

**Northern Ireland Human Rights Commission and  
Equality Commission for Northern Ireland**

**Annual Report of the  
NIHRC and the ECNI on the  
implementation of  
Protocol Article 2  
2022 – 2023**

Presented to Parliament pursuant to Section 78A(4)(a)  
and Section 78B(4)(a) of the Northern Ireland Act 1998



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# Foreword

In this our second annual report, the Commissions set out our work as the dedicated mechanism, advising and holding the UK Government to account on the implementation of the no diminution commitment in Article 2 of the Windsor Framework (formerly known as the Ireland/Northern Ireland Protocol).

We have focused on highlighting those issues and recommendations we have raised over the year ending March 2023.

Whilst we welcome the response received from the Secretary of State for NI to the recommendations made in our last Annual Report 2021-2022, we are disappointed that action on a range of important issues remains outstanding. Further, in the absence of a functioning NI Executive, there has been no substantive response to our recommendations from the Executive Office. We therefore urge both the UK Government and the Executive Office to act on, and respond to, the recommendations set out in this report, including those designed to ensure Article 2 is effectively embedded in policy development and legislative processes. Article 2 has been a binding international commitment for over two years. While we acknowledge useful engagement with Departments, it is time to see the guidance for officials finalised, training rolled out and parliamentary procedure changed to facilitate effective scrutiny.

There is strong public support for Article 2 in Northern Ireland, with nearly three quarters (72%) of respondents in a survey commissioned by us, indicating that they felt that the UK Government's commitment was important or very important to them.

Over the last year, we have produced advice to Government in relation to a number of significant legislative developments, including the changes to the Protocol as a result of the "The Windsor Political Declaration" published in February 2023, the Retained EU Bill, proposed Human Rights Act reform, as well as the outworkings of the Nationality and Borders Act. These developments, and others, have raised significant risks and challenges to the protection of equality and human rights, as detailed in the report and addressed in our recommendations.

Through joint engagement with officials in the NI Office, the Executive Office, and relevant Bill teams, we have sought to ensure the UK Government both considers and complies with its Article 2 obligations.

We have been grateful for the active engagement of UK Parliamentary Committees, including the House of Lords Sub-Committee on the Protocol, which has raised our concerns with the UK Government on a range of matters.

MPs and peers have made time to meet with us, tabled amendments consistent with our recommendations, asked questions and referenced our advice in debates, helping to raise awareness of Article 2 and highlighting potential compliance issues – their contribution has been invaluable.

We have also listened to the views of equality and human rights stakeholders, including through joint events, and consistently highlighted to government the importance of engagement with those stakeholders so as to ensure that their voices are heard and acted on, through timely and structured engagement.

Further, we have continued work to increase awareness and understanding of Article 2, including its scope. For example, in December 2022, following extensive stakeholder engagement and based on internal and externally commissioned research and legal opinions, we published a joint working paper on the scope of Article 2. We are grateful for the contributions of all those with whom we engaged and hope it will be of use for anyone considering what Article 2 means in practice and which EU standards are embraced.

In addition, we have undertaken ground-breaking research, both separately and jointly with the Irish Human and Equality Rights Commission, on a range of areas that have been impacted by Brexit, for example, the impact of loss of EU funding on equality groups; divergence of rights on the island of Ireland; Article 2 and access to healthcare; and Article 2 and human trafficking. This research has shone a powerful light on how rights have been affected post-Brexit, as well as the impact on accessing services by different equality groups. This research has informed our policy recommendations which we have then raised with government and others.

Over the last year we provided advice to individuals who consider that their rights under Article 2 have been breached, and intervened in relevant cases before the High Court and the Court of Appeal, to assist those courts in their interpretation of Article 2.

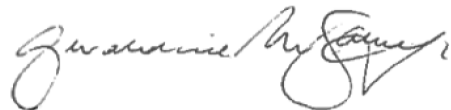
We have worked effectively and in close partnership in the exercise of our mandate to oversee Article 2 to ensure the protection of those rights in challenging times.

We are pleased to present the advice and recommendations arising from our work over the last year and look forward to the response from the Secretary of State and the Executive Office.



**Alyson Kilpatrick**

Chief Commissioner  
NI Human Rights Commission



**Geraldine McGahey**

Chief Commissioner  
Equality Commission for NI

# 1.0 Introduction

- 1.1. Both the Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland (ECNI) (the Commissions) were established following the Belfast (Good Friday) Agreement and pursuant to the Northern Ireland Act 1998. The Commissions are non-departmental public bodies. The NIHRC is a National Human Rights Institution with 'A status' accreditation from the United Nations.
- 1.2. The Commissions are mandated in accordance with Article 2(1) of the Windsor Framework,<sup>1</sup> formerly known as the Protocol on Ireland/Northern Ireland of the UK-EU Withdrawal Agreement<sup>2</sup> to oversee the UK Government's commitment to rights and equality in Northern Ireland (NI) after UK Withdrawal from the EU. The Commissions can exercise these functions separately or jointly.<sup>3</sup>
- 1.3. The Commissions jointly publish this annual report, based on their respective mandates to:
  - monitor the implementation of Article 2;
  - report to the Secretary of State for NI and the NI Executive Office on the implementation of Article 2; and
  - advise the Secretary of State for NI and the NI Executive of legislative and other measures which ought to be taken to implement Article 2.<sup>4</sup>
- 1.4. In addition, the Commissions exercise part of this mandate in partnership with the Irish Human Rights and Equality Commission<sup>5</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>6</sup>

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<sup>1</sup> Decision No 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework.

<sup>2</sup> Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 24 January 2020.

<sup>3</sup> Section 78E, Northern Ireland Act 1998. The EU (Withdrawal Agreement) Act 2020 amended the Northern Ireland Act 1998 to empower the NIHRC and ECNI with functions to monitor, advise, report on, promote, and enforce the implementation of Protocol Article 2 (Sections 78A-78E, Northern Ireland Act 1998). These new powers took effect from 1 January 2021. In July 2020, the Commissions were provided with additional funds to undertake their respective roles as part of the dedicated mechanism.

<sup>4</sup> Section 78A(1)-(2) and 78A(5), Northern Ireland Act 1998 in respect of the NIHRC and Section 78B(1)-(2) and 78B(5) Northern Ireland Act 1998 in respect of the ECNI.

<sup>5</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>6</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.

Further information on the work of the three Commissions can be found in the first annual report detailing joint activities undertaken in 2021-2022.<sup>7</sup>

- 1.5. Further, the Specialised Committee on the implementation of the Protocol<sup>8</sup> can consider any matter of relevance to the UK-EU Withdrawal Agreement brought to its attention by the NIHRC, ECNI or the Joint Committee of representatives of the NIHRC and Irish Human Rights and Equality Commission. Sections 78A(9) and 78B(9) of the NI Act 1988 empower the NIHRC and the ECNI respectively to bring matters of relevance to Article 2 to the attention of the Specialised Committee.
- 1.6. Following the Joint Declaration by the UK and the EU and the decision of the Joint Committee in March 2023, the Protocol is to be known, henceforth, as the Windsor Framework.<sup>9</sup> The agreement between the UK and EU in February 2023 is set out in more detail below.<sup>10</sup> For historic reasons some of the references in the report still mention the Protocol. Where references to the Protocol occur, these should be taken as concerning the Windsor Framework. For ease of reading all references to Article 2 of the Windsor Framework/Protocol are referred to as “Article 2” throughout this report.
- 1.7. In addition, further information on the powers and duties of the Commissions is set out in Appendix 2.

## Focus of the report

- 1.8. In this report, the Commissions have focused on highlighting those obligations under Article 2 which reflect the focus of their work in 2022-2023. This report highlights the key changes to the human rights and equality landscape over the reporting period and sets out the Commissions’ recommendations relating to Article 2 as of the end of March 2023.

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<sup>7</sup> Irish Human Rights and Equality Commission, Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland, Equality and Rights on the island of Ireland after Brexit: Annual joint report of IHREC, ECNI and NIHRC on the implementation of Article 2 of the Ireland/Northern Ireland Protocol January 2021-September 2022, November 2022

<sup>8</sup> The Specialised Committee is co-chaired by the UK and EU and can draw up draft decisions and recommendations and refer them for adoption by the UK-EU Withdrawal Agreement Joint Committee. The Joint Committee is empowered to make decisions in respect of the Withdrawal Agreement which are binding on the EU and UK and have the same legal effect as the Withdrawal Agreement. The Joint Committee can also make appropriate recommendations to the UK and EU. The Specialised Committee can make recommendations to the Joint Committee in respect of the functioning of the Windsor Framework.

<sup>9</sup> Decision No 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework; Joint Declaration No 1/2023 of the European Union and the United Kingdom in the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023.

<sup>10</sup> See Section 2.



- 1.9. The Commissions work closely in the exercise of their mandate to oversee Article 2, reflected in many of the recommendations being made jointly. Some recommendations, however, are made by one or other Commission in keeping with its core remit and consistent with the option under Section 78E of the NI Act 1998, to exercise this mandate jointly or separately. It should be noted that each organisation may have made additional recommendations on the issues set out below, on matters outside the scope of Article 2, which are not included here, but which can be found in the related submissions referenced.
- 1.10. Chapter 2 of this report sets out the international and domestic framework of Article 2. Chapter 3 explores issues related to the implementation and scrutiny of Article 2, with recommendations at the end of each sub-section, given their application across the topic. Chapter 4 is structured under key rights and equality issues and developments, with recommendations at the end of each sub-section. Some narrative is re-stated, where required, to provide the minimum context necessary to understand recommendations without cross-reference to other chapters.
- 1.11. The report also highlights issues relevant to the wider role of the Commissions, in monitoring and considering best practice relating to the rights and equality landscape in NI to ensure there is no diminution of rights as a result of UK withdrawal from the EU, including for those living in border areas. These recommendations on the wider impacts of UK withdrawal on equality and human rights are set out in Chapter 5.
- 1.12. Section 78A(3) in respect of the NIHRC and Section 78B(3) in respect of the ECNI of the NI Act 1998, state that a report under subsection 2 Section 78A and 78B “may require the Secretary of State or the Executive Office in NI to reply in writing to any recommendations contained in the report, explaining what steps have been taken or are planned in response to the recommendations”. **The Commissions therefore request a response from the Secretary of State for NI and the NI Executive Office to the recommendations in this report.**
- 1.13. The Commissions welcome the response received from the Secretary of State for NI to the recommendations made in their joint 2021-2022 Annual Report.<sup>11</sup> However, despite this response there remains a range of outstanding issues relating to the Commissions’ recommendations on the

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<sup>11</sup> Letter from the Minister of State for NI to the NI Human Rights Commission and Equality Commission for NI, 1 December 2022.

UK Government's compliance with Article 2, and these are set out in more detail below.

- 1.14. In July 2022 the Executive Office acknowledged receipt of the Commissions' 2021-2022 Annual Report noting that as the Executive Office had no First Minister or deputy First Minister in office, it was not able to provide a substantive response to the report's recommendations at that time.<sup>12</sup> No further response to the report has been received by the Commissions. The Commissions note that, as of March 2023, the Executive Office has additional powers available to them to act in the absence of an Assembly and Executive.<sup>13</sup>
- 1.15. This Annual Report now constitutes the Commissions current recommendations, including previous recommendations set out in the 2021-2022 Annual Report that have not yet been addressed.

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<sup>12</sup> Letter from Deputy Secretary, Good Relations and Inclusion Directorate, the Executive Office to the Equality Commission for NI and the NI Human Rights Commission, 27 July 2022.

<sup>13</sup> Northern Ireland (Executive Formation etc) Act 2022

## 2.0 International and Domestic Legal Framework

### UK-EU Withdrawal Agreement and the Windsor Framework

- 2.1. The NIHRC and the ECNI are mandated in accordance with Windsor Framework Article 2 of the UK-EU Withdrawal Agreement to oversee the UK Government's commitment on rights and equality in NI after EU withdrawal.
- 2.2. The UK signed the UK-EU Withdrawal Agreement in January 2020 and the Protocol (now referred to as the Windsor Framework), which is part of the treaty, took effect from 1 January 2021.<sup>14</sup>
- 2.3. Section 7A of the EU (Withdrawal) Act 2018 gives effect to all the rights, obligations and remedies arising under the UK-EU Withdrawal Agreement in UK law without the need for further enactment.

### Article 2 of the Windsor Framework

- 2.4. Windsor Framework Article 2 states:
  1. The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.
  2. The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights

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<sup>14</sup> Agreement on the Withdrawal of the UK of Great Britain and NI from the EU and the European Atomic Energy Community 2020 (UK-EU Withdrawal Agreement).

Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards.<sup>15</sup>

- 2.5. In Article 2, the UK Government commits to ensuring that certain rights, safeguards and equality of opportunity protections are not diminished as a result of the UK leaving the EU. Therefore, to fall within scope of Article 2, the human right or equality protection being relied on must be covered by the relevant chapter of the Belfast (Good Friday) Agreement and have been underpinned by EU law including EU treaties, directives and regulations, in place on or before 31 December 2020.
- 2.6. In December 2022 the Commissions published a joint **working paper** on the scope of Article 2(1) of the Windsor Framework.<sup>16</sup> The working paper provides an initial assessment of Article 2, how it is engaged and what rights, safeguards and equality of opportunity protections fall within its scope. Appendix 1 to the working paper sets out the EU law which the Commissions have identified as of that date as falling within the scope of Article 2. The Commissions take the view that this is a reasoned and robust interpretation of the ‘non-diminution’ and ‘keep pace’ obligation and that it provides an essential contribution to our understanding of the UK Government commitment in Article 2.
- 2.7. In addition, in December 2022, the Commissions published a further table which sets out the EU directives which the Commissions have identified, as at that date, as falling within the scope of Article 2 together with the associated underpinning domestic legislation that has transposed each EU Directive into law in NI.<sup>17</sup>

## Windsor Framework

- 2.8. The UK and European Commission jointly published “The Windsor Political Declaration”<sup>18</sup> on 27 February 2023, which indicated that they had reached a new way forward on the Protocol. The UK Government also produced a Command paper setting out the UK Government’s understanding of what has been agreed.<sup>19</sup>

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<sup>15</sup> Article 2(1), Windsor Framework (formerly Ireland/Northern Ireland Protocol) to the UK-EU Withdrawal Agreement.

<sup>16</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).

<sup>17</sup> Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland, Table of EU Directives which underpin the Rights, Safeguards and Equality of Opportunity Provisions included in the Chapter of the Belfast (Good Friday) Agreement of the same name and Implementing Domestic Legislation, December 2022.

<sup>18</sup> Political Declaration by the European Commission and the Government of the United Kingdom of 27 February 2023

<sup>19</sup> HMRC, The Windsor Framework: a new way forward, CP806, February 2023

- 2.9. The Joint Committee met on 24 March 2023 to formally adopt the Decision of the Withdrawal Agreement Joint Committee,<sup>20</sup> which sets out amendments to the text of the original Protocol and a series of recommendations and declarations, and confirmed that the Protocol, as amended, would be renamed the Windsor Framework.<sup>21</sup> This means that legally binding changes to the original Protocol, including some changes relating to the ‘Stormont brake’ mechanism, have been adopted by the UK and EU.
- 2.10. The UK Government published the draft Windsor Framework (Democratic Scrutiny) Regulations 2023 (‘2023 Regulations’) on 20 March 2023. The Regulations are intended to amend the NI Act 1998 so as to implement the ‘Stormont brake’ mechanism in domestic law. The Commissions are concerned that there was a very short timeframe between the publication of the draft 2023 Regulations and their coming into force. There has been very limited time for effective scrutiny by Parliament, or the opportunity for the Commissions, or others, to provide views on the draft 2023 Regulations before being passed by Parliament.
- 2.11. Further, there was no reference in the Explanatory Memorandum to the 2023 Regulations as to what consideration the UK Government had given to compliance with Windsor Framework Article 2.
- 2.12. Following the agreement between the UK and EU at Windsor, the Commissions welcome the protection of Article 2 that results from confirmation of the UK Government’s intention not to proceed with the Protocol Bill.<sup>22</sup>

### **‘Stormont Brake’**

- 2.13. One key aspect of the Windsor Framework is the ‘Stormont brake’, which allows the UK Government to potentially stop the application in NI of amended or replaced EU legal provisions, where MLAs have shown that the EU rule has a significant and lasting impact specific to the everyday lives of communities in NI in a way that is liable to persist.<sup>23</sup> This mechanism would

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<sup>20</sup> Decision No 1/2023 of the Joint Committee established by the agreement on the withdrawal of the United Kingdom Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023, laying down arrangements relating to the Windsor Framework

<sup>21</sup> Ibid

<sup>22</sup> HM Government, *The Windsor Framework: A new way forward*, February 2023, page 26, para 75

<sup>23</sup> This is subject to a procedure set out in the Unilateral Declaration by the UK appended as Annex 1 to Decision No 1/2023 of the Joint Committee established by the agreement on the withdrawal of the United Kingdom Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023, laying down arrangements relating to the Windsor Framework.

be triggered by the UK Government under a process outlined in a new provision at Windsor Framework Article 13(3)(a).

- 2.14. The Commissions welcome the fact that the new provisions amending the dynamic alignment provisions under Article 13(3) of the Windsor Framework,<sup>24</sup> do not apply to the keeping pace obligation as regards the 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.
- 2.15. In particular, a number of EU measures 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>25</sup> There is the potential for the ‘Stormont brake’ mechanism to apply to these provisions and for the UK Government to block the application of these EU rules. The Commissions are concerned that the new mechanism could inhibit changes in NI where these EU laws are amended in ways that could benefit equality groups.
- 2.16. 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 Committee. It is important that the Windsor Framework Democratic Scrutiny Committee undertakes meaningful and timely engagement with the Commissions and equality and human rights groups in NI, in relation to a proposed EU measure, or a replacement EU act, so as to seek their views on the implications for the promotion and protection of equality and human rights in NI.
- 2.17. In addition, the Commissions are 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

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<sup>24</sup> Under the original Protocol, Article 13(3) provides for dynamic alignment of NI standards with EU law stating that any reference to EU law in the Windsor Framework, is to that law “as amended or replaced”. This represents an automatic keeping pace obligation, subject to notification obligations. Under the Windsor Framework, a new provision at Article 13(3)(a) would allow for the legislation as amended or replaced not to have effect from two weeks after the UK notifies the EU, in writing, through the Joint Committee that it is following the mechanism triggered by the ‘Stormont brake’. Once the notification is made and agreed, the amended or replaced provision would be treated like a new addition to an Annex and the UK and EU would have to agree to its inclusion as under Article 13(4).

<sup>25</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)

considerations are built into the revised process under the original Article 13(4) of the Protocol.

## **UK-EU Engagement on Windsor Framework Article 2**

- 2.18. The Windsor Political Declaration proposes enhanced mechanisms for UK-EU cooperation, including for sub-groups to the Joint Consultative Working Group.<sup>26</sup>
- 2.19. The Commissions had previously recommended, in evidence to the Sub-Committee on the Protocol on Ireland/Northern Ireland (Sub-Committee on the Protocol) that the UK Government should give consideration to putting in place appropriate arrangements to ensure that there is regular and meaningful engagement between the Joint Consultative Working Group and the Commissions, as well as with equality and human rights stakeholders in NI, in relation to the commitment set out in Article 2.<sup>27</sup>
- 2.20. The Commissions welcome the introduction of enhanced measures to deepen engagement, including with people in NI, and recognition by the European Commission that engagement with stakeholders in NI is of paramount importance for the EU. The Commissions note however that there is no specific reference made to engagement with the Commissions, as the Dedicated Mechanism, and with equality and human rights groups in NI on EU proposals that have implications for equality and human rights in NI.
- 2.21. In light of the importance of the Article 2 commitment to individuals in NI, and the emerging issues relating to the impact of UK withdrawal from the EU on equality and human rights in NI, the Commissions consider that the establishment of an Article 2 ‘structured sub-group’ within the Joint Consultative Working Group would be beneficial.<sup>28</sup> An Article 2 ‘structured sub-group’ 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 Commissions consider 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 the proposed EU measure on the promotion and protection of equality and human rights.

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<sup>26</sup> See [Political Declaration](#) by the European Commission and UK , Political Declaration , 2023, page 3

<sup>27</sup> Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland, [Submission on the UK and EU proposals and the prospects for Agreement to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland](#), 12 November 2021

<sup>28</sup> See [Political Declaration](#) by the European Commission and UK , Political Declaration , 2023, page 3

### ***Recommendations***

- 2.22. The Commissions recommend 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 Committee.**
- 2.23. The Commissions recommend that the UK Government 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, if introduced, have strengthened equality or human rights.**
- 2.24. The Commissions recommend that the Windsor Framework Democratic Scrutiny Committee undertakes meaningful and timely engagement with equality and human rights groups in NI and the Commissions in relation to a proposed EU measure, or a replacement EU act, so as to seek their views on the implications for the promotion and protection of equality and human rights in NI.**
- 2.25. The Commissions recommend that the word ‘communities’ is interpreted broadly to include a consideration of equality and human rights impacts including on Section 75 equality groups.**
- 2.26. The Commissions recommend that equality and human rights considerations are built into the revised process under Windsor Framework Article 13(4).**
- 2.27. The Commissions recommend that the NI Assembly, in advance of passing an applicability motion regarding the addition of a new measure to an Annex of the Windsor Framework, should give consideration to meaningful and timely engagement with the Commissions and equality and human rights stakeholders.**
- 2.28. The Commissions recommend that the development of “structured sub-groups” within the Joint Consultative Working Group includes establishing a group that focuses on issues relating to Article 2 and equality and human rights in NI.**
- 2.29. The Commissions recommend that the EU (and UK Government) ensure the Commissions are given early notice of relevant EU law and policy developments and that the Commissions have opportunities to highlight**



**in advance any implications of those developments for equality and human rights law in NI.**

- 2.30. The Commissions recommend that the European Commission’s engagement with NI stakeholders includes timely, targeted, and structured engagement, both with the Commissions, as the Dedicated Mechanism, and also with equality and human rights groups in NI on EU proposals that have implications for equality and human rights in NI.**
- 2.31. The Commissions recommend that the European Commission’s impact assessment, as regards NI, on draft EU proposals includes a specific assessment of the impact on the promotion and protection of equality and human rights, including any issues of relevance to the UK Government’s compliance with Article 2.**

## **Legal consideration of Windsor Framework Article 2**

- 2.32. In June 2021, following a legal challenge, the NI High Court upheld the legality of the Protocol/Windsor Framework.<sup>29</sup> In March 2022, the Court of Appeal dismissed the appeal on all grounds noting that Article 2 and the protections for the Common Travel Area in the Protocol/Windsor Framework were not controversial.<sup>30</sup> The case was taken to the Supreme Court and in February 2023 the Court dismissed the appellants’ grounds of appeal.<sup>31</sup>**
- 2.33. In February 2020, in a legal challenge to the NI Health Minister’s power to issue abortion regulations the applicants raised an argument that those regulations breached Article 2.<sup>32</sup> Both Commissions intervened in these legal proceedings on matters related to Article 2.<sup>33</sup> The NI High Court dismissed the challenge on the basis that the right in question was not underpinned by EU law prior to 31 December 2020. In the course of the judgment Colton J found that Article 2 has direct effect and can be relied on in domestic courts;<sup>34</sup> and that there was a continuing obligation to conform with Court of Justice of the European Union (CJEU) jurisprudence in respect of the Protocol/Windsor Framework.<sup>35</sup> The case was appealed and heard at the Court of Appeal in January-February 2023 and a decision is awaited.**

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<sup>29</sup> *In the matter of an application by James Hugh Allister for Judicial Review* [2021] NIQB 64.

<sup>30</sup> *Allister et al v Secretary of State for NI* [2022] NICA 15, at para 324.

<sup>31</sup> *James Hugh Allister and others (First Appellants) and Clifford Peebles (Second Appellant) v the Secretary of State for Northern Ireland and others (Respondents)* [2023] UKSC 5.

<sup>32</sup> *Re SPUC Pro-Life Limited* [2022] NIQB 9.

<sup>33</sup> The NIHRC also intervened on other matters not related to Protocol Article 2.

<sup>34</sup> *Re SPUC Pro-Life Limited* [2022] NIQB 9, at para 77 and para 88.

<sup>35</sup> *Ibid*, at para 78 and para 93.

## 3.0 Implementation and Scrutiny of Windsor Framework Article 2

- 3.1 In exercising their mandate during 2022-23, the Commissions have engaged with Government and parliamentary inquiries and made a number of recommendations aimed at securing the effective implementation of Article 2, seeking to ensure that it is fully considered from the earliest stages of policy and legislative development. These recommendations have been informed by the Commissions' research, including research on the impact of UK withdrawal from the EU on the divergence of rights and best practice on the island of Ireland, and parliamentary scrutiny referenced below<sup>36</sup>.

### Protocol Bill

- 3.2. The NI Protocol Bill was introduced in UK Parliament on 13 June 2022.<sup>37</sup> The Bill sought to empower Ministers to disapply the original Protocol and relevant parts of the EU-UK Withdrawal Agreement in domestic law, as well to make new domestic law in place of what is set out in the original Protocol.<sup>38</sup> In October 2022 the Commissions published a joint briefing<sup>39</sup> on key initial concerns in advance of second reading of the Bill.
- 3.3. The Commissions noted that Article 2 was afforded a degree of protection under the Bill but were concerned that this protection was incomplete. The Commissions were particularly concerned that it could result in a weakening of Article 2 and its oversight mechanisms; or the powers granted to Ministers would permit a future weakening of Article 2 or its associated rights, safeguards and oversight mechanisms. The Commissions also engaged with peers in the development of a number of amendments that were subsequently tabled, but not accepted by the UK Government.
- 3.4. In November 2022 the Commissions responded to the House of Lords Sub-Committee on the Protocol's call for evidence on its inquiry into the Bill raising these concerns.<sup>40</sup> The Sub-Committee wrote to the Secretary of State for Foreign, Commonwealth and Development Affairs on the findings of the inquiry raising the Commissions' concerns on compliance of the Bill

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<sup>36</sup> In addition, the Commissions have completed a range of other research, including ECNI's research on the impact of the loss of EU funding on Section 75 Equality Groups in Northern Ireland and NIHR's research on Brexit, health and its potential impact on Protocol Article 2; and, human trafficking and Protocol Article 2.

<sup>37</sup> See UK Parliamentary Bills [webpage](#) on Northern Ireland Protocol Bill.

<sup>38</sup> House of Commons, [Research Briefing: Northern Ireland Protocol Bill](#), 15 June 2022.

<sup>39</sup> NIHR and ECNI, [NIHR / ECNI Briefing on the Northern Ireland Protocol Bill](#), October 2022.

<sup>40</sup> NIHR and ECNI, [Submission of the NIHR and ECNI to the House of Lords Sub-Committee on the Protocol's call for evidence for its new inquiry into the UK Government's Northern Ireland Protocol Bill](#), 3 November 2022.

with Article 2.<sup>41</sup> The Foreign Secretary and Minister for Europe response referred the Sub-Committee to a separate letter from Lord Caine, on behalf of the NI Office, to Baroness Ritchie of Downpatrick which they indicated addressed the Commissions' concerns over the impact of the Bill on Article 2. However, the Sub-Committee in its January 2023 response to the Foreign Secretary stressed "the importance of providing the Committee with a direct written response to its questions rather than being referred to a separate document".<sup>42</sup>

- 3.5. Following the political agreement between the UK and the EU on the Windsor Framework, the UK Government confirmed its intention not to proceed with the Protocol Bill, a step which would address the concerns above, but had not been taken as of 31 March 2023.<sup>43</sup>

## Retained European Union Law

- 3.6. As noted in the Working Paper on the scope of Article 2, particular care should be taken by the NI Executive and UK Government when repealing or amending retained EU law to ensure it does not result in a diminution of rights, safeguards or equality of opportunity protections contrary to Article 2.
- 3.7. In March 2022, the NIHRC highlighted its concerns regarding the repeal or amendment of retained EU law where it relates to human rights or equality protections in its submission to the fourth cycle of the UN Human Rights Council's Universal Periodic Review of the UK. The submission advised that care should be taken when repealing or amending retained EU law to ensure it does not result in a diminution of rights contrary to Article 2 and that any change impacting human rights or equality, should progress changes by primary legislation, rather than secondary legislation or other 'accelerated process'.<sup>44</sup>

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<sup>41</sup> Letter from European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland to Rt Hon James Cleverly MP, Secretary of State for Foreign, Commonwealth and Development Affairs, on 'Findings of the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland's inquiry into the Northern Ireland Protocol Bill', 22 November 2022.

<sup>42</sup> Letter from the European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland to Secretary of State for Foreign, Commonwealth and Development Affairs Foreign, Commonwealth and Development Office, 12 January 2023.

<sup>43</sup> HM Government, *The Windsor Framework: A new way forward*, February 2023, page 26, para 75. In response, the EU agreed not to continue with infringement proceedings against the UK relating to its implementation of the Ireland/Northern Ireland Protocol. See EU Commission, '[Press release](#): A new way forward on the Protocol on Ireland/Northern Ireland: political agreement in principle on the Windsor Framework', 27 February 2023.

<sup>44</sup> NI Human Rights Commission, 'NI Human Rights Commission Submission to the UN Human Rights Council's Universal Periodic Review of the UK', (NIHRC, 2022), at para 12.

- 3.8. In January 2022, the European Scrutiny Committee launched an inquiry into the future of retained EU law in the context of the reviews announced by the UK Government.<sup>45</sup> In April 2022 the Commissions submitted a response<sup>46</sup> recommending that any amendment or repeal of retained EU law, affecting human rights and/or equality protections in NI, should be progressed on the basis of continuing adherence to the UK constitutional convention of providing for policy change via the primary legislative process, with technical and operational detail addressed in subordinate legislation. In September 2022 the UK Government introduced the Retained EU Law (Revocation and Reform) Bill which provides for the automatic repeal or revocation all EU-derived subordinate legislation and retained direct EU law by 31 December 2023, unless Ministers take action to protect it.<sup>47</sup>
- 3.9. In January 2023 the Commissions published a briefing<sup>48</sup> which, while welcoming assurances by the UK Government of its commitment to Article 2 and its acknowledgement that the commitment is ‘non-controversial’,<sup>49</sup> identified a number of concerns about the impact of the Bill on the operation of Article 2.<sup>50</sup>
- 3.10. The Commissions advised that failure to preserve and/or restate all relevant Retained Direct EU Legislation and EU-derived subordinate legislation in NI within scope of Article 2, within set deadlines – by the end of 2023 or by 23 June 2026 if extended - would result in a breach of Article 2.
- 3.11. Further, the Commissions advised that if the Bill was passed as drafted, a breach of international law, in relation to Article 2, could arise from inaction on the part of devolved authorities or Ministers of the Crown, which may not come to the attention of Parliament in time to be remedied via primary legislation.
- 3.12. The Commissions were also concerned at the speed of this Bill’s passage through Parliament and the rapidly approaching sunseting deadline of the

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<sup>45</sup> European Scrutiny Committee, ‘Call for Evidence: Retained EU Law: Where Next?’, (ESC, 2022).

<sup>46</sup> ECNI and NIHRC, Submission of the NIHRC and ECNI to ‘Retained EU Law: Where next?’ - an inquiry by the European Scrutiny Committee, 11 April 2022.

<sup>47</sup> See UK Parliamentary Bills webpage on the Retained EU Law (Revocation and Reform) Bill.

<sup>48</sup> NIHRC and ECNI, Briefing on the Retained EU Law (Revocation and Reform) Bill, January 2023

<sup>49</sup> UK Government, ‘NI Protocol: the way forward’, (UK Gov, 2021), at para 37. See also Letter from Conor Burns MP, Minister of State in the NI Office to Lord Jay of Ewelme, Chair of the House of Lords EU Affairs Committee Sub Committee on the Ireland/Northern Ireland Protocol, 24 November 2021.

<sup>50</sup> NIHRC and ECNI, Briefing on the Retained EU Law (Revocation and Reform) Bill, January 2023

end of 2023.<sup>51</sup> This could lead to a lack of consultation on policy changes with equality and human rights stakeholders in NI, as well as with the two Commissions as the Dedicated Mechanism. The Commissions were also concerned by the lack of reference to consideration of compliance with Article 2 in the Explanatory Memorandum to the Bill.

- 3.13. In addition, it was noted that, in taking forward any legislative policy changes, NI Departments, and other relevant designated public bodies, must comply with their public sector equality duties under Section 75 of the NI Act 1998 and their public sector Disability Duties and requirements set out in their respective equality schemes.<sup>52</sup> The Commissions were of the view that where this must be done before the sunseting deadline, it was difficult to see how the relevant public authorities could comply with these statutory duties in light of timelines proposed by the Bill.
- 3.14. In response to the Commissions' briefing, in February 2023 the House of Lords Sub-Committee on the Protocol wrote to the Rt Hon Kemi Badenoch MP, Secretary of State for Business and Trade, on the Retained EU Law (Revocation and Reform) Bill and its impact on NI in the context of the Windsor Framework.<sup>53</sup> In its letter the Sub-Committee highlighted the Commissions' concerns and briefing on the Bill and asked a number of questions about how the Bill considers/interacts with the Article 2 commitment.
- 3.15. Further to engagement with a number of peers, a number of amendments were tabled to the Bill which sought to address the Commissions' concerns.
- 3.16. Whilst the Bill was not amended at Committee stage in March 2023 to reflect these amendments, the Commissions welcome the clarification in that debate by Lord Callanan, on behalf of the UK Government, that the Bill "does not disturb Section 7A of the European Union (Withdrawal) Act 2018. That section makes the rights and obligations in the UK-EU Withdrawal Agreement available in domestic law. It also provides that domestic

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<sup>51</sup> Under Clause 1(1), all EU-derived subordinate legislation and all retained direct EU legislation is revoked at the end of 2023 unless preserved under Clause 1(2) or unless the date is extended under Clause 2.

<sup>52</sup> Duties under Section 75 of the NI Act 1998. For further information on the disability duties see [ECNI - Disability Duties for Public Authorities - Equality Commission NI \(equalityni.org\)](#). The Disability Discrimination Act 1995 Section 49A requires designated public authorities to have due regard to the need to promote positive attitudes towards disabled persons, and to the need to encourage participation by disabled persons in public life.

<sup>53</sup> [Letter](#) from European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland to Rt Hon Kemi Badenoch MP Secretary of State for Business and Trade, 9 February 2023.

legislation must be read and given effect subject to those rights and obligations”.<sup>54</sup>

- 3.17 The Commissions also welcomed his assurance that “the Government will ensure that all necessary legislation is in place by the Bill’s sunset date to uphold all the commitments made under Article 2.”<sup>55</sup>
- 3.18 At the time of writing, the Bill was progressing to Report stage in the House of Lords and the Commissions’ recommendations remain relevant. The Commissions are continuing to engage with Peers with respect of their recommendations. The Commissions’ full list of recommendations from the submission is provided below.

### ***Recommendations***

- 3.19. **The Commissions recommend that no change to retained EU law be made which would weaken Article 2, its enforceability or oversight mechanisms.**
- 3.20. **The Commissions recommend that when making any change to retained EU law, the relevant UK or NI Minister confirms that an assessment for compliance with the commitment in Article 2 has been undertaken and that there is no diminution of the rights, safeguards and equality of opportunity as set out in the relevant part of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU.**
- 3.21. **The Commissions recommend that the Bill be amended to include a Clause confirming that the provisions of the Bill are without prejudice to Section 7A of the EU Withdrawal Act 2018.**
- 3.22. **The Commissions recommend that the Minister establish a comprehensive notification process in terms of law that is going to be sunsetted, extended or preserved.**
- 3.23. **The Commissions recommend that Clause 1(5) be amended to exclude all legislation insofar as it is effective in NI and relates to human rights and/or equality, including all legislation that falls within the scope of Article 2. If this is not practicable, the Commissions recommend that that Clause 1(5) be amended to exclude all legislation insofar as it is effective in NI.**

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<sup>54</sup> UK Parliament, [Hansard -Retained EU Law \(Revocation and Reform\) Bill](#), Vol 828, 2 March 2023, Column 495

<sup>55</sup> UK Parliament, [Hansard -Retained EU Law \(Revocation and Reform\) Bill](#), Vol 828, 2 March 2023, Column 495

- 3.24. The Commissions recommend that, if Clause 1(5) is not amended to exclude all human rights and equality legislation insofar as it is effective in NI, the sunset date in Clause 1(1) should be extended to provide adequate time for consultation and appropriate parliamentary scrutiny, in line with constitutional convention.
- 3.25. The Commissions recommend that amendment or repeal of retained EU law, affecting human rights and/or equality protections in NI, should be progressed on the basis of continuing adherence to the UK constitutional convention of providing for policy change via the primary legislative process, with technical and operational detail addressed in subordinate legislation. This applies to legislation that emanates from either Westminster or from the NI Assembly.
- 3.26. The Commissions recommend that the Bill is amended to remove Clause 3, or that Clause 3 is amended to retain Section 4 of the EU (Withdrawal) Act 2018 to the extent that it preserves retained EU law which gives effect to human rights and equality protections in NI law, including all legislation that falls within the scope of Article 2.
- 3.27. The Commissions recommend that, for the avoidance of doubt, Clauses 4 and 5 be amended to insert a clarification into the amended Section 5 of the EU (Withdrawal) Act 2018, that it is subject to the obligations arising under Section 7A of that Act.
- 3.28. The Commissions recommend that compliance with Article 2 be considered in advance of amendment, repeal or revocation of assimilated law and fully explained in associated Explanatory Memoranda/Notes or Human Rights Impact Assessments.
- 3.29. The Commissions recommend that the Minister provide a written assurance that it remains the Government's view that CJEU case-law regarding Article 2 should be adhered to by domestic courts on an ongoing basis, in line with Windsor Framework Article 13, and that this obligation will not be diminished by the Bill.
- 3.30. The Commissions recommend that, unless Clause 1 is amended to remove all legislation effective in NI from automatic repeal/revocation, the deadline for restating secondary retained EU law be extended.
- 3.31. The Commissions recommend that Clause 15 be amended to curtail powers to revoke or replace secondary retained EU Law, affecting human

**rights and/or equality protections in NI, to ensure continuing adherence to the UK constitutional convention of providing for policy change via the primary legislative process, with technical and operational detail addressed in subordinate legislation.**

- 3.32. The Commissions recommend that Ministers engage with stakeholders including the Commissions and human rights and equality organisations before using delegated powers to replace retained EU law.**
- 3.33. The Commissions recommend that Clause 16 be amended to ensure that the delegated power to modify legislation may be used for the purposes of dealing with minor and technical matters only.**
- 3.34. The Commissions recommend that the Secretary of State set out, in detail, what consideration was given to compliance with Article 2 in the development of the Bill and what plans are in place to avoid breach of the commitment.**

## **Resourcing of the Commissions**

- 3.35. The Commissions welcome the UK Government’s commitment to their work overseeing the proper implementation of Article 2.<sup>56</sup> This was reaffirmed in the Minister’s response to the Commissions 2021-2022 Annual Report.<sup>57</sup> Further to the UK Government’s commitment in Article 2(2) of the Windsor Framework to facilitate the related work of the ECNI and the NIHRC in upholding human rights and equality standards, it is important that there is sustained and adequate funding of both Commissions to carry out this related work on upholding rights and equality standards. The Commissions therefore welcome UK Government confirmation of continued funding for the Dedicated Mechanism for 2023-25.**
- 3.36. In 2021, following its 5-year periodic review, the UN deferred its decision on re-accrediting the NIHRC with ‘A Status’ due to concerns about the impact of funding cuts on the NIHRC’s fitness for purpose. The NIHRC advised that there would be a potential breach of Article 2(2) if for this reason its ‘A status’ was not confirmed on review.<sup>58</sup> A second deferral was granted in**

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<sup>56</sup> Letter from Conor Burns MP, Minister of State in the NI Office to Lord Jay of Ewelme, Chair of the House of Lords EU Affairs Committee Sub Committee on the Ireland/ Northern Ireland Protocol, 24 November 2021.

<sup>57</sup> Letter from Steve Baker MP, Minister of State for NI to the NI Human Rights Commission and Equality Commission for NI, 1 December 2022.

<sup>58</sup> Letter from NIHRC to Brandon Lewis MP, Secretary of State for NI, 17 November 2021



October 2022, pending the outcome of an independent review of the NIHRC commissioned by the Secretary of State for NI, which reported in December 2022.<sup>59</sup> A further and final six-month deferral was granted in March 2023, subject to the requirement that, by 1 June 2023, the NIHRC provides the Sub-Committee on Accreditation with “further information on the acceptance and implementation by the Government of the recommendations of the independent review” in relation to a number of the Sub-Committee’s concerns including on funding and financial autonomy.<sup>60</sup>

- 3.37. As noted in paragraph 3.44 below, research commissioned by the ECNI on ‘Legislative Scrutiny and the Dedicated Mechanism for monitoring Article 2 of the Ireland/Northern Ireland Protocol’ has called for the continued and sustained resourcing of the Commissions to fulfil their role under Article 2.<sup>61</sup>

### ***Recommendations***

- 3.38. **The Commissions continue to recommend that the NI Office ensures there is adequate and sustained resourcing of the two Commissions to fulfil their responsibilities as the dedicated mechanism framework.**<sup>62</sup>
- 3.39. **The Commissions continue to recommend that, further to the UK Government’s commitment in Article 2(2) to facilitate the related work of the two Commissions in upholding human rights and equality standards, there is sustained and adequate funding of both Commissions generally.**
- 3.40. **The NIHRC recommends that the NI Office confirms its acceptance of, and plans to implement expeditiously, the recommendations of the independent review, to ensure that the NIHRC retains its ‘A status’ under the UN Paris Principles.**

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<sup>59</sup> At the time of writing, the Review had not been published but recommendations were shared with the Sub-Committee on Accreditation.

<sup>60</sup> At its March meeting, the Sub-Committee on Accreditation considered correspondence from the Secretary of State to NIHRC making commitments as regards seeking additional funding and discussing plans for a Comprehensive Spending Review.

<sup>61</sup> Paul Evans, Alexander Horne, Tasneem Ghazi, ‘[Legislative Scrutiny and the Dedicated Mechanism for monitoring Article 2 of the Ireland/Northern Ireland Protocol](#)’ (ECNI, 2021).

<sup>62</sup> The work of the Commissions as the Dedicated Mechanism is funded by the UK Government, with funding delivered through the Commissions’ respective sponsor Departments.

# Implementation and Parliamentary scrutiny of Windsor Framework Article 2

- 3.41. Any new international commitment, such as that set out in Windsor Framework Article 2, requires a significant body of work by Government and others to implement. For example, it will require incorporation into training and guidance, engagement, consideration and alignment of policy processes and scrutiny work to embed. In their 2021-2022 Annual Report, the Commissions outlined a number of overarching recommendations to assist the UK Government, Committees and NI Departments in embedding the Article 2 commitment into the early stages of policy and legislative development, monitoring EU developments relating to the Annex 1 directives, as well as recommendations in relation to ensuring effective Parliamentary scrutiny of Article 2 compliance.
- 3.42. In response to these recommendations, the UK Government has reiterated its firm commitment to Article 2 and upholding the rights of individuals within NI, in line with Article 2 obligations, including in relation to its negotiations with the EU. They have also stated that “the NIO works closely with colleagues across the UK Government and Executive Office to monitor any proposed changes by the EU to the six Annex 1 equality directives, including relevant case law of the Court of Justice of the European Union (CJEU) and will continue to do so.”<sup>63</sup>
- 3.43. In the past year, the Commissions have been working to advise Government on embedding Article 2 across its work through awareness-raising, engagement, training, and provision of guidance and recommendations.
- 3.44. In 2021, the ECNI published research on how to ensure that there is effective Assembly and Parliamentary scrutiny measures in place related to the Article 2 commitment. The research report,<sup>64</sup> highlighted a number of measures for Westminster and for the NI Assembly, to ensure effective scrutiny of the UK Government’s compliance with its commitment under Article 2. This includes setting out in the Explanatory Memoranda for any new legislative measures and details of the Government’s consideration of Article 2 compliance. It also called for the continued and sustained resourcing of the Commissions (see paragraph 3.37 above).

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<sup>63</sup> Letter from the Minister of State for NI to the NI Human Rights Commission and Equality Commission for NI, 1 December 2022.

<sup>64</sup> Paul Evans, Alexander Horne, Tasneem Ghazi, ‘[Legislative Scrutiny and the Dedicated Mechanism for monitoring Article 2 of the Ireland/Northern Ireland Protocol](#)’ (ECNI, 2021).

- 3.45. Building on this research, the Commissions have engaged with relevant Parliamentary Committees and Committee officials (including the NI Affairs Committee, Joint Committee of Human Rights, European Affairs Committee and the House of Lords Sub-Committee on the Protocol); UK Government officials; the NI Office; and the Executive Office with respect to these recommendations.
- 3.46. In March 2022, in their report on ‘Scrutiny of EU legislative proposals within the scope of the Protocol on Ireland/Northern Ireland’<sup>65</sup> the House of Lords Sub-Committee on the Protocol highlighted the importance of effective scrutiny of compliance with Article 2. It invited the UK Government to confirm that, given the importance of Article 2, it would deposit in Parliament and provide Explanatory Memoranda on draft EU proposals which amend or replace the directives listed in Annex 1, as well as other EU legislation relevant to the provisions of Article 2.<sup>66</sup> In response, the UK Government confirmed that it would continue to submit Explanatory Memoranda on EU proposals which amend or replace existing proposals that fall under scope of the Windsor Framework, including the Annex 1 equality directives.<sup>67</sup>
- 3.47. The Sub-Committee also asked the UK Government to “set out how it intends to ensure that the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission, as well as Committees in Westminster and the Northern Ireland Assembly, are kept informed of wider developments in EU law relevant to Article 2.”<sup>68</sup> In response, the UK Government stated that it continues to work closely with both Commissions to ensure the processes and structures are embedded and further noted that the Commissions already have a formal role to bring matters of relevance to Article 2 to the attention of the Specialised Committee on the Protocol.<sup>69</sup>

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<sup>65</sup> House of Lords European Affairs Committee, 5<sup>th</sup> Report of Session 2021-22. Report from the Sub-Committee on the Protocol on Ireland/Northern Ireland: Scrutiny of EU legislative proposals within the scope of the Protocol on Ireland/Northern Ireland, 22 March 2022

<sup>66</sup> *Ibid.*, p35.

<sup>67</sup> UK Government response to the Sub-Committee on the Protocol on Ireland/Northern Ireland’s report Scrutiny of EU legislative proposals within the scope of the Protocol on Ireland/Northern Ireland, 30 May 2022, at para 15.

<sup>68</sup> House of Lords European Affairs Committee, 5<sup>th</sup> Report of Session 2021-22. Report from the Sub-Committee on the Protocol on Ireland/Northern Ireland: Scrutiny of EU legislative proposals within the scope of the Protocol on Ireland/Northern Ireland, 22 March 2022, p35.

<sup>69</sup> UK Government response to the Sub-Committee on the Protocol on Ireland/Northern Ireland’s report Scrutiny of EU legislative proposals within the scope of the Protocol on Ireland/Northern Ireland, 31 May 2022, at 17-18.

- 3.48. In June 2022 the Chairs of the NI Affairs Committee, the Women and Equalities Select Committee, the House of Lords Sub-Committee on the Protocol and the Joint Committee on Human Rights jointly wrote to the UK Government, on the issue of parliamentary scrutiny of Article 2<sup>70</sup>. The four committees requested that the UK Government consider changes to the ‘Cabinet Office Guide to Making Legislation’ and to ‘Statutory Instrument Practice’ to ensure effective consideration of Article 2, specifically requesting that Explanatory Notes for Bills and Explanatory Memoranda for Statutory Instruments include details on the consideration given to Article 2 issues.
- 3.49. The Leader of the House of Commons responded to the committees in December 2022<sup>71</sup> advising that officials in the NI Office and Parliamentary Business and Legislation Secretariat were working on developing guidance and that it was anticipated this would be issued prior to Christmas 2022. As of 31 March 2022, no updated versions of the documents referenced had appeared online.
- 3.50. In its response to the Commissions’ 2021-2022 Annual Report, the UK Government also confirmed that NI Office officials were engaging with colleagues in the Parliamentary Business and Legislation Secretariat and the Union and Constitution Group who would lead on any changes to Government Policy around Explanatory Memoranda - “to consider mechanisms that could be put in place to ensure future Bills or Statutory Instruments being proposed by the UK Government do not diminish rights protected by Article 2.” As of 31 March 2023, the Commissions are awaiting the development of this guidance.
- 3.51. While there has been some progress by the UK Government and NI Executive, it has been over two years since the implementation of the Windsor Framework and significant work has yet to be undertaken in relation to embedding Article 2 in policy and processes. As we come to the end of the second year of reporting, the Commissions note that full training and guidance on Article 2 has not yet been rolled out across UK and NI Government departments and there is limited evidence that early

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<sup>70</sup> Joint letter from the Northern Ireland Affairs Committee, Women and Equalities Committee, Lords Sub-Committee on the Protocol on Ireland/Northern Ireland and the Joint Committee on Human Rights to the Secretary of State for Northern Ireland, relating to Parliamentary scrutiny of Article 2 of the Protocol on Ireland/Northern Ireland, 23 June 2022

<sup>71</sup> Letter from Rt Hon. Penny Mordaunt MP, the Leader of the House of Commons to Simon Hoare, Chair of the Northern Ireland Affairs Committee on Scrutiny of Article 2 of the Northern Ireland Protocol and UK Government legislation, 5 December 2022

consideration of Article 2 has been embedded in policy and legislative development and processes.<sup>72</sup>

### ***Recommendations***

- 3.52. The Commissions recommend that in the development of any laws or policies the UK Government and NI Executive ensure that compliance with Article 2 is embedded in policy and processes at an early stage. This should include consideration of the extent to which any change engages Article 2 and ensuring that there is no diminution to the rights and safeguards which fall within its scope.**
- 3.53. To ensure effective embedding of Article 2 in policy and processes the Commissions recommend that UK and NI government officials should develop and roll out training and guidance on Article 2 and act promptly to ensure UK and NI government guidance on policy and legislative development is updated to include consideration of Article 2.**
- 3.54. The Commissions recommend that the NI Office and the Executive Office 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.**
- 3.55. The Commissions recommend that the UK Government ensures that new legislation is without prejudice to section 7A of the EU (Withdrawal) Act 2018, which incorporates the UK-EU Withdrawal Agreement into domestic law and is essential to enable rights and equality protections under Article 2 to operate fully within UK law.**
- 3.56. The Commissions continue to recommend that the UK Government ensures that there are no changes to the Windsor Framework that would result in a weakening of either the Article 2 commitment or rights, safeguards and oversight mechanisms relating to this commitment.**
- 3.57. The Commissions continue to recommend that both the NI Executive and UK Government ensure effective and regular engagement with civil society, including human rights and equality groups.**

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<sup>72</sup> For example, the Commissions have raised that the Explanatory Notes to the Protocol Bill, and the Retained EU Law (Revocation and Reform) Bill make no reference to any consideration being given to ensuring compliance with Article 2,.

- 3.58. The Commissions continue to recommend that the NI Office engages with relevant UK Government departments and the supervisory bodies established under the UK-EU Withdrawal Agreement and the UK-EU Trade and Cooperation Agreement to establish formal structures for open, transparent and regular engagement with equality and human rights stakeholders in NI.
- 3.59. The Commissions continue to recommend that the UK Government ensures that Explanatory Memoranda on draft EU proposals which amend or replace the Annex 1 equality directives, as well as other EU legislation relevant to the provisions of Article 2, sets out what consideration has been given to ensuring conformity with Article 2.
- 3.60. The Commissions continue to recommend that the UK Government and NI Executive ensure that Explanatory Memoranda / Human Rights Memoranda on draft UK and NI legislative proposals that are likely to engage Article 2 set out what consideration has been given to ensuring conformity with Article 2.
- 3.61. The Commissions recommend that NI Assembly amend Standing Order 41 to ensure the list of topics covered in the Explanatory and Financial Memoranda accompanying bills be expanded to include a requirement to explain what consideration has been given to equality and human rights.
- 3.62. The Commissions recommend that they are kept informed of any future EU equality law developments relevant to the Annex 1 equality directives, including via the Joint Consultative Working Group, and have the opportunity to highlight in advance any implications of those changes for equality law in NI.
- 3.63. The Commissions recommend that the secretariat of the Joint/Specialised Committee establishes a formal communication channel with the Commissions, to ensure early engagement on anticipated changes or additions to legislation.
- 3.64. The ECNI recommends that the NI Assembly Standing Order/s are amended to provide for the Speaker to send a copy of every Bill introduced to the Assembly to the ECNI as soon as practical after its introduction. This is in addition to the NIHRC which already receives a copy of every Bill.

- 3.65. The ECNI recommends that a new Standing Order is created, to allow for a motion to refer any proposed legislation to the ECNI for an opinion with regards to equality and other matters aligned with our remit, including Article 2. This will enable both organisations that comprise the Dedicated Mechanism to conduct analysis and provide opinion in relation to equality/human rights and Article 2. Currently neither Standing Orders 34 or 35 allow bills to be referred to the ECNI for an opinion.

## 4.0 Windsor Framework Article 2: Rights and Issues

- 4.1. In addition to the recommendations on the implementation and scrutiny of Windsor Framework Article 2 above, the Commissions have considered the non-diminution commitment in a range of substantive areas. This section is organised thematically to reflect the areas where the Commissions have made such recommendations.

### Constitutional issues

- 4.2. Article 2 adds an additional layer of human rights and equality protections in NI which must be considered within the wider constitutional human rights and equality framework. This section identifies those areas where the Commissions have raised specific concerns and made recommendations on the interaction of Article 2 in respect of a Bill of Rights for NI; Divergence of Rights on the island of Ireland; and the Human Rights Act.

#### A Bill of Rights for NI

- 4.3. A Bill of Rights for NI remains an unfulfilled commitment of the Belfast (Good Friday) Agreement.<sup>73</sup> Following commitments made in the New Decade, New Approach agreement,<sup>74</sup> the NI Assembly Ad Hoc Committee on a Bill of Rights was established. In 2021, the Commissions separately provided written submissions and joint oral evidence to the Committee, building upon previous advice.<sup>75</sup> In February 2022 the Committee concluded its work and published a report<sup>76</sup> summarising the findings of the extensive stakeholder consultation activities it undertook between 2020-2021.
- 4.4. In March 2022, in its response to the Ministry of Justice consultation on Human Rights Act Reform,<sup>77</sup> the NIHRC advised that Windsor Framework

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<sup>73</sup> In 2008, as required by the Belfast (Good Friday) Agreement and the NI Act 1998, the NIHRC produced 'A Bill of Rights for Northern Ireland - Advice to the Secretary of State for Northern Ireland (NIHRC, 2009). Subsequent UK Government public consultation found "considerable support" for a Bill of Rights along lines recommended but UK Ministers have since referred to lack of political consensus. See UK Parliament Hansard, 'Written Ministerial Statement: Minister of State Hugo Swire MP', 16 December 2010; UK Parliament Hansard, 'House of Commons (Westminster Hall) - Bill of Rights (NI)', 16 July 2003.

<sup>74</sup> NI Office, 'New Decade, New Approach', (NIO, 2020).

<sup>75</sup> NI Human Rights Commission, 'Briefing Note to the Ad Hoc Committee on a Bill of Rights EU Withdrawal and a Bill of Rights' (NIHRC, 2021); Equality Commission for NI, 'Submission to the Ad Hoc Committee on a Bill of Rights for NI', (ECNI 2021); NI Human Rights Commission, 'Response to the Ad Hoc Committee's Consultation on a Bill of Rights for NI', (NIHRC, 2021); NI Assembly Hansard, 'Ad Hoc Committee on a Bill of Rights: Implications of Brexit for Human Rights: Equality Commission for Northern Ireland; Northern Ireland Human Rights Commission', 29 April 2021.

<sup>76</sup> Ad Hoc Committee on a Bill of Rights, Report of the Ad Hoc Committee on a Bill of Rights, February 2022.

<sup>77</sup> Ministry of Justice, 'Human Rights Act Reform: A Modern Bill Of Rights - A Consultation to Reform the Human Rights Act 1998' (MoJ, 2021).



Article 2 is limited in scope and is no substitute for a NI Bill of Rights.<sup>78</sup> A wide range of NI legislation relevant to rights may be susceptible to diminution that would be incapable of challenge via Windsor Framework Article 2, but could be protected by a non-retrogression clause in a Bill of Rights for NI. In June 2022, the Ministry of Justice issued its response to the consultation and introduced the Bill of Rights Bill, which aimed to reform the Human Rights Act, to Parliament on the same day.<sup>79</sup> This Bill is discussed further below in the section on the Human Rights Act.

- 4.5. There have been no further developments relating to a Bill of Rights for NI since the Ad Hoc Committee on a Bill of Rights published its report.

### ***Recommendations***

- 4.6. **The Commissions continue to recommend that the NI Office implements the UK Government commitment to legislate for a Bill of Rights for NI, as set out in the Belfast (Good Friday) Agreement.**
- 4.7. **The NIHRC continues to recommend that the UK Government, particularly the Ministry of Justice, ensures that any proposed reform of the Human Rights Act does not undermine the Belfast (Good Friday) Agreement 1998 and the process to develop a Bill of Rights for NI.**
- 4.8. **The ECNI continues to recommend that the UK Government and NI Executive ensure that there are additional measures within a Bill of Rights to strengthen NI equality laws, address gaps in equality legislation and protect equality and human rights in a post-Brexit context.**

### **Human Rights Act**

- 4.9. In 2020, the UK Government announced an independent review of the Human Rights Act 1998. In 2021, the Independent Human Rights Act Review Team published its report on the operation of the Human Rights Act 1998 and noted “an overwhelming body of support for retaining the Human Rights Act”.<sup>80</sup> It also noted that the reform proposals “could have a significant impact on devolution” and the Belfast (Good Friday) Agreement 1998 “in the case of straightforward repeal”.<sup>81</sup>
- 4.10. In March 2022, both Commissions individually responded to the Ministry of Justice’s consultation<sup>82</sup> on its proposals to revise the Human Rights Act 1998

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<sup>78</sup> NI Human Rights Commission, ‘Response to the Consultation on Human Rights Act Reform: A Modern Bill of Rights’ (NIHRC, 2022).

<sup>79</sup> Ministry of Justice, ‘Human Rights Act Reform: A Modern Bill of Rights - Consultation Response’ (MoJ, 2022).

<sup>80</sup> Independent Human Rights Act Review Team, ‘Independent Human Rights Act Review’ (MoJ, 2021), at para 19.

<sup>81</sup> Ibid, at para 23.

<sup>82</sup> Ministry of Justice, ‘Human Rights Act Reform: A Modern Bill Of Rights - A Consultation to Reform the Human Rights Act 1998’ (MoJ, 2021).

and replace it with a UK Bill of Rights.<sup>83</sup> The NIHRC rejected in totality the proposals made in the consultation document, warning that the proposals would significantly weaken, not strengthen, human rights protection across the UK.<sup>84</sup> The NIHRC also noted that, in accordance with Windsor Framework Article 2, there can be no diminution of those ECHR rights which were underpinned by EU law prior to 1 January 2021 and that the EU Charter of Fundamental Rights continues to have relevance in NI.<sup>85</sup>

- 4.11. The ECNI highlighted its concern that there is the potential that some of the Government's proposals will weaken current ECHR / Human Rights Act protections and engage some of the rights, safeguards and equality of opportunity provisions set out in the relevant chapter of the Belfast (Good Friday) Agreement.<sup>86</sup>
- 4.12. In 2022, the UK Parliament Joint Committee on Human Rights launched an inquiry on the UK Government's review of the Human Rights Act. The NIHRC provided written and oral evidence to help inform the inquiry, highlighting the significance of the Belfast (Good Friday) Agreement 1998 and Windsor Framework Article 2.<sup>87</sup> The Committee concluded "that weakening the [Human Rights Act] would have a significant impact on the Belfast (Good Friday) Agreement, which in turn risks upsetting the peace settlement in NI."<sup>88</sup> In July 2022, the UK Government responded that it "disagreed" with the Joint Committee on Human Rights' findings.<sup>89</sup>
- 4.13. In March 2022, the NIHRC raised concerns regarding the UK Government's plans to replace the Human Rights Act 1998 in its submission to the fourth cycle of the UN Human Rights Council's Universal Periodic Review of the UK. It highlighted in particular the failure of the proposals to adequately consider the Belfast (Good Friday) Agreement 1998, Windsor Framework Article 2 and the integral role of the ECHR in NI.<sup>90</sup> In November 2022, at its

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<sup>83</sup> Northern Ireland Human Rights Commission Equality Commission for Northern Ireland, Annual Report of the NIHRC and the ECNI on the implementation of Protocol Article 2 2021 – 2022, July 2022

<sup>84</sup> NI Human Rights Commission, 'Response to the Consultation on Human Rights Act Reform: A Modern Bill of Rights' (NIHRC, 2022).

<sup>85</sup> Ibid..

<sup>86</sup> Equality Commission NI, 'Response to consultation: Human Rights Act Reform: A Modern Bill of Rights, Ministry of Justice', (ECNI, 2022).

<sup>87</sup> NI Human Rights Commission, 'Submission to the Joint Committee on Human Rights on the Independent Human Rights Act Review' (NIHRC, 2021), at 3; House of Commons and House of Lords Joint Committee on Human Rights, 'Oral Evidence Session on Human Rights Act Reform, 11 May 2022.

<sup>88</sup> House of Commons House of Lords Joint Committee on Human Rights, [Human Rights Act Reform](#), Thirteenth Report of Session 2021-22, 30 March 2022, at paragraph 252.

<sup>89</sup> UK Government, 'Human Rights Act Reform: Government Response to the Committee's Thirteenth Report of Session 2021-22' (UK Gov, 2022).

<sup>90</sup> NI Human Rights Commission, 'NI Human Rights Commission Submission to the UN Human Rights Council's Universal Periodic Review of the UK' (NIHRC, 2022), at para 9.

Universal Periodic Review session, the UK received several recommendations on Human Rights Act reform, including one urging the UK Government to “ensure that any future human rights legislation complies with the duty under the Belfast (Good Friday) Agreement to ensure full incorporation of the ECHR into NI law”.<sup>91</sup> The UK Government supported this recommendation, along with the majority of others on Human Rights Act reform.<sup>92</sup>

- 4.14. In June 2022, the Ministry for Justice stated that its proposed reforms to the Human Rights Act were “fully in line with our obligations under the Withdrawal Agreement, the [Windsor Framework] and the UK–EU Trade and Cooperation Agreement”.<sup>93</sup> Consequently, the Bill of Rights Bill was introduced to the UK Parliament. In August 2022, the NIHRC provided evidence to the Joint Committee on Human Rights’ legislative scrutiny of the Bill raising concerns that it would significantly weaken human rights protections across the UK.<sup>94</sup> The NIHRC advised that a Bill of Rights should strengthen human rights protections and build on the success of the Human Rights Act. The Bill, as introduced, does the opposite. It contradicts fundamental human rights principles and creates barriers to effective remedy. The Bill also reduces access to domestic courts for individuals seeking a human rights-based remedy, which is contrary to the ECHR and the Belfast (Good Friday) Agreement 1998.
- 4.15. The NIHRC advised that the Bill will create uncertainty and confusion, making the interpretation of Windsor Framework Article 2 more challenging and may lead to a culture shift that will further reduce the robustness of human rights protections in NI. The NIHRC also advised that, irrespective of the provisions of the Bill, future ECtHR jurisprudence will continue to inform the interpretation of Windsor Framework Article 2, where ECHR rights correspond to those in the EU Charter of Fundamental Rights.
- 4.16. In August 2022 the ECNI also responded to the Joint Committee on Human Rights inquiry.<sup>95</sup> The ECNI noted that the UK Government had not set out in detail what consideration has been given to the Bill’s compliance with

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<sup>91</sup> A/HRC/52/10, ‘Report of the Working Group on the Universal Periodic Review of the UK of Great Britain and NI’, 9 January 2023, at 43.24.

<sup>92</sup> A/HRC/52/10/Add.1, ‘Report of the Working Group on the Universal Periodic Review of the UK of Great Britain and NI Addendum: Views conclusions and/or recommendation, voluntary commitments and replies presented by the State under review’, 13 March 2023.

<sup>93</sup> Ministry of Justice, ‘Human Rights Act Reform: A Modern Bill of Rights – Consultation Response’ (MoJ, 2022).

<sup>94</sup> NI Human Rights Commission, ‘Evidence to Joint Committee on Human Rights Legislative Scrutiny of the Bill of Rights Bill’ (NIHRC, 2022).

<sup>95</sup> Equality Commission for Northern Ireland, Response to the UK Joint Committee on Human Rights call for evidence Legislative Scrutiny: Bill of Rights Bill, 26 August 2022

Article 2. In the absence of any detailed consideration of the impact of the Bill on these rights, the ECNI highlighted that it was concerned that the implications of Article 2 may not have been adequately considered.

- 4.17. Further, the ECNI highlighted that the Bill contains no safeguards so to ensure that the Bill, as applied, does not have the potential to give rise to a breach of Article 2. The ECNI noted that it considers that the UK Government should include appropriate safeguards in the Bill to ensure that a breach of Article 2 could not occur in the context of the application of the Bill, which is consistent with the Government's stated general commitment to upholding Article 2, and to its statement on the Bill's compliance with the Windsor Framework.
- 4.18. In January 2023 the Joint Committee on Human Rights published a legislative scrutiny report on the Bill of Rights Bill.<sup>96</sup> The report concludes that the UK Government should not progress the Bill in its current form through Parliament.
- 4.19. The Bill of Rights Bill has not progressed to second reading and no date had been scheduled as of 31 March 2023.

### ***Recommendations***

- 4.20. **The NIHRC continues to recommend that the UK Government recognises the Human Rights Act 1998 as a constitutional statute and ensures any reform builds on the 1998 Act as part of further progress in the promotion and protection of human rights.**
- 4.21. **The NIHRC advises that the protections in Windsor Framework Article 2, while an important safeguard against the diminution of rights following UK withdrawal from the EU, are not a substitute for the comprehensive framework of human rights protections under the Human Rights Act.**
- 4.22. **The NIHRC is concerned that, while Windsor Framework Article 2 provides an additional framework for the protection of rights and safeguards, the weakening of human rights protections in the Bill of Rights Bill will create uncertainty and confusion, making the interpretation of Windsor Framework Article 2 more challenging and may lead to a culture shift that will further reduce the robustness of human rights protections in NI.**

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<sup>96</sup> House of Commons House of Lords Joint Committee on Human Rights, Legislative Scrutiny: Bill of Rights Bill, Ninth Report of Session 2022–23, 17 January 2023.

- 4.23. The NIHRC advises that, irrespective of the provisions of the Bill, future ECtHR jurisprudence will continue to inform the interpretation of Windsor Framework Article 2, due to the interpretive requirement in Article 52 of the EU Charter of Fundamental Rights regarding the ECHR and the resulting CJEU jurisprudence.
- 4.24. The NIHRC advises that while the protections of rights under Windsor Framework Article 2 are not directly impacted by the weakening of positive obligations arising under the ECHR within the domestic legal framework, the present Bill creates unhelpful confusion.
- 4.25. The ECNI recommends that the Human Rights Act 1998 should not be reformed without a convincing case that such reform is necessary to further improve access to rights.
- 4.26. The ECNI recommends that the UK Government should ensure the progressive realisation of rights and ensure that enjoyment of rights does not regress.
- 4.27. The ECNI recommends that the UK Government and the NI Executive should take measures to promote awareness and understanding of equality and human rights and responsibilities.
- 4.28. The ECNI recommends that rolling impact assessment and stakeholder engagement should inform steps to improve realisation of human rights under the Human Rights Act.
- 4.29. The ECNI recommends that the UK Government should set out in detail what consideration has been given to the Bill's compliance with Article 2.
- 4.30. The ECNI recommends that the UK Government should give consideration to including appropriate safeguards in the Bill, so as to ensure that the Bill, as applied, does not have the potential to give rise to a breach of Article 2.

#### **Divergence of rights on the island of Ireland**

- 4.31. In their working paper on the scope of Article 2, the Commissions recognise that long term North-South equivalence of protection for equality and human rights is important to ensure there is no diminution of rights in NI and that human rights and equality protections are subject to continual

improvement.<sup>97</sup> Whilst the Windsor Framework requires that NI equality law keeps pace with any EU changes to the Annex 1 equality directives which enhance protections,<sup>98</sup> there is the potential for equality and human rights on the island of Ireland to diverge after the end of the Brexit transition period.

- 4.32. The Commissions have urged<sup>99</sup> the UK Government and NI Executive to 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 the Annex 1 equality directives.
- 4.33. The Commissions welcome the UK Government's expressed commitment in response to their recommendations, to ensuring that rights and equality protections continue to be upheld in line with the provisions of Article 2.
- 4.34. In 2023, the ECNI, 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>100</sup> The research report analysed the impact, and potential impact, of Brexit as regards the divergence of equality and human rights protections and EU best practice on the island of Ireland. It highlighted EU law, policy and best practice developments from 1 January 2021 and that have the potential to result in divergence of rights on the island of Ireland.
- 4.35. The Commissions have, as a result of the findings of the research, developed a number of key policy recommendations.<sup>101</sup> Whilst some of these recommendations are made jointly by all three Commissions, most recommendations are made jointly by the ECNI and NIHRC. A number of these policy recommendations have been previously highlighted by the Commissions, for example, in the joint annual report of the ECNI and NIHRC

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<sup>97</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, 2022)

<sup>98</sup> Article 13, Windsor Framework (formerly Ireland/Northern Ireland Protocol) to the UK-EU Withdrawal Agreement.

<sup>99</sup> Northern Ireland Human Rights Commission Equality Commission for Northern Ireland, Annual Report of the NIHRC and the ECNI on the implementation of Protocol Article 2 2021 – 2022, July 2022.

<sup>100</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>101</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).

on the implementation of Article 2 2021-2022.<sup>102</sup> Other new recommendations are outlined in relevant sections of this report.

- 4.36. 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. 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>103</sup> and the European Accessibility Act.<sup>104</sup> In addition, NI could fall behind in terms of policy developments in the area of equality and human rights as progressive or good practice policy initiatives are developed and actioned in the EU, such as the recent LGBTQI Equality Strategy.<sup>105</sup>
- 4.37. Prior to the withdrawal of the UK from the EU, in some areas there was already stronger protection against discrimination in both Ireland and Great Britain than in NI.<sup>106</sup>
- 4.38. Further, the Commissions have also highlighted that there is divergence in some key areas of substantive equality rights between Great Britain 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.<sup>107</sup>
- 4.39. There have also been a number of significant CJEU case law developments since 31 December 2020 relating to the interpretation of the Annex 1 equality directives, which continue to have implications for how particular legal rules operate in NI.<sup>108</sup>
- 4.40. Equality law is a devolved matter and numerous examples in the research report illustrate how many devolved areas fall within the scope of Article

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<sup>102</sup> Equality Commission for Northern Ireland and Northern Ireland Human Rights Commission, Annual Report of the NIHRC and the ECNI on the implementation of Protocol Article 2 2021 – 2022, July 2022

<sup>103</sup> Directive 2019/1158/EU ‘Directive of the European Parliament and Council on work-life balance for parents and carers’, 20 June 2019.

<sup>104</sup> Directive 2019/882/EU, ‘Directive of the European Parliament and Council on the accessibility requirements for products and services’, 17 April 2019.

<sup>105</sup> See for example, European Commission, LGBTIQ Equality Strategy 2020-2025 (EC, 2020)

<sup>106</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>107</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), pages 37-41, 58-61

<sup>108</sup> Article 13(2), Windsor Framework. 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, 2022)

2.<sup>109</sup> Article 2 also places obligations on the UK Government in relation to reserved and excepted matters that have implications for NI.<sup>110</sup>

### ***Mechanisms for ensuring Compliance and Voluntary Alignment***

- 4.41. The Commissions consider that the UK Government should ensure that there are robust mechanisms for engaging with compliance and voluntary alignment issues, and to avoid a breach of Article 2 should the NI Executive be unable to or fail to act in relation to devolved issues.
- 4.42. The Secretary of State for NI may exercise their power under Section 26 of the NI Act 1998 to ensure that the UK Government's internationally binding commitments, including under Article 2, are not breached by failure of a NI Minister or Department to act. However, the Commissions consider that there is value in carrying out a review of existing legislative safeguards to ensure that such mechanisms are sufficiently robust and adequate. The researchers<sup>111</sup> suggest a range of options aimed at maintaining, enhancing, and/or clarifying arrangements to ensure compliance with the 'keep pace' obligation under the Windsor Framework, in the context of any changes by the EU to the Annex 1 equality directives.
- 4.43. Further, the Commissions consider that there is value in establishing a Memorandum of Understanding between the UK Government and the NI Executive to assist in clarifying when the UK Government will act to ensure compliance with Article 2. The research report highlights that the "interplay" between the UK Government and NI devolved institutions is significant.<sup>112</sup>
- 4.44. The Commissions consider that such a Memorandum of Understanding should also make explicit commitments on maintaining voluntary alignment between NI and EU law particularly in relation to mirroring developments in

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<sup>109</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>110</sup> By way of example, immigration law is an excepted matter (although trafficking is devolved matter). The research report highlights the potential impact of the Nationality and Borders Act 2022 in relation to reserved/non-devolved matters, which has been raised as having a potential Protocol Article 2 impact by the ECNI and NIHRC. The Act includes a provision to disapply retained European Union law derived from the Trafficking Directive (2011/36/E) where that law conflicts with the provisions of the Act. The Commissions have noted that the disapplication provision appears to be directed at reserved matters and not devolved (transferred) matters. Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland, Joint NIHRC/ECNI Briefing Paper on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill (27 January 2022) page 7.

<sup>111</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) pages 9 and 114

<sup>112</sup> Ibid., page 110



EU equality and human rights legislation relevant to Article 2 and North-South equivalence.<sup>113</sup>

### ***Effective Judicial protections***

- 4.45. The research report and Commissions' recommendations<sup>114</sup> emphasised the need for real and effective judicial protection of rights, arising from recent CJEU case law.
- 4.46. As highlighted in the decision in *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*<sup>115</sup> and *Appointment of Judges* case,<sup>116</sup> Article 47 (Right to an effective remedy and to a fair trial) of the EU Charter on Fundamental Rights<sup>117</sup> has become "a significant supplementary ground in various areas of human rights litigation".<sup>118</sup> The research report noted that "the CJEU views effective judicial protection as a procedural right that is integral to European Union law, both in the field of equal treatment and in respect of other directly effective rights".
- 4.47. It is essential that the application of UK-wide legislation, such as the potential reform of the Human Rights Act 1998, does not compromise the specific protection for access to justice and effective judicial protection in NI law of Article 2.
- 4.48. The Commissions consider that the non-diminution obligation under Article 2 applies not only to the substantive rights but also to how those rights are enforced and available remedies.<sup>119</sup> Similarly, entitlement to compensation must continue to be available under NI law where there are breaches of

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<sup>113</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), page 34

<sup>114</sup> *Ibid*,

<sup>115</sup> Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, EU:C:2021:269. The case concerned a passenger who claimed he was discriminated against on grounds of his ethnicity, requiring him to undertake additional security controls, and resulted in a settlement with the airline paying compensation without admitting that discrimination had taken place.

<sup>116</sup> Case C-824/18, *A.B. and Others v Krajowa Rada Sądownictwa and Others*, EU:C:2021:153.

<sup>117</sup> Article 47 states: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

<sup>118</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), page 87

<sup>119</sup> 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 para 6

rights within the scope of Article 2 which occurred prior to the end of Brexit transition period.<sup>120</sup>

- 4.49. Further, the research report refers to the decision in the VI case<sup>121</sup> and it was the view of the researchers that this could be interpreted as supporting ‘prospective obligations’ to provide EU citizens resident in NI and their family with a right to access health and social care benefits, in the same way that UK and Irish citizens can.<sup>122</sup>

### ***Recommendations***

- 4.50. **The Commissions recommend that North-South equivalence of rights and protections be ensured, by NI law 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 the Annex 1 directives.**
- 4.51. **The Commissions recommend that the Irish Government, NI Executive, and UK Government 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.**
- 4.52. **The Commissions recommend that the UK Government and EU should undertake regular reviews of new EU laws relating to equality and 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.**
- 4.53. **The Commissions recommend that the UK Government undertakes a review of legislative safeguards in place to ensure compliance with Article 2 should the NI Executive or Assembly fail to act as required.**

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<sup>120</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), page 47

<sup>121</sup> Case C-247/20 *VI v Commissioners for Her Majesty's Revenue & Customs*, [EU:C:2022:177](#). In which the CJEU ruled that the UK had wrongfully required private comprehensive health insurance cover as part of its residence requirements upon EU citizens in relation to the Citizens Rights Directive,

<sup>122</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), page 91

- 4.54. **The Commissions recommend that a new memorandum of understanding is established between the UK Government and NI Executive explaining how they will engage on compliance and voluntary alignment issues between NI and EU law relevant to Article 2.**
- 4.55. **The Commissions recommend that the NI Executive reviews remedies available under NI equality law so as to ensure that these remedies result in real and effective judicial protection of the rights derived from the Annex 1 equality directives and Article 47 of the Charter of Fundamental Rights of the European Union.**<sup>123</sup>
- 4.56. **The Commissions recommend that the UK Government, NI Assembly and NI Executive review recent CJEU case law relating to access to court and effective remedies to ensure that their policies/legislation in this area reflect these developments as required and as a matter of best practice.**
- 4.57. **The Commissions recommend that the UK Government, NI Assembly and NI Executive review recent CJEU case law relating to compensation for violations of EU fundamental rights and ensure that their policies and legislation in this area reflect these developments as required and as a matter of best practice.**

## Equality and non-discrimination

- 4.58. Article 2 provides specific protection against discrimination as enshrined in the six EU equality directives listed in Annex 1 of the Windsor Framework (Annex 1 equality directives).<sup>124</sup> The UK Government has said that these directives have “been specifically referenced because of the important framework they provide for the anti-discrimination commitments set out in the relevant chapter of the Belfast (Good Friday) Agreement”.<sup>125</sup>

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<sup>123</sup> Charter of Fundamental Rights of the European Union [2012] OJ C326/02.

<sup>124</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>125</sup> Northern Ireland 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 3.

- 4.59. The Racial Equality Directive protects against discrimination on the grounds of race and ethnicity across a range of areas, including employment and vocational training, access to goods and services, education and social security.<sup>126</sup>
- 4.60. The Employment Equality (Framework) Directive protects against discrimination on the grounds of age; religion; sexual orientation; and disability in employment and vocational training.<sup>127</sup>
- 4.61. The four gender equality directives: Gender Goods and Services Directive,<sup>128</sup> Gender Equality (Employment) Directive,<sup>129</sup> Self-Employment Equality Directive,<sup>130</sup> and Equality in Social Security Directive<sup>131</sup> protect against discrimination in employment (including self-employment) and vocational training, access to goods and services and social security.
- 4.62. NI equality law must keep pace with any changes made by the EU to improve the minimum levels of protection, on or after 1 January 2021 in relation to the Annex 1 directives including monitoring relevant current and future CJEU case law.<sup>132</sup>

### Single Equality legislation

- 4.63. In NI, discrimination is prohibited by a complex framework of legislation and regulations. Unlike other parts of the UK (which fall under the Equality Act 2010) and Ireland, there is no single legislative instrument to consolidate, clarify and enhance existing equality protections in NI.
- 4.64. NI legislation also does not provide for cases of intersectional multiple discrimination. At present in NI, each ground for discrimination must form its own case, meaning it has to be considered and ruled on separately.<sup>133</sup> The Equality Act 2010 which applies in England, Scotland and Wales,

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<sup>126</sup> Directive 2000/43/EC, 'Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000.

<sup>127</sup> Directive 2000/78/EC, 'Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000.

<sup>128</sup> 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

<sup>129</sup> 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

<sup>130</sup> 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

<sup>131</sup> 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>132</sup> Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

<sup>133</sup> Equality Commission for NI, '[Recommendations for law reform: Strengthening protection against racial discrimination](#)', (ECNI, 2014), at 38.

contains a dual discrimination provision, although this has not been brought into force.<sup>134</sup>

- 4.65. In its submission to the Advisory Committee on the Framework Convention on National Minorities, in March 2022, the NIHRC highlighted the lack of a single legislative instrument to consolidate, clarify and enhance existing equality protections in NI, noting that that Article 2 added a further dimension for consideration in this context.<sup>135</sup>
- 4.66. The ECNI, in its shadow report to the Advisory Committee on the Framework Convention on National Minorities, also called for the advancement by the NI Executive of robust and comprehensive single equality legislation.<sup>136</sup> In April 2022, the Advisory Committee visited NI as part of its delegation visit to the UK and in December 2022, the Committee of Ministers adopted its opinion which was not publicly available as of 31 March 2023.
- 4.67. In March 2022, the House of Commons NI Affairs Committee expressed concern that anti-discrimination legislation in NI “lags behind the rest of the UK”.<sup>137</sup> The NI Affairs Committee welcomed proposals from the Executive Office to consult on updating NI race-related legislation, but urged for the process to be expedited “to afford the people of NI the same rights and protections as their fellow citizens throughout the rest of the UK”.<sup>138</sup>
- 4.68. In April 2022, the Commissions responded separately to the European Commission public consultation on potential gaps in the EU Racial Equality Directive and how these gaps should be addressed.<sup>139</sup>
- 4.69. In its submission, the NIHRC highlighted that there has been limited progress to consolidate, strengthen and clarify existing equality protections in NI thus far, despite numerous recommendations from various international standard

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<sup>134</sup> House of Lords Select Committee on the Equality Act 2010 and Disability, *The Equality Act 2010: The Impact on Disabled People* (Report of session 2015-16) HL Paper 117, (HL, 2016).

<sup>135</sup> NI Human Rights Commission, [‘Submission to the Advisory Committee on the Framework Convention for the protection of National Minorities – Parallel Report to the Advisory Committee on the Fifth Monitoring Report of the United Kingdom’](#) (NIHRC, 2022), at para 4.1.

<sup>136</sup> Equality Commission for NI [‘Shadow Report from the Equality Commission for Northern Ireland to the Advisory Committee for the Framework Convention for the Protection of National Minorities on the Fifth Monitoring Report of the United Kingdom’](#), (ECNI, 2022) at para 5.16

<sup>137</sup> House of Commons NI Affairs Committee, [‘The Experiences of Minority Ethnic and Migrant People in NI: Second Report of Session 2021-2022’](#) (NIAC, 9 March 2022), page 3

<sup>138</sup> *Ibid*, page 15

<sup>139</sup> European Commission, *‘Addressing Possible Gaps in the Racial Equality Directive – Public Consultation’* (EU Commission, 2022).

bodies.<sup>140</sup> The NIHRC further highlighted that current NI legislation does not provide for intersectional discrimination and noted with concern the lack of legislative reform due to the absence of an Executive.<sup>141</sup> Given these inadequacies and delays at a domestic level, the NIHRC recommended that the EU Racial Equality Directive be amended to implement specific protections against intersectional and multiple discrimination, since Article 2 would require NI law to keep pace with such changes.<sup>142</sup> It further recommended that the EU Directive be amended to include a requirement that all jurisdictions to which the EU Directive applies take steps to strengthen, simplify and harmonise anti-discrimination protections across all protected categories.<sup>143</sup>

- 4.70. In its submission, the ECNI highlighted the need to introduce protection against intersectional multiple discrimination so that there is protection for individuals who experience discrimination or harassment because of a combination of equality grounds, including racial grounds.<sup>144</sup> This change would remove unjustifiable legal barriers that individuals face when trying to prove discrimination on multiple equality grounds.
- 4.71. Both Commissions highlighted in their submissions that in accordance with Article 2, if the EU Racial Equality Directive is amended in such a way that enhances rights and safeguards, then NI law would then be required to keep pace with those changes.
- 4.72. In October 2022, the ECNI published recommendations on the need for a NI Single Equality Act.<sup>145</sup> In its position paper the ECNI recommended the adoption of a Single Equality Act for NI that should reflect international human rights standards and best practice and build on equality law in Great Britain. The ECNI reiterated that any legislation should also consider and comply with the Article 2 commitment and keep pace with all future EU equality laws that enhance protections. In its paper the ECNI urged decision-makers to prioritise the development of single equality legislation, to ensure protection against discrimination and to promote equality of opportunity and good relations.

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<sup>140</sup> NI Human Rights Commission, 'Response to the European Commission Consultation on the Racial Equality Directive (Directive 2000/43/EC)' (NIHRC, 2022).

<sup>141</sup> Ibid.

<sup>142</sup> Article 13, Ireland/NI Protocol to the UK-EU Withdrawal Agreement 2020.

<sup>143</sup> Ibid

<sup>144</sup> Equality Commission for NI, Response to consultation: European Commission - Addressing possible gaps in the Racial Equality Directive, (ECNI, April 2022)

<sup>145</sup> Equality Commission for NI. The need for a NI Single Equality Act: Policy Position Paper, (ECNI, October 2022)

- 4.73. In December 2022, in its submission to the UN International Covenant on Economic, Social and Cultural Rights (UN ICESCR) Committee, the NIHRC advised that NI continues to “lag behind the rest of the UK” without a single equality act. In that context, the NIHRC also highlighted that pursuant to Article 2, NI law must keep pace with any changes to the Annex 1 equality directives, to the extent that rights or protections are enhanced.<sup>146</sup> In March 2023, the UN ICESCR Committee expressed its regret that no action had been taken on its earlier recommendation to extend “comprehensive anti-discrimination legislation” to NI.<sup>147</sup> The Committee sought information from the UK Government on measures taken to adopt a comprehensive anti-discrimination law prohibiting direct, indirect and multiple forms of discrimination on all grounds, providing effective remedies for the victims in all jurisdictions of the UK.<sup>148</sup>
- 4.74. In February 2023, ECNI, in partnership with NIHRC and Irish Human Rights and Equality Commission, published research on the impact of Brexit on the divergence of rights and best practice on the island of Ireland.<sup>149</sup> The view of the researchers, which aligned with that of the Commissions, is that the introduction of a “consolidated codification of rights and equality legislation”,<sup>150</sup> could assist with NI complying more fully with the principle of equivalence under the Belfast (Good Friday) Agreement 1998,<sup>151</sup> and the NI Assembly’s Ad hoc Committee on a Bill of Rights’ most recent proposals.<sup>152</sup>
- 4.75. The Commissions continue to recommend the adoption of consolidated equality legislation.<sup>153</sup> The Commissions have consistently called for the harmonisation ‘upwards’ of equality law, in a way that strengthens equality rights and protections.<sup>154</sup> The Commissions consider that single equality legislation would best harmonise and simplify the protections available.

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<sup>146</sup> NI Human Rights Commission, ‘Submission to the UN Committee on Economic, Social and Cultural Rights - Parallel Report for the List of Issues in Relation to the Seventh Periodic Report of the UK’, (NIHRC 2023), at para 4.1.

<sup>147</sup> E/C.12/GBR/CO/6, ‘UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI’, 14 July 2016, at para 22-23.

<sup>148</sup> E/C.12/GBR/Q/7, ‘UN ICESCR Committee List of issues in relation to the seventh periodic report of UK of Great Britain and NI, 23 March 2023, at para 9.

<sup>149</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>150</sup> Ibid, page 43

<sup>151</sup> See Northern Ireland Human Rights Commission /Irish Human Rights and Equality Commission, *Advice of the Joint Committee on a Charter of Rights for the Island of Ireland* (2011). See also Oran Doyle, Aileen McHarg and Jo Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (CUP 2021) Chapters 6 and 7.

<sup>152</sup> Ad Hoc Committee for a Bill of Rights, *Report of the Ad Hoc Committee on a Bill of Rights* (2022) NIA 156/17-22.

<sup>153</sup> Equality Commission for Northern Ireland and Northern Ireland Human Rights Commission, *Annual Report* of the NIHRC and the ECNI on the implementation of Protocol Article 2 2021 – 2022, July 2022, at para 4.74

<sup>154</sup> Equality Commission for Northern Ireland, *Response of The Commission for Northern Ireland to the Proposals for A Single Equality Bill for Great Britain*, September 2007; Northern Ireland Human Rights Commission, *The 2022 Annual Statement - Human Rights in Northern Ireland* (NIHRC, 2022)

4.76. In October 2022, the Executive Office confirmed to NIHRC that there was no agreement by the NI Executive to bring forward a Single Equality Act for NI.<sup>155</sup> In March 2023, the Executive Office launched a Consultation on the Review of the Race Relations (NI) Order, without addressing wider concerns about consolidation, clarification and enhancement of existing equality protections in NI or intersectional multiple discrimination. In the absence of an Executive, this recommendation has not been able to be progressed.

### ***Recommendations***

- 4.77. **The Commissions continue to recommend that the NI Executive introduce a single equality act to ensure that NI equality law is strengthened and that gaps are addressed as a matter of urgency.**
- 4.78. **The Commissions recommend that the Executive Office provides for intersectional multiple discrimination claims in NI across all equality grounds, including providing for intersectionality within equality legislation as required.**
- 4.79. **The NIHRC recommends that the European Commission amends the Racial Equality Directive to include a requirement that all jurisdictions to which the Directive applies take steps to strengthen, simplify and harmonise anti-discrimination protections across all protected categories.**
- 4.80. **The NIHRC recommends that the EU Commission, as a minimum standard, include stronger recognition of multiple discrimination and the provision of a mechanism for individuals to bring intersectional claims within the EU Racial Equality Directive.**

### **Binding Standards for Equality Bodies**

- 4.81. In July 2021 the European Commission launched a new initiative to strengthen equality bodies by setting minimum standards on how they operate in all grounds of discrimination and areas covered by EU equality rules.<sup>156</sup> The initiative aims to strengthen equality bodies by setting minimum standards on how they operate in all grounds of discrimination and areas covered by EU equality rules.<sup>157</sup> The ECNI had previously welcomed the European Commission's initiative and responded to their calls for feedback and public consultation on the binding standards

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<sup>155</sup> Email from the Executive Office to the NIHRC, 11 October 2022.

<sup>156</sup> European Commission [Equality bodies – binding standards](#)

<sup>157</sup> Ibid.



Roadmap.<sup>158</sup> The ECNI has been highlighting the importance of developing standards for equality bodies as an active member of Equinet and through its engagement with the European Commission and others since Equinet's Working Paper on Developing Standards for Equality Bodies in 2016.<sup>159</sup>

- 4.82. Reference to equality bodies was first included in the Racial Equality Directive<sup>160</sup> (2000/43/EC), an Annex 1 directive. The Racial Equality Directive listed the tasks to be given to national equality bodies including the promotion of equal treatment through assisting victims of discrimination, conducting independent surveys, publishing independent reports and making recommendations on discrimination matters.
- 4.83. Three subsequent Annex 1 equality directives reference the minimum competencies of equality bodies in their respective field: the Gender Equality Directive in the field of goods and services;<sup>161</sup> the Gender Equality Directive in the field of employment;<sup>162</sup> and the Gender Equality Directive in the field of self-employment.<sup>163</sup>
- 4.84. In December 2022, the European Commission published its proposals on two directives on standards for equality bodies.<sup>164</sup> Whilst the Commissions are currently reviewing these proposals in detail, the Commissions' initial view is that the proposed directives do amend provisions of a number of the Annex 1 equality directives and it is therefore important that NI equality law is amended to keep pace with any changes to these equality directives, if the proposals are introduced.
- 4.85. In December 2022, ECNI, in partnership with NIHRC and Irish Human Rights and Equality Commission commissioned and published research on the

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<sup>158</sup> Equality Commission for Northern Ireland's response to the European Commission's public consultation on Binding standards for Equality Bodies, 16 March 2022

<sup>159</sup> Equinet, Developing Standards for Equality Bodies: An Equinet Working Paper, 4 November 2016

<sup>160</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

<sup>161</sup> Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

<sup>162</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

<sup>163</sup> Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC

<sup>164</sup> Proposal for a COUNCIL DIRECTIVE on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC. Proposal for a DIRECTIVE of the European Parliament and of the Council on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU.

impact of Brexit on the divergence of rights and best practice on the island of Ireland.<sup>165</sup> The research report notes that as the ECNI “continues to perform many of the functions of the equality bodies of European Member States, it is recommended that the law governing its operations should be reconsidered against any resultant EU proposals”.<sup>166</sup>

- 4.86. The Commissions have recognised that the development and adoption of EU legislation on binding standards for equality bodies would be a significant and important step to ensure that EU equality legislation is better applied, reducing opportunities for any divergence of rights across countries where such legislation applies, including NI.<sup>167</sup>
- 4.87. If the changes proposed in the proposed Directive/s were introduced into NI equality law, they would be important, and of great value, not only to the ECNI in carrying out its role and remit as the designated equality body for NI in the areas covered by the relevant Annex 1 equality directives, but, in turn, also of value to individuals in NI seeking redress against discrimination in areas covered by these Annex 1 equality directives.
- 4.88. In February 2023, the ECNI responded<sup>168</sup> to the European Commission’s call for feedback and public consultation on their proposed directives on Binding Standards for Equality Bodies. In its submission the ECNI welcomed the proposals to strengthen equality bodies and that they will be legally binding, setting minimum standards for equality bodies in the following areas: mandate, independence, effectiveness (including resources and powers), accessibility and the national institutional framework for equality. It further highlighted that, importantly, the legislative proposals will help enable the better implementation and also enforcement of the EU’s equal treatment legislation, helping to increase equality and eliminating discrimination.
- 4.89. It is essential that the UK Government and the NI Executive Office, tracks and monitors the passage of the draft EU directives on minimum standards for equality bodies, so as to ensure that, if introduced, that the law in NI is

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<sup>165</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](#), Dec 2022\

<sup>166</sup> Ibid, page 112

<sup>167</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>168</sup> Equality Commission for NI, [Equality Commission for Northern Ireland response to the European Commission’s proposals on Binding standards for Equality Bodies](#), (ECNI, February 2023)

amended to keep pace with those changes that amend or replace an Annex 1 directive/s to ensure compliance with Article 2.

- 4.90. In addition, regardless of whether or not required to under the ‘keeping pace’ requirement associated with Article 2, the Commissions would encourage the NI Executive voluntarily to ensure that NI law aligns with changes that strengthen the ECNI further to the EU directives on standards for equality bodies, if introduced. In the development of any such legislation, it is important that the provisions reflect international human rights best practice and standards.

### ***Recommendations***

- 4.91. **The Commissions recommend that the NI Executive and the UK Government commits to ensuring that to the extent that the EU directives on standards for equality bodies, if introduced, amend or replace an Annex 1 equality directive/s, the law in NI is amended to keep pace with that change.**
- 4.92. **The Commissions further recommend that, regardless of whether or not required to under the ‘keeping pace’ requirement associated with Article 2, the NI Executive should voluntarily ensure that NI law aligns with changes that strengthen the ECNI further to the EU directives on standards for equality bodies, if introduced.**

### **Age Discrimination**

- 4.93. Article 2 provides specific protection against discrimination as enshrined in the six Annex 1 equality directives, including the **EU Employment Equality (Framework) Directive** which protects against discrimination on the grounds of age in employment.<sup>169</sup> NI equality law must keep pace with any enhancements made by the EU to the six Annex 1 directives, on or after 1 January 2021, including monitoring current and future CJEU case law.<sup>170</sup>
- 4.94. There is currently no prohibition on discrimination in the provision of goods, facilities and services in NI on the basis of age, unlike in Great Britain and Ireland.<sup>171</sup> This has resulted in a divergence of rights across the island of Ireland with NI falling behind Ireland and Great Britain with respect to age discrimination.<sup>172</sup>

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<sup>169</sup> Directive 2000/78/EC, ‘Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation’, 27 November 2000.

<sup>170</sup> Article 13, Windsor Framework (formerly the Ireland/NI Protocol to the UK-EU Withdrawal Agreement).

<sup>171</sup> Equality Commission for NI, ‘Gaps in equality law between Great Britain and Northern Ireland’, (ECNI, 2014).

<sup>172</sup> In the UK discrimination on the grounds of age in goods facilities and services is prohibited. In Ireland, the Equal Status Acts 2000-2018 list age as a protected characteristic and prohibits discrimination against adults on grounds of age in the disposal of goods and provision of services.

- 4.95. The Commissions have consistently called for the urgent reform of equality legislation in NI to strengthen protection for all ages and have made recommendations for change to the age discrimination legislation relating to the provision of goods, facilities, and services. In their 2021-2022 Annual Report the Commissions called for the NI Executive to introduce age discrimination legislation in the provision of goods, facilities and services.<sup>173</sup> This recommendation has not been progressed.
- 4.96. As referenced in the Commissions' research report on divergence of rights<sup>174</sup> and as set out in the Commissions' policy recommendations<sup>175</sup>, this would avoid the continuing divergence of rights and ensure that NI keeps pace with British, Irish and potentially European law in relation to age discrimination in the provision of goods, facilities and services in NI.

### ***Recommendation***

- 4.97. **The Commissions continue to recommend that the NI Executive and the Executive Office introduces age discrimination legislation in the provision of goods, facilities and services to address gaps in protections between NI and Great Britain and to avoid divergence of rights on the island of Ireland.**

### **Disability Equality**

- 4.98. Article 2 provides specific protection against discrimination as enshrined in the six Annex 1 equality directives, including the **EU Employment Equality (Framework) Directive** which protects against discrimination on the grounds of disability in employment and vocational training.<sup>176</sup> NI equality law must keep pace with any changes made by the EU to these rights to improve the minimum levels of protection available, on or after 1 January 2021, including with relevant current and future CJEU case law relating to this Directive.<sup>177</sup>

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<sup>173</sup> Equality Commission for Northern Ireland and Northern Ireland Human Rights Commission, [Annual Report](#) of the NIHRC and the ECNI on the implementation of Protocol Article 2 2021 – 2022, July 2022, at para 4.62

<sup>174</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>175</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>176</sup> Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000.

<sup>177</sup> Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

- 4.99. As the EU acceded to the UN Convention on the Rights of People with Disabilities (UN CRPD) prior to UK withdrawal,<sup>178</sup> the overriding obligation to promote, protect and implement the UN CRPD through EU law and policy is relevant to the interpretation of UK-EU Withdrawal Agreement 2020, including Article 2, and to all EU measures referenced in that Agreement.<sup>179</sup>
- 4.100. The UK Government has also recognised a non-exhaustive list of relevant measures which fall within scope of the commitment in Article 2, including specific measures which protect the rights of disabled people.<sup>180</sup> In December 2022, the Commissions published a working paper<sup>181</sup> setting out their view as to the EU laws related to the rights of disabled people which fall within the scope of Windsor Framework Article 2.<sup>182</sup>
- 4.101. Following developments related to the Windsor Framework in early 2023, the Commissions have identified that some of the measures in Windsor Framework Annex 2, which are to be subject the ‘Stormont brake’ mechanism, fall within the scope of the non-diminution commitment in Article 2.<sup>183</sup> These include measures that are relevant for disabled people in terms of accessibility standards. For example, Article 24 of Directive 2006/42/EC of 17 May 2006 on machinery, amends the law on the manufacture of lifts in relation to access for, and use by, disabled people. The ‘Stormont brake’ mechanism may therefore have potential implications for equality and human rights, including those relating to disabled people in NI. As outlined in section 2 above, the Commissions have called for equality and human rights considerations to be built into all key stages of the ‘Stormont brake’ mechanism.

### ***Disability Strategy***

- 4.102. Following the New Decade, New Approach commitment to publish a Disability Strategy, the Department for Communities has adopted a co-design approach in the development of a Disability Strategy. The Commissions have highlighted, among other equality and human rights considerations, the need to embed consideration of Article 2 into the Strategy. The public consultation on the Disability Strategy was due to take

<sup>178</sup> [Council Decision 2010/48/EC](#) concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, 26 November 2009.

<sup>179</sup> Article 4, [UK-EU Withdrawal Agreement](#).

<sup>180</sup> 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 para 13.

<sup>181</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, \(ECNI and NIHRC, 2022\)](#) (See Table of EU Law at Annex 1)

<sup>182</sup> For example, Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies; and Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air.

<sup>183</sup> See Para 2.15

place in early 2022, but this process has been delayed. The Disability Strategy cannot progress until a new NI Executive is in place.<sup>184</sup>

### ***EU Court of Justice (CJEU) developments on Disability***

4.103. In March 2023, the research report on divergence of rights on the island of Ireland<sup>185</sup> and the Commissions' subsequent recommendations<sup>186</sup> highlighted areas where NI disability discrimination law needs to be updated to meet the Windsor Framework's requirements of dynamic alignment, including in relation to evolving CJEU case law on the Annex 1 equality directives post 31 December 2020.<sup>187</sup>

4.104. The research report highlighted that there were implications for NI disability law following the CJEU ruling in the case of *Szpital Kliniczny*<sup>188</sup> which elaborated on the concept of disability within the Framework Equality Directive.<sup>189</sup>

4.105. Further CJEU rulings in the cases of *Jurors*<sup>190</sup> and *Tartu Vangla*<sup>191</sup> highlighted that justifications for the exclusion of persons with a disability from certain professional roles, including public service roles, must be scrutinised closely.

4.106. While some aspects of the Court's findings are covered by the Disability Discrimination Act 1995, as amended, further reform of the 1995 Act is needed, particularly in relation to the definition of disability discrimination. The ECNI has previously called for disability-related discrimination to be replaced by provisions prohibiting indirect discrimination and discrimination arising from disability, which will remove the requirement for a disabled

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<sup>184</sup> Letter from Department for Communities to NI Human Rights Commission, 18 July 2022.

<sup>185</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>186</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>187</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), page 9

<sup>188</sup> Judgment of 26 January 2021 in Case C-16/19, *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, EU:C:2021:64 The CJEU ruled that under Article 1 of the Framework Equality Directive the definition of 'disability discrimination' should include discrimination between persons with disabilities. It also ruled under Article 2 of this Directive any form of discrimination which is inextricably linked to a protected characteristic amounts to direct discrimination, rather than indirect discrimination.

<sup>189</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), page 69

<sup>190</sup> Judgment of 21 October 2021 in Case C-824/19, *TC and UB v Komisja za zashtita ot diskriminatsia and VA ('Jurors')*, EU:C:2021:862

<sup>191</sup> Judgment of 15 July 2021 in Case C-795/19, *XX v Tartu Vangla*, EU:C:2021:606

person to compare his or her treatment with that of someone else.<sup>192</sup> If implemented, this change would potentially have addressed, in part, the implications of the CJEU ruling in this case. It would also help address gaps in protection for disabled people in NI compared to rights for disabled people in Great Britain under equality law.

4.107. The Commissions have also highlighted that the area of disability discrimination is a key area for dynamic alignment when conducting CJEU case law tracking. This is in light of the fact that the research report noted that the European Commission had identified the area of disability discrimination where there has been ongoing and likely to be new legislative developments.<sup>193</sup>

### ***UN Convention on the Rights of Persons with Disabilities (UN CRPD)***

4.108. In accordance with Section 7A of the EU Withdrawal Act 2018, all the rights, obligations and remedies arising under the UK-EU Withdrawal Agreement are part of UK law. The definition of EU law in the UK-EU Withdrawal Agreement encompasses those international agreements to which the EU is party, including the UN CRPD. The UN CRPD is therefore part of NI domestic law to the extent that it was within EU competence prior to the UK leaving the EU. As such, the UN CRPD is relevant for the interpretation of the Annex 1 equality directives and the EU law underpinning rights within the scope of Article 2.<sup>194</sup> The NI High Court has recognised that the UN CRPD is an integral part of the EU legal order and is relevant to Article 2.<sup>195</sup>

4.109. The research report on divergence of rights on the island of Ireland<sup>196</sup> and the Commissions' subsequent recommendations<sup>197</sup> have highlighted that the UN CRPD has not been incorporated directly into domestic law in the UK, including NI. However, the UN CRPD was incorporated into the EU legal order, but only to the extent that it was within EU competence.

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<sup>192</sup> Equality Commission for Northern Ireland, [Strengthening Protection for Disabled People Proposals for Reform](#) - Full report, March 2012, pages 7-8

<sup>193</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), page 69.

<sup>194</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, 2022).

<sup>195</sup> [Re SPUC Pro-Life Limited \[2022\] NIQB 9](#), paras 105-106

<sup>196</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>197</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)



4.110. Research published by ECNI has highlighted that the lack of progress in incorporating the UN CRPD into law has been linked to delays in disability strategies and an absence of progressive change to improve the lives of deaf and disabled people.<sup>198</sup>

4.111. The research report noted the potential for divergence of rights in light of the European Parliament resolution (2021) on establishing a general framework for equal treatment in employment and occupation in light of the UN CRPD. This resolution requires EU Member States to ensure full integration and compliance with the UN CRPD and to propose legislation to protect the rights of people with disabilities, which extends the protections afforded by the Framework Equality Directive.<sup>199</sup> Therefore incorporating UN CRPD rights into NI law would limit any potential for future divergence between NI and Ireland in the area of disability discrimination.

### ***EU Accessibility Act***

4.112. The 2019 European Accessibility Act<sup>200</sup> will benefit people with disabilities and older people including through providing for more accessible products and services, at more competitive prices and fewer barriers to accessing transport and education.<sup>201</sup>

4.113. The Commissions' policy recommendations on divergence of rights on the island of Ireland noted that following its departure from the EU, the UK Government no longer has an obligation to adopt the directive into UK law. However, it could, along with the NI Assembly, choose to do so, to keep pace with EU accessibility legislation and address key inequalities that exist for disabled people in accessing goods and services as well as for older people.<sup>202</sup>

4.114. As noted in the research report, the European Accessibility Act will be adopted in Ireland, therefore creating a potential divergence of rights between Ireland and NI for people with disabilities and older people.<sup>203</sup> The

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<sup>198</sup> Nuala Toman, Tony O'Reilly, Michael McConway, Andrew Hamilton, Emma O'Neill, [Progress Towards the Implementation of the UN CRPD in Northern Ireland](#), (ECNI, February 2022), page 15

<sup>199</sup> Council Directive [2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; [European Parliament resolution](#) of 10 March 2021 on the implementation of Council Directive [2000/78/EC](#) establishing a general framework for equal treatment in employment and occupation in light of the [UN CRPD \(2021\) OJ C 474/04](#).

<sup>200</sup> [European accessibility act - Employment, Social Affairs & Inclusion - European Commission](#)

<sup>201</sup> [Ibid.](#)

<sup>202</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>203</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), page 104



European Accessibility Act does not fall directly under the Article 2 commitment; however, it is relevant due to its impact for people with disabilities and older people.<sup>204</sup>

### ***Autism strategy***

4.115. The Autism Act (NI) 2011 places a statutory responsibility on the Department of Health to publish an autism strategy every seven years. In March 2021, the Department of Health published an 'Autism Interim Strategy 2021-2022'.<sup>205</sup> The Autism (Amendment) Act NI 2022 provides for what should be included in a regional autism strategy.<sup>206</sup> In December 2022, the Department of Health consulted on the 2023-2028 Autism Strategy.<sup>207</sup>

### ***Assistance Dogs***

4.116. In 2021, the Commissions wrote jointly to the then Minister for Agriculture, Environment and Rural Affairs, highlighting potential equality and human rights implications in respect of changes to rules around taking pets, including assistance dogs, from Great Britain to NI.<sup>208</sup> Checks on pets and assistance dogs entering NI from Great Britain were subsequently delayed indefinitely to allow for the UK and EU to find a long-term solution.<sup>209</sup>

4.117. In response to the Commissions' 2021-2022 Annual Report the UK Government reiterated its commitment to finding a long-term solution to enable people to move between Great Britain and NI with assistance dogs specifically and household pets more generally.<sup>210</sup>

4.118. In June 2022, the Commissions jointly responded to the House of Lords Sub-Committee on the Protocol's follow up Inquiry on the Impact of the [original] Protocol.<sup>211</sup> In their joint submission, the Commissions reiterated their call for the UK and the EU to find a long-term, sustainable solution to pet travel arrangements.

4.119. In February 2023, the UK and European Commission published a joint Political Declaration announcing an agreement on the Protocol - the

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<sup>204</sup> Ibid., page 104

<sup>205</sup> Department of Health, 'Autism Interim Strategy 2021-2022', (DoH, 2021).

<sup>206</sup> The NIHRC submitted advice to the Committee for Health on the Bill. NI Human Rights Commission, 'Response to Autism (Amendment) Bill' (NIHRC, 2021).

<sup>207</sup> Department of Health, 'Autism Strategy 2023-2028 Questionnaire' (DoH, 2021).

<sup>208</sup> Amy Stewart, 'Guide Dogs: Charity calls for NI exemption on new post-Brexit rules', *BBC News*, 5 January 2021.

<sup>209</sup> Department of Agriculture, Environment and Rural Affairs, 'Press Release: Permanent solutions needed for pet checks', 15 September 2021.

<sup>210</sup> Letter from Steve Baker, Minister of State for NI to Geraldine McGahey ECNI and Alyson Kilpatrick NIHRC on Annual Report of the Dedicated Mechanism on the implementation of Protocol Article 2 2021-2022, 1 December 2022.

<sup>211</sup> Equality Commission for NI and NI Human Rights Commission, Submission of the NIHRC and ECNI to the House of Lords Sub-Committee on the Protocol's follow up Inquiry on the impact of the Protocol (ECNI and NIHRC 2022)

“Windsor Framework”. The joint Political Declaration<sup>212</sup> stated that the UK and EU had reached a resolution on pet passports with pets “able to easily accompany their owners when they travel within the United Kingdom”. The UK Government Command Paper<sup>213</sup> states that “for Northern Ireland pet owners there will be no new requirements of any kind” and that “pets owners can come and go from Great Britain without ever having to think about any paperwork process”.

4.120. The Commissions welcome any such developments that will remove or reduce those checks on assistance dog owners. The Commissions also welcome the UK Government’s indication that it will work with ferry companies to ensure that their online guidance reflects these new arrangements and gives travellers confidence to travel once again with their pets.<sup>214</sup>

### ***Medicines***

4.121. Following the end of a transitional ‘grace period’, it would have been required under the original Protocol on Ireland/NI that all medicines imported to NI from Great Britain follow EU rules and regulations. As a result, suppliers raised concerns about the viability of supplying items to NI in the longer term. The Commissions raised concerns that this could result in NI facing continued and intensified disruption in relation to medicines supply.<sup>215</sup> In response the UK Government reiterated its commitment to seek a long-term solution on medicines, either through its preferred option of a negotiated solution with the EU, or if this was not possible, via the Protocol Bill.<sup>216</sup>

4.122. In June 2022 the Commissions raised these concerns in evidence to the House of Lords Sub-Committee on the Protocol in their Inquiry on the Impact of the [original] Protocol, highlighting potential equality and human rights implications for disabled people in NI.<sup>217</sup> In its follow up report on the Impact of the [original] Protocol in July 2022, the Sub-Committee urged the UK and the EU “to work together in constructive dialogue, and in full

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<sup>212</sup> Political Declaration by the European Commission and the Government of the United Kingdom, 27 February 2023, page 2

<sup>213</sup> The Windsor Framework: a new way forward - Command Paper 1245, page 17

<sup>214</sup> *Ibid*, page 17, para 46

<sup>215</sup> Equality Commission for NI and NI Human Rights Commission, ‘Submission of the NIHRC and ECNI on the UK and EU proposals and the prospects for Agreement to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland’ (ECNI and NIHRC 2021)

<sup>216</sup> Letter from Steve Baker, Minister of State for NI to Geraldine McGahey ECNI and Alyson Kilpatrick NIHRC on Annual Report of the Dedicated Mechanism on the implementation of Protocol Article 2 2021-2022, 1 December 2022.

<sup>217</sup> *Ibid*, at paras 3.1-3.8.

consultation with industry representatives, to identify sustainable solutions to these issues (medicines) in the months ahead.”<sup>218</sup>

4.123. In February 2023, the UK and EU announced that a permanent resolution had been found to ensure that patients in NI “will have access to new medicines at the same time and under the same conditions as Great Britain”.<sup>219</sup> In addition it stated that: “Under the agreement, they have secured an unprecedented settlement that provides a comprehensive carve-out from EU rules: fully safeguarding the supply of medicines from Great Britain into Northern Ireland”.<sup>220</sup>

4.124. The Commissions welcome the announcements by the UK and EU which aim to address any issues relating to the supply of medicines from Great Britain to NI. The Commissions will continue to monitor the changes pursuant to the Windsor Framework to ensure there is no diminution of the current provision, including for disabled people, and to protect the highest attainable standard of health.

### ***Recommendations***

4.125. **The Commissions continue to recommend that the Department for Communities promptly publishes and effectively implements a robust Disability Strategy, which embeds consideration of Article 2, and is accompanied by a measurable plan of action for improving the living conditions of all persons with disabilities and effective monitoring arrangements.**

4.126. **In line with the ‘keeping pace’ obligations under Article 2, the Commissions continue to recommend that the Department for Communities monitor any proposed changes by the EU to the six Annex 1 equality directives, including relevant case law of the CJEU and the EU Employment Equality (Framework) Directive.**

4.127. **The Commissions recommend that the NI Executive, and relevant NI Departments, ensure that the Framework Equality Directive and domestic law which gives effect to this Directive, is interpreted in line with the decision of the CJEU in the *Szpital Kliniczny* case relating to disability discrimination.**

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<sup>218</sup> Report from the Sub-Committee on the Protocol on Ireland/Northern Ireland: Follow-up report page 75, para 40

<sup>219</sup> [Political Declaration by the European Commission and the Government of the United Kingdom](#), 27 February 2023

<sup>220</sup> Ibid

- 4.128. The Commissions recommend that the NI Executive, NI Assembly and the Department for Communities reform the disability equality legislation so as to ensure that disability-related discrimination is replaced by provisions prohibiting indirect discrimination and discrimination arising from disability.
- 4.129. The Commissions recommend that the UK Government and NI Executive give effect to the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD) in domestic legislation.
- 4.130. The Commissions recommend that the NI Executive, and relevant NI Departments, including the Department for Communities, Department for the Economy and the Executive Office should voluntarily ensure that NI law aligns with the provisions of the EU Accessibility Act which enhance protections for people with disabilities and older people in NI.
- 4.131. The NIHRC recommends that the Department for Communities ensures an up-to-date Autism Strategy, which takes a human rights-based approach in line with international human rights standards and Article 2, is promptly designed, implemented and monitored through meaningful engagement with persons with disabilities and their representative organisations.

## **Discrimination on Grounds of Sexual Orientation**

- 4.132. Article 2 provides specific protection against discrimination as enshrined in the six Annex 1 equality directives, including the **EU Employment Equality (Framework) Directive** which protects against discrimination on the grounds of sexual orientation.<sup>221</sup> NI equality law must keep pace with any changes made by the EU to improve the minimum levels of protection, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.<sup>222</sup>

### ***LGBTQI+ Strategy***

- 4.133. In 2020, the New Decade, New Approach agreement committed to publishing a Sexual Orientation Strategy.<sup>223</sup> A public consultation on the strategy was due to take place in early 2022, but this process has been

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<sup>221</sup> Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000.

<sup>222</sup> Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

<sup>223</sup> NI Office, 'New Decade, New Approach', (NIO, 2020), at 27.

delayed. The Department for Communities has confirmed that the LGBTQI+ Strategy cannot progress until a new NI Executive is in place.<sup>224</sup>

4.134. In March 2023, the NIHRC provided a written briefing to inform a country visit to the UK by the UN Independent Expert on Sexual Orientation and Gender Identity in relation to LGBTQI+ rights in NI. The briefing outlined the ongoing relevance of the Employment Equality (Framework) Directive to protect against discrimination on grounds of sexual orientation in employment and the requirement that NI law keep pace with any changes to EU law which improve on minimum levels of protection.<sup>225</sup>

### ***Recommendation***

4.135. **The Commissions continue to recommend that the Department for Communities promptly publishes and implements a robust LGBTQI+ Strategy for NI, accompanied by a measurable plan of action, which takes into account its obligations under Article 2, including the keeping pace obligations relating to the EU Employment Equality (Framework) Directive.**

### **Gender Equality**

4.136. Article 2 provides specific protection against discrimination as enshrined in the six Annex 1 equality directives, including the **EU equality directives which protect against gender discrimination** and which cover **employment and vocational training**,<sup>226</sup> **access to goods and services**,<sup>227</sup> and **social security**.<sup>228</sup> NI equality law must keep pace with any changes made by the EU which improve the minimum levels of protection, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.<sup>229</sup>

4.137. The rights, safeguards and equality of opportunity provisions set out in the relevant Chapter of the Belfast (Good Friday) Agreement include the “right to equal opportunity in all social and economic activity, regardless of ... gender”. To the extent that additional EU obligations fall within scope of Article 2, such as the EU Parental Leave Directive<sup>230</sup> and the EU Pregnant

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<sup>224</sup> Letter from Minister for Communities. Deirdre Hargey MLA, to Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), Intersex+ Strategy Co-Design Group, 18 July 2022

<sup>225</sup> 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.

<sup>226</sup> 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; 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.

<sup>227</sup> 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.

<sup>228</sup> 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.

<sup>229</sup> Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

<sup>230</sup> Directive 2010/18/EU, ‘Council Directive implementing the revised Framework Agreement on parental leave’, 8 March 2010.

Worker's Directive,<sup>231</sup> there should be no diminution of rights, safeguards and equality of opportunity following the UK withdrawal from the EU.

### ***Gender Equality Strategy***

4.138. In 2020, the New Decade, New Approach agreement included a commitment to publish a new Gender Equality Strategy.<sup>232</sup> The Department for Communities has adopted a co-design approach to development of the strategy. A public consultation on the Gender Equality Strategy was due to take place in early 2022, but this process has been delayed. The Department for Communities has confirmed that the Gender Equality Strategy cannot progress until a new NI Executive is in place.<sup>233</sup>

### ***Participation of Women in Public Life***

4.139. In addition to the keeping pace obligation, the NI Assembly as a matter of best practice can choose to voluntarily align with EU developments, even where it is not required to do so under the Windsor Framework to strengthen protections and ensure North-South equivalence of rights on the island of Ireland.<sup>234</sup>

4.140. In 2022, the EU adopted a directive on gender balance in non-executive director roles,<sup>235</sup> whereby Member States are required to ensure that listed companies employ at least 40% female members in non-executive director roles. Ireland is obliged under EU law to adopt measures to promote the participation of women in non-executive director roles. Such provisions may not be reflected in NI law and could potentially lead to a divergence of rights.

### ***Recommendations***

4.141. **The Commissions continue to recommend that the Department for Communities promptly publishes and implements a robust Gender Equality Strategy for NI, accompanied by a measurable plan of action, which takes into account its obligations under Article 2, including the keeping pace obligations relating to the four gender equality directives in Annex 1.**

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<sup>231</sup> Directive 92/85/EEC, 'Council Directive on the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers who have Recently Given Birth or are Breastfeeding', 19 October 1992.

<sup>232</sup> NI Office, 'New Decade, New Approach', (NIO, 2020).

<sup>233</sup> Letter from Department for Communities to NI Human Rights Commission, 18 July 2022

<sup>234</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](#), February 2023

<sup>235</sup> Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures, 23 November 2022.

4.142. In line with the ‘keeping pace’ obligations under Article 2, the Commissions continue to recommend that the Department for Communities monitor any proposed changes by the EU to the six Annex 1 equality directives, including relevant case law of the CJEU and the four gender equality directives.

### Racial Equality

4.143. Article 2 provides specific protection against discrimination as enshrined in the six Annex 1 equality directives, including the **EU Racial Equality Directive**.<sup>236</sup> NI equality law must keep pace with any changes made by the EU to improve the minimum levels of protection, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.<sup>237</sup>

4.144. In 2016, the UN Convention on the Elimination of Racial Discrimination (UN CERD) Committee recommended that the UK Government and NI Executive promptly adopt comprehensive legislation prohibiting racial discrimination in line with UN CERD.<sup>238</sup>

#### ***Racial Equality Directive***<sup>239</sup>

4.145. The Racial Equality Directive protects against discrimination on the grounds of race and ethnicity across a range of areas, including employment and vocational training, access to goods and services, education and social security.<sup>240</sup>

4.146. In January 2022, the European Commission launched a public consultation, to pinpoint potential gaps in the Racial Equality Directive and identify measures to address these gaps.<sup>241</sup> The Commissions responded separately to the consultation, as part of their respective mandates to monitor the alignment of NI law with any enhancements to rights or safeguards under the Racial Equality Directive.<sup>242</sup>

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<sup>236</sup> 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.

<sup>237</sup> Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

<sup>238</sup> CERD/C/GBR/CO/21-23, ‘Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of United Kingdom’, 26 August 2016, at para 8(c). This was reiterated by UN Special Rapporteur on contemporary forms of racism, E Tendayi Achiume when she visited in NI in 2018 (A/HRC/41/54/Add.2, ‘Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance: Visit to the UK of Great Britain and NI’, 27 May 2019, at para 74(f)).

<sup>239</sup> This section should be read in conjunction with the discussion on that part of the review of the Race Relations Order as relates to multiple and intersectional discrimination in the section on Single Equality Legislation above.

<sup>240</sup> 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.

<sup>241</sup> EU Commission, ‘Addressing possible gaps in the Racial Equality Directive – Public Consultation’, (EU, 2022).

<sup>242</sup> Section 78A(1), Northern Ireland Act 1998.

4.147. In its response to the EU Commission's consultation the ECNI highlighted several areas of importance when identifying gaps in the EU Racial Equality Directive including protection against discrimination on the grounds of colour and nationality, and in relation to public functions, multiple discrimination, third party harassment, increasing protection against victimisation and equality data and monitoring.<sup>243</sup>

4.148. The ECNI highlighted that in light of the 'keeping pace' commitment by the UK Government relating to the Annex 1 equality directives, any changes by the EU which amend or replace the provisions in the Racial Equality Directive, will have implications for race equality rights in NI.<sup>244</sup>

4.149. In its response to the European Commission consultation, the NIHRC, reiterated its overarching concerns in relation to racial equality in NI, including lack of protection against intersectional and multiple discrimination, sectarianism, hate crime, insufficient equality data and monitoring, and lack of legislative harmonisation. Given current inadequacies in NI law, the NIHRC recommended that the EU Directive be updated in these areas to provide an enhanced layer of protection for racial equality in NI.<sup>245</sup> It also outlined the need to enhance the scope of discrimination and compliance under the EU Directive and highlighted the need to identify discrimination arising from algorithms and data-driven technology.<sup>246</sup> Furthermore, the NIHRC recommended that the EU Directive include a specific acknowledgement of the significance of Article 2 and keep pace obligations for racial equality in NI.<sup>247</sup>

4.150. A response by the European Commission in relation to its consultation on the Racial Equality Directive is awaited.

### ***Race Law Reform***

4.151. In 2015, the Executive Office committed to reviewing the Race Relations (NI) Order 1997.<sup>248</sup> In 2021, a comparative study of protections offered by the Race Relations (NI) Order with laws in the rest of the UK and Ireland had been examined by the Departmental Solicitor's Office and formed part of engagement with stakeholders and other administrations.<sup>249</sup> The TEO launched a consultation on legislative reform of the Race Relations (NI)

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<sup>243</sup> Ibid, page 5

<sup>244</sup> Ibid, page 3

<sup>245</sup> NI Human Rights Commission, 'Response to the European Commission Consultation on the Racial Equality Directive (Directive 2000/43/EC)' (NIHRC, 2022).

<sup>246</sup> Ibid.

<sup>247</sup> Ibid.

<sup>248</sup> The Executive Office, 'Racial Equality Strategy 2015-2025' (TEO, 2015).

<sup>249</sup> Email correspondence from the Executive Office to the NI Human Rights Commission, October 2021.



Order in March 2023 which will run until June 2023<sup>250</sup>. As detailed below, the Commissions have previously highlighted concerns about the legislation and are currently considering their response to the proposals.

4.152. In August 2022, the ECNI's paper on "*Race Law Reform: Priorities and Recommendations*" outlined that in the absence of harmonised single equality legislation, urgent changes are required to strengthen racial equality legislation in NI.

4.153. The ECNI's paper highlighted five priorities for action in relation to race equality laws including harmonising and expanding the scope of racial grounds<sup>251</sup>, ensuring broader protection against racial discrimination and harassment by public bodies when carrying out their public functions; introducing protections against combined or multiple discrimination, greater protection for employees against third party racial harassment and expanding the scope of positive action measures. It also reiterated the need to improve workforce monitoring on racial equality grounds, limit exceptions to racial equality law and improve enforcement and remedies.<sup>252</sup>

4.154. The ECNI highlighted the UK Government's commitment under Article 2 to ensure there is no diminution of rights, safeguards and equality of opportunity protections and provisions, including those underpinned by the Racial Equality Directive, as set out in the relevant part of the Belfast (Good Friday) Agreement. It also highlighted the UK Government's commitment to ensure NI's equality laws keep pace with any changes the EU may make to amend or replace the Annex 1 equality directives that enhance protections, including the EU Racial Equality Directive.

4.155. In its response to the EU Commission's public consultation on potential gaps in the EU Racial Equality Directive, the NIHRC noted that given the inadequacies and delays at a domestic level, the review of the Racial Equality Directive provided a welcome opportunity to address these local gaps, including in the implementation of protections against intersectional and multiple discrimination in NI and providing for a duty on all public authorities to collect, analyse and monitor equality data.<sup>253</sup>

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<sup>250</sup> See [Consultation on the Review of the Race Relations \(NI\) Order 1997 | The Executive Office \(executiveoffice-ni.gov.uk\) \(TEO, 2023\)](#)

<sup>251</sup> including on grounds of colour and nationality

<sup>252</sup> Equality Commission for Northern Ireland, [Race Law Reform: Priorities and Recommendations](#), (ECNI, 2022)

<sup>253</sup> NI Human Rights Commission, '[Response to the European Commission Consultation on the Racial Equality Directive \(Directive 2000/43/EC\)](#)' (NIHRC, 2022).

### ***Racial Profiling***

- 4.156. The Commissions have outstanding concerns about Home Office guidance in relation to the Common Travel Area and the proposed intelligence-led immigration checks which could lead to an increased risk of racial profiling.<sup>254</sup>
- 4.157. In 2021, the NIHRC<sup>255</sup> and ECNI<sup>256</sup> wrote separately to the Secretary of State for the Home Department to raise their concerns.
- 4.158. In 2022, the Home Office responded to the NIHRC and the ECNI correspondence. The Home Office reiterated its position that intelligence led checks were conducted under Common Travel Area guidance on journeys between Ireland and the UK to identify people who need permission to enter the UK and to identify anyone attempting to circumvent UK immigration controls. However, the Home Office confirmed that it does not operate routine immigration controls on journeys from within the Common Travel Area and that there are no immigration controls whatsoever on the Ireland-Northern Ireland border.
- 4.159. In its response to the NIHRC, the Home Office confirmed that officers record the reasons for examination of members of the public in their notebooks, but it does not record racial profiles. It stated that data is not recorded in a way which would make it possible to answer the question on how many intelligence-led checks were conducted under Common Travel Area guidance. It also highlighted that all staff must undertake mandatory training to ensure they are compliant with human rights and equality law and that staff are prohibited from using racial profiling.<sup>257</sup> In response to ECNI, the Home Office also stated that racial profiling, or any profiling using protected characteristics, does not and would not form any part of their intelligence-led checks.
- 4.160. As discussed further in chapter 5 of this report, the Commissions raised related concerns<sup>258</sup> in relation to the proposed Electronic Travel Authorisations, under the now Nationality and Borders Act 2022. An Electronic Travel Authorisation will be required for all non-British citizens

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<sup>254</sup> Letter from the NI Human Rights Commission to the Secretary of State for the Home Department, Priti Patel MP, 20 December 2021.

<sup>255</sup> Ibid

<sup>256</sup> Letter from the Equality Commission for NI to the Secretary of State for the Home Department, Priti Patel MP, 26 January 2022.

<sup>257</sup> Letter from the Home Office to the NI Human Rights Commission, 5 July 2022.

<sup>258</sup> NI Human Rights Commission and Equality Commission for NI, 'Joint Submission to House of Lords on the Nationality and Borders Bill', (NIHRC and ECNI, 2022), at 11-12.

who require leave to enter the UK, when travelling from Ireland to the UK.<sup>259</sup>

4.161. In March 2022, the House of Lords Sub-Committee on the Protocol sent a letter to the then Minister for the Home Office, Baroness Williams of Trafford, asking for a specific response on the two Commissions' recommendations.<sup>260</sup> In April 2022, the Minister responded by assuring the Sub-Committee that the Bill was compliant with international obligations, including the Windsor Framework. This response also contended that exemptions for journeys into NI from Ireland would pose too much of a risk to UK border control and to efforts to strengthen borders.<sup>261</sup> The letter further provided an assurance that the UK would not operate routine immigration controls on journeys from within the Common Travel Area, with no immigration controls whatsoever on the Ireland-NI land border.<sup>262</sup> The UK Government has since confirmed this directly with the Commissions.

4.162. In March 2023, the UK Government announced that third country nationals who are resident in Ireland and from a nationality that does not usually require a visa to visit the UK, would be exempt from requiring an Electronic Travel Authorisation to enter the UK, which partially addresses the NIHRC's recommendation. However, individuals not resident in Ireland will still need to apply for an Electronic Travel Authorisation when traveling from Ireland to NI.<sup>263</sup>

4.163. In March 2023, the ECNI finalised its independent research report on the 'Impact of Brexit on minority ethnic and migrant people in Northern Ireland'. The aim of the research was to provide a high level, preliminary analysis of the actual, perceived and potential socioeconomic impacts of Brexit on minority ethnic and migrant people in NI. This includes the experiences of minority ethnic and migrant people in relation to racial profiling at the border. It is anticipated that the report will be published in 2023.

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<sup>259</sup> Section 75 of the Nationality and Borders Act 2022.

<sup>260</sup> Letter from Chair of the Protocol on Ireland/Ni Sub-Committee, Lord Jay of Ewelme, to Minister for the Home Office, Baroness Williams of Trafford, 3 March 2022.

<sup>261</sup> Letter from Chair of the Protocol on Ireland/Ni Sub-Committee, Lord Jay of Ewelme, to Minister for the Home Office, Baroness Williams of Trafford, 1 April 2022.

<sup>262</sup> Ibid.

<sup>263</sup> Home Office, 'Statement of changes to the immigration rules - HC 1160', 9 March 2023.

### ***Minority ethnic groups/faith communities***

- 4.164. The Commissions have raised concerns on access to, cost, and the availability of, halal and kosher food and ritual items and the impact on certain ethnic minority groups/faith communities in NI, including on lower income groups within Jewish and Islamic communities, such as students and refugees and asylum seekers. This results from issues relating to the movement of goods from Great Britain to NI following the UK's withdrawal from the EU.
- 4.165. The Commissions have raised the issue in a joint submission to the House of Lords Sub-Committee on the Protocol on the impact of the original Protocol<sup>264</sup> and in their 2021-2022 Annual Report.<sup>265</sup>
- 4.166. The Commissions had recommended that the UK Government work with the European Commission to find a long-term solution which ensures Muslim and Jewish communities in NI are able to access halal and kosher food products and ritual items respectively. In response to the Commissions' recommendations in its 2021-2022 Annual Report, the UK Government said it was committed to finding a long-term solution to this issue, either by securing a negotiated solution with the EU or through the NI Protocol Bill.
- 4.167. In February 2023, the UK Government and European Commission reached a political agreement in principle in relation to the trading arrangements under the Windsor Framework aimed at improving the flow of goods between Great Britain and NI.<sup>266</sup> The Windsor Framework provides for a dual regulation scheme for NI to facilitate goods coming into NI from Great Britain but still ensure NI exports can move freely into the EU.
- 4.168. The Commissions will monitor the impact of the developments in the Windsor Framework which the UK Government has indicated will facilitate goods coming into NI from Great Britain but still ensure NI exports can move freely into the EU, in terms of the ability of these communities to access these food products and ritual items.

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<sup>264</sup> NI Human Rights Commission and Equality Commission for NI, 'Submission of the NIHRC and ECNI to the House of Lords Sub-Committee on the Protocol's follow up Inquiry on the impact of the Protocol', (NIHRC and ECNI, 2021), paras 2.3 – 2.7.

<sup>265</sup> Equality Commission for Northern Ireland and Northern Ireland Human Rights Commission, [Annual Report of the NIHRC and the ECNI on the implementation of Protocol Article 2 2021 – 2022](#), (ECNI, NIHRC 2022), page 41-42

<sup>266</sup> Decision No 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework.

### ***Recommendations***

- 4.169. The Commissions continue to recommend that the Executive Office monitor any proposed changes by the EU to the six Annex 1 equality directives, including relevant case law of the CJEU and pays particular attention to the ongoing consultation by the EU on the Racial Equality Directive.
- 4.170. The Commissions recommend that the NI Executive and Executive Office introduce strengthened racial equality legislation in NI.
- 4.171. The Commissions recommend that the NI Executive, Assembly and departments ensure that any legislative developments on race law reform in NI are in compliance with Article 2, including the keeping pace obligations relating to the EU Racial Equality Directive.
- 4.172. The NHRC recommends that the European Commission amends the Racial Equality Directive to include a specific acknowledgement of the significance of Article 2 and the keep pace obligations for racial equality in NI.
- 4.173. The NIHRC recommends that the Executive Office takes effective steps to ensure its data collection on racial equality is consistent, extensive and disaggregated. This includes working with the NI Executive and NI Assembly to promptly amend the Race Relations (NI) Order 1997 so that it imposes a duty on specified public authorities to collect data on racial equality and set racial equality objectives.
- 4.174. The ECNI recommends changes to the fair employment legislation to improve workforce monitoring on racial grounds. It also recommends the collection, monitoring and evaluation of appropriate equality data, including on race, to ensure effective policy / service development and delivery and to fulfil obligations arising from Section 75 of the NI Act 1998.
- 4.175. The Commissions recommend that the Home Office take effective steps to enforce the prohibition on racial profiling and ensure it does not occur in the implementation of the revised guidance on the Common Travel Area and the Electronic Travel Authorisation requirements, including at entry to NI at ports and airports and in the context of cross-border travel. This should include effective monitoring of training for enforcement officers, so as to avoid racial profiling. It should also include the collection, monitoring, and evaluation of appropriate data, including disaggregated ethnic data, to ensure effective policy / service development and delivery.

**4.176. The NIHRC continues to recommend that the Home Office ensures that all journeys into NI, that originate from Ireland, should be exempt from Electronic Travel Authorisation requirements.**

#### **Sectarianism** <sup>267</sup>

4.177. In 2021/2022, 1,067 sectarian incidents and 780 sectarian crimes were recorded.<sup>268</sup> This represented an increase from 934 recorded sectarian incidents and 639 recorded sectarian crimes in 2020/2021.<sup>269</sup> The rights, safeguards and equality of opportunity provisions set out in the relevant Chapter of the Belfast (Good Friday) Agreement include the “the right to freedom from sectarian harassment”.<sup>270</sup> The Commissions have identified that EU obligations underpinning the rights of victims fall within the scope of Article 2<sup>271</sup> including the EU Victims’ Directive<sup>272</sup> as well as other relevant EU laws which support victims.<sup>273</sup>

4.178. The EU Victims’ Directive recognises that victims of hate crime are at a high risk of secondary and repeat victimisation and that, as such, there should be a strong presumption that those victims will benefit from special protection measures during criminal proceedings.<sup>274</sup>

4.179. The Department of Justice put in place a dedicated Hate Crime Branch to take forward the Independent Review’s recommendations in a two-stage consultation process.<sup>275</sup> In 2022 both the NIHRC and the ECNI responded separately to stage one of the consultation process,<sup>276</sup> in line with their respective remits.

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<sup>267</sup> This section should be read in conjunction with the section on Hate Crime at para 4.228 below.

<sup>268</sup> Police Service of NI, ‘Incidents and Crimes with a Hate Motivation Recorded by the Police in NI: Financial Year Update’ (PSNI, 2022), at 15.

<sup>269</sup> Ibid

<sup>270</sup> Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

<sup>271</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, 2022).

<sup>272</sup> Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime’, 25 October 2012.

<sup>273</sup> See Directive 2011/36/EU ‘Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims’, 5 April 2011; Directive 2011/92/EU, ‘Parliament and Council Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography’, 13 December 2011; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, 25 October 2012.

<sup>274</sup> Article 8 and Recitals 56-58, Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime’, 25 October 2012.

<sup>275</sup> Department of Justice, ‘Improving the Effectiveness of Hate Crime Legislation in NI: A Public Consultation and Call for Views’ (DoJ, 2022).

<sup>276</sup> Ibid.

4.180. The NIHRC, in its response, supported introducing a sectarian offence definition and a new statutory aggravation for sectarian prejudice.<sup>277</sup> The NIHRC also recommended that the legislation is future-proofed to accommodate the inclusion of sectarianism against a broader range of religious beliefs, descent, nationalities or citizenship.<sup>278</sup>

4.181. The ECNI, in its response welcomed a specific reference to sectarianism in hate crime legislation. The ECNI also recommended that indicators of sectarianism should be expanded to include religious belief, national identity, nationality and citizenship to address gaps in protection and that the Government should ensure that any proposed provisions are compliant with human rights legislation.<sup>279</sup>

4.182. In November 2022, the Department of Justice was considering the responses received and planning for the second stage of the consultation process.<sup>280</sup>

4.183. A consolidated Hate Crime Bill is likely to be introduced in the next NI Assembly mandate.<sup>281</sup> This process is delayed by the continued suspension of the NI Executive and NI Assembly.

### ***EU Racial Equality Directive***

4.184. In 2022, the European Commission launched a public consultation to pinpoint potential gaps in the Racial Equality Directive and identify measures to address these gaps.<sup>282</sup> In its response, the NIHRC reiterated its position that, given the complex interplay between ethnicity, nationality and sectarianism in NI, sectarianism should be recognised as a type of racial discrimination within the EU Directive. This would allow for greater alignment with international standards and guidance on protecting against racial discrimination.<sup>283</sup>

### ***Recommendations***

**4.185. The Commissions continue to recommend that the Department of Justice ensures compliance with Article 2 in the context of the EU Victims'**

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<sup>277</sup> NI Human Rights Commission, '[Response to Public Consultation on Improving the Effectiveness of Hate Crime Legislation in NI](#)' (NIHRC, 2022).

<sup>278</sup> Ibid.

<sup>279</sup> Equality Commission for NI, '[Response to consultation: Department of Justice – Improving the effectiveness of Hate Crime Legislation in Northern Ireland](#)' (ECNI, 2022)

<sup>280</sup> Department of Justice, 'Improving the Effectiveness of Hate Crime Legislation in NI: A Public Consultation and Call for Views' (DoJ, 2022).

<sup>281</sup> Email correspondence from Department of Justice to NI Human Rights Commission, 7 September 2022.

<sup>282</sup> EU Commission, 'Addressing possible gaps in the Racial Equality Directive – Public Consultation', (EU Commission, 2022).

<sup>283</sup> NI Human Rights Commission, 'Response to the European Commission Consultation on the Racial Equality Directive (Directive 2000/43/EC)' (NIHRC, 2022)

**Directive, when developing hate crime legislation, including as regards sectarian hate crime.**

- 4.186. **In line with the ‘keeping pace’ obligations under Article 2, the Commissions continue to recommend that the Department of Justice monitor any proposed changes by the EU to the six Annex 1 equality directives, including relevant case law of the CJEU as well as the outcome of the ongoing consultation on the EU Racial Equality Directive.**
- 4.187. **In line with UN and Council of Europe standards and recommendations the NIHRC recommends that the EU Racial Equality Directive be amended to include a recognition of sectarianism within the framing of racial discrimination.**

### **Trans Equality**

- 4.188. Article 2 provides specific protection against discrimination as enshrined in the six Annex 1 equality directives, including the **EU equality directives** which cover **employment and vocational training**,<sup>284</sup> **access to goods and services**,<sup>285</sup> and **social security**<sup>286</sup> and protect against gender discrimination, including transgender people. The CJEU has made it clear in that “to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard”.<sup>287</sup> NI equality law must keep pace with any changes made by the EU to improve the minimum levels of protection, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.<sup>288</sup>

### ***LGBTQI+ Strategy***

- 4.189. As noted above, the Department for Communities has adopted a co-design approach to developing the strategy, which included appointing an Expert Advisory Panel and undertaking ongoing engagement with a Co-Design Group and Cross-Departmental Working Group made up of key stakeholders. A public consultation on the strategy was due to take place in early 2022, but this process has been delayed. The Department for

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<sup>284</sup> 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; 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.

<sup>285</sup> 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.

<sup>286</sup> 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.

<sup>287</sup> *P v S and Cornwall County Council*, Case C-13/94, 30 April 1996, at para 22.

<sup>288</sup> Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.



Communities has confirmed that the LGBTQI+ Strategy cannot progress until a new NI Executive is in place.<sup>289</sup>

4.190. In March 2023, the NIHRC provided a written briefing to inform a country visit to the UK by the UN Independent Expert on Sexual Orientation and Gender Identity. The briefing outlined the ongoing relevance of the Annex 1 gender equality directives in respect of trans rights and the requirement that NI law keep pace with any changes to EU law which improve on minimum levels of protection.<sup>290</sup>

### ***Recommendation***

4.191. **The Commissions continue to recommend that the Department for Communities promptly publishes and effectively implements a robust LGBTQI+ Strategy for NI, accompanied by a measurable plan of action, including effective monitoring arrangements, which takes into account its obligations under Article 2. This includes the keeping pace obligations relating to the four gender equality directives listed in Annex 1.**

## **Victims' Rights and Freedom from Slavery**

4.192. The rights, safeguards and equality of opportunity section of the Belfast (Good Friday) Agreement includes “the rights of victims to remember as well as to contribute to a changed society”.<sup>291</sup> The UK Government has recognised the EU Victims' Directive falls within scope of Article 2.<sup>292</sup> In addition, the Commissions have identified other relevant EU laws which support victims, including the EU Trafficking Directive<sup>293</sup> and the EU Child Sexual Exploitation Directive.<sup>294</sup> The Commissions consider these directives within scope of Article 2 for a number of reasons: firstly since these are sub-categories of victims and victims' rights are recognised in the relevant chapter of the Belfast (Good Friday) Agreement; secondly on the basis that

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<sup>289</sup> Letter from Minister for Communities. Deirdre Hargey MLA, to Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), Intersex+ Strategy Co-Design Group, 18 July 2022

<sup>290</sup> 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; 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; 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; 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.

<sup>291</sup> Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

<sup>292</sup> Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

<sup>293</sup> Directive 2011/36/EU, 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011.

<sup>294</sup> Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012; Directive 2011/36/EU 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011; Directive 2004/80/EC, 'Council Directive relating to the Compensation to Crime Victims', 29 April 2004.

these directives underpin ECHR rights, including Article 4;<sup>295</sup> and thirdly on the basis of the equality commitments in the relevant chapter of the Belfast (Good Friday) Agreement.

4.193. These directives have implications for policy and legislation across NI Departments responsible for a range of areas set out in this section including hate crime, domestic and sexual violence, child and forced marriage, female genital mutilation and child sexual exploitation. In addition, in those areas where law and policy fall under the remit of reserved or excepted matters, such as in relation to immigration and terrorism offences, or in other areas where UK Government and Parliament is making law and policy for NI, due consideration should be given to Article 2.

### **Child, early and forced marriage**

4.194. The Marriage (NI) Order 2003 permits the marriage of a child aged 16 or 17 years, with the consent of their parents or legal guardians or the courts.

4.195. International human rights oversight bodies have consistently called on the UK Government and the NI Executive to raise the minimum age of marriage to 18 years.<sup>296</sup> The UN Convention on the Elimination of Discrimination against Women (CEDAW) Committee and UN Convention on the Rights of the Child (UN CRC) Committee advise that “child marriage is considered to be a form of forced marriage, given that one or both parties have not expressed full, free and informed consent”.<sup>297</sup>

4.196. In 2021, 39 girls and 15 boys were married in NI.<sup>298</sup> In 2020, 24 girls and seven boys married in NI, which due to COVID-19 and associated lockdown restrictions was lower than previous years.<sup>299</sup> For example in 2019, there were 54 girls and 15 boys married in NI.<sup>300</sup>

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<sup>295</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, 2022).

<sup>296</sup> CRC/GC/2003/4, ‘UN CRC Committee General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child’, 1 July 2003; CRC/C/GC/20, ‘UN CRC Committee General Comment No. 20 on the Implementation of the Rights of the Child during Adolescence’, 6 December 2016; CRC/C/GBR/CO/5, ‘UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016, at para 19; CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI’, 14 March 2019, at para 59(b); CAT/C/GBR/CO/6, ‘UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI’, 7 June 2019, at para 57(f).

<sup>297</sup> CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1, ‘Joint General Recommendation 31 of the UN CEDAW Committee/General Comment 18 of and UN CRC Committee on harmful practices’, 14 November 2014, at para. 20; see also, CRC/C/GC/13, ‘UN CRC Committee General Comment No.13: The right of the child to freedom from all forms of violence’, 18 April 2011, at para 29.

<sup>298</sup> Email correspondence from NI Statistics and Research Agency to NI Human Rights Commission, 4 August 2022.

<sup>299</sup> Email correspondence from NI Statistics and Research Agency to NI Human Rights Commission, 2 July 2021.

<sup>300</sup> Email correspondence from NI Statistics and Research Agency to NI Human Rights Commission, 17 August 2020.

4.197. In 2022 in response to the Department of Finance consultation on changes to Marriage Law in NI,<sup>301</sup> the NIHRC noted that international human rights standards consider child marriage to be a form of forced marriage and the EU Victims' Directive recognises forced marriage as a form of gender-based violence.<sup>302</sup> The NIHRC advised that it considers that certain provisions on marriage law engage Article 2.<sup>303</sup>

4.198. In July 2022, the Department of Finance published its consultation analysis report, which revealed near unanimous support among respondents for increasing the minimum age for marriage and civil partnerships to 18 years.<sup>304</sup> The then Minister for Finance, Conor Murphy MLA, responded signalling his intention to prepare legislation to raise the minimum age for marriage to 18 years old.<sup>305</sup> Such legislation is subject to the reinstatement of the NI Executive and NI Assembly.

### ***Recommendation***

**4.199. The NIHRC recommends that the Department of Finance ensure that Article 2, including the EU Victims' Directive, is considered and complied with in the development of legislation to repeal all legal provisions permitting the marriage of children in NI and to increase the minimum age for marriage to 18 years, for both girls and boys.**

### **Child Sexual Exploitation**

4.200. EU obligations underpinning the rights of child victims in Article 2 include the Directive on combatting sexual abuse and sexual exploitation of children<sup>306</sup> as well as other relevant EU laws which support victims.<sup>307</sup>

4.201. The EU Directive recognises that the best interests of the child is a primary consideration for child victims, in line with the EU Charter of Fundamental Rights and UN CRC.<sup>308</sup> It also recognises the need for enhanced protections for victims, including, in recognition of the harm caused by these offences,

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<sup>301</sup> Department of Finance, 'Belief marriage and minimum age for marriage or civil partnership – a public consultation', (DoF, 2021).

<sup>302</sup> Recital 17, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime', 25 October 2012.

<sup>303</sup> NI Human Rights Commission, 'Submission to the Department of Finance consultation on marriage law', (NIHRC, 2022).

<sup>304</sup> Department of Finance, 'Marriage Law Consultation: Results and Analysis' (DoF, 2022).

<sup>305</sup> Department of Finance, 'Marriage Law: Written Ministerial Statement - Conor Murphy MLA - Minister of Finance' (DoF, 2022).

<sup>306</sup> Directive 2011/92/EU, 'Parliament and Council Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography', 13 December 2011.

<sup>307</sup> Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012; Directive 2011/36/EU 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011; Directive 2004/80/EC, 'Council Directive relating to the Compensation to Crime Victims', 29 April 2004.

<sup>308</sup> Recital 6, Directive 2011/93/EU, 'Directive of the European Parliament and of the Council on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography', 13 December 2011.

that assistance should be provided for as long as necessary for the child's physical and psychological recovery, including into adulthood.<sup>309</sup>

4.202. In 2020, the Criminal Justice Inspection NI found that Public Prosecution Service NI staff needed instructions specific to child sexual abuse and exploitation and that “where cases did progress to court, support for children was required”.<sup>310</sup> The Barnahus (children's house) model was proposed as the preferred approach.<sup>311</sup>

4.203. The Justice (Sexual Offences and Trafficking Victims) Act (NI) 2022 aims to implement certain Gillen Review Recommendations,<sup>312</sup> and to improve services for victims of trafficking and exploitation. It removes potentially harmful terms such as ‘child prostitution’ and ‘child pornography’ from the Sexual Offences (NI) Order 2008 and extends the scope of offences to include the abuse of positions of trust where the perpetrator “coaches, teaches, trains, supervises or instructs” the victim in a sport or religion.<sup>313</sup> In its response to a call for evidence by the NI Assembly Committee for Justice on the Bill, the NIHRC advised that provisions of the Bill engaged Article 2 and noted the need to monitor relevant EU directives and related CJEU jurisprudence to ensure there is no diminution of rights.<sup>314</sup>

### ***Human trafficking of children***

4.204. During the parliamentary passage of the Nationality and Borders Act, the NIHRC raised a number of concerns about compliance with the UK's international human rights obligations on the rights of children throughout the Bill and in relation to its provisions on modern slavery.<sup>315</sup> The House of Lords Sub-Committee on the Protocol also wrote to the Minister for the Home Office, highlighting the Commissions' concerns around the Bill's compliance with Article 2.<sup>316</sup> In April 2022, the Home Office Minister's response recognised the particular vulnerabilities of child victims and the UK Government's duty to safeguard the welfare of children adding that the

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<sup>309</sup> Recital 31, Directive 2011/93/EU, ‘Directive of the European Parliament and Council Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography’, 13 December 2011.

<sup>310</sup> Criminal Justice Inspection NI, ‘Child Sexual Exploitation in NI: An Inspection of the Criminal Justice System's Response’, (CJINI, 2020).

<sup>311</sup> Ibid.

<sup>312</sup> Sir John Gillen, ‘Report into the Law and Procedures in Serious Sexual Offences in NI: Recommendations’ (DoJ, 2019).

<sup>313</sup> Justice (Sexual Offences and Trafficking Victims) Act (NI) 2022.

<sup>314</sup> NI Human Rights Commission, ‘Response to Committee for Justice Call for Evidence on the Justice (Sexual Offences and Trafficking Victims) Bill’ (NIHRC, 2021).

<sup>315</sup> NI Human Rights Commission and Equality Commission for NI, ‘[Joint NIHRC/ECNI Briefing paper on the modern slavery and human trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill](#)’, (NIHRC and ECNI, 2022); Letter from the NI Human Rights Commission and the Equality Commission for NI to Priti Patel MP, Home Secretary, 9 February 2022; Letter from the NI Human Rights Commission and the Equality Commission for NI to Brandon Lewis MP, Secretary of State for NI, 9 February 2022.

<sup>316</sup> Letter from Lord Jay of Ewelme, Chair of the Protocol on Ireland/NI Sub-Committee to Baroness Williams of Trafford, Minister of State in the Home Office, 3 March 2022.

UK Government would engage with stakeholders “to ensure the specific vulnerabilities and needs of children are understood and taken into account”.<sup>317</sup>

4.205. In May 2022, the NIHRC launched research on human trafficking and Article 2 which identifies and further explains the reasoning for the Directive falling within the scope of Article 2 and highlights the obligation on the state to ensure that the child’s best interests are a primary consideration and to provide child victims of trafficking with assistance, support and protection.<sup>318</sup>

4.206. In May 2022, the NIHRC responded to the Department of Justice’s consultation on measures to strengthen the response to modern slavery and human trafficking.<sup>319</sup> The NIHRC highlighted the relevance of the EU Child Sexual Exploitation Directive and Article 2 to the potential provisions contained in the consultation, and recommended that the Department of Justice ensure that Article 2 is built into and considered actively during the development and implementation of all legislation and/or policy.<sup>320</sup>

4.207. In January 2023 the Commissions separately responded to the Department of Justice consultation on its three-year strategy on Modern Slavery and Human Trafficking.<sup>321</sup> The NIHRC’s response highlighted the need to ensure that Article 2 is built into and actively considered during the development and implementation of policy and legislation on modern slavery and human trafficking.<sup>322</sup> The NIHRC also welcomed the inclusion of more child-specific measures within the new strategy and reiterated the importance of ensuring practitioners are aware of and able to identify where the modern slavery and human trafficking of children might be happening in all its forms in NI. This includes highlighting the links with child sexual exploitation, missing children, child criminal exploitation, online exploitation, forced marriage, forced labour and domestic servitude.<sup>323</sup>

4.208. In its response the ECNI recommended that the Department of Justice should include a reference, and a commitment, to ensuring compliance with the UK Government’s Article 2 obligations in its proposed Modern

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<sup>317</sup> Letter from Minister of State in the Home Office, Baroness Williams of Trafford, to Chair of the Protocol on Ireland/NI Sub-Committee, Lord Jay of Ewelme, 1 April 2022.

<sup>318</sup> Alison Harvey, ‘[Human Trafficking and Article 2 of the Ireland/NI Protocol](#)’ (NIHRC, 2022), page 27.

<sup>319</sup> NI Human Rights Commission, ‘Response of the NI Human Rights Commission to the Department of Justice Consultation on Human Trafficking and Slavery: Strengthening NI’s Response’ (NIHRC, 2021).

<sup>320</sup> Ibid, at 10-11.

<sup>321</sup> Department of Justice, ‘NI Draft Modern Slavery and Human Trafficking Strategy: Consultation’ (DoJ, 2022).

<sup>322</sup> NI Human Rights Commission, ‘Submission to the Department of Justice’s Consultation on the Draft Modern Slavery and Human Trafficking Strategy’, (NIHRC, 2023).

<sup>323</sup> Ibid.

Slavery and Human Trafficking Strategy. The ECNI highlighted the importance of ensuring there is no reduction of the rights of trafficked victims under the EU Trafficking Directive and of victims under the EU Child Sexual Exploitation Directive, contrary to Article 2. The ECNI also highlighted that those providing advice and resources to victims/potential victims of modern slavery/human trafficking should make clear to recipients the rights of individuals under both equality legislation and in relation to alleging a breach of Article 2.<sup>324</sup>

4.209. In March 2023, the Illegal Migration Bill was introduced. The Bill includes provisions which prevent children from making an asylum claim where they arrive in the UK irregularly and seeks to deny access to existing support to victims of modern slavery who have arrived in the UK irregularly. The same month, the Joint Committee on Human Rights initiated a legislative scrutiny inquiry on the Bill. As of 31 March, responses to the inquiry by the Commissions were in development, which will raise human rights and equality concerns in relation to the Bill, highlight the relevance of Article 2 and urge the Committee to ask the Secretary of State to consider and detail her analysis of the compliance of provisions affecting children and the modern slavery provisions with Article 2 which was not addressed in the Human Rights Memorandum to the Bill.

### ***Recommendations***

4.210. **The Commissions recommend that the Department of Justice, the Home Office and other relevant departments and bodies, ensure that policy and legislation on child sexual exploitation and on modern slavery and human trafficking is developed in compliance with Article 2 including the requirements of the EU Child Sexual Exploitation Directive, EU Victims' Directive, and the EU Trafficking Directive which require that the child's best interests be a primary consideration in their implementation.**

4.211. **The NIHRC recommends that, in line with best international practice and the requirements of the EU Trafficking Directive, the Department of Justice ensures specialised training is provided for relevant professionals and measures reflective of the Barnahus Model are adopted throughout the criminal justice system.**

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<sup>324</sup> Equality Commission for Northern Ireland's [response to the Department of Justice's public consultation on the Modern Slavery and Human Trafficking Strategy 2022](#) (ECNI, 2023)

## Domestic and Sexual Violence and Abuse

4.212. EU obligations underpinning the rights of victims in Article 2 include the EU Victims' Directive<sup>325</sup> as well as other relevant EU laws which support victims.<sup>326</sup>

4.213. The EU Victims' Directive recognises that where physical, sexual, psychological or economic violence is committed in a close relationship, this can cause psychological and physical trauma and such victims are therefore in need of special protection measures. The Directive further recognises that women are disproportionately impacted by this harm.<sup>327</sup>

### ***EU Combatting Violence Against Women and Domestic Violence Directive***

4.214. In March 2022, the European Commission adopted a proposal for a directive on combatting violence against women and domestic violence. The proposal aims to ensure a minimum level of protection across the EU against such violence, regardless of whether it takes place online or offline.<sup>328</sup>

4.215. In May 2022, the ECNI responded to the consultation, welcoming and supporting the European Commission's commitment to effectively combat violence against women and domestic violence throughout the EU.<sup>329</sup> The ECNI's recommendations included ensuring a targeted approach to tackling the specific nature and impact of violence against women and domestic violence; the meaningful involvement of affected individuals and their representative organisations and effective equality data collection and monitoring.<sup>330</sup>

4.216. The ECNI's response noted that some of the associated directives outlined in the proposal, continue to have relevance for NI, as they fall within the scope of the non-diminution commitment under Article 2, including the EU

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<sup>325</sup> Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

<sup>326</sup> Directive 2011/36/EU 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011; Directive 2011/92/EU, 'Parliament and Council Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography', 13 December 2011; Directive 2004/80/EC, 'Council Directive Relating to the Compensation to Crime Victims', 29 April 2004.

<sup>327</sup> Recital 18, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

<sup>328</sup> European Commission (2022) Proposal for a Directive on combating violence against women and domestic violence

<sup>329</sup> Equality Commission for NI, Response to consultation: European Commission – Combatting Violence Against Women and Domestic Violence Directive (ECNI, May 2022)

<sup>330</sup> Ibid.



Victims' Directive<sup>331</sup>, the EU Trafficking Directive<sup>332</sup> and the EU gender directives<sup>333</sup>. In addition, the ECNI highlighted that the gender equality directives fall within the UK Government's commitment, under the Windsor Framework, to ensure that NI's equality laws will keep pace with any changes the EU may make to the Annex 1 directives. Therefore, any changes by the EU which amend or replace the provisions in Annex 1 directives, including the gender directives, so as to enhance protections, will have implications for gender equality rights in NI.<sup>334</sup>

### ***Domestic Abuse and Violence Against Women and Girls Strategies***

4.217. In 2022, the Commissions separately responded to a call for views on a domestic and sexual abuse strategy by the NI Executive Office, Department of Justice and Department of Health.<sup>335</sup> In its consultation response, the NIHRC recommended that both strategies adopt a gender-sensitive approach, noting that the EU Victims' Directive also recognises that women are disproportionately affected by this harm.<sup>336</sup> Additionally, the EU Directive recognises that where physical, sexual, psychological or economic violence is committed in a close relationship, this can cause psychological and physical trauma and such victims need special protection measures.<sup>337</sup>

4.218. The ECNI's response<sup>338</sup> recommended that the Departments ensure that the Strategy addresses the nature and impact of domestic and sexual violence and abuse on women and men in a gender specific context, noting that women and girls are disproportionately affected by domestic and sexual abuse.<sup>339</sup> The ECNI called for a targeted approach to tackling the specific nature and impact of domestic violence taking account of issues associated

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<sup>331</sup> Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

<sup>332</sup> Directive 2011/36/EU 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011.

<sup>333</sup> Ireland/Northern Ireland Protocol Annex 1 Directives: Gender Goods and Services Directive (Gender): Directive 2004/113/EC of 13 December 2004, Recast Directive (Gender): Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, Racial Equality Directive (Race): Directive 2000/43/EC of 29 June 2000, Framework Directive (religion and belief; age; sexual orientation; and disability): Directive 2000/78/EC of 27 November 2000, Equal Treatment Directive: Self-employment (Gender): Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010, Equal Treatment Directive: Social security (Gender): Directive 79/7/EEC of 19 December 1978

<sup>334</sup> In addition, UK courts when considering the interpretation of any of the equality directives listed in Annex 1, must do so in conformity with any relevant case law of the Court of Justice of the EU (CJEU). The Northern Ireland Office has, in its 2020 Explainer Document, stated that when a UK Court is considering the interpretation of any of the directives listed in Annex 1, this will be done in conformity with any relevant case law of the CJEU.

<sup>335</sup> NI Human Rights Commission, '[NIHRC response to call for views: Domestic abuse strategy and equally safe strategy – a strategy to tackle violence against women and girls](#)', (NIHRC, 2022); Equality Commission for Northern Ireland, '[Response to call for views: The Departments for Justice and Health – Domestic and Sexual Abuse Strategy /The Executive Office – Equally Safe Strategy](#)' (ECNI, 2022).

<sup>336</sup> Recital 18, Directive 2012/29/EU, 'EU Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

<sup>337</sup> Ibid.

<sup>338</sup> Equality Commission for Northern Ireland, '[Response to call for views: The Departments for Justice and Health – Domestic and Sexual Abuse Strategy /The Executive Office – Equally Safe Strategy](#)' (ECNI, 2022) page 6

<sup>339</sup> Ibid, page 10



with specific multiple identities / equality categories.<sup>340</sup> The ECNI also recommended that in the context of any potential future legislative developments in the area, that there is consideration of, and compliance with, Article 2 obligations, highlighting the relevance of the EU Victims Directive in this context.

4.219. In February 2023, the Department of Health and Department of Justice launched their consultation on the draft Domestic and Sexual Abuse Strategy, which closes in May 2023. The ECNI will be responding to this consultation aligned with their remit, highlighting that the provisions of the strategies may fall within the scope of Article 2 and there is a need for consideration of and compliance with Article 2 obligations, including consideration of the EU Victims' Directive.<sup>341</sup> As of 31 March the NIHRC response was in development, welcoming the acknowledgement of the EU Victims' Directive and urging the departments to take a human rights-based approach to the strategy, which includes compliance with Article 2. The EU Victims' Directive recognises that women are disproportionately impacted by domestic abuse, and recognises it as a form of gender-based violence.<sup>342</sup> The Directive requires Member States to ensure that victims' access to rights are not conditional on the victim's residence status and also notes that this harm is aggravated if a woman is dependent on the offender for residence status.

### ***Recommendations***

4.220. **The Commissions continue to recommend that the Department of Health and the Department of Justice consider and take into account the EU Victims' Directive and Article 2 during the development and implementation of the Domestic and Sexual Abuse Strategy.**

4.221. **The Commissions recommend that the Executive Office consider and take into account the EU Victims' Directive and Article 2 during the development and implementation of the Violence Against Women and Girls Strategy.**

4.222. **The NIHRC recommends that the Department of Justice, Department of Health and the Executive Office ensure that all policies and support for victims of domestic and sexual violence and abuse are specialised,**

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<sup>340</sup> Ibid, page 3-5

<sup>341</sup> NI Human Rights Commission, '[NIHRC response to call for views: Domestic abuse strategy and equally safe strategy – a strategy to tackle violence against women and girls](#)', (NIHRC, 2022).

<sup>342</sup> Recitals 17 and 18, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

**accessible, gender-sensitive and guaranteed sustainable funding and that support is available regardless of an individual's immigration status.**

- 4.223. The ECNI recommends the necessity of a gender specific approach to this Strategy and that actions flowing from it around service provision and support should address the nature and impact of domestic abuse on women and men in a gender specific, not gender neutral, context.**

### **Female Genital Mutilation**

- 4.224. EU obligations underpinning the rights of victims in Article 2 include the EU Victims' Directive<sup>343</sup> as well as other relevant EU laws which support victims.<sup>344</sup>

- 4.225. The EU Victims' Directive recognises that victims of gender-based violence, including female genital mutilation, and their children, often require special support and protection against secondary and repeat victimisation, intimidation and retaliation.<sup>345</sup>

- 4.226. In 2022, the NIHRC response to the Departments of Justice and Health domestic abuse strategy and the Executive Office strategy to tackle violence against women and girls noted that the EU Victims' Directive identifies female genital mutilation as a form of gender-based violence. The NIHRC noted that the provisions of a strategy tackling violence against women and girls engages the EU Victims' Directive and therefore, falls within scope of Article 2.<sup>346</sup>

### ***Recommendation***

- 4.227. The NIHRC recommends the Department of Justice and Department of Health ensure that legislative developments progressed by the Equally Safe Strategy ensure that rights protections do not fall below the standards contained in the EU Victims' Directive.**

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<sup>343</sup> Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

<sup>344</sup> Directive 2011/36/EU 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011; Directive 2011/92/EU, 'Parliament and Council Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography', 13 December 2011; Directive 2004/80/EC, 'Council Directive Relating to the Compensation to Crime Victims', 29 April 2004.

<sup>345</sup> Recitals 17 and 21, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

<sup>346</sup> NI Human Rights Commission, '[NIHRC response to call for views: Domestic abuse strategy and equally safe strategy – a strategy to tackle violence against women and girls](#)', (NIHRC, 2022).

## Hate Crime

4.228. The international human rights oversight bodies have consistently called for the UK Government and NI Executive to strengthen their efforts to investigate alleged hate crimes and prosecute perpetrators, provide effective remedies to victims, take action to increase reporting from people impacted by hate crime and to systematically collect disaggregated data.<sup>347</sup>

4.229. In 2021/22, there were 3,119 recorded incidents of hate crime and 2,236 recorded crimes in NI – an increase from 2,493 recorded incidents of hate crime and 1,757 recorded hate crimes in 2020/2021.<sup>348</sup> The number of hate-motivated incidents recorded rose across five of the six hate motivations (racist, homophobic, sectarian, disability and faith/religion), when compared with the previous 12 months. The number of crimes recorded also increased across all six motivations (racist, homophobic, sectarian, disability, faith/religion and transphobic). This was the highest number of crimes recorded since the beginning of the data series for four out of six motivations (racist, homophobic, disability and transphobic). Incidents and crimes with a racist motivation showed the largest overall increase.<sup>349</sup>

4.230. After the Independent Hate Crime Review in 2020,<sup>350</sup> and the Department of Justice response to the Review,<sup>351</sup> the first of a two-stage public consultation was launched in 2022 seeking responses on improving the effectiveness of NI hate crime legislation.

4.231. Both Commissions responded separately to the Department of Justice, aligned with their respective remits. The NIHRC response recommended that the Department of Justice carefully consider the provisions of the EU Victims' Directive within the context of Article 2 in the development of hate crime legislation.<sup>352</sup> The EU Victims' Directive requires that victims receive "timely and individual assessments to assess their specific protection needs" which pays particular attention to victims of hate crime, gender-

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<sup>347</sup> CCPR/C/GBR/CO/7, 'UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and NI', 17 August 2015, at para 10; CERD/C/GBR/CO/21-23, 'Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of the UK of Great Britain and NI', 26 August 2016, at para 16; CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019, at para 63.

<sup>348</sup> Police Service of NI, 'Incidents and Crimes with a Hate Motivation Recorded by the Police in Northern Ireland: Update to 31 March 2022', (PSNI, 2022).

<sup>349</sup> Ibid, page 4.

<sup>350</sup> Independent Hate Crime Review Team, 'Hate Crime Legislation in NI: Independent Review', (DoJ, 2020).

<sup>351</sup> Department of Justice, 'Review of Hate Crime Legislation in Northern Ireland - Departmental Response', (DoJ, 2021).

<sup>352</sup> NI Human Rights Commission, '[Response to Public Consultation on Improving the Effectiveness of Hate Crime Legislation in NI](#)' (NIHRC, 2022), at para 5.18.

based violence and disabled victims.<sup>353</sup> The Commission's response also highlighted that human rights standards are clear that a gender-sensitive approach should be taken to addressing gender-based violence,<sup>354</sup> a position that is echoed in the EU Victims' Directive, which emphasises that women victims of gender-based violence and their children often require special support and protection.<sup>355</sup>

4.232. The ECNI's response noted the need to update, harmonise, consolidate, and strengthen hate crime legislation, including by addressing the significant gaps in the legislation highlighted in the response. The ECNI also underlined the importance of responses to hate crime that go beyond legislative reform including actions to prevent and tackle hate crime and reform equality law are also vital.<sup>356</sup> The ECNI recommended that at all stages of legislative development relating to hate crime there is consideration of, and compliance with, Article 2 obligations and that this should be detailed in the Bill's Explanatory and Financial Memorandum. The ECNI also noted that the EU Victims' Directive falls within the scope of the Article 2 non-diminution principle. Therefore, it is the responsibility of the NI Executive and departments to ensure that legislation progressed does not reduce the rights of victims under the EU Victims' Directive in a manner that is contrary to Article 2.<sup>357</sup>

4.233. In March 2023, the Department of Justice published a summary report of stage one consultation response.<sup>358</sup>

4.234. The Department of Justice has reported that work on the outcome of the phase one consultation and subsequent changes to legislation in a Hate Crime Bill is progressing, but is subject to a functioning Assembly and Executive.<sup>359</sup> Work on stage two has also commenced, with a view to consulting on the relevant issues in 2023, subject to the return of Ministers.<sup>360</sup> These remaining issues will cover the inclusion of age and

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<sup>353</sup> Article 22, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

<sup>354</sup> CEDAW/C/GC/35, UN CEDAW Committee General Recommendation No 35: Gender Based Violence Against Women', 26 July 2017; A/HRC/38/47 'UN Special Rapporteur on Violence against Women, Its Causes and Consequences, Dubravka Šimonovic, Report on Online Violence against Women and Girls from a Human Rights Perspective', 18 June 2018, at para 102.

<sup>355</sup> Recital 17, Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

<sup>356</sup> Equality Commission for Northern Ireland. [Response to consultation: Department of Justice – Improving the effectiveness of Hate Crime Legislation in Northern Ireland](#) (ECNI 2022)

<sup>357</sup> Ibid, page 4-6

<sup>358</sup> Department of Justice, 'Improving the effectiveness of Hate Crime Legislation in Northern Ireland: Summary of Phase One Consultation and Call for Views Responses and Way Forward', March 2023

<sup>359</sup> Department of Justice, 'Improving the effectiveness of Hate Crime Legislation in Northern Ireland: Summary of Phase One Consultation and Call for Views Responses and Way Forward', March 2023,

<sup>360</sup> Ibid, para 9.4

gender as protected groups, ‘stirring up’ offences and the possibility of a statutory duty on public authorities to remove hate expression from public places.<sup>361</sup>

4.235. In March 2023, the ECNI finalised independent research on the impact of Brexit on minority ethnic and migrant people in NI, which includes consideration of the experiences of racism and hate crime after Brexit. It is anticipated that the research will be published in 2023.

### ***Recommendations***

4.236. **The Commissions recommend that the Department of Justice consider carefully and ensure compliance with Article 2, including the provisions of the EU Victims’ Directive in the development of hate crime legislation.**

4.237. **The NIHRC recommends that the Department of Justice promptly and effectively improves hate crime legislation in NI, guided by the Independent Hate Crime Review Team’s recommendations and the Department of Justice’s consultations. The Department of Justice and the Executive Office should ensure that any new legislation compliments existing and future strategies on race and community relations. The Department of Justice should ensure that a victim-centred approach is adopted when investigating, prosecuting and remedying hate crimes.**

4.238. **The ECNI recommends action to update, harmonise, consolidate, and strengthen hate crime legislation, including by addressing the significant gaps in the legislation and ensure support for victims of hate crime, including additional support to vulnerable victims.**

## **Legacy**

### ***NI Troubles (Legacy and Reconciliation) Bill***

4.239. In 2019, the UN Convention against Torture (UN CAT) Committee recommended that the UK Government “take urgent measures to advance and implement the Stormont House Agreement and the mechanisms it contemplates for investigating conflict-related violations”.<sup>362</sup> The UN CAT Committee also recommended the UK Government “refrain from enacting amnesties or statutes of limitations for torture or ill-treatment”, which are inconsistent with UN CAT.<sup>363</sup>

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<sup>361</sup> Ibid, para 9.5

<sup>362</sup> CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019.

<sup>363</sup> CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019.

- 4.240. In Article 2, the UK Government commits to ensuring there is no diminution of the rights, safeguards and equality of opportunity protections contained in that chapter of the Belfast (Good Friday) Agreement 1998 as a result of the UK leaving the EU, including the right of victims “to remember as well as contribute to a changed society”.<sup>364</sup> EU obligations underpinning the rights of victims include the EU Victims’ Directive<sup>365</sup> as well as other relevant EU laws which support victims.<sup>366</sup> The EU Victims’ Directive has been acknowledged by the UK Government as falling within the scope of Article 2.<sup>367</sup>
- 4.241. In 2021, the then Secretary of State for NI set out specific plans for legislation to address the legacy of the Troubles.<sup>368</sup> Contrary to the Stormont House Agreement of 2014 and to the majority of views expressed in 2018, the plans indicated a shift away from conducting human rights compliant Troubles-related investigations, towards seeking and receiving information about Troubles-related deaths and injuries.
- 4.242. In May 2022, the NI Troubles (Legacy and Reconciliation) Bill was introduced to the UK Parliament. It proposes to establish an Independent Commission for Reconciliation and Information Recovery which will conduct reviews, upon request, into deaths and serious injuries resulting from or connected with conduct during the Troubles. It further proposes that the Independent Commission for Reconciliation and Information Recovery will operate a conditional immunity scheme for certain Troubles-related offences and most Troubles-related proceedings will cease with immediate effect.
- 4.243. The NIHRC is gravely concerned that, as currently drafted, the NI Troubles (Legacy and Reconciliation) Bill is not compliant with human rights.<sup>369</sup> In 2022, the NIHRC provided evidence to the NI Affairs Committee, the Joint Committee on Human Rights and the CoE Committee of Ministers setting

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<sup>364</sup> Belfast (Good Friday) Agreement, 10 April 1998, at Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

<sup>365</sup> Directive 2012/29/EU, ‘EU Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime’, 25 October 2012.

<sup>366</sup> Directive 2011/36/EU ‘EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims’, 5 April 2011; Directive 2011/92/EU, ‘EU Parliament and Council Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography’, 13 December 2011; Directive 2004/80/EC, ‘EU Council Directive Relating to the Compensation to Crime Victims’, 29 April 2004.

<sup>367</sup> UK Government, ‘UK Government Commitment to No-diminution of Rights, Safeguards and Equality of Opportunity in NI: What Does It Mean and How Will It Be Implemented?’ (NIO, 2020).

<sup>368</sup> NI Office, ‘Addressing the Legacy of NI’s Past’ (NIO, 2021).

<sup>369</sup> NI Human Rights Commission, ‘Advice on the NI Troubles (Legacy and Reconciliation) Bill’ (NIHRC, 2022); NI Human Rights Commission, ‘Supplementary Briefing: UK Government’s Proposed Amendments to NI Troubles (Legacy and Reconciliation) Bill’ (NIHRC, 2023).

out its concerns with the Bill.<sup>370</sup> In September 2022, The NIHRC also provided broader advice to MPs and Peers to inform consideration of the NI Troubles (Legacy and Reconciliation) Bill as it continued its passage through the UK Parliament.<sup>371</sup> The NIHRC is concerned that the UK continues to fail to implement ECtHR judgments stipulating measures to achieve effective investigations into ‘Troubles-related’ deaths. This continued failure is itself resulting in further violations by the UK. The NIHRC continues to advise that a statute of limitations or immunity scheme that restricts the investigation and prosecution of alleged unlawful killings and serious injuries is incompatible with Articles 2 (right to life) and 3 (freedom from torture) ECHR.

4.244. The NIHRC is also concerned that the current draft of the NI Troubles (Legacy and Reconciliation) Bill may not be compliant with Article 2. For example, Article 11 of the EU Victims’ Directive requires States to ensure that victims have the right to a review of a decision not to prosecute.<sup>372</sup> A decision to grant immunity is tantamount to a decision not to prosecute as it precludes any criminal enforcement action in respect of the offence(s) which are subject to that decision. Article 6 of the Directive provides a right to a victim of a criminal offence to receive information regarding any decision not to proceed with or to end an investigation or not to prosecute the offender.<sup>373</sup> The Bill does not include an express requirement for victims or family members to be informed when an individual has applied for immunity, nor does it expressly require that information relating to the review process or the outcome of the immunity request is provided to victims or family members. Moreover, obligations under the EU Victims’ Directive must be interpreted in line with the EU Charter of Fundamental Rights provisions, including Article 47 (right to an effective remedy and to a fair trial) and general principles of EU law.<sup>374</sup>

4.245. In November 2022, the NIHRC provided advice to the House of Lords Sub Committee on the Protocol on the Bill’s compliance with Windsor Framework Article 2.<sup>375</sup> In December 2022, the Chair wrote to Lord Caine,

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<sup>370</sup> House of Commons NI Affairs Committee, ‘Oral Evidence: Addressing the Legacy of NI’s Past - The UK Government’s New Proposals’, 7 June 2022; NI Human Rights Commission, ‘Legislative Scrutiny: NI Troubles (Legacy and Reconciliation) Bill’ (NIHRC, 2022); NI Human Rights Commission, ‘Rule 9 Submission to the CoE Committee of Ministers in Relation to the Supervision of the Cases Concerning the Actions of the Security Forces in NI: Advice on NI Troubles (Legacy and Reconciliation) Bill’ (NIHRC, 2022).

<sup>371</sup> NI Human Rights Commission, ‘Advice on NI Troubles (Legacy and Reconciliation) Bill’ (NIHRC, 2022).

<sup>372</sup> Articles 6 and 11, Directive 2012/29/EU, ‘EU Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime’, 25 October 2012.

<sup>373</sup> Article 6(1)(a), Directive 2012/29/EU, ‘Directive of European Parliament and the Council establishing minimum standards on the rights, support and protection of victims of crime’, 25 October 2012.

<sup>374</sup> Article 4, Agreement on the Withdrawal of the UK of Great Britain and NI from the EU and the European Atomic Energy Community 2020.

<sup>375</sup> NI Human Rights Commission, ‘Advice on NI Troubles (Legacy and Reconciliation) Bill and Article 2 of the Ireland/Northern Ireland Protocol’, (NIHRC, 2022)



Parliamentary Under Secretary of State in the NI Office, highlighting the NIHRC's concerns about compliance of the Bill with Windsor Framework Article 2 and requesting a response.<sup>376</sup> In response, Lord Caine advised that the UK Government does not consider that the granting of immunity under the Bill amounts to a decision not to prosecute for the purposes of Article 11 of the EU Victims' Directive. He continued that the Government anticipates that the standards for access to information by families and victims in the Independent Commission's investigative processes will be at least equivalent to those which apply to investigations undertaken by police forces.<sup>377</sup> In January 2023, the NIHRC wrote to the Chair of the Sub-Committee on the Protocol to supplement earlier advice and to reiterate its concerns that the provisions on immunity and restrictions on criminal enforcement action in the NI Troubles (Legacy and Reconciliation) Bill may diminish the rights of victims, in breach of Windsor Framework Article 2.<sup>378</sup>

### ***Recommendations***

- 4.246. The NIHRC advises that the fundamentals of the NI Troubles (Legacy and Reconciliation) Bill require immediate and thorough reassessment, which should take place through meaningful engagement. The resulting legislation should be victim-centred and human rights compliant.**
- 4.247. The NIHRC is concerned that the provisions on immunity and restrictions on criminal enforcement action in the NI Troubles (Legacy and Reconciliation) Bill do not appear to be in compliance with the EU Victims' Directive and may diminish the rights of victims, in breach of Article 2.**

### **Modern Slavery and Human Trafficking**

- 4.248. As set out in more detail above in paragraph 4.192, the Commissions take the view that EU obligations underpinning the rights of victims in Article 2 include the EU Trafficking Directive<sup>379</sup> as well as other relevant EU laws which support victims.<sup>380</sup>**

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<sup>376</sup> Letter from Lord Jay, Chair of the European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland to Lord Caine, Parliamentary Under Secretary of State, NI Office, 1 December 2022.

<sup>377</sup> Letter from Lord Caine, Parliamentary Under Secretary of State, NI Office to Lord Jay, Chair of the European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland, 20 December 2022.

<sup>378</sup> Letter from NI Human Rights Commission to Lord Jay, Chair of the European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland, 30 January 2023.

<sup>379</sup> Directive 2011/36/EU, 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011.

<sup>380</sup> Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012; Directive 2011/36/EU 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011; Directive 2004/80/EC, 'Council Directive relating to the Compensation to Crime Victims', 29 April 2004.



4.249. The EU Trafficking Directive sets out a number of provisions which are particularly aimed at criminalisation of trafficking offences,<sup>381</sup> non-prosecution and non-application of penalties to victims,<sup>382</sup> investigation and prosecution of offences<sup>383</sup> and supporting victims, including child victims of trafficking.<sup>384</sup>

### ***Nationality and Borders Act 2022***

4.250. During the parliamentary passage of the Nationality and Borders Act, the NIHRC raised a number of concerns with the provisions relating to human trafficking, including that there was no reference to child victims and that it disappplies the requirements of the EU Trafficking Directive.<sup>385</sup> The Commissions jointly provided further briefings on the Bill and wrote to the Home Secretary and Secretary of State for NI focusing on compliance with Article 2.<sup>386</sup> The House of Lords Sub-Committee on the Protocol also wrote to the Minister for the Home Office, highlighting the Commissions' concerns around the Bill's compliance with Article 2.<sup>387</sup>

4.251. The Commissions remain concerned that the Act requires that a potential victim's late compliance with a Trafficking Information Notice, without good reason, must be taken into account as damaging the person's credibility.<sup>388</sup> In addition, the 2022 Act does not extend to child victims of human trafficking, nor does it recognise that the rights of the child should be a primary consideration.<sup>389</sup> The Commissions are considering next steps in relation to the protection of victims of modern slavery and human trafficking under this Act and the Illegal Migration Bill.

4.252. In May 2022, the NIHRC published legal research on the human trafficking provisions of the then Nationality and Borders Bill and Article 2.<sup>390</sup> This

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<sup>381</sup> Articles 2-7, Directive 2011/36/EU, 'Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims', 5 April 2011.

<sup>382</sup> Ibid, Article 8,.

<sup>383</sup> Ibid, Articles 9-10,.

<sup>384</sup> Ibid, Articles 11-17,.

<sup>385</sup> NI Human Rights Commission, '[Response to Call for Evidence by the Joint Committee on Human Rights on the Nationality and Borders Bill](#)' (NIHRC, 2021).

<sup>386</sup> NI Human Rights Commission and Equality Commission for NI, '[Joint NIHRC/ECNI Briefing paper on the modern slavery and human trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill](#)', (NIHRC and ECNI, 2022); Letter from the NI Human Rights Commission and the Equality Commission for NI to Priti Patel MP, Home Secretary, 9 February 2022; Letter from the NI Human Rights Commission and the Equality Commission for NI to Brandon Lewis MP, Secretary of State for NI, 9 February 2022.

<sup>387</sup> Letter from Lord Jay of Ewelme, Chair of the Protocol on Ireland/NI Sub-Committee to Baroness Williams of Trafford, Minister of State in the Home Office, 3 March 2022.

<sup>388</sup> NI Human Rights Commission and Equality Commission for NI, '[Joint NI Human Rights Commission/Equality Commission for NI Briefing Paper on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation Provisions in the Nationality and Borders Bill](#)' (NIHRC and ECNI, 2022).

<sup>389</sup> Ibid.

<sup>390</sup> Alison Harvey, 'Human Trafficking and Article 2 of the Ireland/NI Protocol' (NIHRC, 2022).

research supported the Commissions' position that the EU Trafficking Directive falls within scope of Article 2.<sup>391</sup>

### ***Modern Slavery and Human Trafficking Strategy***

4.253. In March 2022, the Department of Justice consulted on a range of measures to strengthen their response to modern slavery and human trafficking, including the use of Slavery and Trafficking Risk Orders.<sup>392</sup> In May 2022, the NIHRC responded outlining that Article 2 is engaged by proposed provisions in the consultation and that the EU Trafficking Directive<sup>393</sup> and the EU Child Sexual Exploitation Directive<sup>394</sup> place positive obligations on States to prevent and investigate crimes and to protect victims. The NIHRC also highlighted that powers to impose Slavery and Trafficking Risk Orders will require the processing of personal data, and that any data processing may still be subject to EU General Data Protection Regulations (EU GDPR).<sup>395</sup> The Commissions have identified that the EU GDPR fall within the scope of Article 2.<sup>396</sup>

4.254. In October 2022 the Department of Justice published a consultation on its three-year strategy on Modern Slavery and Human Trafficking, which sought to operationalise the measures brought in under the Justice (Sexual Offences and Trafficking Victims) Act (NI) 2022.<sup>397</sup> Both Commissions responded to this consultation separately, in line with their respective remits.

4.255. In January 2023, the ECNI's response recommended that the Department of Justice include reference to, consideration of and compliance with Windsor Framework Article 2 obligations at all stages of policy and legislative development. The ECNI highlighted the relevance of the EU Trafficking Directive and the EU Child Sexual Exploitation Directive in relation to the development of the strategy and in the context of Article 2 considerations, noting that any legislative developments progressed under this strategy

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<sup>391</sup> As noted in this section above, the Commission considers that victims of trafficking fall within scope of Protocol Article 2 for a number of reasons: first, since these are sub-categories of victims and victims' rights are recognised in the relevant chapter of the Belfast (Good Friday) Agreement 1998; second, on the basis that these EU Directives underpin Article 4 of the ECHR; and third, on the basis of the equality commitments in the relevant chapter of the Belfast (Good Friday) Agreement 1998.

<sup>392</sup> Department of Justice, 'Public Consultation on Measures to Strengthen Response to Modern Slavery and Human Trafficking - Proposed amendments to the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (NI) 2015' (DoJ, 2022)

<sup>393</sup> Directive 2011/36/EU, 'EU Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims', 5 April 2011.

<sup>394</sup> Directive 2011/92/EU, 'EU Directive of the European Parliament and of the Council on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and Replacing Council Framework Decision 2004/68/JHA', 13 December 2011.

<sup>395</sup> NI Human Rights Commission, '[Submission to Department of Justice's Consultation on Measures to Strengthen the Response to Modern Slavery and Human Trafficking](#)', (NIHRC, 2022).

<sup>396</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, 2022) (See Table of EU Law at Annex 1)

<sup>397</sup> Department of Justice, 'NI Draft Modern Slavery and Human Trafficking Strategy: Consultation' (DoJ, 2022).

should not reduce the rights of trafficked victims, including children. The ECNI also highlighted that advice and support provided to victims should include in relation to their rights under both equality legislation and Article 2.<sup>398</sup>

4.256. Similarly, the NIHRC's response highlighted the need to ensure that Article 2 is built into and actively considered during the development and implementation of policy and legislation on modern slavery and human trafficking.<sup>399</sup> The NIHRC also emphasised the importance of specialist support being made available to victims of modern slavery, appropriately tailored to take account of age, gender and culture.<sup>400</sup>

### ***Illegal Migration Bill***

4.257. In March 2023, the Illegal Migration Bill was introduced. The Bill includes provisions which seek to deny access to existing support for victims of modern slavery who have arrived in the UK irregularly. The same month, the Joint Committee on Human Rights initiated a legislative scrutiny inquiry on the Bill. As of 31 March, responses to the inquiry by the Commissions were in development, which will raise human rights and equality concerns in relation to the Bill, highlight the relevance of Article 2 and urge the Committee to ask the Secretary of State to consider and detail her analysis of the compliance of provisions affecting children and the modern slavery provisions with Article 2 which was not addressed in the Human Rights Memorandum to the Bill.

### ***Recommendations***

4.258. **The Commissions continue to recommend that the Home Office and Department of Justice embed consideration of Article 2, in the development and drafting of human trafficking policy and legislation and establish processes to ensure compliance with this obligation.**

4.259. **The Commissions recommend that the Home Office embeds consideration of Article 2 in the subsequent regulations and guidance on the human trafficking provisions in the Nationality and Borders Act. The Commissions further recommend that subsequent regulations and guidance should ensure the needs of child victims are safeguarded in line with the non-diminution commitment under Article 2.**

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<sup>398</sup> Equality Commission for NI, [Response to the Department of Justices' Public Consultation on the Modern Slavery and Human Trafficking Strategy 2022](#) (ECNI January 2023).

<sup>399</sup> NI Human Rights Commission, ['Submission to the Department of Justice's Consultation on the Draft Modern Slavery and Human Trafficking Strategy'](#), (NIHRC, January 2023).

<sup>400</sup> Ibid.

- 4.260. The Commissions recommend that the UK Government considers and details their analysis of the compliance of the modern slavery provisions within the Illegal Migration Bill with Article 2.
- 4.261. The NIHRC recommends that, in line with international human rights standards and Article 2, including the EU Trafficking Directive, the Department of Justice requires compulsory specialised training and guidance to all relevant staff, which is trauma-informed and victim-centred, to ensure victims are accurately identified and supported. This includes ensuring support and services are appropriately tailored to take account of age, gender and culture.
- 4.262. The NIHRC recommends that the Department of Justice promptly introduces legislation providing for Trafficking and Exploitation Risk Orders in NI in line with international human rights standards and Article 2, including the EU Trafficking Directive.
- 4.263. The ECNI recommends that those providing advice and resources make clear to victims of trafficking the rights of individuals under both equality legislation and in relation to alleging a breach of Article 2.

## Administration of Justice

### Access to Justice

- 4.264. In 2017, the UN CRPD Committee recommended that the UK Government and NI Executive ensure that “all persons with disabilities are provided with the right and adequate procedural accommodation within the justice system” and in addition “enable in particular deaf persons through the use of sign language interpreters to fully and equally participate as jurors in court proceedings”.<sup>401</sup>
- 4.265. The EU Victims’ Directive, which falls within scope of Article 2, includes the right of victims to understand and be understood in the context of criminal proceedings and for the right to interpretation and translation services, to that end.<sup>402</sup>

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<sup>401</sup> CRPD/C/GBR/CO/1, ‘UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI’, 3 October 2017, at para 33.

<sup>402</sup> Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime’, 25 October 2012.

4.266. The Commissions are adopting a working assumption that all EU law in force on or before 31 December 2020, which underpins rights in the ECHR, falls within scope of the non-diminution commitment in Windsor Framework Article 2. Article 6(3)(e) of the ECHR states that everyone charged with a criminal offence has the right “to have the free assistance of an interpreter if he cannot understand or speak the language used in court”. The EU Directive on Interpretation and Translation in Criminal Proceedings establishes minimum protections for suspected or accused persons who do not speak or understand the language of the criminal proceedings and facilitates the application of Article 6 ECHR.<sup>403</sup>

### ***Live links***

4.267. In 2020, the Department of Justice consulted on the current use of live links within custody settings and extending the use of live links across other custody functions.<sup>404</sup> The NIHRC response highlighted the need to ensure a review is undertaken to identify individuals for whom live links technology use is not suitable and set out appropriate safeguards for children and young people, disabled people, and those who require an interpreter.<sup>405</sup> The majority of consultees welcomed the amendments proposed “while stressing that the rights, voice and participation of the detainee must be maintained at all times”.<sup>406</sup> In 2021, it was intended that a Justice (Miscellaneous Provisions) Bill would include provisions on the use of live links.<sup>407</sup> However, these plans were amended resulting in the pared-back Justice (Sexual Offences and Trafficking Victims) Act 2022.<sup>408</sup>

4.268. In 2022, the Department of Justice conducted a further consultation on the use of audio and video links for NI Court and Tribunal hearings. The NIHRC provided a response, which highlighted the relevance of Article 2 and recommended that live links are only used when a court or tribunal considers their use to be in the interests of justice.<sup>409</sup>

4.269. The NIHRC advised the Department of Justice to carefully consider the provisions of the EU Victims’ Directive<sup>410</sup> and the EU Interpretation

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<sup>403</sup> Recital 14, Directive 2010/64/EU, ‘Directive of the European Parliament and of the Council on the Right to Interpretation and Translation in Criminal Proceedings’, 20 October 2010.

<sup>404</sup> Department of Justice, ‘Consultation on Proposals on the Use of Live Links for Police Detention/Interviews’ (DoJ, 2020).

<sup>405</sup> NI Human Rights Commission, ‘Briefing Paper: Department of Justice Consultation on Proposals on the Use of Live Links for Police Detention/Interviews’ (NIHRC, 2020).

<sup>406</sup> Department of Justice, ‘The Use of Live Links for Police Detention/Interviews – A Consultation: Summary of Responses’ (DoJ, 2020).

<sup>407</sup> Ibid, at paras 3.3-3.4.

<sup>408</sup> NI Assembly, ‘Justice (Sexual Offences and Trafficking Victims) Bill - NIA Bill 29/17-22’ (NIA, 2021).

<sup>409</sup> NI Human Rights Commission, ‘Response to the Department of Justice’s Consultation on Audio and Video Links for NI Court and Tribunal Hearings’ (NIHRC, 2022).

<sup>410</sup> Directive 2012/29/EU, ‘Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime’, 25 October 2012.

Directive<sup>411</sup> in respect of the person suspected or accused, victims with disabilities and people who do not speak English as a first language.<sup>412</sup> The NIHRC also recommended that research is conducted into whether the use of live links has adverse consequences on the ability of court users with disabilities and those without English as a first language to participate in and understand the proceedings.<sup>413</sup>

### ***Recommendation***

**4.270. The NIHRC recommends that the Department of Justice conducts a review, in line with international human rights standards and Article 2, including the EU Victims' Directive and the EU Interpretation Directive, to identify individuals for whom the use of live links is not suitable, particularly in the context of reviews, hearings or police interviews. Based on the findings of this review, the Department of Justice should ensure that clear guidance is provided on the circumstances in which live links can be used and the safeguards that should be in place to ensure such technology is accessible and used appropriately.**

## **Democratic Rights**

### **Elections Act 2022**

4.271. The Elections Act 2022 made provision about the administration and conduct of elections, including about voting and candidacy rights of certain EU citizens in relation to local elections in NI.<sup>414</sup> During its parliamentary passage, the Commissions had advised that the then Bill had implications for the voting / candidacy rights of these EU citizens who have arrived in NI after the end of the Brexit transition period.

4.272. The Commissions were concerned that provisions of the Bill may amount to a breach of Article 2.<sup>415</sup> The Commissions had recommended that the UK Government sets out, in full, its assessment of the relevant provisions of the Elections Bill, in the context of its conformity with its commitments under Article 2.<sup>416</sup> This assessment was not completed prior to the Bill being passed into law.

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<sup>411</sup> Recital 14, Directive 2010/64/EU, 'Directive of the European Parliament and of the Council on the Right to Interpretation and Translation in Criminal Proceedings', 20 October 2010.

<sup>412</sup> NI Human Rights Commission, 'Response to the Department of Justice's Consultation on Audio and Video Links for NI Court and Tribunal Hearings' (NIHRC, 2022).

<sup>413</sup> Ibid.

<sup>414</sup> Elections Bill 2021- 2022 as introduced in the House of Commons on 5 July 2021 (Bill 138).

<sup>415</sup> Equality Commission for NI and NI Human Rights Commission, 'Joint ECNI / NIHRC Briefing on the provisions on Voting/Candidacy Rights of EU citizens in Northern Ireland in the Elections Bill', (ECNI and NIHRC, 2022).

<sup>416</sup> Equality Commission for Northern Ireland and Northern Ireland Human Rights Commission, [Annual Report of the NIHRC and the ECNI on the implementation of Protocol Article 2 2021 – 2022](#), (ECNI, NIHRC 2022), p59-61

- 4.273. In its response to the recommendations in the Commissions' Annual Report<sup>417</sup>, the UK Government reiterated its current position that it did not accept that the rights of EU citizens resident in NI after the end of the Brexit transition period, but not before, to vote or stand at NI local elections were protected under Article 2.
- 4.274. Its view was that these rights were conferred by Article 22 of the Treaty on the Functioning of European Union, which is linked to the right of free movement (article 20 of the Treaty on the Functioning of European Union) and applies to EU citizens resident in another Member State. The UK Government's view is that it was not intended that these rights would apply to EU nationals resident in NI after the UK had left the EU, was no longer a Member State, and free movement had ended.<sup>418</sup>
- 4.275. The Commissions previously responded to the UK Government's position in April 2022<sup>419</sup>, and made clear that they did not agree. In their correspondence with Minister Burns, the Commissions highlighted that they did not suggest that an EU citizen, who would be excluded from voting in NI District Council elections as a result of the Bill, has any rights in the United Kingdom currently under Article 22 Treaty on the Functioning of European Union, but, critically, rather that this is irrelevant for the purposes of deciding whether Article 2 is now engaged.<sup>420</sup>
- 4.276. On 28 April 2022 the Elections Act 2022 received Royal Assent and is now law.<sup>421</sup> The Commissions are now considering next steps in relation to this matter.

### ***Recommendations***

- 4.277. The Commissions continue to recommend that the Cabinet Office ensures there is no reduction of the rights of certain EU citizens who arrive in NI after the end of the Brexit transition in terms of their voting/candidacy rights in local elections in NI.**

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<sup>417</sup> Correspondence from Steve Baker, Minister of State for Northern Ireland to the Equality Commission for NI and NI Human Rights Commission re: Annual Report of the Dedicated Mechanism on the implementation of Protocol Article 2 2021-2022, 1 December 2022

<sup>418</sup> Ibid

<sup>419</sup> Joint correspondence from the Equality Commission for NI and NI Human Rights Commission to Minister of State NI Conor Burns re: Northern Ireland Protocol and Voting Rights, 11 April 2022

<sup>420</sup> Ibid

<sup>421</sup> [Elections Act 2022 \(legislation.gov.uk\)](https://legislation.gov.uk)

4.278. The Commissions recommend that the UK Government repeals the relevant provisions of Schedule 8 of the Elections Act 2022 to ensure compatibility with Article 2.

## Migrants' Rights

4.279. The parties to the Belfast (Good Friday) Agreement affirmed their commitment to “the mutual respect, the civil rights and the religious liberties of everyone in the community”. The UK Government recognises that Article 2 applies to “everyone who is subject to NI law – irrespective of whether that law has been passed by the NI legislature or Westminster”.<sup>422</sup>

4.280. The non-exhaustive list of rights which are “affirmed in particular” in the relevant Chapter of the Belfast (Good Friday) Agreement include the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity. The Commissions consider that all EU law in force in NI on or before 31 December 2020 which underpins ECHR rights fall within scope of the non-diminution commitment in Article 2.

4.281. In addition, the obligation to keep pace in respect of the six Annex 1 equality directives includes the Race Directive, which establishes a framework for combating discrimination on the grounds of racial or ethnic origin,<sup>423</sup> and the Equality (Goods and Services) Directive, which prohibits sex discrimination in access to goods and services and relevant CJEU case law.<sup>424</sup>

### Migrants' rights – case law of the Court of Justice of the EU

4.282. In March 2023, the research report on divergence of rights<sup>425</sup> and the Commissions' subsequent recommendations<sup>426</sup> highlighted CJEU case law developments after 31 December 2020 related to migrant rights that go beyond the scope of the Annex 1 equality directives and could potentially result in a divergence of rights on the island of Ireland. Aligned to the Commissions' recommendations on avoiding a divergence of rights on the

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<sup>422</sup> 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 para 8.

<sup>423</sup> 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.

<sup>424</sup> 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.

<sup>425</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>426</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)



island of Ireland, these are areas where the NI Executive and UK Government can ensure voluntary alignment with developments in CJEU case law where they enhance equality and human rights in NI in line with international human rights best practice.

- 4.283. The research report highlighted CJEU judgements relating to the Citizens' Rights Directive (Directive 2004/38/EC)<sup>427</sup>. In these cases, the CJEU determined that the Directive should be interpreted in line with Article 1 of the EU Charter (the right to human dignity)<sup>428</sup> and as such required the disbursement of benefits required to ensure a dignified standard of living, for example, housing benefit<sup>429</sup> and subsistence benefits.<sup>430</sup>
- 4.284. The Commissions recommended that the NI Executive and UK Government consider the implications of these recent judgements on the Citizen's Rights Directive for migrants in NI, in relation to access to benefits required to have a "minimally dignified standard of living",<sup>431</sup> in line with Article 1 of the EU Charter of Fundamental Rights.<sup>432</sup>

### ***Recommendation***

- 4.285. **The Commissions recommend that the NI Executive and UK Government review recent CJEU case law on the Citizens' Rights Directive and its enduring relevance in NI and consider what legal and policy changes might be made as required by Article 2 and as a matter of best practice.**

## **Refugees and Asylum Seekers**

- 4.286. The UK Government recognises that Article 2 applies to "everyone who is subject to [NI]... law".<sup>433</sup> The Commissions are of the view that the commitment in the Belfast (Good Friday) Agreement 1998 to the civil rights and religious liberties of "everyone in the community" includes asylum seekers and refugees.

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<sup>427</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

<sup>428</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), page 85

<sup>429</sup> For example, *Land Oberösterreich v KV*

<sup>430</sup> For example, *Universal Credit in CG v The Department for Communities in Northern Ireland*

<sup>431</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), page 98

<sup>432</sup> Article 1 of the [Charter of Fundamental Rights of the European Union](#) states that "human dignity is inviolable. It must be respected and protected".

<sup>433</sup> NI Office, 'UK Government Commitment To "No Diminution of Rights, Safeguards and Equality of Opportunity" In NI: What Does It Mean and How Will It Be Implemented?' (NIO, 2020), at para 8.

- 4.287. Article 2 requires the Executive Office to ensure NI law ‘keeps pace’ with any changes in the EU Racial Equality Directive,<sup>434</sup> and the EU Gender Equality (Goods and Services) Directive<sup>435</sup> and relevant CJEU case law which enhance protections. In addition, the Commissions have identified other relevant EU laws within scope of Article 2 of relevance to refugees and people seeking asylum, including the EU Procedures Directive,<sup>436</sup> EU Reception Directive,<sup>437</sup> Qualification Directive<sup>438</sup> and the Dublin III Regulation.<sup>439</sup>
- 4.288. The EU Charter on 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 Article 2. Article 18 of the Charter protects the Right to Asylum.
- 4.289. The NIHRC has commissioned research to explore the interaction of Article 2 and the rights of asylum seekers and refugees. This research will be published in 2023. In March 2023, the ECNI finalised independent research on the impact of Brexit on minority ethnic and migrant people in NI, which includes consideration of the experiences of asylum seekers and refugees. It is anticipated that the research will be published in 2023.
- 4.290. In December 2022, the NIHRC responded to the UK Joint Committee on Human Rights’ inquiry on the human rights of people seeking asylum in the UK. The response highlighted the ongoing relevance of the EU Procedures Directive and the EU Reception Directive in NI under Article 2.<sup>440</sup> The response emphasised the standards set out in the EU Reception Directive in relation to detention conditions and accommodation and subsistence for people seeking asylum, particularly children.<sup>441</sup>

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<sup>434</sup> 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.

<sup>435</sup> 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.

<sup>436</sup> Directive 2005/85/EC, ‘EU Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status’, 1 December 2005.

<sup>437</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

<sup>438</sup> Directive 2004/83/EC ‘Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted’, 29 April 2004.

<sup>439</sup> Regulation 2013/604/EU, ‘Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person’, 26 June 2013

<sup>440</sup> NI Human Rights Commission, ‘NIHRC Response to the UK Joint Committee on Human Rights’ Call for Evidence on the Human Rights of Asylum Seekers in the UK’, (NIHRC, 2022).

<sup>441</sup> Ibid .

### ***Draft Refugee Integration Strategy***

4.291. In 2022, the Commissions responded separately to the Executive Office consultation on its Draft Refugee Integration Strategy<sup>442</sup> aligned to their respective remits. The ECNI<sup>443</sup> and NIHRC<sup>444</sup> highlighted the Executive Office's obligations under Article 2 and identified the relevance of various EU directives, including the Racial Equality Directive, Victims' Directive, Trafficking Directive. In addition, the Reception Directive and Qualification Directive are also relevant to this strategy.<sup>445</sup>

4.292. In March 2022, the NI Affairs Committee recommended that the final Refugee Integration Strategy address the issues highlighted in the findings of its inquiry on the experiences of minority ethnic and migrant people in NI and that the Strategy be delivered at pace.<sup>446</sup> No further progress has been reported by the Executive Office in relation to the draft Refugee Integration Strategy.

### ***Illegal Migration Bill***

4.293. In March 2023, the Illegal Migration Bill was introduced, which seeks to restrict access to the UK asylum process for people who are deemed to arrive in the UK irregularly. The same month, the Joint Committee on Human Rights initiated a legislative scrutiny inquiry on the Bill. As of 31 March, responses to the inquiry by the Commissions were in development, which will raise human rights and equality concerns in relation to the Bill; highlight the relevance of Article 2; and urge the Committee to ask the Secretary of State to consider and detail her analysis of the compliance of provisions affecting children and the modern slavery provisions in the Bill with Article 2 which was not addressed in the Human Rights Memorandum to the Bill.

### ***Recommendations***

4.294. **The Commissions continue to recommend that the NI Executive, and the Executive Office in particular, ensure that at all stages of policy and legislative development and reform in the area of refugee and asylum seeker integration, including the Refugee Integration Strategy, there is consideration of, and compliance with, Article 2 obligations.**

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<sup>442</sup> The Executive Office, 'Refugee integration strategy for NI 2022-2027 consultation', (TEO, 2022).

<sup>443</sup> Equality Commission for NI, Response to the consultation by The Executive Office on the draft Refugee Integration Strategy 2022-2027 (ECNI, 2022)

<sup>444</sup> NI Human Rights Commission, 'Response to Public Consultation on Draft Refugee Integration Strategy' (NIHRC, 2022).

<sup>445</sup> Ibid .

<sup>446</sup> House of Commons NI Affairs Committee, 'The Experiences of Minority Ethnic and Migrant People in NI' (HoC, 2022), at para 28

4.295. **The NIHRC recommends that the Home Office and the Executive Office urgently review the support and accommodation provided to refugees and people seeking asylum in NI to ensure it is adequate, fit for purpose and culturally appropriate in compliance with international human rights standards and EU standards falling within scope of Article 2, including the EU Reception Directive.<sup>447</sup>**

## Right to Health

4.296. The right to the highest attainable standard to health is protected under the UN ICESCR, UN CRC and UN CRPD.<sup>448</sup> As a minimum, respect for the right to health includes the prohibition of unlawful discrimination in access to health services. As noted above, the obligation to keep pace in respect of the six Annex 1 equality directives includes the Racial Equality Directive<sup>449</sup> and the Gender Equality (Goods and Services) Directive,<sup>450</sup> which prohibit discrimination in access to goods and services on grounds of race and ethnic origin and on grounds of sex respectively.

4.297. In 2022, the NIHRC published research on the implications of UK withdrawal from the EU on access to healthcare on the island of Ireland, which examined the interaction of various international commitments including Citizens' rights provisions of the UK-EU Withdrawal Agreement, Article 2 and the Common Travel Area. The NIHRC also wished to explore arrangements for continuing access to cross-border and all-island services. The research found that in a number of cases, current access to healthcare could amount to a diminution of rights.<sup>451</sup> The evidence presented in the research demonstrated that frontline health staff currently lack clear information about the applicable law for patients accessing healthcare post-Brexit.

4.298. In March 2023, the ECNI finalised research on the impact of Brexit on minority ethnic and migrant people in NI, which explores issues relating to access to public services including health. The research will be published in 2023.

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<sup>447</sup> Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

<sup>448</sup> Article 12, UN International Covenant of Economic, Social and Cultural Rights; Article 24, UN Convention on the Rights of the Child; and Article 25, UN Convention on the Rights of People with Disabilities.

<sup>449</sup> 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.

<sup>450</sup> 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.

<sup>451</sup> Tamara Hervey, 'Brexit, Health and its potential impact on Article 2 of the Ireland/NI Protocol', (NIHRC, 2022).

## Access to Healthcare for Irregular Migrants

- 4.299. Everyone in NI is entitled to free emergency healthcare at the point of service, including irregular migrants. It is important that information regarding the right to emergency healthcare is communicated to irregular migrants to ensure they are able to access this type of healthcare when they need it.
- 4.300. The Commissions have received reports that there are several barriers to migrants, including irregular migrants, accessing healthcare and there have been reports of a lack of access to translation and interpretation services.<sup>452</sup> The Commissions are also aware of instances where migrants are being questioned about immigration status at point of contact with health services.<sup>453</sup> Following UK withdrawal from the EU, EEA and Swiss citizens living in the UK must now apply for settled status, through the EU Settlement Scheme, to ensure they have leave to remain in the UK.<sup>454</sup> NI civil society organisations have raised concerns regarding EU citizens with a pending application for pre-settled and settled status being charged for NHS treatment whilst awaiting a decision and in case of an unsuccessful application.<sup>455</sup>
- 4.301. In December 2022, the High Court confirmed that applicants with pre-settled status have the right to reside permanently in the UK after they have resided there for the required five-year period.<sup>456</sup> In March 2023, in response to a question in the House of Lords, the Parliamentary Under-Secretary of State at the Home Office confirmed that work is proceeding to implement the High Court's decision.<sup>457</sup> The EU Settlement Scheme and the Commissions' related recommendations are discussed further in Chapter 5.
- 4.302. The Commissions reiterate their recommendations related to ensuring compliance with on Article 2 which are relevant to the right to health, in addition to the specific recommendations below.

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<sup>452</sup> NI Human Rights Commission, 'Submission to the NI Affairs Committee Inquiry into the Experience of Minority Ethnic and Migrant People in NI' (NIHRC, 2021) and Equality Commissions for NI, Shadow Report from the Equality Commission for Northern Ireland to the Advisory Committee for the Framework Convention for the Protection of National Minorities on the Fifth Monitoring Report of the United Kingdom (ECNI, 2022)

<sup>453</sup> Roundtable on Access to Healthcare and Protocol Article 2 hosted by the NI Human Rights Commission, 6 June 2022. The ECNI noted similar issues raised in their forthcoming research on the Impact of Brexit on minority ethnic and migrant people in NI.

<sup>454</sup> UK Government, ['Stay in the UK \('settled status'\): Step by Step'](#).

<sup>455</sup> Committee on Administration of Justice, 'Frontline Lessons for the Future Collaborative research on the impact of immigration law and policy in post-Brexit Northern Ireland' (CAJ, 2022), at page 49.

<sup>456</sup> R (Independent Monitoring Authority for the Citizens' Rights) v Secretary of State for the Home Department [2022] EWHC 3274 (Admin), 192.

<sup>457</sup> UK Parliament Hansard, 'Oral Question: EU Settlement Scheme – Baroness Ludford - Volume 828', 13 March 2023.

### ***Recommendations***

- 4.303. **The NIHRC recommends that the Home Office provide further guidance on the rights of people with pending and late applications to the EU Settlement Scheme, to applicants to the Scheme and to healthcare professionals to ensure no diminution of the current provision and to protect the right to the highest attainable standard of healthcare.**
- 4.304. **The NIHRC recommends that the Department of Health provide clear, accessible and complete information on the right to healthcare post-EU withdrawal, including access to cross-border and island-of-Ireland services to ensure no diminution of the current provision and to protect the right to the highest attainable standard of healthcare.**
- 4.305. **The ECNI recommends that the Department of Health, should take appropriate and effective steps to address the barriers experienced by minority ethnic and migrant people in NI in accessing healthcare after Brexit.**

## **Employment Rights**

- 4.306. NI equality law must dynamically align with any changes made by the EU to the six Annex 1 equality directives which improve the minimum levels of protection available on or after 1 January 2021, including monitoring relevant current and future CJEU case law.<sup>458</sup> Four of these directives cover the area of employment discrimination on grounds of race and ethnicity, sexual orientation, religion and belief, disability, age and gender:
- Racial Equality Directive;<sup>459</sup>
  - Employment Equality (Framework) Directive;<sup>460</sup>
  - Gender Equality Directive;<sup>461</sup>
  - Gender Equality (Self-Employment) Directive.<sup>462</sup>
- 4.307. In addition to the Annex 1 equality directives, there are a number of other EU obligations which impact employment and underpin the rights and safeguards in the relevant part of the Belfast (Good Friday) Agreement. For

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<sup>458</sup> Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

<sup>459</sup> 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.

<sup>460</sup> Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000.

<sup>461</sup> 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.

<sup>462</sup> 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.

example, the Commissions consider that the Parental Leave Directive<sup>463</sup> and the Pregnant Workers Directive<sup>464</sup> and other safeguards for part-time workers<sup>465</sup> and agency workers<sup>466</sup> fall within scope of Article 2.

## Employment Equality

### ***Fair Employment and Treatment (NI) Order 1998***

4.308. In May 2022, the Fair Employment (School Teachers) Act (NI) 2022 received Royal Assent but has not yet come into operation. The Commissions welcomed the legislation as a positive step forward in the development of NI equality law.<sup>467</sup>

### ***Freedom of Religion – case-law of the Court of Justice of the EU***

4.309. In March 2023, the research report on divergence of rights<sup>468</sup> and the Commissions' subsequent recommendations<sup>469</sup> highlighted CJEU case law developments after 31 December 2020 in relation to religion as a protected characteristic in the context of the Framework Equality Directive<sup>470</sup>, which is a Windsor Framework Annex 1 equality directive.

4.310. In the joined cases of WABE and Müller<sup>471</sup> the CJEU found that differentiating between religious symbols based on characteristics such as size or scale, amounts to direct discrimination under Article 2(2) of the Framework Equality Directive, and cannot be justified, except by reference to a narrow list of occupational requirements, rather than by a commercial policy of neutrality.

4.311. The CJEU also ruled that the Framework Equality Directive must be interpreted as meaning that a rule prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, does not constitute direct discrimination on the grounds of religion or belief

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<sup>463</sup> Directive 2010/18/EU, 'Council Directive implementing the revised Framework Agreement on parental leave', 8 March 2010.

<sup>464</sup> Directive 92/85/EEC, 'Council Directive on the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers who have Recently Given Birth or are Breastfeeding', 19 October 1992.

<sup>465</sup> Directive 97/81/EC, 'Council Directive Concerning the Framework Agreement on Part-time Workers', 15 December 1997.

<sup>466</sup> Directive 2008/104/EC, 'EU Parliament and Council Directive on temporary agency work', 19 November 2008.

<sup>467</sup> Equality Commission for Northern Ireland and Northern Ireland Human Rights Commission, [Annual Report of the NIHRC and the ECNI on the implementation of Protocol Article 2 2021 – 2022](#), (ECNI, NIHRC 2022).

<sup>468</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>469</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>470</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

<sup>471</sup> Joined Cases C-804/18 and C-341/19, IX v WABE eV and MH Müller Handels GmbH v MJ, EU:C:2021:594 (hereafter 'WABE and Müller')

under the Directive, provided that this rule is applied in a general and undifferentiated way.<sup>472</sup>

4.312. In March 2023, in response to a call for evidence by the Joint Committee on Human Rights inquiry on human rights at work, the NIHRC highlighted this case law and recommended that the UK Government monitors case law of the CJEU relevant to the Annex 1 equality directives and ensures that the Framework Equality Directive is interpreted in line with the decision of the CJEU in the cases of *WABE* and *Müller*. As of 31 March 2023, a response to the inquiry by ECNI was in development, which will raise similar recommendations related to CJEU decisions in relation to these cases.

4.313. ECNI has developed guidance on dress codes in the workplace to assist businesses and public authorities and help them to promote good practice in relation to equality employment law. This includes specific guidance on religious beliefs and/or race.<sup>473</sup>

### ***Recommendations***

4.314. **The Commissions continue to recommend that in the development of any laws or policies in the area of employment the UK Government and relevant NI Executive departments consider the extent to which Article 2 is engaged; ensure that there is no diminution of the rights and safeguards which fall within its scope; and monitor any proposed changes by the EU to the six Annex 1 equality directives, as well as relevant CJEU case law.**

4.315. **In line with the ‘keeping pace’ obligation associated with Article 2, the Commissions recommend that the NI Executive, and relevant NI Departments, ensure that the Framework Equality Directive is interpreted in line with the decision of the CJEU in the cases of *WABE* and *Müller*.**

### **Gender Pay Gap**

4.316. The international human rights oversight bodies have consistently called for the UK Government and NI Executive to adopt effective measures to eliminate the gender pay gap.<sup>474</sup>

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<sup>472</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), page 68

<sup>473</sup> See [Equality Commission for Northern Ireland Dress Code in the workplace guidance](#)

<sup>474</sup> E/C.12/GBR/CO/6, 'UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 14 July 2016; CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019.



4.317. In 2022, NI was recorded as the fourth top-performing UK region for women's empowerment.<sup>475</sup> Yet, in 2021, considering all employees regardless of working pattern, women earned 5.7 per cent less than males in NI - for every £1 earned by men, women earned £0.94.<sup>476</sup> In 2022 the gender pay gap was much greater in the private sector where men earn 15.6 per cent more, compared to 4.4 per cent more within the public sector.<sup>477</sup> Moreover, the gender pay gap in NI is affected by the 'part-time effect', as part-time employees earn less on average than full-time employees and a higher proportion of part-time employees are women.<sup>478</sup>

4.318. The obligation to keep pace with the Annex 1 equality directives includes the Gender Equality (Employment) Directive which protects against discrimination in employment on the grounds of gender.<sup>479</sup> NI equality law must align with any improvements made by the EU to these rights, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.<sup>480</sup>

4.319. In 2021, the Expert Advisory Panel for the Gender Equality Strategy made a number of recommendations on the gender pay gap for the purpose of developing the Gender Equality Strategy.<sup>481</sup> A public consultation on the Gender Equality Strategy was due to take place in early 2022, but this process has been delayed.<sup>482</sup>

### ***Pay Transparency***

4.320. In 2021, the European Commission issued a proposal for a new Directive on gender pay transparency.<sup>483</sup> The proposed Pay Transparency Directive is designed to strengthen the existing enforcement tools and procedures in regard to the rights and obligations in the Gender Equality (Employment) Directive.<sup>484</sup>

4.321. The Commissions progressed work to explore the extent to which this proposed Directive amends or replaces the Gender Equality (Employment) Directive in Annex 1. Considerations include the legal basis for this new measure; the purpose of the new measure; the degree of overlap on the

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<sup>475</sup> Price Waterhouse Cooper, 'Women in Work Index 2022' (PWC, 2022), page 20.

<sup>476</sup> NI Statistics and Research Agency, 'Employee Earnings in NI' (NISRA, 2021), at 26.

<sup>477</sup> NI Statistics and Research Agency, Employee earnings in Northern Ireland (NISRA 2022)

<sup>478</sup> Ibid.

<sup>479</sup> 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.

<sup>480</sup> Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

<sup>481</sup> Department for Communities, 'Gender Equality Strategy Expert Advisory Panel Report', (DfC, 2021).

<sup>482</sup> Letter from Department for Communities to NI Human Rights Commission, 18 July 2022

<sup>483</sup> EU Commission proposal for a Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms (COM(2021) 93).

<sup>484</sup> Ibid.

substance of the rights and safeguards between the new measure and the Annex 1 equality directives, any relevant CJEU case law; and the extent to which the new measure facilitates the implementation and/or enforcement of an Annex 1 equality directive.

- 4.322. In March 2023, the research report on divergence of rights<sup>485</sup> and the Commissions' subsequent policy recommendations<sup>486</sup> noted legislative advancements within the EU and Ireland on pay transparency reporting, highlighting divergence, noting that equality legislation in NI does not align with EU legislative proposals and legislation in Ireland, as well as in Great Britain.<sup>487</sup>
- 4.323. There have been requirements on gender pay gap reporting in Great Britain since 2017 (the Gender Pay Gap Reporting Regulations)<sup>488</sup> and Ireland has introduced the Gender Pay Gap Information Act 2021.<sup>489</sup> Section 19 of the Employment Act (NI) 2016<sup>490</sup> would implement pay transparency obligations in NI but it has not yet been brought into effect. This has resulted in a divergence of rights across the island of Ireland with NI falling behind Ireland, as well as Great Britain, with respect to gender pay transparency.<sup>491</sup>
- 4.324. The ECNI has made a number of recommendations relating to strengthening gender pay transparency, including the introduction of requirements on gender pay gap reporting.<sup>492</sup>
- 4.325. In March 2023, the EU Parliament adopted the new pay transparency directive. As of 31 March 2023, the EU Council has to formally approve the agreement before the text is signed into law and published in the EU Official Journal. The new rules will come into force twenty days after their

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<sup>485</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>486</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), page 36, para 4.42.

<sup>487</sup> Ibid., page 36, para 4.45-4.46

<sup>488</sup> The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (SI 2017/172); Regulations came into force on 6 April 2017 and which applies to all private and voluntary sector employers with 250 or more employees in England, Wales and Scotland. Public sector employers with 250 or more employees that are listed in The Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 (SI 2017/353) are also required to publish information on their gender pay gap. These Regulations came into force on 31st March 2017.

<sup>489</sup> Gender Pay Gap Information Act 2021.

<sup>490</sup> Section 19, Employment Act (Northern Ireland) 2016.

<sup>491</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), page 36, para 4.45-4.46

<sup>492</sup> Equality Commission for NI, 'Gender Pay Strategy and pay Reporting – Summary of policy recommendations', (ECNI, 2019).

publication.<sup>493</sup> The Commissions are currently considering the extent to which the Pay Transparency Directive amends or replaces the Gender Equality (Employment) Directive.

4.326. In line with the ‘keeping pace’ obligation associated with Article 2, where one of the Annex 1 equality directives is amended or replaced by the EU on or after 1 January 2021, NI law must be updated to reflect any enhancements to the rights or safeguards in those directives.<sup>494</sup>

4.327. In addition to ensuring law in NI is amended to keep pace with any such changes, the Commissions have encouraged the Executive Office in the development of any legislation relating to gender pay gap reporting, to ensure that it reflects international human rights best practice and standards, and where necessary, to go beyond protections in Great Britain, where this is needed to ensure robust rights and protections.

4.328. In March 2023, in response to a call for evidence by the Joint Committee on Human Rights inquiry on human rights at work, the NIHRC highlighted the Commissions’ ongoing work to explore the extent to which this proposed EU Pay Transparency Directive amends or replaces the EU Gender Equality (Employment) Directive. As of March 2023, the ECNI was developing its response to the call for evidence by the Joint Committee on Human Rights inquiry on human rights at work, which will raise equality and human rights concerns in relation to employment and highlight the relevance of Article 2.

### ***Recommendations***

4.329. **The Commissions continue to recommend that the Executive Office commit to ensuring that to the extent that the EU Pay Transparency Directive, when introduced, amends or replaces the EU Gender Equality (Employment) Directive, the law in NI is amended to keep pace with that change.**

4.330. **The Commissions continue to recommend that, regardless of whether or not required to under the ‘keeping pace’ requirement associated with Article 2, the NI Executive should ensure that NI law keeps pace with changes that enhance equality and human rights protections further to the EU Pay Transparency Directive, when introduced.**

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<sup>493</sup> Gender pay gap: Parliament adopts new rules on binding pay-transparency measures | News | European Parliament ([european-council.europa.eu](https://european-council.europa.eu/media/en/press-room/detail/16-03-2023))

<sup>494</sup> Article 13(3), Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

## Right to privacy and surveillance at work

4.331. In March 2023, in response to a call for evidence by the Joint Committee on Human Rights inquiry on human rights at work, the NIHRC highlighted that it is the view of the NIHRC that the non-diminution commitment in Article 2 encompasses the full range of rights set out in the ECHR, to the extent that they are underpinned by EU law. The European Court of Human Rights (ECtHR) has recognised that the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life and therefore engages Article 8 of the ECHR.<sup>495</sup> It is well established that EU law recognises the right to privacy and data protection as a fundamental right.<sup>496</sup>

4.332. So far, the UK has not diverged significantly from the EU General Data Protection Regulation but may do so in the future. For example, the Data Protection and Digital Information (No. 2) Bill aims to review how data protection and processing operates in the UK following UK withdrawal from the EU. The NIHRC is of the view that to the extent that workplace surveillance engages EU General Data Protection Regulation, any divergence from those standards is likely to engage Article 2.

### ***Recommendation***

**4.333. The NIHRC recommends that particular consideration be given to Article 2 and the EU General Data Protection Regulations in the development of employment law and practice that may impact on the privacy of workers and surveillance at work.**

## Work-Life Balance

4.334. In March 2023, the research report on divergence of rights<sup>497</sup> and the Commissions' subsequent policy recommendations<sup>498</sup> noted legislative developments within the EU including Ireland in relation to work-life balance for parents and carers which could potentially lead to a divergence of rights.

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<sup>495</sup> *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* (2017) ECHR 607, at para 137.

<sup>496</sup> Article 1, Regulation (EU) 2016/679, 'Regulation of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)' 27 April 2016.

<sup>497</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>498</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), page 40-42.

- 4.335. In 2019 the European Parliament adopted a Directive on work-life balance (Work-Life Balance Directive) for parents and carers,<sup>499</sup> which aims to improve families' access to family leave and flexible work arrangements, encourage a more equal sharing of parental leave between men and women, and to address women's underrepresentation in the labour market. The Commissions' policy recommendations<sup>500</sup> noted that following its departure from the EU, the UK no longer has an obligation to adopt/transpose the Directive into national legislation. Ireland, as an EU Member State, will be required to adopt the directive into law, which could lead to a divergence of rights on the island of Ireland if similar provisions are not implemented in NI.
- 4.336. However, the UK Government along with the NI Assembly, could choose to keep pace with EU employment rights and address key inequalities that exist within the UK labour market by implementing the elements of the Work-Life Balance Directive that enhance equality and human rights and which are not already transposed into domestic legislation, such as in relation to non-transferable parental leave.
- 4.337. The Work-Life Balance Directive repeals and replaces the Parental Leave Directive.<sup>501</sup> Although this is not a directive listed under Annex 1 Windsor Framework, the Commissions have identified the Parental Leave Directive as falling within the scope of Article 2.<sup>502</sup> This has also been recognised by the UK Government.<sup>503</sup>
- 4.338. The Commissions note that the failure by the NI Assembly to transpose the provisions of the Work-Life Balance Directive which do not already exist in domestic legislation would result in NI being in the position of continuing to mirror the more limited obligations of the Parental Leave Directive, even though it has been replaced by the Work-Life Balance Directive.
- 4.339. The Commissions have called for the NI Assembly to legislate where necessary to implement the provisions of the Work-Life Balance Directive

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<sup>499</sup> Directive 2019/1158/EU of the European Parliament and of the Council of 20 June 2019 work-life balance for parents and carers

<sup>500</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 4.66.

<sup>501</sup> Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC

<sup>502</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, 2022)

<sup>503</sup> Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland, 7 August 2020

which enhance rights.<sup>504</sup> It is the view of the Commissions that such provisions would avoid a potential divergence of rights on the island of Ireland and could positively contribute to addressing some of the key barriers to the full and equal participation of women in employment, by encouraging an equal sharing of parental leave.

### ***Recommendations***

**4.340. The Commissions recommend that the NI Executive and relevant NI Departments, including the Department for the Economy and The Executive Office should voluntarily ensure that NI law aligns with any changes that enhance equality and human rights protections further to the EU Work-Life Balance Directive.**

## **Right to Education**

### **Migrant and Minority Ethnic Children**

4.341. Article 2 provides specific protection against discrimination enshrined in the six Annex 1 equality directives, including the Racial Equality Directive which protects against discrimination on the grounds of race and ethnicity in the area of education.<sup>505</sup> NI equality law must keep pace with any changes made by the EU to these rights to improve the minimum levels of protection available, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.<sup>506</sup>

4.342. In its submission the Advisory Committee on the Framework Convention for the protection of National Minorities, the NIHRC drew attention to these protections in relation to the inequalities experienced by minority ethnic and migrant children.<sup>507</sup> In particular, it highlighted the need to ensure protection for children from Traveller communities, children from the Roma community and refugee children.<sup>508</sup>

4.343. The ECNI's submission to the Advisory Committee on the Framework Convention for the protection of National Minorities highlighted its recommendations aimed at addressing barriers and inequalities in

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<sup>504</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), page 40-42.

<sup>505</sup> 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.

<sup>506</sup> Article 13, Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

<sup>507</sup> NI Human Rights Commission, 'Submission to the Advisory Committee on the Framework Convention for the protection of National Minorities – Parallel Report to the Advisory Committee on the Fifth Monitoring Report of the UK', (NIHRC, 2022), at para 11.5.

<sup>508</sup> Ibid, at paras 11.3-11.14.

education experienced by newcomer children, Roma, asylum seeker and minority ethnic pupils including Irish Traveller children.<sup>509</sup>

4.344. The UN Committee on the Rights of the Child has raised concerns about the substantial, persistent inequalities in educational achievement of children in poverty, Roma, Gypsy and Traveller children, and migrant children among others.<sup>510</sup>

4.345. In 2021, the Expert Panel on Educational Underachievement highlighted that children from the Traveller community, Roma children and looked after children, have some of the lowest levels of attainment of all equality groups.<sup>511</sup> The final report and accompanying action plan cannot be progressed without agreement about funding this action plan while the NI Executive is suspended.<sup>512</sup>

4.346. In 2021 the NIHRC met with representatives of the Independent Review of Education Panel and raised, along with other issues, the need to consider Article 2 in its work. The Panel has taken evidence from a range of stakeholders including political parties, trade unions, sectoral bodies, and the Children's Commissioner. The online request for views closed on Friday 4th February 2022 and elicited over 1,200 responses from a wide range of stakeholders.<sup>513</sup> The panel is expected to deliver a final report in September 2023.

### ***Recommendations***

4.347. **The Commissions recommend that in the development of any laws or policies in the area of education and the educational needs of migrant and minority ethnic children, the Department of Education consider and comply with Article 2, including the keeping pace obligations relating to the Racial Equality Directive.**

4.348. **In line with the 'keeping pace' obligations associated with Article 2, the Commissions recommend that the Department of Education monitor any proposed changes by the EU to the Racial Equality Directive, including relevant case law of the CJEU.**

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<sup>509</sup> Equality Commissions for NI, Shadow Report from the Equality Commission for Northern Ireland to the Advisory Committee for the Framework Convention for the Protection of National Minorities on the Fifth Monitoring Report of the United Kingdom (ECNI, 2022)

<sup>510</sup> CRC/C/GBR/CO/5, 'UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016.

<sup>511</sup> Expert Panel on Educational Underachievement, 'A Fair Start: Final Report and Action Plan', (DE, 2021).

<sup>512</sup> NI Assembly Hansard, 'Written Question: A Fair Start - Diane Dodds MLA - AQW 3017/22-27', 26 January 2022.

<sup>513</sup> Independent Review of Education, 'February Update' (IRE, 2022).

- 4.349. The NIHRC recommends that the Department of Education promptly updates and publishes its proposals for the revised policy for children of migrant families, including an action plan that will guide its effective implementation. This should take a human rights-based approach in line with international human rights standards and Article 2. It should also include reconsidering the use of the term ‘newcomer pupils’.**
- 4.350. The ECNI recommends that the NI Executive and Department of Education work with the regional Inclusion and Diversity Service to understand and improve the experiences of and outcomes for newcomer (including Roma and asylum seeker) children and minority ethnic pupils.**



## 5.0 Human Rights and Equality after Brexit: Article 2 and Beyond

- 5.1. The UK's withdrawal from the EU has implications for human rights and equality that are not fully encompassed by Article 2 but are connected to the work of the Dedicated Mechanism. The Commissions have set out below their recommendations on the wider impact of Brexit on the equalities and human rights landscape in NI, aligned to their respective remits and statutory roles.

### Birthright

- 5.2. Recognition in the Belfast (Good Friday) Agreement, of the “birthright of all the people of NI to identify themselves and be accepted as Irish or British, or both”, has attracted renewed focus in the context of EU withdrawal, due to the implications for access to EU free movement rights.
- 5.3. In 2020, the Joint Committee of the NIHRC and the Irish Human Rights and Equality Commission published a legal analysis and proposals for reform to enshrine the commitment in domestic law.<sup>514</sup> Under Section 1 of the British Nationality Act 1981, anyone born in the UK to a British, Irish, or settled parent, is deemed British. In 2019 and 2021, unsuccessful attempts were made to challenge these provisions before the Upper Immigration and Asylum Tribunal and NI High Court.<sup>515</sup> In 2022, the NI Court of Appeal found that the appellant's case failed to identify any consequences of the operation of 1981 Act or arbitrariness in its provisions which constituted an interference with her private and family life as protected by Article 8 of the ECHR.<sup>516</sup> The court noted that Section 1 of the British Nationality Act 1981 was compatible with the UK's international obligation to protect individuals against statelessness and that the Section 12 of the Act provides for a right to renounce one's citizenship.<sup>517</sup>
- 5.4. In 2020, following a commitment in New Decade, New Approach agreement,<sup>518</sup> temporary changes came into force to allow for a “relevant person of NI” to access EU free movement law protections.<sup>519</sup> A relevant

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<sup>514</sup> Alison Harvey, 'A Legal Analysis of Incorporating into UK Law the Birthright Commitment under the Belfast (Good Friday) Agreement 1998', (NIHRC and IHREC, 2020).

<sup>515</sup> *De Souza (Good Friday Agreement: Nationality)* [2019] UKUT 355, at para 54-57; *In the Matter of Ní Chuinneagain* [2021] NIQB 79, at para 17.

<sup>516</sup> *In the Matter of Ní Chuinneagain* [2022] NICA 56, at paras 92-93.

<sup>517</sup> *Ibid*, at paras 75-76.

<sup>518</sup> NI Office, 'New Decade, New Approach' (NIO, 2020), at 48.

<sup>519</sup> Home Office, 'Statement of Changes in Immigration Rules CP232', (HO, 2020), at 10.

person of NI was defined as someone who is a British citizen, an Irish citizen, or both British and Irish, and was born in NI to a parent who was British, Irish, or both, or otherwise entitled to reside in NI without any restriction on their period of residence. This scheme closed on 30 June 2021 in line with the EU Settlement Scheme.<sup>520</sup>

- 5.5. In 2021, following written and oral evidence from the NIHRC,<sup>521</sup> the NI Affairs Committee further called on the UK Government to “clarify the meaning of the phrase ‘to be accepted as’ in Article 1(vi) of the Agreement, including how it is respected and upheld in the [UK] Government’s approach towards the birthright provisions for the people of NI”.<sup>522</sup> In its response to the Committee in 2022, the UK Government restated its view that “UK nationality legislation - including the British Nationality Act 1981 - is compliant with the agreed text of the Belfast (Good Friday) Agreement”.<sup>523</sup>
- 5.6. In 2021, the NIHRC recommended that the then Nationality and Borders Bill be amended to recognise the birthright commitment.<sup>524</sup> In 2022, during the passage of the Bill in the House of Lords, the UK Government confirmed its view that the birthright provisions were already clear and that further legislation stipulating a particular view of identity would risk impinging upon the freedom of the people of NI to choose what their identity means to them.<sup>525</sup> In April 2022, the Nationality and Borders Act received Royal Assent, with no amendments to address the issue of birthright included.

### ***Recommendation***

- 5.7. **The NIHRC continues to recommend that the Home Office amend nationality and immigration laws to reflect the commitment under the Belfast (Good Friday) Agreement 1998, that it is the birthright of all the people of NI to identify, and be accepted, as Irish or British or both, without any loss of rights or entitlements.**

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<sup>520</sup> NI Human Rights Commission, ‘EU Settlement Scheme extended to the people of Northern Ireland: what does it mean for me?’, (NIHRC, 2020).

<sup>521</sup> NI Human Rights Commission, ‘Submission to the NI Affairs Committee Inquiry into Citizenship and Passport Processes’ (NIHRC, 2021); UK Parliament Hansard, ‘NI Affairs Committee Inquiry into Citizenship and Passport Processes in NI - NI Human Rights Commission’, 10 March 2021; NI Human Rights Commission, ‘NI Affairs Committee Inquiry into Citizenship and Passport Processes in NI: NIHRC Commentary on the NI Office/Home Office Submission to the Committee’ (NIHRC, 2021).

<sup>522</sup> NI Affairs Committee, ‘First Report of Session 2021/2022 on Citizenship and Passport Processes relating to NI’ (HoC, 2021), at para 14.

<sup>523</sup> NI Affairs Committee, ‘Second Special Report of Session 2021/2022 on Citizenship and Passport Processes relating to NI: Government Response to the Committee’s First Report of Session 2021-2’ (HoC, 2022), at paras 12 and 16.

<sup>524</sup> NI Human Rights Commission, ‘Response to Call for Evidence by the Joint Committee on Human Rights on the Nationality and Borders Bill’ (NIHRC, 2021), at paras 3.1-3.4.

<sup>525</sup> UK Parliament Hansard, ‘House of Lords: Nationality and Borders Bill (Committee Stage) – Lord Sharpe of Epsom – Column 1937’, 10 February 2022.

## Common Travel Area

- 5.8. Article 3 of the Windsor Framework recognises that the UK and Ireland “may continue to make arrangements between themselves relating to the movement of persons between their territories”, subject to Ireland’s obligations under EU law.
- 5.9. In the context of UK withdrawal from the EU, the UK Government advised Irish nationals that they need not apply for the EU Settlement Scheme on the basis that “You can still enter and reside in the UK and enjoy your existing rights as provided for by the CTA arrangements”.<sup>526</sup>
- 5.10. In March 2021, the NIHRc provided oral evidence to the NI Affairs Committee’s inquiry on Citizenship and Passport Processes in NI and outlined the limited legal underpinning to Common Travel Area rights in the absence of supporting EU law.<sup>527</sup> UK withdrawal from the EU has brought these matters into sharper focus and has, in part, prompted the NIHRc to undertake further research on Windsor Framework Article 2 and the right to health and the rights of frontier workers.<sup>528</sup>
- 5.11. In 2021, new Home Office guidance took effect, stating that while travellers into Great Britain from Ireland need not show a passport to a Border Force officer, they may be asked to show a document confirming their identity and nationality.<sup>529</sup> European Economic Area and Swiss citizens may be asked to show their passport or identity card to enter Great Britain when travelling from Ireland if they are encountered by Border Force. The Commissions have raised concerns about the risk of racial profiling in the context of additional checks arising from EU exit, including in correspondence to the Home Office, enquiring about the training, guidance and procedures in place to prevent and address such occurrences.<sup>530</sup>

### Nationality and Borders Act: Electronic Travel Authorisations

- 5.12. The Nationality and Borders Act provided for Electronic Travel Authorisations, which will be required for all non-British citizens who

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<sup>526</sup> Home Office, ‘Common Travel Area Guidance’, (HO, 2021), at section 8A.

<sup>527</sup> NI Human Rights Commission ‘Submission to the NI Affairs Committee Inquiry into Citizenship and Passport Processes’ (NIHRc, 2021); NI Human Rights Commission, ‘NI Affairs Committee Inquiry into Citizenship and Passport Processes in NI: NIHRc Commentary on the Northern Ireland Office/Home Office Submission to the Committee’, (NIHRc, 2021); UK Parliament Hansard, ‘Northern Ireland Affairs Committee Inquiry into Citizenship and Passport Processes in NI - NI Human Rights Commission - HC1111’, 10 March 2021.

<sup>528</sup> Tamara Hervey, ‘Brexit, Health and Its Potential Impact on Article 2 of the Ireland/NI Protocol’ (NIHRc, 2022).

<sup>529</sup> Cabinet Office and Home Office, ‘Common Travel Area Guidance’, (CO and HO, 2021).

<sup>530</sup> Letter from NI Human Rights Commission to Home Office, 20 December 2021; Letter from Equality Commission for NI to Home Office, January 2021.

require leave to enter the UK when travelling from Ireland to the UK. Irish citizens are excluded as individuals not requiring leave to enter the UK by virtue of Section 3ZA of the Immigration Act 1971. However, a significant number of individuals who do not hold recognised UK immigration status will be affected despite free travel across the island of Ireland being available to them under the current system.

- 5.13. While the Explanatory Notes confirm that British and Irish citizens do not require an Electronic Travel Authorisation, their permission to travel will require evidence of their nationality, as “demonstrated by their passports”.<sup>531</sup> It is not known what measures are in place to decide which individuals will be required to ‘demonstrate’ that permission to travel.
- 5.14. In 2021, the NIHRC wrote to the Home Secretary, to raise concerns about proposals to introduce Electronic Travel Authorisations.<sup>532</sup> The letter advised that the imposition of restrictions and checks engages Article 8 of the ECHR and that related checks raised the risk of racial profiling. The NIHRC noted that, under the Windsor Framework, the UK Government committed to avoiding a hard border, including related checks and controls, and gave undertakings in respect of protecting North-South co-operation and the Common Travel Area.
- 5.15. In January 2022, the Commissions published a briefing recommending that all journeys to NI from Ireland be exempt from Electronic Travel Authorisation requirements.<sup>533</sup>
- 5.16. The NIHRC and the ECNI jointly sent letters to the Home Secretary<sup>534</sup> and the Secretary of State for NI<sup>535</sup> and, alongside Irish Human Rights and Equality Commission, an additional letter to the Irish Minister for Foreign Affairs outlining potential Article 2 concerns with Electronic Travel Authorisations.
- 5.17. In March 2022, the House of Lords Sub-Committee on the Protocol sent a letter to the then Minister for the Home Office, asking for a specific response on the two Commissions’ recommendations.<sup>536</sup> In April 2022, the

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<sup>531</sup> Explanatory Notes to the Nationality and Borders Bill as brought from the House of Commons on 9 December 2021 (HL Bill 82), at para 676.

<sup>532</sup> Letter from NI Human Rights Commission to Priti Patel MP, Home Secretary, 20 December 2021.

<sup>533</sup> NI Human Rights Commission and Equality Commission for NI, ‘Joint NI Human Rights Commission/Equality Commission for NI Briefing Paper in the Modern Slavery and Human Trafficking and Electronic Travel Authorisation Provisions in the Nationality and Borders Bill’ (NIHRC and ECNI, 2022), at 13-14.

<sup>534</sup> Letter from NI Human Rights Commission and Equality Commission NI to Home Office, 9 February 2022.

<sup>535</sup> Letter from NI Human Rights Commission and Equality Commission NI to Northern Ireland Office, 9 February 2022.

<sup>536</sup> Letter from Chair of the Protocol on Ireland/Ni Sub-Committee, Lord Jay of Ewelme, to Minister for the Home Office, Baroness Williams of Trafford, 3 March 2022.

then Minister for the Home Office responded, assuring the Sub-Committee that the Bill was compliant with international obligations, including the Windsor Framework. This response also contended that exemptions for journeys into NI from Ireland would pose too much of a risk to UK border control and to efforts to strengthen borders.<sup>537</sup> The letter further provided an assurance that the UK would not operate routine immigration controls on journeys from within the Common Travel Area, with no immigration controls whatsoever on the Ireland-NI land border.<sup>538</sup> The UK Government has since confirmed this directly with the Commissions.

- 5.18. In April 2022, the Nationality and Borders Act received Royal Assent, with no amendments to Electronic Travel Authorisation provisions.<sup>539</sup>
- 5.19. In November 2022, in response to a question from Stephen Farry MP, Immigration Minister, Robert Jenrick MP indicated that the UK Government's long-term aim is that all visitors and migrants entering the UK will provide both facial and fingerprint biometrics under a single global immigration system. However, in respect of Electronic Travel Authorisations, currently applicants only need to provide facial images until such times as there is a technological solution to allow applicants to self-upload fingerprints as well.<sup>540</sup>
- 5.20. In March 2023, the UK Government updated its guidance on Electronic Travel Authorisations confirming that third country nationals, who are resident in Ireland and from a nationality that does not usually require a visa to visit the UK, are exempt from requiring an Electronic Travel Authorisation to enter the UK. This partially addressed the NIHRC's concerns, however, individuals not resident in Ireland will still need to apply for an Electronic Travel Authorisation when travelling from Ireland to NI.<sup>541</sup>

## **Racial Profiling**

- 5.21. In December 2021, the NIHRC wrote to the Home Secretary requesting information on the measures the Home Office has adopted to ensure that the intelligence led checks do not use racial profiling.<sup>542</sup> In January 2022, the ECNI also wrote to the Home Secretary to highlight specific concerns from equality and human rights stakeholders in NI that the enforcement of

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<sup>537</sup> Letter from Chair of the Protocol on Ireland/NI Sub-Committee, Lord Jay of Ewelme, to Minister for the Home Office, Baroness Williams of Trafford, 1 April 2022.

<sup>538</sup> Ibid.

<sup>539</sup> Section 75, Nationality and Borders Act 2022.

<sup>540</sup> UK Parliament Hansard, 'Written Question: Immigration Controls: Biometrics – Stephen Farry MP – UIN 77641, 2 November 2022.

<sup>541</sup> Home Office, 'Statement of changes to the immigration rules - HC 1160', 9 March 2023.

<sup>542</sup> Letter from NI Human Rights Commission to Priti Patel MP, Home Secretary, 20 December 2021.

the Electronic Travel Authorisations could result in an increase of racial profiling and racial discrimination.

- 5.22. In January 2022, the NIHRC and the ECNI also raised their concerns regarding the potential increase in racial profiling as a result of Electronic Travel Authorisations across the island of Ireland and suggested further consideration was required, including specifically Windsor Framework Article 2's 'non-diminution' guarantee, which includes the right to "equal opportunity in all social and economic activity".<sup>543</sup>
- 5.23. In May 2022, the ECNI received a response from the Home Office in relation to its letter highlighting concerns regarding racial profiling arising from the Electronic Travel Authorisation Scheme. The Home Office stated that it considered the Electronic Travel Authorisation scheme to be compliant with its obligations under the ECHR and the Windsor Framework. In addition, the letter highlighted that the UK and Ireland had agreed to work together to establish whether there is scope for a workable UK/Ireland data-sharing solution to determine whether a person is a lawful resident of Ireland and could therefore be exempt from the Electronic Travel Authorisation requirement for travel to the UK.<sup>544</sup>
- 5.24. In July 2022, Immigration Enforcement NI wrote to the NIHRC advising that officials are strictly prohibited from using racial profiling and that as a core part of operational officers' induction programmes, all staff undergo mandatory training ensure that they comply with human rights and equality legislation. The letter further confirmed that the reason for all examinations of members of the public are recorded in officers' notebooks, but that the Home Office does not record racial profiles.<sup>545</sup>

### ***Recommendations***

- 5.25. **The Commissions recommend that the Home Office enforce the prohibition on racial profiling and ensure it does not occur in the implementation of the revised guidance on the Common Travel Area and the Electronic Travel Authorisation requirements, including at entry to NI at ports and airports and in the context of cross-border travel. This should include effective monitoring of training for enforcement officers, so as to avoid racial profiling. It should also include the collection, monitoring, and**

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<sup>543</sup> The Belfast (Good Friday) Agreement section on Rights, Safeguards and Equality of Opportunity – Human Rights; the Agreement references "the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity".

<sup>544</sup> Letter from the Home Office to the Equality Commission for NI, 16 May 2022.

<sup>545</sup> Letter from Immigration Enforcement, Home Office to the NI Human Rights Commission, 5 July 2022; Letter from Steve Baker MP, Minister of State for NI to the NI Human Rights Commission and the Equality Commission for NI, 1 December 2022.

**evaluation of appropriate data, including disaggregated ethnic data, to ensure effective policy / service development and delivery.**

- 5.26. The NIHRC recommends that the Common Travel Area and associated rights are enshrined in law by agreeing a comprehensive bilateral treaty between the UK and Irish governments. The NIHRC further recommends that this agreement codifies reciprocal free movement rights and rights to employment, education, health care and justice and security to maintain the same level of protection as existed on 31 December 2020 and that it is incorporated into domestic legislation.**
- 5.27. The Commissions recommend that the Home Office confirms that Article 2 should be considered and complied with throughout its implementation and the development of regulations and guidance relating to the Nationality and Borders Act.**
- 5.28. The NIHRC continues to recommend that all journeys into NI that originate from Ireland should be exempt from Electronic Travel Authorisation requirements.**

## **Cross-Border Justice Arrangements**

### **Policing, Security and Criminal Justice**

- 5.29. In 2021, the NIHRC submitted evidence to NI Affairs Committee inquiry on cross-border cooperation on policing, security and criminal justice after Brexit<sup>546</sup> highlighting human rights and data protection standards and the need to establish effective and efficient UK-EU extradition arrangements which would ensure victims' rights and the rights of accused persons are upheld.<sup>547</sup>**
- 5.30. In its response the UK Government highlighted a number of significant developments in relation to cross-border policing, security and criminal justice after Brexit, including a commitment to work with domestic and EU partners to monitor the operation of the new extradition arrangements under the Trade and Cooperation Agreement; to work with EU and Irish law enforcement partners to strengthen international law enforcement**

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<sup>546</sup> NI Affairs Committee, 'Cross-Border Cooperation on Policing, Security and Criminal Justice after Brexit', (NIAC, 2021).

<sup>547</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).

cooperation in the absence of access to Schengen Information System II;<sup>548</sup> and to ongoing cooperation in information-sharing initiatives.<sup>549</sup>

- 5.31. The NIHRC welcomes the commitment in the Trade and Cooperation Agreement to ensure criminal justice cooperation is based on respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the ECHR.<sup>550</sup>
- 5.32. The Trade and Cooperation Agreement established a fast-track system which enables the extradition of either UK or EU nationals.<sup>551</sup> However, this system will likely be more restrictive in practice as it also revives the ‘dual criminality’ requirement, meaning that an offence must exist in both jurisdictions before an extradition request can be granted.<sup>552</sup> The NIHRC welcomes the EU’s data adequacy decisions in respect of the UK, which allow for the sharing of some information but regrets that access to information sharing tools such as Schengen Information System II has been lost.<sup>553</sup>
- 5.33. Any delays and impediments to the timely operation of the criminal justice system have the potential to impact on both the rights of the accused person and victims. Where such delays result in a diminution of the current levels of protection for victims, these have the potential to engage Article 2.

### **Civil Justice and the Adoption and Children Bill**

- 5.34. In 2021, questions of cross-border civil justice co-operation arose during committee stage of the then Adoption and Children (NI) Bill. In January 2022, following oral evidence to the Committee, the NIHRC responded to a request by the Committee for Health for further information regarding the possible impact of Article 2.<sup>554</sup>

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<sup>548</sup> Schengen Information System (SIS II) is a European database, which provides alerts on the movement of people or objects of interest as they cross EU borders. Regulation 1987/2006, ‘European Parliament and European Council Regulation on the Establishment, Operation and Use of the Second Generation Schengen Information System (SIS II)’, 28 December 2006.

<sup>549</sup> NI Affairs Committee, ‘Cross-border co-operation on policing, security and criminal justice after Brexit: Government Response to the Committee’s Fourth Report of Session 2019–21’, (NIAC, 2021).

<sup>550</sup> Article 524, UK-EU Trade and Cooperation Agreement 2020.

<sup>551</sup> Article 596-632, UK-EU Trade and Cooperation Agreement 2020.

<sup>552</sup> Section 12, European Union (Future Relationship) Act 2020 has repealed Sections 64 and 65, Extradition Act 2003 which previously contained a waiver in relation to the requirement of dual criminality.

<sup>553</sup> Commission Implementing Decision pursuant to Regulation (EU) 2016/679 on the adequate protection of personal data by the United Kingdom, C(2001) 4800, 28 June 2021; and Commission Implementing Decision pursuant to Regulation (EU) 2016/680 on the adequate protection of personal data by the United Kingdom, C(2001) 4801, 28 June 2021.

<sup>554</sup> Letter from the NI Human Rights Commission to the Committee for Health, 17 January 2022.



- 5.35. Before 1 January 2021, cross-border disputes within the EU relating to children were regulated under the Brussels IIa Regulation ('Brussels IIa').<sup>555</sup> Neither the UK-EU Withdrawal Agreement, nor the UK-EU Trade and Cooperation Agreement address cooperation on matters of cross-border civil justice and no replacement of the Brussels IIa system has been put in place. Therefore, for cases instituted after 1 January 2021, the mechanisms for inter-country child placement are now governed by common law and the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention).<sup>556</sup>
- 5.36. In its correspondence with the Committee for Health, the NIHRC questioned whether the loss of the Brussels IIa framework could adversely impact how the cross-border placement of children is managed in the context of Special Guardianship Order. The NIHRC further asked whether placing children under Special Guardianship Orders overseas or cross-border may warrant a distinct form of regulatory framework (for example a bilateral agreement between UK and Ireland), in order to pre-empt any difficulties that may arise.
- 5.37. In April 2022, the Adoption and Children Act (NI) 2022 received Royal Assent. The Committee for Health agreed to seek assurances from the Department of Health and the Department of Justice that the loss of the Brussels IIa framework would not adversely affect how the cross-border placement of children is managed and whether placing children under overseas or cross-border Special Guardianship Orders warrants a distinct form of regulatory framework. In addition, the Committee for Health recommended that the Department of Health undertake a review of cross-border care arrangements including consideration of a regulatory framework for cross-border cases.<sup>557</sup>

### ***Recommendations***

- 5.38. **The NIHRC recommends that the highest standards of victims' rights and rights of accused persons are central to cross-border criminal justice cooperation.**
- 5.39. **The NIHRC recommends that, in the absence of CJEU oversight of the extradition process, the UK and EU establish clear safeguards within the Trade and Cooperation Agreement oversight mechanisms to ensure robust**

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<sup>555</sup> Regulation 2201/2003/EU, 'Council regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels IIa)', 27 November 2003.

<sup>556</sup> Ratified by the UK in 2012.

<sup>557</sup> NI Assembly Hansard, 'Committee for Health: Report on the Adoption and Children Bill - NIA 132/17-22', 27 January 2022.

**human rights and legal safeguards for accused persons and for victims of crimes.**

- 5.40. The NIHRC recommends that the UK and the EU ensure that new information sharing arrangements are sufficient to ensure investigations and proceedings are conducted in an efficient manner, in full compliance with the ECHR and EU Victims' Directive.**
- 5.41. The NIHRC recommends that consideration be given to how the cross-border placement of children is managed following the UK's withdrawal from the EU, to ensure no adverse impacts.**

## **EU Settlement Scheme**

- 5.42. The EU Settlement Scheme is relevant to the Commissions' role under Article 2 of the Windsor Framework as it concerns the rights of EU nationals living in NI prior to 1 January 2021 and therefore interacts with the 'no diminution' commitment. The Independent Monitoring Authority has responsibility for monitoring the EU Settlement Scheme.
- 5.43. The EU Settlement Scheme was designed to protect the rights of EU and EEA citizens and their family members already living in the UK prior to 1 January 2021.<sup>558</sup> The EU Settlement Scheme gives effect to the Citizens' Rights provisions in the UK-EU Withdrawal Agreement. Applicants and their families can be granted either settled status (indefinite leave to remain) or pre-settled status (temporary right to reside for five years). EU, EEA and Swiss citizens who come to the UK from 1 January 2021 are subject to the UK's points-based immigration system.
- 5.44. In 2021, the House of Lords European Affairs Committee published a report highlighting potential difficulties for some people who have been granted settled or pre-settled status because of the lack of a physical document proving one's immigration status.<sup>559</sup> NI civil society organisations have raised a number of issues with the implementation of the EU Settlement Scheme, including proving long residence needed for justifying permanent residence; challenges with the digital immigration status, including technical issues;<sup>560</sup> anecdotal evidence that it is increasingly not accepted as proof of

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<sup>558</sup> Part 2, UK-EU Withdrawal Agreement 2020.

<sup>559</sup> House of Lords European Affairs Select Committee, 'Citizens' Rights: 1st Report of Session 2021-2022' (HoL, 2021).

<sup>560</sup> Work Rights Centre and the 3million, 'Letter to The Rt Hon Mel Stride MP – Secretary of State for Work and Pensions, The Rt Hon Robert Jenrick MP – Minister for Immigration, Lord Murray of Blidworth – Parliamentary Under Secretary of State at the Home Office', 22 March 2023.

immigration status;<sup>561</sup> and reintroduction of banking checks with a high degree of failure.<sup>562</sup>

- 5.45. In June 2022 the Independent Monitoring Authority launched an inquiry into EU Settlement Scheme Certificate of Application delays.<sup>563</sup> Obtaining a Certificate of Application protects the applicant's rights pending a decision on settled status.<sup>564</sup> The purpose of the consultation is to examine the extent, nature and cause of any delays in issuing the certificates and assess whether there is any breach of the Withdrawal and Separation Agreements. The Independent Monitoring Authority will also look at the impact any delays are having on citizens who are unable to exercise their rights until the Certificate of Application is issued. As of 31 March 2023, a report outlining the consultation results is pending.
- 5.46. In October 2022, the UK Government updated its rules on the EU Settlement Scheme and family permit which changed application deadlines for certain joining family members and persons exempt from immigration control; the definitions of 'qualifying British citizen' and their family members; the commencement of the qualifying period for certain family members; new suitability grounds for EU Settlement Scheme family permits; and ECtHR case-law derived rights.<sup>565</sup> The Independent Monitoring Authority has raised no issue of concern with the changes, but continue to monitor their application.

### **Pre-settled status**

- 5.47. Pre-settled status under the EU Settlement Scheme is limited leave to remain. Under the Universal Credit Regulations, access to this benefit is limited to applicants who are habitually resident in the UK and this excluded people with pre-settled status from this benefit.<sup>566</sup> In 2021, a successful challenge of the rule was brought forward by a person with pre-settled status.<sup>567</sup> The CJEU found that applications to the Universal Credit by applicants with pre-settled status can only be refused if the claimants and their dependents would not be exposed to "an actual and current risk of violation of their fundamental rights".<sup>568</sup>

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<sup>561</sup> Committee on Administration of Justice, 'Frontline Lessons for the Future Collaborative research on the impact of immigration law and policy in post-Brexit Northern Ireland' (CAJ, 2022), at page 46.

<sup>562</sup> The Rt Hon Robert Jenrick MP, 'Press release: New crackdown to prevent illegal migrants accessing bank accounts', *Home Office*, 6 April 2023.

<sup>563</sup> Independent Monitoring Authority, 'Press Release: IMA launches inquiry to investigate EUSS Certificate of Application delays', 6 June 2022.

<sup>564</sup> For details see UK Government Guidance 'Apply to the EU Settlement Scheme (settled and pre-settled status)'

<sup>565</sup> Home Office, 'Statement of Changes to the Immigration Rules - HC 719', 18 October 2022.

<sup>566</sup> Regulation 9(3)(d), Universal Credit Regulations (NI) 2016.

<sup>567</sup> *CG v Department for Communities*, Case C-709/20, 15 July 2021.

<sup>568</sup> *CG v Department for Communities*, Case C-709/20, 15 July 2021, at para 93.

- 5.48. In 2021, the Independent Monitoring Authority issued judicial review proceedings against the Home Office, challenging the Home Office's position that EU citizens who failed to apply for Settled Status before the Expiry of their Pre-Settled Status automatically lose their rights, as unlawful.<sup>569</sup> In December 2022, the High Court confirmed that applicants with pre-settled status have the right to reside permanently in the UK after they have resided there for the required five-year period.<sup>570</sup> In February 2023, the Home Office confirmed that they will not pursue an appeal of the High Court's decision.<sup>571</sup> In March 2023, in response to a question in the House of Lords, the Parliamentary Under-Secretary of State at the Home Office confirmed that work is proceeding to implement the High Court's decision.<sup>572</sup>
- 5.49. In September 2022, the Independent Monitoring Authority launched a review to find out what measures are being taken across all the regions of the UK to ensure all eligible looked after children and care leavers have their rights protected.<sup>573</sup> In 2021, civil society organisations had warned that children, particularly children in and leaving care, may be falling through the gaps as they are less likely to be identified or supported to apply.<sup>574</sup> Following engagement with the Children's Law Centre, the NIHRC understands that all outstanding applications were resolved before the deadline for applications. However, the NIHRC continues to monitor to ensure that any child or care leaver with pre-settled status is supported to make the application for EU Settled Status.
- 5.50. In September 2022, Home Office statistics confirmed that 6.9 million applications for EU Settled Status had been received, with 2% of applications from NI. Of the concluded outcomes, 50% (3,359,250) were granted settled status, 40% (2,677,190) were granted pre-settled status and 10% had other outcomes.<sup>575</sup>
- 5.51. In March 2023, the ECNI finalised independent research on the impact of Brexit on minority ethnic and migrant people in NI, which includes

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<sup>569</sup> Independent Monitoring Authority, 'Press Release: Judicial Review Claim by Independent Monitoring Authority', 14 December 2021.

<sup>570</sup> R (Independent Monitoring Authority for the Citizens' Rights) v Secretary of State for the Home Department [2022] EWHC 3274 (Admin), 192.

<sup>571</sup> Independent Monitoring Authority, 'Press Release: IMA welcomes confirmation that Home Office will not pursue appeal in EU Settlement Scheme case', 16 February 2023.

<sup>572</sup> UK Parliament Hansard, 'Oral Question: EU Settlement Scheme – Baroness Ludford - Volume 828', 13 March 2023.

<sup>573</sup> Independent Monitoring Authority, 'Press Release: EU citizens watchdog takes steps to secure rights of looked after children and care leavers', 24 October 2022.

<sup>574</sup> Children's Law Centre, 'Briefing on the Implications for EU families with Children Who Fail to Apply to the EU Settlement Scheme' (CLC, 2021).

<sup>575</sup> Home Office, 'Official Statistics EU Settlement Scheme quarterly statistics, September 2022', 25 November 2022.

consideration of the experiences of applicants to the EU Settlement Scheme. It is anticipated that the research will be published in 2023.

### **Late applications**

- 5.52. The deadline for applications to the EU Settlement Scheme was 30 June 2021. The UK Government confirmed that late applications would be accepted where there are reasonable grounds for failing to meet the deadline. Guidance indicated that a “flexible and pragmatic approach” should be taken; that rights would be protected pending consideration of applications; and that those without status, encountered by Immigration Enforcement, who may be eligible, should be afforded the opportunity to make a late application.<sup>576</sup>
- 5.53. However, a number of issues arose regarding the implementation of the scheme. There was concern that children and young people, including looked after children and care leavers, who did not apply to the EU Settlement Scheme within the prescribed timeframe, would find themselves unlawfully residing in the UK. The Independent Monitoring Authority called on the Home Office to provide further clarity on the rights of EU citizens whose applications are pending or who have made late applications to ensure public bodies and individuals concerned are aware of and can vindicate their rights.<sup>577</sup>
- 5.54. In January 2023, the EU Settlement Scheme was discussed in the House of Commons.<sup>578</sup> Despite the deadline for applications to the Settlement Scheme ending on 31 December 2020 the scheme is still active and late applications are still being processed and 3,740 applicants are still awaiting an outcome. Further, 442,770 applications have been refused, which means the applicants could apply again. NI civil society organisations have also raised concerns regarding EU citizens with a pending application for pre-settled and settled status being charged for NHS treatment whilst awaiting decision and in case of an unsuccessful application.<sup>579</sup>

### **Deferrals**

- 5.55. Applicants to the EU Settlement Scheme with pending criminal proceedings have been experiencing delays in getting their applications processed and decisions are being deferred until the criminal process is resolved. In the

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<sup>576</sup> Home Office, 'EU Settlement Scheme: EU, Other EEA and Swiss Citizens and Their Family Members' (HO, 2021), at 31-34.

<sup>577</sup> Independent Monitoring Authority, 'Press Release: Home Office asked to clarify the rights of EU citizens applying late to the EU Settlement Scheme', 27 September 2021.

<sup>578</sup> UK Parliament Hansard, 'Commons Chamber: EU Settlement Scheme – Stuart McDonald MP – Column 720', 20 January 2023.

<sup>579</sup> Committee on Administration of Justice, 'Frontline Lessons for the Future Collaborative research on the impact of immigration law and policy in post-Brexit Northern Ireland' (CAJ, 2022), at page 49.

case of pending criminal proceedings, the delays in the criminal justice system are well documented and have been exacerbated by the COVID-19 pandemic, meaning applicants can face extensive delays in getting their status confirmed.<sup>580</sup> The NIHRC continues to monitor the situation regarding applicants for the EU Settlement Scheme who have had their applications deferred due to minor criminal convictions or pending prosecutions.

- 5.56. Concerns have been raised with the Commissions about individuals' access to housing benefit and individuals being denied employment, despite being able to prove that they had applied for settled status, which both Commissions have subsequently raised with the Independent Monitoring Authority. The Commissions engage regularly with the Independent Monitoring Authority on issues relating to the operation of the EU Settlement Scheme.

## **VI v HMRC**

- 5.57. In 2022, the Social Security Appeal Tribunal (NI) referred a case to the CJEU for a preliminary ruling under Article 267 of the Treaty on the Functioning of the EU. The case concerned *VI*, a woman from a third country living in NI and her right to reside in the UK and receive Child Tax Credit and Child Benefit during periods in 2006 and 2014-2015.<sup>581</sup> *VI*'s son had resided legally in the UK for a period of 5 years and thus acquired permanent residence pursuant the EU Citizens' Rights Directive.
- 5.58. The CJEU found that the requirement to have comprehensive sickness insurance cover does not apply to EU citizens who have permanent residence, included their family members even where they are not dependants. The court also found that for the periods before the child acquired permanent residence in the UK, *VI* and her son were affiliated to the UK's public sickness insurance system offered free of charge by the National Health Service and therefore had comprehensive sickness insurance within the meaning of EU Citizens' Rights Directive.
- 5.59. The Commissions' research on divergence of rights also highlighted the *VI* case in relation to access to benefits and entitlement to compensation in NI law where there is a breach of rights within the scope of Article 2.<sup>582</sup> The Commissions' view is that the non-diminution obligation under Article 2

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<sup>580</sup> Cormac Campbell, 'Coronavirus: COVID-19 courthouse closures create huge backlog', *BBC News*, 15 July 2020; NI Audit Office, 'Speeding Up Justice: Avoidable Delay in the Criminal Justice System' (NIAO, 2018).

<sup>581</sup> *VI v HMRC*, C-247/20, 10 March 2022.

<sup>582</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), page 91

applies not only to the substantive rights but also to how those rights are enforced and available remedies.<sup>583</sup>

- 5.60. In addition, the researchers also highlighted that the CJEU judgement in the *VI* case could be interpreted as supporting “prospective obligations” to provide EU citizens resident in NI and their family with a right to health and social care benefits, equal to that enjoyed by UK and Irish citizens.<sup>584</sup>
- 5.61. The researchers conclude that EU citizens resident in the UK “should be able to establish ongoing rights to the benefits which should apply pursuant to the correct interpretation of the Citizens Rights Directive even after the end of the transitional period, provided their residency commenced during or before the transitional period”.<sup>585</sup>
- 5.62. In October 2022, the UK Government responded to this judgment in an update to its guidance to Home Office staff on European Economic Area Nationals: qualified persons.<sup>586</sup> It confirmed that European Economic Area nationals living in the UK before 31 December 2020 did not need to be exercising rights under the EU Treaties or have the right to reside under EU Citizens’ Rights Directive in order to be considered ordinarily resident for the purpose of accessing the NHS free of charge.<sup>587</sup>
- 5.63. Some confusion persists in the guidance regarding the distinction between EEA nationals and their family members.<sup>588</sup> Non-EEA family members must demonstrate that their EEA national relative was a qualified person at the time they were using the NHS in order to be considered ordinarily resident in the UK. The guidance states that non-EEA family members “must demonstrate that their EEA national family member was exercising Treaty rights” but it may not be clear enough to confirm that affiliation to the NHS is considered as exercising treaty rights. Home Office Guidance on lawful residence in the UK has been updated to reflect the judgment.<sup>589</sup>

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<sup>583</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), page 90

<sup>584</sup> *Ibid*, page 91

<sup>585</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), page 90

<sup>586</sup> Home Office, ‘European Economic Area Nationals: Qualified Persons - Version 9.0’ (HO, 2022), at 41.

<sup>587</sup> *Ibid.*, at 41.

<sup>588</sup> Josie Laidman, ‘Home Office guidance update: the NHS and comprehensive sickness insurance for EEA national’, *Free Movement*, 2 November 2022.

<sup>589</sup> Home Office, ‘Ways in which people can be lawfully resident in the UK’ (HO, 2022)

### *Recommendations*

- 5.64. **The ECNI and NIHRC recommend that the UK Government, NI Assembly and NI Executive review recent CJEU case law relating to compensation for violations of EU fundamental rights and ensure that their policies/legislation in this area reflect these developments as required and as a matter of best practice.**
- 5.65. **The NIHRC recommends that the Home Office takes immediate action to resolve all outstanding applications under the EU Settlement Scheme and ensures that no one is left without the ability to prove their right to live and work in the UK on the basis of pending minor criminal prosecutions that would otherwise not meet the threshold for refusal.**
- 5.66. **The NIHRC recommends that the Home Office establishes a system to engage with individuals who have pre-settled status to advise when they are approaching the five-year time limit and facilitate them regularising their permanent right to reside.**
- 5.67. **The NIHRC recommends that the Home Office ensure that all eligible vulnerable individuals, who had not applied to the EU Settlement Scheme by 30 June 2021, are supported to regularise their status in an efficient and timely way.**

## EU Citizenship and Workers' Rights

- 5.68. Under Article 26 of the UK-EU Withdrawal Agreement, frontier workers are entitled to be issued with appropriate documentation which certifies their rights as frontier workers. Article 10(1)(c) extends the rights set out in Part Two of the treaty, to “Union citizens who exercised their right as frontier workers in the UK in accordance with Union law before the end of the transition period and continue to do so thereafter”. In practical terms, this means that Irish, British and EU citizens who commenced a cross-border job on or before 31 December 2020 will benefit from the Withdrawal Agreement.
- 5.69. The Frontier Workers Permit Scheme was established by the UK Government to ensure that EU citizens living in Ireland but working in NI on or after 1 July 2021 can prove their right to work in the UK.<sup>590</sup> Any EU

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<sup>590</sup> Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020.



- citizens wishing to come to the UK to work on or after 1 January 2021 will have to apply through the new points-based immigration system.
- 5.70. EU citizens, including Irish citizens, living in NI and working in Ireland on or after 1 January 2021 do not have to apply to a similar scheme as they maintain their right to work in the EU as an EU citizen. Similarly, British citizens living in NI and working in Ireland will have their right to work protected under the reciprocal guarantees associated with the Common Travel Area.<sup>591</sup>
- 5.71. The Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020 set out the rules governing the application of the frontier workers permit scheme, the timeframes within which applications have to be made, and the grounds upon which a refusal can be issued. They also set out the circumstances in which a worker or self-employed person can retain their status. These cover instances involving accidents, illnesses, engagement in vocational training and pregnancy or childbirth.<sup>592</sup> The regulations confirm that applications can be refused on grounds of public policy, public security, public health or on grounds of misuse of rights.<sup>593</sup> The regulations are likely to apply to a number of EU citizens travelling between Ireland and NI for work.
- 5.72. A number of civil society organisations raised concerns about this scheme, including the lack of consultation and impact assessment in advance of the regulations being published and the limited period provided for registration.<sup>594</sup>
- 5.73. Following earlier research,<sup>595</sup> the NIHRC has commissioned ongoing research to explore the protection of rights under the Frontier Worker scheme and its interaction with Article 2, which it will publish later in 2023.
- 5.74. In March 2023, the ECNI finalised independent research on the impact of Brexit on minority ethnic and migrant people in NI, which includes consideration of the experiences of Frontier Workers. It is anticipated that the research will be published in 2023.

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<sup>591</sup> Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland concerning the Common Travel Area and associated reciprocal rights and privileges, 8 May 2019.

<sup>592</sup> Regulation 4, Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020.

<sup>593</sup> Regulation 18, Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020.

<sup>594</sup> Letter from the Committee on the Administration of Justice; UNISON; Border People; Centre for Cross Border Studies; Migrant Centre NI; Irish Congress of Trade Unions; Migrant Rights Centre Ireland; Stronger Together; South Tyrone Empowerment Project; Inter Ethnic Forum: Chinese Welfare Association; Omagh Ethnic Community Support Group; Belfast Metropolitan College, College of Sanctuary; North West Migrant Forum; Advice NI; Granite Legal Services NI to the Home Secretary, 26 October 2020.

<sup>595</sup> Tamara Hervey, 'Brexit, Health and Its Potential Impact on Article 2 of the Ireland/NI Protocol' (NIHRC, 2022), at Chapter 3.

### ***Recommendation***

- 5.75. **The NIHRC advises that people living and working across the border are in a particularly vulnerable situation and recommends that the Home Office adopts a flexible approach to late applications to the Frontier Workers Scheme.**

## **EU Loss of Funding**

- 5.76. In April 2022 the ECNI published research<sup>596</sup> on the ‘Impact of Brexit on Section 75 Equality Groups: EU funding’.
- 5.77. In May 2022, the ECNI published its policy recommendations on the “Impact of Brexit on Section 75 Equality Groups: EU funding”.<sup>597</sup> The policy recommendations were informed by and reflect the recommendations in the research report but also took into consideration the publication of the Government’s main form of replacement EU funding, the Shared Prosperity Fund<sup>598</sup> in April 2022 and ECNI engagement with Section 75 stakeholder groups and Departmental officials in May 2022.
- 5.78. In its policy recommendations, the ECNI highlighted that equality and good relations should be at the heart of government policy making in this area, calling on the Secretary of State for NI, to designate for the purposes of Section 75 the UK Government department(s) responsible for the delivery of Shared Prosperity Fund funding in NI.<sup>599</sup> It also highlighted its concern that the NI Executive/Departments have not been allocated a greater role in undertaking the design and implementation of the NI Shared Prosperity Fund investment plan.<sup>600</sup>
- 5.79. The ECNI policy recommendations raised concerns that Shared Prosperity Fund replacement funding will not, as a minimum, match the size of EU funds prior to 2024-2025 and that there will be possible shortfalls in funding as the Shared Prosperity Fund will not reach the full level of funding until 2024-25.<sup>601</sup> In addition, timing is a serious issue with the move from one funding regime to another. A gap or shortfall in funding may lead to a financial ‘cliff-edge’ or break in revenue for community and voluntary

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<sup>596</sup> Rory O’Connell and Tim Cunningham, ‘[Impact of Brexit on Section 75 Equality Groups in Northern Ireland: EU Funding](#)’, (ECNI, 2022).

<sup>597</sup> Equality Commission for Northern Ireland, [Policy Recommendations: Impact of Brexit on Section 75 Equality Groups in Northern Ireland: EU Funding](#), (ECNI, 2022)

<sup>598</sup> Department for Levelling Up, Housing and Communities, UK Shared Prosperity Fund: Prospectus, 13 April 2022.

<sup>599</sup> Equality Commission for Northern Ireland, [Policy Recommendations: Impact of Brexit on Section 75 Equality Groups in Northern Ireland: EU Funding](#), (ECNI, 2022), para 2.13

<sup>600</sup> Ibid, para 2.4

<sup>601</sup> Ibid, para 4.24

organisations which may impact on services provided to Section 75 equality groups in NI.<sup>602</sup>

- 5.80. The ECNI also highlighted the role of NI Departments, aligned with their Section 75 equality duties, to continue to support the needs of people from different equality groups, who have been supported by EU funding. This should include actions to address any shortfalls and gaps in funding that may impact negatively on these groups.<sup>603</sup>
- 5.81. Following the publication of the research and policy recommendations, the ECNI engaged and consulted with the UK Government including the Department for Levelling Up, Housing and Communities, relevant NI Departments and impacted Section 75 groups to highlight the relevant key findings and recommendations aligned to ECNI policy recommendations.
- 5.82. In July 2022, the ECNI wrote to a number of Permanent Secretaries of the NI Departments to highlight the policy recommendations relevant to their Departments. In addition, the ECNI wrote to the NI Minister of State in August 2022 and March 2023, requesting that the Secretary of State for NI designate the Department for Levelling Up, Housing and Communities in relation to NI's Section 75 duties. As of March 2023, the Department for Levelling Up, Housing and Communities has not yet been designated.
- 5.83. In December 2022, the UK Shared Prosperity Fund Investment Plan for NI was published by Department for Levelling Up, Housing and Communities<sup>604</sup>. The ECNI has continued to engage with Department for Levelling Up, Housing and Communities highlighting the urgent need to address funding decisions in relation to the Shared Prosperity Fund and raising stakeholder concerns.
- 5.84. In March 2023, the Department for Levelling Up, Housing and Communities announced an extra £29.6million to address shortfalls in funding for community and voluntary groups in NI. On 30 March 2023, the Department for Levelling Up, Housing and Communities announced funding allocations for the UK Shared Prosperity Fund Economic Inactivity programme. The ECNI welcomed the allocation of over £57 million of funds to community-based projects across NI and has called for the UK Government and the NI

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<sup>602</sup> Ibid, para 4.34

<sup>603</sup> Ibid, page 50-51

<sup>604</sup> [UKSPF Investment Plan Northern Ireland](#)

departments to work together to identify and address any gaps in vital services that promote equality.<sup>605</sup>

### ***Recommendations***

- 5.85. The ECNI continues to recommend that the UK Government should address through future funding arrangements the potential negative impact of the loss of EU funding on programmes, including under the European Social Fund, on equality groups, including the impact on the voluntary and community sector.**
- 5.86. The ECNI recommends the Secretary of State for NI should designate for the purposes of Section 75 the UK Government department(s) responsible for the delivery of Shared Prosperity Fund funding in NI.**
- 5.87. The ECNI recommends that Department for Levelling Up, Housing and Communities and the UK Government should put in place formal structures for collaboration with relevant government departments in NI and follow best practice, with regards to the promotion of equality of opportunity and good relations, in the allocation and monitoring of funding and to identify and address any gaps in vital services that promote equality.**
- 5.88. The ECNI recommends that the NI Executive and NI Departments should clarify how the needs of people from different equality groups, who have been supported through European funding, particularly European Social Fund, will be supported by the Executive in the future; address any potential shortfall in funding; and incorporate ‘lessons learnt’ into future funding programmes.**
- 5.89. The ECNI recommends that the Department for Levelling Up, Housing and Communities, in delivering future Shared Prosperity Fund funding programmes in NI should continue to ensure effective partnership working and engagement with key stakeholders, including with equality stakeholders and groups in NI and follow best practice in terms of engagement with equality groups.**
- 5.90. The ECNI recommends that the Department for Levelling Up, Housing and Communities, in delivering Shared Prosperity Fund funding, should ensure the collection and monitoring of robust equality data across all Section 75**

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<sup>605</sup> Equality Commission for NI Statement, [Announcement of Shared Prosperity Fund allocations in NI \(ECNI, March 2023\)](#)

**groups, including disaggregated data, as well as ensuring the effective monitoring of outcomes related to equality and good relations.**

- 5.91. The ECNI recommends that the NI Executive and relevant NI departments should develop and implement wider strategies to address structural barriers to equality (for example, lack of affordable, quality childcare) experienced by Section 75 groups.**
- 5.92. The ECNI recommends there should be ongoing evaluation of the Levelling Up Fund to include details on how equality of opportunity and good relations have been considered and promoted and which Section 75 groups have benefitted.**

# Summary of Recommendations

## 2.0 International and Domestic Legal Framework

### Windsor Framework

- 2.22. The Commissions recommend 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 Committee.
- 2.23. The Commissions recommend that the UK Government 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, if introduced, have strengthened equality or human rights.
- 2.24. The Commissions recommend that the Windsor Framework Democratic Scrutiny Committee undertakes meaningful and timely engagement with equality and human rights groups in NI and the Commissions in relation to a proposed EU measure, or a replacement EU act, so as to seek their views on the implications for the promotion and protection of equality and human rights in NI.
- 2.25. The Commissions recommend that the word ‘communities’ is interpreted broadly to include a consideration of equality and human rights impacts including on Section 75 equality groups.
- 2.26. The Commissions recommend that equality and human rights considerations are built into the revised process under Windsor Framework Article 13(4).
- 2.27. The Commissions recommend that the NI Assembly, in advance of passing an applicability motion regarding the addition of a new measure to an Annex of the Windsor Framework, should give consideration to meaningful and timely engagement with the Commissions and equality and human rights stakeholders.
- 2.28. The Commissions recommend that the development of “structured sub-groups” within the Joint Consultative Working Group includes establishing a group that focuses on issues relating to Article 2 and equality and human rights in NI.

- 2.29. The Commissions recommend that the EU (and UK Government) ensure the Commissions are given early notice of relevant EU law and policy developments and that the Commissions have opportunities to highlight in advance any implications of those developments for equality and human rights law in NI.
- 2.30. The Commissions recommend that the European Commission's engagement with NI stakeholders includes timely, targeted, and structured engagement, both with the Commissions, as the Dedicated Mechanism, and also with equality and human rights groups in NI on EU proposals that have implications for equality and human rights in NI.
- 2.31. The Commissions recommend that the European Commission's impact assessment, as regards NI, on draft EU proposals includes a specific assessment of the impact on the promotion and protection of equality and human rights, including any issues of relevance to the UK Government's compliance with Article 2.

## **3.0 Implementation and Scrutiny of Windsor Framework Article 2**

### **Retained European Union Law**

- 3.19. The Commissions recommend that no change to retained EU law be made which would weaken Article 2, its enforceability or oversight mechanisms.
- 3.20. The Commissions recommend that when making any change to retained EU law, the relevant UK or NI Minister confirms that an assessment for compliance with the commitment in Article 2 has been undertaken and that there is no diminution of the rights, safeguards and equality of opportunity as set out in the relevant part of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU.
- 3.21. The Commissions recommend that the Bill be amended to include a Clause confirming that the provisions of the Bill are without prejudice to Section 7A of the EU Withdrawal Act 2018.
- 3.22. The Commissions recommend that the Minister establish a comprehensive notification process in terms of law that is going to be sunsetted, extended or preserved.
- 3.23. The Commissions recommend that Clause 1(5) be amended to exclude all legislation insofar as it is effective in NI and relates to human rights and/or

equality, including all legislation that falls within the scope of Article 2. If this is not practicable, the Commissions recommend that that Clause 1(5) be amended to exclude all legislation insofar as it is effective in NI.

- 3.24. The Commissions recommend that, if Clause 1(5) is not amended to exclude all human rights and equality legislation insofar as it is effective in NI, the sunset date in Clause 1(1) should be extended to provide adequate time for consultation and appropriate parliamentary scrutiny, in line with constitutional convention.
- 3.25. The Commissions recommend that amendment or repeal of retained EU law, affecting human rights and/or equality protections in NI, should be progressed on the basis of continuing adherence to the UK constitutional convention of providing for policy change via the primary legislative process, with technical and operational detail addressed in subordinate legislation. This applies to legislation that emanates from either Westminster or from the NI Assembly.
- 3.26. The Commissions recommend that the Bill is amended to remove Clause 3, or that Clause 3 is amended to retain Section 4 of the EU (Withdrawal) Act 2018 to the extent that it preserves retained EU law which gives effect to human rights and equality protections in NI law, including all legislation that falls within the scope of Article 2.
- 3.27. The Commissions recommend that, for the avoidance of doubt, Clauses 4 and 5 be amended to insert a clarification into the amended Section 5 of the EU (Withdrawal) Act 2018, that it is subject to the obligations arising under Section 7A of that Act.
- 3.28. The Commissions recommend that compliance with Article 2 be considered in advance of amendment, repeal or revocation of assimilated law and fully explained in associated Explanatory Memoranda/Notes or Human Rights Impact Assessments.
- 3.29. The Commissions recommend that the Minister provide a written assurance that it remains the Government's view that CJEU case-law regarding Article 2 should be adhered to by domestic courts on an ongoing basis, in line with Windsor Framework Article 13, and that this obligation will not be diminished by the Bill.



- 3.30. The Commissions recommend that, unless Clause 1 is amended to remove all legislation effective in NI from automatic repeal/revocation, the deadline for restating secondary retained EU law be extended.
- 3.31. The Commissions recommend that Clause 15 be amended to curtail powers to revoke or replace secondary retained EU Law, affecting human rights and/or equality protections in NI, to ensure continuing adherence to the UK constitutional convention of providing for policy change via the primary legislative process, with technical and operational detail addressed in subordinate legislation.
- 3.32. The Commissions recommend that Ministers engage with stakeholders including the Commissions and human rights and equality organisations before using delegated powers to replace retained EU law.
- 3.33. The Commissions recommend that Clause 16 be amended to ensure that the delegated power to modify legislation may be used for the purposes of dealing with minor and technical matters only.
- 3.34. The Commissions recommend that the Secretary of State set out, in detail, what consideration was given to compliance with Article 2 in the development of the Bill and what plans are in place to avoid breach of the commitment.

### **Resourcing of the Commissions**

- 3.38. The Commissions continue to recommend that the NI Office ensures there is adequate and sustained resourcing of the two Commissions to fulfil their responsibilities as the dedicated mechanism framework.
- 3.39. The Commissions continue to recommend that, further to the UK Government's commitment in Article 2(2) to facilitate the related work of the two Commissions in upholding human rights and equality standards, there is sustained and adequate funding of both Commissions generally.
- 3.40. The NIHRC recommends that the NI Office confirms its acceptance of, and plans to implement expeditiously, the recommendations of the independent review, to ensure that the NIHRC retains its 'A status' under the UN Paris Principles.

## **Implementation and Parliamentary scrutiny of Windsor Framework Article 2**

- 3.52. The Commissions recommend that in the development of any laws or policies the UK Government and NI Executive ensure that compliance with Article 2 is embedded in policy and processes at an early stage. This should include consideration of the extent to which any change engages Article 2 and ensuring that there is no diminution to the rights and safeguards which fall within its scope.
- 3.53. To ensure effective embedding of Article 2 in policy and processes the Commissions recommend that UK and NI government officials should develop and roll out training and guidance on Article 2 and act promptly to ensure UK and NI government guidance on policy and legislative development is updated to include consideration of Article 2.
- 3.54. The Commissions recommend that the NI Office and the Executive Office 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.
- 3.55. The Commissions recommend that the UK Government ensures that new legislation is without prejudice to section 7A of the EU (Withdrawal) Act 2018, which incorporates the UK-EU Withdrawal Agreement into domestic law and is essential to enable rights and equality protections under Article 2 to operate fully within UK law.
- 3.56. The Commissions continue to recommend that the UK Government ensures that there are no changes to the Windsor Framework that would result in a weakening of either the Article 2 commitment or rights, safeguards and oversight mechanisms relating to this commitment.
- 3.57. The Commissions continue to recommend that both the NI Executive and UK Government ensure effective and regular engagement with civil society, including human rights and equality groups.
- 3.58. The Commissions continue to recommend that the NI Office engages with relevant UK Government departments and the supervisory bodies established under the UK-EU Withdrawal Agreement and the UK-EU Trade and Cooperation Agreement to establish formal structures for open, transparent and regular engagement with equality and human rights stakeholders in NI.

- 3.59. The Commissions continue to recommend that the UK Government ensures that Explanatory Memoranda on draft EU proposals which amend or replace the Annex 1 equality directives, as well as other EU legislation relevant to the provisions of Article 2, sets out what consideration has been given to ensuring conformity with Article 2.
- 3.60. The Commissions continue to recommend that the UK Government and NI Executive ensure that Explanatory Memoranda / Human Rights Memoranda on draft UK and NI legislative proposals that are likely to engage Article 2 set out what consideration has been given to ensuring conformity with Article 2.
- 3.61. The Commissions recommend that NI Assembly amend Standing Order 41 to ensure the list of topics covered in the Explanatory and Financial Memoranda accompanying bills be expanded to include a requirement to explain what consideration has been given to equality and human rights.
- 3.62. The Commissions recommend that they are kept informed of any future EU equality law developments relevant to the Annex 1 equality directives, including via the Joint Consultative Working Group, and have the opportunity to highlight in advance any implications of those changes for equality law in NI.
- 3.63. The Commissions recommend that the secretariat of the Joint/Specialised Committee establishes a formal communication channel with the Commissions, to ensure early engagement on anticipated changes or additions to legislation.
- 3.64. The ECNI recommends that the NI Assembly Standing Order/s are amended to provide for the Speaker to send a copy of every Bill introduced to the Assembly to the ECNI as soon as practical after its introduction. This is in addition to the NIHRC which already receives a copy of every Bill.
- 3.65. The ECNI recommends that a new Standing Order is created, to allow for a motion to refer any proposed legislation to the ECNI for an opinion with regards to equality and other matters aligned with our remit, including Article 2. This will enable both organisations that comprise the Dedicated Mechanism to conduct analysis and provide opinion in relation to equality/human rights and Article 2. Currently neither Standing Orders 34 or 35 allow bills to be referred to the ECNI for an opinion.

## **4.0 Windsor Framework Article 2: Rights and Issues**

### **Constitutional Issues**

#### ***A Bill of Rights for NI***

- 4.6. The Commissions continue to recommend that the NI Office implements the UK Government commitment to legislate for a Bill of Rights for NI, as set out in the Belfast (Good Friday) Agreement.
- 4.7. The NIHRC continues to recommend that the UK Government, particularly the Ministry of Justice, ensures that any proposed reform of the Human Rights Act does not undermine the Belfast (Good Friday) Agreement 1998 and the process to develop a Bill of Rights for NI.
- 4.8. The ECNI continues to recommend that the UK Government and NI Executive ensure that there are additional measures within a Bill of Rights to strengthen NI equality laws, address gaps in equality legislation and protect equality and human rights in a post-Brexit context.

#### ***Human Rights Act***

- 4.20. The NIHRC continues to recommend that the UK Government recognises the Human Rights Act 1998 as a constitutional statute and ensures any reform builds on the 1998 Act as part of further progress in the promotion and protection of human rights.
- 4.21. The NIHRC advises that the protections in Windsor Framework Article 2, while an important safeguard against the diminution of rights following UK withdrawal from the EU, are not a substitute for the comprehensive framework of human rights protections under the Human Rights Act.
- 4.22. The NIHRC is concerned that, while Windsor Framework Article 2 provides an additional framework for the protection of rights and safeguards, the weakening of human rights protections in the Bill of Rights Bill will create uncertainty and confusion, making the interpretation of Windsor Framework Article 2 more challenging and may lead to a culture shift that will further reduce the robustness of human rights protections in NI.
- 4.23. The NIHRC advises that, irrespective of the provisions of the Bill, future ECtHR jurisprudence will continue to inform the interpretation of Windsor Framework Article 2, due to the interpretive requirement in Article 52 of the EU Charter of Fundamental Rights regarding the ECHR and the resulting CJEU jurisprudence.

- 4.24. The NIHRC advises that while the protections of rights under Windsor Framework Article 2 are not directly impacted by the weakening of positive obligations arising under the ECHR within the domestic legal framework, the present Bill creates unhelpful confusion.
- 4.25. The ECNI recommends that the Human Rights Act 1998 should not be reformed without a convincing case that such reform is necessary to further improve access to rights.
- 4.26. The ECNI recommends that the UK Government should ensure the progressive realisation of rights and ensure that enjoyment of rights does not regress.
- 4.27. The ECNI recommends that the UK Government and the NI Executive should take measures to promote awareness and understanding of equality and human rights and responsibilities.
- 4.28. The ECNI recommends that rolling impact assessment and stakeholder engagement should inform steps to improve realisation of human rights under the Human Rights Act.
- 4.29. The ECNI recommends that the UK Government should set out in detail what consideration has been given to the Bill's compliance with Article 2.
- 4.30. The ECNI recommends that the UK Government should give consideration to including appropriate safeguards in the Bill, so as to ensure that the Bill, as applied, does not have the potential to give rise to a breach of Article 2.

***Divergence of rights on the island of Ireland***

- 4.50. The Commissions recommend that North-South equivalence of rights and protections be ensured, by NI law 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 the Annex 1 directives.
- 4.51. The Commissions recommend that the Irish Government, NI Executive, and UK Government 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.

- 4.52. The Commissions recommend that the UK Government and EU should undertake regular reviews of new EU laws relating to equality and 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.
- 4.53. The Commissions recommend that the UK Government undertakes a review of legislative safeguards in place to ensure compliance with Article 2 should the NI Executive or Assembly fail to act as required.
- 4.54. The Commissions recommend that a new memorandum of understanding is established between the UK Government and NI Executive explaining how they will engage on compliance and voluntary alignment issues between NI and EU law relevant to Article 2.
- 4.55. The Commissions recommend that the NI Executive reviews remedies available under NI equality law so as to ensure that these remedies result in real and effective judicial protection of the rights derived from the Annex 1 equality directives and Article 47 of the Charter of Fundamental Rights of the European Union.
- 4.56. The Commissions recommend that the UK Government, NI Assembly and NI Executive review recent CJEU case law relating to access to court and effective remedies to ensure that their policies/legislation in this area reflect these developments as required and as a matter of best practice.
- 4.57. The Commissions recommend that the UK Government, NI Assembly and NI Executive review recent CJEU case law relating to compensation for violations of EU fundamental rights and ensure that their policies and legislation in this area reflect these developments as required and as a matter of best practice.

## **Equality and non-discrimination**

### ***Single Equality legislation***

- 4.77. The Commissions continue to recommend that the NI Executive introduce a single equality act to ensure that NI equality law is strengthened and that gaps are addressed as a matter of urgency.
- 4.78. The Commissions recommend that the Executive Office provides for intersectional multiple discrimination claims in NI across all equality

grounds, including providing for intersectionality within equality legislation as required.

- 4.79. The NIHRC recommends that the European Commission amends the Racial Equality Directive to include a requirement that all jurisdictions to which the Directive applies take steps to strengthen, simplify and harmonise anti-discrimination protections across all protected categories.
- 4.80. The NIHRC recommends that the EU Commission, as a minimum standard, include stronger recognition of multiple discrimination and the provision of a mechanism for individuals to bring intersectional claims within the EU Racial Equality Directive.

#### ***Binding Standards for Equality Bodies***

- 4.91. The Commissions recommend that the NI Executive and the UK Government commits to ensuring that to the extent that the EU directives on standards for equality bodies, if introduced, amend or replace an Annex 1 equality directive/s, the law in NI is amended to keep pace with that change.
- 4.92. The Commissions further recommend that, regardless of whether or not required to under the 'keeping pace' requirement associated with Article 2, the NI Executive should voluntarily ensure that NI law aligns with changes that strengthen the ECNI further to the EU directives on standards for equality bodies, if introduced.

#### ***Age Discrimination***

- 4.97. The Commissions continue to recommend that the NI Executive and the Executive Office introduces age discrimination legislation in the provision of goods, facilities and services to address gaps in protections between NI and Great Britain and to avoid divergence of rights on the island of Ireland.

#### ***Disability Equality***

- 4.125. The Commissions continue to recommend that the Department for Communities promptly publishes and effectively implements a robust Disability Strategy, which embeds consideration of Article 2, and is accompanied by a measurable plan of action for improving the living conditions of all persons with disabilities and effective monitoring arrangements.
- 4.126. In line with the 'keeping pace' obligations under Article 2, the Commissions continue to recommend that the Department for Communities monitor any

proposed changes by the EU to the six Annex 1 equality directives, including relevant case law of the CJEU and the EU Employment Equality (Framework) Directive.

- 4.127. The Commissions recommend that the NI Executive, and relevant NI Departments, ensure that the Framework Equality Directive and domestic law which gives effect to this Directive, is interpreted in line with the decision of the CJEU in the Szpital Kliniczny case relating to disability discrimination.
- 4.128. The Commissions recommend that the NI Executive, NI Assembly and the Department for Communities reform the disability equality legislation so as to ensure that disability-related discrimination is replaced by provisions prohibiting indirect discrimination and discrimination arising from disability.
- 4.129. The Commissions recommend that the UK Government and NI Executive give effect to the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD) in domestic legislation.
- 4.130. The Commissions recommend that the NI Executive, and relevant NI Departments, including the Department for Communities, Department for the Economy and the Executive Office should voluntarily ensure that NI law aligns with the provisions of the EU Accessibility Act which enhance protections for people with disabilities and older people in NI.
- 4.131. The NIHRC recommends that the Department for Communities ensures an up-to-date Autism Strategy, which takes a human rights-based approach in line with international human rights standards and Article 2, is promptly designed, implemented and monitored through meaningful engagement with persons with disabilities and their representative organisations.

#### ***Discrimination on Grounds of Sexual Orientation***

- 4.135. The Commissions continue to recommend that the Department for Communities promptly publishes and implements a robust LGBTQI+ Strategy for NI, accompanied by a measurable plan of action, which takes into account its obligations under Article 2, including the keeping pace obligations relating to the EU Employment Equality (Framework) Directive.

#### ***Gender Equality***

- 4.141. The Commissions continue to recommend that the Department for Communities promptly publishes and implements a robust Gender Equality Strategy for NI, accompanied by a measurable plan of action, which takes



into account its obligations under Article 2, including the keeping pace obligations relating to the four gender equality directives in Annex 1.

4.142. In line with the 'keeping pace' obligations under Article 2, the Commissions continue to recommend that the Department for Communities monitor any proposed changes by the EU to the six Annex 1 equality directives, including relevant case law of the CJEU and the four gender equality directives.

### ***Racial Equality***

4.169. The Commissions continue to recommend that the Executive Office monitor any proposed changes by the EU to the six Annex 1 equality directives, including relevant case law of the CJEU and pays particular attention to the ongoing consultation by the EU on the Racial Equality Directive.

4.170. The Commissions recommend that the NI Executive and Executive Office introduce strengthened racial equality legislation in NI.

4.171. The Commissions recommend that the NI Executive, Assembly and departments ensure that any legislative developments on race law reform in NI are in compliance with Article 2, including the keeping pace obligations relating to the EU Racial Equality Directive.

4.172. The NHRC recommends that the European Commission amends the Racial Equality Directive to include a specific acknowledgement of the significance of Article 2 and the keep pace obligations for racial equality in NI.

4.173. The NIHRC recommends that the Executive Office takes effective steps to ensure its data collection on racial equality is consistent, extensive and disaggregated. This includes working with the NI Executive and NI Assembly to promptly amend the Race Relations (NI) Order 1997 so that it imposes a duty on specified public authorities to collect data on racial equality and set racial equality objectives.

4.174. The ECNI recommends changes to the fair employment legislation to improve workforce monitoring on racial grounds. It also recommends the collection, monitoring and evaluation of appropriate equality data, including on race, to ensure effective policy / service development and delivery and to fulfil obligations arising from Section 75 of the NI Act 1998.

4.175. The Commissions recommend that the Home Office take effective steps to enforce the prohibition on racial profiling and ensure it does not occur in

the implementation of the revised guidance on the Common Travel Area and the Electronic Travel Authorisation requirements, including at entry to NI at ports and airports and in the context of cross-border travel. This should include effective monitoring of training for enforcement officers, so as to avoid racial profiling. It should also include the collection, monitoring, and evaluation of appropriate data, including disaggregated ethnic data, to ensure effective policy / service development and delivery.

- 4.176. The NIHRC continues to recommend that the Home Office ensures that all journeys into NI, that originate from Ireland, should be exempt from Electronic Travel Authorisation requirements.

### ***Sectarianism***

- 4.185. The Commissions continue to recommend that the Department of Justice ensures compliance with Article 2 in the context of the EU Victims' Directive, when developing hate crime legislation, including as regards sectarian hate crime.

- 4.186. In line with the 'keeping pace' obligations under Article 2, the Commissions continue to recommend that the Department of Justice monitor any proposed changes by the EU to the six Annex 1 equality directives, including relevant case law of the CJEU as well as the outcome of the ongoing consultation on the EU Racial Equality Directive.

- 4.187. In line with UN and Council of Europe standards and recommendations the NIHRC recommends that the EU Racial Equality Directive be amended to include a recognition of sectarianism within the framing of racial discrimination.

### ***Trans Equality***

- 4.191. The Commissions continue to recommend that the Department for Communities promptly publishes and effectively implements a robust LGBTQI+ Strategy for NI, accompanied by a measurable plan of action, including effective monitoring arrangements, which takes into account its obligations under Article 2. This includes the keeping pace obligations relating to the four gender equality directives listed in Annex 1.

## **Victims' Rights and Freedom from Slavery**

### ***Child, early and forced marriage***

- 4.199. The NIHRC recommends that the Department of Finance ensure that Article 2, including the EU Victims' Directive, is considered and complied with in the development of legislation to repeal all legal provisions permitting the

marriage of children in NI and to increase the minimum age for marriage to 18 years, for both girls and boys.

### ***Child Sexual Exploitation***

- 4.210. The Commissions recommend that the Department of Justice, the Home Office and other relevant departments and bodies, ensure that policy and legislation on child sexual exploitation and on modern slavery and human trafficking is developed in compliance with Article 2 including the requirements of the EU Child Sexual Exploitation Directive, EU Victims' Directive, and the EU Trafficking Directive which require that the child's best interests be a primary consideration in their implementation.
- 4.211. The NIHRC recommends that, in line with best international practice and the requirements of the EU Trafficking Directive, the Department of Justice ensures specialised training is provided for relevant professionals and measures reflective of the Barnahus Model are adopted throughout the criminal justice system.

### ***Domestic and Sexual Violence and Abuse***

- 4.220. The Commissions continue to recommend that the Department of Health and the Department of Justice consider and take into account the EU Victims' Directive and Article 2 during the development and implementation of the Domestic and Sexual Abuse Strategy.
- 4.221. The Commissions recommend that the Executive Office consider and take into account the EU Victims' Directive and Article 2 during the development and implementation of the Violence Against Women and Girls Strategy.
- 4.222. The NIHRC recommends that the Department of Justice, Department of Health and the Executive Office ensure that all policies and support for victims of domestic and sexual violence and abuse are specialised, accessible, gender-sensitive and guaranteed sustainable funding and that support is available regardless of an individual's immigration status.
- 4.223. The ECNI recommends the necessity of a gender specific approach to this Strategy and that actions flowing from it around service provision and support should address the nature and impact of domestic abuse on women and men in a gender specific, not gender neutral, context.

### ***Female Genital Mutilation***

- 4.227. The NIHRC recommends the Department of Justice and Department of Health ensure that legislative developments progressed by the Equally Safe

Strategy ensure that rights protections do not fall below the standards contained in the EU Victims' Directive.

### ***Hate Crime***

4.236. The Commissions recommend that the Department of Justice consider carefully and ensure compliance with Article 2, including the provisions of the EU Victims' Directive in the development of hate crime legislation.

4.237. The NIHRC recommends that the Department of Justice promptly and effectively improves hate crime legislation in NI, guided by the Independent Hate Crime Review Team's recommendations and the Department of Justice's consultations. The Department of Justice and the Executive Office should ensure that any new legislation compliments existing and future strategies on race and community relations. The Department of Justice should ensure that a victim-centred approach is adopted when investigating, prosecuting and remedying hate crimes.

4.238. The ECNI recommends action to update, harmonise, consolidate, and strengthen hate crime legislation, including by addressing the significant gaps in the legislation and ensure support for victims of hate crime, including additional support to vulnerable victims.

### ***Legacy***

4.246. The NIHRC advises that the fundamentals of the NI Troubles (Legacy and Reconciliation) Bill require immediate and thorough reassessment, which should take place through meaningful engagement. The resulting legislation should be victim-centred and human rights compliant.

4.247. The NIHRC is concerned that the provisions on immunity and restrictions on criminal enforcement action in the NI Troubles (Legacy and Reconciliation) Bill do not appear to be in compliance with the EU Victims' Directive and may diminish the rights of victims, in breach of Article 2.

### ***Modern Slavery and Human Trafficking***

4.258. The Commissions continue to recommend that the Home Office and Department of Justice embed consideration of Article 2, in the development and drafting of human trafficking policy and legislation and establish processes to ensure compliance with this obligation.

4.259. The Commissions recommend that the Home Office embeds consideration of Article 2 in the subsequent regulations and guidance on the human trafficking provisions in the Nationality and Borders Act. The Commissions

further recommend that subsequent regulations and guidance should ensure the needs of child victims are safeguarded in line with the non-diminution commitment under Article 2.

- 4.260. The Commissions recommend that the UK Government considers and details their analysis of the compliance of the modern slavery provisions within the Illegal Migration Bill with Article 2.
- 4.261. The NIHRC recommends that, in line with international human rights standards and Article 2, including the EU Trafficking Directive, the Department of Justice requires compulsory specialised training and guidance to all relevant staff, which is trauma-informed and victim-centred, to ensure victims are accurately identified and supported. This includes ensuring support and services are appropriately tailored to take account of age, gender and culture.
- 4.262. The NIHRC recommends that the Department of Justice promptly introduces legislation providing for Trafficking and Exploitation Risk Orders in NI in line with international human rights standards and Article 2, including the EU Trafficking Directive.
- 4.263. The ECNI recommends that those providing advice and resources make clear to victims of trafficking the rights of individuals under both equality legislation and in relation to alleging a breach of Article 2.

## **Administration of Justice**

### ***Access to Justice***

- 4.270. The NIHRC recommends that the Department of Justice conducts a review, in line with international human rights standards and Article 2, including the EU Victims' Directive and the EU Interpretation Directive, to identify individuals for whom the use of live links is not suitable, particularly in the context of reviews, hearings or police interviews. Based on the findings of this review, the Department of Justice should ensure that clear guidance is provided on the circumstances in which live links can be used and the safeguards that should be in place to ensure such technology is accessible and used appropriately.

## **Democratic Rights**

### ***Elections Act 2022***

- 4.277. The Commissions continue to recommend that the Cabinet Office ensures there is no reduction of the rights of certain EU citizens who arrive in NI

after the end of the Brexit transition in terms of their voting/candidacy rights in local elections in NI.

- 4.278. The Commissions recommend that the UK Government repeals the relevant provisions of Schedule 8 of the Elections Act 2022 to ensure compatibility with Article 2.

## **Migrants' Rights**

### ***Migrants' rights – case law of the Court of Justice of the EU***

- 4.285. The Commissions recommend that the NI Executive and UK Government review recent CJEU case law on the Citizens' Rights Directive and its enduring relevance in NI and consider what legal and policy changes might be made as required by Article 2 and as a matter of best practice.

### ***Refugees and Asylum Seekers***

- 4.294. The Commissions continue to recommend that the NI Executive, and the Executive Office in particular, ensure that at all stages of policy and legislative development and reform in the area of refugee and asylum seeker integration, including the Refugee Integration Strategy, there is consideration of, and compliance with, Article 2 obligations.
- 4.295. The NIHRC recommends that the Home Office and the Executive Office urgently review the support and accommodation provided to refugees and people seeking asylum in NI to ensure it is adequate, fit for purpose and culturally appropriate in compliance with international human rights standards and EU standards falling within scope of Article 2, including the EU Reception Directive.

## **Right to Health**

### ***Access to Healthcare for Irregular Migrants***

- 4.303. The NIHRC recommends that the Home Office provide further guidance on the rights of people with pending and late applications to the EU Settlement Scheme, to applicants to the Scheme and to healthcare professionals to ensure no diminution of the current provision and to protect the right to the highest attainable standard of healthcare.
- 4.304. The NIHRC recommends that the Department of Health provide clear, accessible and complete information on the right to healthcare post-EU withdrawal, including access to cross-border and island-of-Ireland services to ensure no diminution of the current provision and to protect the right to the highest attainable standard of healthcare.

- 4.305. The ECNI recommends that the Department of Health, should take appropriate and effective steps to address the barriers experienced by minority ethnic and migrant people in NI in accessing healthcare after Brexit.

## **Employment Rights**

### ***Employment Equality***

- 4.314. The Commissions continue to recommend that in the development of any laws or policies in the area of employment the UK Government and relevant NI Executive departments consider the extent to which Article 2 is engaged; ensure that there is no diminution of the rights and safeguards which fall within its scope; and monitor any proposed changes by the EU to the six Annex 1 equality directives, as well as relevant CJEU case law.
- 4.315. In line with the 'keeping pace' obligation associated with Article 2, the Commissions recommend that the NI Executive, and relevant NI Departments, ensure that the Framework Equality Directive is interpreted in line with the decision of the CJEU in the cases of WABE and Müller.

### ***Gender Pay Gap***

- 4.329. The Commissions continue to recommend that the Executive Office commit to ensuring that to the extent that the EU Pay Transparency Directive, when introduced, amends or replaces the EU Gender Equality (Employment) Directive, the law in NI is amended to keep pace with that change.
- 4.330. The Commissions continue to recommend that, regardless of whether or not required to under the 'keeping pace' requirement associated with Article 2, the NI Executive should ensure that NI law keeps pace with changes that enhance equality and human rights protections further to the EU Pay Transparency Directive, when introduced.

### ***Right to privacy and surveillance at work***

- 4.333. The NIHRC recommends that particular consideration be given to Article 2 and the EU General Data Protection Regulations in the development of employment law and practice that may impact on the privacy of workers and surveillance at work.

### ***Work-Life Balance***

- 4.340. The Commissions recommend that the NI Executive and relevant NI Departments, including the Department for the Economy and The Executive Office should voluntarily ensure that NI law aligns with any changes that

enhance equality and human rights protections further to the EU Work-Life Balance Directive.

## **Right to Education**

### ***Migrant and Minority Ethnic Children***

4.347. The Commissions recommend that in the development of any laws or policies in the area of education and the educational needs of migrant and minority ethnic children, the Department of Education consider and comply with Article 2, including the keeping pace obligations relating to the Racial Equality Directive.

4.348. In line with the 'keeping pace' obligations associated with Article 2, the Commissions recommend that the Department of Education monitor any proposed changes by the EU to the Racial Equality Directive, including relevant case law of the CJEU.

4.349. The NIHRC recommends that the Department of Education promptly updates and publishes its proposals for the revised policy for children of migrant families, including an action plan that will guide its effective implementation. This should take a human rights-based approach in line with international human rights standards and Article 2. It should also include reconsidering the use of the term 'newcomer pupils'.

4.350. The ECNI recommends that the NI Executive and Department of Education work with the regional Inclusion and Diversity Service to understand and improve the experiences of and outcomes for newcomer (including Roma and asylum seeker) children and minority ethnic pupils.

## **5.0 Human Rights and Equality after Brexit: Article 2 and Beyond**

### **Birthright**

5.7. The NIHRC continues to recommend that the Home Office amend nationality and immigration laws to reflect the commitment under the Belfast (Good Friday) Agreement 1998, that it is the birthright of all the people of NI to identify, and be accepted, as Irish or British or both, without any loss of rights or entitlements.

### **Common Travel Area**

5.25. The Commissions recommend that the Home Office enforce the prohibition on racial profiling and ensure it does not occur in the implementation of the revised guidance on the Common Travel Area and the Electronic Travel



Authorisation requirements, including at entry to NI at ports and airports and in the context of cross-border travel. This should include effective monitoring of training for enforcement officers, so as to avoid racial profiling. It should also include the collection, monitoring, and evaluation of appropriate data, including disaggregated ethnic data, to ensure effective policy / service development and delivery.

- 5.26. The NIHRC recommends that the Common Travel Area and associated rights are enshrined in law by agreeing a comprehensive bilateral treaty between the UK and Irish governments. The NIHRC further recommends that this agreement codifies reciprocal free movement rights and rights to employment, education, health care and justice and security to maintain the same level of protection as existed on 31 December 2020 and that it is incorporated into domestic legislation.
- 5.27. The Commissions recommend that the Home Office confirms that Article 2 should be considered and complied with throughout its implementation and the development of regulations and guidance relating to the Nationality and Borders Act.
- 5.28. The NIHRC continues to recommend that all journeys into NI that originate from Ireland should be exempt from Electronic Travel Authorisation requirements.

### **Cross-Border Justice Arrangements**

- 5.38. The NIHRC recommends that the highest standards of victims' rights and rights of accused persons are central to cross-border criminal justice cooperation.
- 5.39. The NIHRC recommends that, in the absence of CJEU oversight of the extradition process, the UK and EU establish clear safeguards within the Trade and Cooperation Agreement oversight mechanisms to ensure robust human rights and legal safeguards for accused persons and for victims of crimes.
- 5.40. The NIHRC recommends that the UK and the EU ensure that new information sharing arrangements are sufficient to ensure investigations and proceedings are conducted in an efficient manner, in full compliance with the ECHR and EU Victims' Directive.

- 5.41. The NIHRC recommends that consideration be given to how the cross-border placement of children is managed following the UK's withdrawal from the EU, to ensure no adverse impacts.

### **EU Settlement Scheme**

- 5.64. The ECNI and NIHRC recommend that the UK Government, NI Assembly and NI Executive review recent CJEU case law relating to compensation for violations of EU fundamental rights and ensure that their policies/legislation in this area reflect these developments as required and as a matter of best practice.
- 5.65. The NIHRC recommends that the Home Office takes immediate action to resolve all outstanding applications under the EU Settlement Scheme and ensures that no one is left without the ability to prove their right to live and work in the UK on the basis of pending minor criminal prosecutions that would otherwise not meet the threshold for refusal.
- 5.66. The NIHRC recommends that the Home Office establishes a system to engage with individuals who have pre-settled status to advise when they are approaching the five-year time limit and facilitate them regularising their permanent right to reside.
- 5.67. The NIHRC recommends that the Home Office ensure that all eligible vulnerable individuals, who had not applied to the EU Settlement Scheme by 30 June 2021, are supported to regularise their status in an efficient and timely way.

### **EU Citizenship and Workers' Rights**

- 5.75. The NIHRC advises that people living and working across the border are in a particularly vulnerable situation and recommends that the Home Office adopts a flexible approach to late applications to the Frontier Workers Scheme.

### **EU Loss of Funding**

- 5.85. The ECNI continues to recommend that the UK Government should address through future funding arrangements the potential negative impact of the loss of EU funding on programmes, including under the European Social Fund, on equality groups, including the impact on the voluntary and community sector.

- 5.86. The ECNI recommends the Secretary of State for NI should designate for the purposes of Section 75 the UK Government department(s) responsible for the delivery of Shared Prosperity Fund funding in NI.
- 5.87. The ECNI recommends that Department for Levelling Up, Housing and Communities and the UK Government should put in place formal structures for collaboration with relevant government departments in NI and follow best practice, with regards to the promotion of equality of opportunity and good relations, in the allocation and monitoring of funding and to identify and address any gaps in vital services that promote equality.
- 5.88. The ECNI recommends that the NI Executive and NI Departments should clarify how the needs of people from different equality groups, who have been supported through European funding, particularly European Social Fund, will be supported by the Executive in the future; address any potential shortfall in funding; and incorporate 'lessons learnt' into future funding programmes.
- 5.89. The ECNI recommends that the Department for Levelling Up, Housing and Communities, in delivering future Shared Prosperity Fund funding programmes in NI should continue to ensure effective partnership working and engagement with key stakeholders, including with equality stakeholders and groups in NI and follow best practice in terms of engagement with equality groups.
- 5.90. The ECNI recommends that the Department for Levelling Up, Housing and Communities, in delivering Shared Prosperity Fund funding, should ensure the collection and monitoring of robust equality data across all Section 75 groups, including disaggregated data, as well as ensuring the effective monitoring of outcomes related to equality and good relations.
- 5.91. The ECNI recommends that the NI Executive and relevant NI departments should develop and implement wider strategies to address structural barriers to equality (for example, lack of affordable, quality childcare) experienced by Section 75 groups.
- 5.92. The ECNI recommends there should be ongoing evaluation of the Levelling Up Fund to include details on how equality of opportunity and good relations have been considered and promoted and which Section 75 groups have benefitted.

# Appendix 1: About Us

The NIHRC and the ECNI are mandated in accordance with Article 2(1) of the Windsor Framework to the UK-EU Withdrawal Agreement<sup>606</sup> to oversee the UK Government's commitment on rights and equality in NI after EU withdrawal.

The Commissions' functions for this purpose, set out in Sections 78A-78E of the Northern Ireland Act 1998, are:

- monitoring the implementation of Article 2 (rights of individuals);
- reporting to the Secretary of State for NI and the NI Executive Office on the implementation of Article 2;
- advising the Secretary of State for NI and the NI Executive of legislative and other measures which ought to be taken to implement Article 2;
- advising the NI Assembly (or a committee of the Assembly) whether a Bill is compatible with Article 2;
- promoting understanding and awareness of the importance of Article 2, including undertaking, commissioning or providing financial or other assistance for research and educational activities;
- bringing any appropriate matters of relevance to Article 2 to the attention of the Specialised Committee on the Protocol;
- taking judicial review proceedings in respect of an alleged breach (or potential future breach) of Article 2;
- assisting persons in legal proceedings or proposed proceedings in respect of an alleged breach (or potential future breach) of Article 2; and
- intervening in legal proceedings in so far as they relate to an alleged breach (or potential future breach) of Article 2.

## NIHRC

The NIHRC was established as a result of the Belfast (Good Friday) Agreement 1998. The NIHRC's governing legislation is the Northern Ireland Act 1998, as amended by the Justice and Security (Northern Ireland) Act 2007 and the European Union (Withdrawal Agreement) Act 2020.

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<sup>606</sup> Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 24 January 2020.

The NIHRC is a National Human Rights Institution with ‘A status’ accreditation from the United Nations. This recognition means that the organisation operates independently in full accordance with the UN General Assembly Resolution 48/134 (the Paris Principles) reporting to UN treaty bodies and exercising speaking rights before the UN Human Rights Council.

The NIHRC is also a non-departmental public body and receives grant-in-aid from the UK Government through the NI Office. We report to Parliament through the Secretary of State for NI.

The NIHRC also has additional functions, as set out in the Northern Ireland Act 1998, to:

- keep under review the adequacy and effectiveness in NI of law and practice relating to the protection of human rights;
- advise the Secretary of State for NI and the NI Executive of legislative and other measures which ought to be taken to protect human rights;
- advise the NI Assembly whether proposed legislation is compatible with human rights standards;
- promote understanding and awareness of the importance of human rights in NI, for example, by undertaking or commissioning or otherwise assisting research and educational activities;
- give assistance to individuals who apply to it for help in relation to proceedings involving law or practice concerning the protection of human rights;
- bring proceedings involving law or practice concerning the protection of human rights;
- intervene in legal proceedings concerning human rights where it need not be a victim or potential victim of the unlawful act to which the proceedings relate;
- conduct investigations;
- require a person to provide information and documents in their possession, and to give oral evidence, in respect of an investigation;
- enter a specified place of detention in NI, in respect of an investigation; and
- publish its advice and the outcome of its research and investigations.

## ECNI

The ECNI is an executive non-departmental public body sponsored by the Executive Office (TEO). The ECNI, established on 1 October 1999 under the Northern Ireland Act 1998, assumed, along with the responsibilities for statutory equality duties and new disability matters, the duties and responsibilities of four former organisations:

- The Commission for Racial Equality for Northern Ireland;
- The Equal Opportunities Commission for Northern Ireland;
- The Fair Employment Commission for Northern Ireland; and
- The Northern Ireland Disability Council.

Since October 1999, additional duties and responsibilities with respect to age, disability, sexual orientation and special educational needs have also been assumed.

During 2009, jointly with the NIHRC, the ECNI was designated as the independent mechanism for NI of the UN Convention on the Rights of Persons with Disabilities (UN CRPD) with the role of promoting, protecting and monitoring the implementation of the Convention.

The main pieces of legislation from which the Commission derives its duties and powers are:

- Sex Discrimination (NI) Order 1976, as amended;
- Disability Discrimination Act 1995, as amended;
- Race Relations (NI) Order 1997, as amended;
- Fair Employment and Treatment (NI) Order 1998, as amended;
- Northern Ireland Act 1998, as amended;
- Equality (Disability, etc.) (NI) Order 2000;
- Employment Equality (Sexual Orientation) Regulations (NI) 2003, as amended;
- Special Educational Needs and Disability (NI) Order 2005, as amended;
- Disability Discrimination (NI) Order 2006;

- Employment Equality (Age) Regulations (NI) 2006, as amended; and
- Equality Act (Sexual Orientation) Regulations (NI) 2006, as amended.

# Appendix 2: List of Submissions

## Joint Submissions

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Equality Commission for NI and NI Human Rights Commission, '[Submission of the NIHRC and ECNI to 'Retained EU Law: Where next?' - an inquiry by the European Scrutiny Committee](#)', 11 April 2022.

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[evidence for its new inquiry into the UK Government's Northern Ireland Protocol Bill](#), 3 November 2022.

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Equality Commission for NI, NI 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' February 2023.

### **ECNI Submissions**

Equality Commission for NI's Submission to the European Commission on [addressing possible gaps in the EU Race Equality Directive](#), April 2022

Equality Commission for NI's [Submission to the European Commission Consultation on combating gender-based violence](#), May 2022

Equality Commission for NI and NI Human Rights Commission, [Policy Recommendations: Impact of Brexit on Section 75 Equality Groups in Northern Ireland: EU Funding](#), May 2022

Equality Commission for NI's [response to the UK Joint Committee on Human Rights call for evidence Legislative Scrutiny: Bill of Rights Bill](#), August 2022

Equality Commission for NI, [Race Law Reform: Priorities and Recommendations](#), August 2022

Equality Commission for NI's [response to the Department of Justice's public consultation on the Modern Slavery and Human Trafficking Strategy 2022](#), January 2023

Equality Commission for NI response to the [European Commission's proposals on Binding Standards for Equality Bodies](#), February 2023

Equality Commission for NI's [response to the Department of Health's public consultation on proposed amendments to the Human Trafficking and Exploitation \(Criminal Justice and Support for Victims\) \(Independent Guardian\) Regulations \(Northern Ireland\) 2016](#), February 2023

### **NIHRC Submissions**

NI Human Rights Commission, '[NI Human Rights Commission Submission to the UN Human Rights Council's Universal Periodic Review of the UK](#)', (NIHRC, 2022).

NI Human Rights Commission, '[Response to the European Commission Consultation on the Racial Equality Directive \(Directive 2000/43/EC\)](#)' (NIHRC, 2022).

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