination, ensuring safety, building inclusive societies, and leading the call for LGBTIQ equality worldwide. The Strategy calls on the Council to extend EU sexual orientation anti-discrimination law beyond the employment context. The Strategy also highlights new challenges such as the use of face recognition software which may have implications for trans people.

**We recommend that the Executive Office consider developments in the LGBTIQ Equality Strategy where this may identify examples of best practice with which Northern Ireland may wish to voluntarily align where they strengthen rights and reflect international human rights standards.**

### 7.3.5 Disability

The European Commission has adopted a Strategy for the Rights of Persons with Disabilities 2021-2030.<sup>695</sup> The Strategy addresses topics such as promoting accessibility; the enjoyment of rights such as free movement and participation in the democratic process; supporting a decent quality of life and independent living, including access to quality and sustainable jobs, adequate social protection; equal access and non-discrimination across areas such as justice, healthcare, housing, education; ensuring safety and protection; and promoting disability rights globally.

**We recommend that the Executive Office consider developments in the Strategy for the Rights of Persons with Disabilities 2021-2030 where this may identify best practice with which Northern Ireland may wish to voluntarily align where they strengthen rights and reflect international human rights standards.**

693 NIHRC, [Response to the European Commission Consultation on the Racial Equality Directive](#) (12 April 2022); ECNI, [Response to consultation: European Commission - Addressing possible gaps in the Racial Equality Directive](#) (April 2022).

694 European Commission, [Union of Equality: LGBTIQ Equality Strategy 2020-2025](#) (2020).

695 European Commission, [Union of Equality: Strategy for the rights of persons with disabilities 2021-2030](#) (2020).

## 7.4 Human rights protection

### 7.4.1 Criminal justice: victims' rights

As part of its overall strategy on criminal justice,<sup>696</sup> in 2020, the EU adopted its Strategy on victims' rights (2020-2025), the first of its kind in the Union.<sup>697</sup> This strategy essentially aims at: ensuring that all crime victims can fully rely on their rights (empowerment); and outlining actions that will be conducted by the European Commission, Member States and civil society (collaboration). As a result, it sets five key priorities, listed below:

- Effective communication with victims and a safe environment for victims to report crime;
- Improving support and protection to the most vulnerable victims;
- Facilitating victims' access to compensation;
- Strengthening cooperation and coordination among all relevant actors; and
- Strengthening the international dimension of victims' rights.

Our report focuses on developments that occurred between 1 January 2022 and 31 August 2023 and this policy was adopted in 2020. However, it highlights priority areas in which one can expect particularly dynamic EU protection (including legislative developments) to protect victims' rights until 2025.

**We recommend that the Northern Ireland Department of Justice review the EU strategy on victims' rights to identify examples of best practice that could strengthen rights and reflect international human rights standards and best practice.**

### 7.4.2 Childrens' rights

In 2021, the EU adopted a new comprehensive EU policy framework to protect the rights of all children, and secure vulnerable children's access to basic services. This framework includes: the EU Strategy on the Rights of the Child and the European Child Guarantee.<sup>698</sup>

The thematic areas of the EU Strategy on the Rights of the Child includes:

- Child participation in political and democratic life
- Socio-economic inclusion, health and education
- Combating violence against children and ensuring child protection
- Child-friendly justice
- Digital and Information Society
- The Global dimension

696 European Commission, [EU strategy on criminal justice](#).

697 European Commission, [EU Strategy on victims' rights \(2020-2025\)](#).

698 European Commission, [The EU Strategy on the Rights of the Child and the European Child Guarantee](#).

The European Child Guarantee provides guidance and means for Member States to support minors at risk of poverty or social exclusion, and requires that all children in need have affective access to:

- Early childhood education and care (for free)
- Education and school-based activities (for free)
- At least one healthy meal each school day (for free)
- Healthcare (for free)
- Healthy nutrition
- Adequate housing

Our report focuses on developments that occurred between 1 January 2022 and 31 August 2023 and this framework was adopted in 2021. However, it highlights priority areas in which one can expect particularly dynamic EU protection (including legislative developments) to protect children's rights and no end date has been set for the operationalisation of this framework.

We note that NI has adopted the Children's Services Co-operation Act (Northern Ireland) 2015, according to which the NI Executive must develop and adopt a strategy aiming at improving the well-being of children and young people in NI. We also note that in 2003, NI created the NI Commissioner for Children and Young People,<sup>699</sup> to safeguard and promote the rights and best interests of children and young people in Northern Ireland.

However, concerns have been raised in NI regarding the high number of children living in poverty and the inadequate housing, health and nutrition they have access to; as well as the insufficient support and education for children with disabilities or special educational needs. Concerns have also been raised on how these issues disproportionately affect children refugees and children in care.<sup>700</sup>

**We recommend relevant NI departments review EU policy developments aimed at protecting the rights of all children, including combating child poverty, securing vulnerable children's access to basic services, including children living in poverty, children with disabilities and special educational needs, children refugees and children in care, with a view to taking measures that strengthen rights and reflect international human rights standards and best practice.**

699 The Commissioner for Children and Young People (NI) Order (2003)

700 For example NIHRC, '[Submission to the UN Committee on the Rights of the Child: Parallel Report to the Pre-Session on the Combined Sixth and Seventh Reports of the UK of Great Britain and NI](#)' (December 2022).

## 7.5 Migration

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### 7.5.1 Migrants and asylum-seekers

The EU has recently adopted key policies on migration, listed below.<sup>701</sup>

- The adoption of a Pact on Migration and Asylum in 2020, which establishes improved and faster asylum and migration procedures, through the principles of fair sharing of responsibility and solidarity amongst Member States;
- The creation of the EU Agency for Asylum in 2022 (replacing the European Asylum Support Office), which supports Member States to converge their asylum and reception practices by meeting high EU standards;
- The adoption of an EU Strategy on voluntary return and reintegration in 2021, which aims (inter alia) at improving the quality of the support provided to the returnees;
- The adoption of a renewed action plan against migrant smuggling for the period 2021-2025, alongside the dedicated priority of the European Multidisciplinary Platform Against Criminal Threats towards migrant smuggling for the period 2022-2025.

Our report focuses on developments that occurred between 1 January 2022 and 31 August 2023 and these policies were adopted between 2020 and 2022. However, they highlight priority areas in which one can expect particularly dynamic EU protection (including legislative developments) – some of which could protect migrants and asylum-seekers by improving reception standards across EU Member States, speeding up administrative procedures, and combatting smuggling. Furthermore, no end date has been set for the operationalisation of most of these developments.

We note that nationality, immigration and asylum represent excepted matters reserved to Westminster. However, concerns have been raised regarding the UK adoption of the Safety of Rwanda (Asylum and Immigration) Act, which would allow the UK to remove asylum-seekers to Rwanda, as this would amount to a breach of the principle of non-refoulement; see further chapter two and chapter five.

### 7.5.2 Victims of human trafficking

In 2021, the EU adopted a Strategy on Combatting Trafficking in Human Beings (2021-2025),<sup>702</sup> closely linked to the EU Strategy to Tackle Organised Crime (2021-2025). This strategy aims at providing a comprehensive response to the crime of human trafficking to better protect its victims through prevention, protection and empowerment. Its four objectives are listed below:

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701 European Commission, [Migration and Home Affairs](#).

702 European Commission, [EU Strategy on Combatting Trafficking in Human Beings \(2021-2025\)](#).

- Reducing demand that fosters trafficking
- Breaking the business model of traffickers through effective operational means against the criminal business model, tackling the culture of impunity by building capacity for a robust criminal justice response, as well as the digital business model of traffickers
- Protecting, supporting and empowering the victims with a specific focus on women and children
- Promoting international cooperation.

Our report focuses on developments that occurred between 1 January 2022 and 31 August 2023 and this policy was adopted in 2021. However, it highlights priority areas in which one can expect particularly dynamic EU protection (including legislative developments) to protect victims of human trafficking until 2025.

We note that NI has adopted the Human Trafficking and Exploitation Act NI 2015; and the Justice (Sexual Offences and Trafficking Victims) Act (NI) 2022.

However, concerns have been raised in this report regarding the UK Government willingness to consider the EU Trafficking Directive as falling outside the scope of Article 2 WF;<sup>703</sup> and to limit the possibility for certain migrants to rely on section 3 of the Human Rights Act, under the Illegal Migration Act 2023. The view of this report, in line with the previous report and the position outlined by the ECNI, is that the EU Trafficking Directive falls within the scope of Article 2 WF. The *Illegal Migration Act case* confirms that the Trafficking Directive is within the scope of Article 2 WF.<sup>704</sup>

**We recommend relevant NI departments review the EU Strategy on combatting trafficking with a view to taking measures that strengthen rights and reflect international human rights standards and best practice.**

## 7.6 Conclusion

We have highlighted that the European Union is pursuing a large number of policies that relate to the protection and promotion of human rights and equality. These range across such important matters as those of gender equality, race, victims' rights, migrants' rights. Some of these policies concern legislative developments in relation to the Annex 1 Directives and so may trigger the keeping pace requirement in Article 2 WF; even where this is not the case the Article 2 WF focus on discrimination law highlights the centrality of equality policies and all the policies discussed in the chapter represent an opportunity to reflect on and learn from what is emerging best practice in the EU as regards equality and human rights.

703 Hansard, '[Illegal Migration Bill Volume 831: debated on Wednesday 28 June 2023](#)'.

704 [Illegal Migration Act case](#) [147]-[158].

## List of Recommendations

We recommend that that EU and UK publish a consolidated version of the Windsor Framework text.

We recommend that the Executive Office explicitly refer to, and consider, the Article 2 WF obligations in its work on reform of the Race Relations Order. This should include as regards relevant CJEU case law.

We recommend that the Executive Office and other relevant NI Departments consider any EU proposals for amendments to EU law where they may trigger the keeping pace requirement because they amend or replace an Annex 1 directive or may represent an opportunity for voluntary alignment to strengthen rights and reflect international human rights standards and best practice.

We recommend that the Executive Office and other relevant NI Departments consider any proposals for amendments to the Irish equality legislation where they highlight a risk of divergence of rights or an opportunity for voluntary alignment to strengthen rights and reflect international human rights standards and best practice.

We recommend that the UK Government introduce amendments into Parliament to amend any enacted legislation that has included provisions limiting the application of section 3 of the Human Rights Act to remove that limitation.

We recommend that the UK Government introduce legislation into Parliament to amend the Elections Act to restore the rights of all EU citizens to vote in local elections in Northern Ireland and to ensure compliance with Article 2 WF.

We recommend that the European Union should review current arrangements as regards the rights of UK citizens who were born and residing in NI who move to EU Member States to vote in local elections in that Member State.

We recommend that the UK Government introduce legislation to repeal the Safety of Rwanda Act or to amend it to remove provisions that do not comply with Article 2 WF or the Human Rights Act.

We recommend that, in the interests of transparency, the Government publish details of its account of retained EU law, including details on the methodology used to identify relevant issues.

We recommend that the Government ensure that the Explanatory Notes for any draft legislation impacting on Northern Ireland explicitly state, in detail, whether the Government considers that Article 2 WF is engaged by the proposals and if so, how the draft legislation respects the keeping pace and non-diminution aspects of Article 2 WF.

We recommend that the Executive Office and other relevant NI Departments consider any proposals for amendments to the Irish equality legislation where they highlight a risk of divergence of rights or an opportunity for voluntary alignment with international human rights standards and best practice.

We recommend that the NI Executive and relevant NI Departments bring into force the necessary measures to comply with the requirements set by the Pay Transparency Directive EU Directive 2023/970 by June 2026.

We agree with the ECNI and NIHRC recommendation that all relevant portions of the Pay Transparency Directive should be transposed into Northern Ireland law, further to obligations in the WF.

We recommend that the Government of Ireland legislates to provide for non-transferable parental leave as required under the Work-Life Balance Directive.

We recommend that the Department for the Economy, as a matter of voluntary alignment, introduce legislation mirroring the provisions of the Work-Life Balance Directive where these strengthen rights and reflect international human rights standards insofar as they are not part of Northern Ireland law.

We recommend the Department for the Economy consider the possible need for a remote working strategy in Northern Ireland to avoid divergence of rights on the island of Ireland where this strengthens rights and reflects international human rights standards and best practice. The Department for the Economy in considering the need for this strategy should consider any relevant EU law developments in this area.

We recommend that the Department for the Economy should ensure that NI law voluntarily aligns with the requirements of the Gender Balance on Boards Directive where these strengthen rights and reflect international human rights standards and best practice.

We recommend the Department for the Economy commence sections 1-3 of the Domestic Violence (Safe Leave) Act 2022.



We recommend the Government of Ireland amend the Work Life Balance and Miscellaneous Provisions Act 2023 to provide for ten days paid domestic violence leave as to be provided for under the Northern Ireland legislation.

We recommend that the NI Department of Health and NI Department of Justice consider any lessons learnt from the Irish experience under the Domestic, Sexual and Gender-Based Violence Agency Act 2023 to determine if it demonstrates strengthened rights and reflects international human rights standards and best practice.

We recommend that the NI Department of Justice monitor possible new EU initiatives in the areas of anti-trafficking and violence against women which may offer opportunities to adopt policies which strengthen rights and reflect international human rights standards and best practice.

We recommend that the Northern Ireland Executive and the Government of Ireland consider how to ensure more systematic mutual consideration of legal developments in both jurisdictions to avoid divergence of rights on the island of Ireland post-Brexit, to facilitate equivalence, to ensure consideration of international human rights standards and best practice and to strengthen rights and equality.

We recommend that the Irish Department for Children, Equality, Disability, Integration and Youth include proposals to amend Irish law on 'religious belief' to include 'religion or belief' to bring it into line with EU law.

We recommend that the Government of Ireland and NI Executive consider legislative proposals as regards a ban on conversion therapy that takes into consideration any EU developments in this area and ensures that any published legislative proposals strengthen rights and reflect international human rights standards and best practice.

We recommend that the Government of Ireland include proposals to amend the equality acts provisions on the religious ethos exemption to bring them into line with EU standards.

We recommend the NI Executive draft legislation to give effect to the standards as are provided for in Ireland in its implementation of the European Accessibility Act as a matter of voluntary alignment where these strengthen rights and reflect international human rights standards and best practice.

We recommend the Government of Ireland consider as part of its EU Adequate Minimum Wage Directive Action Plan, legislation on the statutory recognition of trade unions, bearing in mind the Northern Ireland model.

We recommend the NI Executive and relevant departments conduct a review on why collective bargaining coverage remains so low in Northern Ireland.

We recommend that, as a matter of voluntary alignment with good practice, the Northern Ireland Executive and UK Government consider the need to introduce reporting requirements mirroring those in the EU Corporate Sustainability Reporting Directive, where these strengthen rights and reflect international human rights standards and best practice.

We recommend that the NI Executive, relevant NI departments and others, address gaps in equality data, ensure where possible that equality data is comparable with international frameworks including at EU level, and consider any examples of best practice from the EU Equality Data Collection guidance and from any developments on a National Equality Data Strategy in Ireland.

We recommend that the EU and UK Government provide for a Northern Ireland representative on the EU Equality Data Subgroup.

We recommend the NI Executive review Northern Ireland public interest disclosure legislation in light of the review in Great Britain and the changes in Ireland as a result of implementing the EU Whistleblowing Directive, with a view to amending legislation to strengthen rights and reflect international human rights standards and best practice, in particular to expand the scope of people protected and to require companies to adopt internal reporting channels.

We recommend that the ECNI and NIHRC conduct an analysis to determine if the Gender Balance on Boards Directive amends or replaces an Annex 1 directive.

We recommend that the UK Government, NI Executive and relevant departments bring into force the necessary measures to comply with any requirements set by the Equality Bodies Directives on gender equality in the workplace and on equal treatment in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation and gender equality in social security and goods and services, further to obligations in the WF.

We recommend that the NI Executive and relevant departments implement the standards in the Violence Against Women and Domestic Violence Directive to the extent that these strengthen rights and reflect international human rights standards and best practice.

We recommend that the ECNI and NIHRC conduct an analysis to determine if the Violence Against Women and Domestic Violence Directive amends or replaces an Annex 1 directive.

We recommend that, as a matter of voluntary alignment, the UK Government, NI Executive ensures that NI law complies with the standards in EU Directive 2023/977 on exchange of information between law enforcement authorities and EU Directive 2022/211 on the protection of personal data, so as ensure continued cross border criminal justice cooperation, where this will strengthen rights and reflect international human rights standards and best practice.

We recommend that the UK Government, NI Executive and relevant departments review data protection standards as they relate to cross-border security and voluntarily align with EU standards where they strengthen rights and reflect international human rights standards and best practice.

We recommend the UK Government and the NI Executive ensure that EU standards are respected in cross-border cases in order to avoid divergence in the realisation of the right to privacy on the island of Ireland.

We recommend that the UK Government and the NI Executive ensure compliance with EU Regulations 2023/1182 and 2022/641 on rules relating to medicinal products.

We recommend that the UK Government and the NI Executive ensure that access to, and the prices of, medicines in NI, as well as individuals' control of personal medical data in NI, match any revised EU standards in order to avoid divergence in the realisation of the right to health on the island of Ireland to the extent that these strengthen rights and reflect international human rights standards and best practice. This may involve amendments of the current legislative frameworks governing those topics.

We recommend that the UK Government and NI Executive implement the standards in the Adequate Minimum Wages Directive, as a matter of voluntarily alignment, to the extent that these strengthen rights and reflect international human rights standards and best practice.

We recommend that the ECNI and NIHRC conduct an analysis to determine if the Adequate Minimum Wages Directive amends or replaces an Annex 1 directive.

We recommend that the UK Government, NI Executive and relevant departments voluntarily report annually on how asylum and migration policies comply with requirements on equality and non-discrimination.

We recommend the NI Executive monitor EU proposals on the protection of people from manifestly unfounded or abusive court processes and victims' rights with a view to assessing whether Northern Ireland law needs amendment to strengthen rights and reflect international human rights standards and best practice.

We recommend voluntary alignment with EU proposals in these areas where they strengthen rights and reflect international human rights standards and best practice.

We recommend the NI Executive monitor EU proposals on the protection of workers, forced labour, corporate sustainability and the gig economy with a view to assessing whether Northern Ireland law needs amendment to reflect best international practice. We recommend voluntary alignment where they will strengthen rights and reflect international human rights standards and best practice.

We recommend the UK Government and relevant NI Departments monitor EU measures to combat trafficking in human beings and proposals to combat child sexual abuse online with a view to assessing whether Northern Ireland law needs amendment to reflect best international practice and deal with cross-border challenges. We recommend voluntary alignment in order to strengthen rights and to reflect international human rights standards and best practice.

We recommend that there needs to be continued monitoring and tracking of CJEU case law by the UK Government, NI Executive and NI Departments to ensure compliance with the Annex 1 Directives.

We recommend the Northern Ireland Executive, relevant NI Departments and others consider how to gather disaggregated equality data in relation to the full list of protected characteristics in Northern Ireland law in a way which not only meets the needs of NI but where possible is comparable with common international frameworks, including at EU level; it may be helpful to reflect on Ireland's plans to develop an Equality Data strategy.

We recommend that, the Department for Communities, and other relevant NI Departments, consider developments in EU Gender policy where this may raise issues of Article 2 WF requirements or with which Northern Ireland may wish to voluntarily align where it strengthens rights and reflects international human rights standards and best practice.

We recommend that the Executive Office consider developments in the EU Anti-Racism Action Plan and Roma Strategic Framework where this may identify best practice with which Northern Ireland may wish to voluntarily align where it strengthens rights and reflect international human rights standards.

We recommend that the Executive Office consider developments in the LGBTIQ Equality Strategy where this may identify examples of best practice with which Northern Ireland may wish to voluntarily align where they strengthen rights and reflect international human rights standards.

We recommend that the Executive Office consider developments in the Strategy for the Rights of Persons with Disabilities 2021-2030 where this may identify best practice with which Northern Ireland may wish to voluntarily align where they strengthen rights and reflect international human rights standards.

We recommend that the Northern Ireland Department of Justice review the EU strategy on victims' rights to identify examples of best practice that could strengthen rights and reflect international human rights standards and best practice.

We recommend relevant NI departments review EU policy developments aimed at protecting the rights of all children, including combating child poverty, securing vulnerable children's access to basic services, including children living in poverty, children with disabilities and special educational needs, children refugees and children in care, with a view to taking measures that strengthen rights and reflect international human rights standards and best practice.

We recommend relevant NI departments review the EU Strategy on combatting trafficking with a view to taking measures that strengthen rights and reflect international human rights standards and best practice.

## Appendix 1: Mapping Exercise 1: CJEU Case Law Mapping of Annex 1 Directives

CJEU case law mapping of Annex 1 directives is available by contacting the Equality Commission at [DMU@equalityni.org](mailto:DMU@equalityni.org)

## Appendix 2: Mapping of EU Directives and Regulations from 1 January 2022 to 31 August 2023

Mapping of EU directives and regulations from 1 January 2022 to August 2023 are available by emailing the Equality Commission at [DMU@equalityni.org](mailto:DMU@equalityni.org)

## Appendix 3: Notes on Methodology in Specific Chapters

### Chapter 4: Tracking EU Legal Developments since January 2022: Adopted and Proposed Directives and Regulations

We have used a rigorous methodology allowing us to update on and identifies EU legal developments from 1 January 2022 to 31 August 2023 regarding adopted or proposed EU law (directives and regulations), which relate to human rights and equality, and which did not apply in NI domestic law before the end of the Brexit transition period.

**To identify adopted EU directives**, we used the official EU online legal database EUR-lex,<sup>705</sup> using the following parameters:

- Domain: EU law and case-law
- Subdomain: Legal acts
- Type of act: All directives
- Date: From: 01/01/2022, To: 31/08/2023,
- Published in: English
- Search language: English
- Date of document: 2022 + 2023 (cut-off: 31/08/2023)

Results: 52 EU directives were adopted between 1 January 2022 and 31 August 2023 (37 directives in 2022 and 15 directives in 2023). After reading each directive in that sample, we then identified 15 EU directives that sufficiently relate to human rights and equality (and, therefore, fall under the scope of the 1998 Agreement), justifying further discussion in this report.

**To identify adopted EU regulations**, we also used the official EU online legal database EUR-lex,<sup>706</sup> using the following parameters:

- Domain: EU law and case-law
- Subdomain: Legal acts
- Type of act: All regulations

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705 To identify adopted EU legislation, we used EUR-lex which can be [accessed online](#)..

706 Ibid.

- Subject matter, 1st level:<sup>707</sup> Anti-discrimination; Area of freedom, security and justice; Asylum policy; Charter of Fundamental Rights; Economic, financial and technical cooperation with third countries; Economic, social and territorial cohesion; Education, vocational training and youth; Employment; Environment; Eur Foundation Improvement of Living and Working Conditions; European Convention on Human Rights; Fundamental rights; Health and safety; Human rights; Immigration and asylum policy; Judicial proceedings; Justice and home affairs; Non-discrimination on grounds of nationality; Pollution; Public health; Social Policy; Social provisions; Social security for migrant workers; Solidarity clause
- Date: From: 01/01/2022, To: 31/08/2023
- Published in: English
- Date of document: 2022 + 2023 (cut-off: 31/08/2023)
- Search language: English

Results: 138 EU regulations were adopted between 1 January 2022 and 31 August 2023, regarding topics potentially relevant to human rights and equality, for example, 86 regulations in 2022 and 52 regulations in 2023. After reading each regulation in that sample, we then identified 69 EU regulations that sufficiently relate to human rights and equality (and, therefore, fall under the scope of the 1998 Agreement), justifying further discussions in this report.

**To identify proposed EU legislation (EU directives and regulations),** we used the website of the European Commission (webpage ‘Published Initiatives’),<sup>708</sup> using the following parameters:

- Topic: Justice and Fundamental Rights (when looking at proposed legislation relevant to justice and fundamental rights, we only selected proposed legislation addressing fundamental rights for relevance sakes); Employment and Social Affairs; Migration and Asylum
- Type of Act: Legislative Proposals (when looking at legislative proposals, we only selected those that were ‘adopted’ by the Commission since they are more likely to enter into force soon,<sup>709</sup> and those that were adopted by the Commission during the period 1 January 2022 – 31 August 2023)

707 Unlike the search parameters used for directives (see above), we had to filter regulations by themes for efficiency purposes, since 745 regulations were adopted in 2023 (with the cut-off 31/08/2023); and 1185 regulations were adopted in 2022. Total: 1,930 regulations were adopted between 1 January 2022 and 31 August 2023, regardless of the subject matter.

708 To identify proposed EU legislation, we used: European Commission, ‘[Published Initiatives](#)’.

709 For a piece of EU law to be proposed, the European Commission must make a legislative proposal which must be adopted by the college of the members of the Commission. The transformation of proposed EU legislation into adopted EU legislation tends to then takes place when both the EU Parliament and the Council of the EU approve the proposal.



We verified that we had not missed any other important developments by using the website of the European Parliamentary Research Service and more specifically, the webpage ‘EU Legislation in Progress’.<sup>710</sup> This resulted in the addition of a few relevant pieces of proposed EU legislation.

Results: 17 EU directives and regulations were proposed and adopted by the Commission between 1 January 2022 and 31 August 2023 regarding topics relevant to human rights and equality.

**To identify the relevance of these legislative developments for Northern Ireland,** we then divided adopted and proposed EU legislation adopted between 1 January 2022 and 31 August 2023 regarding topics potentially relevant to human rights and equality, into two categories:

- EU law that could potentially amend and/or update an Annex 1 Directive;
- EU law that does not amend and/or update an Annex 1 Directive but that would have applied to NI, had the UK remained in the EU.

This categorisation allowed us to identify: which EU legal measures may trigger the dynamic alignment or the keeping pace requirement in Article 2 WF for Northern Ireland; and which EU legal measures, while not subject to dynamic alignment, may raise issues of possible divergence on the island of Ireland that could encourage Northern Ireland to voluntarily align to EU law standards as a matter of good practice.

## Chapter 8: Tracking EU Policy Developments and Initiatives since January 2022

We used the website of the European Commission and more specifically, the webpage ‘[Published Initiatives](#)’, using the following parameters:

- Topic: Justice and Fundamental Rights (when looking at proposed legislation relevant to justice and fundamental rights, we only selected proposed legislation addressing fundamental rights for relevance sakes); Employment and Social Affairs; Migration and Asylum
- Type of Act: Legislative Proposals (when looking at legislative proposals, we only selected those that were ‘adopted’ since they are more likely to enter into force soon,<sup>711</sup> and those that were adopted during the period 1 January 2022 – 31 August 2023)

710 To identify proposed EU legislation, we also used: European Parliamentary Research Service, ‘[EU Legislation in Progress](#)’.

711 The adoption of EU proposed legislation takes place when both the EU Parliament and the EU Council agree on the amendments initially suggested.

We verified that we had not missed any other important developments by using the website of the European Parliamentary Research Service and more specifically, the webpage '[EU Legislation in Progress](#)'. This resulted in us adding a few projects relating to Human Rights and Equality to the list below.

#### Chapter 6: CJEU Case Law that Relates to Each of the Windsor Framework Annex.1 Directives Delivered since January 2022

The mapping of CJEU case law was completed for the following Annex 1 Directives:

1. Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services
2. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)
3. Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
4. Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
5. Directive 2010/41/EU of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC
6. Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security

The date range for the search on each Annex 1 Directive was from 01/01/2022 to 31/08/2023 to provide an update on the previous mapping and report commissioned. All case law searches took place on the curia.eu database and all the cases were systematically analysed. To aid with review, a relevance key was implemented to highlight cases deemed Core © or Periphery (P) distinction so that a deeper analysis could be carried out on cases which were deemed core to the parameters of the report and the aforementioned Directions. This was implemented as case law was flagged whereby the Directive was either significant and pivotal to the judgment reached, or alternatively mentioned only in passing. However, for completeness and transparency of the process, all case law mapped has been included within Appendix 1 notwithstanding if it has been referenced to within the final report.



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