



**Submission of the NIHRC and ECNI
to the Introductory Inquiry into the
Operation of the Protocol
by the House of Lords Sub-Committee on
the Protocol on Ireland/Northern Ireland**

14 June 2021

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1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (the NIHRC), pursuant to section 69(1) the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI).
- 1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding but provide further guidance in respect of specific areas.
- 1.3 The Equality Commission for Northern Ireland (ECNI) is an independent public body established under the Northern Ireland Act 1998. Its powers and duties derive from a number of equality statutes providing protection against discrimination on the grounds of age, disability, race, religion and political opinion, sex and sexual orientation. Its remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998.
- 1.4 The EU (Withdrawal Agreement) Act 2020 empowers the Commissions with new functions to monitor, advise, report on, promote, and enforce the implementation of Article 2(1) of the Ireland/Northern Ireland Protocol ('the Protocol') to the UK-EU Withdrawal Agreement.
- 1.5 In accordance with these functions, the Commissions provide this joint submission to the Introductory Inquiry into the Operation of the Protocol on Ireland/Northern Ireland of the European Affairs Sub-Committee on the Protocol.¹
- 1.6 The Commissions welcome this opportunity to provide written evidence to the introductory inquiry and are available to provide an oral briefing if this could provide further assistance to the Committee. In this briefing, the Commissions have focused on addressing only those questions in the Sub-Committee's call for evidence which fall within the scope of our respective roles and remit.

¹ House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, 'Introductory Inquiry into the operation of the Protocol on Ireland/Northern Ireland', available at <https://committees.parliament.uk/work/1207/introductory-inquiry-into-the-operation-of-the-protocol-on-irelandnorthern-ireland/>.

2.0 Positive impact of the Protocol

- 2.1 Question 4 of the call for evidence requests evidence on whether the Protocol has had any positive impact for NI.
- 2.2 Human rights and equality protections are at the heart of the Belfast (Good Friday) Agreement 1998 and are central to the peace process in NI. The importance of protecting the 1998 Agreement and its human rights and equality commitments was accepted in negotiations leading to the UK's withdrawal from the EU.² This is reflected in the Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement 2020 ('the Protocol').³
- 2.3 The Commissions consider that the commitment by the UK Government in Article 2 of the Protocol is a positive development as it recognises the centrality of equality and human rights in the Belfast (Good Friday) Agreement and the durability of the peace process. In addition, the establishment, resourcing, and new powers and duties of the Commissions as the dedicated mechanism to oversee the implementation of this commitment is another positive development (see Appendix 1 hereto).⁴
- 2.4 This enables the Commissions to hold the UK Government to account in terms of the implementation of the Article 2 commitment. It also provides individuals with rights to challenge the actions of the NI Executive, NI Ministers, and the NI Assembly should they breach this commitment. A further positive aspect of the role of the dedicated mechanism is its close working with the Irish Human Rights and Equality Commission on matters relevant to Article 2 that have an island of Ireland dimension. The Commissions' also have the power to directly raise matters of concern with the Specialised Committee on the implementation of the Protocol.
- 2.5 As a result of being granted these new functions, the Commissions have commenced engagement with a range of stakeholders, including equality and human stakeholders, to raise awareness of the rights of individuals in respect of Article 2 and the role and remit of the dedicated mechanism. However, as noted below, there are limitations to the Article 2 commitment.

² Joint report from the Negotiators of the EU and UK Government progress during Phase 1 of Negotiations under Article 50 TEU on the UK's Orderly Withdrawal from the EU, 8 December 2017, para 42 and 53.

³ Preamble to the Protocol on Ireland/Northern Ireland to the UK-EU Withdrawal Agreement 2020.

⁴ Sections 78A-78E, Northern Ireland Act 1998.

Scope of Article 2

2.6 In Article 2 of the Protocol, the UK Government has committed to ensuring 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.

2.7 The 'non-diminution' guarantee commits the UK Government to ensuring there is no lowering of the rights set out in the relevant chapter of the Belfast (Good Friday) Agreement (as set out in Appendix 1) and which are underpinned by EU obligations, including EU treaties, directives and regulations, in place at the end of the transition period.

2.8 Annex 1 of the Protocol sets out six EU equality Directives (as set out in Appendix 1). Under the Protocol, the UK Government has committed not only to ensuring there is no diminution of the rights contained in the Annex 1 Directives but also that NI equality law will dynamically align with any enhancements made by the EU to these rights, after 1 January 2021.⁵

2.9 Article 2 binds the UK Government as a matter of international law and has been given domestic legal effect through the EU (Withdrawal Agreement) Act 2020. Ministers and policy-makers, in the NI Assembly and Westminster, must consider human rights and equality issues in the development of policy and the passage of legislation affecting Northern Ireland.⁶

2.10 The Commissions are currently undertaking work to examine the scope of Article 2, however, it will be the courts that will ultimately interpret the parameters of Article 2 of the Protocol.

⁵ Article 13, Protocol on Ireland/Northern Ireland to the UK-EU Withdrawal Agreement 2020.

⁶ Section 24(1)(aa), Northern Ireland Act 1998; Section 7A, EU (Withdrawal) Act 2018.

3.0 Role of the NI Executive in relation to the Protocol

- 3.1 Question 7 of the call for evidence asks about what action the NI Executive should take in relation to the Protocol and highlights in particular its engagement with the UK Government, the EU and the Government of Ireland.
- 3.2 The Protocol covers a range of complex issues and the Commissions are mindful that its implementation will require the NI Executive and departments to build knowledge and understanding on the full range of issues covered by it. In the context of the wider significant economic concerns which are dominating much of the public discussion around the Protocol, it is essential that awareness of the human rights and equality obligations that relate to Article 2 are prioritised within the NI Executive and departments at all levels. This includes monitoring of EU policy and legislative developments and relevant CJEU case law relating to Article 2.
- 3.3 The EU (Withdrawal Agreement) Act 2020 creates an obligation on the NI Executive, and the UK Government, to ensure that it embeds consideration of Article 2 in the development of law and policy.
- 3.4 **The Commissions recommend that the NI Executive ensures that models of scrutiny and compliance with human rights and equality protections include effective consideration of Article 2 at all stages of development of law and policy.**
- 3.5 Further, there is no reference in the NI Executive's Programme for Government (PfG) draft Outcomes Framework of the impact of exit from the EU on equality groups or on equality and human rights.⁷
- 3.6 **The Commissions recommend that the NI Executive makes clear in its PfG Outcomes Framework, and any subsequent PfG, its support for the commitment to act in accordance with the UK Government's obligations under Article 2 of the Protocol, and the commitment in the Protocol to keep pace with any future EU changes to the Annex 1 equality Directives.**
- 3.7 The scope of Article 2 is limited to ensuring there is no lowering of certain human rights and equality protections following the UK withdrawal from the EU and the 'keeping pace' requirement only applies to the six specified directives in Annex 1 of the Protocol and not to other relevant directives which

⁷ NI Executive consultation on a draft [PfG outcomes framework](#) closed in March 2021 and the outcome of that consultation is awaited.

underpin the rights, equality and safeguards in the relevant chapter of the Belfast (Good Friday) Agreement.

3.8 The NI Executive must work with the UK Government, including through the UK Government's role on the UK-EU Joint Consultative Working Group, to ensure that it is kept informed of any developments at an EU level of relevance to the human rights and equality protections within the scope of Article 2.

3.9 Alongside the UK dimension, the NI Executive should also be working, on a North-South basis, including through the institutions established in line with the Belfast (Good Friday) Agreement, in relation to those aspects of upholding the Article 2 commitment which have an all-island dimension.

3.10 **The Commissions recommend that:**

- **the NI Executive work with the UK Government and on a North-South basis to build strong open channels of communication to keep informed of key developments of relevance to Article 2. This includes working with the UK Government to establish formal relationships for timely information to flow through the Specialised Committee on the implementation of the Protocol and the Joint Consultative Working Group on developments relating to relevant EU human rights and equality obligations.**
- **the NI Executive progress measures to ensure that equality law in NI is strengthened, simplified and harmonised into a single equality act, and that gaps, including existing gaps between NI and Great Britain equality law, are addressed as a matter of urgency.**
- **the NI Executive ensures people in NI have at least equivalent human rights and equality protections to those in Ireland. The Commissions further recommend that this commitment is reflected in the NI Executive's PfG Outcomes Framework and in any subsequent PfG.**
- **the NI Executive, and NI Departments, ensure effective and regular engagement with a range of NI stakeholders, including civil society and human rights and equality groups, to identify impacts of the implementation of the Protocol on people living in NI in relation to human rights and equality considerations.**

4.0 Work of the Committee

- 4.1 In question 13 the Committee seeks views on what work it should undertake to scrutinise the operation and impact of the Protocol.
- 4.2 Parliamentary scrutiny of the implementation of the commitment in Article 2 of the Protocol will be an important safeguard against the diminution of rights, safeguards and equality of opportunity.
- 4.3 To facilitate this Parliamentary scrutiny of the UK Government's commitment in Article 2, the Committee should receive timely notice of any planned and adopted EU law within the scope of the Protocol, including Article 2. It would also be helpful if the Committee, when considering the implications of the proposed EU legislation in relation to the Article 2 commitment, seeks the views of the UK Government, and of the dedicated mechanism (as referred to below), on the degree to which any proposed EU legislation impacts on the Article 2 commitment, and for the Committee to liaise closely with other Parliamentary Committees, such as the European Scrutiny Committee, in this regard.
- 4.4 The Commissions are currently giving consideration to any recommended reform of both Parliamentary and NI Assembly scrutiny mechanisms or processes to ensure that there is effective Parliamentary and NI Assembly scrutiny of the UK Government's compliance with its commitment under Article 2(1) of the Protocol, and we would welcome the opportunity to provide further evidence and recommendations to the Committee on this matter at a later date.
- 4.5 **The Commissions recommend that the Committee scrutinises the UK Government's commitment in Article 2 to ensure that there is no diminution of human rights and equality as a result of leaving the EU. In particular, the Commissions recommend that the Committee gives consideration to holding a Committee inquiry, in due course, into the UK Government's approach to implementing its commitment in Article 2, with a focus on communication, monitoring and engagement.**
- 4.6 **The Commissions recommend that, as part of its role to scrutinise the Protocol's overall impact on NI, the Committee continues to engage regularly with a range of NI stakeholders, including the Commissions, civil society and human rights and equality groups, to identify human rights and equality impacts of the implementation of the Protocol on people living in NI.**

4.7 Following the UK's withdrawal from the EU, there are a breadth of human rights and equality issues which the Committee may wish to examine. The Commissions have previously raised a range of human rights and equality concerns both jointly and solely by the NIHRC on those human rights areas which fell solely within its remit prior to the establishment of the dedicated mechanism. These include the following:

- Equality Rights;
- Common Travel Area;
- Rights of Irish Citizens;
- EU Citizens;
- Frontier Workers;
- Birthright Commitment; and
- EU Charter of Fundamental Rights.⁸

5.0 Engagement and participation

Engagement with Northern Ireland stakeholders on the Protocol

- 5.1 Question 8 and question 9 request views on the UK Government's and EU's approach to the Protocol, respectively, and on their engagement with Northern Ireland stakeholders.
- 5.2 As noted above, the Commissions have new functions to oversee the implementation of the UK Government's commitment in Article 2 of the Protocol,⁹ including a power to raise any matter of relevance to Article 2 with the Specialised Committee.¹⁰
- 5.3 The Commissions note that while there has been some engagement between the UK Government and the EU supervisory bodies with civil society groups in Northern Ireland, this has not been focused on engaging with equality and human rights stakeholders and the processes for engagement have lacked transparency. It is essential that the voices of equality and human rights stakeholders are heard on Brexit related matters that impact on their human

⁸ NIHRC and ECNI, 'Submission to the Seanad Éireann Special Select Committee on the UK Withdrawal from the EU' (NIHRC and ECNI, 2021); NIHRC and ECNI, 'Submission to the Northern Ireland Affairs Committee Inquiry on Brexit and the Northern Ireland Protocol' (NIHRC and ECNI, 2020); NIHRC, 'Briefing Note for the Ad Hoc Committee on a Bill of Rights – EU Withdrawal and a Bill of Rights' (NIHRC, 2021) and ECNI, 'Submission to Ad Hoc Committee on a Bill of Rights for Northern Ireland' (ECNI, 2021).

⁹ Sections 78A-78E, Northern Ireland Act 1998.

¹⁰ Article 14, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement 2020.

rights and equality protections, and that structures are in place to facilitate and encourage their participation in decision making on these matters.

- 5.4 There are a number of arrangements in place to ensure regular engagement between the dedicated mechanism and the NI Office. We would welcome the opportunity to have regular engagement with the Joint Consultative Working Group, on matters relating to the implementation of Article 2 of the Protocol.
- 5.5 **The Commissions recommend that UK Government and the supervisory bodies established under the UK-EU Withdrawal Agreement and the UK-EU Trade and Cooperation Agreement establish formal structures for open, transparent and regular engagement with equality and human rights stakeholders in NI.**

Addressing the democratic deficit

- 5.6 Question 12 requests views on how to address concerns about the perceived democratic deficit at the heart of the Protocol, in view of the continued dynamic application of significant areas of EU law to NI in the absence of UK participation in the EU institutions.
- 5.7 There is no express right to a particular form of democratic representation contained in the human rights treaties to which the UK is a signatory. Article 3 of Protocol 1 of the ECHR protects the right to free elections, which also encompasses the right to vote. The protection afforded by this right is only related to the domestic legislature.
- 5.8 Following the decision of UK in 2016 to withdraw from the EU, there has been a loss of representation in the EU institutions as the UK is no longer an EU Member State. However, the UK-EU Withdrawal Agreement makes provision for a series of new mechanisms for ongoing engagement between the UK and the EU and ongoing oversight of the UK-EU Withdrawal Agreement. These new institutions include establishing a Specialised Committee on the implementation of the Protocol¹¹ and a Joint Consultative Working Group to facilitate the exchange of information and mutual consultation.¹²
- 5.9 In addition, the Protocol also provides for the Northern Ireland Assembly to give consent periodically as regards the continuing operation of its single market and customs provisions.¹³

¹¹ Article 14, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement 2020.

¹² Article 15, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement 2020.

¹³ Article 18, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement 2020.

- 5.10 Under the UK-EU Trade and Cooperation Agreement 2020, the UK Government will establish domestic advisory groups in different configurations to discuss the implementation of the Agreement.¹⁴ The parties will also establish a Civil Society Forum which will meet a minimum of once per year and will focus on Part 2 of the Agreement.¹⁵ These groups will include representation of independent civil society organisations including in the area of human rights.
- 5.11 As set out above, since 1 January 2021, the Commissions have new duties and powers as the ‘dedicated mechanism’ to monitor, supervise, advise, enforce, and report on this commitment. In this role, we can raise issues directly with the Specialised Committee.¹⁶
- 5.12 The Belfast (Good Friday) Agreement has been exposed to risks pursuant to the withdrawal of the UK from the EU. The UK Government has recognised that human rights and equality protections are essential to the continued peace and stability in NI. To that end, there should be a renewed focus on the full implementation of the Belfast (Good Friday) Agreement, including in relation to social inclusion and community development.
- 5.13 **The Commissions recommend that the Committee urge the UK Government engage in a public awareness raising exercise outlining the roles and remit of the various UK-EU oversight bodies of the UK-EU Withdrawal Agreement and the UK-EU Trade and Cooperation Agreement and which clarifies the role of the NI Executive input in relation to each of these bodies.**

¹⁴ Article 13, UK-EU Trade and Cooperation Agreement 2020.

¹⁵ Article 14, UK-EU Trade and Cooperation Agreement 2020.

¹⁶ Sections 78A-78E, Northern Ireland Act 1998.

6.0 Appendix 1

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

- the right to freedom and expression of religion;
- the right to pursue democratically national and political aspirations;
- the right to seek constitutional change by peaceful and legitimate means;
- the right to freely choose one's place of residence;
- the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
- the right to freedom from sectarian harassment;
- the right of women to full and equal political participation;
- the right of victims to remember as well as to contribute to a changed society;
- respect, understanding and tolerance in relation to linguistic diversity; and
- the need to ensure that symbols and emblems are used in a manner which promotes mutual respect rather than division.¹⁷

Annex 1 of the Protocol, sets out six EU equality Directives:

- Gender Goods and Services Directive;¹⁸
- Equal Treatment Directive;¹⁹
- Racial Equality Directive;²⁰
- Equality Framework Directive;²¹
- Self-Employment Equal Treatment Directive;²² and
- Equal Treatment in Social Security Directive.²³

The Commissions' new powers and duties, which they can exercise either jointly or separately, include:

¹⁷ Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights, available at <https://www.gov.uk/government/publications/the-belfast-agreement>

¹⁸ Directive 2004/113/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and Services', 13 December 2004.

¹⁹ Directive 2006/54/EC, 'EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation', 5 July 2006.

²⁰ Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000.

²¹ Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000.

²² Directive 2010/41/EU, 'EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity', 7 July 2010.

²³ Directive 79/7/EEC, 'EU Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security', 19 December 1978.

- monitoring how the commitment is implemented;
- reporting on its implementation to the Secretary State for Northern Ireland and The Executive Office;
- advising the Secretary of State and the Northern Ireland Assembly Executive Committee of legislative and other measures that must be taken to implement the commitment;
- advising the Northern Ireland Assembly (or a committee of the Assembly) whether a Bill is compatible with the commitment;
- promoting understanding and awareness of how important the commitment is;
- bringing or intervening in legal proceedings in respect of an alleged breach (or potential future breach of the commitment); and
- assisting persons in relevant legal proceedings.

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