



## **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**

Equality Commission

FOR NORTHERN IRELAND



Coimisiún na hÉireann um Chearta  
an Duine agus Comhionannas  
Irish Human Rights and Equality Commission



NORTHERN IRELAND  
HUMAN RIGHTS  
COMMISSION



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# 1. Introduction and context

- 1.1 Both the Equality Commission for Northern Ireland (ECNI) and the Northern Ireland Human Rights Commission (NIHRC) (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 Irish Human Rights and Equality Commission (IHREC) is Ireland's National Human Rights Institution and its National Equality Body. It was established on 1 November 2014, as an independent public body under the Irish Human Rights and Equality Commission Act 2014. IHREC is an 'A status' National Human Rights Institution as accredited by the United Nations.
- 1.3 The ECNI and NIHRC are mandated in accordance with Article 2(1) (Protocol Article 2) of the Protocol on Ireland/Northern Ireland of the UK-EU Withdrawal Agreement (the Protocol) to oversee the UK Government's commitment on rights and equality in Northern Ireland (NI) after EU withdrawal.<sup>1</sup> The Commissions can exercise these functions separately or jointly.<sup>2</sup>
- 1.4 The ECNI and NIHRC exercise part of this mandate in partnership<sup>3</sup> with the IHREC ('the three Commissions') in relation to those aspects of oversight, and reporting on, rights and equalities issues falling within the scope of Protocol Article 2 which have an island of Ireland dimension.<sup>4</sup> Further information on the role and remit of the three Commissions is set out in Appendix 1 to this paper.
- 1.5 The key **policy recommendations** of the Commissions set out below relate to the impact of Brexit on the divergence of rights and equalities that have an island of Ireland dimension.

1 [Sections 78A-78E, Northern Ireland Act 1998.](#)

2 [Section 78E, Northern Ireland Act 1998.](#)

3 In March 2021, the NIHRC, ECNI and IHREC agreed a Memorandum of Understanding on providing oversight of and reporting on rights and equality issues falling within the scope of the commitment in Protocol Article 2 that have an island of Ireland dimension. See: [Northern Ireland Human Rights Commission, Equality Commission for Northern Ireland, Irish Human Rights and Equality Commission, 'Ireland/ Northern Ireland Protocol of the European Union Withdrawal Agreement, Article 2: Island of Ireland Dimension - Memorandum of Understanding'](#), (NIHRC, ECNI and IHREC, 2021).

4 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)

- 1.6 Whilst some of these recommendations are made jointly by all three Commissions, most recommendations are made solely 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 on the implementation of Protocol Article 2 2021-2022.<sup>5</sup>
- 1.7 Our recommendations have been informed by the findings of a research report (2022) commissioned by the ECNI, in conjunction with the NIHRC and IHREC, on *“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”* (‘research report’).<sup>6</sup>
- 1.8 The aim of the research was to produce an expert paper which analyses the impact, and/or potential impact, of Brexit as regards the divergence of equality and human rights protections and European Union (EU) best practice on the island of Ireland.
- 1.9 This research highlighted EU developments (EU law, Court of Justice of the EU (CJEU) case law, policy and best practice) that relate to equality and human rights in NI post Brexit and that have the potential to result in divergence of rights on the island of Ireland.

### Protocol Article 2 commitment and the Dedicated Mechanism

- 1.10 Protocol Article 2 states:

“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.

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 Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards”.<sup>7</sup>

5 Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission, [Annual Report](#) of the NIHRC and the ECNI on the implementation of Protocol Article 2 2021 – 2022, July 2022

6 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022.

7 Article 2(1), Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement. For further information on the scope of Protocol Article 2, see ECNI/NIHRC [Working Paper: The Scope of Article 2\(1\) of the Ireland/Northern Ireland Protocol](#) (ECNI, NIHRC, 2022)

- 1.11 In Protocol 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 Protocol 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.
- 1.12 Protocol Article 2 provides specific protection against discrimination enshrined in the six EU equality directives listed in Annex 1 of the Protocol. 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>8</sup>
- 1.13 The ‘keeping pace’ obligation which arises in the context of the Annex 1 equality directives requires ongoing monitoring of the development and interpretation of EU law to ensure that any amendment to, or replacement of, an Annex 1 equality directive by the EU on or after 1 January 2021, which enhances rights and protections, is reflected in NI law. The view of ECNI and NIHRC is that, in line with Article 13 of the Protocol, the Annex 1 equality directives will continue to be informed by future CJEU rulings and, to the extent that such rulings evolve general principles of EU law, the EU Charter of Fundamental Rights and the relevant EU Treaty provisions, these will continue to have relevance in NI.<sup>9</sup>
- 1.14 The UK Government’s commitment in Protocol Article 2 is given effect in UK law by section 7A of the EU (Withdrawal) Act 2018. In addition, section 6 of the NI Act 1998 prohibits the NI Assembly from making any law which is incompatible with Protocol Article 2. Section 24 of the 1998 Act also provides that NI Ministers and NI Departments have no power to make, confirm or approve subordinate legislation or to do any act in so far as that legislation or act is incompatible with Protocol Article 2. This means that the NI Assembly, NI Ministers and NI Departments cannot legislate or act in a way that is incompatible with Protocol Article 2. A similar restriction applies to UK Government actions in accordance with the EU (Withdrawal) Act 2018.
- 1.15 Protocol Article 2(1) provides that the no-diminution guarantee in that paragraph shall be implemented through dedicated mechanisms.

8 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 page 3.

9 Article 13(2) and 13(3), Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement. See also [Re SPUC Pro-Life Limited \[2022\] NIQB 9](#), at para 93

As the dedicated mechanism the ECNI and NIHRC were granted new functions to monitor, advise, report on, promote, and enforce the implementation of Protocol Article 2.<sup>10</sup>

- 1.16 In addition, the ECNI, NIHRC, and IHREC work together to provide oversight of, and report on, issues which engage Protocol Article 2 that have an island of Ireland dimension.<sup>11</sup>
- 1.17 In March 2021, the ECNI, NIHRC, and IHREC agreed a Memorandum of Understanding on providing oversight of and reporting on rights and equality issues falling within the scope of the commitment in Protocol Article 2 that have an island of Ireland dimension.<sup>12</sup>

### Equivalence of rights

- 1.18 The text of the Belfast (Good Friday) Agreement requires “at least an equivalent level of protection of human rights” in Ireland as in NI.<sup>13</sup> However, in its Explainer on Protocol Article 2, the UK Government takes the view that the 1998 Agreement does not require North-South equivalence of rights and equality protections.<sup>14</sup>
- 1.19 The ECNI, NIHRC, and IHREC consider that long-term North-South equivalence is important and that it is essential that NI equality and human rights law keeps pace with changes to equality and human rights law in Ireland, including rights introduced in Ireland as a result of EU laws, that enhance protections introduced on or after 1 January 2021.

### Divergence of Rights

- 1.20 The UK Government has committed under Protocol Article 2, read in conjunction with Protocol Article 13, to keep pace with any EU changes that amend or replace the Protocol Annex 1 equality directives which result in a strengthening of equality protections in NI. However, there is no corresponding obligation on the UK Government to ensure that NI law keeps pace with EU law developments that do not amend or replace the Protocol Annex 1 equality directives.

<sup>10</sup> [Sections 78A-78E, Northern Ireland Act 1998](#)

<sup>11</sup> Article 2(2) and Article 14(c), Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement. See also 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 page 5.

<sup>12</sup> Northern Ireland Human Rights Commission, Equality Commission for Northern Ireland, Irish Human Rights and Equality Commission, [‘Ireland/ Northern Ireland Protocol of the European Union Withdrawal Agreement, Article 2: Island of Ireland Dimension - Memorandum of Understanding’](#), (NIHRC, ECNI and IHREC, 2021).

<sup>13</sup> [Belfast \(Good Friday\) Agreement](#), 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity: “The Irish Government will also take steps to further strengthen the protection of rights in its jurisdiction ... The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland”.

<sup>14</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 9.



- 1.21 Therefore, should the EU introduce a subsequent EU Directive on equality and/or human rights that does not amend or replace the Protocol Annex 1 equality directives after 31 December 2020, this could result in stronger equality and human rights for people in Ireland compared to people in NI.<sup>15</sup> There is thus the risk of increasing ‘divergence’ of equality and human rights on the island of Ireland as a result of Brexit.
- 1.22 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>16</sup>
- 1.23 As highlighted in the research report, prior to the withdrawal of the UK from the EU, in some areas there is already stronger protection against discrimination in both Ireland and Great Britain than in NI. For example, unlike in NI, in Ireland rights have been introduced in the following areas; work-life balance, age discrimination in access to goods, facilities and services, pay transparency reporting.
- 1.24 Prior to 31 December 2020, EU law had facilitated the alignment of many laws on rights and equality between Ireland and NI. However, as identified in the research report, there are further future potential areas of divergence in a number of areas related to EU law developments, including in the areas of work-life balance, age discrimination in access to goods, facilities, and services, pay transparency reporting, and the EU Accessibility Act.<sup>17</sup> The research report highlights the important role of the Commissions in identifying pre-existing and potential areas for divergence to occur.
- 1.25 Such divergence between Ireland and NI has the potential to have implications for Protocol Article 2, as set out in more detail in the policy recommendations highlighted below.<sup>18</sup>
- 1.26 Further, as set out in the research report, there is divergence in some key areas of substantive equality rights between Great Britain and NI.

15 For example, the EU has already published a [Proposal](#) for a Directive of the European Parliament and of the Council 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, 4 March 2021. In addition, it has introduced [Directive](#) (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, which entered into force on 1 August 2019 and had to be implemented into the national legislation of Member States on or before the 2 August 2022. This Directive was not transposed into UK law prior to 31 December 2020.

16 See for example, European Commission (2020), [LGBTIQ Equality Strategy 2020-2025](#)

17 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, pages 77-78, 38-39, 100-101, 104

18 See paragraph 1.33 below.



This includes in the areas of gender pay gap reporting, discrimination by public authorities on grounds of sex in the exercise of their public functions, and age discrimination in access to goods, facilities, and services.<sup>19</sup>

- 1.27 Both ECNI and NIHRC have consistently called for the introduction of single equality legislation in NI to consolidate, clarify and enhance existing equality protections in NI.<sup>20</sup> The research report notes, for example, that a Single Equality Act for NI would assist in improving access to justice and strengthening protections against discrimination in NI, noting the consolidated nature of equality legislation in Ireland and Great Britain.
- 1.28 In addition to legislative developments since 31 December 2020, as set out in the research report, there have been a number of significant CJEU case law developments relating to the interpretation of the Protocol Annex 1 equality directives which, under Protocol Article 2 and Protocol Article 13(2), are relevant to NI. These CJEU decisions continue to have implications for how particular legal rules operate in NI.<sup>21</sup>
- 1.29 As noted in the research report, equality law is a devolved matter, and many examples in the research report illustrate how many devolved areas, including equality, fall within the scope of Protocol Article 2. However, importantly, Protocol Article 2 obligations extend to the UK Government in relation to reserved and excepted matters that have implications for Northern Ireland and fall within the scope of Protocol Article 2. 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.<sup>22 23</sup>
- 1.30 The ECNI and NIHRC have also identified a range of other EU measures that fall within the scope of Protocol Article 2 and which relate to reserved and excepted matters.<sup>24</sup>

19 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, pages 37-39

20 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, paras 4.46 – 4.74

21 Equality Commission for Northern Ireland and Northern Ireland Human Rights Commission, [Working Paper: Scope of Article 2\(1\) of the Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement 2020](#) (December 2022)

22 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

23 The Act includes a provision to disapply retained European Union law derived from the [Trafficking Directive](#) (2011/36/EU) where that law conflicts with the provisions of the Act. The two Commissions have noted that the disapplication provision appears to be directed at reserved matters and not devolved (transferred) matters.

24 Equality Commission for Northern Ireland and Northern Ireland Human Rights Commission, [Working Paper: Scope of Article 2\(1\) of the Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement 2020](#) (December 2022). See Annex 1: Table of Rights, Safeguards and Equality of Opportunity Provisions included in the Chapter of the Belfast (Good Friday) Agreement of the same name and the underpinning EU law

- 1.31 The Commissions have also identified that, where required by the UK-EU Withdrawal Agreement, including under the Protocol and Article 2, the EU Charter of Fundamental Rights continues to have relevance in this area.<sup>25</sup> This has been confirmed in the research report, which outlines the need for NI courts to take into account any Charter of Fundamental Rights provisions (and pre-existing general principles) that are relevant to the application of Protocol Article 2.<sup>26</sup>
- 1.32 Further, as set out in the research report, there is an important role carried out by EU agencies and networks whose work is often significant in the justice, rights and equality sphere; including the work of the EU Agency for Fundamental Rights (FRA) and the European Network of Equality Bodies (Equinet).<sup>27</sup> The research report also notes that Brexit has ended the UK's involvement in the comparative evaluation and regular benchmarking processes, thereby curtailing the flow of such valuable information for NI's institutions and civil society networks.<sup>28</sup>

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25 Ibid, page 35

26 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 24

27 Ibid., page 102

28 Ibid.

## Summary of Recommendations

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1.33 The ECNI, NIHRC, and IHREC have set out below a summary of their key policy recommendations relating to the impact of Brexit on the divergence of rights on the island of Ireland, informed by the findings the research report.

### Overarching Recommendations: Compliance with Protocol Article 2

- The ECNI and NIHRC recommend that in the development of any laws or policies the UK Government and NI Executive consider, particularly at an early stage, the extent to which any change engages Protocol Article 2 and ensure that there is no diminution to the rights and safeguards which fall within its scope.
- The ECNI and NIHRC recommend that the UK Government and NI Executive ensure that Explanatory Memoranda on draft UK and NI legislative proposals that are likely to engage Protocol Article 2 set out what consideration has been given to ensuring conformity with Protocol Article 2.
- The ECNI and NIHRC 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 Protocol Article 2, sets out what consideration has been given to ensuring conformity with Protocol Article 2.
- The ECNI and NIHRC 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.
- The ECNI and NIHRC 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 Protocol Article 2 to operate fully within UK law.
- The ECNI and NIHRC recommended that the UK Government ensures that there are no changes to the Protocol that would result in a weakening of either the Protocol Article 2 commitment or rights, safeguards and oversight mechanisms relating to this commitment.
- The ECNI and NIHRC recommend that the UK Government undertakes a review of legislative safeguards in place to ensure compliance with Protocol Article 2 should the NI Executive or Assembly fail to act as required.

- The ECNI and NIHRC recommend that the UK Government and EU work together to ensure that there are timely updates and relevant information exchange on developments in EU law, to aid the effective implementation of Protocol Article 2 commitments.
- The ECNI and NIHRC recommend that the UK Government and EU 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.

### Protocol Annex 1 Directives: Compliance with CJEU Case Law Developments

- The ECNI and NIHRC recommend that the NI Executive, and relevant NI Departments, ensure that the Framework Equality Directive<sup>29</sup> (contained in Protocol Annex 1), 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.
- The ECNI and NIHRC recommend that the NI Executive, NI Assembly and the Department for Communities should 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.
- The ECNI and NIHRC recommend that the NI Executive, and relevant NI Departments, ensure that the Framework Equality Directive (contained in Protocol Annex 1) is interpreted in line with the decision of the CJEU in the cases of *WABE* and *Müller*.
- The ECNI and NIHRC 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>30</sup>

### Avoiding Divergence of Rights

- The ECNI, NIHRC, and IHREC 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 Protocol Annex 1 Directives.

29 Council Directive [2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

30 [Charter of Fundamental Rights of the European Union](#) [2012] OJ C326/02.

- The ECNI, NIHRC, and IHREC 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.
- The ECNI and NIHRC 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 Protocol Article 13(4), with particular consideration being given to alignment of standards across the two jurisdictions on the island of Ireland.
- The ECNI and NIHRC 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 Protocol Article 2.
- The ECNI and NIHRC recommend that the UK Government, NI Executive and relevant NI Departments, incorporate the following measures into domestic law in NI so as to strengthen equality and human rights in NI in line with international human rights best practice and to avoid a divergence of rights on the island of Ireland.
- The ECNI and NIHRC 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.
- The ECNI and NIHRC recommend that The Executive Office commit to ensuring that, to the extent that the EU Pay Transparency Directive, if introduced, amends or replaces the Gender Equality (Employment) Directive,<sup>31</sup> the law in NI is amended to keep pace with that change.
- The ECNI and NIHRC further recommend that, regardless of whether or not required to under the 'keeping pace' requirement associated with Protocol Article 2, the NI Executive should ensure that NI law voluntarily aligns with changes that enhance equality and human rights protections further to the Pay Transparency Directive, if introduced.

31 Directive [2006/54/EC](#) of 5 July 2006 on equal opportunities and equal treatment of women and men in employment and occupation

- The ECNI and NIHRC recommends 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.
- The ECNI and NIHRC further recommend that, regardless of whether or not required to under the ‘keeping pace’ requirement associated with Protocol Article 2, the NI Executive should ensure that NI law voluntarily aligns with changes that strengthen the ECNI further to the EU directives on standards for equality bodies, if introduced.
- The ECNI and NIHRC recommend that the NI Executive, and relevant NI Departments, including the Department for Communities, Department for the Economy and The Executive Office should ensure that NI law voluntarily aligns with the provisions of the EU Accessibility Act which enhance protections for people with disabilities and older people in NI.
- The ECNI and NIHRC recommend that the NI Executive and relevant NI Departments, including the Department for the Economy and The Executive Office should ensure that NI law voluntarily aligns with any changes that enhance equality and human rights protections further to the EU Work-Life Balance Directive.

### **CJEU Case Law Developments: Non – Protocol Annex 1 Directives**

- The ECNI and NIHRC 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 and as a matter of best practice.
- The ECNI and NIHRC 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.
- 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.

## Wider Equality and Human Rights Developments

- The ECNI and NIHRC recommend that the UK Government and NI Executive give effect to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in domestic legislation.
- The ECNI and NIHRC recommend that the NI Executive and relevant departments, including the Department for Communities and The Executive Office ensure that the area of disability discrimination is prioritised as a key area for dynamic alignment when conducting CJEU case law tracking.
- The ECNI and NIHRC 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.



## 2. Overarching Recommendations: Compliance with Protocol Article 2

- 2.1 Outlined below are the Commissions' (ECNI and NIHRC) overarching recommendations which are primarily aimed at ensuring that the UK Government complies with its commitment under Protocol Article 2.
- 2.2 These overarching policy recommendations include policy recommendations that have been previously highlighted by the Commissions, as well as additional recommendations arising out of the research findings.<sup>32</sup>
- 2.3 For ease of reference these **previously highlighted overarching recommendations** of the Commissions are summarised below, and further details on recommendations and supporting rationales can be found in Appendix 2 hereto. The additional recommendations arising out of the research are set out in detail below with supporting rationale.

The ECNI and NIHRC recommend that in the development of any laws or policies the UK Government and NI Executive consider, particularly at an early stage, the extent to which any change engages Protocol Article 2 and ensure that there is no diminution to the rights and safeguards which fall within its scope.

The ECNI and NIHRC recommend that the UK Government and NI Executive ensure that Explanatory Memoranda on draft UK and NI legislative proposals that are likely to engage Protocol Article 2 set out what consideration has been given to ensuring conformity with Protocol Article 2.

The ECNI and NIHRC 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 Protocol Article 2, sets out what consideration has been given to ensuring conformity with Protocol Article 2.

The ECNI and NIHRC 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.

32 For example, in the joint annual report of the ECNI and NIHRC on the implementation of Protocol Article 2 2021-2022. See Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission, [Annual Report](#) of the NIHRC and the ECNI on the implementation of Protocol Article 2 2021 – 2022, July 2022

- 2.4 A number of **additional overarching recommendations**, along with supporting rationale, arising from the research and related to compliance with Protocol Article 2 are set out below.

**The ECNI and NIHRC 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 Protocol Article 2 to operate fully within UK law.**

**The ECNI and NIHRC recommended that the UK Government ensures that there are no changes to the Protocol that would result in a weakening of either the Protocol Article 2 commitment or rights, safeguards and oversight mechanisms relating to this commitment.**

#### *Supporting rationale*

- 2.5 Section 7A of the European Union (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.
- 2.6 Article 4 of the Withdrawal Agreement provides that individuals can rely directly on the provisions of the Withdrawal Agreement in UK courts, including Protocol Article 2. Article 4 further provides that judicial and administrative authorities must be empowered to “disapply inconsistent or incompatible domestic provisions.”<sup>33</sup> This has been incorporated into UK law in Section 7A of the EU (Withdrawal) Act 2018.
- 2.7 The UK Government has recognised that Protocol Article 2 has direct effect and that individuals can invoke their rights under Protocol Article 2 in UK courts.<sup>34</sup>
- 2.8 The ECNI and NIHRC have highlighted a number of concerns about the impact of the Protocol Bill, currently progressing through Parliament, on the implementation of Protocol Article 2.<sup>35</sup> For example, they have raised concerns that the Bill needs to be amended to ensure that it does not impact on the duty, under Protocol Article 13(2), on domestic courts and tribunals to interpret EU law relevant to Protocol Article 2 in conformity with the relevant case law of the CJEU.

33 [Article 4](#) of the UK-EU Withdrawal Agreement

34 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), para 29

35 Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland, [NIHRC / ECNI Briefing on the Northern Ireland Protocol Bill](#), October 2022

- 2.9 The ECNI and NIHRC continue to raise the point that the UK Government must ensure that there are no changes to the Protocol, including via the Protocol Bill, that would result in a weakening of either the Protocol Article 2 commitment or rights, safeguards and oversight mechanisms relating to this commitment.<sup>36 37</sup>

**The ECNI and NIHRC recommend that the UK Government undertakes a review of legislative safeguards in place to ensure compliance with Protocol Article 2 should the NI Executive or Assembly fail to act as required.**

*Supporting rationale*

- 2.10 Section 26 of the Northern Ireland Act 1998 sets out the power of the Secretary of State for NI to direct that an action must not be taken when a NI Minister or Department's actions are incompatible with international obligations, as well as a positive obligation to compel action should it be considered necessary to give effect to an international obligation.<sup>38</sup>
- 2.11 This is a power rather than a duty and this power sits in the context of a sovereign parliament which can legislate as required, regardless of which matters are devolved, reserved or excepted under the Northern Ireland Act 1998.
- 2.12 In addition, section 26 must be read in light of section 7A of the EU Withdrawal Act 2018, which incorporates the UK EU Withdrawal Agreement into domestic law, including all obligations, remedies, liabilities arising. Whilst the Secretary of State for NI may exercise his power to ensure that the UK Government's internationally binding commitments, including under Protocol Article 2, were not breached by failure of a NI Minister or Department to act, there is value in carrying out a review of existing legislative safeguards to ensure that such mechanisms are sufficiently robust and adequate.
- 2.13 The need for such a review is particularly relevant in the context that the UK Government has, on a previous occasion, had to legislate in relation to a devolved area in NI to ensure compliance with its EU obligations.<sup>39</sup>

36 Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission, [Annual Report of the NIHRC and the ECNI on the implementation of Protocol Article 2 2021 – 2022](#), July 2022, para 3.11

37 Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland, [NIHRC / ECNI Briefing on the Northern Ireland Protocol Bill](#), October 2022

38 [Section 26](#) of the Northern Ireland Act 1998

39 [Explanatory Memorandum](#) to the Sex Discrimination (Amendment of Legislation) Regulations SI 2008/963, para 7.3-7.5: "Although the NI Assembly has competence to legislate on this devolved matter, because the First Minister did not agree to the inclusion of references to transgender or gender reassignment in the Northern Ireland Regulations, the First Minister and Deputy First Minister could not reach joint agreement on all of the policy proposals to implement the Gender Directive".

- 2.14 The research report suggests a range of options aimed at maintaining, enhancing, and/or clarifying arrangements to ensure compliance with alignment requirements under the Protocol, which arise as a result of Protocol Article 2 in the context of any changes by the EU to the Annex 1 equality directives.
- 2.15 The report explores the advantages and disadvantages of each of these options. Each of these options, if implemented, would require amendments to the Northern Ireland Act 1998.<sup>40</sup> The report makes clear that when considering legislative options to address Protocol Article 2's dynamic alignment requirements, "legislation must avoid amending devolved competences by a sidewind."<sup>41</sup>
- 2.16 We consider it important that the UK Government takes forward a review that considers the potential introduction of additional measures aimed at maintaining, enhancing, and/or clarifying compliance requirements, and that these options are considered as part of its review.

**The ECNI and NIHRC recommend that the UK Government and EU work together to ensure that there are timely updates and relevant information exchange on developments in EU law, to aid the effective implementation of Protocol Article 2 commitments.**

**The ECNI and NIHRC recommend that the UK Government and EU ensure the Commissions are given early notice of relevant EU law and policy developments and have opportunities to highlight in advance any implications of those developments for equality and human rights law in NI.**

### *Supporting rationale*

- 2.17 As identified in the research report, providing information on developments in EU law, and also policy developments, to the Commissions, the NI Executive and the UK Government will be an important aid to help ensure the effective implementation of Protocol Article 2.<sup>42</sup>
- 2.18 Article 15(3)(b) of the Protocol states that within the Joint Consultative Working Group the EU shall inform the UK about all planned EU legislation that falls within the scope of the Protocol. As such, the European Commission website should include EU law which falls within the scope of Protocol Article 2.<sup>43</sup> The research report importantly highlights, aligned to the

40 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, pages 9 and 114

41 Ibid., page 119

42 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, pages 9 and 114

43 Ibid., page 108

Commissions' view, that there are, and will be, wider EU legislative developments which potentially relate to the Rights, Safeguards and Equality of Opportunity provisions of the Belfast (Good Friday) Agreement.<sup>44</sup>

- 2.19 The European Commission has since launched on its EUR-Lex<sup>45</sup> website a webpage on the Protocol<sup>46</sup> which lists all EU acts that apply in the UK in respect of NI, including the Protocol Annex 1 equality directives.
- 2.20 This will be a useful resource that will assist all relevant parties, including the two Commissions, in their role in monitoring and scrutinising the UK Government's compliance with its Protocol Article 2 obligations, and its obligation to keep pace with any future EU changes that amend or replace provisions in the Annex 1 equality directives. It will also help improve transparency.
- 2.21 Further to the EU's aim of increasing transparency, it is important that the website includes the publication of proposed or updated EU legislation that is relevant to the Protocol Article 2 (1) non-diminution commitment, as well as EU law that amends or replaces provisions in the Annex 1 equality directives. It would be helpful, in the interests of clarity and certainty, if the website also clearly stated whether the proposed/updated EU law is applicable to any of the Annexes in the Protocol.
- 2.22 Whilst the publication of the proposed or updated EU legislation that relates to the keeping pace requirement in relation to Annex 1 directives under Protocol Article 2 is of primary importance, the publication of such legislation that falls within the scope of Protocol Article 2, beyond the Annex 1 Directives, will assist with monitoring and tracking potential areas of future EU equality and human rights law that NI could potentially voluntarily align with. This will assist, not only the Commissions, but also the UK Government, NI Executive and relevant NI Departments track and monitor such EU developments.
- 2.23 The research report highlights the benefits to stakeholders should the European Commission website include this additional information. It also suggests that the earlier flagging of relevant parts of the Commission's Work Programme by the EU would be preferable,<sup>47</sup> as it would better enable NI stakeholders to respond to such legislative developments, for example, through consultations.

44 Ibid.

45 [EUR-Lex](#) is a website which lists EU legislation as it applies to EU Member States

46 [Protocol on Ireland / Northern Ireland - EUR-Lex \(europa.eu\)](#), launched 30 June 2022

47 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 108

- 2.24 Further, it is essential that the ECNI and NIHRC are not only kept informed of any future EU equality law developments relevant to the Annex 1 equality directives in the Protocol, including through the Joint Consultative Working Group, but also have the opportunity to highlight in advance, in the context of any new arrangements being taken forward by the UK Government, any implications of those changes for equality law in NI.<sup>48</sup>

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48 Submission of the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland 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, page 6



### 3. Protocol Annex 1 Directives: Compliance with CJEU Case Law Developments

- 3.1 Outlined below are our recommendations aimed at ensuring that NI law keeps pace with specific developments relating to evolving CJEU case law on the Protocol Annex 1 equality directives post 31 December 2020.
- 3.2 Our recommendations build on the findings of the research report relating to the Annex 1 equality directives and the implications of CJEU developments, as well as other legislative developments since 31 December 2020.
- 3.3 In particular, the research report made clear that there are areas where NI law requires to be changed to meet the Protocol's requirements of dynamic alignment in relation to those matters.<sup>49</sup> The Commissions' overarching recommendation, set out in the previous chapter, seeks to address this issue. In particular, the ECNI and NIHRC recommend that the UK Government and NI Executive, and relevant Departments, monitor CJEU case law relevant to the Annex 1 equality directives as this case law evolves on or after 1 January 2021, so as to ensure those directives are interpreted in NI law in line with such CJEU case law, which enhance protections.
- 3.4 As set out below, some developments relate to specific Annex 1 equality directives only, whereas other developments merit attention in relation to all six Annex 1 equality directives.
- 3.5 To avoid duplication of work, the researchers have not addressed those updates which the EU Commission highlighted in its report on the Race Equality Directive and the Framework Equality Directive.<sup>50</sup>
- 3.6 As highlighted below, it is essential that the NI Assembly addresses any shortcomings in Northern Ireland resulting from relevant developments in CJEU case law, as set out in this European Commission report.

49 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 9

50 The European Commission must report to the European Parliament and Council on the application of the Race Equality Directive (Council Directive [2000/43/EC](#) of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin) and the Framework Equality Directive (Council Directive [2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation) every five years and that report covers recent developments, including relevant case law of the CJEU. See Article 17 of the [Race Equality Directive](#) and Article 19 of the [Framework Directive](#).



## Specific Recommendations

- 3.7 Outlined below are our recommendations relating to specific areas where there is a need for the NI Assembly and NI Executive to address shortcomings in NI equality law resulting from developments in CJEU case law post 31 December 2020 relating to the Protocol Annex 1 equality directives.

### Disability discrimination law

**ECNI and NIHRC recommend that the NI Executive, and relevant NI Departments, ensure that the Framework Equality Directive<sup>51</sup> (contained in Protocol Annex 1), 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.**

**ECNI and NIHRC recommend that the NI Executive, NI Assembly and the Department for Communities should 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.**

### *Supporting rationale*

- 3.8 The research report has identified that there are implications for NI's disability law and policy following the CJEU ruling in the case of *Szpital Kliniczny*<sup>52</sup> on 26 January 2021.
- 3.9 The research report noted that the case had significantly elaborated on the concept of disability within the Framework Equality Directive.<sup>53</sup> The case related to an employee who challenged her employer's decision to grant a disability allowance to workers with a disability on the condition that they submitted their disability certificates after a specific date; thus excluding from the allowance workers who had submitted their disability certificates before that date.
- 3.10 Specifically, the research report states that NI must ensure that the implementation and interpretation of disability discrimination pursuant to Article 1 of the Framework Equality Directive does not render the concept of disability dependent on the *absence* of disability as the key comparator; namely that the definition of 'disability discrimination' should include discrimination between persons with disabilities.<sup>54</sup>

51 Council Directive [2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

52 Judgment of 27 January 2021 in Case C-16/19, *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, [EU:C:2021:64](#)

53 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 69

54 Ibid., page 71

- 3.11 It should also be noted that the research report made clear that Article 2 of this Directive should be interpreted as meaning any form of discrimination which is inextricably linked to a protected characteristic amounts to direct discrimination, rather than indirect discrimination.<sup>55</sup>
- 3.12 Further, the research report highlights that justifications for the exclusion of persons with a disability from certain professional roles, including public service roles, must be scrutinised closely, as shown by the CJEU rulings in the cases of *Jurors*<sup>56</sup> on 21 October 2021, and *Tartu Vangla*<sup>57</sup> on 15 July 2021.<sup>58</sup>
- 3.13 The Disability Discrimination Act 1995 (DDA 1995), as amended, covers some aspects of the Court's findings in these areas. The ECNI has made clear in its guidance to employers that under the DDA 1995 that employers can treat people with disabilities more favourably than people without, and that employers can take positive action provided such positive action measures are offered to people with disabilities generally, rather than only to people with specific impairments.<sup>59</sup>
- 3.14 However, further reform of the DDA 1995 is needed. The ECNI has previously recommended that *disability-related discrimination* is replaced by provisions prohibiting indirect discrimination and discrimination arising from disability which will remove the requirement for a disabled person to compare his or her treatment with that of someone else; namely, show that s/he has been treated less favourably than someone without a disability or with a different disability.<sup>60</sup>
- 3.15 The introduction of provisions prohibiting discrimination arising from disability will mean that employers, service providers and others cannot, without justification, treat a disabled person less favourably because of something arising in consequence of his or her disability.

55 Ibid.

56 Judgment of 21 October 2021 in Case C-824/19, *TC and UB v Komisija za zashtita ot diskriminatsia and VA* ('Jurors'), [EU:C:2021:862](#)

57 Judgment of 15 July 2021 in Case C-795/19, *XX v Tartu Vangla*, [EU:C:2021:606](#)

58 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 71

59 See ECNI guidance for employers on [positive action when recruiting disabled people](#): "The Disability Discrimination Act 1995 allows employers to treat people with disabilities more favourably than people without. This creates opportunities for employers to take positive action of a kind that would not be permitted under the other anti-discrimination laws....The positive actions listed below are lawful provided they are offered to people with disabilities generally, rather than only to people with specific impairments (e.g. learning disabilities, sensory disabilities or other)".

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

- 3.16 This change will remove the requirement for a disabled person to compare his or her treatment with that of someone else; namely, show that s/he has been treated less favourably than someone without a disability or with a different disability. Such a change to the law, if implemented, has the potential to help address, in part, the implications of the CJEU *Szpital Kliniczny* ruling.<sup>61</sup>
- 3.17 Further, these recommended changes have already been implemented in Great Britain under the Equality Act 2010. Implementing this change to the disability legislation will not only strengthen rights for disabled people in NI but will help address gaps in protection for disabled people here compared to rights for disabled people in Great Britain under equality law.

### Religious freedom / Manifestation of religious symbols at work

**The ECNI and NIHRC recommend that the NI Executive, and relevant NI Departments, ensure that the Framework Equality Directive (contained in Protocol Annex 1) is interpreted in line with the decision of the CJEU in the cases of *WABE* and *Müller*.**

#### *Supporting rationale*

- 3.18 In relation to developments in the field of religious freedom the research report has identified recent developments in EU case law in relation to religion as a protected characteristic in the context of the Framework Equality Directive.<sup>62</sup>
- 3.19 It states that the CJEU decision in the 2021 joined cases of *WABE and Müller*<sup>63</sup> is significant in relation to its partial clarification of the application of the Framework Equality Directive to the issue of wearing religious symbols in the workplace. The cases concerned (as two joined cases) a special needs carer and a sales assistant, who had both been prevented by their respective employers from wearing an Islamic headscarf on the basis of their respective employers' rules. The former's employer prohibited the wearing of any religious symbols in the workplace. The latter's employer prohibited 'conspicuous or large-sized' symbols.

61 It should be noted that discrimination arising from disability will not occur if the employer or service provider can show that treatment was justified, or that they did not know, or could not reasonably be expected to know, that the person was disabled; therefore, unlike direct discrimination under the Disability Discrimination Act 1995, such treatment can be justified.

62 Council Directive [2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

63 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*')

- 3.20 In the research report, the researchers take the view that at the centre of the cases were the same legal question: “do religious neutrality policies that ban some or all religious symbols constitute discrimination within the European Union’s Framework Equality Directive and, if so, do they constitute indirect or direct discrimination? Whereas the former can be justified by reference to occupational requirements, the latter cannot”.<sup>64</sup>
- 3.21 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.<sup>65</sup>
- 3.22 The CJEU also ruled that the Framework Equality Directive “must be interpreted as meaning that an internal rule of an undertaking prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, does not constitute, with regard to workers who observe certain clothing rules based on religious precepts, direct discrimination on the grounds of religion or belief, for the purpose of that directive, provided that that rule is applied in a general and undifferentiated way”.<sup>66</sup>
- 3.23 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>67</sup>

### Effective judicial protections

**The ECNI and NIHRC 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>68</sup>

64 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 63

65 *WABE and Müller*, para. 73, as noted in the research report, page 68

66 *Ibid.*, para. 74, as quoted in the research report page 68

67 See Equality Commission for Northern Ireland [Dress Code guidance](#)

68 [Charter of Fundamental Rights of the European Union](#) [2012] OJ C326/02.

**Supporting rationale**

- 3.24 The research report has identified recent CJEU case law and legislative advancements which “highlight a continuing emphasis on effective judicial protection within European Union equality law”,<sup>69</sup> as highlighted in the CJEU decision in *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*<sup>70</sup> of 15 April 2021.
- 3.25 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.
- 3.26 As highlighted in the research report, within the judgement the CJEU noted the link between specific protections in the Race Equality Directive,<sup>71</sup> (Articles 7(1) and (2)), and the Charter of Fundamental Rights (Article 47 the right to an effective remedy, as further enshrined in the general principle of effective judicial protection),<sup>72</sup> and therefore that these provisions of the Charter should “determine the interpretation that should be given to the Directive”.<sup>73</sup> The Court further found that although Member States are free to determine what form related procedures and remedies take, it is required that the remedies result in “real and effective judicial protection of the rights that are derived from [the Race Equality Directive]”.<sup>74</sup>
- 3.27 In the research report, the researchers take the view that although the *Braathens* case concerned the Race Equality Directive only, the Court’s reasoning is not necessarily confined thereto,<sup>75</sup> and thus it can be assumed that the need for effective judicial scrutiny in relation to the Race Equality Directive can be extended across the Annex 1 equality directives.
- 3.28 The research report finds that the approach of the Court illustrates that there is a requirement for a review of the remedies available for discriminatory treatment.<sup>76</sup>

69 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 73

70 Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, [EU:C:2021:269](#)

71 Council Directive [2000/43/EC](#) of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

72 Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, [EU:C:2021:269](#), para. 33-34

73 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 74

74 Case C-30/19 *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, [EU:C:2021:269](#), para. 33-34, as quoted on page 74 of the research report

75 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 74

76 Ibid., page 74.

- 3.29 The researchers suggest that “the need for dynamic alignment means that it is advisable to review the remedies available for discrimination in respect of all of the Annex 1 equality directives, to ensure that they are sufficiently dissuasive and that they appropriately designate discrimination as the harm being remedied”.<sup>77</sup>
- 3.30 The CJEU noted that in relation to racial discrimination “access to Court must always be possible in the final instance and the remedies provided must explicitly set out to rectify the discrimination suffered by the victim, as well as being financially dissuasive”.<sup>78</sup>
- 3.31 Potential areas for divergence of rights, as regards effective judicial protections, including in the context of the application of UK-wide legislation, such as the Judicial Review and Courts Act 2022 and the potential reform of the Human Rights Act 1998 are explored in following chapter.<sup>79</sup>

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77 Ibid.

78 Ibid.

79 See paragraph 4.86.



## 4. Avoiding Divergence of Rights

- 4.1 As noted above, the ECNI, NIHRC, and IHREC consider that long-term North-South equivalence is important and that it is essential that NI equality and human rights law keeps pace with changes to equality and human rights law in Ireland, including rights introduced in Ireland as a result of EU laws, that enhance protections introduced on or after 1 January 2021.
- 4.2 Outlined below are a number of our key recommendations which are aimed at avoiding a divergence of rights and protections on the island of Ireland in the area of equality and human rights post Brexit.
- 4.3 They include overarching recommendations, as well as specific recommendations relating to EU law developments and CJEU case law developments in areas beyond the Annex 1 equality directives, which if implemented in NI would enhance equality and human rights.
- 4.4 In addition to the key recommendations set out below, the ECNI and NIHRC have highlighted additional recommendations relating to reform of the equality and human rights legislation so as to address existing gaps in protection between Ireland and NI as well as between GB and NI.<sup>80</sup>

### Ensuring North-South Equivalence

**The ECNI, NIHRC, and IHREC 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 Protocol Annex 1 Directives.**

**The ECNI, NIHRC, and IHREC 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.**

<sup>80</sup> ECNI has set out a range of recommendations for law reform in other areas, including in the area of gender law reform. This has included ECNI recommendations on reform of the definition of gender reassignment. See [ECNI - Law Reform - Addressing Inequality, Equality Commission NI \(equalityni.org\)](#). Other areas of law reform are highlighted in the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission, [Annual Report](#) of the NIHRC and the ECNI on the implementation of Protocol Article 2 2021 – 2022, July 2022.



*Supporting rationale*

- 4.5 While Protocol Article 2 requires that NI equality law keeps pace with any EU changes to the Annex 1 equality directives which enhance protections, there is the potential for equality and human rights on the island of Ireland to diverge after 31 December 2020, particularly in relation to EU laws introduced on or after 1 January 2021, which do not fall within the Annex 1 equality directives.
- 4.6 The Rights, Safeguards and Equality of Opportunity chapter of the Belfast (Good Friday) Agreement has a north-south dimension, which includes the commitment of the Government of Ireland to ensuring an equivalent level of protection of human rights in Ireland as in NI.
- 4.7 The Joint Committee of NIHRC and IHREC believe that it is clear from the context of the provisions and the establishment of the Joint Committee that long-term North-South equivalence was the intention.
- 4.8 In the research report, the researchers take the view that while the non-diminution and ‘keeping pace’ obligations regarding Protocol Article 2 provide some clarity in terms of minimum compliance for the UK Government and NI Executive, they “do not take account of the fact that European Union law works in an integrated fashion and that the operation of Article 2 will rapidly give rise to significant gaps between the law in operation in Northern Ireland and European Union law”.<sup>81</sup> The researchers also take the view that such divergence could hamper the application of the Protocol’s standards.
- 4.9 As the researchers note, in addition to the keeping pace obligation, as matters relating to equality law are devolved, the NI Assembly can choose to voluntarily align with EU developments, even where it is not required to do so under the Withdrawal Agreement.<sup>82</sup>
- 4.10 In its Explainer on Protocol Article 2, the UK Government sets out its view that the 1998 Agreement does not require North-South equivalence of rights and equality protections.<sup>83</sup> However, in the context of the Protocol Article 2 commitment, it also highlighted that “best practices in the area of human rights and equalities in the rest of the UK, the EU and rest of the world will be taken into consideration as the commitment is implemented”.<sup>84</sup>

81 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 115

82 Ibid., page 111

83 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 9.

84 Ibid., at para 7.

- 4.11 The Commissions consider that long-term North-South equivalence is important to ensure there is no diminution of rights in NI and to ensure that human rights and equality protections are subject to continual improvement. The Commissions have continued to recommend that such equivalence is maintained by NI keeping pace with changes to equality and human rights law that enhance protections.<sup>85</sup>

**The ECNI and NIHRC 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 Protocol Article 13(4), with particular consideration being given to alignment of standards across the two jurisdictions on the island of Ireland.**

#### *Supporting rationale*

- 4.12 The UK Government has confirmed its commitment to dynamic alignment with the Annex 1 equality directives to “provide a reassurance that, at the very least, the minimum standard of rights protection required by the listed directives will continue to be relevant in NI” and this will “ensure NI will not fall behind minimum European standards in anti-discrimination law”.<sup>86</sup>
- 4.13 The research report suggested that, in order to ensure gaps do not arise between NI equality and rights legislation and that of the EU, the new EU provisions, such as EU directives, could, on a case-by-case basis, be considered for addition to the list of equality directives within Annex 1. It states that this would, for example, limit divergence of rights on the island of Ireland, and reflect the concept of equivalence under the Belfast (Good Friday) Agreement.<sup>87</sup>
- 4.14 This is in line with Article 13 (4) of the Protocol,<sup>88</sup> which provides a mechanism for consideration and adoption of new EU laws being added to Annex 1 of the Protocol.<sup>89</sup> Under this mechanism, the UK/EU Joint Committee hold an exchange of views on the implications of the new EU law for the proper functioning of the Protocol, and, on agreement, this EU measure could then be added to Protocol Annex 1.

85 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, para 4.20

86 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 12

87 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 110

88 Article 13 (4), [Protocol on Ireland/Northern Ireland to the UK-EU Withdrawal Agreement 2020](#)

89 Article 13(4) states that where new EU law “falls within the scope of this Protocol, but which neither amends nor replaces a Union act listed in the Annexes to this Protocol” the EU shall inform the UK of the adoption of that act via the Joint Committee. The Joint Committee should then hold an exchange of views on the implications of the act for the proper functioning of the Protocol and on agreement could then “adopt a decision adding the newly adopted act to the relevant Annex to this Protocol”. Article 13 (4) also provides additional mechanisms, where agreement is not reached or a decision not made within a reasonable time by the Joint Committee.

- 4.15 The research report notes that the potential benefits of adding to the Annex 1 equality directives will vary and should be considered on a case-by-case basis, and points to a number of factors that should be considered should new measures be added, or indeed should NI law voluntarily align with EU law:

“...including the workability of the proposal in light of Northern Ireland law (including the elements of European Union law operating within it), and the degree of alignment which is enabled across neighbouring legal systems”.<sup>90</sup>

- 4.16 Further, additional factors to be considered, as regards the addition of new measures and the need for voluntarily alignment, include ensuring the adoption of best practice and compliance with international obligations relating to equality and human rights.
- 4.17 To assist with this process, the Commissions consider it would be value if the European Commission would publish on an annual basis a summary of key EU legislative and /or policy developments likely to be of relevance to the promotion of equality and human rights in NI.

**The ECNI and NIHRC 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 Protocol Article 2.**

#### *Supporting rationale*

- 4.18 As noted above, under Protocol Article 2 the protections afforded under the six equality directives in Annex 1 are subject to dynamic alignment, or a ‘keeping pace’ obligation.
- 4.19 To assist in meeting these obligations, the research report recommended that a new Memorandum of Understanding/s (MoU) is agreed between the UK Government and the NI Executive, which would clarify when/how the UK Government and NI Executive will engage with both compliance and voluntary alignment issues between NI and EU law relevant to Protocol Article 2.<sup>91</sup>
- 4.20 The research report also indicated that an MoU between the UK Government and the NI Executive, could clarify when the UK Government will seek to use its powers to legislate and intervene to prevent prolonged periods in which Protocol Article 2 obligations are not fulfilled in the event of impasses in the devolved process.

90 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, pages 111-112

91 Ibid., page 111

- 4.21 The report identifies that there is a need for the UK Government to make explicit the circumstances in which it will intervene to protect the rights and equalities protections under Protocol Article 2, to provide “an effective safety net”<sup>92</sup> should for any reason the Northern Ireland Executive/Assembly be unable or unwilling to do so, including when the Executive is functioning.<sup>93</sup>
- 4.22 The ECNI and NIHRC consider that the establishment of such an MoU would be beneficial in clarifying when the UK Government will act to ensure compliance with Protocol Article 2.
- 4.23 The research report notes that the relationship between the UK Government and NI Executive is significant in ensuring that Protocol Article 2 protections are safeguarded.<sup>94</sup> It also highlights that the “interplay” between the UK Government and NI devolved institutions is significant.<sup>95</sup> This aligns with the Commissions’ views that there can areas of law that relate to both devolved and excepted matters; for example, as made clear by the Commissions in their views on the compliance of the Nationality and Borders Bill 2022 with Protocol Article 2, and where the Commissions highlighted that immigration law is an excepted matter, yet trafficking is devolved matter.<sup>96</sup>
- 4.24 Further, an MoU between the UK Government and the NI Executive should make explicit commitments on maintaining voluntary alignment between NI and EU law, relevant to Protocol Article 2, particularly in relation to mirroring developments in EU equality/rights legislation and in relation to North-South equivalence.
- 4.25 As noted by the research report, equality issues are generally a devolved responsibility, and that legislation passed by the NI Assembly can mirror developments in EU law, even when it is not required to do so by the Withdrawal Agreement.<sup>97</sup> As such the UK Government and NI Executive should make it explicit how each will ensure this is achieved, where necessary.
- 4.26 Further, the MOU should make explicit the obligations placed on the UK Government and The Executive Office to respond to the ECNI’s and NIHRC’s recommendations, including on ensuring compliance and voluntary alignment with EU law relevant to NI under Protocol Article 2.

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92 Ibid., page 118

93 Ibid.

94 Ibid., page 110

95 Ibid.

96 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)

97 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 110

- 4.27 The research report highlights that the ECNI and NIHRC, as statutory bodies who have been granted powers to monitor, supervise, advise, enforce, and report on the Protocol Article 2 commitment, are best placed to make recommendations to the UK Government and NI Executive regarding this.<sup>98</sup>
- 4.28 Further a report issued by the ECNI and /or NIHRC relating to Protocol Article 2<sup>99</sup> may require the Secretary of State or The Executive Office (TEO) 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”. As such, an MoU should explicitly reflect these specific obligations of both the UK Government and the TEO to respond to the ECNI’s and NIHRC’s recommendations.

## EU Law Developments

- 4.29 Highlighted below are a number of areas where there is a potential for equality and human rights to diverge on the island of Ireland as a result of changes in EU laws that have occurred on or after 1 January 2021, or due to potential future changes to EU laws.
- 4.30 In particular, there are already a number of proposed EU laws, and/or EU laws which were not transposed into NI law prior to 31 December 2020, that have the potential to strengthen equality and human rights. Under the Protocol there is no requirement for the UK Government to keep pace, in terms of equality and human rights law in NI, with any changes arising as a result to these actual and/or proposed EU laws, if introduced; apart from changes to EU law that amend or replace provisions in the Protocol Annex 1 equality directives.
- 4.31 In summary:

**The ECNI and NIHRC recommend that the UK Government, NI Executive and relevant NI Departments, incorporate the following measures into domestic law in NI so as to strengthen equality and human rights in NI in line with international human rights best practice and to avoid a divergence of rights on the island of Ireland.**

<sup>98</sup> Ibid., page 112

<sup>99</sup> Report issued under [subsection 2 Section 78A and 78B of the NI Act](#)

**Age discrimination - goods, facilities and services**

**The ECNI and NIHRC 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.**

*Supporting rationale*

- 4.32 The research report states that in NI, unlike both Great Britain and Ireland, there is no general protection against discrimination based on age in relation to the access to goods, facilities, and services.<sup>100</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.
- 4.33 There is also a draft EU Directive (the Horizontal Directive)<sup>101</sup> on prohibiting age discrimination in access to goods, facilities, and services, as well as discrimination on other equality grounds, such as religion and belief, which has yet to be finalised and brought into force. If introduced, the UK, including NI would have had to implement this Directive if the UK had not left the EU.
- 4.34 Further, as the draft EU Directive was first introduced in 2008 and there is no imminent date for its finalisation or implementation, it is important that NI legislation that implements this legislation advances regardless of whether or not this Directive is adopted by the EU, so as to strengthen rights and align with international human rights best practice in this area.
- 4.35 Protocol Article 2 provides specific protection against discrimination as enshrined in the six directives listed in Annex 1 of the Protocol, including the Employment Equality (Framework) Directive which protects against discrimination on the grounds of age in employment.<sup>102</sup>
- 4.36 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. This obligation also includes monitoring current and future CJEU case law. Both Commissions have called for the NI Executive to introduce specific legislation which will extend protection against age discrimination in the provision of goods, facilities, and services. As, in general, there is protection against age discrimination for adults in Great Britain and Ireland, this would avoid the continuing divergence of rights and ensure that Northern Ireland keeps pace with British, Irish and potentially European law in relation to age discrimination in the provision of goods, facilities and services in NI.

100 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, pages 38-39

101 European Union, [Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation](#), 2008

102 [Directive 2000/78/EC](#), 'EU Council Directive on establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000



- 4.37 The adoption of such legislative protections would mean that individuals in NI would have protection against unjustifiable discrimination on the grounds of their age outside the workplace. Currently protection against unlawful discrimination on the grounds of age in NI is limited to the fields of employment and occupation.<sup>103</sup>
- 4.38 In June 2016, the United Nations Convention on the Rights of the Child (UN CRC) Committee recommended that the UK Government and the NI Executive “consider the possibility of expanding legislation to provide protection of all children under 18 years of age against discrimination on the grounds of their age”.<sup>104</sup>
- 4.39 The ECNI and NIHRC have consistently called for the urgent reform of equality legislation in NI to strengthen protection for all ages and has made recommendations for change to the age discrimination legislation relating to the provision of goods, facilities, and services.<sup>105</sup> ECNI has called for legislation to be introduced in NI in order to keep pace with changes to the law in Great Britain, and that individuals have increased protection against discrimination on the grounds of age by those providing goods, facilities, services, including health and social care; financial services; the exercise of public functions by public bodies; private clubs and associations; charities; accommodation.<sup>106</sup>
- 4.40 The NIHRC has called for extended protection against age discrimination in the provision of goods, facilities and services and that this legislation provides protection to all children under 16 years of age against discrimination on the grounds of their age.<sup>107</sup>
- 4.41 Such reform will limit divergence not only with Great Britain, but also Ireland as EU legislation on the issue develops. As stated in the research report,<sup>108</sup> in Ireland age is a protected characteristic under the Equal Status Acts 2000-2018,<sup>109</sup> which prohibits discrimination against adults on the grounds of age in the disposal of goods and the provision of services.<sup>110</sup>

103 Equality Commission for Northern Ireland, [Strengthening Protection for all Ages Ending Age Discrimination in the Provision of Goods and Services Proposals for Reform – Full Report](#), April 2012, page 3

104 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

105 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

106 Equality Commission for Northern Ireland, [Age Equality Policy Priorities and Recommendations](#), December 2017, page 5

107 Northern Ireland Human Rights Commission, [The 2021 Annual Statement: Human Rights in Northern Ireland](#), December 2021, pages 39-40

108 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 39

109 [Equal Status Act 2000](#), s. 3(2)(f)

110 [Equal Status Act 2000](#), s. 5



## Gender pay transparency

The ECNI and NIHRC recommend that The Executive Office commit to ensuring that, to the extent that the EU Pay Transparency Directive, if introduced, amends or replaces the Gender Equality (Employment) Directive,<sup>111</sup> the law in NI is amended to keep pace with that change.

The ECNI and NIHRC further recommend that, regardless of whether or not required to under the ‘keeping pace’ requirement associated with Protocol Article 2, the NI Executive should ensure that NI law voluntarily aligns with changes that enhance equality and human rights protections further to the Pay Transparency Directive, if introduced.

### *Supporting rationale*

- 4.42 The research report has 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>112</sup>
- 4.43 In March 2021 the EU proposed a directive which aims 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.<sup>113</sup> Under this directive, EU Member States would be required to report “on the pay gap between female and male workers. This provision requires employers with at least 250 workers to make publicly available and accessible certain information such as the pay gap between female and male workers in their organisation”.<sup>114</sup>
- 4.44 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>115</sup> It has also been recommended by the UN Committee on the Elimination of Discrimination against Women (CEDAW) that these provisions are brought into effect in Northern Ireland.<sup>116</sup> CEDAW recommends that the UK Government should:

111 Directive [2006/54/EC](#) of 5 July 2006 on equal opportunities and equal treatment of women and men in employment and occupation

112 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, pages 38, 47

113 Proposal for a Directive of The European Parliament and of the Council 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 mechanism ([COM/2021/93 final](#))

114 Ibid, Article 8 of Chapter II, Pay Transparency

115 Equality Commission for Northern Ireland, [Gender Pay Strategy and Pay Reporting - Policy Recommendations](#), August 2019

116 UN CEDAW Committee (2019), [CEDAW Concluding observations on the eight periodic report of United Kingdom of Great Britain and Northern Ireland](#)

“Ensure that the provisions regarding mandatory pay gap reporting in the Employment Act (Northern Ireland) 2016 is brought into effect in Northern Ireland”.<sup>117</sup>

- 4.45 In July 2021 the Irish Government introduced the Gender Pay Gap Information Act 2021 which requires organisations with over 250 employees to report their hourly gender pay gap across a range of metrics from 2022.<sup>118</sup> This requirement will extend to organisations with more than 150 employees from 2024, and those with more than 50 employees from 2025.<sup>119</sup>
- 4.46 In Great Britain, the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 impose obligations on employers with 250 or more employees to publish information relating to the gender pay gap in their organisation.<sup>120</sup> Unlike Great Britain and Ireland, there are no requirements on gender pay gap reporting in NI with the NI Executive, to date, not enacting Section 19 of the Employment Act (NI) 2016<sup>121</sup> which would have implemented pay transparency obligations. This has resulted in a divergence of rights across the island of Ireland with NI legislation failing to reflect developments in Great Britain<sup>122</sup> and Ireland.
- 4.47 The ECNI and NIHRC are currently considering the extent to which this proposed Directive amends or replaces the Gender Equality (Employment) Directive<sup>123</sup> in Annex 1 of the Protocol. Considerations include the legal basis for this new measure; the purpose of the new measure; the degree of overlap on the 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.
- 4.48 In line with the ‘keeping pace’ obligation in Protocol 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>124</sup>

117 Ibid, [para 43\(c\)](#)

118 [Gender Pay Gap Information Act 2021](#)

119 [Gender Pay Gap Information Act 2021](#), 2(c)

120 [The Equality Act 2010 \(Gender Pay Gap Information\) Regulations 2017](#)

121 [Employment Act \(Northern Ireland\) 2016](#), Section 19. The Act also places a duty on a government department to develop the regulations and publish a gender pay strategy and action plan within 18 months of the Act receiving Royal Assent.

Section 19 of the Employment Act (Northern Ireland) 2016 relates to gender pay gap reporting and includes requirements for employers to publish information, including whether “there are differences in the pay of male and female employees” Equality Commission for Northern Ireland, [Gender Pay Strategy and Pay Reporting – Policy Recommendations](#), August 2019, page 8

122 [Directive 2000/78/EC, ‘EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation’](#), 27 November 2000.

124 Article 13(3), [Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement](#).

- 4.49 It is therefore essential that The Executive Office tracks and monitors the passage of the draft Pay Transparency Directive, so as to ensure that, if introduced, and if it amends or replaces the Gender Equality (Employment) Directive,<sup>125</sup> that the law in NI is amended to keep pace with that change.
- 4.50 In addition to ensuring law in NI is amended to keep pace with any such changes, the Commissions would encourage The Executive Office in the development of any legislation introducing requirements relating to gender pay gap reporting, to ensure that it reflects international human rights best practice and standards, and where necessary, go beyond protections in Great Britain, where this is needed to ensure robust rights and protections.
- 4.51 Both Commissions continue to raise these existing recommendations with The Executive Office and relevant departments.<sup>126</sup>

### Binding standards for equality bodies

**The ECNI and NIHRC recommends that the NI Executive Office, 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.**

**The ECNI and NIHRC further recommend that, regardless of whether or not required to under the ‘keeping pace’ requirement associated with Protocol Article 2, the NI Executive should ensure that NI law voluntarily aligns with changes that strengthen the ECNI further to the EU directives on standards for equality bodies, if introduced.**

### *Supporting rationale*

- 4.52 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>127</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>128</sup>

125 Directive [2006/54/EC](#) of 5 July 2006 on equal opportunities and equal treatment of women and men in employment and occupation

126 Equality Commission for Northern Ireland and the 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 paras 4.267-4.268

127 [Equality bodies – binding standards \(europa.eu\)](#)

128 Ibid.

- 4.53 Reference to equality bodies was first included in the Race Equality Directive<sup>129</sup> (2000/43/EC), an Annex 1 directive. The Race 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.
- 4.54 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>130</sup> the Gender Equality Directive in the field of employment<sup>131</sup>; and the Gender Equality Directive in the field of self-employment.<sup>132</sup>
- 4.55 In December 2022, the European Commission published its proposals on two Directives on standards for equality bodies.<sup>133</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. 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>134</sup>
- 4.56 The ECNI and NIHRC recognise 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.

129 Council Directive [2000/43/EC](#) of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

130 [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

131 [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)

132 [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

133 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.

134 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 112

- 4.57 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 Protocol 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.
- 4.58 The ECNI has welcomed the European Commission's initiative and responded to their call for feedback and public consultation.<sup>135</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>136</sup>
- 4.59 It is essential that the 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 amended to keep pace with those changes that amend or replace an Annex 1 Directive/s.
- 4.60 In addition, regardless of whether or not required to under the 'keeping pace' requirement associated with Protocol Article 2, the Commissions would encourage the Executive Office to ensure that NI law *voluntarily* 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.

### Disability and older people rights - EU Accessibility Act

**The ECNI and NIHRC recommend that the NI Executive, and relevant NI Departments, including the Department for Communities, Department for the Economy and The Executive Office should ensure that NI law voluntarily aligns with the provisions of the EU Accessibility Act which enhance protections for people with disabilities and older people in NI.**

#### *Supporting rationale*

- 4.61 The 2019 European Accessibility Act (EAA) is an EU Directive that aims to "improve the functioning of the internal market for accessible products and services, by removing barriers created by divergent rules in Member States".<sup>137</sup> It will benefit people with disabilities and older people including

135 Equality Commission for Northern Ireland's response to the European Commission's public consultation on Binding standards for Equality Bodies, 16 March 2022

136 Equinet, [Developing Standards for Equality Bodies: An Equinet Working Paper](#), 4 November 2016

137 [European accessibility act - Employment, Social Affairs & Inclusion - European Commission \(europa.eu\)](#)

through more accessible products and services, accessible products and services at more competitive prices and fewer barriers to accessing transport, education.<sup>138</sup>

- 4.62 As the deadline for Member States to implement the provisions of the Act was 28 June 2022 (to become effective by 2025), the UK Government was not required to transpose the European Accessibility Act into domestic legislation. Following its departure from the EU, and provisions included within the Withdrawal Act 2020, the UK Government no longer has an obligation to adopt the directive into national legislation. 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.
- 4.63 Further, as noted in the research report it will be adopted in Ireland, therefore creating a potential divergence of rights between Ireland and NI for people with disabilities and older people.<sup>139</sup>
- 4.64 The research report recognises that the European Accessibility Act does not fall directly under the Protocol Article 2 commitment; however, it is relevant due to its impact for people with disabilities and older people.<sup>140</sup>

## Work-life balance

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

### *Supporting rationale*

- 4.65 In 2019 the European Parliament adopted a Directive on work-life balance (Work-life Balance Directive) for parents and carers,<sup>141</sup> which aims to improve families' access to family leave and flexible work arrangements. The Work-life Balance Directive introduces a set of legislative actions designed to modernise the existing EU legal and policy frameworks, to better support a work-life balance for parents and carers, encourage a more equal sharing of parental leave between men and women, and to address women's underrepresentation in the labour market.<sup>142</sup> The Work-life Balance Directive

<sup>138</sup> [Ibid.](#)

<sup>139</sup> S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 104

<sup>140</sup> [Ibid.](#), page 104

<sup>141</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>142</sup> [EU Work-life Balance Directive enters into force - Employment, Social Affairs & Inclusion - European Commission \(europa.eu\)](#)



was due to have been transposed by EU Member States by August 2022;<sup>143</sup> though there is an extended transposition period to August 2024 regarding the Directive's new paid leave requirements.

- 4.66 Following its departure from the EU, and provisions included within the Withdrawal Act 2020, the UK no longer has an obligation to adopt/transpose the directive into national legislation. However, the UK Government along with the NI Assembly, could choose to do so 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<sup>144</sup> that enhance equality and human rights and which are not already transposed into domestic legislation.
- 4.67 A provision of the directive that has not been reflected in NI law includes two months of non-transferable parental leave.<sup>145</sup> The Work and Families (Northern Ireland) Act 2015 introduced shared parental leave and statutory shared parental pay in NI. This enables the voluntary sharing of leave and pay entitlements between parents following the birth or adoption of a child<sup>146</sup> and exceeds the four months' minimum set out in the Directive.<sup>147</sup> However, this legislation does not currently make any provisions relating to non-transferable leave.
- 4.68 The CEDAW Committee (2019) has recommended to the UK Government that, particularly in NI, the UK Government should ensure:
- “...further incentives to encourage men to take parental leave, such as non-transferrable leave, and encourage men to participate equally in childcare responsibilities”.<sup>148</sup>
- 4.69 It is important to note that the Work-life Balance Directive repeals and replaces the 2010 Council Directive 2010/18/EU<sup>149</sup> which implemented the revised Framework Agreement on parental leave (Parental Leave Directive). Although this is not a directive listed under Protocol Annex 1, the ECNI and NIHRC consider that the Parental leave Directive falls within the scope of the UK Government's non-diminution commitment under Protocol Article 2.

143 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 77

144 Directive [2019/1158/EU](#) of the European Parliament and of the Council of 20 June 2019 work-life balance for parents and carers

145 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 77

146 [Work and Families Act \(Northern Ireland\) 2015](#), Chapter 1B Shared Parental Leave

147 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 77

148 UN CEDAW Committee (2019), [CEDAW Concluding observations on the eight periodic report of United Kingdom of Great Britain and Northern Ireland, para 45\(c\)](#)

149 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



This has also been recognised by the UK Government in its Explainer document on Protocol Article 2.<sup>150</sup>

- 4.70 The ECNI and NIHRC consider that the failure by the NI Assembly to transpose the provisions of the Work-life Balance Directive<sup>151</sup> which do not already exist in domestic legislation would result in NI being in the position of continuing to mirror the aims of the Parental Leave Directive, even though it has been replaced by the Work-life Balance Directive.
- 4.71 As an EU Member State, Ireland is required to adopt the provisions of the Work-life Balance Directive, as a minimum standard. As the provisions of the Work-life Balance Directive are implemented this could lead to a disparity and divergence of rights on the island of Ireland – if similar provisions are not implemented in NI.<sup>152</sup>
- 4.72 The ECNI and NIHRC therefore call for the NI Assembly to legislate where necessary to implement the provisions of the Work-life Balance Directive which enhance rights; noting that the date by which the Work-life Balance Directive was due to be adopted by EU Member States was August 2022.<sup>153</sup> This includes amending the Work and Families (Northern Ireland) Act 2015 to provide for a non-transferable period of parental leave provision of at least two months, compensated at least at the level of statutory sick pay aligned to provisions in the Work-life Balance Directive.
- 4.73 It is the view of the research report that should the NI Assembly adopt these,<sup>154</sup> this will promote uptake by ensuring the leave provision is incentivised.<sup>155 156</sup>
- 4.74 In line with the aims of the Work-life Balance Directive such a provision could positively contribute to addressing some of the key barriers to the full and equal participation of women in employment, often primary carers, by encouraging an equal sharing of parental leave between parents and addressing the underrepresentation of women in the labour market.<sup>157</sup>

150 [Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland](#), 7 August 2020

151 Directive [2019/1158/EU](#) of the European Parliament and of the Council of 20 June 2019 work-life balance for parents and carers

152 Work Life Balance and Miscellaneous Provisions Bill 2022 passed Dail's second stage on 12/10/22. [Work Life Balance and Miscellaneous Provisions Bill 2022 – No. 92 of 2022](#) – Houses of the Oireachtas

153 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 77

154 Ibid.

155 UK Government Equalities Office, [What motivates employers to improve their Shared Parental Leave and pay offers?](#) Page 19, April 2020

156 Without providing sufficient, higher than statutory compensation such measures do not sufficiently provide incentives for take-up and incentivising take up amongst secondary earners in the household. Uptake rates of shared parental leave in the UK remains low, particularly amongst men. See UK Government Equalities Office, [What motivates employers to improve their Shared Parental Leave and pay offers?](#) Page 19, April 2020

157 European Commission, Employment, Social Affairs & Inclusion, News: [EU Work-life Balance Directive enters into force](#) 22/08/2019

## CJEU Case Law Developments: Non – Protocol Annex 1 Directives

### Introduction

- 4.75 Outlined below are our recommendations relating to CJEU case law developments after 31 December 2020 in the field of equality and human rights that *go beyond* the scope of the Annex 1 equality directives, and 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.
- 4.76 Aligned to our overarching recommendations on avoiding a divergence of rights on the island of Ireland, set out above, **we recommend** that the NI Assembly, NI Executive, and relevant NI departments enact legal changes in line with international human rights best practice and to reflect the following developments in CJEU case law on equality and rights where they enhance equality and human rights in NI.

### Migrants' rights

**The ECNI and NIHRC 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 and as a matter of best practice.**

#### *Supporting rationale*

- 4.77 The research report identifies that in the area of migration law there have been developments in EU equality and human rights case law, in areas beyond the Annex 1 equality directives protection; specifically pertaining to the Charter of Fundamental Rights Article 1 commitment to human dignity.<sup>158</sup>
- 4.78 It highlights CJEU judgements relating to the Citizens' Rights Directive (Directive 2004/38/EC)<sup>159</sup> which it states underscore the need for migrants in NI to have access to the benefits required to have a "minimally dignified standard of living",<sup>160</sup> as required under Article 1 of the Charter of Fundamental Rights.<sup>161</sup>

158 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 91

159 [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.

160 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 98

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

- 4.79 In particular, it highlighted the case of *Land Oberösterreich v KV*<sup>162</sup> of 10 June 2021, which concerned the issues of racial discrimination and migrant exceptions. Specifically, the Court considered the compatibility of Citizens' Rights Directive and Article 21 of the Charter of Fundamental Rights<sup>163</sup> with a "requirement that third country nationals prove basic language proficiency as a condition of eligibility for housing benefit, when this condition did not apply to European Union citizens".<sup>164</sup>
- 4.80 The research report notes that the case makes a significant contribution to the EU's approach towards the rights of migrants. It states that the Court considered, within the meaning of Citizens' Rights Directive, that housing benefit was likely to amount to a 'core benefit' under Article 11(4) of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents;<sup>165</sup> as housing benefit makes an important contribution to the objective of the Directive of social integration by ensuring a decent standard of living above the poverty line.<sup>166</sup>
- 4.81 The Court also "agreed with the Advocate General that the Directive requires the disbursement of benefits required to ensure a dignified standard of living, as it should be interpreted in line with Article 1 of the Charter (the right to human dignity)".<sup>167</sup>
- 4.82 The research report also notes a further CJEU case which underscores these conclusions; namely, the case of *CG v The Department for Communities in Northern Ireland*<sup>168</sup> which related to entitlement to the Universal Credit benefit by an EU citizen with pre-settled status under the EUSS. It states that the "Court held that the United Kingdom could not exclude from a subsistence benefit such as Universal Credit a European Union citizen without sufficient resources to whom it had granted a right to reside, solely on the basis of her nationality".<sup>169</sup> The Court also found that the benefit was also essential to ensure a dignified standard of living (protected under Article 1 of the Charter).<sup>170</sup>

162 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 85

163 Article 21 (non-discrimination) of the [Charter of Fundamental Rights](#): "1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited."

164 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 85

165 Ibid.

166 Judgment of 10 June 2021 in Case C-94/20, *Land Oberösterreich v KV*, [EU:C:2021:477](#), para. 42 (see also para. 59 of the Opinion).

167 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 85

168 Ibid., page 86

169 Ibid.

170 Case C-709/20, *CG v The Department for Communities in Northern Ireland*, [ECLI:EU:C:2021:602](#), para 89

## Effective judicial protection

**The ECNI and NIHRC 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.**

### *Supporting rationale*

- 4.83 The research report has highlighted that recent CJEU case law, such as the *Appointment of Judges* case,<sup>171</sup> has made effective judicial protection as an enforceable right stronger and more significant by asserting the connections to EU human rights law, including Article 47 of the Charter.<sup>172</sup> The research report further notes that Article 47 (Right to an effective remedy and to a fair trial)<sup>173</sup> “is becoming a significant supplementary ground in various areas of human rights litigation, such as to support free movement rights for dual citizens, and to challenge delays in a criminal trial process”<sup>174</sup> and that the CJEU “has shown considerable willingness to affirm a right to judicial review across these cases”.<sup>175</sup>
- 4.84 The research report states 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”. Aligned to the Commissions’ views, it further states that: “As such, effective judicial protection must be viewed as inherent in the concepts of ‘safeguards’ and ‘civil rights’ within this section of the 1998 Agreement”.<sup>176</sup>
- 4.85 As regards potential areas of divergence of rights, the researchers were of the view, for example, that it is essential to ensure that the application of UK-wide legislation, such as the Judicial Review and Courts Act 2022 and 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; though it notes that the exclusion of NI from the effect of certain provisions of the Judicial Review and Courts Act 2022 potentially reflects this priority.

171 Case C-824/18, A.B. and Others v Krajowa Rada Sądownictwa and Others, [EU:C:2021:153](#).

172 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 87

173 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.”

174 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 87

175 Ibid.

176 Ibid., page 88

- 4.86 As regards proposed reforms in these areas, the ECNI has recommended in relation to Human Rights Act reform, and the Bill of Rights Bill, that the UK Government should not introduce an additional permission stage when individuals wish to bring a human rights claim, in relation to civil law claims with a human rights element.<sup>177</sup> The NIHRC is concerned that any weakening of the protection of rights and safeguards in the Human Rights Act will create uncertainty and confusion, making the interpretation of Protocol Article 2 more challenging and may lead to a culture shift that will further reduce the robustness of human rights protections in NI.
- 4.87 As regards individual rights under Protocol Article 2, the Commissions welcome the UK Government's recognition that Protocol Article 2 has direct effect and that individuals can invoke their rights under Protocol Article 2 in UK Courts.<sup>178</sup> The NI High Court has also recognised that "Article 2 has direct effect and legal persons ... are able to rely on it in domestic courts".<sup>179</sup>
- 4.88 Further, the Commissions take the view that a GFA-protected right, for example, the right relating to 'non-discrimination', is underpinned not only by the substantive rules of EU law, but also the EU rules concerning how that right is enforced and available remedies; for example, the right to secure damages for breach of an EU rule by the state. Any removal of available remedies, or changes which limit how a right is enforced, would constitute a diminution of that right. The Commissions consider that the non-diminution obligation under Protocol Article 2 applies not only to the substantive rights but also to how those rights are enforced and available remedies.<sup>180</sup>

**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.**

### *Supporting rationale*

- 4.89 Protocol Article 2 is framed within the wider context of EU legal obligations, which are woven through the Withdrawal Agreement. The UK Government has recognised that it is "obliged to ensure that holders of relevant rights are able to bring challenges before domestic courts and ... that appropriate remedies are available".<sup>181</sup>

177 [Written evidence from Equality Commission for Northern Ireland](#) to the Joint Committee on Human Rights call for evidence - Legislative Scrutiny: Bill of Rights Bill, August 2022

178 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), para 29.

179 *Re SPUC Pro-Life Limited* [2022] NIQB 9, at para 77.

180 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

181 Ibid.



- 4.90 The UK-EU Withdrawal Agreement requires that UK law provide for individual redress where a person feels that there has been a diminution of rights, safeguards and equality of opportunity protections in Protocol Article 2 and that this is given effect in UK law.<sup>182</sup>
- 4.91 As mentioned above, the ECNI and NIHRC welcome the UK Government's recognition that Protocol Article 2 has direct effect and that individuals can invoke their rights under Protocol Article 2 in UK courts.<sup>183</sup> The NI High Court has also recognised that "Article 2 has direct effect and legal persons ... are able to rely on it in domestic courts".<sup>184</sup>
- 4.92 On the broader point, in terms of ensuring there is no diminution in how EU rights falling within the scope of Protocol Article 2 are enforced or on the right to secure remedies for a breach of those rights, the Commissions consider that, since Protocol Article 2 requires no diminution in terms of access to remedies, entitlement to compensation must continue to be available under NI law where there is a breach of rights within the scope of Protocol Article 2.
- 4.93 The researchers' findings align with the Commissions' view that, by virtue of Article 4 of the Withdrawal Agreement and Section 7A of the EU (Withdrawal) Act, the limitation in Schedule 1(4) of the EU (Withdrawal) Act does not apply in relation to rights within the scope of Protocol Article 2.
- 4.94 The researchers also consider that the Protocol Article 2 non-diminution commitment is not 'static' – "while it only captures the interpretation of European Union law that existed before the end of the transitional period, its application is intended to be prospective".<sup>185</sup>
- 4.95 Drawing on the findings of the research report, the Commissions take the view that people should be able to access - as a minimum - compensation for breaches of their rights within the scope of Protocol Article 2 which occurred prior to the end of Brexit transition period.<sup>186</sup>
- 4.96 The research report refers to the outcome of the CJEU VI case<sup>187</sup> 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

182 Article 4(1), UK-EU Withdrawal Agreement

183 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), para 29

184 [Re SPUC Pro-Life Limited \[2022\] NIQB 9](#), at para 77

185 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 90

186 Ibid.

187 Case C247/20 VI v Commissioners for Her Majesty's Revenue & Customs, [EU:C:2022:177](#)

in relation to the Citizens Rights Directive.<sup>188</sup> It is 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 health and social care benefits, in the same way as UK and Irish citizens can.<sup>189</sup>

- 4.97 The research report also makes the case that “there is a strong case that rights regarding health care and benefits such as those at stake in VI (Child Tax Credit and Child Benefit) fall within the 1998 Agreement’s concept of a right to ‘equal opportunity in all social and economic activity’”.<sup>190</sup> In light of the VI case the Home Office has updated its guidance in relation to the provision of health care for EEA nationals.<sup>191</sup>
- 4.98 The research report also concludes more generally 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 Citizens Rights Directive even after the end of the transitional period, provided their residency commenced during or before the transitional period.”<sup>192</sup>

## Wider Equality and Human Rights Developments

### Disability rights

**The ECNI and NIHRC recommend that the UK Government and NI Executive give effect to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in domestic legislation.**

#### *Supporting rationale*

- 4.99 The ECNI and NIHRC are jointly designated as the ‘independent mechanism’ to promote, protect and monitor implementation of the UNCRPD in Northern Ireland, and report on this to the UN Committee.<sup>193</sup>
- 4.100 Research commissioned by the ECNI has highlighted areas of substantial shortfalls in public policy and programme delivery in Northern Ireland relative to the key requirements of the UNCRPD,<sup>194</sup> and identified that

188 [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

189 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 91

190 The researchers argue that “the limitations in the UK’s withdrawal legislation could thus be considered breaches not only of the Withdrawal Agreement but also of the Protocol, as they result in a remedial diminution of rights falling within the scope of Article 2”. Ibid., page 90.

191 See Home Office: [European Economic Area nationals: qualified persons, version 9.0, 31 October 2022](#) and Josie Laidman. [Home Office guidance update: the NHS and comprehensive sickness insurance for EEA nationals](#), Freemovement blog, 2 November 2022

192 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 90

193 IMNI, [ECNI - International Monitoring Mechanism - UNCRPD \(equalityni.org\)](#)

194 Disability Action, commissioned by ECNI, [Disability Programmes and Policies: How Does Northern Ireland measure up?](#) January 2012



“if properly incorporated within domestic law in NI, the UNCRPD would provide an extensive network of rights which would protect and empower disabled people”.<sup>195</sup>

- 4.101 The UK Independent Mechanism (UKIM)<sup>196</sup> submission (2017)<sup>197</sup> on the UNCRPD highlighted that the UK and devolved governments have not taken all the appropriate steps to progress implementation of the UN CRPD. It noted that uncertainty about the future of human rights legislation, as well as the UK’s planned withdrawal from the EU, posed risks to disabled people’s rights. UKIM highlighted that clear action plans were needed by the UK and devolved governments to meet CRPD requirements.
- 4.102 Further, the ECNI and NIHRC have made a number of recommendations relating to the need for NI’s disability legislation<sup>198</sup>, as well as other equality legislation, to be harmonised, simplified and strengthened, and considers that the proposed or recommended changes are in keeping with the UK Government’s international obligations under the UNCRPD.<sup>199</sup>
- 4.103 Research commissioned by ECNI has noted that the lack of progress to incorporate the UNCRPD into law is linked to continuing delays in the development and implementation of subsequent disability strategies and an absence of progressive change to improve the lives of deaf and disabled people.<sup>200</sup>
- 4.104 The NI High Court has recognised that the UNCRPD is an integral part of the EU legal order and is “relevant for the purposes of determining whether subsequent actions by the UK constituted a diminution from rights protected that existed prior to UK Exit”.<sup>201</sup>
- 4.105 The UK is bound to give effect to the UN CRPD in UK law, but the UN CRPD has not been incorporated directly into domestic law in the UK, including NI. However, the UNCRPD was incorporated into the EU legal order, but only to the extent that it was within EU competence. The definition of EU law within the UK-EU Withdrawal Agreement includes those international agreements to

195 Disability Action, commissioned by ECNI, [Progress Towards the Implementation of the UNCRPD in Northern Ireland](#), February 2022, page 53

196 In 2009 the UK Government designated the Equality and Human Rights Commission (EHRC), ECNI, NIHRC, and the Scottish Human Rights Commission (SHRC) as UKIM under Article 33 of the CRPD.

197 UK Independent Mechanism, [Disability Rights in the UK: Updated submission to the UN Committee on the Rights of Persons with Disabilities in advance of the public examination of the UK’s implementation of the UN CRPD](#), July 2017.

198 See, for example, Equality Commission for Northern Ireland, [Strengthening Protection for Disabled People Proposals for Reform - Full report](#), March 2012

199 Northern Ireland Human Rights Commission ‘[The 2022 Annual Statement - Human Rights in NI](#)’ (NIHRC, 2022); [NIHRC and ECNI Annual Report of the NIHRC and ECNI on the implementation of Protocol Article 2 2021 – 2022](#) (ECNI and NIHRC, 2022)

200 Nuala Toman, Tony O’Reilly, Michael McConway, Andrew Hamilton, Emma O’Neill, Commissioned by ECNI, [Progress Towards the Implementation of the UNCRPD in Northern Ireland](#), February 2022, page 15

201 [Re SPUC Pro-Life Limited \[2022\] NIQB 9](#), paras 105-106

which the EU is party.<sup>202</sup> The UNCRPD is part of NI domestic law as a result of the Withdrawal Agreement, to the extent that it was within EU competence prior to the UK leaving the EU. Therefore, the UN CRPD is relevant for the interpretation of the Annex 1 equality Directives and the EU law underpinning rights within the scope of Protocol Article 2.

- 4.106 The research report highlights the European Parliament resolution (2021) on establishing a general framework for equal treatment in employment and occupation in light of the UNCRPD which requires EU Member States to ensure full integration and compliance with the UNCRPD and to propose legislation to protect the rights of people with disabilities, which extends the protections afforded by the Framework Equality Directive.<sup>203 204</sup>
- 4.107 Incorporating UNCRPD rights into domestic legislation in NI would limit any potential for future divergence between NI and Ireland in the area of disability discrimination. As noted above, EU developments could include the future adoption of a “horizontal directive on equal treatment” that would strengthen rights for disabled people outside the workplace.<sup>205</sup> It should be noted however, that the draft Directive, as currently drafted, if introduced, is unlikely to result in changes to the Annex 1 Directives as regards the rights of disabled people; in which case the UK Government would not be required to keep pace with those EU changes further to Protocol Article 2 requirements.

**The ECNI and NIHRC recommend that the NI Executive and relevant departments, including the Department for Communities and The Executive Office ensure that the area of disability discrimination is prioritised as a key area for dynamic alignment when conducting CJEU case law tracking.**

### *Supporting rationale*

- 4.108 As highlighted in the chapter on CJEU case law and Annex 1 equality directives, the research report found that in the area of disability current NI legislation has not been updated in line with developments in CJEU case law and recommends that the NI Assembly addresses these shortcomings within policy and legislation.<sup>206</sup>
- 4.109 Critically, it highlights that the European Commission has identified the area of disability discrimination where there has been ongoing and likely to be new legislative developments; citing a move away from the CJEU’s earlier

202 A2(a)(iv) [UK-EU Withdrawal Agreement](#)

203 Council Directive [2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

204 [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 [UNCRPD \(2021\) OJ C 474/04](#).

205 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 83

206 Ibid., page 9

‘cautious’ case law, with more recent rulings setting out “a stronger position both in relation to added requirements, conditions, or incentives for the integration of persons with disabilities in the workplace, and in relation to justifications for the exclusion of persons with disabilities from certain professional roles”.<sup>207</sup>

- 4.110 Drawing on an EU Commission Report, in June 2021, the NIHRC and ECNI wrote to the head of the NI Civil Service drawing attention to key legal and other developments on the Racial Equality Directive and the Employment Equality (Framework) Directive relevant to the ‘keeping pace’ obligation under Protocol Article 2.<sup>208</sup> The research report also notes that this EU Commission report has identified the requirement for future legislative development on disability discrimination.<sup>209</sup> In addition, a recent European Parliament Resolution has called for the Framework Equality Directive to be amended<sup>210</sup> to “ensure the full integration of Persons with disabilities and give further effect to the UNCRPD”.<sup>211</sup>
- 4.111 It is the view of the research report that CJEU case law on disability discrimination illustrates the “Court’s understanding of the integration of persons with disabilities from an aspirational protection to an enforceable element of European Union equality law, both because of the application of Article 26 of the Charter and because of the obligation to comply with Article 5 of the UNCRPD”.<sup>212</sup>

### Single equality legislation

**The ECNI and NIHRC 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.**

#### *Supporting rationale*

- 4.112 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), there is no single legislative instrument to consolidate, clarify, and enhance existing equality protections in NI.

207 Ibid., page 69

208 EU Commission, [Report](#) to the EU Parliament and Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘the Racial Equality Directive’) and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (‘the Employment Equality Directive’), COM/2021/139, (EU Commission, 2021).

209 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 72

210 [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 [UNCRPD \(2021\) OJ C 474/04](#).

211 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 72

212 Ibid.

- 4.113 In 2016, the UN International Covenant on Economic, Social and Cultural Rights (UN ICESCR) Committee stated its regret that no action had been taken on its earlier recommendation to extend comprehensive anti-discrimination legislation to NI.<sup>213</sup> It further called for NI law to be enhanced to reflect protections in other jurisdictions in the UK.<sup>214</sup>
- 4.114 Protocol Article 2 adds a further dimension which was highlighted in relation to consolidating and clarifying equality legislation in the NIHRC's submission to the Advisory Committee on the Framework Convention on National Minorities, in March 2022.<sup>215</sup>
- 4.115 The view of the research report, in line with that of the Commissions is that the introduction of a "consolidated codification of rights and equality legislation",<sup>216</sup> could assist with NI complying more fully with the principle of equivalence under the Belfast/Good Friday Agreement 1998,<sup>217</sup> and the NI Assembly's Ad hoc Committee on a Bill of Rights' most recent proposals for a NI Bill of Rights.<sup>218</sup>
- 4.116 The ECNI and NIHRC continue to recommend the adoption of consolidated equality legislation.<sup>219</sup> The Commissions have consistently called for the harmonisation 'upwards' of equality law, in a way that strengthens equality rights and protections.<sup>220</sup> The Commissions consider that single equality legislation would best harmonise and simplify the protections available.
- 4.117 The research report states that "incremental change to non-discrimination legislation in Northern Ireland, including significant amendments and updates required by European Union law to implement and incorporate European Union regulations and directives, has left Northern Ireland equality law

213 [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

214 Ibid, at para 23. Calls for equality protections to be extended to all parts of the UK, including NI were reiterated by [CRI\(2016\)38](#), 'European Commission on Racial Intolerance Report on the UK (Fifth Monitoring Cycle)', (ECRI, 2016), at para 22; [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 16(a); and [CRPD/C/GBR/CO/1](#), 'UN CRPD Committee Concluding Observations on the Initial Report of the United Kingdom of Great Britain and NI', 3 October 2017, at para 17(b)

215 Northern Ireland 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).

216 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 43

217 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.

218 Ad Hoc Committee for a Bill of Rights, [Report of the Ad Hoc Committee on a Bill of Rights](#) (2022) NIA 156/17-22.

219 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

220 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)

‘piecemeal, complex, inconsistent and incomplete’.<sup>221</sup> It also notes that in NI there are over 80 pieces of related legislation which offer different levels of protection, which the report identifies can cause confusion for those who may be discriminated against, and also for employers and service providers.<sup>222</sup>

4.118 ECNI advises that NI equality law also contains a number of unjustifiable exceptions which limit the scope of the equality legislation, as well as unnecessary barriers that limit individuals’ ability to exercise their rights under the legislation.<sup>223</sup> In addition, in some areas, NI equality law has failed to keep pace with new and emerging forms of discrimination, and in these areas, individuals have no or limited protection against unlawful discrimination.

4.119 Both the UN Committee on the Elimination of Racial Discrimination (CERD)<sup>224</sup> and the Committee on the Elimination of Discrimination against Women (CEDAW),<sup>225</sup> have expressed concern that NI does not have the same level of equality protections as compared to their counterparts in other parts of the UK. The introduction of single equality legislation has also been recommended by the European Commission on Racism and Intolerance (ECRI) (2019).<sup>226</sup>

4.120 The research report underscores the Commissions’ view that the consolidation of rights and equality legislation in NI would be a valuable step to assist in facilitating the Commission and the NIHRC in conducting their role<sup>227</sup> to monitor, supervise, advise, enforce, and report on the Protocol Article 2 commitment.

221 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 43, referencing Debbie Kohner, ‘The Equality Framework in Northern Ireland’ in Brice Dickson and Brian Gormally (eds), *Human Rights in Northern Ireland: The CAJ Handbook* (Hart, 2015) 263, p. 266

222 Ibid., page 43

223 See for example ECNI’s policy position paper on race law reform which has called for the removal of a number of unjustifiable exceptions and barriers to accessing rights. [Race Law Reform Policy Position - Priorities and recommendations](#) ([equalityni.org](#)) (2022).

224 Committee on the Elimination of Racial Discrimination [Concluding observations on the combined twenty-first to twenty-third periodic reports of the United Kingdom of Great Britain and Northern Ireland](#), (2016), paras 7-8, and also, Committee on the Elimination of Racial Discrimination, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland* (14 September 2011) CERD/C/GBR/CO/18-20, para. 19

225 CEDAW Committee (2019) [Concluding observations on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland](#), paras 15-16.

226 ECRI (2019) [Conclusions on the implementation of the recommendations in respect of the UK subject to interim follow up](#).

227 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, page 44



## 5. Concluding Comments

- 5.1 In conclusion, the UK Government has acknowledged the importance of the rights and equality protections set out in the Good Friday (Belfast) Agreement, which recognise the unique circumstances of NI's history and the need to put rights and equality central to creating a peaceful and shared future in NI. The UK Government has also made clear its ongoing commitment to Protocol Article 2, which it has recognised as an important commitment.
- 5.2 Aligned to that a number of our recommendations are aimed at ensuring ongoing compliance by the UK Government, the NI Executive and NI Departments with Protocol Article 2, including the 'keeping pace' duty, further to Protocol Article 13. They are also aimed at encouraging the UK Government, the NI Executive and NI Departments to adopt best practice in the area of human rights and equalities issues in NI. This includes introduced new equality and human rights laws and protections that strengthen protections for people in NI, even if not required to do so under Protocol Article 2.
- 5.3 Our recommendations are also made in the current context of proposed legislative developments as regards the Retained EU Law Bill. It is essential that the application of this Bill does not facilitate an increasing divergence of rights between NI and Ireland and NI and GB that results in weaker protections in NI. The ECNI and NIHRC advise that the Bill increases the risk of divergence of rights on the island of Ireland and have recommended amendments to the Bill to minimise divergence and ensure rights are not diminished in breach of Protocol Article 2<sup>228</sup>.
- 5.4 Finally, we continue to urgently call for our equality and human rights laws to be strengthened by addressing gaps in protection between Ireland and NI and NI and Great Britain, and so as to avoiding a divergence of equality rights and protections on the island of Ireland post Brexit.

**February 2023**

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228 See Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland, [NIHRC / ECNI Briefing on the Retained EU Law \(Revocation and Reform\) Bill](#), January 2023

## Appendix 1: About the Commissions

The NIHRC and the ECNI are mandated in accordance with Article 2(1) of the Protocol on Ireland/Northern Ireland of the UK-EU Withdrawal Agreement to oversee the UK Government's commitment on rights and equality in Northern Ireland 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 Protocol Article 2 (rights of individuals);
- reporting to the Secretary of State for NI and the NI Executive Office on the implementation of Protocol 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 Protocol Article 2;
- advising the NI Assembly (or a committee of the Assembly) whether a Bill is compatible with Protocol Article 2;
- promoting understanding and awareness of the importance of Protocol Article 2, including undertaking, commissioning or providing financial or other assistance for research and educational activities;
- bringing any appropriate matters of relevance to Protocol 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 Protocol Article 2;
- assisting persons in legal proceedings or proposed proceedings in respect of an alleged breach (or potential future breach) of Protocol Article 2; and
- intervening in legal proceedings in so far as they relate to an alleged breach (or potential future breach) of Protocol Article 2.

In addition, the NIHRC, ECNI and IHREC will work together to provide oversight of, and report on, issues which engage Protocol Article 2 that have an island of Ireland dimension.

### NIHRC

The Northern Ireland Human Rights Commission (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.



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 Commission 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 Executive Committee of the NI Assembly 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 Equality Commission for Northern Ireland (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 (UNCRPD) 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.

## **IHREC**

The Irish Human Rights and Equality Commission (IHREC) was established on 1 November 2014, as an independent public body under the Irish Human Rights and Equality Commission Act 2014. IHREC is Ireland's independent National Human Rights Institution and its National Equality Body. Since 2020 it is also Ireland's Independent National Rapporteur on the Trafficking of Human Beings. IHREC Members are appointed by President Michael D. Higgins, following a resolution by both Houses of the Oireachtas. IHREC operates independently of Government, with its institutional independence guaranteed in its establishing legislation, which provides for accountability of the Commission for its statutory functions to the Oireachtas.

The overall statutory functions of IHREC provided for in section 10 of the legislation are:

- to protect and promote human rights and equality;
- to encourage the development of a culture of respect for human rights, equality, and intercultural understanding in the State;
- to promote understanding and awareness of the importance of human rights and equality in the State;
- to encourage good practice in intercultural relations, to promote tolerance and acceptance of diversity in the State and respect for the freedom and dignity of each person; and
- to work towards the elimination of human rights abuses, discrimination and prohibited conduct.

In undertaking its mandate, IHREC is explicitly tasked with contributing to the development of a society in which:

- there is respect for, and protection of, each person's human rights;
- there is respect for the dignity and worth of each person;
- a person's ability to achieve his or her potential is not limited by prejudice, discrimination, neglect or prohibited conduct;
- each person has a fair and equal opportunity to participate in the economic, political, social or cultural life of the State; and
- there is mutual respect between persons, including classes of persons, based on a shared understanding of the value of diversity within society and on a shared respect for equality and human rights

## Appendix 2: Overarching Policy Recommendations (ECNI/NIHRC Joint Annual Report)

- 1.1 The following overarching policy recommendations have been previously highlighted by the Commissions (ECNI and NIHRC) in their joint annual report<sup>229</sup> on the implementation of Protocol Article 2 2021-2022 and are supported by the research findings.

**The ECNI and NIHRC recommend that in the development of any laws or policies the UK Government and NI Executive consider, particularly at an early stage, the extent to which any change engages Protocol Article 2 and ensure that there is no diminution to the rights and safeguards which fall within its scope.**

### *Supporting rationale*

- 1.2 The ECNI and NIHRC have raised and continue to raise, the need for policy makers within government to ensure, not only compliance with Protocol Article 2, but also that consideration of compliance with Protocol Article 2 is embedded at the earliest stages of policy and legislative development.<sup>230</sup>
- 1.3 Early consideration, including through seeking the views of the Commissions on compliance, will help lead to improved policy making and increased opportunities to consider at an early stage whether or not changes are needed to draft legislation so as to ensure compliance with Protocol Article 2.

**The ECNI and NIHRC recommend that the UK Government and NI Executive ensure that Explanatory Memoranda on draft UK and NI legislative proposals that are likely to engage Protocol Article 2 set out what consideration has been given to ensuring conformity with Protocol Article 2.**

**The ECNI and NIHRC 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 Protocol Article 2, sets out what consideration has been given to ensuring conformity with Protocol Article 2.**

229 Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission, [Annual Report](#) of the NIHRC and the ECNI on the implementation of Protocol Article 2 2021 – 2022, July 2022

230 Ibid, at para 3.5

- 1.4 Research on parliamentary scrutiny and Protocol Article 2 commissioned by ECNI highlighted the important role of monitoring and effective scrutiny of legislation in ensuring the UK Government's compliance with its commitment under Protocol Article 2.<sup>231</sup>
- 1.5 The research report, completed in September 2021, highlighted the unique nature of obligations under Protocol Article 2 which requires scrutiny of five different streams of legislation: primary and secondary legislation created both in Westminster and the NI Assembly, and also EU legislation.
- 1.6 It identified a number of measures that could be undertaken by the UK Government and NI Assembly, to ensure effective scrutiny of the UK Government's compliance with its commitment under Protocol Article 2. This includes setting out in the Explanatory Memoranda for any new UK, NI and EU legislative proposals, details of the Government's consideration of Protocol Article 2.<sup>232</sup> The ECNI and NIHRC have and will continue to raise this recommendation with government stakeholders.<sup>233</sup>
- 1.7 In relation to EU legislation, the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland has called on Government to submit Explanatory Memoranda for draft UK legislative proposals that are likely to engage Article 2(1) of the Protocol, and for draft EU proposals which amend or replace the Directives listed in Annex 1 to the Protocol, as well as other relevant EU legislation that the Commissions judge are relevant to the provisions of Article 2.<sup>234</sup>
- 1.8 The research report<sup>235</sup> has reiterated the views of Evans, Horne and Ghazi (2021)<sup>236</sup> that the provision of such Explanatory Memoranda will assist the Commissions in fulfilling their monitoring and scrutiny role in relation to the Protocol Article 2 commitment. It will also assist relevant Westminster committees in their scrutiny role in relation to ensuring the UK Government is complying with its commitments under the Protocol. It will help ensure that they have been given adequate information surrounding the compatibility of any new legislation or proposals with Protocol Article 2. Further, this information would also be available to civil society organisations and thus would enable their full engagement in the scrutiny process.

231 Paul Evans, Alexander Horne and Tasneem Ghazi, (ECNI) [Legislative Scrutiny and the Dedicated Mechanism for monitoring Article 2 of the Ireland/Northern Ireland Protocol](#), December 2021

232 Ibid., pages 6-7, 9, 71

233 Equality Commission for Northern Ireland and Northern Ireland Human Rights Commission, [Annual Report](#) of the NIHRC and ECNI on the implementation of Protocol Article 2 2021 – 2022, July 2022, at paras 3.9-3.10

234 House of Lords Sub-Committee on the Ireland/Northern Ireland Protocol, [Letter to Conor Burns MP](#), Minister of State at the Northern Ireland Office, 16 December 2021.

235 S Craig, A Deb, E Frantziou, A Horne, C Murray, C Rice and J Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), Dec 2022, pages 48 and 114

236 Paul Evans, Alexander Horne and Tasneem Ghazi, (ECNI) [Legislative Scrutiny and the Dedicated Mechanism for monitoring Article 2 of the Ireland/Northern Ireland Protocol](#), December 2021

## 1.9 Evans, Horne and Ghazi (2021) recommended that:

“A clear expectation must be established that the UK government and the Northern Ireland Executive will provide explanatory memoranda for any measures which it believes will engage the terms of Article 2(1), whether they be UK, Northern Ireland or EU proposals”.<sup>237</sup>

**The ECNI and NIHRC 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.**

*Supporting rationale*

- 1.10 Protocol Article 2 requires, read in conjunction with Protocol Article 13, that the UK Government must ensure that NI’s equality laws keep pace with any changes the EU may make to amend or replace the EU equality laws, set out in Annex 1 to the Protocol,<sup>238</sup> to enhance protections, on or after 1 January 2021.<sup>239</sup>
- 1.11 The UK Government has also confirmed its commitment to dynamic alignment with the Annex 1 equality directives to “provide a reassurance that, at the very least, the minimum standard of rights protection required by the listed directives will continue to be relevant in NI” and this will “ensure NI will not fall behind minimum European standards in anti-discrimination law”.<sup>240</sup>
- 1.12 Article 4(4) of the UK-EU Withdrawal Agreement provides that any EU law concept or provision referred to in that Agreement shall, in its implementation and application, be interpreted in conformity with the relevant case law of the CJEU handed down on or before 31 December 2020.<sup>241</sup> In addition, Article 4(5) provides that judicial and administrative authorities shall have “due regard” to relevant CJEU case law handed down on or after 1 January 2021.<sup>242</sup>

237 Ibid., page 6

238 These Directives include the [Race Equality Directive \(2000/43/EC\)](#), the [Employment Equality \(Framework\) Directive \(2000/78/EC\)](#) and the four gender equality directives: [Gender Goods and Services Directive \(2004/113/EC\)](#); [Gender Equality \(Employment\) Directive \(2006/54/EC\)](#); [Self-Employment Equality Directive \(2010/41/EU\)](#); and [Equality in Social Security Directive \(79/7/EEC\)](#). In addition, UK courts when considering the interpretation of any of the equality directives listed in Annex 1, including the Race Directive, must do so in conformity with any relevant case law of the Court of Justice of the EU (CJEU). UK Government, [Explainer Document](#): UK Government commitment to “no diminution of rights, safeguards and equality of opportunity” in Northern Ireland, 7 August 2020

239 Article 13 (3), [Protocol on Ireland/Northern Ireland to the UK-EU Withdrawal Agreement 2020](#)

240 [Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland](#), 7 August 2020

241 Article 4(1) and (2) apply both to the provisions of the Withdrawal Agreement and EU law made applicable by it, whereas the provisions in Article 4 (3-5) apply only to provisions of the Withdrawal Agreement referring to EU Law. ‘Article 4 – Commentary’ in Manuel Kellerbauer, Eugenia Dumitriu-Segnana, and Thomas Liefänder (ed) ‘The UK-EU Withdrawal Agreement - A Commentary’, (OUP, 2021), at 38.

242 [Article 4\(4\) and \(5\), UK-EU Withdrawal Agreement 2020](#)



- 1.13 Firstly, the protection of rights, safeguards and equality of opportunity in Protocol Article 2 includes an overarching non-diminution guarantee, which freezes the baseline of rights and safeguards to those that applied on or before 31 December 2020.<sup>243</sup> Therefore, in line with Article 4(4) and (5) of the Withdrawal Agreement, the interpretation and application of these rights must, as a minimum, conform with the body of CJEU jurisprudence, including insofar as it relates to general principles and the EU Charter of Fundamental Rights, on 31 December 2020. In relation to any subsequent CJEU decisions of relevance to Protocol Article 2, they should as a minimum be given due regard by judicial and administrative authorities.
- 1.14 In addition, Article 13(2) of the Protocol provides an important clarification requiring continued alignment with CJEU jurisprudence regarding EU measures listed in the Protocol:
- “Notwithstanding Article 4(4) and (5) of the Withdrawal Agreement, the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union”.
- 1.15 Therefore, as required by Protocol Article 13, the Annex 1 equality directives will continue to be informed by future CJEU rulings and, to the extent that such rulings evolve general principles of EU law, the EU Charter of Fundamental Rights and the relevant EU Treaty provisions, these will continue to have relevance in NI.<sup>244</sup>
- 1.16 CJEU case law will therefore continue to play an important role in the application and interpretation of the rights and safeguards in Protocol Article 2, particularly as regards the rights underpinned by the Annex 1 equality directives.
- 1.17 Ensuring that NI law keeps pace with any changes to the Annex 1 equality directives, including relevant CJEU case law, will also limit any divergence between NI and Ireland as Ireland continues to adopt CJEU case law interpretations.

243 With the exception of the six equality directives in Annex 1, Article 2 sets a standard for ‘no diminution’ defined by the relevant EU standards underpinning the rights, safeguards and equality of opportunity protections in the Belfast (Good Friday) Agreement as they were on 31 December 2020

244 Article 13(2) and 13(3), [Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement](#). See also [Re SPUC Pro Life Limited \[2022\] NIQB 9](#), at para 93

- 1.18 The Commissions continue to raise recommendations relating to the keeping pace requirement, both in regard to Annex 1 equality directives and CJEU case law and have advised the UK Government and NI Executive that Protocol Article 2 to monitor changes, to ensure NI law keeps pace with changes which enhance protections.<sup>245</sup>
- 1.19 There are existing reporting mechanisms which would assist in ensuring compliance with the keeping pace requirement. For example, the European Commission must report to the European Parliament and Council on the application of the Race Equality Directive<sup>246</sup> and the Framework Equality Directive<sup>247</sup> every five years and that report covers recent developments, including relevant case law of the CJEU.<sup>248</sup> It is essential that the NI Assembly addresses any shortcomings in NI resulting from relevant developments in CJEU case law, including as set out in this European Commission report.

245 Equality Commission for Northern Ireland and the 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 pages 5 and paras 3.6-3.7

246 [Council Directive 2000/43/EC](#) of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

247 Council Directive [2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

248 See Article 17 of the [Council Directive 2000/43/EC](#) of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Article 19 of the [Council Directive 2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

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For further information and guidance, please contact:

**Equality Commission for Northern Ireland**

Equality House, 7-9 Shaftesbury Square, Belfast, BT2 7DP

**Telephone:** + 44 (0)28 9050 0600

**Email:** DMU@equalityni.org

**Web:** [www.equalityni.org/brexit](http://www.equalityni.org/brexit)



**The Irish Human Rights and Equality Commission**

**Coimisiún na hÉireann um Chearta an Duine agus Comhionannas**

16-22 Sráid na Faiche, Baile Átha Cliath 7, D07 CR20

16-22 Green Street, Dublin 7, D07 CR20

**Íosghlao/Lo-call** 1890 245 245

**Guthán/Phone** + 353 (0) 1 858 3000

**Ríomhphost/Email** [info@ihrec.ie](mailto:info@ihrec.ie)

**Idirlíon/Web** [www.ihrec.ie](http://www.ihrec.ie)



**Northern Ireland Human Rights Commission**

4th Floor Alfred House, 19-21 Alfred Street, Belfast, BT2 8ED

**Telephone:** + 44 (0)28 9024 3987

**Email:** [info@nihrc.org](mailto:info@nihrc.org)

**Web:** [www.nihrc.org/brexit](http://www.nihrc.org/brexit)

