

**Submission of the NIHRC and ECNI
to ‘Retained EU Law: Where next?’
- an inquiry by the European Scrutiny
Committee**

11 April 2022

Summary of recommendations

- 2.5** The Commissions recommend that any detailed proposals to amend the categorisation or treatment of what is currently 'retained EU law' should include safeguards to prevent any breach of human rights and equality obligations deriving from the UK EU Withdrawal Agreement, including Protocol Article 2.
- 3.3** The Commissions recommend that the Committee scrutinises proposed changes to rules around interpretation and application of EU-derived domestic law, for compliance with Protocol Article 2.
- 4.7** The Commissions recommend that amendment or repeal of Retained EU Law, affecting human rights and/or equality protections in Northern Ireland, should be progressed on the basis of continuing adherence to the UK constitutional convention of providing for policy change via the primary legislative process, with technical and operational detail addressed in subordinate legislation. This applies to amending or repealing legislation that emanates from either Westminster, as regards laws that impact on rights relating to human rights and equality in Northern Ireland, or from the NI Assembly.
- 5.9** The Commissions advise that the UK Government has made internationally binding commitments in relation to the supremacy of the UK EU Withdrawal Agreement and EU law made applicable under it, which are central to the enforcement of the human rights and equality commitment under Protocol Article 2. The Commissions recommend that no change be made which would weaken Article 2, its enforceability or oversight mechanisms.
- 7.11** The Commissions recommend that, irrespective of the categorisation of retained EU law, particular caution be exercised in amending or repealing EU-derived domestic legislation in areas which overlap transferred and reserved or excepted matters relating to NI.
- 7.12** The Commissions recommend that Explanatory Notes to any legislation, primary or secondary, either passed by Westminster or the NI Assembly, which amends or repeals legislation, including retained EU law, and that impacts on human rights or equality protections in NI, should indicate the consideration given to compliance with Protocol Article 2.

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (the NIHRC), pursuant to section 69(1) 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).
- 1.2 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 on the promotion of equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998.
- 1.3 NIHRC and ECNI, pursuant to section 78A(1) and 79B(1) of the Northern Ireland Act 1998, respectively, monitor the implementation of Article 2(1) of the Protocol on Ireland/Northern Ireland (Protocol Article 2) in the EU Withdrawal Agreement.
- 1.4 The EU (Withdrawal Agreement) Act 2020 empowers the Commissions to monitor, advise, report on, promote, and enforce the implementation of Article 2(1) of the Ireland/Northern Ireland Protocol ('the Protocol') to the UK-EU Withdrawal Agreement.
- 1.5 In accordance with these functions, the Commissions provide this joint submission to the House of Commons European Scrutiny Committee inquiry on retained EU law (REUL).
- 1.6 The Commissions welcome this opportunity to provide written evidence and are available to provide a further oral briefing if this could provide further assistance to the Committee. In this briefing, the Commissions have focused on addressing only those questions in the call for evidence which fall within the scope of our respective roles and remit.

2.0 Retained EU Law as a category of domestic law

2.1 Article 2(1) of the Ireland /Northern Ireland Protocol to the UK EU Withdrawal Agreement, states:

The UK shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.

2.2 This means, first of all, that the UK Government must ensure that certain rights, safeguards and equality of opportunity protections are not diminished as a result of the UK leaving the EU. In addition, Protocol Article 2 requires the law in Northern Ireland ('NI') to 'keep pace' with EU law developments falling within the six EU Equality Directives listed in Annex 1 to the Protocol¹ where minimum standards of protection are increased.² To fall within scope of Protocol Article 2, the human right or equality protection in question must be covered by the relevant chapter of the Belfast (Good Friday) Agreement and have been underpinned by EU law, binding on the UK on or before 31 December 2020 and protected in NI law on or before 31 December 2020.

2.3 The UK Government has therefore made an international treaty commitment under Protocol Article 2, in relation to standards that will be protected in law in certain areas, many of which fall within the current classification of 'retained EU law'. This commitment has been incorporated into domestic law as referenced in section 5 below, regarding supremacy.

2.4 As is clear from its text, however, the categorisation of EU-derived domestic provisions as REUL or otherwise, is not material to whether provisions fall within the scope of Protocol Article 2 (or engage other treaty obligations).

¹ Council 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; 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; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; 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; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

² See Protocol Article 13(3) and, for commentary, [Northern Ireland Office, 'UK Government Commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland: What does it mean and how will it be implemented?', \(NIO, 2020\), at para 13.](#)

Equally, if current REUL provisions are entirely replaced by new domestic legislation, its content is what will determine the extent to which the Act, or particular provisions of it, falls within the scope of Protocol Article 2.

- 2.5 **The Commissions recommend that any detailed proposals to amend the categorisation or treatment of what is currently ‘retained EU law’ should include safeguards to prevent any breach of human rights and equality obligations deriving from the UK EU Withdrawal Agreement, including Protocol Article 2.**

3.0 Principles and Concepts of EU law

- 3.1 Article 4(3) of the UK EU Withdrawal Agreement states that:

The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.

- 3.2 Protocol Article 2 imposes an obligation of result, so while the form of the legislation can change, the no diminution requirement applies to the substance of the rights protected as well as to the procedural safeguards relevant to implementation and enforcement of rights. Changes to the status of EU-derived UK law which, for example, excluded specific EU general principles, changed how courts interpret that law, and/or reduced or limited the means by which rights can be asserted or enforced, could therefore potentially constitute a diminution of rights.
- 3.3 **The Commissions recommend that the Committee scrutinises proposed changes to rules around interpretation and application of EU-derived domestic law, for compliance with Protocol Article 2.**

4.0 Amendment or repeal of Retained EU Law

- 4.1 Procedures for the amendment and repeal of retained EU law should be considered in light of UK constitutional conventions as to the appropriate use of primary and subordinate legislation, to ensure robust democratic scrutiny of policy change. For the Commissions, this is particularly important in respect of policy change impacting human rights and equality.
- 4.2 The Commissions are mindful of concerns expressed about increasing reliance on delegated powers given the limited scrutiny of such legislation, deriving

from the speed with which it is considered, the volume of instruments and the absence of detailed debate or amending stages. A recent expression of this is seen in the House of Lords Sub-Committee on the Constitution which reported in 2018:

As part of our scrutiny of bills, and from the work of the DPRRC [Delegated Powers and Regulatory Reform Committee], we have identified a number of recurring problems with delegated powers. We have observed an increasing and constitutionally objectionable trend for the Government to seek wide delegated powers, that would permit the determination as well as the implementation of policy. In recent years the Government has sought to create criminal offences and establish public bodies through delegated powers. This is constitutionally unacceptable.

...If the Government uses delegated powers to propose secondary legislation which makes technical provision within the boundaries of the policy and has previously been agreed in primary legislation, Parliament is unlikely to wish to block statutory instruments. However, we are concerned that these boundaries are not always respected and that ministers may seek to use statutory instruments to give effect to significant policy decisions. Without a genuine risk of defeat, and no amendment possible, Parliament is doing little more than rubber-stamping the Government's secondary legislation. This is constitutionally unacceptable.³

- 4.3 It is acknowledged that during the UK's membership of the EU, significant change was introduced via subordinate legislation, but it is worth noting that this was in the context of the policy having been decided by Member States, including the UK, at EU level and set out in Directives.
- 4.4 The Commissions would therefore caution against a standard approach facilitating amendment or repeal of REUL by an 'accelerated procedure' or subordinate legislation, particularly in light of the UK Government's human rights and equality obligations under Protocol Article 2 and the volume of REUL relevant to that commitment. Excessive reliance on secondary legislation could increase the risk of a breach of treaty commitments.

³ The Legislative Process: The Delegation of Powers, 16th Report of Session 2017-19, HL Paper 225, House of Lords Select Committee on the Constitution, at paragraphs 50 and 110

- 4.5 Now that the UK has withdrawn from the EU, there is no reason not to maintain the convention of ensuring full democratic scrutiny of provisions introducing policy change.
- 4.6 The Commissions advise that the need for procedures that ensure robust scrutiny of legislation aimed at amending or repealing human rights and equality law in Northern Ireland, including that deriving from EU obligations, applies to both the devolved institutions in Northern Ireland as well as the UK Parliament. It will be noted that equality law is largely a transferred matter, whereas the observation and implementation of international obligations, including the ECHR, remains excepted under Schedule 2 to the Northern Ireland Act 1998.
- 4.7 **The Commissions recommend that amendment or repeal of Retained EU Law, affecting human rights and/or equality protections in Northern Ireland, should be progressed on the basis of continuing adherence to the UK constitutional convention of providing for policy change via the primary legislative process, with technical and operational detail addressed in subordinate legislation. This applies to amending or repealing legislation that emanates from either Westminster, as regards laws that impact on rights relating to human rights and equality in Northern Ireland, or from the NI Assembly.**

5.0 Supremacy of EU law

- 5.1 UK and EU commitments in Article 4 of the UK EU Withdrawal Agreement, including to the supremacy of its terms and of EU law made applicable under it, are central to the enforceability of the Protocol Article 2 commitment on the protection of human rights and equality and the means by which individuals can assert their rights before a domestic court.
- 5.2 Article 4(1) of the UK EU Withdrawal Agreement states that:
- The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.
- 5.3 It goes on to provide for individual redress such that a person can “rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law”.

- 5.4 Article 4(2) requires the UK to ensure compliance with the above, including as regards the power of judicial and administrative authorities to “disapply inconsistent or incompatible domestic provisions”, which must be provided for in primary legislation.⁴
- 5.5 The UK has incorporated the Withdrawal Agreement, including the Protocol, into domestic law through the EU (Withdrawal Agreement) Act 2020.⁵ Section 7A of the EU (Withdrawal) Act 2018 provides that all rights, obligations and remedies from Withdrawal Agreement, including Protocol Article 2, are recognised and protected in domestic law.
- 5.6 The principle of supremacy of EU law obligations over the domestic law provisions is closely linked to that of direct effect.⁶ Direct effect enables individuals immediately to invoke an EU provision before a national court. Article 4 acknowledges that this principle applies to the provisions of the UK-EU Withdrawal Agreement, where such provisions meet the conditions for direct effect.⁷ This includes Protocol Article 2, and any EU measure given effect by it. For a provision of EU law to have direct effect it must be set out in unconditional and unequivocal terms and be sufficiently clear and precise to be invoked by an individual.⁸
- 5.7 In its Explainer on Protocol Article 2, the UK Government acknowledges this wider legal context and framing of the commitment, confirming that:
Given that under Article 4 of the Withdrawal Agreement, incorporated into domestic law through the EU (Withdrawal Agreement) Act 2020, all provisions in the Withdrawal Agreement and the provisions of Union law that it makes applicable in the UK have the same legal effect in the UK as in the EU and its Member States, individuals will also be able to bring challenges to the Article 2(1) commitment directly before the domestic courts”.⁹
- 5.8 The UK and EU commitments in Article 4 of the UK EU Withdrawal Agreement, including to the supremacy of its terms and of EU law made applicable under

⁴ Article 4(2), UK-EU Withdrawal Agreement.

⁵ Sections 6(2)(ca) and 24(1)(aa) of the Northern Ireland Act 1998 limit the competence of the NI Assembly and Executive and proscribe making any law which is incompatible with Protocol Article 2.

⁶ *Daniel Adam Popławski (European Arrest Warrant)*, C-573/17, 24 June 2019, at para 59-65; *Flaminio Costa v ENEL*, Case 6/64, 15 July 1964; *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, 17 December 1970, at para 3; *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, Case 106/77, 9 March 1978.

⁷ Article 4(1), UK-EU Withdrawal Agreement 2020: “legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law”.

⁸ *Gassmayr v Bundesminister für Wissenschaft und Forschung*, Case C-194/08, 1 July 2010, at para 44 and 45.

⁹ 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 29; Letter from Robin Walker MP, Minister of State for NI to Professor Christopher McCrudden, 26 February 2020.

it, also provide an important basis for the exercise of the Commissions' oversight power to initiate, support or intervene in legal proceedings in relation to Protocol Article 2.¹⁰

- 5.9 The Commissions advise that the UK Government has made internationally binding commitments in relation to the supremacy of the UK EU Withdrawal Agreement and EU law made applicable under it, which are central to the enforcement of the human rights and equality commitment under Protocol Article 2. The Commissions recommend that no change be made which would weaken Article 2, its enforceability or oversight mechanisms.**

6.0 Retained EU Case law & CJEU jurisprudence

- 6.1 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 Court of Justice of the EU (CJEU) handed down on or before 31 December 2020.¹¹ 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 2021.¹²
- 6.2 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 31 December 2020.¹³ 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. Any subsequent CJEU decisions of relevance to Protocol Article 2 should as a minimum be given due regard by judicial and administrative authorities.
- 6.3 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:

¹⁰ Sections 78C-78D, Northern Ireland Act 1998

¹¹ 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 Liefländer (ed) ‘The UK-EU Withdrawal Agreement - A Commentary’, (OUP, 2021), at 38.

¹² Article 4(4) and (5), UK-EU Withdrawal Agreement 2020

¹³ 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.

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.

- 6.4 Therefore, this creates an additional obligation in respect of the Protocol, including Article 2. Annex 1 to the Protocol lists six equality directives, which as noted above, require dynamic alignment. The UK Government has accepted that “if the EU decides to amend or replace the substantive rights in those directives to improve the minimum levels of protection available, the corresponding substantive rights protections in Northern Ireland will also develop to take account of this”.¹⁴
- 6.5 **The Commissions advise 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.**¹⁵

7.0 Retained EU law and devolution

- 7.1 As an international treaty commitment, Protocol Article 2 binds the UK Government as well as devolved authorities and is domestically enforceable as outlined above.
- 7.2 Section 6 of the Northern Ireland Act 1998 provides that the NI Assembly is prohibited from making any law which is incompatible with Protocol Article 2. Section 24 of the 1998 Act also provides that all acts of Executive Ministers or NI Departments must be compatible with Protocol Article 2.
- 7.3 Where the UK Government is legislating for Northern Ireland in respect of reserved or excepted matters, Protocol Article 2 will require particular consideration, in line with section 7A of the EU (Withdrawal) Act 2018.
- 7.4 An example of the interaction between retained EU law and devolved competence is provided by the Nationality and Borders Bill, currently in passage in the House of Lords.

¹⁴ 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.

¹⁵ 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, at para 93.

- 7.5 Clause 67 of the Nationality and Borders Bill seeks to disapply retained EU law deriving from the Trafficking Directive to the extent that other measures within Part 5 of the Bill are inconsistent with it.
- 7.6 The Commissions take the view that protections resulting from the Trafficking Directive fall within the no diminution commitment under Protocol Article 2 and have expressed concern about compliance of the Bill with the Directive and therefore with Protocol Article 2.¹⁶ It is not clear what, if any, consideration was given to Protocol Article 2 in the development of the Bill. There was, for example, no indication in the Explanatory Notes to the Bill as to what consideration was given by the Government in terms of its compliance with Protocol Article 2.
- 7.7 More generally, ensuring that the Explanatory Notes of proposed legislation, both primary and secondary, passed by Westminster outline what consideration has been given to Protocol Article 2 compliance assists not only the Commissions, but also the Committee, in terms of their role in scrutinising the UK Government's compliance with Protocol Article 2.
- 7.8 The Commissions have recommended that the House of Lords amend the Nationality and Borders Bill to remove Northern Ireland from the extent of Clause 67 (and other related Clauses), to avoid potential breach of Protocol Article 2.¹⁷
- 7.9 A complicating factor is that while immigration remains an excepted matter, matters relating to modern slavery and human trafficking are devolved.¹⁸ The Explanatory Notes to the Bill indicate that Clause 67 "extends UK-wide insofar as any incompatibility is between the Directive and a provision that is reserved and extends across the UK" but that it does not extend to NI in respect of devolved matters.¹⁹
- 7.10 The Explanatory Notes also state that "none of the provisions within the Bill involve the UK Parliament legislating on a matter that is within the legislative competence of a devolved legislature" and therefore the UK Government does not need to seek consent from devolved legislatures under the terms of the Sewel Convention.²⁰ However, there are provisions within the Nationality and

¹⁶ See [Briefing Paper on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill \(NIHRC and ECNI, 2022\)](#) at para. 3.2 and section 4.

¹⁷ Ibid. at para. 3.6.

¹⁸ Department of Justice Northern Ireland Organised Crime Task Force Modern Slavery Strategy 2021-2022: 1.31

¹⁹ Nationality and Borders Bill: Explanatory Notes, at para 865

²⁰ Explanatory notes at para 88; Under the terms of the Sewel Convention, the UK Parliament will not normally legislate with regard to matters within the legislative competence of the Scottish, Welsh or Northern Irish legislatures without the consent of the legislatures concerned.

Borders Bill that diverge from the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, which makes provision relating to human trafficking in NI. **The Commissions advise that the UK Government is bound by Protocol Article 2 in respect of reserved, excepted and transferred matters relating to NI.**

- 7.11 **The Commissions recommend that, irrespective of the categorisation of retained EU law, particular caution be exercised in amending or repealing EU-derived domestic legislation in areas which overlap transferred and reserved or excepted matters relating to NI.**
- 7.12 **The Commissions recommend that Explanatory Notes to any legislation, primary or secondary, either passed by Westminster or the NI Assembly, which amends or repeals legislation, including retained EU law, and that impacts on human rights or equality protections in NI, should indicate the consideration given to compliance with Protocol Article 2.**

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