



Rt Hon Brandon Lewis MP  
Secretary of State for  
Northern Ireland  
Northern Ireland Office  
1 Horse Guards Road  
London, SW1A 2HQ

25 October 2021

Dear Secretary of State,

## **ARTICLE 2 OF THE PROTOCOL ON IRELAND/NORTHERN IRELAND (RIGHTS OF INDIVIDUALS)**

1. At its meeting of 15 September 2021, the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, which I chair, held a public evidence session with representatives from the Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland (ECNI) on Article 2 of the Protocol on Ireland/Northern Ireland (Rights of individuals).
2. Under Article 2 of the Protocol, the Government commits to ensuring that:

“no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 [Belfast/Good Friday] Agreement entitled Rights, Safeguards and Equality of opportunity results from its withdrawal from the [European] Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex I to this Protocol, and shall implement this paragraph through dedicated mechanisms.”<sup>1</sup>

In other words, the Government is committed to ensuring that there is no lowering of the rights which are set out in the relevant section of the Belfast/Good Friday Agreement and are underpinned by EU obligations, including EU treaties, Directives and Regulations, in place at the end of the transition period. In addition to this non-regression commitment, there is a further obligation, in respect of six Equality Directives specified in Annex I to the Protocol, to “keep pace” with any changes made by the EU to rights to improve the minimum levels of protection available, after 1 January 2021.

3. The Equality Commission for Northern Ireland (ECNI) and the Northern Ireland Human Rights Commission (NIHRC), referred to as ‘the Commissions’ in this letter, were appointed to monitor, supervise, advise, enforce and report on the implementation of Article 2, as part of the dedicated mechanism framework, in effect since 1 January of this year. NIHRC and ECNI also jointly submitted evidence as part of the Committee’s introductory inquiry into the operation of the Protocol. I am writing to raise some important questions prompted by the evidence we heard.

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<sup>1</sup> Protocol on Ireland/Northern Ireland, [Article 2 Rights of Individuals](#)

4. The Committee invited Chief Commissioners of ECNI and the NIHRC respectively, Geraldine McGahey OBE and Alyson Kilpatrick, and Roisín Mallon and Éilis Haughey, who lead on the Commissions' Dedicated Mechanism Units, to discuss the provisions laid out in Article 2, under which the Government commits to the non-diminution of rights, safeguards and equality of opportunity provided by the relevant section of the Belfast/Good Friday Agreement as a result of withdrawal from the EU. In our evidence session, we took stock of the work carried out by the Commissions as part of the dedicated mechanism over the first nine months of its operation.
5. Against the backdrop of continuing tensions between the UK and the EU over the Protocol, our witnesses stressed the importance of upholding the Article 2 commitments. Ms Mallon told us that the impact of “the loss of Article 2 cannot be overestimated” because of the “risk of a diminution of equality and human rights that would affect the people in Northern Ireland” (Q 8). She said that EU law had underpinned many of the equality laws in Northern Ireland, strengthening protection for women, disabled people, older people and people from different communities. Despite this, she said that “equality law in Northern Ireland is well behind equality law in Great Britain in many key aspects, particularly in relation to single equality legislation”. She warned: “If there were a roll-back on rights in Northern Ireland, we could end up with Ireland, which would be required to keep pace with EU law, having stronger equality rights, whereas citizens in Northern Ireland, on the other side of the border, could have progressively fewer rights” (Q 8).
6. Indeed, Ms McGahey echoed this sentiment, stating that “Article 2 is one of the really important positive aspects of the Withdrawal Agreement and the Protocol. We would be very, very disappointed to see it diminished or weakened in any way” (Q 8). Ms Kilpatrick told us that Article 2 “is fundamental to the Belfast Agreement, to the peace process itself and, we would say, to Northern Ireland’s ability to flourish and to be positive following withdrawal from the EU” (Q 8).
7. **The Government’s July 2021 Command Paper on the Northern Ireland Protocol: the way forward<sup>2</sup> stated that the Protocol’s provisions “that ensure there is no diminution of human rights in Northern Ireland as a result of the UK’s withdrawal from the European Union are not controversial”. In view of this, and notwithstanding the continuing tensions over the trade and institutional framework elements of the Protocol, can you commit to upholding the Article 2 provisions and the dedicated mechanism framework for their implementation, come what may?**
8. Ms McGahey also stressed the respective responsibilities of the UK Government and the Northern Ireland Executive. She acknowledged the complex interaction between the commitments under Article 2 and transferred, reserved and excepted powers under the devolution settlement. She said that, while it is ultimately the responsibility of the UK Government to uphold the ‘no diminution’ commitment in Article 2, “we envisage that the Northern Ireland Assembly and their Ministers will be introducing legislation to keep pace via their devolved powers if it lies within their devolved remit” (Q 5). **Can you clarify the respective responsibilities of the UK Government and the Northern Ireland Executive, in the context of transferred, reserved and excepted powers under the devolution settlement, in upholding Article 2? How is the Government liaising with Executive Ministers and officials in order to meet your respective**

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<sup>2</sup> [CP 502](#)

## obligations?

9. Given that the Protocol, and therefore the specific work the two Commissions are undertaking under Article 2, is in its infancy, we heard that it was, in some cases, too soon to answer in full some of the questions posed, for example about resources. Geraldine McGahey told us that “so far” she felt that they were adequately resourced, but that “we may not be able to give that guarantee further down the line” (Q 2). We were told that the number of inquiries to the Commissions related to Article 2 had been relatively low because of a relative lack of awareness of Article 2 among the public. Alyson Kilpatrick also told us: “It is only as we move forward that we might see UK law and EU law starting to diverge and therefore issues that might well start to emerge” (Q 4). **Can you provide assurances that the Commissions will have adequate and continuing resources to fulfil their monitoring role? Should the workload increase, as it may well do should relevant UK and EU law start to diverge, what measures are in place to ensure that capacity and resources can be increased?**
  
10. We welcomed assertions from both Commissions that the existence of the Article 2 commitment, in Alyson Kilpatrick’s words, “recognised the centrality of the Belfast/Good Friday Agreement of 1998 and that it required special consideration and protection” (Q 3). We were told that, while the Commissions had worked tirelessly to research the scope of Article 2 and to understand how it interacts with the Belfast/Good Friday Agreement, they were “still working out the extent of interaction” (Alyson Kilpatrick Q 3). For example, Ms Kilpatrick told us there was no clear definition of a “right, safeguard or equality of opportunity” (Q 3), which made it difficult to truly understand the scope of Article 2. She asked: “What does ‘underpinned by an EU law obligation’ really mean—which EU laws? Has there been a diminution on or after 1 January 2021?” (Q 3). Furthermore, Ms McGahey told us that “the scope of Article 2 is still very unclear. It represents a real challenge in making clear to all stakeholders what individual rights they actually have and how they are protected” (McGahey, Q 6). **What further clarity can you provide on these questions, including the scope of Article 2, the definition of a “right, safeguard or equality of opportunity”, and what is meant by being “underpinned by an EU law obligation”, in order to help the Commissions to carry out their monitoring role in a thorough and meaningful way?**
  
11. The Commissions told us that they had already identified and begun research on issues arising from the Protocol. These include the operation of the EU Settlement Scheme (Kilpatrick Q 4), the potential impact on health policy including access to all-island services as a result of regulatory questions such as mutual recognition of professional qualifications; and for border communities accessing cross-border health services (Éilis Haughey Q 3), and the possible implications of the loss of EU funding on certain groups in Northern Ireland which, Ms McGahey told us, was “quite a concern for many of the groups” (Q 2). The witnesses told us about several issues they had raised with you in June. We were told that, while some of these concerns had been at least partially or temporarily assuaged, such as the voting rights of EU citizens resident in Northern Ireland, pet passports and the potential discrimination against people requiring assistance dogs, it remains to be seen whether permanent solutions to these issues can be identified. Meanwhile, we were told that there is ongoing work being carried out on the proposed EU Pay Transparency Directive, the voting rights of EU citizens arriving after the end of the transition period, and on access to kosher and halal food. On these matters, the ramifications of the Article 2 provisions were not yet clear. **What is your assessment of the interaction of these issues with the**

**provisions of Article 2? What update can you provide on the Government's efforts, including in dialogue with the EU, to resolve these issues?**

12. The Committee heard that there needed to be an increase in the level of public awareness about Article 2 and the dedicated mechanism. Ms McGahey told us that “not all the issues and concerns that [had] been raised with us to date about the impact of Brexit on equality and human rights issues amount to a breach of Article 2” (Q 6). In her view, this “reinforce[d] the need for clarification to be given and to be given as quickly as we can.” Ms Kilpatrick echoed this sentiment, telling us about a community worker she met who said she “was not aware of any of this stuff and that it means nothing to her but that her community were frightened by the notion of the Protocol and do not know what will happen if their rights are diminished” (Q 6). She added: “We have to reach those people. We clearly have not yet.” While the Commissions were both in the process of rolling out robust public engagement and awareness-raising campaigns, they felt that there was more the Government could be doing to assist this work. **What work is the Government doing to enhance public awareness of Article 2, and of the relevant work of the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland? As Ms Kilpatrick astutely commented, “a human right is of no benefit whatever if you cannot actually enforce it” (Q 6).**
13. Similarly, the witnesses were keen to stress, both in oral and written evidence, the importance of engagement between human rights and civil society stakeholders, and the UK Government and EU institutions. Ms Kilpatrick highlighted the “importance of regular, structured, transparent engagement with a broad range of stakeholders, but not so broad that we are losing sight of what we are supposed to be focused on” (Q 6). In written evidence submitted by the two Commissions, they wrote:
- “While there has been some engagement between the UK Government and the EU supervisory bodies with civil society groups in Northern Ireland, this has not been focused on engaging with equality and human rights stakeholders and the processes for engagement have lacked transparency. It is essential that the voices of equality and human rights stakeholders are heard on Brexit related matters that impact on their human rights and equality protections, and that structures are in place to facilitate and encourage their participation in decision making on these matters.”<sup>3</sup>
14. **What work is being done to foster engagement with equality and human rights stakeholders and civil society groups in Northern Ireland? What steps is the Government taking to enhance the transparency of its processes for engagement?**
15. On contact with the UK-EU governance bodies established under the Protocol, Ms Mallon told us that the Commissions would “welcome more regular engagement with the Joint Consultative Working Group” (Q 7), with whom they had not yet met. Ms Haughey suggested that the fact that the debate on Northern Ireland and Brexit had been “seemingly dominated entirely by trade questions [was] probably... why we have not yet been before the Joint Consultative Working Group” (Q 7). This is in spite of the fact that the Government proposed, in its May 2020 Command Paper on *The UK's approach to the Northern Ireland Protocol*, that the Joint Consultative Working Group should hold a dedicated meeting on implementation of Article 2. Ms Mallon also told us that they had stressed “the

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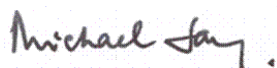
<sup>3</sup> Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland – Joint written evidence ([II00031](#))

need for the Joint Consultative Working Group not only to engage with the dedicated mechanism in relation to the Article 2 commitment, but to engage more widely with equality and human rights stakeholders in Northern Ireland” so that their voices are heard (Q 7). **What steps will you take to ensure that the UK-EU governance bodies established under the Protocol prioritise human rights and equality concerns, including engagement with key stakeholders in Northern Ireland? We would like to express our disappointment that the Commissions have not yet had the opportunity to meet with the Joint Consultative Working Group (JCWG) and would stress the importance of meetings between the two Commissions and the JCWG. What update can you give on the Government’s proposal that the JCWG should hold a dedicated meeting on implementation of Article 2?**

16. Ms Haughey told us that formal channels were not the only means for engagement, but that there was also a need to develop informal relationships with the EU institutions. She said: “We meet periodically on an informal basis at official level with the EU delegation to the UK, and we have discussed the need for and the benefits of good channels of communication there. We would like to have those informal relationships to ensure that we are aware of what is coming down track before it is formally notified to us by the Specialised Committee and the Joint Committee structures, and so on” (Q 7). **How can the Government assist the Commissions in developing formal and informal relationships, with the UK Government, the Northern Ireland Executive and the EU institutions?**
17. Ms Mallon stressed the importance of the Joint Consultative Working Group’s role, as set out in Article 15 of the Protocol, as a forum for exchange of information, including the provision by the EU to the UK of information on planned EU law that amends the Directives listed in Annex 1 to the Protocol, and cited in Article 2(1). However, Éilís Haughey said that the Commissions’ interests went beyond these Directives, to include, for example, the Victims Directive and the Parental Leave Directive, as they are within the scope of the Article 2 ‘non-diminution’ commitment, where they “would be looking [at] and monitoring the standards that are in place and the relevant jurisprudence” (Q 9). Ms Mallon said that the Commissions had made clear in their contact with Government officials “the need for the dedicated mechanism to have good communications and good sharing of timely and relevant information, so that we are aware of EU legislation” (Q 7). This would enable the Commissions to fulfil their monitoring role.
18. **What steps is the Government taking to ensure that the human rights and equality Commissions, as well as Parliament (including this Committee), are kept informed of developments in EU law relevant to Article 2 of the Protocol? Will you agree to ensure that:**
  - a) **Explanatory Memoranda for draft UK legislative proposals that are likely to engage Article 2(1) of the Protocol are submitted, and set out what consideration has been given by the Government to ensuring conformity with Article 2 (1)?**
  - b) **Explanatory Memoranda for draft EU proposals which amend or replace the Directives listed in Annex 1 of the Protocol, as well as other relevant EU legislation that the Commissions judge are relevant to the provisions of Article 2, such as the Victims Directive and the Parental Leave Directive, are submitted, and set out what consideration has been given by the Government to ensuring conformity with Article 2 (1)?**

19. Finally, the Committee asked witnesses about the likely implications of divergence in EU and UK equality and human rights protections for Northern Ireland. Ms McGahey told us that a failure to keep pace with EU law would mean that “equality rights would fall further behind the equality rights in the rest of Ireland” (Q 10). This was because, Ms Mallon told us, “EU law has underpinned many of the equality laws in Northern Ireland”, strengthening “protection for a wide range of equality groups, including women, disabled people, older people and [people from] different communities.” As we have already set out, she went on to say that Northern Ireland “is well behind equality law in Great Britain in many key aspects, particularly in relation to single equality legislation. If there were a roll-back on rights in Northern Ireland, we could end up with Ireland, which would be required to keep pace with EU law, having stronger equality rights, whereas citizens in Northern Ireland, on the other side of the border, could have progressively fewer rights.”
20. Ms Kilpatrick told us that the Commission had identified a number of specific issues arising from divergence, focussing mainly on free movement: frontier workers crossing the border, and the difference between Irish citizens in Northern Ireland being treated as EU citizens and being able to move freely in other parts, and having to rely on the common travel area once the free movement provision fell away (Q 10). **What assessment has the Government made of the practical implications of divergence in human rights and equality protections?**
21. We look forward to considering your response to the questions raised in this letter by 15 November 2021.
22. I am copying this letter to the Rt Hon Lord Frost CMG, Minister of State, Cabinet Office; Sir William Cash MP, Chair of the House of Commons European Scrutiny Committee; Simon Hoare MP, Chair of the House of Commons Northern Ireland Affairs Committee, and Sinéad McLaughlin MLA, Chair of the Northern Ireland Assembly Committee for the Executive Office; Stephen Torney, Northern Ireland Office; Les Saunders and Donald Harris, Cabinet Office.

Yours sincerely,



Lord Jay of Ewelme  
Chair of the Protocol on Ireland/Northern Ireland Sub-Committee

