



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**NIHRC Submission to Department for Economy
on Miscarriage Leave and Pay**

December 2022

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Summary of Recommendations

The NIHRC recommends:

- i. That the Department for the Economy should monitor any developments in EU law relating to the miscarriage leave and pay regulations to ensure compliance with Protocol Article 2.**
- ii. That the regulations follow medical and legal terminology, and are applied broadly to ensure there is appropriate support available to those who are affected by the wide range of circumstances that result in pregnancy loss.**
- iii. That it should be clear that miscarriage leave can apply to women, trans men and other people who can experience pregnancy, including pregnancy partners, and in a way that reflects modern-day parental arrangements.**
- iv. That the evidential and administrative requirements for a person intending to claim miscarriage leave and pay should be consistent with the requirements of other forms of bereavement leave, this includes keeping such requirements to a minimum and adopting a self-declaration model.**
- v. That the Department for the Economy ensures that the qualifying provisions in the new regulations do not negatively impact on people in temporary or precarious work and those on zero-hours contracts who may need to avail of miscarriage leave and pay. This will require a gender-sensitive approach to ensure that women are not disproportionately affected.**
- vi. That the Department for the Economy carries out a thorough human rights impact assessment, including with respect to Protocol Article 2, regarding its miscarriage pay and leave proposals. This assessment should involve a detailed consideration of both the potential positive and negative impacts on each human right engaged by the proposals, drawing from the eight human rights treaties ratified by the UK as relevant.**

1.0 Introduction

1.1 The Northern Ireland Human Rights Commission (NIHRC), pursuant to section 69(4) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). The NIHRC, pursuant to section 78A(6) of the Northern Ireland Act 1998, must advise the Assembly (or a committee of the Assembly) whether a Bill is compatible with Article 2(1) of the Ireland/Northern Ireland Protocol. In accordance with these functions, the following advice is submitted to the Department for the Economy on the Miscarriage Leave and Pay Regulations.

1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN). The relevant regional and international treaties in this context include:

- CoE European Convention on Human Rights 1950 (ECHR);¹
- UN International Covenant on Economic, Social and Cultural Rights 1966 (UN ICESCR);²
- UN Convention on Elimination of Discrimination against Women 1981 (UN CEDAW);³ and
- CoE Convention on Preventing and Combating Violence Against Women and Domestic Violence 2011 (Istanbul Convention).⁴

1.3 In addition to these treaty standards, the following declarations and principles provide further guidance in respect of specific areas:

- UN ICESCR Committee General Comment No 23;⁵
- UN CEDAW 2019 Committee Concluding Observations on the UK;⁶
- UN ICCPR Committee General Comment No 36.⁷

¹ Ratified by the UK 1951. Further guidance is also taken from the body of case law from the European Court of Human Rights (ECTHR).

² Ratified by the UK 1976.

³ Ratified by the UK 1986.

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⁵ E/C.12/GC/23, 'UN ICESCR Committee General comment No. 23: On the Right to Just and Favourable Conditions of Work', 27 April 2016.

⁶ CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the UK Eighth Periodic Report', 8 March 2019.

⁷ CCPR/C/GC/35, 'UN Human Rights Committee General comment no. 36, Article 6 (Right to Life)', 3 September 2019.

1.4 The NIHRC further advises on the UK Government's commitment (in Protocol Article 2) to ensure there is no diminution of rights, safeguards and equality of opportunity in the relevant section of the Belfast (Good Friday) Agreement as a result of the UK's withdrawal from the EU. This 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 requires all acts of NI Ministers and NI Departments to be compatible with Protocol Article 2. The relevant EU measures in this context include:

- EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation;⁸
- EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation;⁹
- EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity.¹⁰

1.5 Under the proposed regulations, which aim to introduce a legal requirement for miscarriage leave and pay, NI will become the first region in the UK to enshrine a legal requirement for miscarriage leave and pay. NI will also be amongst the first countries globally to offer this form of statutory leave. The Commission welcomes the proposed intention for NI to lead in providing such an important form of support. The Commission has some recommendations for how the regulations could be improved to ensure it does provide in practice equality of access to leave entitlement and financial security when grieving.

⁸ Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000.

⁹ Directive 2006/54/EC, 'EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation', 5 July 2006.

¹⁰ Directive 2010/41/EU, 'EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity', 7 July 2010.

2.0 Protocol Article 2

- 2.1 Article 2 of the Ireland/Northern Ireland Protocol (the Protocol) requires the UK Government and NI Executive to ensure there is no diminution of rights, safeguards and equality of opportunity, as set out in the relevant chapter of the Belfast (Good Friday) Agreement 1998, as a result of the UK's withdrawal from the EU. That chapter includes a commitment to the "civil rights and religious liberties of everyone in the community" and affirms in particular a list of rights.¹¹ The phrase "affirmed in particular" suggests that this is a non-exhaustive list of rights.
- 2.2 Protocol Article 2 includes a commitment to 'keep pace' with EU law developments falling within the six EU Equality Directives listed in Annex 1 to the Protocol which improve the minimum levels of protection available after 1 January 2021, including relevant case law of the Court of Justice of the EU.¹² This means that if the minimum standards in the Annex 1 Equality Directives are amended or replaced, the UK Government and NI Executive must ensure that domestic legislation in NI reflects any substantive enhancements in relevant protections.¹³
- 2.3 In addition to the six Annex 1 Equality Directives, there is other relevant EU law that underpins rights set out in the relevant chapter of the Belfast (Good Friday) Agreement. The UK Government has committed to ensuring that there will be no diminution of protections as were contained in relevant EU law on 31 December 2020.
- 2.4 In addition to the listed rights, safeguards and equality of opportunity protections, the Belfast (Good Friday) Agreement also commits the UK Government to the incorporation of the ECHR. Thus, the non-diminution commitment in Protocol Article 2 encompasses the full range of rights set

¹¹ Belfast (Good Friday) Agreement 1998.

¹² Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000; Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000; Directive 2004/113/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and Services', 13 December 2004; Directive 2006/54/EC, 'EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation', 5 July 2006; Directive 2010/41/EU, 'EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity', 7 July 2010.; Directive 79/7/EEC, 'EU Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security', 19 December 1978.

¹³ Article 13, The Ireland/NI Protocol to the EU/UK Withdrawal Agreement 2020.

out in the ECHR, to the extent that they are underpinned by EU legal obligations in force on or before 31 December 2020.¹⁴

2.5 No breach of Protocol Article 2 has been identified in relation to the proposed Miscarriage Leave and Pay Regulations. However, the Annex 1 Equality Directives contain provisions relating to non-discrimination in matters of employment, including the Equality Framework Directive,¹⁵ the Recast Equal Treatment (Employment) Directive¹⁶ and the Equal Treatment (Self-Employment) Directive.¹⁷ There is a possibility that these Directives could be updated or replaced by the EU with a higher level of protection relevant to the proposed Regulations. Therefore, ongoing monitoring of changes in relevant EU law will be required in the development and implementation of the proposed Regulations.

2.6 The Commission recommends the Department for the Economy should monitor any developments in EU law relating to the miscarriage leave and pay regulations to ensure compliance with Protocol Article 2.

3.0 Definitions

3.1 Article 8 of the ECHR provides for the right to privacy and the right to physical and psychological integrity.¹⁸ The consultation document states that the proposed leave entitlement is for those who experience “unintentional miscarriage”.¹⁹ The consultation notes that medical and legal definitions of miscarriage are complex and varied and that the regulations do not seek to redefine existing definitions.²⁰ However, this is not a medical or legal term and raises concerns as to the practical effect that using this term as a start point may have. Adopting this terminology runs the risk of disproportionately interfering with the psychological integrity and privacy of the individuals affected, by creating an extra layer

¹⁴ NI Human Rights Commission and Equality Commission NI, ‘Working Paper: Scope of Article 2(1) of the Ireland/NI Protocol to the UK-EU Withdrawal Agreement 2020’, (NIHRC and ECNI, 2022).

¹⁵ Directive 2000/78/EC, ‘EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation’, 27 November 2000.

¹⁶ Directive 2006/54/EC, ‘EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation’, 5 July 2006.

¹⁷ Directive 2010/41/EU, ‘EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity’, 7 July 2010.

¹⁸ *Denisov v Ukraine* (2018) ECHR 1061.

¹⁹ Department for the Economy, ‘Miscarriage Leave and Pay: Public Consultation’, (DfE, 2022) at 7 and 9.

²⁰ Department for the Economy, ‘Miscarriage Leave and Pay: Public Consultation’, (DfE, 2022) at 9.

of unnecessary and ill-founded bureaucracy for proving that a miscarriage was, by this distinction, 'unintentional'. This can only lead to additional distress at an already difficult time for those that fall within this category and stigmatisation of parents that do not. From a practical point of view, it also has the potential to create confusion amongst employers and employees as to who can avail of the support.

- 3.2 The UN CEDAW Committee noted that in NI "no structures, such as bereavement services, exist to support women following an abortion".²¹ The use of the term 'unintentional miscarriage' indicates that the Department of the Economy is omitting individuals and their pregnancy partners who have experienced a termination of pregnancy. In addition to concerns around the stigmatising effect of this approach, if alternative additional support is not provided for termination of pregnancy, this will leave a significant gap in support for a now legally recognised healthcare service.²²
- 3.3 **The Commission recommends that the regulations follow medical and legal terminology, and are applied broadly to ensure there is appropriate support available to those who are affected by the wide range of circumstances that result in pregnancy loss.**
- 3.4 Article 14 of the ECHR prohibits discrimination "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". The term 'other status' has been interpreted to include sexual orientation,²³ gender identity,²⁴ parental or marital status.²⁵
- 3.5 The Belfast (Good Friday) Agreement 1998 protects the right to equality of opportunity. The EU Recast Equal Treatment (Employment) Directive and the EU Equal Treatment (Self-Employment) Directive in Annex 1 to the NI Protocol prohibit discrimination on grounds of sex, which includes transgender people. The CJEU has made it clear that "to tolerate such

²¹ CEDAW/C/OP.8/GBR/1, 'UN CEDAW Committee Inquiry Concerning the UK of Great Britain and NI Under Article 8 of the Optional Protocol to the UN CEDAW', 6 March 2018, at para 31.

²² Section 9(2), NI (Executive Formation etc) Act 2019.

²³ *Fretté v France* (2002) ECHR 156, at para 32.

²⁴ *Identoba and Others v Georgia* (2015) ECHR 474.

²⁵ *Weller v Hungary* (2009) ECHR 530; *Serife Yigit v Turkey* (2010) ECHR 1672, at para 79.

discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard”.²⁶ NI law must keep pace with any changes made by the EU to improve the minimum levels of protection, on or after 1 January 2021, including monitoring relevant current and future CJEU case law.²⁷

- 3.6 The proposal that the diversity of relationships, as currently protected by the Parental Bereavement Bill, will also apply to the Miscarriage Leave Regulations is welcomed. However, there should be clarity that this diversity covers the full extent of modern-day parental arrangements.
- 3.7 **The Commission recommends that it should be clear that miscarriage leave can apply to women, trans men and other people who can experience pregnancy, including pregnancy partners, and in a way that reflects modern-day parental arrangements.**

4.0 Evidence Requirement

- 4.1 The right to privacy and the right to physical and psychological integrity (Article 8 of the ECHR)²⁸ are qualified rights that can only be interfered with when it is proportionate in pursuit of a legitimate aim, such as the “economic well-being of the country, prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.²⁹
- 4.2 Article 2(e) of the UN CEDAW provides that State Parties should “undertake... to take all appropriate measures to eliminate discrimination against women by any person”. The UN CEDAW Committee has confirmed that gender-based violence is a form of discrimination and there is an “obligation of due diligence” on State Parties to “take all appropriate measures to prevent... acts or omissions by non-State actors that results in gender-based violence against women”.³⁰ This includes “having laws,

²⁶ *P v S and Cornwall County Council*, Case C-13/94, 30 April 1996, at para 22.

²⁷ Article 13, Ireland/Ni Protocol to the UK-EU Withdrawal Agreement 2020.

²⁸ *Denisov v Ukraine* (2018) ECHR 1061.

²⁹ Article 8(2), European Convention on Human Rights 1950.

³⁰ CEDAW/C/GC/35, ‘UN CEDAW Committee General Recommendation No 35: Gender Based Violence Against Women, Updating General Recommendation No 19’, at para 24(2)(b).

institutions and systems in place to address such violence and ensuring that they function effectively in practice and are supported by all State agents and bodies who diligently enforce the laws”.³¹ The UN CEDAW Committee has also been clear that “all laws that constitute discrimination against women, including those which cause, promote or justify gender-based violence or perpetuate impunity for such acts, are to be repealed”.³² Article 4 of the Istanbul Convention further requires States to “take the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere”.

- 4.3 The Department for the Economy is considering whether it should be a requirement for a person intending to claim miscarriage leave and/or pay to provide medical confirmation of a miscarriage up to the end of the twenty-third week of pregnancy. The consultation document notes that an evidential requirement for miscarriage leave may “involve the sharing of sensitive personal medical information which may cause additional upset and distress”.³³ Considering the right to physiological integrity, the question is whether such an approach is proportionate in terms of what it aims to achieve and the additional upset and distress that the evidence provider(s) may experience as a result.
- 4.4 In addition, it should be considered whether the possible requirement to share sensitive personal medical information could have any negative implications. For example, even just the potential for such a scenario to arise may cause significant distress and disproportionately affect the psychological integrity of a victim or survivor of domestic violence or abuse.
- 4.5 In the context of parental bereavement leave, the Department for the Economy has kept the evidential and administrative requirements to a minimum and adopted a self-declaration model.
- 4.6 **The Commission recommends that the evidential and administrative requirements for a person intending to claim**

³¹ CEDAW/C/GC/35, ‘UN CEDAW Committee General Recommendation No 35: Gender Based Violence Against Women, Updating General Recommendation No 19’, at para 24(2)(b).

³² CEDAW/C/GC/35, ‘UN CEDAW Committee General Recommendation No 35: Gender Based Violence Against Women, Updating General Recommendation No 19’, at para 26(a).

³³ Department for the Economy, ‘Miscarriage Leave and Pay: Public Consultation’, (DfE, 2022).

miscarriage leave and pay should be consistent with the requirements of other forms of bereavement leave, this includes keeping such requirements to a minimum and adopting a self-declaration model.

5.0 Minimum qualifying earnings threshold

- 5.1 The 'other status' aspect of Article 14 of the ECHR (prohibition of discrimination) is recognised as including that there should not be discrimination based on status relating to employment.³⁴ The UN ICESCR provides for the right to work (Article 6) and the right to just and favourable work conditions (Article 7).
- 5.2 The UN ICESCR Committee is clear that "the right to just and favourable conditions of work is a right of everyone, without distinction of any kind. The reference to "everyone" highlights the fact that the right applies to all workers in all settings".³⁵ The UN CEDAW Committee has highlighted that "women are more likely to be engaged in informal, temporary or precarious forms of employment, including with employment with zero-hours contracts".³⁶ Article 2 of the UN CEDAW requires that:

States Parties must address all aspects of their legal obligations under the [UN CEDAW]... to respect, protect and fulfil women's right to non-discrimination and to the enjoyment of equality. The obligation to respect requires that States Parties refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights.³⁷

- 5.3 The Commission welcomes the Department for the Economy's intention to introduce a day one entitlement, instead of limiting entitlement to those

³⁴ Valkov and Others v Bulgaria (2011) ECHR 1956, at para 115.

³⁵ E/C.12/GC/23, 'UN ICESCR Committee General comment No. 23: On the Right to Just and Favourable Conditions of Work', 27 April 2016, at para 5.

³⁶ CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the eighth periodic report of the UK and NI', 14 March 2019, at para 43(b).

³⁷ CEDAW/C/GC/28, 'UN CEDAW Committee General Recommendation No 28: Core Obligations of States Parties Under Article 2 of the UN CEDAW', 16 December 2010, at para 9.

who have been in at least 26 weeks continuous employment. However, as with parental bereavement pay, there will be a minimum qualifying earnings threshold of £123 per week. This qualifying threshold could impact on the ability of agency workers and those on zero-hours contracts to make use of these provisions if they should require them. If this is the case, it will particularly affect women.

- 5.4 The Commission recommends the Department for the Economy ensures that the qualifying provisions in the new regulations do not negatively impact on people in temporary or precarious work and those on zero-hours contracts who may need to avail of miscarriage leave and pay. This will require a gender-sensitive approach to ensure that women are not disproportionately affected.**

6.0 Human Rights Impact Assessment

- 6.1 The Commission notes that in relation to the proposed Miscarriage Leave Regulations, the Department for the Economy has completed an equality screening exercise. However, it has not published a human rights impact assessment.³⁸
- 6.2 The Commission recommends that the Department for the Economy carries out a thorough human rights impact assessment, including with respect to Protocol Article 2, regarding its miscarriage pay and leave proposals. This assessment should involve a detailed consideration of both the potential positive and negative impacts on each human right engaged by the proposals, drawing from the eight human rights treaties ratified by the UK as relevant.**

³⁸ The Executive Office, 'Human Rights Impact Assessment Proforma'. Available at: [Human Rights Impact Assessment proforma | The Executive Office \(executiveoffice-ni.gov.uk\)](https://www.executiveoffice-ni.gov.uk/human-rights-impact-assessment-proforma)

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