



NORTHERN IRELAND
HUMAN RIGHTS
COMMISSION

**Submission of the NIHRC and ECNI
to the House of Lords Sub-
Committee on the Protocol's call
for evidence for its new inquiry
into the UK Government's
Northern Ireland Protocol Bill**

03 November 2022

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Summary of Recommendations

In summary, the Commissions recommend that:

- 2.5 The Commissions consider that the UK Government’s commitment in Protocol Article 2, as well as the establishment of the dedicated mechanism to oversee this commitment, is an important and positive development in relation to the protection of equality and human rights in NI.**

- 2.14 The Commissions recommend that the UK Government work with the EU Commission to find a long-term solution which ensures Muslim and Jewish communities in Northern Ireland are able to access halal and kosher food products and ritual items respectively.**

- 2.15 The Commissions recommend that the UK Government, working with the EU continues to monitor and address any outstanding issues relating to the supply of medicines from Great Britain to Northern Ireland to guarantee no diminution of the current provision, including for disabled people, and to protect the highest attainable standard of health.**

- 2.16 The Commissions recommend that the UK Government work with the EU Commission to find a long-term solution which minimises checks on assistance dog owners travelling between Great Britain and Northern Ireland.**

- 2.21 The Commissions recommend that compliance with Protocol Article 2 be considered from the earliest stages in the development of policy and legislation, and that there is early engagement with the Commissions on draft legislation to ensure compliance with Protocol Article 2.**

- 2.22 The Commissions recommend that the UK Government ensures that Explanatory Memoranda on draft UK proposals that are likely to engage Protocol Article 2 set out what consideration has been given to ensuring conformity with Protocol Article 2.**

- 2.23** The Commissions recommend that the Committee asks the Minister in charge of the Bill to set out, in detail, what consideration was given to compliance with Protocol Article 2 in the development of the Protocol Bill.
- 3.6** The Commissions recommend that Clause 13 be amended to make clear that subsection 1 does not restrict the role of the CJEU where it is asked to give a ruling under Article 174 of the Withdrawal Agreement (Disputes raising questions of Union law) relating to the interpretation of EU law relevant to Protocol Article 2.
- 3.11** The Commissions recommend that Clause 15(3) be amended to supplement the restriction preventing Ministers from designating Protocol Article 2 as excluded provision, to ensure that Ministers are also prevented from designating as excluded provision, any provision of the Withdrawal Agreement or Protocol insofar as it affects the interpretation, implementation and/or enforcement of Protocol Article 2.
- 3.16** The Commissions recommend that the Bill be amended to make clear that a Minister's powers under Clause 14(4), or any other Clause of the Bill, do not extend to taking any action that weakens the interpretation, implementation or enforcement of Protocol Article 2, either by excluding provisions of the Protocol or Withdrawal Agreement insofar as they relate to Protocol Article 2, or by any other exercise of delegated powers under the Bill.¹
- 3.21** The Commissions recommend that Clause 20 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.
- 4.3** The Commissions recommend that there are no changes to the Protocol that would result in a weakening of either the Article 2(1)

¹ See, for example, Clause 22 on the scope of delegated powers under the Bill.

commitment or the Protocol's rights, safeguards and oversight mechanisms relating to this commitment.

5.5 The Commissions continue to recommend that:

- as the EU considers proposed structures for engagement with NI stakeholders, this should include open, transparent and regular engagement with the Commissions and equality and human rights stakeholders in Northern Ireland; and this should include those working on cross border issues relating to equality and human rights.
- the Commissions are kept informed of any future EU equality law developments relevant to the Annex 1 equality Directives in the Protocol, and have the opportunity to highlight in advance any implications of those changes for equality law in Northern Ireland;
- the NI Executive work with the UK Government and on a North-South basis to build strong open channels of communication to keep informed of key developments of relevance to Article 2;
- any proposals between the UK Government and EU on the development of "structured groups" within the Joint Consultative Working Group includes consideration being given to establishing a group that focuses on issues relating to Protocol Article 2;
- proposals on increased transparency relating to the Joint Consultative Working Group are extended to include the publication of agendas in advance of meetings.

6.3 The Commissions recommend that the UK Government and EU continue to undertake engagement with equality and human rights stakeholders in NI, including those working on cross-border issues.

1.0 Introduction

- 1.1. The Northern Ireland Human Rights Commission (the NIHRC), pursuant to section 69(1) 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.
- 1.2. The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding but provide further guidance in respect of specific areas.
- 1.3. The Equality Commission for Northern Ireland (ECNI) is an independent public body established under the Northern Ireland Act 1998. Its powers and duties derive from a number of equality statutes providing protection against discrimination on the grounds of age, disability, race, religion and political opinion, sex and sexual orientation. Its remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998.
- 1.4. The NIHRC and ECNI (the Commissions), pursuant to sections 78A(1) and 78B(1) respectively of the Northern Ireland Act 1998, monitor the implementation of Article 2(1) of the Ireland/Northern Ireland Protocol ('the Protocol') to the UK-EU Withdrawal Agreement.
- 1.5. The Commissions welcome this opportunity to respond to the call for evidence by the House of Lords Sub-Committee on the Protocol ('the Sub-Committee') for its new inquiry into the UK Government's Northern Ireland Protocol Bill. The Commissions are available to provide an oral briefing if this could provide further assistance to the Committee.

- 1.6. This submission follows our joint June 2021 submission to the Sub-Committee’s introductory inquiry into the operation of the Protocol,² our joint November 2021 submission to the Sub-Committee on the UK and EU proposals and the prospects for Agreement³ and the Commissions recent joint submission to the Committee’s follow up Inquiry on the impact of the Protocol in June 2022.⁴
- 1.7. In this briefing, the Commissions have focused on addressing only those questions in the Sub-Committee’s call for evidence which fall within the scope of our respective roles and remits.

2.0 Impact of the Protocol

Question1: How would you summarise the impact (both positive and negative) of the Protocol as it currently operates on Northern Ireland?

Positive impact of the Protocol

- 2.1. Human rights and equality protections are at the heart of the Belfast/ Good Friday Agreement 1998 and are central to the peace process in Northern Ireland. The importance of protecting the 1998 Agreement and its human rights and equality commitments was accepted in negotiations leading to the UK’s withdrawal from the EU.⁵ This is reflected in the Protocol to the UK-EU Withdrawal Agreement 2020.⁶
- 2.2. As previously highlighted to the Sub-Committee, the Commissions consider that the commitment by the UK Government in Article 2 of the

² Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland, Joint written evidence to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland’s Introductory Inquiry into the operation of the Protocol on Ireland/Northern Ireland, [June 2021](#).

³ Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland, Submission on the UK and EU proposals and the prospects for Agreement to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland, [12 November 2021](#).

⁴ Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland, Joint written evidence to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland’s Introductory Inquiry into the operation of the Protocol on Ireland/Northern Ireland, [June 2022](#).

⁵ Joint report from the Negotiators of the EU and UK Government progress during Phase 1 of Negotiations under Article 50 TEU on the UK’s Orderly Withdrawal from the EU, 8 December 2017, para 42 and 53.

⁶ Preamble to the Protocol on Ireland/Northern Ireland to the UK-EU Withdrawal Agreement 2020.

Protocol is a positive development as it recognises the centrality of equality and human rights in the Belfast/Good Friday Agreement and the durability of the peace process.⁷ The establishment, resourcing, and new powers and duties of the Commissions as the dedicated mechanism to oversee the implementation of this commitment is another positive development (see Appendix 1 hereto).⁸

- 2.3. Undertaking the role of dedicated mechanism enables the Commissions to hold the UK Government to account in terms of the implementation of the Article 2 commitment. It also provides individuals with rights to challenge the actions of the UK Government, the Northern Ireland Executive, Northern Ireland Ministers, and the Northern Ireland Assembly should they breach this commitment. A further positive aspect of the role of the dedicated mechanism is its close working with the Irish Human Rights and Equality Commission on matters relevant to Article 2 that have an island of Ireland dimension. The Commissions also have the power to directly raise matters of concern of relevance to Protocol Article 2 with the Specialised Committee on the implementation of the Protocol.⁹
- 2.4. As a result of being granted these functions, the Commissions continue to undertake engagement with a range of stakeholders, including equality and human stakeholders. This engagement seeks to raise awareness of the rights of individuals in respect of Article 2 and the role and remit of the dedicated mechanism, and to highlight issues of concern in relation to draft legislation progressing through Parliament.
- 2.5. **The Commissions consider that the UK Government’s commitment in Protocol Article 2, as well as the establishment of the dedicated mechanism to oversee this commitment, is an important and positive**

⁷ Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland, [Submission on the UK and EU proposals and the prospects for Agreement to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland](#), 12 November 2021.

⁸ Sections 78A-78E, Northern Ireland Act 1998.

⁹ Sections 78A(9) and 78B(9), Northern Ireland Act 1998.

development in relation to the protection of equality and human rights in NI.

Impact of the Protocol/Brexit on equality groups

- 2.6. The Commissions have previously highlighted to the Sub-Committee our concerns about the impact of Brexit on marginalised and minority groups in Northern Ireland.

Minority ethnic groups/faith communities

- 2.7. The Commissions have previously raised in submissions to the Sub-Committee concerns over the potential impact of Brexit on the sourcing of halal and kosher meat products and ritual items on Muslim and Jewish communities in Northern Ireland¹⁰.
- 2.8. The Commissions have raised concerns on access to, cost, and the availability of halal and kosher food and ritual items, including the potential impact on lower income groups, such as students and refugees and asylum seekers¹¹.
- 2.9. The Commissions' view is that there should be no adverse impacts due to Brexit on the ability of faith communities in Northern Ireland to access halal and kosher meat products and ritual items.

Medicines

- 2.10. Under the Protocol, Northern Ireland remains aligned to EU regulations and legislation on medicines and their supply. Following the end of the 'grace period', which had been due to end on 31 December 2021, it would have been required that all medicines imported to Northern Ireland from GB follow EU rules and regulations. As a result, suppliers

¹⁰ We note the UK Government's unilateral decision to indefinitely extend the grace period; including on the import of chilled meats from Great Britain.

¹¹ Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland, [Submission on the UK and EU proposals and the prospects for Agreement to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland](#), 12 November 2021, and Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland, Joint written evidence to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland's Introductory Inquiry into the operation of the Protocol on Ireland/Northern Ireland, [June 2022](#).

raised concerns about the viability of supplying items to Northern Ireland in the longer term.

- 2.11. The Commissions have previously raised concerns with the Sub-Committee that this could result in Northern Ireland facing continued and intensified disruption in relation to medicines supply.¹² We highlighted the potential equality and human rights implications and negative impacts on the day to day lives of disabled people in Northern Ireland; and emphasised that there should be no-diminution of rights for disabled people in relation to their access to health and treatment.¹³ Whilst the Commissions recognise that UK/EU negotiations are ongoing, we are concerned that, to date, long-term sustainable solutions that address the issues we have raised are still outstanding.¹⁴ We consider that it is essential to allay fears regarding the future supply of medicines, especially for disabled people who are reliant on medication to improve or maintain their health.

Assistance dogs

- 2.12. The Commissions have previously highlighted to the Sub-Committee that the issue of travel arrangements for assistance dogs between Great Britain and Northern Ireland may have potential equality and human rights implications both domestically and internationally. This includes in relation to Protocol Article 2, Article 8 ECHR and the United Nations Convention on the Rights of Persons with Disabilities. We have also highlighted the need to ensure that there are no adverse impacts on

¹² Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland, Joint written evidence to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland's Introductory Inquiry into the operation of the Protocol on Ireland/Northern Ireland, [June 2022](#).

¹³ NI Human Rights Commission and Equality Commission for NI, '[Submission of the NIHRC and ECNI on the UK and EU proposals and the prospects for Agreement to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland](#)' (NIHRC and ECNI, 2021), at paras 3.1 – 3.8

¹⁴ The Commissions note that in December 2021, the EU announced that it would act unilaterally to ensure the continued long-term supply of medicines from GB into NI with the grace period extended until the end of 2022 or the finalisation of the legislative procedure. While the UK Government states EU legislation does address some immediate and urgent supply issues it has described the EU's package as "not comprehensive" with some issues still to be addressed.

Assistance Dog Owners in Northern Ireland in terms of requirements on pet passport arrangements post Brexit.¹⁵

- 2.13. The Commissions note that checks on pets entering Northern Ireland from Great Britain were subsequently delayed until July 2021 and then further delayed indefinitely to allow for the UK and EU to find a long-term solution. To date a long term solution between the UK and EU which minimises checks on assistance dog owners travelling between Great Britain and NI has not been reached.
- 2.14. **The Commissions recommend that the UK Government work with the EU Commission to find a long-term solution which ensures Muslim and Jewish communities in Northern Ireland are able to access halal and kosher food products and ritual items respectively.**
- 2.15. **The Commissions recommend that the UK Government, working with the EU continues to monitor and address any outstanding issues relating to the supply of medicines from Great Britain to Northern Ireland to guarantee no diminution of the current provision, including for disabled people, and to protect the highest attainable standard of health.**
- 2.16. **The Commissions recommend that the UK Government work with the EU Commission to find a long-term solution which minimises checks on assistance dog owners travelling between Great Britain and Northern Ireland.**

Question 2: What is your overall assessment of the UK Government's approach to the Protocol, including bringing forward the Northern Ireland Protocol Bill? To what extent will it alleviate the issues with the Protocol that it seeks to address?

- 2.17. The Commissions have welcomed assurances by the UK Government of

¹⁵ Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland, Joint written evidence to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland's Introductory Inquiry into the operation of the Protocol on Ireland/Northern Ireland, [June 2022](#).

its commitment to Protocol Article 2 and its acknowledgement that the commitment is ‘non-controversial’.¹⁶

2.18. However, the Commissions have identified a number of concerns about the impact of the Bill on the implementation of Protocol Article 2, which are explored in detail in section 4.0 of this response.¹⁷

2.19. While a letter from the Secretary of State to the Joint Committee on Human Rights¹⁸ alluded briefly to the ‘special protections’ afforded to Protocol Article 2, Committee Explanatory Notes of the Bill make no reference to any consideration given to compliance with Protocol Article 2. The Commissions have previously recommended that this should be the case regarding all relevant legislation.¹⁹

2.20. The Commissions would also highlight the lack of engagement on the proposed content of this Bill by the UK Government, including with the Commissions and equality and human rights stakeholders in NI, prior to the Bill being presented in Parliament. We consider it would have been helpful for the UK Government to seek those views, including the views of the Commissions in terms of the implications of this Bill on Protocol Article 2, as early as possible. Additionally, the speed at which this Bill is progressing through Parliament leaves little time for adequate scrutiny of measures that will impact an international agreement.

2.21. The Commissions recommend that compliance with Protocol Article 2 be considered from the earliest stages in the development of policy and legislation, and that there is early engagement with the Commissions on draft legislation to ensure compliance with Protocol

¹⁶ UK Government, ‘NI Protocol: the way forward’, (UK Gov, 2021), at para 37. See also Letter from Conor Burns MP, Minister of State in the NI Office to Lord Jay of Ewelme, Chair of the House of Lords EU Affairs Committee Sub Committee on the Ireland/ Northern Ireland Protocol, 24 November 2021.

¹⁷ See also ‘[NIHRC/ECNI Briefing on the Northern Ireland Protocol Bill](#)’, (NIHRC/ECNI, 2022).

¹⁸ [Letter from Rt Hon Elizabeth Truss MP, Secretary of State for Foreign, Commonwealth and Development Affairs to Rt Hon Harriet Harman MP, Chair of the Joint Committee on Human Rights, 15 June 2022.](#)

¹⁹ See also recommendations in ‘Legislative Scrutiny and the Dedicated Mechanism for Monitoring Article 2 of the Ireland/Northern Ireland Protocol’, Paul Evans, Alexander Horne and Tasneem Ghazi (ECNI, 2021).

Article 2.

- 2.22. **The Commissions recommend that the UK Government ensures that Explanatory Memoranda on draft UK proposals that are likely to engage Protocol Article 2 set out what consideration has been given to ensuring conformity with Protocol Article 2.**
- 2.23. **The Commissions recommend that the Committee asks the Minister in charge of the Bill to set out, in detail, what consideration was given to compliance with Protocol Article 2 in the development of the Protocol Bill.**

Question 3: What is your overall assessment of the Government's argument that the Bill, and the measures contained within it, are necessary to safeguard the Belfast/Good Friday Agreement?

- 2.24. The Commissions have not identified that any of the provisions of the NI Protocol Bill are necessary to safeguard the human rights or equality aspects of the Belfast/Good Friday Agreement. Protection of human rights and equality is central to the Belfast/Good Friday Agreement, as reflected in the UK Government commitment in Protocol Article 2. In addition, the UK Government's commitment in Protocol Article 2 is an important and positive commitment providing a measure of certainty and stability in the context of wider change resulting from EU withdrawal.
- 2.25. The non-diminution commitment under Protocol Article 2 is intended to safeguard the commitments to human rights and equalities in the relevant chapter of the Belfast/Good Friday Agreement. While the Bill offers a measure of protection for Protocol Article 2, the Commissions have identified a number of clauses within the Bill that will weaken Protocol Article 2 in practice, if not addressed. Weakening Protocol Article 2 undermines the UK Government's commitments in the relevant chapter of the Belfast/Good Friday Agreement relating to human rights and equality.

3.0 Legal Impact of the Bill

Question 4: What impact will the Northern Ireland Protocol Bill have on the economic and political climate in NI, and on North-South and East-West relations, if and when it comes into law?

- 3.1 The text of the Belfast/Good Friday Agreement requires “at least an equivalent level of protection of human rights” in Ireland as in Northern Ireland.²⁰ 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.²¹ 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”.²²
- 3.2 The Commissions consider that long-term North-South equivalence of rights and equality protections is important to ensure there is no diminution of rights in Northern Ireland and to ensure that human rights and equality protections are subject to continual improvement. Any weakening of Protocol Article 2, including requirements relating to ‘keeping pace’,²³ could potentially cause Northern Ireland to fall behind Ireland in terms of rights and equality protections. This would impact on North-South equivalence of rights and equality protections.
- 3.3 In addition, it is important that the Bill and its outworkings do not result in any weakening of Protocol Article 2, including its oversight mechanisms, as they relate to human rights and equality protections

²⁰ Belfast (Good Friday) Agreement 1998, at 19.

²¹ 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.

²² Ibid, at para 7.

²³ Protocol Article 2, read in conjunction with Protocol Article 13, includes a commitment to ‘keep pace’ with EU law developments falling within the six EU Equality Directives listed in Annex 1 to the Protocol. That means that if the minimum standards in the Annex 1 Directives are updated or replaced, the UK Government must ensure that domestic legislation in Northern Ireland reflects any substantive enhancements in relevant protections.

with an island of Ireland dimension, which fall within the scope of that commitment.²⁴

Question 5: What is your assessment of the Government’s legal justification for the Bill? What would you identify as the principle legal issues and consequences arising in relation to the NI Protocol Bill?

Clause 13

- 3.4 Clause 13(1) states that any provision of the Protocol or Withdrawal Agreement is excluded provision so far as it confers jurisdiction on the CJEU in relation to the Protocol or the Withdrawal Agreement, whether the jurisdiction relates to excluded provision or any other matter.
- 3.5 This may be relevant to Protocol Article 2. Under Article 164 of the Withdrawal Agreement, the UK and the EU, through the Joint Committee, supervise and facilitate the implementation of the UK-EU Withdrawal Agreement. The Joint Committee can adopt decisions and make appropriate recommendations to the UK and EU. Such decisions shall be agreed by mutual consent between the parties, have the same legal effect as the Withdrawal Agreement and are binding on both parties. Where there is a dispute on the application and interpretation of the UK-EU Withdrawal Agreement that cannot be resolved through the Joint Committee, it will be subject to arbitration and any decision of the arbitration panel will be binding on both parties. Under Article 174 of the Withdrawal Agreement, where a dispute relates to specified matters, including the interpretation of EU law, an arbitration panel must ask the Court of Justice of the EU (CJEU) to provide its interpretation and the CJEU’s interpretation will be binding. To the extent that Clause 13 of the Bill would restrict the CJEU’s interpretive role in disputes relevant to Protocol Article 2, the Commissions would regard this as a weakening of the non-diminution commitment.

²⁴ Protocol Article 2(2) recognises the Belfast (Good Friday) Agreement commitment for a Joint Committee of representatives of the two human rights commissions on the island of Ireland as a forum for the consideration of human rights issues on the island of Ireland. The NIHRC, ECNI and the Irish Human Rights and Equality Commission also work together to provide oversight of, and report on, issues which engage Protocol Article 2 that have an island of Ireland dimension.

- 3.6 **The Commissions recommend that Clause 13 be amended to make clear that subsection 1 does not restrict the role of the CJEU where it is asked to give a ruling under Article 174 of the Withdrawal Agreement (Disputes raising questions of Union law) relating to the interpretation of EU law relevant to Protocol Article 2.**

Clause 15

- 3.7 While Clause 15(3) protects Protocol Article 2 insofar as it states that Ministers may not use the powers conferred in the Clause to define Protocol Article 2 as ‘excluded provision’, it does not protect other aspects of the Protocol which are relevant to the implementation of Protocol Article 2.
- 3.8 Article 14(c) of the Protocol provides that the UK-EU Specialised Committee on the Protocol shall “consider any matter of relevance to Article 2 of this Protocol brought to its attention by 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”.
- 3.9 Clause 15 does not explicitly protect Protocol Article 14(c) from becoming excluded provision. Nor does it protect Protocol Article 15 (Joint Consultative Working Group), in the context of its relevance to Protocol Article 2, which is to “serve as a forum for the exchange of information and mutual consultation”. This is also important for the effective operation of Protocol Article 2.
- 3.10 As referenced further below, the extensive regulation-making powers granted to Ministers under the Bill reinforce the need for clarity on the face of the Bill in respect of these matters.²⁵

²⁵ In terms of the implications of these extensive regulation-making powers, the Commissions, for example, note the strong concerns expressed by the House of Lords Delegated Powers and Regulatory Reform Committee which stated that the Bill “confers on Ministers a licence to legislate in the widest possible terms” and is “unprecedented in its cavalier treatment of Parliament, the EU and the Government’s international obligations”. See, 7th Report of Session 2022-23, HL Paper 40.

In addition, Clause 15(2) (a) provides for an extensive delegated power stating that a Minister “may, by regulations, provide for any provision of the Northern Ireland Protocol or any related provision of the EU withdrawal agreement to become excluded provision wholly or to any other extent...”.

- 3.11 The Commissions recommend that Clause 15(3) be amended to supplement the restriction preventing Ministers from designating Protocol Article 2 as excluded provision, to ensure that Ministers are also prevented from designating as excluded provision, any provision of the Withdrawal Agreement or Protocol insofar as it affects the interpretation, implementation and/or enforcement of Protocol Article 2.**

Delegated Powers

- 3.12 The Commissions note the strong concerns expressed by the House of Lords Delegated Powers and Regulatory Reform Committee which stated that the Bill “confers on Ministers a licence to legislate in the widest possible terms” and is “unprecedented in its cavalier treatment of Parliament, the EU and the Government’s international obligations”.²⁶
- 3.13 By way of example, Clause 14(4) provides an extensive delegated power, stating that the Minister may “make any provision which the Minister considers appropriate in connection with any provision of the Northern Ireland Protocol and other parts of the EU withdrawal agreement to which this section relates.” While Clause 14 does not *relate* directly to Protocol Article 2, subsection (2) of the Clause does refer to Articles of the Protocol and Withdrawal Agreement which are important for the interpretation, implementation and enforcement of Protocol Article 2. Protocol Article 13 is referenced which, as set out above, provides for domestic courts to follow certain CJEU case-law on an ongoing basis; and Withdrawal Agreement Article 4 is referenced, which provides the basis for individual redress.

²⁶ 7th Report of Session 2022-23, HL Paper 40.

- 3.14 Further, Clause 9 provides that a Minister ‘may, by regulations, make any provision about regulation of goods which the Minister considers appropriate in connection with the Northern Ireland Protocol’. Under Clause 10, this includes the production and use of goods, putting goods into service and making goods available on the market. The Commissions are of the view that there are a number of EU Directives and Regulations which relate to accessibility standards of goods and products for disabled people and which are within the scope of Protocol Article 2.²⁷ We consider that the Bill should not permit a Minister, by way of regulations relating to goods, to reduce rights for disabled people in Northern Ireland that are underpinned by EU law in force on or before the end of the Brexit transition period, and which fall within the scope of Protocol Article 2.
- 3.15 Clause 22 (Regulations) is also very broadly scoped. While it does not grant additional powers, it provides detail as to the potential extent of Regulations which may be made under other provisions of the Bill. It states, for example, that Regulations may include provisions incompatible with the Protocol or Withdrawal Agreement and that they may repeal domestic law giving effect to the Protocol or Withdrawal Agreement. Again, neither Protocol Article 2, nor other provisions essential to its operation, are excepted.
- 3.16 **The Commissions recommend that the Bill be amended to make clear that a Minister’s powers under Clause 14(4), or any other Clause of the Bill, do not extend to taking any action that weakens the interpretation, implementation or enforcement of Protocol Article 2, either by excluding provisions of the Protocol or Withdrawal Agreement insofar as they relate to Protocol Article 2, or by any other exercise of delegated powers under the Bill.**²⁸

²⁷ For example, Directive (EU) 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system within the European Union

²⁸ See, for example, Clause 22 on the scope of delegated powers under the Bill.

Question 10: What are the practical and legal implications of removing the jurisdiction of the European Court of Justice in the UK to oversee the implementation of the Protocol and stating that UK courts are not bound by decisions of the CJEU on matters relating to the Protocol?

Clause 20

- 3.17 Clause 20(2)(a) of the Bill states that domestic courts and tribunals are “not bound by any principles laid down, or any decisions made, on or after the day on which this section comes into force by the European Court”. No exception is made for Protocol Article 2. This is a serious omission because of the ‘keeping pace’ obligation associated with Protocol Article 2, by virtue of Protocol Article 13 (Common Provisions).
- 3.18 Protocol Article 13(3) states that references to EU law in the Protocol are to that law “as amended or replaced”. Six equality directives related to Protocol Article 2 are listed in Annex 1 to the Protocol.²⁹ The law in NI therefore has to provide at least the same level of protection as that provided under any of those directives and standards must be raised as required if those Directives are amended or replaced to enhance protections.
- 3.19 Protocol Article 13(2) stipulates that provisions of the Protocol referring to EU law shall “be interpreted in conformity with the relevant case law of the Court of Justice of the EU” and distinguishes this obligation from the timebound requirement under Article 4 of the Withdrawal Agreement. This means there is an ongoing interpretive duty as regards

²⁹ Council Directive 2004/113/EC, ‘EU Council Directive 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 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; Council Directive 2000/43/EC, ‘EU Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin’, 29 June 2000; Council Directive 2000/78/EC, ‘EU Council Directive establishing a general framework for equal treatment in employment and occupation’, 27 November 2000; Directive 2010/41/EU, ‘EU Directive 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’, 7 July 2010; Council 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.

CJEU jurisprudence relating to the Annex 1 Directives. Therefore, under the Protocol, the standards set out in the six Directives must be interpreted by domestic courts to ensure at least the same level of protection as is available under CJEU interpretation.

3.20 Failure to make an exception for Protocol Article 2, in the text of Clause 20(2)(a), may suggest that domestic courts need not adhere to the interpretive requirement in Protocol Article 13. This is contrary to the Protocol and inconsistent with Clause 15 of the Bill.

3.21 **The Commissions recommend that Clause 20 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.**

4.0 Article 16

Question 11: What would be the economic, political and legal implications of a decision by the UK Government to invoke Article 16?

4.1. It is essential that any legislation – including the Protocol Bill – brought forward by the UK Government in relation to the Protocol and/or the use of the safeguarding mechanism in Article 16 does not weaken Protocol Article 2 or the Article 2 oversight mechanisms.

4.2. If action was taken by the UK Government to weaken Article 2 and/or the Article 2 oversight mechanisms, that could result in a loss of individual rights for those living in Northern Ireland under Article 2. It could have potential implications for the work, role and remit of the two Commissions and our functions as the Dedicated Mechanism; for example, as regards holding the UK Government to account in terms of its compliance with Protocol Article 2.

4.3. **The Commissions recommend that there are no changes to the Protocol that would result in a weakening of either the Article 2(1) commitment or the Protocol’s rights, safeguards and oversight mechanisms relating to this commitment.**

5.0 The EU's response

Question 12: What is your overall assessment of the EU's approach in relation to the Protocol. Is the EU going far enough in addressing the problems that have arisen under the Protocol?

- 5.1. In our joint submission to the Sub-Committee on the UK and EU proposals and the prospects for Agreement in November 2021, the Commissions outlined our views on and the EU's 'non-papers'.³⁰
- 5.2. The Commissions welcomed a number of the EU's proposals set out in its non-paper on Engagement with Northern Ireland Stakeholders and Authorities. We recommended further actions that the EU can take based on their proposals, including in relation to increased transparency, the Joint Consultative Working Group, structured dialogue with Northern Ireland stakeholders and the Specialised/Joint Committee.
- 5.3. The Commissions welcome progress to date in relation to some of the recommendations we made in our submission. This includes the development of a European Commission website to publish EU legislation applicable in Northern Ireland under the Protocol,³¹ and progress by the UK Government to ensure engagement with civil society, including human rights/equality groups via the UK-EU Trade and Cooperation Agreement Civil Society Forum.³² We also note that the UK and EU have set up Domestic Advisory Groups for stakeholder engagement, including with civil society stakeholders in Northern Ireland. However, we understand that discussions in these groups are more focused on the matters relating to the UK-EU Trade and Cooperation Agreement, rather than on equality and human rights issues arising out of the Protocol. As raised previously with the Sub-

³⁰ Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland, [Submission on the UK and EU proposals and the prospects for Agreement to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland](#), 12 November 2021

³¹ https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-withdrawal-agreement/protocol-ireland-and-northern-ireland_en

³² [UK-EU Trade and Cooperation Agreement Civil Society Forum](#), first meeting was held in Brussels on 4 October 2022.

Committee, we consider that a direct and structured forum for equality and human rights stakeholders, including the Commissions, would provide an opportunity to discuss potential Protocol Article 2 impacts and/or issues and concerns.

5.4. We note that a number of our recommendations for the UK Government and EU set out in their submission to the Sub-Committee in November 2021 have not yet been addressed.³³

5.5. **The Commissions continue to recommend that:**

- **as the EU considers proposed structures for engagement with NI stakeholders, this should include open, transparent and regular engagement with the Commissions and equality and human rights stakeholders in Northern Ireland; and this should include those working on cross border issues relating to equality and human rights.**
- **the Commissions are kept informed of any future EU equality law developments relevant to the Annex 1 equality Directives in the Protocol, and have the opportunity to highlight in advance any implications of those changes for equality law in Northern Ireland;**
- **the NI Executive work with the UK Government and on a North-South basis to build strong open channels of communication to keep informed of key developments of relevance to Article 2;**
- **any proposals between the UK Government and EU on the development of “structured groups” within the Joint Consultative Working Group includes consideration being given to establishing a group that focuses on issues relating to Protocol Article 2 ;**

³³ ECNI and NIHRC, [Submission of the NIHRC and ECNI on the UK and EU proposals and the prospects for Agreement to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland](#), 12 November 2021

- **proposals on increased transparency relating to the Joint Consultative Working Group are extended to include the publication of agendas in advance of meetings.**

6.0 The way forward

Question 14: What is the best way forward to resolve the current impasse between the UK Government and EU?’

- 6.1. The Commissions welcome the resumption of negotiations between the UK Government and EU in October 2022. We reiterate our call made in our November 2021 submission to the Sub-Committee for the UK Government and EU to continue to undertake constructive engagement to reach timely agreement on sustainable, long-term solutions for all ongoing issues which have the potential to impact the rights of people in living in Northern Ireland. This includes those mentioned above on travel with assistance animals and access to halal and kosher food.³⁴
- 6.2. It is important the UK Government and EU continue to engage with equality and human rights stakeholders including on cross-border issues, as they take forward negotiations
- 6.3. **The Commissions recommend that the UK Government and EU continue to undertake engagement with equality and human rights stakeholders in NI, including those working on cross-border issues.**

³⁴ ECNI and NIHRC, [Submission of the NIHRC and ECNI on the UK and EU proposals and the prospects for Agreement to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland](#), 12 November 2021

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