



**Submission of the ECNI to the House  
of Lords Sub-Committee on the  
Windsor Framework's call for evidence  
for its inquiry on regulatory  
divergence and the Windsor  
Framework**

**1 December 2023**

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## Summary:

The Equality Commission for NI recommends:

- the UK Government (UKG) and NI Executive ensure North-South equivalence of rights, by keeping pace with changes to equality and human rights law, arising as a result of EU laws introduced on or after 1 January 2021, that enhance protections. This should include rights introduced as a result of EU laws that do not amend or replace Annex 1 equality directives;
- the Irish Government, NI Executive, and UKG work to enhance and harmonise equality and human rights protections on the island of Ireland, aligned to their respective remits, and make a clear commitment to working towards ensuring North-South equivalence of rights on the island of Ireland so as to strengthen protections;
- the UKG, NI Executive, and relevant NI Departments amend certain equality and human rights law in NI in line with international human rights best practice and to reflect developments in CJEU case law where they enhance equality and human rights in NI;
- equality and human rights considerations are built into all stages of the ‘Stormont brake’ mechanism, and into the revised process under Article 13(4);
- the UKG and EU to work together to ensure that there are timely updates and relevant information exchange on developments in EU law, to aid the effective implementation of Article 2 commitments;
- the UKG and EU ensure the ECNI, along with the NIHRC, are given early notice of relevant EU law and policy developments and have opportunities to highlight in advance any implications of those developments for equality and human rights law in NI;
- timely, regular, targeted, and structured engagement by the UK Government with equality and human rights groups in NI, including on matters relating to regulatory divergence and the implications of this for equality and human rights in NI;
- the development of “structured sub-groups” within the JCWG includes establishing a group that focuses on issues relating to Article 2 and equality and human rights in NI;
- the NI Office and Executive Office ensure the UKG and NI Executive monitor any proposed changes by the EU to the six Annex 1 equality directives,

including relevant case law of the CJEU to ensure compliance with the keeping pace obligation;

- the UKG and EU undertake regular reviews of new EU laws relating to equality and human rights to identify new measures for addition to the Annex 1 equality directives, as provided for under Article 13(4), with particular consideration being given to alignment of standards across the two jurisdictions on the island of Ireland;
- the UKG and the NI Executive monitor the impact on equality and human rights in NI, of any divergence of rights on the island of Ireland resulting from the Stormont Brake being applied to block EU legislation which would have, if introduced, strengthened equality or human rights.

## 1 Introduction

- 1.1. The Equality Commission for Northern Ireland (the ‘Commission’/ ‘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.
- 1.2. The Commission, along with the Northern Ireland Human Rights Commission (NIHRC), pursuant to sections 78A(1) and 78B(1) of the Northern Ireland Act 1998, monitor the implementation of Article 2(1) of the Ireland/Northern Ireland Protocol (‘the Protocol’) to the UK-EU Withdrawal Agreement<sup>1</sup>. As the Sub-Committee will be aware, the EU and UK has now agreed to refer to the Protocol as ‘the Windsor Framework’. Consequently, hereinafter, Article 2 of the Protocol is referred to as ‘Article 2 of the Windsor Framework’.
- 1.3. In addition, the Commissions exercise part of this mandate in partnership with the Irish Human Rights and Equality Commission<sup>2</sup> in relation to those aspects of oversight of, and reporting on, rights and equalities issues falling within the scope of Article 2 which have an island of Ireland dimension.<sup>3</sup>
- 1.4. The Commission welcomes this opportunity to respond to the call for evidence by the House of Lords Sub-Committee on the Windsor

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<sup>1</sup> Article 2(1) states: “The UK shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.”

<sup>2</sup> Equality Commission for Northern Ireland, Irish Human Rights and Equality Commission and Northern Ireland Human Rights Commission, Ireland/Northern Ireland Protocol of the European Union (EU) Withdrawal Agreement, Article 2: island of Ireland dimension Memorandum of Understanding, March 2021.

<sup>3</sup> Article 2(2) and Article 14(c), Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement; NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’, (NIO, 2020), at 5.

Framework ('the Sub-Committee') on its inquiry into regulatory divergence and the Windsor Framework.

- 1.5. In this briefing, the Commission has focused on addressing only those questions in the Sub-Committee's call for evidence which fall within the scope of our respective roles and remits.
- 1.6. In addition, ECNI on behalf of all three Commissions (including the NIHRC and Irish Human Rights and Equality Commission (IHREC)), has commissioned follow up research on divergence of rights, following our research report (2022)<sup>4</sup> and policy recommendations (2023)<sup>5</sup> on 'The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland'. The Commission would be happy to share this report and ensuing policy recommendations, once published, with the Sub-Committee in 2024.

## 2 Responses to Questions

### Question 4:

**What do you think are the main risks or opportunities in relation to regulatory divergence now and in the future?**

- 2.1. In terms of risks relating to regulatory divergence, whilst Windsor Framework Article 2 requires that NI equality law keeps pace with any EU changes to the Windsor Framework Annex 1 equality directives which enhance protections, there is the risk of equality and human rights on the island of Ireland increasingly diverging after 31 December 2020, particularly in relation to EU laws introduced on or after 1 January 2021, which do not fall within the Annex 1 equality directives.
- 2.2. The Rights, Safeguards and Equality of Opportunity chapter of the Belfast (Good Friday) Agreement includes the commitment of the Government

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<sup>4</sup> S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J 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, Dec 2022

<sup>5</sup> ECNI, NIHRC, IHREC, '[Policy recommendations](#)': The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland', (February 2023).

of Ireland to ensuring an equivalent level of protection of human rights in Ireland as in NI.

- 2.3. In 2023, the Commission, on behalf of the NIHRC and Irish Human Rights and Equality Commission, published a research report on the impact of Brexit on the divergence of rights and best practice on the island of Ireland.<sup>6</sup> The research found that there are already a number of proposed EU laws, and EU laws which were not transposed into NI law prior to 31 December 2020, that have the potential to strengthen equality and human rights in NI. Such EU laws, if introduced, will need to be implemented in law in Ireland, but NI law will not be required to keep pace with them pursuant to the Windsor Framework. Such EU laws include, for example, the Work-life Balance Directive,<sup>7</sup> and the European Accessibility Act.<sup>8</sup>
- 2.4. The Commission has highlighted that there is already divergence in some key areas of substantive equality rights between Great Britain and NI and Ireland and NI. This includes in the areas of gender pay gap reporting, single equality legislation and age discrimination in access to goods, facilities and services. Future divergence of rights on the island of Ireland risks equality and human rights protection in NI falling further behind, with the potential for individuals in Northern Ireland to have lesser rights and protections compared to their cross-border neighbours in Ireland.
- 2.5. The Commission considers that long-term North-South equivalence of rights is important to ensure there is no diminution of equality and human rights in NI, and to ensure that these protections are subject to continual improvement.
- 2.6. Our recommendations are also made in the context of the recent passage of the Retained EU Law (Revocation and Reform) Act 2023. As the Commission, jointly with the NIHRC, advised as the Bill was being

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<sup>6</sup> 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, IHREC 2022)

<sup>7</sup> Directive 2019/1158/EU 'Directive of the European Parliament and Council on work-life balance for parents and carers', 20 June 2019.

<sup>8</sup> Directive 2019/882/EU, 'Directive of the European Parliament and Council on the accessibility requirements for products and services', 17 April 2019.

considered by Parliament, it is essential that the application of this Act does not facilitate an increasing divergence of rights between NI and Ireland and NI and GB that results in weaker protections in NI. The Commission has advised that the Act could potentially increase the risk of divergence of rights on the island of Ireland.<sup>9</sup>

- 2.7. The Commission continues to recommend that the UK Government and NI Executive ensure North-South equivalence of rights, by keeping pace with changes to equality and human rights law, arising as a result of EU laws introduced on or after 1 January 2021, that enhance protections. This should include voluntary alignment with rights introduced as a result of EU laws that do not amend or replace the Annex 1 equality directives.
- 2.8. The Commission has also called for the Irish Government, NI Executive, and UK Government to work to enhance and harmonise equality and human rights protections on the island of Ireland, aligned to their respective remits, and make a clear commitment to working towards ensuring North-South equivalence of rights on the island of Ireland so as to strengthen protections.<sup>10</sup>
- 2.9. Further, we continue to recommend that the UK Government, NI Executive, and relevant NI Departments amend certain equality and human rights law in NI in line with international human rights best practice and to reflect developments in CJEU case law where they enhance equality and human rights in NI.<sup>11</sup> These areas of law that require amendment, which include in relation to protection against age discrimination in the provision of goods and services, are set out in more detail in our policy recommendations on *The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland (2023)*.<sup>12</sup>

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<sup>9</sup> Equality Commission for Northern Ireland, Northern Ireland Human Rights Commission and Irish Human Rights and Equality 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, NIHRC and IHREC, 2023), para. 5.3.

<sup>10</sup> Equality Commission for Northern Ireland, Northern Ireland Human Rights Commission and Irish Human Rights and Equality 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, NIHRC and IHREC, 2023).

<sup>11</sup> Ibid.

<sup>12</sup> *ibid.*, see Chapter 4, '[Avoiding Divergence of Rights](#)'.



## Question 5:

**What impact, if any, has the agreement of the Windsor Framework had on the issue of regulatory divergence?**

- 2.10. We welcome that the changes, introduced by the Windsor Framework, to the original Protocol Article 13 (3) do not apply to the Windsor Framework Annex 1 Equality Directives. However, there is the potential for the ‘Stormont brake’ mechanism, as regards certain EU law in Annex 2 of the Windsor Framework, to have implications for equality and human rights in NI and for divergence of rights.<sup>13</sup>
- 2.11. In particular, a number of EU measures<sup>14</sup> that are listed in Annex 2 of the Windsor Framework, have been identified by the Commissions as falling within scope of the Article 2 ‘non-diminution’ commitment.<sup>15</sup> There is the potential for the ‘Stormont brake’ mechanism to apply to these provisions and for the UK Government subject to a finding of non-compliance by the arbitration panel, the application of an EU rule that amends/ replaces certain EU law within Windsor Framework Annex 2, and the accompanying Court of Justice of the EU (CJEU) interpretation.
- 2.12. The Commission is concerned that the new mechanism could inhibit changes in NI where these EU laws are amended in ways that could benefit equality groups. This would result in increasing divergence of equality and human rights on the island of Ireland post Brexit.
- 2.13. It is therefore vital that equality and human rights considerations are built into all key stages of the ‘Stormont brake’ mechanism, including inquiries by the Windsor Framework Democratic Scrutiny (WFDS) Committee. It is important that the WFDS Committee undertakes meaningful and timely engagement with the Commissions and equality and human rights groups in Northern Ireland, in relation to a proposed EU measure, or a replacement EU act, to seek their views on the

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<sup>13</sup> Equality Commission for Northern Ireland and Northern Ireland Human Rights Commission, 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 (ECNI and NIHRC, 2023).

<sup>14</sup> For example, Article 24 of Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on machinery, and amending Directive 95/16/EC, amends the law on the manufacture of lifts in relation to access for, and use by, disabled people.

<sup>15</sup> Equality Commission for Northern Ireland and Northern Ireland Human Rights Commission, Working Paper: The Scope of Article 2(1) of the Ireland/ Northern Ireland Protocol, (ECNI and NIHRC, December 2022)

implications for the promotion and protection of equality and human rights in Northern Ireland.

- 2.14. In addition, the Commission is concerned that changes introduced, regarding applicability motions aligned to Article 13(4) of the Windsor Framework, could potentially mean that new procedural hurdles impede the application of a new or amended/replaced EU act that has equality and/or human rights implications. **It is vital that equality and human rights considerations are built into the revised process under Article 13(4) of the Windsor Framework.**

#### **Question 7:**

**Are you able to access information on regulatory divergence easily, whether it results from legislative developments in either the EU or GB?**

- 2.15. As part of its EUR-Lex website, the European Commission has launched a webpage on the Protocol which lists all EU acts that apply in respect of NI, including the Annex 1 equality directives.<sup>16</sup> It is important that the website includes the publication of proposed or updated EU legislation that is relevant to the Article 2 (1) non-diminution commitment, as well as EU law that amends or replaces provisions in the Annex 1 equality directives. It would be helpful, in the interests of clarity and certainty, if the website also clearly stated whether the proposed/updated EU law is applicable to any of the Annexes in the Windsor Framework.
- 2.16. The publication of such legislation that falls within the scope of Article 2, beyond the Annex 1 Directives, will assist with monitoring and tracking potential areas of future EU equality and human rights law that could potentially lead to divergence of rights and which NI could voluntarily align with. This will assist, not only the Commission, but also the UK Government, NI Executive and relevant NI Departments to track and monitor such EU developments.
- 2.17. In addition, the earlier flagging by the EU of relevant parts of the EU Commission's Work Programme would better enable NI stakeholders to

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<sup>16</sup> [Protocol on Ireland / Northern Ireland](#) - EUR-Lex (europa.eu), launched 30 June 2022

respond to such legislative developments, for example, through consultations.

- 2.18. Further, we would ask the Sub-Committee to note that concerns have been raised with the ECNI by a number of organisations representing equality groups, for example, women organisations, that they find that the complex nature of Brexit has made it difficult for organisations to keep up with and understand, the impact of Brexit, including on their equality and human rights. This highlights the importance of people having access to timely, accurate, accessible, and comprehensive information as regards their equality and human rights and entitlements post Brexit, as well as any changes to their rights, including by the UK Government and the NI Executive.
- 2.19. The Commission has continued to call for the UK Government and EU work together to ensure that there are timely updates and relevant information exchange on developments in EU law, to aid the effective implementation of Windsor Framework Article 2 commitments.<sup>17</sup>
- 2.20. We have also recommended that the UK Government and EU ensure the Commissions are given early notice of relevant EU law and policy developments and have opportunities to highlight in advance any implications of those developments for equality and human rights law in NI.<sup>18</sup>

### **Question 8:**

**How much engagement has there been between the UK Government and sectors affected by divergence? Has this been sufficient, in your view?**

- 2.21. We consider that additional measures could be put in place by the UK Government to ensure greater engagement, not only with the Commission and NIHRC, as the dedicated mechanism, but also with equality and human rights stakeholders.

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<sup>17</sup> 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](#), (May 2023), p.2.

<sup>18</sup> *ibid.*

- 2.22. The Commission has previously called for the UK Government to ensure effective and regular engagement with civil society, including human rights and equality groups.<sup>19</sup> This should include establishing formal structures to ensure that there is open, transparent and regular engagement with equality and human rights stakeholders in NI, in relation to the commitment set out in Article 2 Windsor Framework.<sup>20</sup>
- 2.23. It is also essential that the Commission and the NIHRC, as the dedicated mechanism, are not only kept informed of any future EU equality law developments relevant to the Annex 1 equality directives, including through the Joint Consultative Working Group, but also have the opportunity to highlight in advance, in the context of any new arrangements being taken forward by the UK Government, any implications of those changes for equality law in NI.
- 2.24. In terms of the Joint Consultative Working Group, which is co-chaired by the UK and the EU, we continue to recommend the establishment of an Article 2 ‘structured sub-group’ within the Joint Consultative Working Group. We consider that this could assist with ensuring regular and structured engagement and information exchange between the Joint Consultative Working Group and the Commissions, as well as wider equality and human rights stakeholders. The Commission considers it vital that their views and those of equality and human rights groups in NI are heard and taken into consideration, in terms of the implications of proposed EU measures on the promotion and protection of equality and human rights, as well as on matters concerning divergence of rights.
- 2.25. The Commission is concerned that with the scale and pace of change in EU law, developments in EU law that have implications for equality and human rights law in NI could potentially be missed. An Article 2 subgroup could, therefore, be an important forum for considering relevant potential EU legislative developments and for liaising with the Commission, and the NIHRC, on EU law proposals that are relevant to the Annex 1 Directives. The Commission considers this form of engagement

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<sup>19</sup> Equality Commission for Northern Ireland and Northern Ireland Human Rights Commission. [Annual Report of the NIHRC and the ECNI on the Implementation of Article 2 of the Windsor Framework 2022–2023](#) (ECNI and NIHRC, 2023) page 25, para 3.57.

<sup>20</sup> *ibid*, para 3.58

via a subgroup is distinct from, and different to, the role/power of the Commission and NIHRC to raise matters with the Specialised Committee.

- 2.26. We welcome that the Sub Committee included a recommendation in its report in which they endorsed “the calls for dedicated sub-groups on agri-food, retail, haulage and the Article 2 provisions on human rights and equalities issues”<sup>21</sup>, and we note that the UK Government’s response to the Sub-Committee did not address this recommendation relating to a subgroup on Article 2 issues.<sup>22</sup>
- 2.27. The Commission continues to call for timely, regular, targeted, and structured engagement by the UK Government with equality and human rights groups in NI, including on matters relating to regulatory divergence and the implications of this for equality and human rights in NI.
- 2.28. The Commission continues to recommend that the development of “structured sub-groups” within the JCWG includes establishing a group that focuses on issues relating to Windsor Framework Article 2 and equality and human rights in NI.

#### **Question 9:**

**Are you aware of any Government attempts to track instances of regulatory divergence of relevance to the Windsor Framework? If so, how would you assess them? Do you think that areas of regulatory divergence should be centrally logged by the Government or another body?**

- 2.29. We consider there is value in the UK Government and the Executive Office centrally logging areas of regulatory divergence post Brexit relating to equality and human rights in Northern Ireland, and making this information public in an accessible and transparent way. This should include in the context of divergence of rights on the island of Ireland and divergence of rights between NI and Great Britain. This will increase awareness and understanding of such rights and entitlements in NI post

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<sup>21</sup>House of Lords European Affair Committee. [Report from the Sub-Committee on the Protocol on Ireland/Northern Ireland: The Windsor Framework](#) 7<sup>th</sup> Report of Session 2022-23, page 92, para. 298

<sup>22</sup> HMG. [Government response to the Northern Ireland Protocol Sub-Committee Report on the Windsor Framework](#). 26 July 2023

Brexit, and increase accessibility of information, including to equality groups in NI.

- 2.30. We are aware that the NI Executive Office has established a system (EULITS) for tracking and monitoring EU law relevant to the Annexes in the Windsor Framework in relation to the ‘keeping pace’ commitment in Article 13(3). This system is internal to the Northern Ireland Civil Service, so the Commission is not in a position to comment further.
- 2.31. The Commission continues to engage with the Executive Office to advise that monitoring should include those EU laws or proposed EU laws that are relevant to equality and human rights but do not fall within the keeping pace commitment relevant to the Annex 1 Directives, as well as EU law and case law of the CJEU relevant to the ‘keeping pace’ commitment. This would assist in monitoring the potential for divergence of equality and human rights on the island of Ireland after the end of the Brexit transition period.
- 2.32. Linked to the above point on the need for robust monitoring by the NIO and the Executive Office, we also consider that there is a need for the UK Government, together with the EU, to consider measures to limit divergence of rights on the island of Ireland. Specifically, such measures should include the consideration of new EU laws, on a case-by-case basis, for addition to the list of equality directives within Annex 1, as provided for under the mechanisms of Windsor Framework Article 13(4).<sup>23</sup>
- 2.33. The Commission has continued to call for the NI Office and the Executive Office to ensure that the UK Government and NI Executive monitor any proposed changes by the EU to the six Annex 1 equality directives, including relevant case law of the CJEU to ensure compliance with the keeping pace obligation.
- 2.34. We have also recommended that the UK Government and EU should undertake regular reviews of new EU laws relating to equality and

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<sup>23</sup> <sup>23</sup> Equality Commission for Northern Ireland, Northern Ireland Human Rights Commission and Irish Human Rights and Equality 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, NIHRC and IHREC, 2023).

human rights to identify new measures to be considered for addition to the Annex 1 equality directives, as provided for under Article 13(4), with particular consideration being given to alignment of standards across the two jurisdictions on the island of Ireland.

- 2.35. We have also called for the UK Government and the NI Executive to monitor the impact on equality and human rights in NI, of any divergence of rights on the island of Ireland resulting from the Stormont Brake being applied to block EU legislation which would have, if introduced, strengthened equality or human rights.

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