



**Equality Commission for Northern Ireland's  
response to the Department of Health's public  
consultation on proposed amendments to the  
Human Trafficking and Exploitation (Criminal  
Justice and Support for Victims) (Independent  
Guardian) Regulations (Northern Ireland) 2016  
("the 2016 Regulations")**

**February 2023**

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# 1. Introduction

- 1.1 The Equality Commission for Northern Ireland (ECNI) is an independent public body established under the Northern Ireland Act 1998. Its powers and duties derive from a number of equality statutes providing protection against discrimination on the grounds of age, disability, race, religion and political opinion, sex and sexual orientation. Its remit also includes overseeing the statutory duties on public authorities on the promotion of equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998.
- 1.2 Following the UK's exit from the EU, the UK Government has committed under Article 2 of the Ireland/Northern Ireland Protocol ('the Protocol') to ensuring that certain equality and human rights in Northern Ireland will continue to be upheld after Brexit. Since 1 January 2021, the Equality Commission, together with the Northern Ireland Human Rights Commission (NIHRC), has been given additional powers and responsibilities, as the 'dedicated mechanism', to ensure that the UK Government's commitment under Protocol Article 2 is met<sup>1</sup>.
- 1.3 The Commission welcomes the opportunity to respond to the Department of Health's consultation on its proposed amendments to the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) (Independent Guardian) Regulations (Northern Ireland) 2016 ("the 2016 Regulations"), and notes that the Department is seeking views on proposed amendments to this legislation which governs the Independent Guardian Service (IGS) for separated/unaccompanied asylum-seeking children, including those who may have been trafficked.
- 1.4 In summary, the Commission **recommends** that:
  - The Department of Health, in the development of any laws or policies in the area of human trafficking and exploitation, including the proposed amendments to the 2016 Regulations, considers the extent to which any change engages Protocol Article 2, and ensures that there is no diminution to the rights and safeguards which fall within its scope.
  - The 2016 Regulations, if amended, make clear in its Explanatory Memorandum what consideration has been given to ensuring compliance with Protocol Article 2.

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<sup>1</sup> Schedule 3 of the European Union (Withdrawal Agreement) Act 2020 amended the Northern Ireland Act 1998 to confer these additional powers on the Commission – to monitor, advise, report on and enforce the UK's adherence to its commitment.

## 2. Protocol Article 2

- 2.1 Under Protocol Article 2(1) the UK Government has committed to ensuring there is no diminution of rights, safeguards and equality of opportunity protections and provisions as set out in the relevant part of the Belfast (Good Friday) Agreement. There is also a commitment to ensuring that some of Northern Ireland's equality laws will keep pace with any changes the EU may make to amend or replace the EU equality laws, set out in Annex 1 to the Protocol<sup>23</sup>.
- 2.2 In addition, UK courts when considering the interpretation of any of the equality directives listed in Annex 1, must do so in conformity with any relevant case law of the Court of Justice of the EU (CJEU)<sup>45</sup>.
- 2.3 Significantly, neither the Northern Ireland Assembly, nor the Northern Ireland Executive, can act in a way that is incompatible with the UK Government's commitment. If they do, those actions can be challenged in courts, by way of judicial review proceedings.
- 2.4 This commitment therefore has significant implications for the work of the NI Assembly, Executive Ministers, and departments, including as they develop, consult on, introduce or amend legislation. They must ensure that legislation complies with the UK Government's commitment under the Protocol.
- 2.5 As there is no reference in the consultation document or the accompanying document on equality/human rights impact<sup>6</sup> as to what consideration has been given to compliance with Protocol Article 2, it is not clear what consideration, if any, the Department has given to ensuring compliance with Protocol Article 2. The Commission **recommends** that the Department of

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<sup>2</sup> Ireland/Northern Ireland Protocol Annex 1 Directives: [Gender Goods and Services Directive \(Gender\)](#): Directive 2004/113/EC of 13 December 2004, [Recast Directive \(Gender\)](#): Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, [Race Equality Directive \(Race\)](#): Directive 2000/43/EC of 29 June 2000, [Framework Directive \(religion and belief; age; sexual orientation; and disability\)](#): Directive 2000/78/EC of 27 November 2000, [Equal Treatment Directive: Self-employment \(Gender\)](#): Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010, [Equal Treatment Directive: Social security \(Gender\)](#): Directive 79/7/EEC of 19 December 1978.

<sup>3</sup> In addition, UK courts when considering the interpretation of any of the equality directives listed in Annex 1, including the Race Directive, must do so in conformity with any relevant case law of the Court of Justice of the EU (CJEU). UK Government, [Explainer Document](#): UK Government commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland, 7 August 2020

<sup>4</sup> The Northern Ireland Office has, in its 2020 [Explainer Document](#), stated that when a UK Court is considering the interpretation of any of the directives listed in Annex 1, this will be done in conformity with any relevant case law of the CJEU

<sup>5</sup> See: ECNI and NIHRC, [Working Paper: The Scope of Article 2\(1\) of the Ireland/Northern Ireland Protocol](#), 2022, at paras 4.9 – 4.15

<sup>6</sup> Equality Screening, Disability Duties and Human Rights Assessment for Proposed Legislative Amendments to the Independent Guardian Service (IGS)

Health, in the development of any laws or policies in the area of human trafficking and exploitation, considers, particularly at an early stage, the extent to which any change engages Protocol Article 2 and ensure that there is no diminution to the rights and safeguards which fall within its scope.

- 2.6 The Commission further **recommends** that the 2016 Regulations, if amended, should make clear in its Explanatory Memorandum what consideration has been given to ensuring compliance with Protocol Article 2.

### 3. EU Anti-Trafficking Directive

- 3.1 The Commission would also like to highlight the relevance of the EU Anti-Trafficking Directive in the context of any future amendments to the 2016 Regulations and the Department's consideration of the amended Regulations' compliance with Protocol Article 2.
- 3.2 The EU Anti-Trafficking Directive<sup>7</sup> is the fundamental EU legislative act addressing human trafficking. The Commission considers that the Anti-Trafficking Directive falls within the scope of Protocol Article 2 because it protects a subset of victims in Northern Ireland<sup>8</sup>.
- 3.3 The Commission **recommends** that the Department of Health ensures that any amendments to the 2016 Regulations do not reduce the rights of trafficked victims under the EU Trafficking Directive in a manner that is in breach of the UK Government's commitment under Protocol Article 2.
- 3.4 The Commission refers the Department to the joint ECNI-NIHRC *Table of EU Directives which underpin the Rights, Safeguards and Equality of Opportunity Provisions included in the Chapter of the Belfast ('Good Friday') Agreement of the same name and Implementing Domestic Legislation*<sup>9</sup>. This table lists the underpinning domestic legislation that has transposed the EU Anti-Trafficking Directive into law in Northern Ireland before the end of the Brexit transition period. The Department should ensure there is no reduction of these rights relating to this Directive that were in NI law on or before 31 December 2021 and which fall within the scope of Protocol Article 2.
- 3.5 The Commission notes that the purpose of this amendment is to improve access to support for child victims of trafficking, by seeking to amend the

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<sup>7</sup> [Directive 2011/36/EU](#) of the European Parliament and of the 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

<sup>8</sup> See [Joint NIHRC / ECNI Briefing Paper on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill](#). Paras 3.2. page 6

<sup>9</sup> ECNI and NIHRC, [EU Directives which underpin the Rights, Safeguards and Equality of Opportunity Provisions included in the Chapter of the Belfast \('Good Friday'\) Agreement of the same name and Implementing Domestic Legislation](#), 2022, pages 29-31

criteria required to act as an Independent Guardian, by removing the requirement for social workers to have five years' post-qualifying experience and to instead set a statutory requirement that Independent Guardians be qualified social workers who have completed their post-qualification assessed period of employment. The Commission also notes that the department is proposing to consider what other roles and professions may be appropriate for non-Independent Guardian roles within the IGS.

- 3.6 We would ask the Department to note that the following articles of the Anti-Trafficking Directive are of specific relevance to the provision of support for child victims of trafficking: Article 13 'General provisions on assistance, support and protection measures for child victims of trafficking in human beings'; Article 14 'Assistance and support to child victims'; Article 15 'Protection of child victims of trafficking in human beings in criminal investigations and proceedings'; and Article 16 'Assistance, support and protection for unaccompanied child victims of trafficking in human beings'<sup>10</sup>.

## 4. Conclusion

- 4.1 The Commission welcomes the opportunity to respond to the Department's consultation on the 2016 Regulations.
- 4.2 We trust that the information and recommendations set out in this response are of assistance.
- 4.3 Further information on the Commission's Protocol [Article 2 role and responsibilities](#) is also available on our website. More information on the Commission's view on the scope of Protocol Article 2 and the EU legal obligations which underpin the rights and safeguards in the relevant part of the Belfast (Good) Friday Agreement - which are subject to the no diminution commitment - can be found in the joint ECNI-NIHRC [working paper](#) on 'The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol'. We look forward to further engagement with the Department on these issues.

**February 2023**

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<sup>10</sup> [Directive 2011/36/EU](#) of the European Parliament and of the 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, Articles 13-16