



# **Submission of the NIHRC and ECNI to the European Affairs Committee Inquiry on UK-EU Data Adequacy Agreements**

**24 May 2024**

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## **Summary of Advice & Recommendations**

- 2.11** The Commissions advise that, as a fundamental right, the right to personal data protection falls within the scope of “civil rights” under the relevant chapter of the Belfast (Good Friday) Agreement. Further, as an essential element of the right to respect for private and family life in Article 8 ECHR, any right to personal data protection afforded by EU law, by which the UK was bound on 31 December 2020, falls within the scope of the non-diminution commitment in Windsor Framework Article 2.
- 3.10** The Commissions recommend that the Secretary of State reviews the provisions of Data Protection and Digital Information Bill and brings forward amendments as required to avoid a divergence of data protection standards between the UK and the EU that might result in the free flow of data between the UK and the EU being compromised, which could have a detrimental effect on cross-border justice in NI.
- 3.16** The Commissions recommend that the Secretary of State reviews the provisions of Data Protection and Digital Information Bill and brings forward amendments as required to avoid a divergence of data protection standards between the UK and the EU that might result in the free flow of data between the UK and the EU being compromised, in order to ensure there will be no impact on the ability of patients in NI to access vital cross-border and all-island health services.
- 4.10** The Commissions recommend the Secretary of State reviews Clause 14, new Articles 22A-D, and brings forward amendments as required to ensure no diminution of rights relating to automated decision-making as compared EU GDPR.
- 4.11** The Commissions recommend that the Committee request from the Secretary of State a written assurance on how access to cross-border

**services requiring the free-flow of data between the UK and the EU will be protected in light of Clause 14 of the Bill on automated decision-making.**

- 4.15 The Commissions recommend that the Secretary of State reviews Schedule 5 of the Bill and brings forward amendments as required to ensure no diminution of rights in NI relating to data transfer to third countries, measured against relevant EU GDPR standards.**
- 4.19 The Commissions recommend that the Secretary of State reviews Clause 2 and brings forward amendments as required to ensure no diminution of rights in NI in relation to the processing of personal data for scientific purposes.**
- 4.20 The Commissions recommend that the Secretary of State reviews the provisions of Clause 5 of the Bill and brings forward amendments as required to avoid a divergence of data protection standards between the UK and the EU that might result in the free flow of data between the UK and the EU being compromised.**
- 4. 23 The ECNI recommends that the Secretary of State for Science, Innovation and Technology makes all required amendments to the Data Protection (Fundamental Rights and Freedoms) (Amendment) Regulations 2023 so as to ensure compliance with Windsor Framework Article 2.**

## 1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (NIHRC) is a national human rights institution accredited with 'A' status by the United Nations. Pursuant to section 69(1) of the Northern Ireland Act 1998, the NIHRC reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI).
- 1.2 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. It also oversees 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.
- 1.3 NIHRC and ECNI (the Commissions), pursuant to section 78A(1) and 78B(1) of the Northern Ireland Act 1998 respectively, monitor the implementation of Article 2(1) of the Windsor Framework ('Windsor Framework Article 2') to the EU Withdrawal Agreement. Windsor Framework Article 2 is a UK Government commitment to ensure no diminution of certain rights, safeguards and equality of opportunity protections, as a result of the UK's withdrawal from the EU.
- 1.4 The UK has incorporated the Withdrawal Agreement, including the Windsor Framework, into domestic law through the EU (Withdrawal Agreement) Act 2020. Section 7A EU (Withdrawal) Act 2018 (EUWA) provides that all rights, obligations and remedies from the Withdrawal Agreement, including Windsor Framework Article 2, are recognised and available in domestic law.

- 1.5 The Commissions have been given additional powers to oversee the UK Government’s commitment under Windsor Framework Article 2.<sup>1</sup> The Commissions are responsible for providing advice to government and monitoring, supervising, enforcing and reporting on the ongoing implementation of this commitment.
- 1.6 This submission is made jointly by the NIHRC and ECNI, with one recommendation being made specifically by ECNI in line with its remits. The Commissions offer the following advice in accordance with the functions outlined above. The Commissions would be happy to engage further with the Committee, should that be helpful.

## **2.0 Data Protection and Windsor Framework Article 2**

- 2.1 Windsor Framework Article 2 requires the UK Government to ensure that no diminution of rights, safeguards and equality of opportunities contained in the relevant part of the Belfast (Good Friday) Agreement 1998 occurs as a result of the UK’s withdrawal from the EU. This includes an obligation to “keep pace” with any changes made to the six Annex 1 equality directives<sup>2</sup> which improve the minimum levels of protection available, after 1 January 2021.<sup>3</sup> For other EU obligations which underpin the rights, safeguards and equality of opportunity in Windsor

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<sup>1</sup> Sections 78A-E, Northern Ireland Act 1998.

<sup>2</sup> These are the Racial Equality Directive (Directive 2000/43/EC, ‘Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin’, 29 June 2000); the Employment Equality (Framework) Directive (Directive 2000/78/EC, ‘Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation’, 27 November 2000); the Gender Goods and Services Directive (Directive 2004/113/EC, ‘Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and services’, 13 December 2004); Gender Equality (Employment) Directive (Directive 2006/54/EC, ‘Directive of European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast)’, 5 July 2006); the Self-Employment Equality Directive (Directive 2010/41/EU, ‘Directive of the European Parliament and of the Council on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity’, 7 July 2010); and the Equality in Social Security Directive (Directive 79/7/EEC, ‘Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security’, 19 December 1978).

<sup>3</sup> Article 13, Windsor Framework to the UK-EU Withdrawal Agreement.

Framework Article 2, the UK Government commitment to ensure ‘no diminution’ is measured by the relevant EU standards as they were on the 31 December 2020.<sup>4</sup>

- 2.2 Following extensive research and legal analysis, the Commissions published a working paper setting out their view as to which EU laws and obligations underpin the rights and safeguards in the relevant part of the Belfast (Good Friday) Agreement.<sup>5</sup>
- 2.3 The Belfast (Good Friday) Agreement chapter entitled ‘Rights, Safeguards and Equality of Opportunity’ begins with a section on “Human Rights” containing a general commitment to the “civil rights and religious liberties of everyone in the community” and a non-exhaustive list of rights “affirmed in particular”, as well as a commitment to the incorporation of the ECHR with direct access to the courts and remedies for breach.
- 2.4 The High Court in NI has adopted a ‘generous and purposive’ approach in interpreting the relevant chapter of the Belfast (Good Friday) Agreement,<sup>6</sup> and concluded that a narrow interpretation of “civil rights” in the 1998 Agreement undermines the future-facing dimension of the non-diminution commitment.<sup>7</sup>
- 2.5 The Commissions consider that all EU law in force in NI on or before 31 December 2020 which underpins ECHR rights, falls within scope of the non-diminution commitment in Windsor Framework Article 2. The protection of personal data is a fundamental human right and a key

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<sup>4</sup> UK Government, ‘UK Government Commitment to No-diminution of Rights, Safeguards and Equality of Opportunity in Northern Ireland’ (NIO, 2020), at para 13.

<sup>5</sup> NI Human Rights Commission and Equality Commission NI, ‘Working Paper: The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol’ (ECNI & NIHRC, 2022).

<sup>6</sup> *In the matter of an application by Martina Dillon and others for Judicial Review* [2024] NIKB 11, at para 535.

<sup>7</sup> *In the matter of an application by Martina Dillon and others for Judicial Review* [2024] NIKB 11, at para 554. See also A case involving the removal of an asylum seeker from NI to Scotland - *In the Matter of an Application by Angesom for Judicial Review* [2023] NIKB 102, at para 107.

component of the right to privacy, enshrined in Article 8 of the ECHR. The European Court of Human Rights (ECtHR) has recognised that the protection of personal data is of fundamental importance to the realisation of the right to respect for private and family life, as guaranteed by Article 8 of the ECHR.<sup>8</sup>

- 2.6 The EU Charter of Fundamental Rights also continues to have relevance in the application and interpretation of those provisions of EU law which are relevant to the application of Windsor Framework Article 2. The NI High Court also affirmed the continued enforceability and relevance of the EU Charter for Windsor Framework Article 2.<sup>9</sup> The right to data protection is enshrined in Article 7 and Article 8 of the EU Charter of Fundamental Rights.
- 2.7 Data protection is given effect across a number of EU measures including the EU General Data Protection Regulation (EU GDPR), which is clear that “the protection of natural persons in relation to the processing of personal data is a fundamental right”.<sup>10</sup> As a Regulation, the EU GDPR is a binding legislative act that must be applied in its entirety across the EU in all Member States. Prior to exiting the EU, the UK further implemented the EU GDPR in domestic law with the Data Protection Act 2018. Section 1(2) of the Data Protection Act 2018 states that most processing of data is governed by the EU GDPR.<sup>11</sup> In 2023, the UK High Court confirmed that the UK GDPR is the retained version of the EU GDPR with amendments made to secure its political effectiveness,<sup>12</sup> read together with the Data Protection Act 2018.<sup>13</sup> The Commissions have

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<sup>8</sup> *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* (2015) ECHR 713, at para 137.

<sup>9</sup> *In the Matter of an Application by Aman Angsom for Judicial Review* [2023] NIKB 102, at para 93. See also *Secretary of State for Work and Pensions v AT* [2023] EWCA Civ 1307; *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NIKB 11.

<sup>10</sup> Recital 1, Regulation 2016/679/EU, ‘Regulation of the European Parliament and Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data’ (EU GDPR), 27 April 2016.

<sup>11</sup> Section 3(10), Data Protection Act 2018.

<sup>12</sup> Data Protection, Privacy and Electronic Communications (Amendments, etc) (EU Exit) Regulations 2019 (SI 2019/419).

<sup>13</sup> *The3million & Open Rights Group v Secretary of State for the Home Department* [2023] EWHC 713 (Admin), at para 9.



raised concerns about continued alignment in the context of recent changes as a result of the Data Protection (Fundamental Rights and Freedoms) (Amendment) Regulations 2023, which is discussed further below.<sup>14</sup>

- 2.8 Further to the EU GDPR, the EU has adopted additional laws that set out rules regarding the protection of personal data in specific contexts. These include the EU Data Protection Law Enforcement Directive,<sup>15</sup> the EU E-Privacy Directive<sup>16</sup> and rules regarding the processing of personal data by EU bodies and institutions.<sup>17</sup>
- 2.9 The EU E-Privacy Directive provides harmonisation across the EU Member States in terms of the requirement to ensure an equivalent level of protection of fundamental rights and freedoms, in particular the right to privacy and the right to confidentiality, with respect to the processing of personal data in the electronic communications sector.<sup>18</sup> Alongside the EU GDPR, the E-Privacy Directive protects the right to data protection by providing rights holders with specific privacy rights in the context of marketing calls, emails, cookies and similar technologies. The

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<sup>14</sup> See NI Human Rights Commission, 'Submission on the Data Protection and Digital Information Bill' (NIHRC, 2024), at para 1.6; Equality Commission NI, 'Submission on the Data Protection and Digital Information Bill' (ECNI, 2024), at para 2.4. In the ECNI's view, the alignment of the UK GDPR with the EU GDPR is subject to ECNI's view of the amendment made by the Data Protection (Fundamental Rights and Freedoms) (Amendment) Regulations 2023, discussed below.

<sup>15</sup> Directive 2016/680/EU, 'Directive of the of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data' (EU GDPR), 27 April 2016.

<sup>16</sup> Directive 2009/136/EC, 'Directive of the European Parliament and of the Council amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws', 25 November 2009.

<sup>17</sup> Regulation 2018/1725/EU, 'Regulation of the of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data', 23 October 2018.

<sup>18</sup> Recital 51, Directive 2009/136/EC, 'Directive of the European Parliament and of the Council amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws', 25 November 2009.

UK transposed the obligations via provisions including the Privacy and Electronic Communications (EC Directive) Regulations 2003. As the EU E-Privacy Directive lays down rules for the protection of the fundamental right to privacy in specific contexts, the Commissions consider it to fall within the relevant chapter of the Belfast (Good Friday) Agreement and therefore within scope of Windsor Framework Article 2.

- 2.10 The EU Data Protection and Law Enforcement Directive lays down safeguards for the protection of personal data in the context of law enforcement that are without prejudice to any of the EU GDPR rules, but extends them to the field of law enforcement. The UK took additional steps to incorporate the EU Data Protection and Law Enforcement Directive into UK law via Part 3 of the Data Protection Act 2018, which sets out rules on the processing of personal data for criminal law enforcement purposes.
- 2.11 **The Commissions advise that, as a fundamental right, the right to personal data protection falls within the scope of “civil rights” under the relevant chapter of the Belfast (Good Friday) Agreement. Further, as an essential element of the right to respect for private and family life in Article 8 ECHR, any right to personal data protection afforded by EU law, by which the UK was bound on 31 December 2020, falls within the scope of the non-diminution commitment in Windsor Framework Article 2.**

### **3.0 Question 1: What is your assessment of the existing adequacy arrangement underpinning data flows between the UK and the EU?**

- 3.1 After the UK’s exit from the EU, the free flow of data between the EU and the UK is currently made possible by the power of two data adequacy decisions by the EU which recognise the “essentially

equivalent level of protection” of personal data in the UK and the EU.<sup>19</sup> The data adequacy decisions are respectively under the EU GDPR<sup>20</sup> and under the EU Data Protection Law Enforcement Directive.<sup>21</sup>

- 3.2 The free flow of data between the UK and the EU, as guaranteed by the UK-EU data adequacy agreements, is of particular importance for NI. During the negotiations leading to the UK’s withdrawal from the EU, the UK and the EU recognised that the Belfast (Good Friday) Agreement 1998 required consideration and protection. Human rights and equality protections are at the heart of the Belfast (Good Friday) Agreement and are central to the peace process in NI. EU law has underpinned and contributed to many of those safeguards.
- 3.3 The Preamble to the Windsor Framework affirms that the Belfast (Good Friday) Agreement should be “protected in all its parts” and recognises that “cooperation between Northern Ireland and Ireland is a central part of the 1998 Agreement”. The UK Government and EU were also determined that the Windsor Framework, in its application, “should impact as little as possible on the everyday life of communities in both Ireland and Northern Ireland”.<sup>22</sup>
- 3.4 The specific circumstances of NI, such as the centrality of EU free movement law for maintaining an open border on the island and for providing a framework for human rights and equality in a post-conflict society,<sup>23</sup> means that NI is affected by the UK’s exit from the EU in more complex ways than the rest of the UK.

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<sup>19</sup> EU Commission, ‘Press Release: Data protection: Commission adopts adequacy decisions for the UK, 28 June 2021.

<sup>20</sup> Commission Implementing Decision (EU) 2021/1772, pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom, 28 June 2021.

<sup>21</sup> Commission Implementing Decision (EU) 2021/1773, pursuant to Directive (EU) 2016/680 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom, 28 June 2021.

<sup>22</sup> Preamble, Windsor Framework to the UK-EU Withdrawal Agreement.

<sup>23</sup> NI Human Rights Commission and Equality Commission NI, ‘Working Paper: The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol’ (ECNI & NIHRC, 2022), at para 2.3.

- 3.5 The Commissions have published a significant amount of research on the impact of Brexit in NI, which details the complexity of life on the island and the various ways in which the enjoyment of rights has changed for various communities after the UK’s withdrawal from the EU.<sup>24</sup> The free flow of data between NI, the UK and Ireland, as facilitated by the UK-EU data adequacy agreements, is an important mitigating factor for the functioning of all-island services and facilities in NI.
- 3.6 The data adequacy decisions are vital for facilitating the cross-border aspects of health, education, justice, policing, and environmental protection on the island of Ireland. All these areas require the safe transfer, storage and processing of vast amounts of personal data across the border, including sensitive personal data, therefore any disruptions to the UK-EU data adequacy agreements would be detrimental. This submission is limited to examples of the Commissions’ concerns about the effect of a possible disruption or loss of the data adequacy agreements to the areas of cross-border justice and cross-border health as two particular examples.

### **Cross-Border Justice**

- 3.7 In 2019, the NIHRC and the Irish Human Rights and Equality Commission published independent research which emphasised that “Data sharing has become an essential tool for justice and security cooperation between the EU and UK.”<sup>25</sup> The NIHRC has previously underlined the

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<sup>24</sup> See Amanda Kramer, Rachael Dickson and Anni Pues, ‘Evolving Justice Arrangements Post-Brexit’ (IHREC and NIHRC, 2019); Tamara Hervey, ‘Brexit, Health and its potential impact on Article 2 of the Ireland/Northern Ireland protocol’ (NIHRC, 2022); Sylvia de Mars & Charlotte O’Brien, ‘Frontier Workers and their Families: Rights after Brexit’ (NIHRC, 2023); Alison Harvey, ‘Article 2 of the Windsor Framework and the rights of refugees and persons seeking asylum’ (NIHRC, 2023); Alison Harvey, ‘Human Trafficking and Article 2 of the Ireland/Northern Ireland Protocol’ (NIHRC, 2022); 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’ (ECNI, NIHRC and IHREC, 2022); Pivotal, ‘Impact of Brexit on Minority Ethnic and Migrant People in Northern Ireland (ECNI, 2023); Katharine A. M. Wright, Ruth McAreevey and Rebecca Donaldson, ‘Impact of Brexit on Women in Northern Ireland’ (ECNI, 2024).

<sup>25</sup> Amanda Kramer, Rachael Dickson and Anni Pues, ‘Evolving Justice Arrangements Post-Brexit’ (IHREC and NIHRC, 2019).

importance of free flow of data for cross-border cooperation on policing, security and criminal justice.<sup>26</sup> The ability to share information in relation to crime prevention and criminal cases is an important component of protecting and promoting human rights in NI and to ensure justice is not unduly delayed for suspects or victims of crime.<sup>27</sup> Cross-border justice requires the sharing of personal data, including sensitive personal data, therefore maintaining equally adequate standards of data protection in both jurisdictions is a corner stone of the free flow of data.<sup>28</sup>

3.8 The NIHRC has called for the facilitation of data sharing between the UK and the EU to be based on mutual trust in the legal process and to encompass a commitment to the rule of law, the protection of human rights and, as part of this, a commitment to data protection standards and effective regulation of privacy rights.<sup>29</sup>

3.9 Both the NIHRC and ECNI stress the importance of the continuation of data sharing arrangements for the facilitation of speedy information sharing and retrieval in the context of cross-border justice cooperation.<sup>30</sup> Any diminution in data protection rights resulting in a loss of data adequacy recognition would result in delays in investigations and proceedings as well as engaging Windsor Framework Article 2.

3.10 **The Commissions recommend that the Secretary of State reviews the provisions of Data Protection and Digital Information Bill and brings forward amendments as required to avoid a divergence of data**

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<sup>26</sup> NI Human Rights Commission, 'Submission to NI Affairs Committee Inquiry on Cross-border Cooperation on Policing, Security and Criminal Justice after Brexit' (NIHRC, 2020).

<sup>27</sup> NI Human Rights Commission, 'Brexit and the Implications for Justice Co-operation' (NIHRC, 2019).

<sup>28</sup> Commission Implementing Decision (EU) 2021/1773, pursuant to Directive (EU) 2016/680 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom, 28 June 2021, at para 5.

<sup>29</sup> NI Human Rights Commission, 'Submission to NI Affairs Committee Inquiry on Cross-border Cooperation on Policing, Security and Criminal Justice after Brexit', (NIHRC, 2020), at para 3.12.

<sup>30</sup> See NI Human Rights Commission, 'Submission to NI Affairs Committee Inquiry on Cross-border Cooperation on Policing, Security and Criminal Justice after Brexit', (NIHRC, 2020), at para 3.11.

**protection standards between the UK and the EU that might result in the free flow of data between the UK and the EU being compromised, which could have a detrimental effect on cross-border justice in NI.**

## **Cross-Border Health**

- 3.11 The free flow of data, currently guaranteed by the UK-EU data adequacy agreements, is of crucial value for healthcare in NI, by virtue of enabling patients to access all-island and cross-border health services. The integrated nature of health provision on the island of Ireland means that the UK's withdrawal from the EU affects Northern Ireland (and Ireland) in a way in which other parts of the UK (and other EU Member States) are not affected.
- 3.12 All-island health services and cross-border health services are two different aspects of the integrated health system on the island of Ireland. Examples of key all-island health services include the paediatric cardiac surgery service in Children's Health Ireland at Crumlin Hospital in Dublin, which enables infants, children and their families to travel from NI to Ireland to receive specialised care. Another example are the cross-border emergency cardiology service and the cross-border radiotherapy service in Altnagelvin Hospital in Derry/Londonderry, which allow patients from Ireland to travel to NI to access medical treatment. Similarly, the Middleton Centre for Autism based in Armagh, and the Human Donor Milk Bank in based Enniskillen work with carers and families from across the island.<sup>31</sup> Examples of cross-border health services are those facilitated by the Cooperation and Working Together health and social care partnership between Ireland and NI, such as the Out-of-Hours services in border areas allowing patients to access health

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<sup>31</sup> Health Service Executive, 'EU and North-South Unit'. Available at: <https://www.hse.ie/eng/about/who/national-services/eu-and-north-south-unit/>. See also Department of Health, 'Cross border services and reciprocal healthcare FAQs'. Available at: <https://www.health-ni.gov.uk/cross-border-services-and-reciprocal-healthcare-faqs>

services closer to their homes, even if these services are in another jurisdiction.<sup>32</sup>

- 3.13 In 2022, the NIHRC published research on the impact of the UK's withdrawal from the EU on the right to health in NI.<sup>33</sup> The research identified potential gaps in accessing the all-island health services and facilities for particular communities, such as frontier workers and irregular migrants, as well as their families.
- 3.14 The NIHRC remains concerned about the lack of clarity and the legal footing for access to all-island health services.<sup>34</sup> Further research has demonstrated that access to all-island health services depends on the safe sharing and storing of very sensitive personal information, including health information.<sup>35</sup> Therefore, maintaining equally robust standards of data protection and preserving and continuing the data adequacy agreements enabling the free flow of data between the UK and the EU are key to ensuring that people in NI are able to access the highest standards of health care in a timely way.<sup>36</sup>
- 3.15 The Commissions stress the importance of the continuation of data sharing arrangements for the facilitation of cross-border health services. Any diminution of data protection rights resulting in loss of adequacy status may hinder access to important all-island and cross-border healthcare, as well as engaging Windsor Framework Article 2.

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<sup>32</sup> Health Service Executive and Health and Social Care in Northern Ireland, 'Cooperation and Working Together'. Available at <https://cawt.hscni.net/>

<sup>33</sup>Tamara Hervey, 'Brexit, health and its potential impact on Article 2 of the Ireland/Northern Ireland Protocol' (NIHRC, 2022).

<sup>34</sup> NI Human Rights Commission, 'Briefing Paper & Draft Recommendations on Brexit, Health and its potential impact on Article 2 of the Windsor Framework', (NIHRC, 2023).

<sup>35</sup> A similar argument was presented by recent research on cross-border transfers of personal data commissioned by the NI Department for the Economy. See Orla Lynskey, Maria Helen Murphy and Katherine Nolan, 'Understanding the risks to cross border transfer of personal data: EU-UK Data Adequacy' (Department for the Economy, 2023), at 20.

<sup>36</sup> Commission Implementing Decision (EU) 2021/1772, pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom, 28 June 2021, at para 5.

3.16 **The Commissions recommend that the Secretary of State reviews the provisions of Data Protection and Digital Information Bill and brings forward amendments as required to avoid a divergence of data protection standards between the UK and the EU that might result in the free flow of data between the UK and the EU being compromised, in order to ensure there will be no impact on the ability of patients in NI to access vital cross-border and all-island health services.**

#### **4.0 Question 3a: Do you have any concerns about the direction of travel of the UK Government’s data policies as set out in the Data Protection and Digital Information Bill, and about the potential for greater divergence from EU data standards?**

4.1 The Commissions have published detailed analyses of the Data Protection and Digital Information Bill containing a non-exhaustive list of concerns regarding the impact of the Bill on data protection rights, standards and safeguards in NI.<sup>37</sup> In this submission we reiterate the recommendations we have already made to the UK Government.

4.2 The Commissions share concerns regarding potential diminutions of rights contrary to Windsor Framework Article 2 if the Bill should become law. The NIHRC is also concerned about the impact that divergence in data protection rights could have on the data adequacy agreements currently in place.

4.3 The result of the Data Protection and Digital Information Bill<sup>38</sup> changing the data protection standards in the UK would be divergence in data

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<sup>37</sup> NI Human Rights Commission, ‘NIHRC Briefing on the Data Protection and Digital Information Bill’ (NIHRC, 2024); Equality Commission for NI, ‘Submission on the Data Protection and Digital Information Bill’ (ECNI, 2024).

<sup>38</sup> All references to the Bill are references to the version of the Bill as it was presented to the House of Lords.



protection standards between the UK and the EU. Such divergence may result not only in diminution of established data protection rights, contrary to the commitment in Windsor Framework Article 2, but could also put a strain on the continuation of data adequacy agreements, which would in turn impact access to all island services, such as health care, and justice and policing cooperation. Therefore, maintaining the current standards of data protection in the UK is of paramount importance.

- 4.4 The Commissions are concerned about changes to standards in relation to automated decision-making in terms of their compliance with Windsor Framework Article 2 and the rights of individuals. As set out above, the NIHRC has also raised concerns about the impact a divergence between the UK and the EU could have on both the rights of individuals and on the data adequacy agreements. EU GDPR and UK GDPR currently offer the same safeguards from the impact of automated decision making and prohibit automated decision-making based on special categories of data.<sup>39</sup> The Data Protection and Digital Information Bill, however, would legalise fully automated decision-making based on the processing of the broader category of personal data.<sup>40</sup>
- 4.5 The Commissions are concerned about the effect of limiting the protection from automated decision-making only to the processing of sensitive personal data on the rights of individuals. The weakening of current safeguards from the impact of automated decision making would engage the no diminution of rights commitment under Windsor Framework Article 2.
- 4.6 The Commissions are concerned about whether the UK providing weaker data protection safeguards on automated decision-making than

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<sup>39</sup> Article 22, Regulation 2016/679/EU, 'Regulation of the European Parliament and Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data' (EU GDPR), 27 April 2016.

<sup>40</sup> New Articles 22A-22D, in Clause 14, Data Protection and Digital Information Bill.

the EU could put undue pressure on the stability of the UK-EU data adequacy agreements, as equally strong and robust data protection regimes are a prerequisite to the agreement existing.

- 4.7 The ECNI has raised concerns relating to Clause 9, which widens the facility for a data controller to refuse a data request, thereby restricting the subject's right to access the information and to understand how their personal data is processed and for what purposes.<sup>41</sup> It has also raised concerns regarding Clause 20 and 21 which it considers may weaken the safeguards relating to the processing of high-risk data.<sup>42</sup>
- 4.8 Further, the ECNI considers that the changes brought about by Clause 128 and Schedule 11 of the Bill (which, if passed into law, will allow the Department for Communities to obtain information about bank accounts into which social security benefit payments are paid)<sup>43</sup> may disproportionately impact people with certain protected characteristics and therefore weaken the protections that were afforded to individuals under Article 6 of the EU GDPR prior to the end of the Brexit transition period.
- 4.9 As part of the UK Independent Mechanism tasked with monitoring the implementation of the UN Convention on the Rights of People with Disabilities (UN CRPD), the Commissions, together with the Equality and Human Rights Commission and the Scottish Human Rights Commission, submitted a joint report to the UN CRPD Committee in their inquiry into the UK, where concerns about the Data Protection and Digital Information Bill granting powers to the Department for Work and Pensions to access benefit claimants' bank accounts when monitoring

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<sup>41</sup> Clause 9, Data Protection and Digital Information Bill.

<sup>42</sup> Clause 20 and Clause 21, Data Protection and Digital Information Bill.

<sup>43</sup> Schedule 11, Data Protection and Digital Information Bill.

for fraud and error were brought up.<sup>44</sup> The CRPD Committee expressed significant concerns regarding this power in their follow up report to the UK.<sup>45</sup>

- 4.10 **The Commissions recommend the Secretary of State reviews Clause 14, new Articles 22A-D, and brings forward amendments as required to ensure no diminution of rights relating to automated decision-making as compared EU GDPR.**<sup>46</sup>
- 4.11 **The Commissions recommend that the Committee request from the Secretary of State a written assurance on how access to cross-border services requiring the free-flow of data between the UK and the EU will be protected in light of Clause 14 of the Bill on automated decision-making.**
- 4.12 Another area of concern is divergence between the UK and the EU regarding transfer of data to third countries. Currently Article 45, UK GDPR and EU GDPR have the same rules on transfers, including those made without specific authorisation and on the basis of adequacy regulations.<sup>47</sup> The UK and the EU have to consider the same principles before transferring data to third countries, and these principles include “the rule of law, respect for human rights and fundamental freedoms”, among other elements, in the third country.<sup>48</sup>
- 4.13 The Commissions are concerned that the Data Protection and Digital Information Bill could lower data protection standards by requiring less rigorous considerations for third country data transfers than those

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<sup>44</sup> Letter from the UK Independent Mechanism to the UN Committee on the Rights of Persons with Disabilities, 1 March 2024, at para 21.

<sup>45</sup> See CRPD/C/GBR/FUIR/1, ‘UN CRPD Committee Report on follow-up to the inquiry concerning the United Kingdom of Great Britain and Northern Ireland’, 22 March 2024, at para 84.

<sup>46</sup> Here we mean EU GDPR as it was on 31 December 2020. See above at footnote 14 for more details.

<sup>47</sup> Article 45(2), Regulation 2016/679/EU, ‘Regulation of the European Parliament and Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (EU GDPR)’, 27 April 2016.

<sup>48</sup> Article 45(2), Regulation 2016/679/EU, ‘Regulation of the European Parliament and Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (EU GDPR)’, 27 April 2016.

specified by the UK GDPR, pulling it out of alignment with the EU GDPR.<sup>49</sup> A key requirement removed is consideration of how public authorities in a third country would access personal and potentially sensitive data. This may allow for data subjects' rights to privacy to be compromised, without adequate safeguards in place and opportunities for independent enforcement and redress. This may also engage the commitment to no diminution of rights under Windsor Framework Article 2.

- 4.14 The Commissions are also concerned that if the Bill results in the UK having weaker standards on protection of personal data when transferring the data to third countries, this may threaten the UK-EU data adequacy agreements, which are based on both jurisdictions having equally strong data protections in place.
- 4.15 **The Commissions recommend that the Secretary of State reviews Schedule 5 of the Bill and brings forward amendments as required to ensure no diminution of rights in NI relating to data transfer to third countries, measured against relevant EU GDPR standards.**
- 4.16 A third area of concern is the UK and the EU potentially having different standards for the lawful processing of personal data for scientific research. Currently UK GDPR and EU GDPR have the same rules allowing for the lawful processing of both personal data and special categories of personal data for specified, explicit and legitimate purposes, including scientific research, provided that safeguards are put in place.<sup>50</sup> The Data Protection and Digital Information Bill, however, defines “scientific research” much more broadly as “any research that can reasonably be

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<sup>49</sup> Schedule 5, Data Protection and Digital Information Bill.

<sup>50</sup> Article 9(2)(j), Regulation 2016/679/EU, 'Regulation of the European Parliament and Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data' (EU GDPR), 27 April 2016.

described as scientific, whether publicly or privately funded and whether carried out as a commercial or non-commercial activity”.<sup>51</sup>

- 4.17 The Commissions are concerned about the Data Protection and Digital Information Bill might lower current UK data protection standards by allowing for the processing of personal data when necessary for the purposes of scientific research to be conducted in a way that causes a diminution of data protection rights contrary to the commitment under Windsor Framework Article 2.
- 4.18 The Commissions have concerns about a divergence of data protection standards between the UK and the EU on the processing of personal data for scientific research that might result in the free flow of data between the UK and the EU being compromised.
- 4.19 **The Commissions recommend that the Secretary of State reviews Clause 2 and brings forward amendments as required to ensure no diminution of rights in NI in relation to the processing of personal data for scientific purposes.**
- 4.20 **The Commissions recommend that the Secretary of State reviews the provisions of Clause 5 of the Bill and brings forward amendments as required to avoid a divergence of data protection standards between the UK and the EU that might result in the free flow of data between the UK and the EU being compromised.**
- 4.21 The Commissions will continue to monitor the implications of the cross-over between this Bill and other legislative developments. We note The Data Protection (Fundamental Rights and Freedoms) (Amendment) Regulations 2023. which amended the definition of fundamental rights and freedoms in the UK GDPR and the Data Protection Act 2018 refer to

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<sup>51</sup> Clause 2, Data Protection and Digital Information Bill.

those set out under the ECHR as opposed to the EU Charter of Fundamental Rights. The EU Charter applied in Northern Ireland up to 31 January 2020 and contains a specific right that governs the use of personal data. The EU GDPR was promulgated under, inter alia, Article 8 of the EU Charter of Fundamental Rights (see Recital 1, EU GDPR).

- 4.22 The ECNI considers that removing the EU Charter of Fundamental Rights from the range of applicable fundamental rights in the Data Protection Act 2018 may diminish the rights protection provided on or before the end of the Brexit transition period. Further, the ECNI considers there may also be a diminution of rights protections in the fact that an individual could not now rely on case law of the CJEU in relation to those rights. The ECNI therefore consider that these Regulations amount to a potential breach of Windsor Framework Article 2.
- 4.23 **The ECNI recommends that the Secretary of State for Science, Innovation and Technology makes all required amendments to the Data Protection (Fundamental Rights and Freedoms) (Amendment) Regulations 2023 so as to ensure compliance with Windsor Framework Article 2.**

## Contact us

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